



Planning &
Environment

Planning Legislation Updates

***Summary of
proposals
January 2017***

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Minister's Foreword

This guide sets out the Government's proposals to update the *Environmental Planning and Assessment Act 1979* (EP&A Act) through a series of targeted amendments.

These updates aim to build greater confidence in the planning system by enhancing community participation, strengthening upfront strategic planning and delivering greater probity and integrity in decision-making. The updates will make the system simpler and faster for all participants and help ensure that growth across NSW is carefully planned into the future.

The EP&A Act has been amended some 150 times in the decades since its establishment. While it still provides a solid foundation for our planning system, we need to remove the unnecessary complexity that has built up over the years and return the focus to delivering transparent processes that enable best practice planning outcomes.

We particularly want to protect and enhance the community's participation in the system, and passion about where they live and work.

The targeted amendments outlined in this guide will help create a planning system that delivers good amenity and liveability, encourages connected communities and promotes the enjoyment and protection of the local environment and heritage. They will help create a system that allows us to balance different views and values, and helps us accommodate growth in a way that produces better outcomes.

We are living in the most highly urbanised era in Australian history, so it is time we elevated the critical role of design in the built environment to deliver neighbourhoods, streets, parks and recreation spaces that balance the needs of communities with the need to accommodate growth.

The updates detailed in this guide sit alongside other initiatives the Government has already taken to deliver a better built environment. Among these are the establishment of the Greater Sydney Commission to plan for a liveable, productive and sustainable Greater Sydney, the roll out of regional plans across the state and the development of the new NSW Planning Portal, which makes planning information and services readily accessible.

We look forward to hearing your views on the proposals and welcome constructive debate in order to help us to deliver great planning outcomes for our state.

Rob Stokes

Minister for Planning

Introduction

Objectives of the legislative updates

The primary purpose of this package of updates to the *Environmental Planning and Assessment Act 1979* (EP&A Act) is to promote confidence in our state's planning system. This will be achieved through four underlying objectives:

- to enhance community participation;
- to promote strategic planning;
- to increase probity and accountability in decision-making; and
- to promote simpler, faster processes for all participants.

The proposed amendments build on recent policy, operational and legislative improvements to the NSW planning system. These include:

- **Greater Sydney Commission:** Within the Greater Sydney Region, the Commission is now responsible for preparing district plans, making a range of strategic planning and development decisions, and implementing *A Plan for Growing Sydney*.
- **Strategic planning:** A hierarchy of regional and district plans is now established in legislation, which must be implemented in local planning controls in the Greater Sydney Region, and can be switched on for other areas of NSW.
- **ePlanning:** The NSW planning database has been established as an electronic repository of planning information, and the NSW Planning Portal provides online access to planning information, tools and services.
- **Enforcement:** A new three tier offence regime is now in place, with substantial increases to maximum penalties for offences under the EP&A Act. This is supported by consolidated departmental and council investigative powers.

The proposed amendments also build on the significant work undertaken by the Government and stakeholders in 2013 to identify improvements to the planning system. At that time, the Government proposed a range of reforms set out in the Planning Bill 2013 and the *White Paper: A New Planning System for NSW*.

The current proposals outlined in this paper build on areas of agreement from 2013 and the subsequent improvements. They are the next steps in promoting confidence in the NSW planning system.

Figure 1 maps the current set of proposals against the policy objectives.

Figure 1: Objectives of the updates to planning legislation

Objectives		Initiatives
Community participation	Enhancing community involvement in the key decisions that shape our cities, towns and neighbourhoods	<ul style="list-style-type: none"> Community participation plans Community participation principles Statement of reasons for decisions Stronger consultation requirements for major projects Up to date engagement tools Early consultation with neighbours
Strategic planning & better outcomes	Continuing to improve upfront strategic planning to guide growth and development	<ul style="list-style-type: none"> Local strategic planning statements Regular local environment plan (LEP) checks Standard development control plan (DCP) format Optional model DCP provisions A new design object Design-led planning strategy Enforceable undertakings Improved environmental impact assessments Fair and consistent planning agreements
Probity and accountability in decisions	Improving transparency, balance and expertise in decision-making to improve confidence and trust in the planning system	<ul style="list-style-type: none"> Discontinuing Part 3A arrangements Directions for local planning panels Improved environmental impact assessments Ensuring delegation to council staff Refreshed thresholds for regional development Independent Planning Commission Model codes of conduct for planning bodies Preventing the misuse of modifications Clearer powers to update conditions on monitoring and environmental audit
Simpler, faster planning	Creating a system that is easier to understand, navigate and use, with better information and intuitive online processes	<ul style="list-style-type: none"> Efficient approvals and advice from NSW agencies Standard DCP format Optional model DCP provisions Improved complying development pathway Transferrable conditions Fair and consistent planning agreements Simplified and consolidated building provisions

A more accessible Act

Part of making the NSW planning system easier to understand and navigate is to make the EP&A Act itself more accessible in terms of its structure and provisions. The amendments include a range of housekeeping and structural changes, such as:

- clarifying development assessment pathways by clearly describing all categories of development in one place;
- standardising and consolidating provisions governing the administration of the planning system;
- removing repealed provisions;
- updating the numbering and names of parts, divisions, sections and schedules;
- refining some terms and definitions to clarify policy intent; and
- transferring appropriate provisions to the *Environmental Planning and Assessment Regulation 2000 (EP&A Regulation)*.

These changes will ensure the EP&A Act is clearer and easier to use.

Updated objects

We also propose to modernise the objects of the EP&A Act. The updates do not change the intent or effect of the objects, except for the inclusion of an object to promote good design in the planning system, as detailed in section 9 of this paper. The proposed objects are as follows:

The updated objects of this Act include:

- to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources;

- to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment;
- to promote the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing);
- to protect the environment, including the conservation of threatened and other species of native animals and plants;
- to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage);
- to promote good design in the built environment;
- to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State; and
- to provide increased opportunity for community participation in environmental planning and assessment.

Discussions to date

Following the Government's announcement in May 2016 of its plan to update the EP&A Act, the Department of Planning and Environment (the Department) conducted targeted stakeholder consultations in Sydney, Parramatta, Queanbeyan, Gosford, Newcastle, Tamworth, Griffith, Coffs Harbour, Wollongong and Dubbo.

Discussion forums were held during May and June 2016, and were attended by more than 370 representatives of councils, practitioners, and industry, environmental and community groups.

These were robust discussions, and the exchange of views and new ideas has been valuable in the policy development process.

The Department also sought input from targeted stakeholders through a follow-up survey, and received direct correspondence from a range of stakeholders identifying options to improve the planning system.

The feedback from stakeholder consultations is also outlined in the Stakeholder feedback report that accompanies these consultation documents.

Consultation documents

The proposed planning legislation updates comprise four sections:

1. Summary of proposals (this document)
2. Bill Guide
3. Draft Bill
4. Stakeholder feedback

Summary of proposals – gives an overview the key changes to the planning system that are being proposed in this package and the reasons for them. Some of the changes would be made through the legislation, and some through supporting policies and initiatives.

The proposals are set out according to the following themes:

- enhancing community participation;
- completing the strategic planning framework;
- better processes for local development, better processes for State;
- significant development;
- fair and consistent planning agreements;
- confidence in decision-making;
- clearer building provisions;
- elevating the role of design; and
- enhancing the enforcement toolkit.

Bill Guide – is an explanation of the legislative amendments. It is intended to be read alongside the draft Environmental Planning and Assessment Amendment Bill 2017 (the Bill).

The Department is seeking stakeholder feedback on the proposals. This feedback will inform the preparation of a final Bill for introduction to parliament in early 2017, please see Box 1 for information on how to make a submission.

Draft Bill – contains the draft legislation.

Stakeholder feedback – summarises public discussion on a series of initial proposals made by the Government in the development of the draft Bill.

Box 1: How to make a submission

You can make a submission on the legislative updates in two ways. These are:

1. Complete the online feedback form available on the Department's website, <http://www.planning.nsw.gov.au/Have-Your-Say/Community-Consultations>.
2. Forward written submission to the Department at the Legislative Updates email box, legislativeupdates@planning.nsw.gov.au.

1. Enhancing community participation

Community participation in planning processes increases the accountability of decision-makers and promotes transparency and confidence in the planning system.

It also improves planning outcomes by providing additional information and diverse perspectives to inform decision-making. This includes helping to identify local and regional impacts, values and priorities, and practical solutions to issues.

Community participation is particularly important for strategic planning, where the vision, priorities and ground rules for land use in a local area are set out.

It is also important on an ongoing basis to support decision-making about individual developments. The extent and methods of community participation should vary depending on the community's needs and the potential impact of development.

This section sets out the key initiatives that, if adopted, would enhance community participation in the planning system.

Community participation plans

Each planning authority under the EP&A Act will have to prepare a community participation plan (see Schedule 2.1[1], clause 2.23(1) on page 16 of the Bill). The plan will explain how the authority will engage the community in plan-making and development decisions.

This obligation will apply to:

- all local councils;
- NSW Government agencies that are planning authorities under the EP&A Act; and
- the Secretary of the Department of Planning and Environment.

The plan will set out how and when the planning authority will undertake community participation in relation to upcoming proposals and development applications, including:

- the ways in which the community can provide their views and participate in plan-making and planning decisions made by the authority; and
- how the community can access information about planning proposals and decisions.

The plans will have to be prepared in accordance with requirements set out in the Regulation, such as exhibition timeframes. The Regulation will outline requirements for the content of and process for developing community participation plans.

Councils and other authorities will be able to specify mandatory participation requirements in their plans so that they can design effective, proportionate and clear approaches to community engagement. Once made, a plan will only be able to be challenged within three months of its publication.

As part of the introduction of the requirement for community participation plans, it is also proposed to update the current minimum public exhibition requirements. For example, all applications for consent for local development will be required to be exhibited for a minimum of 14 days. Councils currently have some discretion over whether to exhibit such applications.

To reduce duplication for local councils, the amendments specify that a council does not need to prepare a separate community participation plan if it can meet the EP&A Act requirements through the broader community engagement strategy it has prepared under the *Local Government Act 1993*.

Councils that choose this approach will need to consider the principles under the EP&A Act in developing community engagement strategies, to the extent that the strategy covers the council's planning functions.

Support for councils in implementing this change will include the development of model plans and guidance material.

To meet its obligations as a planning authority, the Department will develop its own community participation plan. This will set out how the Department will engage the community across its different planning functions, including strategic planning and priority precincts. Other NSW agencies that are planning authorities under the Act will be able to develop their own plans or rely on the Department's plan.

Community participation principles

When preparing community participation plans, planning authorities will need to have regard to the community participation principles that will be set out in the EP&A Act (see Schedule 2.1[1], clause 2.23(2) on page 16 of the Bill).

These principles have been developed from the community participation charter that was proposed in 2013.

Planning authorities will have the flexibility to apply these principles in the way that best suits their communities and the types of developments occurring in their local area.

Box 2 sets out the principles that must be considered during the development of community participation plans.

Box 2: Community participation principles

- The community has a right to be informed about planning matters that affect it.
- Planning authorities should encourage the effective and on-going partnerships with the community to provide meaningful opportunities for community participation in planning.
- Planning information should be in plain language, easily accessible and in a form that facilitates community participation in planning.
- The community should be given opportunities to participate in strategic planning as early as possible to enable community views to be genuinely considered.
- Community participation should be inclusive and planning authorities should actively seek views that are representative of the community.
- Members of the community who are affected by proposed major development should be consulted by the proponent before an application for planning approval is made.
- Planning decisions should be made in an open and transparent way and the community should be provided with reasons for those decisions (including how community views have been taken into account).
- Community participation methods (and the reasons given for planning decisions) should be appropriate having regard to the significance and likely impact of the proposed development.

Statement of reasons for decisions

Decision-makers will be required to give reasons for their decisions (see Schedule 2.1[2], clause 19(2) (c) on page 21 of the Bill). This will help community

members to see how their views have been taken into account. The Department will develop guidance material to help decision-makers set out their reasons.

The statement of reasons should be proportionate to the scale and impact of decision. This means that less complex projects can have a simple statement of the reasons. For more complex projects, more detailed information will be needed about how the decision was made. Planning authorities making complex decisions will be encouraged to include a summary page to make it easier for community members to understand the reasons.

The statement of reasons should highlight considerations – such as the need to mitigate specific impacts or community concerns – that are particularly important to the decision. These will then be taken into account in any future decision about any modifications to a project. More information on proposals relating to modifications can be found in section 3.3 of this paper.

Stronger consultation requirements for major projects

In the case of State significant development, applicants will be asked to demonstrate how they consulted with the community prior to lodgment. The Department will require this as part of the applicant's environmental impact statement.

This approach is consistent with the proposed community participation principles in Box 2.

Pre-lodgment consultation options at the local development level are discussed in section 3.1 of this paper.

Up-to-date engagement tools

The Government will work to ensure that all users of the planning system understand and encourage community participation.

The Department is exploring options to improve the suite of tools available to consent authorities to improve their engagement capacity.

Options under consideration include new guidance materials, online tools and applications, and case studies of effective and innovative ways to engage the community, particularly on strategic planning.

We also propose to release new community consultation guidelines, in light of new approaches such as social media, online campaigns and the NSW Planning Portal.

This guidance material will also address the consultation and engagement requirements of specialist audiences. In particular, there will be a focus on how consent authorities can better involve Aboriginal communities in planning decisions.

2. Completing the strategic planning framework

A key part of the agenda for improving the NSW planning system has been to strengthen strategic planning. Strategic plans set the vision and context for an area in consultation with the community, and help to guide the efficient distribution of resources and facilitate coordinated development outcomes.

In 2015, the Government established regional and district plans as part of the EP&A Act. Under the Act, regional and district plans must identify:

- the basis for strategic planning in the region or district, having regard to economic, social and environmental matters;
- a vision statement and objectives;
- strategies and actions for achieving those objectives; and
- a monitoring and reporting framework.

In the Greater Sydney Region, district plans are required to give effect to the *Plan for Growing Sydney*, and for local environment plans (LEPs) to give effect to relevant district plans. The EP&A Act contains a provision to introduce this for other regional plans if appropriate over time.

Further options are proposed to enhance the strategic planning framework under the Act, and to ensure development controls are clear and accessible and remain up to date. This section sets out proposals to:

- ensure that the 'line of sight' of strategic planning clearly flows to the local level through new local strategic planning statements;
- introduce regular LEP checks to make sure that LEPs remain responsive to strategic planning objectives and up to date in relation to their local areas; and
- improve the consistency of development control plans, so that they are easier to navigate and apply.

2.1 Strategic planning at the local level

There is currently a missing piece of the hierarchy of strategic plans in the EP&A Act. While the EP&A Act provides for strategic plans at the regional and district level, and for legal controls (through the LEP) at the local level, it does not require a strategic plan at the local level.

Many councils prepare land use strategies to inform their overarching Community Strategic Plans (under the Local Government Act) and their LEPs.

There is opportunity to establish a mechanism under the EP&A Act to complete the 'line of sight' in strategic planning from the regional to the local level, while at the same time drawing on local land use values and priorities set out in Community Strategic Plans.

Local strategic planning statements

The amendments will require councils to develop and publish local strategic planning statements (see Schedule 3.1[20] on page 45 of the Bill).

Local strategic planning statements will be developed by councils in consultation with the community, and will:

- tell the story of the local government area and set out the strategic context within which the LEP has been developed (including the rationale behind the application of zones and development controls);
- explain how strategic priorities at the regional and/or district level are given effect at the local level; and
- incorporate and summarise land use objectives and priorities identified through the council's Community Strategic Plan process.

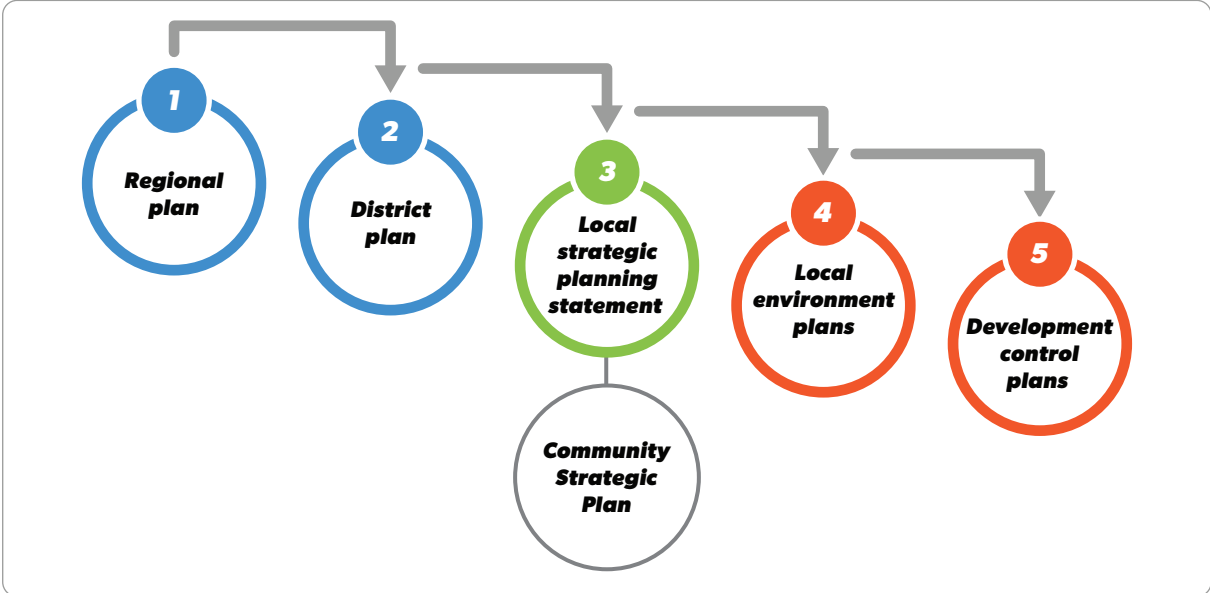
The statements will not be part of the LEP itself, but will help explain the LEP and development control plans. They will provide the strategic context and rationale for local planning controls. The local strategic planning statements would complete the line of sight from regional and district plans. They will need to be consistent with regional and district plans, and may develop the policies and actions in those plans in greater detail at the local or neighbourhood level.

The statements should reflect and promote the themes of the council’s Community Strategic Plan as they relate to land use planning. Councils will be able

to draw on land use strategies prepared under their Community Strategic Plans in developing the local strategic planning statements.

The statements will therefore be a mechanism for aligning relevant goals and actions in the Community Strategic Plans with those in the regional and district plans, as illustrated in Figure 2 below. The statements will bring together these different plans into one succinct document that sets out the story of and vision for the local area.

Figure 2: Completing the line of sight in strategic planning



Box 3 outlines the proposed structure and content of the local strategic planning statements. As with regional and district plans, this will include vision, goals, actions and measures of progress. The Government is seeking input from councils and other stakeholders on what the statements should look like and contain.

The statements are intended to be easily accessible to community members seeking to understand the future direction and current planning controls in their area. They will be published on the NSW Planning Portal alongside LEPs.

The vision presented by the local strategic planning statements should take a 20-year horizon, consistent with regional and district plans. To ensure the statements remain current, councils will be required to refresh their statements at least once every five years. Councils may choose to do this every four years as part of their overarching Integrated Planning and Reporting processes, and will need to take into account regional and district planning cycles.

Once in place, the local strategic planning statements will inform rezoning decisions and guide development. Councils will be required to consider their statements when preparing planning proposals.

The local strategic planning statements will be developed and finalised by local councils in consultation with stakeholders (including NSW agencies). In order to be taken into account when planning proposals, such as rezoning proposals, are being considered for approval, the statements will need to be endorsed by the Department (or the Greater Sydney Commission in the case of councils in the Greater Sydney Region).

The Government will help local councils prepare their local strategic planning statements by providing guidance and model statements.

Implementation will be staged over coming years to align with current regional and district planning processes.

Box 3: What will the local strategic planning statements look like?

The local strategic planning statements will follow a basic standard structure. However, councils will be able to tailor their statements to their areas. The statements are intended to be clear and succinct, but may be simpler or more complex depending on the requirements of the local area. In either case they should be in plain language and make use of maps and graphical representations.

<p>A 20 year vision for the local area</p> <p>The vision tells the story about the role and character of towns, suburbs and precincts in the local government area and the way they will develop over time. It captures the desired future state for the local area and the high-level outcomes envisaged for it.</p> <p>The vision should reflect relevant elements of visions in both the regional and district plans, as well as the objectives and values in the council’s Community Strategic Plan as they relate to land use.</p>	<p>Goals and actions to achieve the vision</p> <p>The statements will identify goals and actions for local areas that will assist in achieving the vision.</p> <ul style="list-style-type: none"> • Goals will be focused statements of the outcomes the council aims to achieve in the local area. They should be clear and measurable. • Actions will set out what is required to deliver goals. <p>As the statement will be aligned with the Community Strategic Plan, councils may choose to carry the goals and actions through into their delivery programs or operational plans.</p>
<p>Links to planning controls</p> <p>In this section, the statements will explain how the vision, goals and actions shape the planning controls and development decisions in the local area.</p> <p>Good calibration between the statement, planning controls and decision-making will help deliver development that is in line with the vision and supported by strong strategic planning foundations.</p>	<p>Monitoring and reporting on progress</p> <p>The statement will establish performance indicators by which progress towards the goals can be measured. It will also explain how progress will be monitored and reported.</p> <p>Councils may choose to use their existing processes under the Integrated Planning and Reporting Framework to monitor and report on progress.</p>

2.2 Keeping local environmental plans up to date

LEPs are the key legal controls for development in a local area. For LEPs to be effective in achieving the best planning outcomes for the community, it is important they are kept up to date. They must also give effect to higher-level policies and strategies in district and regional plans, as required by the EP&A Act.

The Act requires councils to keep their LEPs under regular review. However, it does not specify how often LEPs must be reviewed. This is different to jurisdictions such as Victoria, which requires a review every four years, and Queensland, which requires a review every 10 years.

Prior to the adoption of the standard instrument LEP in 2006, the average age of LEPs in NSW was 14 years. This included 67 LEPs that had not been significantly reviewed for over 20 years. Currently, LEPs in NSW are comprehensively remade every seven years on average with smaller changes made more frequently through individual planning proposals.

It is important that LEPs are kept up to date to ensure that changes in land use are considered in a comprehensive manner. Up-to-date LEPs are more strongly connected with the needs and values of residents and businesses of a local area. They also reduce the need for spot rezonings, being ad-hoc planning proposals that change the allowable land use, or zoning, of a plot of land. Spot rezonings create high costs for businesses and planning system users, taking on average 374 days to be determined and costing \$450,000 to \$800,000.

Regular LEP checks

Local government areas across NSW experience varying levels of growth or change. In some areas, little will change over five years and it would not be appropriate or efficient to require a comprehensive review and remake of the LEP.

However, in other areas there may be major changes to demographics, infrastructure and services, the economic structure of the area, environmental factors or state and regional policies. These may warrant a full review of the LEP or major components of it.

The Government is therefore proposing that all councils undertake a five-yearly LEP check against set criteria (see Schedule 3.1[13] on page 44 of the Bill). The proposed criteria are listed in Box 4 below.

Box 4: Proposed LEP check criteria

- Does a new regional or district plan necessitate major change to local strategic plans or controls?
- Has there been a marked demographic change in recent years, or is one expected in coming years?
- Has there been or is there expected to be significant infrastructure investment that necessitates or justifies major change to local strategic plans or controls?
- Has there been a high number of planning proposals in recent years?
- Does the LEP demonstrate consistency with relevant state environmental planning policies, section 117 directions and the regulations?
- Has the community requested significant changes to the LEP in recent years?

Councils will be required to conduct a preliminary assessment of whether external or local circumstances suggest that significant changes to the LEP are needed. Where this is the case, those changes would be identified through a more comprehensive LEP review with full community participation.

The outcomes of the LEP check and any recommendations will be provided to the Minister for Planning, or the Greater Sydney Commission in the case of councils located in the Greater Sydney region.

The Department will work with councils to plan for and implement follow up actions identified by the LEP check, such as putting forward planning proposals for minor amendments, or performing a full LEP review.

2.3 More consistent development control plans

Development control plans (DCPs) are made by councils to provide detailed guidance about planning and design to support the statutory planning controls in a LEP. There are currently over 400 DCPs across NSW.

The structure and content of DCPs vary significantly between councils, whilst some councils have multiple DCPs. DCPs cover a range of subject matters and can be based on location and types of development. This may include requirements for specific land uses, design standards or project specific requirements or objectives.

The current variations in structure and format between DCPs can make them difficult to understand and apply. Such variations also limit the opportunity to embed DCP controls in the NSW Planning Portal alongside other planning controls, such as those included in LEPs.

Standard DCP format

To address this complexity and confusion, the EP&A Act will be amended to require DCPs follow a standard format (see Schedule 3.1[17] on page 44 of the Bill). This will improve consistency across local councils and improve user navigation of the planning system and its controls. It will also allow DCPs to be spatially represented on the NSW Planning Portal. A standard format for DCPs will be a critical step to reducing red tape for industry and increasing transparency for the community.

While the format of the DCPs will be made consistent, the content of the DCP provisions will remain a matter for councils. Councils may choose to adopt model DCP provisions (discussed below).

A standard format across DCPs could help achieve significant cost and time savings for planning system users, by simplifying the processes for planning consultants to find and navigate the relevant provisions of DCPs.

The standard format will be developed in consultation with councils to ensure that DCPs have the right balance of consistency and flexibility to capture local contexts. A consistent structure could adopt a menu approach allowing councils to choose elements relevant to the local government area.

The Government will work with councils to develop an approach to how the standard format DCP could be implemented. This work will investigate how statewide and locally specific provisions could be constructed, and develop an appropriate online platform using the NSW Planning Portal.

Optional model DCP provisions

In addition to developing the standard DCP template, a working group will develop an online library of model provisions. The working group will include Government, council and industry representatives.

This is a non-legislative action that will support the improvements to how DCPs are accessed and navigated. Councils will be able to access and use these model provisions on an optional basis.

The model provisions will be developed over time in line with priorities identified by the working group. This would include a scoping phase where the Department engages with councils and stakeholders to understand which areas are best suited to a model approach.

The library of model provisions will be available through the NSW Planning Portal.

3. Better processes for local development

Local development is development for which the council is the planning authority. For many individuals and businesses, their main experience of the planning system is with local development, as either an applicant or someone affected by or interested in a proposed project.

Making local development processes simpler and faster for all participants is one of the goals of the legislative updates. This would reduce cost and delay for proponents, and allow interested members of the community to better understand the assessment process and how they can access information and participate.

At the same time, a key priority for the Government is to deliver faster housing approvals. The Premier has committed to ensuring that 90 per cent of housing approvals are processed within 40 days. An important part of the strategy to achieve this target is by improving development assessment processes for local development.

This section discusses a range of proposals that aim to improve local development assessment processes by:

- encouraging early consultation with neighbours;
- improving efficiency and transparency where a development application needs approvals from other NSW Government agencies;
- preventing the modification of a consent where the work has already been carried out; and
- improving the pathway for complying development.

These changes, if adopted, will contribute to a simpler, faster planning system with savings in time and money for proponents, councils and the community.

3.1 Early consultation with neighbours

Consulting with neighbours before lodging a development application is good practice. It allows neighbours to have input at an early stage in the design process on matters that may impact on them, such as loss of views and overshadowing.

It increases the likelihood that issues can be resolved up front to the satisfaction of all parties. This means that fewer issues are left to be resolved by councils or the Land and Environment Court, with associated delay and cost.

Exploring incentives for early consultation

There are significant benefits in encouraging applicants to consult with their neighbours in the early stages of a project.

The legislative amendments will clarify that the EP&A Act provides a power to make regulations to encourage or require certain activities to be completed before a person lodges a development or modification application (see Schedule (see Schedule 2.1[2], clause 23 on page 22 of the Bill).

Before making any such regulation, the Department will conduct further research into current barriers to early consultation and possible options and incentives to overcome them. This will include looking into:

- tools to facilitate early conversations between neighbours, including through the NSW Planning Portal; and

- incentives in the system, including in relation to fees, where an applicant can demonstrate he or she has actively resolved issues through early consultation.

The Department will conduct a pilot with selected local councils to trial different incentive mechanisms and administrative approaches. The results of the research and pilot program may inform any changes to the regulations in 2017.

3.2 Efficient approvals and advice from NSW agencies

State agencies play an important role in local development by providing advice to councils on key issues relating to the environment, safety and other matters.

Depending on the legislation or planning instrument that requires the agency's input, agencies may provide:

- advice, being general comments on a proposal;
- concurrence, being agreement to an element or elements of a project; or
- 'general terms of approval', being an in-principle approval, given where a development requires approval under the EP&A Act and another Act.

Development that requires approval under multiple Acts is known as 'integrated development'.

NSW agencies provide some 8,000 pieces of advice on local development each year. Approximately 10 per cent of these take longer than 40 days. The annual value of development applications with more than one concurrence and/or referral is approximately \$6.1 billion.

The need to obtain an agency's advice is an important protection within the planning system, but delay in the delivery of that advice prevents

the granting of development consent, creates uncertainty and increases costs for applicants. This in turn may deter investment.

Delays cannot be attributed to any single feature of the system. Features that contribute to delay include:

- a lack of communication between agencies and/or proponents;
- manual transactions;
- limited transparency in agency processes; and/or
- an absence of systematic oversight and performance accountability.

Integrated development, concurrence and referral processes can be improved to make agencies more accountable to councils and proponents, and to ensure they participate in a timely and productive manner. The changes discussed in this section are expected to save applicants approximately 11 days as part of the average integrated development process.

Step-in power to ensure timely approvals

The amendments will give the Secretary of the Department of Planning and Environment the reserve power to prevent delays and resolve conflicts between agencies (see Schedule 4.1[12] on page 50 of the Bill).

The Secretary will be able to give advice, concurrence or general terms of approval on behalf of another agency where:

- the agency has not provided the advice, granted or refused concurrence, or provided general terms of approval within statutory timeframes; and/or
- the advice, concurrence or general terms of approval from two or more agencies are in conflict.

The Secretary's powers to act in these situations will be reserve powers, exercised at her or his discretion.

When exercising the reserve powers, the Secretary will have regard to the 'State Assessment Requirements'. This will be a statutory policy to guide the Secretary's decisions. It will also guide applicants by:

- helping applicants determine whether they need approval from other agencies;
- clarifying agencies' information requirements and assessment criteria; and
- providing information on how agencies will assess an application and what outcomes applicants can expect.

The Secretary's powers will apply to developments for which a council is the consent authority. They will not apply to State significant development or infrastructure or to activities assessed under Part 5 of the EP&A Act.

The Regulation will also be amended to allow the Secretary to restart the assessment process and timing where an agency has paused it, in order to make an additional information request that is inconsistent with policy requirements.

Performance improvement approach

To accompany the new powers, the Department will play a leadership role in the system, working with councils and agencies to identify opportunities for improvement and supporting them to perform their roles.

Agencies will be supported in implementing a risk-based approach to concurrences and referrals, ensuring decisions are robust and made at the right level of government.

The new system is modelled on NSW Food Authority's Food Regulation Partnership (FRP) program, which has been identified by the Independent Pricing and Regulatory Tribunal as leading practice in how to facilitate and manage state and local government interactions. Key principles of the FRP include clear delineation of parties' roles and

responsibilities, providing state support for councils to perform their function, state oversight of the process, and two-way communication.

Figure 3 on page 19 illustrates the difference between the current system for managing concurrences and referrals and the proposed model.

Transparent digital platform

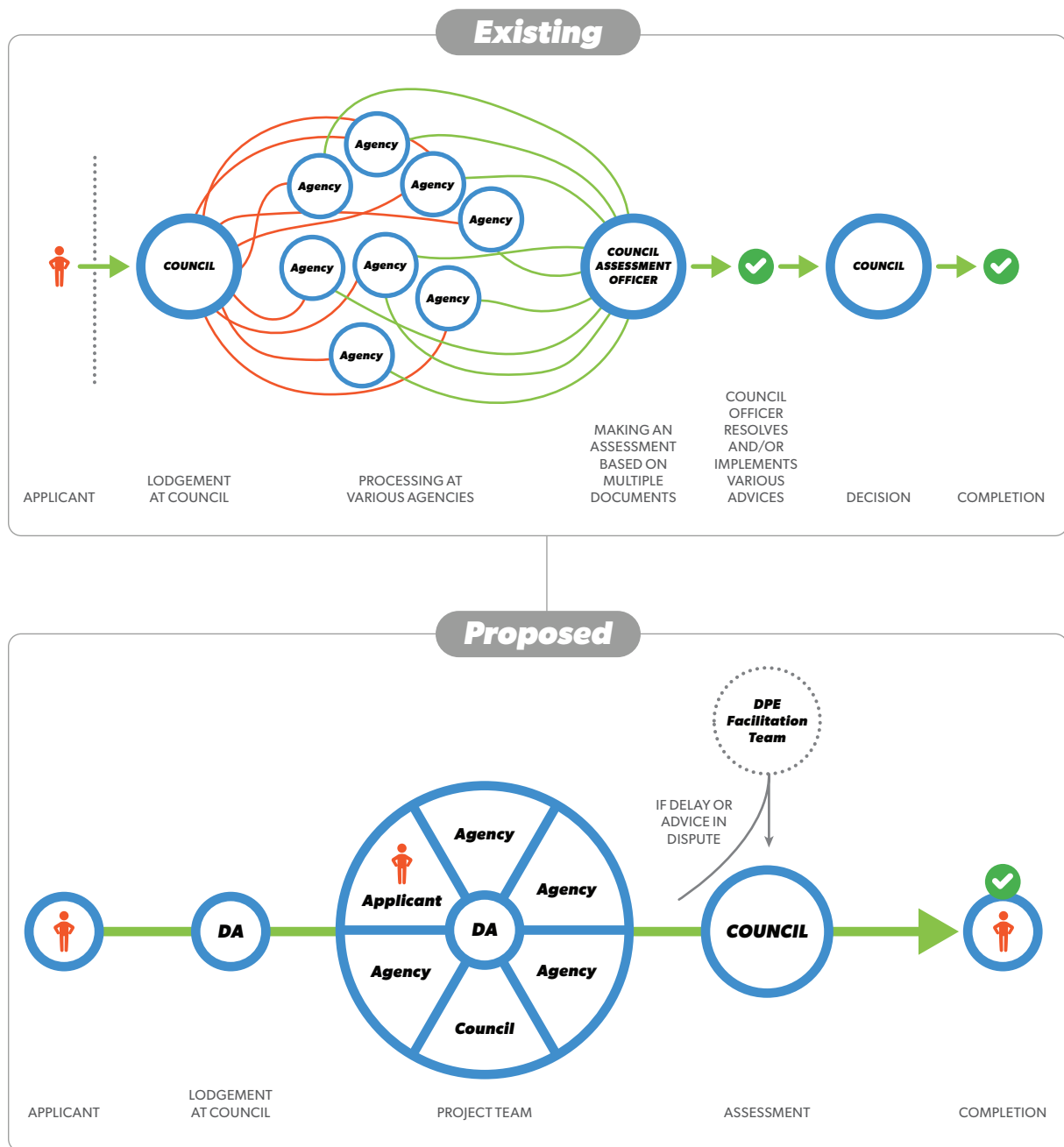
Underpinning this performance improvement approach, the Department is developing an electronic system to digitise the transactional elements of the system and promote collaborative work practices. The system will be an element of the NSW Planning Portal and link with online lodgement facilities. It will have functions including:

- allowing payments to be made to different agencies;
- information sharing among all participants;
- data collection;
- notifications at each stage of the process; and
- the publication of decisions.

Together with the digital platform, the new provisions will improve the accountability of all agencies, as councils and proponents will be able to track the progress of the concurrences and referrals.

Data collected by the system will be a valuable resource that will be used to manage the processing of applications and for process analysis to identify opportunities for improvement. The Department will publish performance monitoring reports to promote self-regulation and identify opportunities for improvement.

Figure 3: The existing and proposed concurrence and referral workflows



Ongoing review of concurrences and referrals

We will continue to update requirements so as to minimise costs and delays for all stakeholders. To support this, the Department will undertake a comprehensive, whole-of-government review of referrals and concurrences. The aim will be to identify unnecessary requirements and alternative tools to assess less complex impacts. It will also identify whether decisions are being made at the right level of government.

This will allow concurrences and referrals to be rationalised and removed where redundant, following a review by the Department in consultation with agencies. These changes will help make existing concurrence and referrals requirements operate more efficiently and transparently.

3.3 Preventing the misuse of modifications

One of the basic principles of the NSW planning system and the EP&A Act is that a development consent can only be modified:

- to correct minor errors, misdescription or miscalculations; and/or
- to an extent such that the consent authority is satisfied the development has not significantly changed.

This principle ensures that developments are built to be consistent with how they were planned and approved.

Over time, this principle has been eroded by the granting of retrospective approvals for works that go beyond the original consent.

An example of this is the case of *Windy Dropdown v Warringah Council*, outlined in Box 5.

Box 5: Windy Dropdown Pty Ltd v Warringah Council

Windy Dropdown Pty Ltd was the owner of land known as Windy Dropdown, over which there was an existing development consent to subdivide the land for the construction of residential houses. Drainage work and other approved works were carried out in accordance with the consent. However, landfill was placed on the site in breach of conditions of the original consent.

Windy Dropdown lodged an application under section 96 of the EP&A Act to modify the consent to approve the increased filling, despite the work having already occurred. The council alleged the extra landfill markedly changed the character of the land from a naturally vegetated area to bare space.

The court considered whether the modification power under section 96 was available to amend a development consent where the relevant works had already been carried out. It ordered that the retrospective section 96 application was valid.

The effect of the decision is that an application can be made to modify a development consent which would extend that development consent to cover work already carried out.

Source: *Windy Dropdown Pty Ltd v Warringah Council* [2000] NSWLEC 240.

Some councils have raised concerns that there has been an increase in the number of developments that are being built without the appropriate approvals. This undermines the development consent process and diminishes the rights of residents where illegal works have a negative impact on the surrounding properties.

Strengthening deterrence of unauthorised works

The Act is being amended to prevent planning authorities, including the court, from approving a modification in relation to works already completed, other than in limited circumstances (see Schedule 4.1[15] on page 51 of the Bill). These limited circumstances are to correct a minor error, misdescription or miscalculation.

This change reinstates the original principle of the EP&A Act, while still allowing the modification mechanism to be used to authorise minor departures from the original consent.

The effect of the amendment is that unauthorised works falling outside these parameters may be subject to enforcement action, such as demolition, or require a new building certificate.

Modifications must take into account reasons for original consent

Additionally, the current system allows for the modification provisions to be used to amend, or remove, conditions of a development consent without proper consideration of why those conditions were originally imposed.

Under the proposed amendments, a planning authority will be required to give reasons for a decision (see section 1 of this paper). In setting out its reasons for a decision, consent authorities can explain the importance of certain conditions and the reasons for imposing them.

A further amendment will require planning authorities, when considering a modification application, to consider the statement of reasons for the original consent (see Schedule 4.1[14] and [16] on page 51 of the Bill).

3.4 Improving the complying development pathway

In the NSW planning system, 'complying developments' are low impact proposals that meet development standards set out in an environmental planning instrument.

The key set of standards for complying development are found in *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (the State Policy). Low impact projects covered by the State Policy include new one or two storey dwellings, alterations to existing dwellings and commercial and industrial premises.

If the proposal fully meets the standards, an accredited council or private certifier can approve the development by issuing a complying development certificate (CDC). This is a combined planning and building approval.

Complying development brings a number of benefits for applicants. These include shorter approval timeframes, reduced administrative costs, and greater certainty about whether the development is permissible.

This pathway is a key mechanism for ensuring that housing supply meets demand created by population growth and demographic changes.

By 2036, New South Wales will have an extra 2.1 million people and Sydney alone will need an extra 725,000 houses.

Box 6 provides an overview of the use of the complying development pathway in NSW.

Box 6: Complying development in NSW

- In 2014-15, 29,075 CDCs were issued in NSW by private and council certifiers. This represented 32 per cent of all local development approved (development applications and CDCs combined), and an increase of 17 per cent since 2013-14.
- The value of approved complying development projects was \$5.24 billion, an increase in CDCs of 17 per cent since 2013-14.
- CDCs issued by council certifiers took an average of 22 days, whereas development applications took on average 71 days to determine.

Source: *Local Development Performance Monitoring report, 2014-15*

The measures proposed below would grow complying development as a proportion of total development, while at the same time increasing confidence that the relevant standards will be enforced.

Ongoing work to improve the complying development pathway

In early discussions, stakeholders raised some issues that act as barriers to the uptake of complying development. The current standards can be seen as overly complex. In addition, the compliance and enforcement regime for private certifiers is seen as confusing and sometimes ineffective, undermining public confidence.

These concerns can be addressed through a range of legislative and non-legislative measures. The aim is to:

- deliver a clear set of rules that make it as easy as possible for participants to follow the complying development pathway;

- build confidence that complying development standards are being met;
- ensure that councils have the necessary resources and tools to ensure complying development standards are met; and
- level the regulatory playing field between development applications and complying development certificates.

The Department has an ongoing program of work to simplify the planning rules around complying development. The aim is to improve the efficiency and uptake of this pathway for low impact projects. This work includes

- preparing a new user-friendly simplified Housing Code, which includes explanatory diagrams;
- reviewing and simplifying development standards for complying development in greenfield areas;
- developing simplified controls for complying development in inland areas of NSW with the introduction of an Inland Code;
- implementing an education program on exempt and complying development to assist councils in understanding the State Policy and providing advice to applicants;
- undertaking work to enhance the education of accredited certifiers in NSW; and
- enhancing the NSW Planning Portal to allow online lodgement of complying development certificates (and development applications).

An important recent development has been the release of a draft *Medium Density Design Guide and Medium Density Housing Code* for public comment.

The draft Guide and Code are aimed at making it cheaper, easier and faster to build lower-rise medium density housing, specifically:

- dual occupancies – two dwellings on one lot of land;

- terraces – three or more attached dwellings with common street frontage;
- townhouses – three or more dwellings on a lot; of land where not all dwellings have a street frontage; and
- manor houses – two storey buildings that contain three or four dwellings.

The Guide and Code have been extensively discussed and debated among stakeholders. To view the exhibition material, please visit the Department's website, <http://www.planning.nsw.gov.au/Policy-and-Legislation/Housing/Medium-Density-Housing>.

In addition, a design competition for medium density housing has been launched to test and demonstrate how the draft guide and code can deliver design-led planning. The outcomes of this competition will help inform the final guide and code.

Ensuring the development meets the standards

The Government proposes to amend the EP&A Act to make it clear that, where a CDC does not comply with the relevant standards in the State Policy, it can be declared invalid (see Schedule 4.1[9] on page 50 of the Bill).

This amendment is needed to address an issue identified in recent case law (*Trives v Hornsby Shire Council*, outlined in Box 7). At present, a CDC may approve development that is outside the relevant standards, but this would not be enough for the certificate to be overturned by the court. The Court has held that, if an accredited certifier is satisfied that the development meets the standards, her or his opinion prevails provided it is reasonable.

Box 7: Trives v Hornsby Shire Council

In April 2014, Hornsby Shire Council challenged the validity of three complying development certificates issued by a private certifier, Mr Trives, on the basis that the structures certified were not properly characterised as 'detached studios' within the meaning of the State Policy.

The Land and Environment Court (LEC) found that the characterisation of the development as 'complying development' was a jurisdictional fact. The Court invalidated the certificates on the basis that the jurisdictional fact did not exist. In other words, because the complying development certificate did not comply with the relevant standards, the Court could invalidate the certificate.

However, the Court of Appeal determined that the LEC was incorrect in deciding it could make a finding about whether particular development was in fact complying development. That is, the Court of Appeal found that the characterisation of complying development could only be made by the certifier, and that a court could not look into this matter as a question of 'jurisdictional fact' (as a basis for judicial review of the decision to issue the certificate).

The Court of Appeal held that the power to issue a complying development certificate depends on the certifier's state of satisfaction. This was based on section 85A(3)(a) of the EP&A Act requiring a certifier to be satisfied the proposed structures were complying development within the meaning of the State Policy. That state of satisfaction had to be one that could be formed by a reasonable person with an understanding of the State Policy.

This decision means that if a person challenges a CDC by bringing judicial review proceedings, they would need to demonstrate that the certifier acted unreasonably given the information before them, rather than simply demonstrating that the development was not within complying development rules.

Source: *Trives v Hornsby Shire Council* [2015] NSWCA 158

This situation can mean that little can be done to challenge complying development that does not meet the standards unless the certifier acted unreasonably.

The proposed amendments address this by allowing a person or a council to bring proceedings to challenge the validity of a complying development certificate, and allowing a court to objectively determine whether the certificate is in accordance with relevant standards.

Improved information for councils and neighbours

The notification requirements for complying development are more limited than for development applications. For example, complying development proposals are not publicly exhibited.

The reason for this is that complying development should be approved if it meets the standards in the State Policy. This is because complying development is low impact by its nature.

The Government recognises that greater transparency for complying development would improve confidence in the system. At present it can be difficult for councils and neighbours to satisfy themselves as to whether the proposed development meets the required standards.

This will be addressed by preparing regulations that:

- require certifiers who are intending to issue a complying development certificate in metropolitan areas to give a copy of the proposed certificate, any plans and other applicable documents (such as a compliance table demonstrating how the proposal complies with the relevant standards) to the council and direct neighbours; and
- require certifiers, after issuing a certificate, to give a copy of the certificate and any endorsed plans to direct neighbours at the same time as they provide the information to councils.

This will increase transparency and checks and balances in the system.

In time, neighbours will be able to access plans and certificates on the NSW Planning Portal, which will contribute to greater transparency in the system.

Limit some sensitive categories to council certifiers

As the use of complying development grows, it may be necessary to put in place additional safeguards to ensure the appropriate consideration of proposals with greater potential to impact local values or sensitive areas.

On this basis, the regulation will be able to specify certain categories of development for which only a council certifier is authorised to issue a complying development certificate. (see Schedule 4.1[7] on page 49 of the Bill).

These circumstances will be clearly set out in regulations and limited to categories of development where councils are best-placed to decide whether a complying development proposal meets the standard.

This will also give councils increased visibility over sensitive complying development in their areas, and help them to improve their monitoring and enforcement functions.

Powers and resources for councils

Councils are the enforcement authority responsible for monitoring how development is carried out at the local level, and ensuring that it follows the rules. This includes complying development where the certificate is issued by a private certifier.

However, work on complying development can proceed very quickly. This leaves councils with limited time in which to investigate whether a complying development certificate is being followed. If work proceeds while the investigation

is being undertaken, it could limit the enforcement options available to the council if the work is found to be non-compliant.

To remedy this, a new investigative power is proposed for councils (see Schedule 9.1[2], clauses 9.33 and 9.34 on pages 86-87 of the Bill). Where a complying development certificate has been issued, councils will be able to issue a temporary stop work order on the project, in order to investigate whether it is being constructed in line with the CDC. Work will be able to be stopped for seven days, and the power will be limited to genuine complaints about building work not complying with a CDC.

Resourcing constraints also place limits on compliance and enforcement action by councils. This is particularly the case for complying development, as councils do not currently collect fees from complying development applications made through private certifiers.

The government proposes to establish a compliance levy to support councils in their role in enforcing complying development standards (see Schedule 4.1[17] on page 51 of the Bill). This would be part of the fee structure for complying development certificates, whether issued by a private or council certifier. It will also be made clear that the levy can extend to development applications. The revenue from this levy will be remitted to councils to resource investigation and enforcement activity under the EP&A Act.

The proposed amendments create the power to establish the compliance levy through a regulation. Further work is needed to determine the most efficient and equitable model for the levy. The Department will model and consult on different options, with a view to introducing the levy as part of the forthcoming remake of the EP&A Regulation.

Levelling the playing field between complying development and development applications

At present, the EP&A Act contains anomalies that create unnecessary differences between the complying development and development application pathways.

One such anomaly is that a certifier is not currently able to issue a complying development certificate if the development is to occur on an unregistered lot.

This serves as a barrier to the adoption of complying development in greenfield areas. By contrast, consent to a development application may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority as to any matter specified in the condition, such as lot registration.

To address this, the EP&A Act will allow for the deferred commencement of a complying development certificate in certain circumstances (see Schedule 4.1[8] on page 49 of the Bill). An example of such circumstances could be requiring a subdivision to be registered prior to the development commencing.

Another anomaly is that there is currently no ability to levy for special infrastructure contributions for complying developments (as can be done for development applications).

This will be corrected by allowing special infrastructure contributions to be required, and planning agreements to be entered into, for complying developments (see Schedule 7.1[1], [3] and [5]-[7] on page 73 of the Bill).

4. Better processes for State significant development

Better processes are needed for State significant development to reduce complexity and overall assessment times while also providing for greater transparency and accountability.

The Government has committed to the State priority of halving assessment times for State significant development. This can be achieved in a manner that maintains high environmental standards and strong community engagement.

This section discusses proposals for improving processes for State significant development including:

- better integration of development consents and other statutory approvals;
- making it easier to ensure up-to-date monitoring and reporting;
- providing a clear legislative basis for modern approaches to manage impacts; and
- closing off the former Part 3A development pathway.

If adopted, the proposals outlined below would strike a balance between reducing complexity and regulatory burden for proponents of major projects, and improving confidence and accountability in the planning system.

4.1 Clarifying the regulation of major projects

Consent for State significant development is generally granted subject to a broad range of conditions. Some of these requirements are

replicated on other licences or authorisations, such as environment protection licences (EPLs) and mining leases.

State significant developments, such as mines, wind energy developments and industrial manufacturing sites can have multiple agencies regulating their environmental risks, such as noise, blasting, dust, air quality, water and biodiversity impacts. The Department provides initial regulation of these risks through conditions on the development consent. The Environment Protection Authority provides ongoing operational regulation of these risks through the application of EPLs. Additionally, NSW Resources and Energy regulates operational and rehabilitation risks through mining leases.

This arrangement is problematic for two reasons:

- The conditions of the development consent are fixed in time. This means it is not possible to take into account emerging information, a change in the risks being regulated or to reflect a change in standards or best practice. By contrast, the conditions of the mining lease and EPLs are not required to be substantially consistent with the conditions of consent after either the first renewal of the lease or the first five-yearly review of the EPL.
- Over time it can become confusing for operators and the community as to which regulator is managing which risks and impacts.

The fixed nature of development consents also means that reporting and other machinery provisions may not keep up to date with modern standards.

To address these issues, changes to the EP&A Act will improve the responsiveness and efficiency of conditions of consent for State significant projects, without compromising the protections that those conditions afford.

Transferrable conditions

Sometimes conditions are duplicated across more than one approval, creating parallel regimes that regulate the same impacts.

To address this, the amendments will establish a mechanism of 'transferrable' conditions (see Schedule 4.1[6] on page 49 of the Bill). These are conditions of consent that no longer need to apply, because they are substantially consistent with conditions subsequently imposed under other regulatory approvals or licences.

In determining a development application, conditions of consent will still need to address the impacts of the development as a whole. However, where these impacts are better regulated through another regulatory approval such as an EPL, mining lease or other approval they will subsequently cease to have any effect once they are imposed on that other approval.

These consent conditions will lapse as substantially equivalent conditions are included in the other regulatory instruments. Responsibility for enforcing these conditions will then lie with the government agency issuing the lease, licence or other approval rather than with the original consent authority. This will ensure transparency and accountability for proponents and the public. It will also reduce inconsistency and confusion over time, as underlying approvals may have their conditions change in a way that leads to the conditions of the consent becoming redundant or no longer fit for purpose. The change will also remove confusion regarding which government agency is regulating which aspect of the development.

As noted above, some regulatory approvals can be amended over time. For example, an environment protection licence can be amended after the first review, which must take place within five years after it was issued. Where this is the case, the legislation will specify that the amendments will not be able to permit greater impacts than those allowed under the conditions in the original development consent.

Clearer powers to update conditions on monitoring and environmental audit

The Minister for Planning currently has the power to impose conditions on a project approval that require monitoring activities or an environmental audit. These conditions can be imposed at the time of an approval or at any time thereafter by written notice to the proponent.

The new amendments will strengthen this power by clarifying that the Minister may also vary or revoke monitoring or environmental audit requirements in existing approvals (see Schedule 4.1[18] on page 51 of the Bill). This provides greater flexibility to ensure that conditions in older consents remain relevant, contemporary and enforceable. It will support a program of appropriate audits, which, over time, will improve the standard and consistency of older consents.

Clear basis for modern approaches to managing impacts

Further amendments will clarify that the conditions of consent can require financial securities to fund the decommissioning or rehabilitation of sites (see Schedule 4.1[6] on page 49 of the Bill). This will enable the environmental and community impacts of the development to be better and more flexibly managed.

These amendments are particularly relevant to developments where the landholder is not the proponent, or holder of the development consent. This has emerged as a particular concern for wind energy developments and quarries, where turbines are being constructed and construction materials are extracted by proponents, subject to agreement with the landholder of the private land.

Consideration is also being given as to whether special provisions should be made with respect to conditions relating to offsets for the impacts of proposed development. These amendments would confirm that conditions of consent can apply offset requirements to address any environmental impact of a project, not just biodiversity impacts.

In applying conditions requiring either financial assurance or offsets, consent authorities would not seek to duplicate the role of other approvals such as EPLs or mining leases.

The regulations would set out the classes of development to which these types of conditions could be applied. Such conditions would only be able to be imposed where a NSW Government policy is in place to set out how they would operate. For example, the regulation would allow either a particular type of offset condition or financial security to be imposed in relation to a particular class of development, to ensure that there is a sound policy basis for the application of such conditions.

Tools and guidance for better conditions

To support these amendments, the Department will develop:

- guidance material on the scope of the new conditioning powers for stakeholders and the community;
- guidance material for consent authorities on how to write consistent, robust and legally enforceable conditions of consent; and
- a database of clear, enforceable standard or model conditions for major projects. This would include more flexible auditing and reporting, and future-proof machinery conditions.

4.2 Improved environmental impact assessment

Stakeholders, including community and environmental groups and planning authorities, frequently raise concerns with the quality of environmental impact assessment for major projects.

Poor environmental impact assessment undermines community confidence in planning decisions. It also causes delays in the assessment process as authorities seek further information.

For proponents, there is currently a lack of clear guidance on how environmental impact assessment should be conducted and what is required from consent authorities. This adds to the time and costs of the project and means that the assessment may not be sufficiently linked to the decision-making criteria.

Environmental Impact Assessment (EIA) Improvement project

The Government has released a discussion paper with ideas about how to improve the assessment of major projects. The proposed improvements discussed in the paper include:

- driving earlier and better engagement with affected communities;
- improving the quality and consistency of EIA documents;
- developing a standard approach for applying conditions to projects;
- providing greater certainty and efficiency around decision-making, including assessment timeframe;
- strengthening monitoring and reporting on project compliance; and
- improving the accountability of EIA professionals.

The changes proposed are aimed at ensuring public confidence in the assessment process.

To view the discussion paper and to make a submission please visit the Department's website, <http://www.planning.nsw.gov.au/Policy-and-Legislation/Environmental-impact-assessment-improvement-project>.

Feedback on the discussion paper will be used to develop draft guidelines. The draft guidelines will be released for consultation.

4.3 Discontinuing Part 3A

In 2011, the NSW Government repealed Part 3A of the EP&A Act, a method of assessment for major projects that were considered to be of State or regional planning significance, and announced that it would no longer accept any new projects in the Part 3A assessment system. This system has been replaced by the State significant development (SSD) and State significant infrastructure (SSI) pathways that commenced on 1 October 2011.

Under transitional arrangements, Part 3A continues to apply to certain projects approved or pending at the time of its repeal. The Department continues to accept modifications to applications previously approved under Part 3A of the EP&A Act.

This means new Part 3A modification applications continue to be made almost five years after the Part 3A Repeal Act was passed. Part 3A modification applications are subject to a much broader modification power (section 75W) than under the SSD provisions of the EP&A Act (section 96). Section 96 requires development to be 'substantially the same' as the development originally approved.

Discontinuing transitional arrangements

To prevent the ongoing use of former section 75W to modify former Part 3A projects, the transitional arrangements in the EP&A Act will be repealed subject to the arrangements listed below (see Schedule 10.1[7] on page 110 of the Bill). All existing approvals under Part 3A or the transitional provisions will then be moved to the current SSD and SSI pathways, with provisions to ensure that development completed or under construction will be unaffected by the change.

It is proposed that the following rules will apply to the repeal of the Part 3A transitional arrangements:

- modification applications under the former section 75W will be received for a period of two months following the passage of the Bill (the 'two month window') and determined under section 75W;
- where Secretary's Environmental Assessment Requirements have already been given for a modification application under the former section 75W, the application will be determined under section 75W provided an environmental impact statement is lodged within 12 months;
- where a modification for a former Part 3A consent is lodged after the two month window, the modification will be assessed against the development as at the time it is transitioned to either SSD or SSI (in other words, as at the time the development was last modified); and
- the ongoing effect of approved Part 3A concept plans will be preserved.

Box 8 shows the current categories of transitional Part 3A projects and the development pathway to which they will transfer once Part 3A is fully discontinued.

Box 8: Part 3A project transition	
Category	SSI or SSD?
Agriculture, timber and food	SSD
Coastal	SSD
Health, education and community services	SSI
Manufacturing	SSD
Mining, petroleum and extractive	SSD
Residential, commercial and retail	SSD
Resource recovery and waste	SSD
Tourism and recreation	SSD
Transport, energy, water and telecommunications	SSI

5. Facilitating infrastructure delivery

To ensure the strategic and cost effective delivery of major infrastructure projects, such as major road and rail projects, the Department has released a planning guideline for infrastructure corridors. The guideline sets out a process for planning major infrastructure corridors to assist infrastructure agencies in understanding and using the different planning mechanisms available through the phases of a corridor's lifecycle.

For development in these corridors that requires consent under the EP&A Act, there is a requirement to obtain the advice or concurrence of agencies, such as Transport for NSW and Roads and Maritime Services. Examples of such requirements for road and rail corridors are set out in the Infrastructure SEPP.

Currently, this approach does not apply to activities assessed under Part 5 of the EP&A Act. These are activities undertaken by public authorities that do not require development consent, but must still be subject to an environmental assessment.

It is current practice for public authorities to consult with other agencies and State owned corporations about their proposed activity to ensure that it will not affect future plans for an infrastructure corridor. There is a need to formalise this practice in law.

Concurrence for Part 5 activities

The proposed amendments extend the current ability of environmental planning instruments to require concurrence or notification of public authorities to activities under Part 5 within future infrastructure corridors (see Schedule 5, Item [1] on page 53-54 of the Bill).

This will ensure inappropriate development does not occur within a corridor that will create problems when it is time to construct the infrastructure. For example, if services needed to be re-located within the corridor this could have significant cost implications for the Government.

6. Fair and consistent planning agreements

The legislative framework for planning agreements has been in place for over a decade. Planning agreements are entered into by a planning authority (such as the Minister for Planning) and a developer where the developer agrees to provide or fund designated State infrastructure such as public amenities, affordable housing, transport or other infrastructure.

It has helped set a clear basis for legal agreements between planning authorities and developers to deliver public benefits in association with development, particularly in relation to complex, large scale or staged infrastructure for major development.

A key principle underpinning planning agreements is that they are intended to be a voluntary arrangement between parties towards a public purpose in support of the objects of the EP&A Act. A planning agreement must be directed towards a legitimate planning purpose and provide for a reasonable means of achieving that purpose.

A planning agreement may not authorise a breach of an environmental planning instrument or a development consent, and the benefits of a planning agreement should be given appropriate weight when considered against other environmental, economic, or social considerations in making a planning decision.

The legislative framework for planning agreements is broad and flexible. Although this allows significant potential for innovative or unique delivery of public benefits and infrastructure, it also means there is opportunity for parties to a planning agreement to make unfair or unreasonable demands on what is required under a planning agreement.

Clearer directions to councils

The Government is developing a clearer policy framework for the role and use of planning agreements in the planning system.

The Bill clarifies and strengthens the Minister's power to make a direction about the methodology underpinning planning agreements (Schedule 7.1, item 2, on page 73 of the Bill).

The Department has released a suite of draft documents to improve the policy framework for planning agreements. These are a proposed ministerial direction, revised practice note and planning circular. If adopted, the direction will require that local councils have regard to specific principles, policy and procedures when negotiating or preparing a planning agreement.

The draft documents aim to encourage councils and developers to work together to get the best possible outcomes out of planning agreements so that:

- the planning agreement results in a clear public benefit;
- the process for negotiating the planning agreement is fair and reasonable for both parties and is transparent to the broader community; and
- the infrastructure identified in the planning agreement is informed by an assessment of the needs of the local community.

To view the draft documents and to make a submission, please visit the Department's website. The Department is seeking feedback by 27 January 2017.

Other improvements to infrastructure contributions

In addition to the improvements to the policy framework for planning agreements, the Government is committed to improving the infrastructure contributions system more broadly. This will enable the efficient, transparent and fair sharing of infrastructure costs and benefits where development occurs.

To achieve this, the Government is undertaking the following initiatives:

- **Special infrastructure contributions (SICs)**
 - in high growth areas like priority precincts and priority growth areas across metropolitan Sydney, the Hunter and Illawarra, the Department is preparing SIC determinations for regional infrastructure to make sure new development is accompanied by key growth infrastructure.
- **Reviewing local infrastructure guidelines**
 - the Department will work with IPART, councils and industry to review current guidelines on the costs, design and provision of local infrastructure delivered through section 94 infrastructure contributions to ensure they are delivered efficiently and to appropriate standards.
- **Section 94A guidelines** – the Department will prepare a guideline and assessment criteria for requests by councils to vary the levy rate for section 94A contributions in growth areas.

7. Confidence in decision-making

A key objective of the proposed changes to the EP&A Act is to build community confidence through enhancing the probity and accountability of decision-making in the planning system. This involves improving transparency and balance in assessment and determination processes, and the independence and expertise of the decision-makers.

There is scope to improve confidence in decision-making at all three levels of the planning system – local, regional and State significant development.

The following sections describe the Government's proposals to:

- deliver better local decisions through promoting the consistent use of local planning panels and establishing tools to ensure experts make decisions where needed;
- update the thresholds for regional development – that is, development determined by regional planning panels; and
- strengthen decision-making in relation to state significant development through changes to emphasise the independence and determinative function of the current Planning Assessment Commission.

7.1 Better local decisions

At the local level, independent hearing and assessment panels (IHAPs) have been established by a number of local councils over the last two decades. The role of these panels is to provide independent, expert advice and recommendations to councils exercising planning functions, or to exercise those functions on behalf of the council. That is, panels can be tasked with determining development applications, such as those over a certain value or which have attracted a high number of objections.

Under this model, elected councils set the strategy, policy and standards for development on behalf of their constituents, while technical assessments and decisions are made by independent experts in line with council's framework.

The benefit of this approach is that it helps to depoliticise and improve the thoroughness and quality of decision-making and, over time, increase community confidence in the planning system. The use of panels also reduces the risk of conflicts of interest that may arise from elected officials making decisions about planning matters in which they have an interest. These benefits are maximised when the panel has a determinative, rather than advisory, function.

Stakeholder feedback shows that many existing IHAPs in NSW are working well, and are helping councils manage increased workload. While only around 0.7 per cent of development applications were determined by IHAPs in 2014-15, these tend to be the more complex and controversial applications.

The following sections discuss proposed amendments to make local planning panels a regular feature of the planning system across local government areas, by:

- updating the provisions of the EP&A Act relating to IHAPs and bringing all local planning panels under one framework; and
- giving the Minister the power to direct a council to appoint a local planning panel where this is warranted to improve the quality and timeliness of planning decisions in the local area, or manage conflicts of interest or corruption.

The amendments will also include a tool to ensure councils are delegating the determination of development applications to council staff where appropriate, to remove unnecessary delays and support good decision-making.

Consistent provisions for local planning panels

While many local councils already have IHAPs or similar panels in place, there can be confusion and inconsistency as to how they are established and operate.

This arises because some panels operate under the IHAP provisions in the EP&A Act, and others have been set up by councils under local government legislation. Existing panels vary significantly in terms

of composition, the kinds of matters that are referred to them, and how they are accountable to the community for their timeliness and performance.

To address this, the current IHAP provisions will be replaced with updated provisions on local planning panels (see Schedule 2, Division 2.5 on pages 14-15 of the Bill). These will set basic rules about the constitution, membership and functions of local planning panels, and allow the application of consistent performance reporting requirements.

In the first instance, each council may decide whether it wishes to establish a local planning panel. The council will also determine which planning functions are to be exercised by the panel. Should a council choose to establish a panel to exercise its planning functions, it will need to do so under the new provisions. These are outlined in Box 9.

Box 9: How will local planning panels operate?

Under the proposed amendments and supporting regulations, local planning panels will be established and operate as follows:

- The panels are to comprise three members, with an independent expert chair, another independent expert member and a community representative.
- The panel will not be subject to the direction or control of council except in relation to procedure and the time within which it is to deal with any matter.
- The members are appointed by the council.
- The expert members will be required to have expertise in any of the following areas – planning, architecture, heritage, the environment, urban design, economics, traffic and transport, law, engineering, tourism or government and public administration.
- The community member is to be appointed from a pool of nominees approved by the council.
- The council will set the rules for which matters go to the panel. It is expected that the vast majority of development applications would continue to be determined by council staff, with the more complex and contentious applications reserved for the local planning panels.
- The NSW Government will publish guidance material to help councils establish the panels, including a model charter and operating procedures.

To ensure all local planning panels operate under this single framework, any IHAPs or similar panels already established by councils will be transitioned to the new provisions. They will be taken to have been established under these provisions as if this was directed by the Minister (see below). Where the composition or functions of any such panel are inconsistent with the new requirements, councils will be given 12 months to bring these into compliance.

Councils with existing panels will also be encouraged to review the panel's charter and operating procedures against the model charter and operating procedures once these have been published by the Government.

Power to direct that a local planning panel must make determinations

The amendments will allow the Minister to direct a council to establish a local planning panel to determine development assessments (see Schedule 4, item [3] on page 48 of the Bill).

The direction would also require the membership of the panel be approved by the Minister, and set out the circumstances in which the panel is to exercise the determination function. In most cases this would be in line with the model charter and operating procedures.

The Minister would exercise this power where it is needed to address sustained community concern about the timeliness or quality of a council's planning decisions, or about conflict of interest. Considerations for the Minister making a direction

can be specified in the regulations. These could include consideration of performance indicators such as the timeliness of decisions and the frequency with which the council's determination depart from the development standards, or of the findings of a relevant report by the Independent Commission Against Corruption. The regulations may also require the Minister to consult with specific parties (such as the council or Local Government NSW) before making the direction.

The new power of direction will replace the existing provisions allowing the Minister to appoint a planning administrator or panel to exercise the planning functions of a council.

Ensuring delegation to council staff

The new power of direction will also allow the Minister to require that more planning functions are carried out by the council staff.

The vast majority of development applications should be determined by council staff on delegation. Councils have expert practitioners on staff who are knowledgeable about local planning strategies and technical requirements. In addition, councils that delegate more applications to their staff have shorter processing times. For example, in 2014-15 in the Sydney region:

- Councils with the highest levels of delegation (i.e., where 98 per cent of development applications were determined by staff) had an average processing time of 82 days.

- Councils with the lowest levels of delegation (with less than 80 per cent of development applications determined by staff) took on average 106 days.

For most councils, there will be no need for the Minister to make a direction to that council staff must make determinations. In 2014-15, 95.7 per cent of development and modification applications were determined by council officers under delegation.

However, there were 19 local government areas in which more than 10 per cent of applications were determined by councils themselves, creating unnecessary delay.

Any direction that determination functions are to be exercised by council staff will be supported by a best practice model to be developed by the Government, setting out which matters should be determined by staff on delegation and which should be reserved for the council or local planning panel.

7.2 Refreshed thresholds for regional development

Regional planning panels currently determine the classes of development known as regionally significant development. The current thresholds for regionally significant development were established in 2011 and have not since been reviewed.

Preliminary feedback from stakeholders is that joint regional planning panels are working well.

The current legislative updates provide an opportunity to consult with the community on whether the thresholds for regionally significant development remain effective. In particular, as local planning panels enhance expertise and independence in decision-making at the local level, the Government is considering whether a greater

share of applications should be determined by panels. This would require raising the thresholds for regionally significant development.

Proposed new thresholds are set out in the table below. These take into account suggestions in early consultation with councils that the basic threshold for regionally significant development should be increased from \$20 million to \$30 million. All new schools will be treated as SSD, while the thresholds for alterations and additions at existing schools will be lowered to \$20 million. Other thresholds remain the same, as outlined in Box 10.

Box 10: Proposed new thresholds for regionally significant development

- Development applications with a capital investment value of more than \$30 million.
- Council-related development investment greater than \$15 million for councils with a local planning panel.
- Private infrastructure and community facilities greater than \$5 million.
- Educational facilities (including associated research facilities) that have a capital investment value of more than \$30 million.
- Ecotourism facilities greater than \$5 million.
- Designated development for extractive industries, marinas and waste management facilities or works.
- Certain coastal subdivisions.
- Development greater than \$10 million but less than \$30 million undetermined within 120 days and at the applicant's request, unless the delay was caused by the applicant.
- Development designated by order where the council's development assessment is considered unsatisfactory.

In addition, the thresholds will be moved from the EP&A Act into the appropriate State Environmental Planning Policy, to allow them to be updated from time to time in response to periodic review.

7.3 Strengthening decisions at the State significant level

The Planning Assessment Commission (the Commission) was established in 2008 and plays an important role in improving transparency and independence in the planning system.

The Commission's functions are to determine applications for State significant proposals under delegation from the Minister, and provide independent expert advice (or review) on a range of planning and development matters.

The role of the Commission has evolved over time. Since 2011, the main role of the Commission has been to determine projects, rather than provide advice or assess projects. For example, in 2014-15, 78 matters were referred to the Commission, with 66 of these being development proposals for determination.

This contemporary emphasis on determination is not reflected in legislated functions of the Commission or its name.

The Commission currently reviews State significant proposals, and then later may determine the same proposals. This results in duplication as a detailed assessment is undertaken twice on the same proposal. This is inefficient and creates uncertainty for communities and industry, as illustrated in Figure 4.

It is a Government priority to halve the time taken to assess applications for State significant developments. Project assessment times for complex State significant proposals increased from 598 days in 2008 to 1089 days in 2014. A more predictable, efficient and transparent system will assist in reducing assessment times and uncertainty for all stakeholders.

Independent Planning Commission

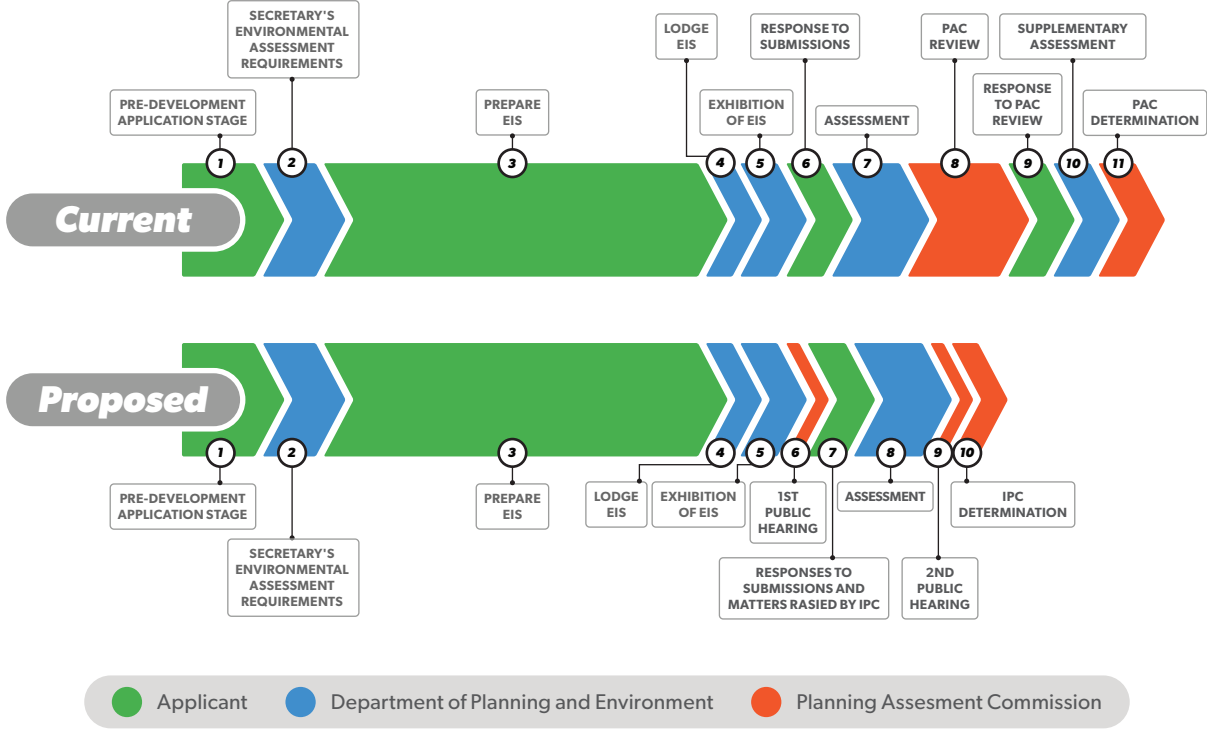
The name of the Planning and Assessment Commission will be changed to the Independent Planning Commission (see Schedule 2.1[1], clause 2.7 on page 9 of the Bill). This reflects the independent, expert nature of the Commission and the fact that its role is primarily one of determining State significant proposals, rather than providing advice.

To support this, the Commission will no longer have a statutory function to review development proposals. As the determining authority, it will guide assessments undertaken by the Department, to ensure that these assessments take into account all issues the Commission wishes to consider. This will result in resource and time savings, with no reduction in assessment rigour.

An initial assessment of the effect of the proposed changes indicates potential savings of between 70 and 160 days per proposal, depending the proposal's complexity.

To emphasise the independent and determinative role of the Commission, and provide greater certainty to industry and the community, the State Environmental Planning Policy (State and Regional Development) 2011 will prescribe the types of State significant proposals that are to be determined by the Commission.

Figure 4: Removal of the duplicative review function



Fair and robust public hearings

The EP&A Act will continue to enable the Minister to ask the Commission to hold public hearings prior to determining State significant proposals. There are no proposed changes to the availability of third party merit appeals following a public hearing.

The public hearing will be held over two stages:

- The first stage will allow the Commission to hear from the community and the proponent, and identify issues for the assessment of the proposal.

- The second stage will allow the Commission to examine in detail and interrogate the proposal, the assessment report and any draft conditions.

Community members will be involved early in the process and have the opportunity at each stage to hear from the proponent and government officials and to assist the Commission in testing the veracity of claims and the effectiveness of conditions. Box 11 outlines the new public hearing process.

Box 11: The new public hearing process

Stage 1	Stage 2
<p>Timing: Held in the final weeks of the Department's public exhibition period, prior to the close of public submissions.</p>	<p>Timing: Held once the Department has prepared its draft assessment.</p>
<p>Role of the Commission: to hear from the community and the proponent, and identify issues for the assessment of the proposal.</p>	<p>Role of the Commission: to examine in detail and interrogate the proposal, the draft assessment report and any draft conditions.</p>
<p>How it will work:</p> <p>The proponent will outline the proposal and reasons to support it.</p> <p>The Department will present an initial whole-of-government briefing on the project, setting out the policy context and other information relevant to the proposals.</p> <p>Stakeholders will be given the opportunity to speak, providing their own initial views and issues on the proposal.</p> <p>The Commission may question any of the speakers and may visit the site of the proposal.</p>	<p>How it will work:</p> <p>The second stage will be more inquisitorial, with the Commission formulating and publishing questions arising from its review of the Department's assessment report.</p> <p>The public will be given the opportunity to speak and present their views on the Department's assessment report.</p> <p>The proponent, the Department, invited experts and other government agencies may be questioned by the Commission.</p> <p>The proponent will be given the opportunity to make any final comments before the hearing concludes.</p>
<p>What happens next: The Commission will release a summary paper that identifies issues for the Department's assessment of the proposal.</p>	<p>What happens next: The Commission will undertake further deliberations, if required, and make its determination.</p>

A public hearing will be held when directed by the Minister. Separate to a public hearing, the Commission may hold a public meeting before making a determination. Public meetings are not the same as a public hearing and do not affect appeal rights.

Additional expertise

A large proportion of State significant proposals referred to the Commission include resource proposals.

The proposed legislative amendments will expand the Commission's expertise in this area by:

- specifying that Commissioners may have qualifications in soil and agricultural science, hydrogeology, economics, and mining and petroleum development; and
- combining the current Mining and Petroleum Gateway Panel established under the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007, so that members of the Gateway Panel will become Commissioners.

7.4 Managing conflicts for panels

The EP&A Act currently allows planning bodies to determine their own procedures for calling meetings and the conduct of business during those meetings, subject to any Ministerial direction.

The Planning Assessment Commission and regional planning panels have prepared and adopted their own codes of conduct for members. The code of conduct for regional planning panel members was prepared in September 2012, while the Commission last updated its code of conduct in September 2014.

Existing Independent Hearing and Assessment Panels (IHAPs) set up by councils are subject to few procedural requirements under the EP&A Act. The procedures for IHAPs are determined by individual councils.

The charters and operational procedures of existing IHAPs show elements of consistency and some areas of difference between councils. Each council requires panel members to adhere to a code of conduct of some form, although there is variation in how this is applied in practice. For example, a number of councils require IHAP members to adhere to the council's code of conduct, while other councils have developed panel-specific codes.

Model codes of conduct for planning bodies

To ensure a common approach to the conduct of members of planning bodies, we propose to develop model codes of conduct. This will be done in consultation with the Independent Commission Against Corruption to ensure the highest ethical standards in the exercise of duties and responsibilities.

The model codes of conduct will be adopted by the EP&A Regulation, and will need to be incorporated in the codes of conduct adopted by the Sydney district and regional planning panels and local planning panels.

For local planning panels, the Department will gather information from councils that have previously set up IHAPs to identify common issues or areas for inclusion in the model code of conduct.

The Department will work closely with the Office of Local Government to ensure the proposed measures are developed in line with the model code of conduct for councillors.

The Department will also work with the Independent Planning Commission to update its current code of conduct to reflect the model codes where necessary or appropriate.

A key element of a code of conduct is requirements for managing conflicts of interest. While the Act currently sets requirements to disclose pecuniary (financial) interests, it is difficult to regulate how non-pecuniary interests are dealt with. This is because they require an individual to make a subjective judgment about their personal interests, such as personal or professional relationships, rather than relying on the objective fact of a pecuniary interest. The model codes of conduct will therefore complement the statutory requirements by setting principles and practices for managing non-pecuniary interests in the event of a conflict.

7.5 Review of decisions

Applicants of development consents can sometimes be dissatisfied with council decisions, due to conditions or refusal. In these cases, the applicant can request that the council review its decision.

Following the review, the council can decide to change or uphold its original decision. This process is known as an internal review. Internal reviews are an important part of the planning system, as they provide a quick, low cost alternative to court proceedings. However, internal reviews are not currently available for all categories of development.

Expanded scope for internal review

We propose to expand the scope of internal reviews to include decisions about integrated development and State significant development (see Schedule 8.1[2], clause 8.2 on page 75-76 of the Bill).

Integrated development includes certain development applications that require a permit or license from a NSW Government agency in addition to a development consent from the Department. This is common for heritage approvals.

Under the proposed changes, applicants will be able to request an internal review of a council's decision about integrated development, provided the relevant agencies are involved in the review.

Applicants will also be able to seek review of the Minister's decision about State significant development, including decisions made under delegation by the Independent Planning Commission or another delegate.

However, internal reviews of State significant development will not be available for high-risk developments, such as heavy industries, intensive livestock industries and mining operations, if the Commission has held a public hearing into the development.

8. Clearer building provisions

Building regulation and certification provisions in the EP&A Act describe the requirements for certifying building work from design through to construction and occupation. Together with the *Building Professionals Act 2005* (Building Professionals Act) and the *Home Building Act 1989*, these provisions underpin the quality and safety of buildings in NSW.

In 2015, the Independent Review of the Building Professionals Act 2005 (the Lambert Report) identified areas for improvement in the current building regulation and certification system. While most of the improvements relate to the Building Professionals Act, changes to the EP&A Act will address issues identified by the Lambert Report by providing a clearer, more logical structure to building regulation and certification in the Act.

In September 2016, the Government responded to the Lambert Report with commitments to:

- improve how building and development certification information is collected and published under the Building Professionals Act;
- consolidate key building provisions, under the responsibility of the Minister for Innovation and Better Regulation;
- implement a package of fire safety reforms for both new and existing buildings; and
- establish a Building Regulators Committee to improve coordination across NSW Government.

As part of this broader set of initiatives, the Government is proposing changes to the EP&A Regulation about buildings and fire safety to ensure an effective building regulation and certification system by:

- consolidating building regulation and subdivision certification provisions into a single part of the EP&A Act;

- enabling regulations that allow accredited certifiers to place conditions on the issue of construction certificates and complying development certificates;
- ensuring construction certificates do not allow proponents to depart significantly from planning approvals.

These measures are discussed below.

Simplified and consolidated building provisions

The provisions for building regulation and certification are currently located in different areas within the EP&A Act, as well as in the EP&A Regulation. Ministerial oversight is also divided between the Minister for Planning and the Minister for Innovation and Better Regulation.

The Lambert Report identified that the building industry, including certifiers, find the EP&A Act challenging to navigate and difficult to understand due to the lack of consolidation of building provisions. This can reduce the efficiency and effectiveness of regulation, and can result in poor development outcomes.

The Lambert Report recommended an approach to creating a sound, easily comprehended legislative framework by revising and consolidating the existing building regulation provisions in the EP&A Act into one part.

The amendments will bring together the key provisions relating to building regulation and certification into a single part of the EP&A Act (Part 6).

The administration of this new consolidated part will be allocated to the Minister for Innovation and Better Regulation. This change will provide strong oversight of building laws by consolidating responsibility for building within one portfolio.

Consistency with the development approval

Planning authorities are responsible for assessing the impact of a proposal when deciding whether or not to give a planning approval. This includes ensuring that the development meets state and local requirements and that development is safe, functional and appropriate for the local area.

However, a planning approval does not cover all aspects of a building's design and construction. Construction certificates set out the detailed plans and specifications of a building, and ensure that it will comply with technical requirements, such as the Building Code of Australia.

To ensure that significant changes are not made to the development envisioned by the planning approval, existing regulations under the EP&A Act provide that a construction certificate must not be issued if the development will be inconsistent with the development consent. While minor changes to development plans may need to take place to account for new or unforeseen issues, it is important that construction certificates do not create a pathway for significant changes to the development consent.

In recent years, case law has demonstrated that the current wording of the EP&A Act and EP&A Regulation does not ensure that the construction certificates are consistent with development consents. This is outlined in Box 12.

Box 12: Burwood Council v Ralan

In November 2015, the Court of Appeal in *Burwood Council v Ralan Burwood Pty Ltd* held that development carried out in accordance with a construction certificate is not necessarily invalid, even where it differs substantially from the building approved under the related development consent. This ruling was made even though such an inconsistency would be in breach of clause 145(1) of the EP&A Regulation 2000 or section 109F(1)(a) of the EP&A Act.

The Court of Appeal's reasoning was that a clear requirement for a construction certificate to be consistent with the development consent was not adequately established through the EP&A Act and Regulations.

Since the building in that case was substantially completed, the Court also considered that invalidating a construction certificate could result in public inconvenience, as it may prevent a person from being able to occupy or use the building or be caused to be in breach of other parts of the legislation.

This decision by the Court of Appeal may mean that while certifiers will still be liable to prosecution under the EP&A Act for issuing a construction certificate that is inconsistent with a development consent, there may now be less incentive on both developers and certifiers to ensure consistency between a construction certificate and a development consent.

Source: *Burwood Council v Ralan Burwood Pty Ltd (No. 3) [2014] NSWCA 404*

To address this, the amendments:

- place in the Act itself (rather than the Regulations) a clear requirement that a construction certificate must be consistent with the development consent
- give the Court the ability to declare a construction certificate invalid if it is inconsistent with the consent.

Proceedings to seek such a declaration will be limited to three months after the construction certificate has been granted.

We will develop non-statutory guidance and criteria to assist accredited certifiers in ensuring that construction certificates are consistent with development consents, and clarify what is required for a development to meet the consistency test.

9. Elevating the role of design

Our future productivity and the liveability of our communities is heavily influenced by the design of the built environment. The built environment includes the places where people live, work, play and learn, such as towns, suburbs and cities.

Housing supply in the greater Sydney region and key regional centres will need to increase to accommodate the projected population growth over the coming decades. The Sydney metropolitan region alone will need an additional 725,000 new dwellings by 2036.

It is important that the planning system delivers well-designed urban areas, including streets, parks and recreation spaces, to meet the needs of a growing population. Design will work alongside urban planning to help to meet practical objectives including:

- preserving a neighbourhood's cohesion and identity;
- enhancing amenity;
- encouraging enjoyment and use of services, public and green spaces; and
- putting buildings, places, infrastructure and resources to best use.

Design in the built environment creates an urban environment that works for individuals and communities, is fit-for-purpose, attractive, safe, efficient, built to last and can adapt to the needs of future generations.

Good design is good for business. It generates innovation, investment and construction, which are fundamental components of the economy. Well-designed buildings, and urban areas, attract and support business.

Appropriate design can be promoted through a mix of regulatory and non-regulatory tools and measures. Non-regulatory tools and measures act to equip and motivate industry, councils and communities to raise the quality of design at both the precinct and individual development level.

A new design object

The amendments include a new object in the EP&A Act, promoting good design in the built environment (see Schedule 1.1, clause 1.4 on page 3 of the Bill).

The objects of an Act are a statement of Parliament's intention for the legislation. An object assists decision-makers to interpret how to exercise their statutory powers.

Design is already a relevant consideration that may be taken into account by decision-makers. However, the design object, if implemented, will ensure that design is considered and balanced with the other objects of the EP&A Act. For example, the promotion of good design will be considered in a framework that also promotes land use planning that encourages economic development and the principles of ecologically sustainable development. This will be the task of decision-makers in the context of both strategic planning and development assessments.

Design-led planning strategy

The Office of the Government Architect will develop a design-led planning strategy, comprising incentives and measures to assist planning system users to achieve well-designed places.

In developing the strategy, the Office of the Government Architect will consult with the community, industry and council stakeholders to develop specific initiatives to promote good design.

The first step in this process has been the launch of a draft Architecture and Design Policy for NSW.

The draft policy is the beginning of a discussion about the opportunities we have in NSW to deliver good design outcomes in the urban environment.

It provides a set of principles and guidance to support productivity, environmental management and liveability in NSW. It is focusing on the delivery of housing, employment, infrastructure, open space and the public domain.

For more information on the design-led planning strategy and on the architecture and design policy please visit the Government Architect NSW's website, <http://www.planning.nsw.gov.au/About-Us/Office-of-the-Government-Architect>.

10. **Enhancing the enforcement toolkit**

In 2014, the enforcement system in the EP&A Act was strengthened through the introduction of tiered penalties, improved investigative tools for local councils and new powers for the courts.

These amendments were made in order to provide greater deterrence against breaches of consent conditions, and to ensure that proponents who commit breaches are held accountable for any resulting community and environmental harm.

This accountability requires strong and flexible enforcement tools. The current approach provides for fines and court actions.

Enforceable undertakings

In order to give regulators greater flexibility in improving compliance, we propose to give the Department and local councils the ability to enter into enforceable undertakings with holders of a development consent (see Schedule 9.1[1] on page 86 of the Bill).

Enforceable undertakings are a commonly used tool that can improve compliance outcomes in cases where fines or prosecutions may be less useful. These give the regulator the power to enter into an agreement that then requires the consent holder to rectify harm that has occurred and to commit to improved behaviours in the future.

In the event that the consent holder then breaches the terms of the agreement, the regulator can then efficiently apply to the court to enforce those terms.

This is a faster and cheaper regulatory option than prosecuting the original breach of the consent.

The proposed enforceable undertakings system is similar to that already used in many other jurisdictions, as well as in NSW legislation including under the *Protection of the Environment Operations Act 1997*, the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*.

The Department will also develop guidance material to assist in employing this new tool.



*For more information about Planning Legislation Updates
visit www.planning.nsw.gov.au/legislative-updates*