TWEED SHIRE COUNCIL

Review - Planning Legislation Amendment Bill 2017

Relating to the Environmental Planning and Assessment Act 1979 (NSW)

Compiled by: Strategic Planning & Urban Design Unit

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This document has been prepared for the purpose of informing the Tweed Shire Council on key aspects of the NSW Government's proposed legislative amendments to the EP&A Act 1979, prepared by Council Staff following a Councillor Workshop on 9 February 2017, for the purpose of an attachment to the Council Business Paper for the March 2017 Council Meeting, and to inform a reply submission to the NSW Department of Planning and Environment.

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1.0 BACKGROUND

The NSW Government's former Minister for Planning Mr Rob Stokes (as at Monday 9 January 2017) released details of proposed amendments to the *Environmental Planning and Assessment Act 1979* (NSW) for consultation and public feedback.

In releasing details of the proposed legislative changes the Minister said that the proposed amendments reflected that:

> "The [NSW] Government is committed to ensuring a planning system that is straightforward and ensures high-quality decisions and planning outcomes."

The public has until **Friday 31 March** to provide submissions, following which the Government is expected to consider submissions received and, re-draft accordingly and release regulation impact modelling and introduce a Bill to Parliament.

To assist the public with its review and understanding of the proposed amendments the Department of Planning and Environment (DP&E) has released the following explanatory information:

1. Summary of proposals
2. Draft Bill: Environmental Planning and Assessment Amendment Bill 2017
3. Bill guide
4. Stakeholder feedback summary

In addition to these publications the DP&E held an information workshop on 2 March, and was attended by Council staff.

In 2012/13, the State Government underwent an extensive review of the Environmental Planning and Assessment Act 1979 ("the Act"). This included a Green Paper in 2012, a White Paper in 2013 followed by a Planning Bill 2013 – Exposure Draft that was presented to Parliament. The Bill did not become legislation and was reported as being partly due to sustained community objection to a number of the reforms then proposed, including proposals to widen the use of private certification and the ambit of a complying development or 'code assessable development'.

A review in 2016 revisited areas for reform that previously gained community and stakeholder support but not those that attracted significant objection. The proposal therefore is to update the Act's objects and structure, widen and clarify the role and timing of public participation and its procedural requirements, reform the framework and executive powers for establishing state and local decision-making panels, speed up decision making (approvals), establish greater and more flexible compliance enforcement powers, and close the remaining assessment pathways of the former Part 3A major projects framework that was repealed in 2011.

As highlighted in the introduction of the *Summary of Proposals* document of January 2017:

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

The DP&E have listed the following as key proposed amendments:

- Enhancing community participation: establishing a new part of the Act that consolidates community consultation provisions, and requiring decision-makers to give reasons for their decisions;
- Completing the strategic planning framework: through local strategic planning statements, up-to-date Local Environmental Plans and more consistent and workable Development Control Plans;
- Development pathways: improvements to the various development pathways and preventing the misuse of modifications;
- State significant development: through better environmental impact assessment and more effective conditions of consent;
- Clearer building provisions: simplified and consolidated building provisions, allowing conditions on construction certificates and ensuring consistency with development approvals'
- Elevating the role of design: through a new design object in the Act, and a Design-Led Planning Strategy; and
- Improving enforcement: with the introduction of enforceable undertakings in compliance actions.

1.1 Key Review Areas of this Report:

The areas reviewed in this report follow the same theme as presented in the Councillor Workshop of 9 February. In addition it provides a commentary of the staffs' views on the proposals and in particular any areas of apparent concern. The key areas covered include:

1. Background.
2. General Amendments – including the 'Objects' of the Act.
3. Community consultation and participation.
4. Strategic and Local Planning.
5. Development Assessment (State and Local).
6. Building and Complying Development.

NOTE: Consistent with the Officers' recommendation within the corresponding Council Business Paper Report the Itemised List of Points for Submission Reply is attached at toward the end of this document.

2.0 GENERAL AMENDMENTS – REVIEW

2.1 'Objects' of the Planning Act

In addition to the revision of key provisions and format and structure, the Bill proposes to modernise the 'objects' of the Act. Among them there are new objects such as promotion of 'good design', promotion of 'timely delivery of business, employment and housing', and promotion of 'sustainable management of built and cultural heritage (including Aboriginal cultural heritage)'. Current objects to encourage land for public purposes, utilities, community services and facilities are removed in their current form and to varying extents are captured within the broader meaning of the revised objects.

2.1.1 Analysis

The objects of the Act provide the overarching guidance for decision-makers. Their function is to provide a purpose to ensure that land-use planning and management is carried out to achieve these objects for the benefit of the people and environment of NSW. They are fundamental to the application of the Act to ensure the Government's objectives for the built and natural environment are consistently delivered, and regulated.

At the DP&E workshop[1] the 'objects' were described as adding 'flavour' to the Act. This was taken to mean that they give a sense of direction of what the Act is intended to achieve, and was perhaps a useful way of describing their role to a wider audience of varying understanding of legislative instruments. While a suitable description in the general workshop context a clearer understanding of their importance to the working and implementation of Act and how they may subsequently be used or relied on nevertheless needs be properly characterised and understood.

Objects provide a purpose to the legislation; they not only assist drafters with framing provisions with the purpose of achieving the Parliament's intentions, but they both guide the interpretation of those provisions when ambiguity arises. They also influence the drafting of regulations and other delegated legislation; in practice they also guide or influence non-statutory rules, policies or strategies at the local level. Collectively these tiers of law and policy aim to consistently implement land-use planning outcomes that accord with the State's priorities and principles.

Setting the correct purpose through the drafting of the objects is of fundamental importance. It is their clarity of expression and meaning that will aid the statutory interpretation of the legislation in a way that observes the Parliament's intentions.

The following statement from the case of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384[i], illustrates the importance of 'purpose' in statutory construction:

> *"[t]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or*

[1] Ramada Hotel, Ballina (NSW) 2 March 2017.

> *grammatical construction, the purpose the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."*

Further elucidating the importance of ensuring the Act's 'objects' are up to the job of securing the Parliament's intentions is s 33 of the *Interpretation Act 1987* (NSW), which accords with the High Court's rulings, and adoption of same in the Commonwealth legislation:

> ***33 Regard to be had to purposes or objects of Acts and statutory rules***
> *In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.*

It is essential that the Act's objects are therefore clear and precise as to their purpose.

Ecological Sustainable Development

In relation to plan-making, through environmental planning instruments (e.g., local environmental plans) the Act enables such instruments to cover a wide range of issues: under s 24(1) of the Act and *[w]ithout affecting the generality of any other provisions of th[e] Act, an [instrument] may be made in accordance with this Part* ***for the purposes of achieving any of the objects*** *of th[e] Act.* In relation to the regulation of development assessment s 79C obliges consent authorities to take specific factors into account when making decisions. It was held in *Carstens v Pittwater Council* (1999) 111 LGERA 1; applied in *Yam v Ashfield Municipal Council* [2010] NSWLEC 1043 at [45]; that; *[s]ection 79c of the Act set out the matters that must be taken into consideration but did not exclude consideration of other matters of relevance and of any matter* ***which, in the public interest, related to the objects*** *of the Act as set out in s 5,* and it was further explained at [22] that:

> *These objects, in my opinion, can only be given full effect by not adopting a narrow construction of s 79c(1). A narrow construction would exclude from consideration the objects of the Act. For example, one of the objects of the Act is to encourage ecologically sustainable development (s 5(a)(vii)). If s 79c(I) were to be regarded as an exclusive list of relevant considerations it would result in the exclusion from consideration of an important objective of the Act.*

Under the current Act the objects specifically encourage 'ecologically sustainable development', whereas the proposed revision of the objects now sees this presented in a revised way:

> *"to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment;"*

This is consistent with the prevailing government policy enshrined in the *Local Government Act 1993* (NSW); (LGA), which states ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. It is

also recognised in the integrated planning and reporting framework that requires councils to address social, environmental and economic factors, among others, in an integrated way.

The origin of this proposed revision may stem from the earlier reform proposals that where exhibited as part of the Government's 2013 White Paper – *A New Planning System for NSW*, which discussed the concept of sustainable development in more of a planning and land-use context:

> *".....sustainable development is achieved by the integration of economic, environmental and social considerations, having regard to present and future needs, in decision making about planning and development.*

The White Paper further clarified the core of these three pillars and included; protecting threatened species and habitats, minimising environmental impacts, promoting the development of the economy by, among others improving productivity and facilitating business and employment, and creating a high quality built environment; promoting accessibility to services and addressing housing needs. However it did this upon that definition and did not speak directly to the 'ecologically sustainable development' term that is both the basis of the current Act's object, which is taken from Australia's *National Strategy for Ecologically Sustainable Development* (NSESD, 1992), as endorsed by the Council of Australian Governments December 1992, and which defines ecologically sustainable development as:

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

It might be said that a reference to *sustainable development* does not connote a reference to *ecologically sustainable development* despite there being common ground in many aspects with their meaning.

The definition of sustainable development that is most widely understood was framed in the World Commission on Environment and Development's publication; *Our Common Future* (Brundtland, 1987):

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

It was driven by the United Nations' acknowledgement and concern that a change in global attitude was needed if the prevailing impact of economic growth on the Earth's biosphere was to be managed sustainably. This would require uniform sustainable development policy that would embrace what have become the key pillars: economic growth, social development and protection of the environment.

Australia took this concept further by incorporating the definition of 'ecological sustainable development' into the NSESD. The Australian Government's Department of Environment and Energy notes[ii] that while there is no identifiable point where we can say we have achieved ESD, there are key changes to the way we think, act and make decisions that will help ensure Australia's economic development is 'ecologically sustainable'. It identifies two main features which distinguish an ecologically sustainable approach to development:

- we need to consider, in an integrated way, the wider economic, social and environmental implications of our decisions and actions for Australia, the international community and the biosphere; and
- we need to take a long-term rather than short-term view when taking those decisions and actions.

It is put more plainly by describing ESD as development which aims to meet the needs of Australians today, while conserving our ecosystems for the benefit of future generations. This will necessitate developing ways of using those environmental resources which form the basis of our economy in a way which maintains and, where possible, improves their range, variety and quality.

It is also noteworthy that the opening paragraph to the Explanatory note for the *Biodiversity Conservation Bill 2016* (BCB) states:

> *The purpose of this Bill is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future,* ***consistent with the principles of ecologically sustainable development.***

In our view the proposed revision of the ecological sustainable development object is not wholly consistent with either the NSESD or BSB, and while seemingly more consistent with the LG Act 1993 and the integrated planning and reporting framework it may add uncertainty to the intended meaning of ESD in a planning context. If a revision is seen to be necessary then the previous 2013 White Paper proposal, stated above, may provide a greater level of clarity than the current proposal.

Affordable housing

The Government's proposal has provided further opportunity to look at how the social equality aspect of their priorities, especially regarding access and availability to affordable housing, is being addressed.

There is a substantial amount of research and debate surrounding housing affordability issues. Underlying the growth of the issue across the nation is the growing demand for housing, which is persistently outstripping supply despite much effort by governments to reduce costs, approval timeframes and red-tape. Yet despite these efforts the NSW Government's research illustrate the gap between demand and supply is substantial:

> *"There seems to be a consensus that the 'underlying' demand for dwellings is growing by around 180,000 dwellings a year, around 30,000 more than is the stock of dwellings."*[iii]

The *Committee* went further to explain that increasing the supply of housing is not the only factor in addressing the affordability issue; it stressed that new housing must be well located and serviced with jobs, public transport and social and community infrastructure. It must also be suited to the needs and the means of purchasers; it would necessitate different housing options offering a wider choice of dwelling size, tenure type and price, to meets these.

The proposal is to revise the Act's objects to include a new object addressing affordable housing and diversity (choice):

> "to promote the timely delivery of business, employment and housing opportunities (including for housing choice and affordable housing)"

It may be that a better way of addressing this issue through the Act's objects would be to separate the housing object from the businesses and employment aspect. This would enable the object to remain short and succinct, for example:

- To facilitate timely delivery of housing, housing choice and affordability.
- To promote business and employment opportunity.

Climate Change

In December 2015, 195 countries, including Australia, agreed on the United Nations Paris Agreement on climate change. The NSW Government then committed to an aspirational objective of achieving net-zero emissions by 2050. The objective is intended to provide a clear statement of the government's intent, commitment, and level of ambition and to set expectations about future emissions pathways that will help the private sector and government agencies to plan and act.

In relation to the *Biodiversity Conservation Bill 2016* the Hon Mark Speakman in the second reading of the Bill to the Legislative Assembly on 16 November 2016, said:

> *"We have listened to that feedback and inserted a new object to support biodiversity conservation in the context of climate change."*

It might be considered appropriate for the principal land-use planning Act in NSW to include a similar object pertaining to land-use in the context of climate change, for example:

- Promote the use and development of land in the context of a changing climate.

Good Design

A welcomed introduction as objects is the promotion of good design in the built environment and sustainable management of built and cultural heritage (including Aboriginal cultural heritage). These updates are long overdue and respond to current pressures being experienced in association with rapid development, particularly in sensitive coastal areas and higher density built environments where quality design and sense of place is being overridden by homogenisation and contextually unrepresentative housing that is largely off-the-shelf (also referred to as 'project homes') and justified as being 'affordable'.

This new good design object in concert with others will help guide decision-makers at the policy and assessment level to better juxtapose considerations of place making and urban design with the need to meet growing demand but through a more character and contextual led approach, that addresses also sustainability through climate responsive development and health living environments. It will elevate the consideration and weight to be given to managing cultural heritage in a sustainable way, and should lead to greater recognition and force of strategic cultural policy at the development design and assessment level.

2.1.2 Implications for Council

In broad terms the amendments are not seen as likely to bring about a significant change in the way the Council approaches and manages its strategic planning, assessment or compliance functions. That said they could address key issues with greater specificity and stronger sense of purpose.

2.1.3 TSC Letter of Submission –Points of Reply

1. Council does not support the amendments to the Act's objects as they are proposed.
2. Incorporating good design in the built environment as an object is supported.
3. Council does not support the revision of the object regarding ecologically sustainable development.
4. Promoting consideration of relevant economic, social and environmental factors '*subject to'* the principles of ecologically sustainable development in decision making is a preferred alternative to the proposed revision, but not preferred to the current object.
5. Guidelines as to how each of the promoted objects is to be achieved and monitored at the State and local level, for example through District or Regional Plans, should be prepared and results published annually.
6. Council supports the inclusion of a new object that refers specifically to land use in the context of 'Climate Change'.

2.2. Definitions, Section 4

There is the introduction of **9** new definitions, and repeal of **6** others.

2.2.1 Analysis

Notably is the introduction of the definition of the term 'work', which will complement the proposed redefinition of the term 'development'; collectively these terms should remove the majority of uncertainty and ambiguity as to what is or what is not development:

> ***work*** includes any physical activity in relation to land that is specified by a regulation to be a work for the purposes of this Act, but does not include a reference to any activity that is specified by a regulation not to be a work for the purposes of this Act.
>
> The ***carrying out*** of a work includes:
> (a) the renewal of, the making of alterations to, or the enlargement or extension of, a work, or
> (b) enclosing a public place in connection with the carrying out of a work.

There is also a new term that defines the boundaries constituting the 'erection' of a building, which similarly should assist with minimising ambiguity and dispute:

> ***erection*** of a building includes:
> (a) the rebuilding of, the making of alterations to, or the enlargement or extension of, a building, or
> (b) the placing or relocating of a building on land, or
> (c) enclosing a public place in connection with the construction of a building, or

(e) erecting an advertising structure over a public road, or
(f) extending a balcony, awning, sunshade or similar structure or an essential service pipe beyond the alignment of a public road,

but does not include any act, matter or thing excluded by the regulations (either generally for the purposes of this Act or only for the purposes of specified provisions of this Act)

Further, the use of land is also defined to clarify that it includes the change of a building use:

Use of land includes a change of building use.

A new Section 1.5 - Meaning of "development" is proposed. This is seemingly beneficial as it removes the term 'development' from the definitions under s 4 of Part 1 and is reinserted as section 1.5. Under this new section the term is expanded upon to clarify that the 'carrying out of development' is the doing of the acts, matters or things referred in the list of matters detailed within the clause, and further clarifies that it does not include any act, matter or thing excluded by the regulations.

Whilst these amendments may appear superficial or semantic, in practice the nuances in the definitional terms are often exploited to argue different meanings and therefore to support different results than might have otherwise been thought or intended; there being an apparent link between ambiguity in the language in statutory instruments surrounding 'meaning or intent' and the ability or opportunity for those willing to litigate a point to gain a greater advantage.

In the absence of the new or amended regulations however it is not possible to ascertain what, if any, 'development' will be excluded from falling within these terms.

2.2.2 Implications for Council

On the information available no significant adverse impact is foreshadowed.

2.2.3 TSC Letter of Submission –Points of Reply

7. Council supports the addition of the new terms to the dictionary of terms and inclusion of Section 1.5.

3.0 COMMUNITY CONSULTATION AND PARTICIPATION

3.1 Community participation plans

It is proposed to introduce a mandatory community participation requirement that planning authorities give notice of the following decisions, and provide reasons for them (including how community views were taken into account):

- development application determinations (including modification applications);
- approving or deciding to carry out an activity where an environmental impact statement was obtained and exhibited under Part 5; and
- State significant infrastructure determinations (including modification requests).

A new community participation plan will need to be prepared that reflects the community participation principles to be set out in the Planning Act (unless this can be met through the community engagement strategy it has prepared under the Local Government Act 1993 (NSW)).

3.1.1 Analysis

Early consultation:

Provisions of the Planning Act will be refined to clarify that regulations may be made to encourage or require certain activities to be performed before lodgement of a development or modification application. Providing incentives for early consultation will be explored by the Department. State significant development (SSD) proponents will have to demonstrate community consultation prior to lodgement as part of an environmental impact statement.

The detail surrounding the requirements for consultation carried on prior to a development or modification application being made remains unclear, as is the detail of the Department's proposal of incentivising early consultation by developers. The Department of Planning and Environment is said to be currently in talks with Councils in order to establish the exact parameters of these incentives. In the meantime the proposed reforms can be summarised as:

- Mandatory requirement for development applications of a minimum 14 days public exhibition period;
- Subject to possible exception once the regulations and incentive mechanisms have been settled;
- Exclusion of any notification period between 20 December and 10 January; and
- The need for councils and other planning authorities to prepare and abide by 'Community Participation Plans', which will outline how the community can be informed about and make submissions on development application for consent prior to it being made (lodged).

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.

The community participation principles are generally acceptable however their effectiveness translating to a meaningful tool to aid good planning outcomes will not become clear until a workable model Plan is presented for review. In the meantime there is an existing object in the Act addressing the need for increased opportunity for public involvement and participation in environmental planning and assessment. This is backed by various requirements for community engagement at both the strategic planning level [Section s38, s57, s75AH] and the development assessment stage [s79, s79A, s79C, 89F].

In our view community engagement is meaningful and justified when it has a benefit to the planning outcome. This takes varying forms such as; ensuring that neighbours who stand to be affected by development can engage in the process or to enable an applicant to modify their proposal to address concerns before the application is made. Whether community engagement is meaningful or justified may depend on such things as; whether the likely impact would reasonably warrant and amendment of the proposal or the content and form of engagement is sufficient to meet the needs of those who stand to be affected.

To achieve a benefit to the planning outcome the form and content of community consultation would need to respond to the specific characteristics of the proposal. They would also need to be flexible to allow the suspension or extension of engagement as the circumstances dictate. For example culture or customs in some communities may require a specific or tailored engagement or simply require more time. In others it may be that consent is obtained and engagement would be superfluous. The Department has canvassed the use of incentives to encourage early consultation, when in practice this does not guarantee wider acceptance for a proposal or that there will be a better planning outcome.

There is also discussion of community consultation guidelines being released at some future date to include guidance on innovative ways to engage the community and in light of new approaches such as social media and the NSW Planning Portal however it is not clear how the NSW planning Portal would operate.

The general rule of thumb seems to be that applicants do as they are legislatively required, and whilst some commentators have noted that community engagement requires cultural change within the development industry not legislative reform there is no guarantee of a uniform, fair and consistent application unless it is legislated.

These new plans will need to be publicly exhibited and:

- they can include mandatory or discretionary requirements, but
- can only be legally challenged within 3 months of being published, and
- planning authorities will need to report on the implementation of their community participation plans in accordance with the regulations (once made).

3.1.2 Implications for Council

In theory the community participation plan seems sound as a policy reply for clarifying when and how pubic participation and engagement must occur. Whether there will be any negative impact on Council is too early to say categorically and based on what has been assed is likely to be outweighed by the public benefit advantages. This only leaves the main area of concern being the 'incentivised'

aspect of the proposal. This is to be piloted with councils prior to any developer incentives being incorporated and as such does not represent an immediate concern.

Whilst it is considered that the proposal to exhibit all applications for a minimum 14 days as an acknowledgement of the some shortcomings with current practice it is not of itself guaranteed to lead to better planning outcomes, but it will increase the cost and may delay approvals for low impact categories of development. It is noteworthy therefore that many local councils operate a discretionary system of notification utilising a DCP or similar policy with notification being triggered by early characterisation of the development based on its likely impact. This is seen to be more efficient and cost effective, and they implicitly 'reward' applicants for their good design when it evidently respects neighbour amenity, and local character, by negating the need for public notification.

Tweed Council has recently considered a proposal to publish receipt of new DAs through its weekly resident newspaper. This does not incorporate a formal submission period but will allow for a person to make enquiries or raise concerns, on those applications not normally formally notified. It is considered that this compliments the discretionary formal notification requirements and negates the need for additional cost and delay associated with the proposed 14 day mandatory exhibition.

3.1.3 TSC Letter of Submission –Points of Reply

8. The idea of a community participation plan tailorable to suit the needs of individual councils and their communities that has legislative weight and the ability to set the limits beyond any prescribed minimum is a welcomed move for local communities; and it will need to be properly supported in advance with the further research, guidance and model examples to ensure State-wide consistency.

9. Mandatory 14 day exhibition of all applications for development is considered to be excessive and does not demonstrate a nexus with the sensitivity of development. It will increase cost and delay on many applications. Council supports the continued use of discretionary notification for lesser impact development such as dwelling-houses, and supports the general publication of all new applications for community information. It would also support a mandatory requirement to consider a public submission made in respect of a publicised notice of new applications as applies to applications that are formally exhibited.

4.0 STRATEGIC & LOCAL PLANNING

4.1 Elevating the role of good design.

The objects of the Planning Act will be updated to include "promote good design in the build environment" to allow for the consideration and balancing of design against other objects of the Planning Act.

In the context of the need to increasing housing supply to accommodate increasing population growth it has been identified that it is important the planning system delivers well-designed urban centres, streets, parks and recreation spaces. If implemented, the design object will ensure design needs to be considered and balanced with other objects of the EP&A Act which include land use planning, economic development and the principles of ecological sustainable development.

4.1.1 Analysis

The Government Architects will develop a design led planning strategy, comprising incentives and measures to assist planning system users to achieve well designed places.

The Governments Architect's Office has released a draft Architecture and Design policy for NSW. It provides a set of principles and guidance to encourage good design across housing, employment, infrastructure, open space and the public domain.

Whilst the introduction and promotion of good design as 'an object' would elevate design and the role of design as a key underlying principle of the Act is welcomed, its delivery and integration as a tangible consideration within the plan making and merits assessment processes remains ambiguous and principally 'at odds' with other proposed draft legislative amendments; namely exempt and complying development SEPP(s).

In the context of draft amendments to the exempt and complying development SEPP, which would see an increase in the scope and breadth of development which would qualify under exempt and complying SEPP(s) and subject to standardised code assessable criteria, there would be less design consideration within the merits assessment process of those qualifying development types.

This includes recent exhibition of draft amendments which would see 'missing middle' medium density housing typologies potentially qualifying as complying development, facilitating smaller lot subdivision and increased density across residential zones where those land uses are permitted.

The outcome, particularly in low density residential neighbourhoods, could result in a significant departure from existing and desired future character. More concerning however is that these building typologies, which have potential for significant character impacts, would not be subject to the contextual consideration, design review and merits assessment currently assigned to those development types.

4.1.2 Implications for Council

The identification of good design as an object would in effect elevate good design as a key underlying principle to be considered in the plan making and development assessment process.

However given the lack of formal framework and regulatory processes within the legislation to support good design as an object, there will be an onus on Council to make provision within local environmental planning instruments, locality plans, character statements and development control plans to implement tangible design considerations which will achieve the design desire future

characters of our settlements. While this would be a worthwhile cause it would have resourcing implications for Council.

4.1.3 TSC Letter of Submission –Points of Reply:

10. Inclusion of 'good design' as an object in the Act is supported.
11. The intent of developing an Architecture and Design Policy for NSW is supported.
12. Additional clarification is sought as to how good design as a legislative object and the principles within the Architecture and Design policy would be embedded and considered in the context of draft proposed changes to Exempt and Complying Development SEPP(s) and development of local strategic planning statements.
13. It requested that consideration as to how the monitoring and reporting of this new object and good design generally can be achieved through District and Regional plans.

4.2 Strategic planning at the local level

Measures requiring councils to develop and publish local strategic planning statements is proposed.

The Planning Legislation Updates Bill Guide states:

> *"Councils are required to prepare and **publish a local strategic planning statement**, and to **review it every 5 years**. The local strategic planning statement explains how the council will give effect to regional and district plans in its local area, **having regard to any community strategic plan** under the Local Government Act 1993."*

The *Environmental Planning and Assessment Amendment Bill 2017* (Schedule 3 Amendment No. 103) states that:

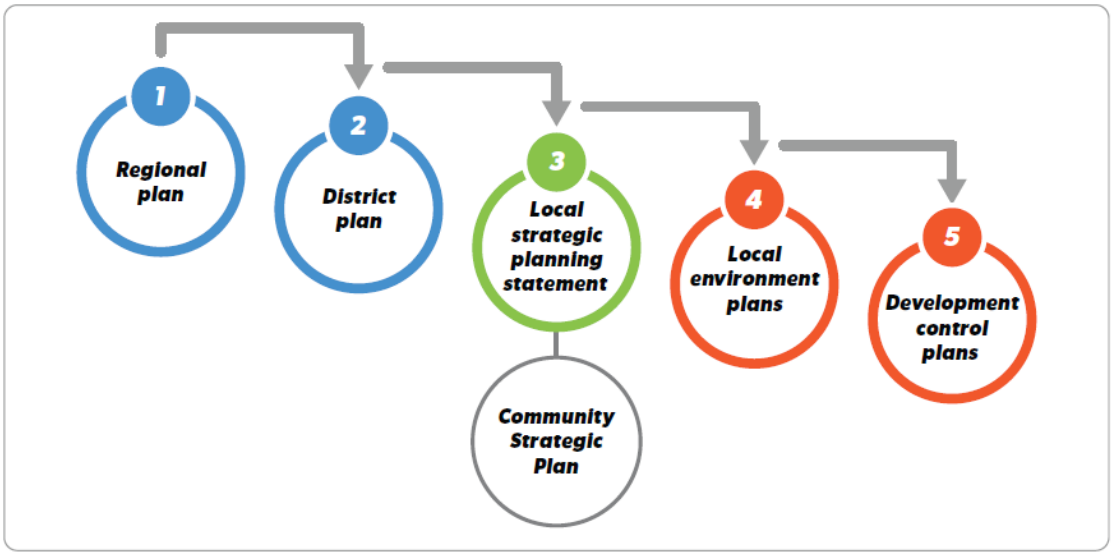
> *(1) The council of an area must prepare and publish a local strategic planning statement and review the statement at least every 5 years.*
> *(2) The statement must include or identify the following:*
> *(a) the basis for strategic planning in the area, having regard to economic, social and environmental matters,*
> *(b) the planning priorities for the area that are consistent with any strategic plan applying to the area and any applicable community strategic plan under section 402 of the Local Government Act 1993,*
> *(c) the actions required for achieving those planning priorities,*
> *(d) the basis on which the council is to monitor and report on the implementation of those actions.*
> (3) *The Planning Secretary may issue requirements with respect to the preparation and publication of local strategic planning statements*.

4.2.1 Analysis

In summary, this amendment proposes a new additional statutory layer for local strategic planning within the planning framework. The local strategic planning statement is to become a mechanism for aligning relevant goals and actions stated in Council's Community Strategic Plan CSP) with those in Regional Plans, and with Council's Local Environmental Plans and Development Control Plan objectives and provisions.

The purpose of the local strategic planning statement is to "inform rezoning decisions and guide development" and Councils will be required to consider their local strategic planning statements when preparing planning proposals." Planning Legislation Updates: Summary of proposals, DP&E, January 2017.

Figure 2: Completing the line of sight in strategic planning



4.2.2 Implications for Council

Council will be required to prepare and publish local strategic planning statements in accordance with requirements as per sub-clauses 2 and 3 of the Bill, above. The supporting document "Planning Legislation Updates: Summary of proposals", provides an expected structure, as follows:

Vision	• Should reflect relevant elements of visions in both Regional and district plans, as well as the objectives and values in the Council's Community Strategic Plans as they relate to land use. • Should take a 20 year horizon, consistent with regional and district plans, with a refresh at least once every 4-5 years to align with integrated planning and reporting processes.
Goals and actions will assist in achieving the visions	• Goals – will be focussed statements of the outcomes the council aims to achieve for the local area. Clear and measurable. • Actions will set out what is required to deliver goals.
Link to planning controls	Statements will need to explain how vision, goals, and actions shape planning controls and development decisions in the local area.
Monitoring and reporting of progress	Statements will establish performance indicators by which progress towards the goals can be measured. 4-5 yearly reporting cycles will be required, which may use existing processes under the Integrated Planning and Reporting Framework under the Local Government Act 1993.

- Taking these into account, it will be essential for the Community Strategic Plan (CSP) to set the strategic framework for sustainable growth and settlement planning, development guidelines, urban design principles, heritage protection and the like and to define delivery of outcomes through the local strategic planning statements and environmental plans.

- Local Strategic Planning Statements are expected to "reflect and promote the themes, objectives and values of the Community Strategic Plan", as the highest form of local strategic planning document, so that it may act as a mechanism for aligning with relevant goals and actions to Regional Plans, and Council's local strategies, LEP and Development Control Plans.

- The review will also seek to align performance indicators for actions linked to strategic objectives and visions with the *Integrated Performance Reporting Framework.*

  The proposed model structure to enable a line of sight between strategic planning objectives, by setting a vision, actions, link to planning controls and performance measures is considered robust. Council requests that this structure is also applied to state planning mechanisms from Regional Plans and State Environmental Planning Policies (SEPPs) that prevail over local mechanisms, to ensure transparency and accountability of decisions and outcomes, and to enable performance monitoring and evaluation of the efficacy of the complete hierarchy of state and local strategic and statutory planning mechanisms.

- It is unclear how the publication of local strategic planning statements will be managed and whether endorsement of the state will be required – whether by the Secretary of the Department of Planning and Environment or the Minister for Planning, given that:

  - the EP&A Act provides for the publication of other planning instruments through the NSW Planning Portal, as managed by the DP&E; and
  - local strategic planning statements are to become the basis of rezoning decisions, and need to align with Section 117 Ministerial Directions which enforce Regional Growth Plan directions and actions, and are made by the Minister for Planning.

- A significant programme of works and resources are considered to be required in order to prepare, publish, and monitor, report and review the local strategic planning statement visions, goals, actions, and measures on a five-yearly basis.

4.2.3 TSC Letter of Submission –Points of Reply

14. Council supports the proposed legislative action to strengthen upfront strategic planning by requiring councils to prepare and publish local strategic planning statements, as a new mechanism to complete the line of sight between regional and district strategic plans and local environmental plans and development controls plans.

15. There is the risk however of planning controls being applied, when considered in the light of strategic planning statements, more subjectively and this may make decision-making more complicated, less certain and biased, especially as current consideration of the application of planning controls is objective and supported by much current law and legal reasoning, which contributes significantly to planning certainty. It would be beneficial therefore if the legislation was clear on the preferred method of application whether that be objective, subjective, premised on the promotion of the outcomes i.e., 'purposive' or some other, as this would assist with minimising opportunity for litigation on ambiguity.

16. The proposed model structure to enable a line of sight between strategic planning objectives, by setting a vision, actions, link to planning controls and performance measures is considered robust and is supported. Council requests that this structure is also applied to state planning mechanisms from Regional Plans and State Environmental Planning Policies (SEPPs) that prevail over local mechanisms, to ensure transparency and accountability of decisions and outcomes, and to enable performance monitoring and evaluation of the efficacy of the complete hierarchy of state and local strategic and statutory planning mechanisms.

4.3 LEP periodic currency review

Measures are proposed to ensure that local environmental plans are kept up to date by completing a five-yearly LEP check against set criteria and working with the DP&E to implement any necessary changes identified through these checks.

The reviews aim to ensure consistency with the regional and district plans, changes in local demographics, social, environmental and infrastructure needs, and to ensure that the community has input into the LEP at regular intervals. This should keep the LEP more responsive and applicable to local needs over time.

4.3.1 Analysis

The introduction of a five year review period for local environmental plans (LEPs) is welcomed and supported. It is considered the review process provides sufficient flexibility to enable a council to demonstrate the need, or absence of need, for the preparation of a full LEP review, whilst allowing for planning proposals to proceed if justified.

The fourth dot point refers to "a high number of planning proposals". Clarification around what this may mean is required. It is suggested this should be relative to the general trend of the local government area, rather than a standard quantified number.

It is suggested that the review criteria is essentially urban focussed and does not address many regional issues, such as the use of environmental zones, responding to climate change, flooding, declining economic conditions of rural towns and the like.

The checklist could be expanded to include an additional criterion, for example as follows:

- Is there an important or emerging need to address a significant environmental, social or economic issue?

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 i coming years?
- Has there been or is there expected to be significant infrastructure investment that necessitates or justifies major change to loca 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?

4.3.2 Implications for Council

The effect of the proposed legislative change places a timeframe on s.73, which refers to undertaking regular and period review of LEPs, to require a review every 5 years against a set LEP checklist. Review against the checklist is to be submitted to the Minister and the DP&E will work with Councils as to whether Council should prepare a planning proposal for minor amendments or a full LEP review.

As a high growth local Council a review of the LEP every 5 years would be beneficial in keeping the LEP directions, zones and land uses tables current and relevant. A five year review process would [should] likely result in fewer planning proposal (PP) applications and in the PPs being processed as a group as part of a wider relevant strategic review rather than in isolation of their potential cumulative impacts.

For this to be an effective and efficient process site specific PPs could be limited to urgent or correction of error matters, allowing resources to be diverted into a more strategic approach to

amending the LEP. PPs which seek a wider change of use or intensification of development should be considered as part of a strategic LEP review.

This approach would accord with the general intent of the legislative review to engage the community in the early strategic planning phase and should result in a more holistic approach to managing the LEP to keep pace with strategic growth needs and emerging issues.

This focus and intent also reinforces the importance of a Community Strategic Plan which sets sound strategic goals for balancing growth and development with social and environmental needs, and sets up a clear line of sight between these goals, regional plans and local land use planning (LEPs and DCPs).

4.3.3 TSC Letter of Submission –Points of Reply:

17. Dot point four of the proposed LEP checklist criteria in relation to "a high number of planning proposals" to be clarified to ensure this is relative to the general trend of the local government area, rather than a quantified number.

18. The proposed LEP checklist criteria include an additional criterion addressing significant rural and regional environmental, social or economic issues.

19. It be generally noted that the 'health check' of LEPs is likely to be an administrative exercise without additional strategic planning to underpin decisions about change, and as such the perceived benefit over current practice may be negligible in practice.

20. Council supports greater consideration being given to elevating the role of community-based strategic land-use policies to guide the development of localities, districts, centres or the like with the legislative instruments (LEPs) there to support their implementation with minimal interference.

4.4 More consistent development control plans

Measures standardising the structure and form of council's development control plans to make them easier to understand and navigate.

The Planning Legislation Updates Bill Guide states:

> *"The regulations may require the standardisation of development control plans and authorise the Minister to publish requirements as to the form, structure and subject-matter of these plans."*

Currently, there are over 400 DCPs across NSW varying in content and format and the proposal to standardise these plans is much like the previous standardisation of LEPs under the former planning reform package of 2006.

However, unlike early approaches to standardisation the new standardised DCP will only address the format issue for now, with the decision on content remaining with individual Councils, however as the Regulations are yet to be publicised this is not guaranteed, the Bill guide states:

> *The regulations may require the standardisation of development control plans and authorise the Minister to publish requirements as to the form, structure and subject-matter of these plans.*

4.4.1 Analysis

State-wide consistency is supported, for the benefit of navigation and access e.g., via online tools, as it is generally agreed that variations in structure and format between DCPs and other instruments make it difficult to understand and apply, and limits the opportunity to embed DCP controls in the NSW Planning Portal alongside other planning controls, such as those included in LEPs.

Tweed has developed and implemented its own model template for the various sections that apply under the Tweed DCP 2008, to ensure that, regardless of whether they are theme-based, locality-based or development-type based controls, a consistent structure and format is applied to facilitate user navigation and transparency of the various sections, and as base data for online transactional services such as online lodgement of development applications.

It is important for Council not to lose its flexibility or precision in the effort to achieve consistency. The DP&E has highlighted that they will convene a working group to develop optional model provisions that councils can use in the drafting of their plans, which be made accessible through the NSW Planning Portal. These can be evaluated, tested, and reported on at a later as more information becomes available.

At this juncture it is considered important that council supports the proposal for content to remain a matter for councils, including the adoption of and variation to model DCP provisions. Since there is a wide coverage of environmental, safety, social, heritage, economic development and engineering issues and priorities in DCP sections; model provisions should strive to avoid transferring locality and site specific requirements to a subordinate document or parts that fall outside of the agreed structure. Lessons from the standardisation of LEPs via the model template show that the structure of Parts 1 -5 are standardised, however, emerging Parts 6-8, that enable locally relevant exceptions and variations, have resulted in wide-variation and bespoke instruments across the state, and technical difficulties in managing and publishing data for online transactions. The implication is that important LEP or DCP planning provisions or controls may not be readily found by users performing online property enquiries, creating confusion, uncertainty and delays at early development investigation stages.

It is also noted there is potential to extend the legislative update programme to review the organisation and order of Parts 6-8 in LEPs across the state, to ensure a comprehensive approach to the hierarchy of instruments in the effort to improve navigation and transparency. This would be a highly beneficial reform.

Lastly, proposed consultation with councils and industry to develop the standard format and its implementation is welcomed. In July 2016, SP&UD staff were extended an invitation to participate in a targeted working group to develop this standard and model provisions, and align this with initiatives under the ePlanning program to revise standard technical requirements for DCP spatial datasets. Staff are liaising with DP&E on this initiative.

Similarly, SP&UD staff have been invited to partnering with the DP&E ePlanning program to review and develop the supporting technical specifications for spatial datasets that will drive online lodgement transactional services through the NSW Planning Portal, and that will need to reflect and align with the agreed structure of a DCP model instrument.

4.4.2 Implications for Council

Thus far no draft standard template has been formally issued, making it difficult to predict the full implications for Council.

However, on the information available, it is quite apparent there would be a resource burden to prepare and publish the Tweed Development Control Plan and Contributions Plans according to the standard requirements, when determined, to be *significant*. It will involve the structural and format review of the Tweed Development Control Plan 2008, and its 39 sections and further:

- Implementation timeframes will be important, particularly where proposed Amendments provide for DCPs and Contributions Plans to commence *only* when published to the NSW Planning Portal; rather than at Council's discretion when published to our website or gazette, and

- These proposed requirements, will place greater responsibility and accountability on the Planning and Regulation Division and Strategic Planning & Urban Design Unit, as custodians of the DCP, to manage and coordinate the preparation and submission to the DP&E of draft sections ensuring they comply with the standard instrument requirements and technical specifications for spatial datasets, as set by the Secretary toward their publication on the NSW Planning Portal.

4.4.3 TSC Letter of Submission –Points of Reply

21. Standardisation of DCPs and Contribution Plans undertaken progressively and consultatively where the content remains with councils is supported.

22. The detail of the standard template requirements, model provisions, technical specifications for spatial dataset and procedures for submitting and publishing draft plans on exhibition and final plans to the NSW Planning Portal is absent, yet it is apparent that it will place a resource burden on councils. In this case, Tweed Council supports progressive and sensible implementation programme in partnership with DP&E Legislative Updates and ePlanning branches, and other councils to align the model instrument template with associated spatial datasets that will enable user navigation and drive DA transactional services.

23. A similar effort to set and enforce a standard structure for Parts 6 – 8 of the Standard Instrument LEP, and for State Environment Planning Policies, would complement council's significant efforts to standardise DCPs and Contributions Plans and ensure the Planning Portal easily delivers a complete account of all planning controls that apply to a land parcel or proposed development.

4.5 Planning panels

Presently, a council may constitute one or more local planning panels for the whole or any part of its local government area. Local planning panels are currently called independent hearing and assessment panels.

The proposal is to increase the use of independent planning panels and creation of a uniform set of rules, responsibilities and functions to ensure consistency in their operation across NSW.

4.5.1 Analysis

Under this model the elected council sets 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. It is proposed that the Minister would have the power to direct a council to appoint a local planning panel where this would improve the quality and timeliness of planning decisions in the local area.

The Bill proposes to make local planning panels a regular feature of the planning system by introducing consistent provisions for such panels across the State and by 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 decision in the local area, or manage conflicts of interest or corruption.

The Bill's proposed amendments include:

- establishing rules about the membership and functions of panels; and new powers for the Minister to direct councils to:
    - establish a panel to determine particular development assessments, for example 'where it is needed to address sustained community concern about the timeliness or quality of a council's planning decisions, or about a conflict of interest';[7] and
    - otherwise delegate more planning decisions to council staff, which should speed up assessment timeframes.
    - Change the name of the existing Planning Assessment Commission so that it will be known as the Independent Planning Commission.
        - The Commission consists of the members appointed by the Minister. Each member is to have expertise in at least one of the areas specified.
        - The Commission can arrange for the use of the Department's staff or engage consultants to exercise its functions.
- The regulations can require a council to establish a panel.
- a local planning panel will consists of 3 members, including a community representative. The other two independent members must have expertise in at least one of the areas specified, and one of these members is also the chair of the panel;
    - a local planning panel has any functions conferred on it by the legislation, including:
        - consent authority functions of a council, conferred under the planning legislation, and
        - assessing any aspect of a development proposal or planning matter referred to it by council.
    - the council must provide staff and facilities to enable the local planning panel to exercise its functions, and
    - a local planning panel can delegate any of its functions to the general manager or other council staff member.
- 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.
- With the potential of more proposals being determined at a local-level by panels, the Government may raise the thresholds for 'regionally significant development' which are determined by regional planning panels. Most notably, development with a capital investment value of more than $30 million will likely become 'regionally significant development', which would be up from the current threshold of $20 million.

It is a well-established practice that the planning panels include experts from the fields of heritage, environment, law, transport, urban design, architecture or social planning.

It is proposed that there will be three panel members; two will be designated experts, and the third being a community member. However the community member will also be required to have expert knowledge in one of the relevant fields. Whether this position could be filled by a Councillor is

unclear and nevertheless seems unlikely. It is proposed there would be a pool of suitably qualified community panel members and a procedure for their selection to a panel when convened. These are likely to be subject-matter based.

The proposition therefore is that such expert panels are better placed to make complex determinations (following and supported by staff assessment) with greater impartiality or objectivity, freeing elected Councillors to oversee and direct the broader strategic planning, is sound.

Notwithstanding, the requirement that one of the panel members must be a community member may be viewed as less desirable. It is conceivable that the wider community might not accept an unelected community member to represent the wider community view, as the broad cross section of community ideology and views is too diverse for one person to represent; and is the reason why the community is required to elect several community members as councillors.

It might be considered that if the panels will operate as a professionally, independently, and objectively as suggested then the actual need for a community is negated. This might be better serviced if an elected council decided whether and if there is a community member required. This would permit the council to take into consideration the availability and preference for there to be three highly skilled panel members, depending on the complexity of the class of development delegated to it.

Schedule 2, Division 2.5 clause 2.19 (2) of the Bill provides that additional planning functions may be exercised by a local planning panel, but it is unclear how a reduced panel size of 3 members will accommodate and manage these broader functions. More information about additional functions and their resourcing is needed.

4.5.2 Implications for Council

It is said that local planning panels reduce costs, speed up approvals, are more transparent and accountable, and may contribute to better planning outcomes. While this may be the case no reviewable evidence has been presented. However, it is foreseeable that a panel of subject matter experts would likely contribute to better planning outcomes if not the cost and time. They are also more likely than not to provide detailed reasons for their decisions, which would assist any subsequent modification application, litigation and the public interest.

The noticeable downside is that councils will need resource local planning panels in a variety of ways that will ultimately impact on the long-term financial plan. They may have the effect of negatively impacting on service delivery in other aspects of council business because of these additional costs.

In conclusion, there is a clear and present growth in the use of planning panels at all levels of government and across most, if not all States. This evidences a system that has advantages and which may serve council and their communities well. The intention with the NSW planning reforms is for elected councillors to engage in the strategic planning with their local communities, and defer the technical implementation of those to technical panels and staff. This is a sound strategy.

It is noted that in its reply submission to the then 2013 planning amendment Bill the then Tweed Council objected to the use of local planning panels.

The issue that seems to arise is the ability of the Minister or their delegate to impose or force a council to establish a panel. Using their reserve powers in this way would no doubt rarely arise and one might expect only in extreme circumstances. With that in mind the option of establishing a planning panel under a controlled arrangement could be viewed positively.

4.5.3 TSC Letter of Submission –Points of Reply

24. The proposal to allow a local panel to delegate a function to the General Manager is supported, but the notion of delegating to any other staff member is not. It is preferred that the panel make a recommendation to the GM when another staff member is identified and the GM is to undertake the delegation if they consider it appropriate.

25. Directory powers to order a council or mandatory provisions for establishing a local planning panel is not supported. The proposed legislative amendments providing greater clarity about the formation of panels and the optional establishment by a planning authority is supported.

26. The requirement for a community panel member may operate to subvert the ultimate purpose of the panel: to provide expert, impartial and objective opinion. If anything it should be optional, this would allow elected Councillors to decide whether it is in their LGA's best interest to adopt that model or not.

5.0. DEVELOPMENT ASSESSMENT – (STATE & LOCAL)

5.1 Statement of reasons

Decision-makers will need to give a statement of reasons for any decision that is proportionate to the scale and impact of the decision.

5.1.1 Analysis

The statement will highlight specific considerations of particular importance to the decision and must be considered by consent authorities when considering any future modification applications.

Planning authorities will be required to provide a 'statement of reasons' for planning and development decisions that are proportionate to the scale and impact of the decision (ie large and complex developments will require a more comprehensive statement of reasons as opposed to a smaller development with less impact).

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

By way of example of how the statement reasons policy might be applied in future is when the Act allows for the modification provisions to be used to amend, or remove, conditions of a development consent without. Currently, there is no formal requirement to document and consider why those conditions were originally imposed.

Under the proposed amendments a planning authority will be required to give reasons for a decision, part of which is to explain the importance of certain conditions and the reasons for imposing them, and them to have consideration of those reasons when considering a future modification application; that is, to consider the statement of reasons for the original consent.

Whilst in practice it would likely be rare for a modification application to be assessed without recourse to the original files and approval, the likelihood of ascertaining with certainty the reasons for specific conditions, at least in a timely manner, on the face of the record would best be described as less than guaranteed. This disadvantages all parties. Consequently whilst there would remain uncertainty as to what matters should or should not be explained overall the general purpose and logic for the proposal is sound and would serve a broader public interest purpose.

5.1.2 Implications for Council

Whilst the Department's objective of providing a greater level of transparency in decision making is to be commended, applying this requirement to all types of applications will be practicably difficult and onerous for local councils to implement.

To apply this In effect it will represent a further body of work for each application, which cumulatively has the potential to be quite significant; for example an average of an hour of staff time reviewing and preparing the statement of reasons multiplied by the number of decisions (about 800-1,000 DAs) per annum translates to several weeks-worth of staff time. Whether this cost is justifiable relative to the benefit is unclear, but it will undoubtedly impact on the overall cost and time of assessment. This needs to be considered in context with other proposals such as the mandatory 14 day public exhibition.

To ensure that decision-makers are more inclined to comply with this, the statutory scheme will operate such that the reason for decisions will be a mandatory step in the decision making process. This means that a decision could be struck down for failing to comply with the statutory requirements; it will make councils more vulnerable to litigation on their decisions as it will to cost orders against them should the applicant succeed.

The question that may then arise for an elected council is what will the process or in-house procedure for debating and recording these reasons look like? This will be essential for a council who resolves differently to what is recommended in a planning report, as it is likely that the planning staff will only record reasons for a decision based on what they have recommended. This may prove more challenging in instances when council resolves to approve / refuse an application recommended by staff for refusal / approval.

There are many other practical issues to be resolved, including where and how these reasons should be located in approval notices and publications.

5.1.3 TSC Letter of Submission –Points of Reply

27. The proposal to prepare reasons for decisions is generally supported however the requirement to prepare reasons should be tempered by the need to do so in every case. Threshold indicators as to when reasons might be appropriate, but maintaining the planning authorities discretion is considered a better approach, at least for a trial period to allow for a benefit cost review.

28. Statement of reasons if introduced should be applied consistently across the planning system to all planning authorities or decision-makers, including Private Certifiers.

5.2 Termination of transitional Part 3A arrangements

A key planning amendment is the termination of the residual modification powers under the former Part 3A – Major Development, development approvals pathway.

5.2.1 Analysis

The Part 3A scheme governed the approval of major projects in NSW between 2005 and 2011 and although while mostly repealed in 2011 the transitional arrangements then adopted continue to:

- regulate the completion of applications then made and pending,
- preserve Part 3A approvals made under that pathway; and
- enable a continuation of the same framework for modifications under s 75W.

Section 75W is quite unlike its s.96 counterpart that applies to development applications under Part 4 of the Act and which require the modified development to be substantial the same as the development when first approved. There is no similar means test, meaning that 75W has a very wide import, allowing modifications to substantially different to the development as first approved. This has been a contentious point for many years. Yet despite the decision under the current proposal to repeal 75W and instigate a modification pathway with a development similarity test like that of s.96, it is proposed that a further 2 month grace period (savings period) be given to Part 3A approvals holders to make a final 75W modification.

While the proposal to repeal 75W is welcomed, the savings provision is not, particularly as the publication of the proposed amendment has been wide and provided sufficient time for a last minute modification to be lodged. Those applications will be saved by a fairly standard savings

provision that captures development applications made but not finally determined; as can be seen as cl 1.8 in the Tweed Local Environmental Plan 2014.

The proposed legislative amendments will see existing approvals under Part 3A will be moved to the State Significant Development (SSD) or State significant infrastructure (SSI) pathways. This will not apply to development that is either completed or under construction.

It is also proposed that upon making of the amendments to the Act any subsequent modification applications will be assessed against the approved development at the time it became either an SSD or SSI. As some approvals have been modified numerous times it would be totally unworkable to apply the substantially the same development test to a major project from the beginning because in many instances the last approved development may be substantially different from the first; therefore the proposed test – the last approved development under a modification will substitute the original approval for the sake of applying the sameness test from that point forward.

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

Under this revised planning system a modification application that is not substantially the same development will be impermissible and a fresh application would be required. This would bring state significant development into line with the approvals pathways under Part 4 for which local councils are in the majority of case the planning authority.

It also appears that the proposed amendments will not affect the status of concept plans approved under Part 3A, as they will be preserved. We take from this that concept plans will then be succeeded by either an SSD or SSI application, whereas currently it would be a major project application, with planning consent remaining with the State Government.

Lastly, modification applications lodged but not yet determined will be assessed under the current rules and will need to be supported with an EIS:

> *"[w]here Secretary's Environmental Assessment Requirements have already given for a modification applications under the former section 75W, the application will be determined under section 75W provided an environmental impact statement is lodged within 12 months"*[iv]

The EIS will be required to demonstrate how community consultation has been undertaken, and this is to be informed by a new Departmental guideline for EIS projects.

5.2.2 Implications for Council

The key implication is for Council and the Department to understand and practically implement the new assessment process for amendments to former Part 3A development approvals. Tweed Council has a number of major development sites that fall into this category. It expected that the future modification processes will still require substantial Council resources to make comment on these new assessments. Council currently does not receive fees for their substantial input to these processes, often with unrealistic timeframes, which is considered to be an unreasonable resource burden. It is therefore considered that the Department should consider a proportionate allocation of fees be given to Council's for their assessment functions.

5.2.3 TSC Letter of Submission –Points of Reply

29. That the Department be requested to consider a proportionate allocation of fees be given to Councils for their assessment functions in the new modification system for developments approved under the former Part 3A legislation.

5.3 Deterring unauthorised works:

Planning authorities, including the Land and Environment Court, will be prevented from approving modification applications for works that have already been completed (other than in limited circumstances, e.g. minor error, mis-description or miscalculation). This means that enforcement action (eg. a demolition order), or a requirement to obtain a new building certificate, may be imposed in respect of any unauthorised works.

5.3.1 Analysis

Whilst it is considered that the elimination of the use of Section 96 as a deterrent to unauthorised works is appropriate, there still needs to be legislative remedy for unauthorised works that fall outside of development consent, given that building certificates and demolition orders do not cover all the scenarios when it comes to unauthorised works. Consideration should be given to a new application category that deals with unauthorised works outside the development consent that also has deterrent aspect with higher fees, notification procedures and alternate assessment timeframes.

5.3.2 Implications for Council

Councils are increasingly being called upon to take regulatory action in respect of unauthorised works and activities. It is important that any statutory amendments provide a clear and practical pathway for Councils to perform their regulatory role.

5.3.3 TSC Letter of Submission –Points of Reply

30. Whilst Council supports the elimination of the use of Section 96 as a deterrent to unauthorised works, it is considered that the Department should further examine an appropriate remedy for unauthorised works that fall outside of development consent. Consideration should be given to a new application category that deals with unauthorised works outside the development consent that also has deterrent aspect with higher fees, notification procedures and alternate assessment timeframes.

6.0. BUILDING AND COMPLYING DEVELOPMENT

6.1 Complying development generally

There are several proposals aimed at strengthening the overall compliance regime, including the ability of councils to suspend a work for up to 7 days; aligning current distinctions with DAs, particularly as it relates to new Greenfield sites and special infrastructure contributions, widening the power of the courts to declare a certificate invalid, and creating a form of complying development that is not of an insignificant impact such that an accredited certifier may not issue a complying development certificate

The Bill guide states some of the key proposals as:

- The regulations may identify types of complying development for which an accredited certifier may not issue a complying development certificate.
- A complying development certificate can be subject to a deferred commencement condition.
- If a complying development certificate is challenged within 3 months and the Court finds that it was not authorised to be issued, the certificate can be declared invalid.
- The regulations can make provision for a levy on applicants for complying development certificates which reimburse councils for the costs of investigating and enforcing compliance with the planning legislation.
- The regulations can authorise council officers to suspend the carrying out of work under a complying development certificate for up to 7 days, pending an investigation into the whether the development complies with the applicable development standards.

6.1.1 Analysis

Complying developments are best described as 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* (Codes SEPP). Low impact projects covered by the Codes SEPP include new one or two storey dwellings, alterations to existing dwellings and commercial and industrial premises. A draft amendment seeking to include medium density development is currently under review following its public consultation. That draft amendments proposes the following development types:

- 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.

If a proposal fully meets the standards in the Codes SEPP, 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.

Ensuring the Standards are met

One of the key matters affecting the wider acceptance of complying development has been the issues associated with development that has, or is perceived as not, meeting the required standards. In reply the Government is proposes to amend the Act to make it clear that, where a CDC does not comply with the relevant standards in the Codes SEPP, the certificate of approval is capable of being declared invalid by the courts.

The present position is that a CDC may approve development that is outside the relevant standards, but this would not be enough for the certificate to be overturned because the court has previously held (*Trives v Hornsby Shire Council [2015] NSWCA 158)* that, if an accredited certifier is satisfied that the development meets the standards, her or his opinion prevails provided it is reasonable.

The welcomed proposal to address this is 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 and as such access to information is limited, as is the opportunity to check whether the standards are being met before it is too late. The Government has recognised the importance of greater transparency in and surrounding complying development and how that would improve overall confidence in the system.

In response the proposal is to amend the regulations (at some later time) to:

- 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,
- 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, and
- in the longer term make plans and certificates readily accessible on the NSW Planning Portal.

Enabling access to this information is important and welcomed however, if the certificate has already been issued and access to a building site / private land is restricted there is likely to be little value or utility in the giving of information other than to clarify the type and general scale of development approved.

Limit some sensitive categories to council certifiers

The Government is indicating that as the use of complying development widens and the take-up rate increases it may be necessary to put in place additional safeguards to ensure the appropriate consideration of proposals with greater sensitivity.

It was clarified by DP&E at their Ballina information session that the kind of complying development likely to fall within the restricted category in the short-term will be medium density.

These kinds of complying development will not however be any different to others in respect of the rules are applied. As with single dwelling-houses there will be a strict set of standards that are either met or not met. Where they are met refusal is not an option for either Council or a Private Certifier.

It would appear that the only reason for limiting the certification to councils is that the community may feel more accepting of the assessment of these forms of complying development. The downside is, because unlike a development application, as there is no qualitative assessment aspect council would be obliged to issue a certificate if the standards are met irrespective of whether it is considered to be an appropriate design for the site or not. This could have the opposite effect of building the community's confidence in the planning system, by giving them a false hope that councils can somehow act differently when assessing the more significant classes of complying development.

If, as it is said it will be, the complying regime will be a purely tick-a-box set of standards then there is no substantive argument for monopolising the assessment of these complying development types to councils, as this would unnecessarily restrict the competition and choice for consumers.

This proposal is however generally supported, but it is noted that currently councils are contacted by the community as soon as development occurs, irrespective of who may have issued the approval certificate for the development. Consequently there is a degree of expectation within the community that sensitive development should only occur when a council is the consent authority.

A Council often has to negotiate with many parties to ensure positive environmentally sensitive outcomes are achieved in accordance with community standards and expectation. The current situation that enables a non-local Certifier, who may be based remotely in any part of New South Wales and is not visible to the community, to issue a CDC for development, that the community considers to be sensitive, may therefore raise concerns within the community particularly in respect of compliance with the standards.

Validity of Complying Development Certificates

This is considered to be a positive approach, but proceedings should be able to be brought within 3 months after the commencement of work, rather than 3 months from the issuance of the Complying Development Certificate. This is because our experience is that non-compliances are often not identified until after the work has physically commenced on site. It should be noted that the consent authority is not required to check the work of private certifiers when approval documents are archived with Council. Further, a Complying Development Certificate is valid for 5 years.

The Department has also identified anomalies between the complying development and development application pathways. Examples of such differences include that a certifier cannot issue a complying development certificate if the development is on an unregistered lot and a special infrastructure contribution cannot be levied for complying development. The Bill proposes amendment close this difference which occurs between complying development and DAs.

6.1.2 Implications for Council

Overall the proposed amendment and expansion of the Complying Development pathway are generally positive and in step with the longer-term planning system objectives of the NSW Government. However it is noted that included more sensitive classes or scale of development will not be without its challenges and as such there is a preference that these new development types be piloted for a set period during which councils are the only certifying authority for these.

6.1.3 TSC Letter of Submission –Points of Reply

31. Amendments to the complying development pathway are supported however, for new classes of sensitive development the limit on which only councils may certify such development should be limited to a set period. This would permit an evaluation of the implementation of these more sensitive development types and were appropriate the expansion of certification by the private certification.

6.2 Miscellaneous

6.2.1 Principal certifiers to ensure Building manuals are provided to the Building Owner prior to the issuance of an Occupation Certificate for class 2 to 9 buildings.

This is support on the proviso that it is the Builder who will have to prepare the Building manual and not the Principal Certifying Authority (PCA).

This process should be the responsibility of the builder who is paid to do the work and is the person who has managed the purchase of all products and building components during the construction process. They are also the person who has been on site every day supervising the day to day construction work. It is therefore important to ensure that the responsibility to pass this critical information to the building owner should rest with the builder and that the builder should have to formally advise the principal certifier of this occurrence.

6.2.2 Implications for Council

There will be a small time and cost implication when Council acts as the PCA as this will be an additional item that has to be checked off prior to any Occupation Certificate being issued. Council' Schedule of fees and charges may need to be adjusted to account for this.

6.2.3 TSC Letter of Submission –Points of Reply

32. It is requested confirmation be provided as to whether it will be the builder who is responsible for preparing the Building manual.

6.2A Compliance levy – payable by Applicants for Complying Development Certificates.

This is considered to be essential as it currently costs Council a considerable amount to investigate and enforce compliance action to ensure Development proceeds in accordance with approvals issued.

Applicants for Complying Development Certificates will have to pay a Compliance levy.

This is considered to be essential as it currently costs Council a considerable amount to investigate and enforce compliance action to ensure Development proceeds in accordance with approvals issued.

6.2A.1 Implications for Council.

The costs associated with monitoring compliance with Complying Development Certificates can be substantial, particularly if it is found that a Complying Development Certificates has been incorrectly issued and Council has to pursue a legal remedy. It is anticipated that that this type of enforcement action may become more prevalent in the future to ensure that Complying Development Standards are met.

6.2A.2 TSC Letter of Submission –Points of Reply.

33. It is requested that careful consideration be given to any proposed fee structure to ensure that any Compliance Levy adequately covers the councils likely enforcement costs, and preferably that this be widely consulted with councils in advance.

6.2B Principal Certifier Non-compliance Responsibilities

This addresses the ability of Certifying Authorities to deal with non-compliances by giving informal advice to builders.

When a Principal Certifier becomes aware of any matter of non-compliance they will now be compelled to issue a notice in writing to the person responsible for carrying out the development identifying this matter. This is considered to be a positive initiative as this will better align the Principal Certifier with that of a public official, which is the actual and often misunderstood, role of the Principal Certifier.

6.2B.1 Implications for Council

This should result in a higher level of development compliance being achieved, however will also result in more formal notices being received by Council from Private Certifiers that will have to be registered and included in Councils' record management system. This will also result in additional time and expense for Council to manage the system for the benefit of the broader community.

6.2B.2 TSC Letter of Submission –Points of Reply

34. The proposal to require a PCA to issue a notice of non-compliance is supported.

6.3 Construction certificates

6.3.1 Analysis

The ability to place conditions on Construction Certificates.

This is considered to be appropriate for smaller scale development such as dwellings, townhouses, garages and pools. That is, class 1 and 10 buildings. However, it is not considered to be appropriate for large scale development such as commercial development or multi-residential development; these being class 2-9 buildings. This reason this is not considered to be appropriate is that proponents of larger development have the ability to seek the services of many professionals that should have the ability to provide plans and specification to Certifiers that fully comply with building standards and will therefore not require the imposition of conditions to ensure their compliance.

It is recognised that the current proposal to enable Construction Certificates to be conditioned is what occurred prior to 1998 with Building Applications. It is further noted and recommended that any conditions should only be imposed that directly relate to compliance with the National Construction Code.

6.3.2 Implications

Construction Certificates documentation submitted to Council for archiving may lack detail if conditions are permitted to be imposed on Class 2 to 9 buildings.

6.3.3 TSC Letter of Submission –Points of Reply

35. It is requested that conditions to be imposed on Construction Certificates apply to Class 1 and Class 10 buildings only.

TSC Letter of Submission – Itemised List of Points of Reply

1. Council does not support the amendments to the Act's objects as they are proposed.
2. Incorporating good design in the built environment as an object is supported.
3. Council does not support the revision of the object regarding ecologically sustainable development.
4. Promoting consideration of relevant economic, social and environmental factors '*subject to'* the principles of ecologically sustainable development in decision making is a preferred alternative to the proposed revision, but not preferred to the current object.
5. Guidelines as to how each of the promoted objects is to be achieved and monitored at the State and local level, for example through District or Regional Plans, should be prepared and results published annually.
6. Council supports the inclusion of a new object that refers specifically to land use in the context of 'Climate Change'.
7. Council supports the addition of the new terms to the dictionary of terms and inclusion of Section 1.5.
8. The idea of a community participation plan tailorable to suit the needs of individual councils and their communities that has legislative weight and the ability to set the limits beyond any prescribed minimum is a welcomed move for local communities; and it will need to be properly supported in advance with the further research, guidance and model examples to ensure State-wide consistency.
9. Mandatory 14 day exhibition of all applications for development is considered to be excessive and does not demonstrate a nexus with the sensitivity of development. It will increase cost and delay on many applications. Council supports the continued use of discretionary notification for lesser impact development such as dwelling-houses, and supports the general publication of all new applications for community information. It would also support a mandatory requirement to consider a public submission made in respect of a publicised notice of new applications as applies to applications that are formally exhibited.
10. Inclusion of 'good design' as an object in the Act is supported.
11. The intent of developing an Architecture and Design Policy for NSW is supported.
12. Additional clarification is sought as to how good design as a legislative object and the principles within the Architecture and Design policy would be embedded and considered in the context of draft proposed changes to Exempt and Complying Development SEPP(s) and development of local strategic planning statements.
13. It requested that consideration as to how the monitoring and reporting of this new object and good design generally can be achieved through District and Regional plans.
14. Council supports the proposed legislative action to strengthen upfront strategic planning by requiring councils to prepare and publish local strategic planning statements, as a new mechanism to complete the line of sight between regional and district strategic plans and local environmental plans and development controls plans.
15. There is the risk however of planning controls being applied, when considered in the light of strategic planning statements, more subjectively and this may make decision-making more complicated, less certain and biased, especially as current consideration of the application of planning controls is objective and supported by much current law and legal reasoning, which contributes significantly to planning certainty. It would be beneficial therefore if the legislation was

clear on the preferred method of application whether that be objective, subjective, premised on the promotion of the outcomes i.e., 'purposive' or some other, as this would assist with minimising opportunity for litigation on ambiguity.

16. The proposed model structure to enable a line of sight between strategic planning objectives, by setting a vision, actions, link to planning controls and performance measures is considered robust and is supported. Council requests that this structure is also applied to state planning mechanisms from Regional Plans and State Environmental Planning Policies (SEPPs) that prevail over local mechanisms, to ensure transparency and accountability of decisions and outcomes, and to enable performance monitoring and evaluation of the efficacy of the complete hierarchy of state and local strategic and statutory planning mechanisms.

17. Dot point four of the proposed LEP checklist criteria in relation to "a high number of planning proposals" to be clarified to ensure this is relative to the general trend of the local government area, rather than a quantified number.

18. The proposed LEP checklist criteria include an additional criterion addressing significant rural and regional environmental, social or economic issues.

19. It be generally noted that the 'health check' of LEPs is likely to be an administrative exercise without additional strategic planning to underpin decisions about change, and as such the perceived benefit over current practice may be negligible in practice.

20. Council supports greater consideration being given to elevating the role of community-based strategic land-use policies to guide the development of localities, districts, centres or the like with the legislative instruments (LEPs) there to support their implementation with minimal interference.

21. Standardisation of DCPs and Contribution Plans undertaken progressively and consultatively where the content remains with councils is supported.

22. The detail of the standard template requirements, model provisions, technical specifications for spatial dataset and procedures for submitting and publishing draft plans on exhibition and final plans to the NSW Planning Portal is absent, yet it is apparent that it will place a resource burden on councils. In this case, Tweed Council supports progressive and sensible implementation programme in partnership with DP&E Legislative Updates and ePlanning branches, and other councils to align the model instrument template with associated spatial datasets that will enable user navigation and drive DA transactional services.

23. A similar effort to set and enforce a standard structure for Parts 6 – 8 of the Standard Instrument LEP, and for State Environment Planning Policies, would complement council's significant efforts to standardise DCPs and Contributions Plans and ensure the Planning Portal easily delivers a complete account of all planning controls that apply to a land parcel or proposed development.

24. The proposal to allow a local panel to delegate a function to the General Manager is supported, but the notion of delegating to any other staff member is not. It is preferred that the panel make a recommendation to the GM when another staff member is identified and the GM is to undertake the delegation if they consider it appropriate.

25. Directory powers to order a council or mandatory provisions for establishing a local planning panel is not supported. The proposed legislative amendments providing greater clarity about the formation of panels and the optional establishment by a planning authority is supported.

26. The requirement for a community panel member may operate to subvert the ultimate purpose of the panel: to provide expert, impartial and objective opinion. If anything it should be optional, this would allow elected Councillors to decide whether it is in their LGA's best interest to adopt that model or not.

27. The proposal to prepare reasons for decisions is generally supported however the requirement to prepare reasons should be tempered by the need to do so in every case. Threshold indicators as to when reasons might be appropriate, but maintaining the planning authorities discretion is considered a better approach, at least for a trial period to allow for a benefit cost review.

28. Statement of reasons if introduced should be applied consistently across the planning system to all planning authorities or decision-makers, including Private Certifiers.

29. That the Department be requested to consider a proportionate allocation of fees be given to Councils for their assessment functions in the new modification system for developments approved under the former Part 3A legislation.

30. Whilst Council supports the elimination of the use of Section 96 as a deterrent to unauthorised works, it is considered that the Department should further examine an appropriate remedy for unauthorised works that fall outside of development consent. Consideration should be given to a new application category that deals with unauthorised works outside the development consent that also has deterrent aspect with higher fees, notification procedures and alternate assessment timeframes.

31. Amendments to the complying development pathway are supported however, for new classes of sensitive development the limit on which only councils may certify such development should be limited to a set period. This would permit an evaluation of the implementation of these more sensitive development types and were appropriate the expansion of certification by the private certification.

32. It is requested confirmation be provided as to whether it will be the builder who is responsible for preparing the Building manual.

33. It is requested that careful consideration be given to any proposed fee structure to ensure that any Compliance Levy adequately covers the councils likely enforcement costs, and preferably that this be widely consulted with councils in advance.

34. The proposal to require a PCA to issue a notice of non-compliance is supported.

35. It is requested that conditions to be imposed on Construction Certificates apply to Class 1 and Class 10 buildings only.

References

[i] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384.

[ii] Australian Government, Department of the Environment and Energy, *National Strategy for Ecologically Sustainable Development,* (1992) accessed 21 February 2017 at: http://www.environment.gov.au/about-us/esd/publications/national-esd-strategy

[iii] NSW Parliamentary Library, Research Service, Louise O'Flynn, *Housing Affordability,* Briefing Paper No 04/2011 (July 2011), accessed 18 February 2017 at: https://www.parliament.nsw.gov.au/researchpapers/Documents/housing-affordability/Housing%20Affordability.pdf

[iv] Department of Planning and Environment, *Planning Legislation Updates - Summary of Proposals,* (January 2017) p29, accessed 13 February 2017 at: http://www.planning.nsw.gov.au/~/media/Files/DPE/Other/summary-of-proposals-2017-01-09.ashx

TWEED SHIRE COUNCIL

Planning Act Amendments 2017

Councillor Briefing Workshop

9 February 2017

background 1 of 6

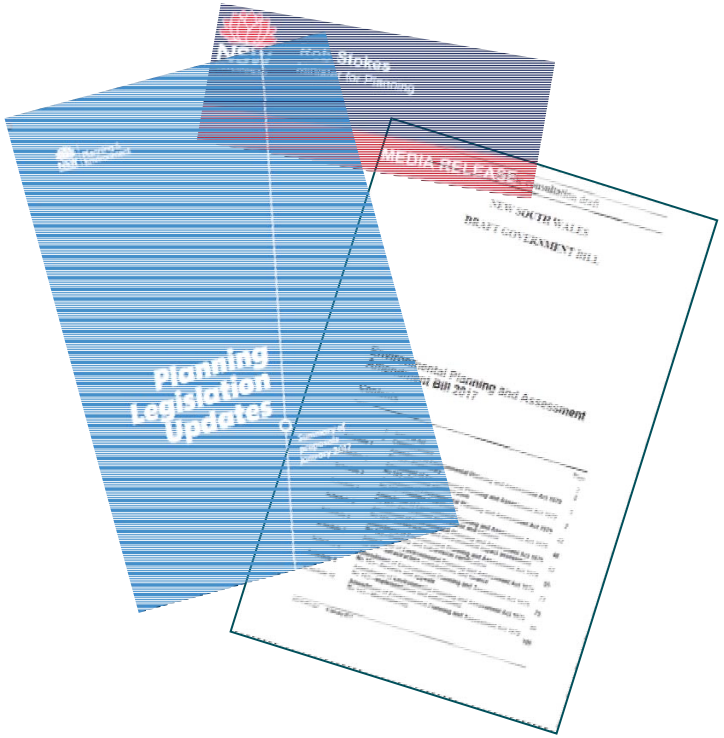
May 6, 2016 Planning Minister announces NSW Government will release legislative planning amendments to build a simpler, modern planning system

"Our amendments will focus on ensuring confidence and consistency within the planning system"

January 9, 2017 Planning Minister released details of the proposed amendments to the *Environmental Planning and Assessment Act 1979* (NSW) for consultation and public feedback

Most of the proposals are based on those 'broadly supported' as part of the failed 2013 draft Bill

Public consultation is scheduled
to close on **31 March 2017** (extended from 10 March)



background 2 of 6

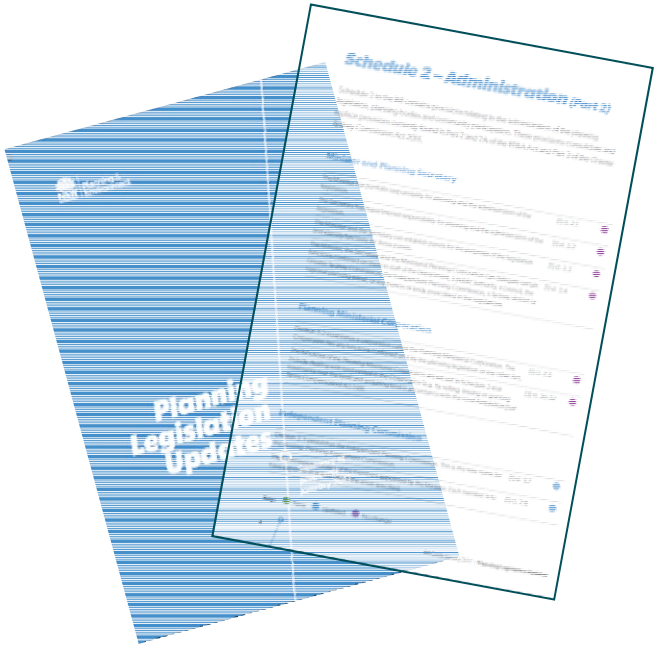
Objectives of the legislative updates

The primary purpose of this package of updates to the Planning Act is to *promote confidence* in the state's planning system, speed up approvals and reduce costs

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

It is also quite apparent that strengthening compliance and enforcement powers and reporting is similarly a key focus of the reforms

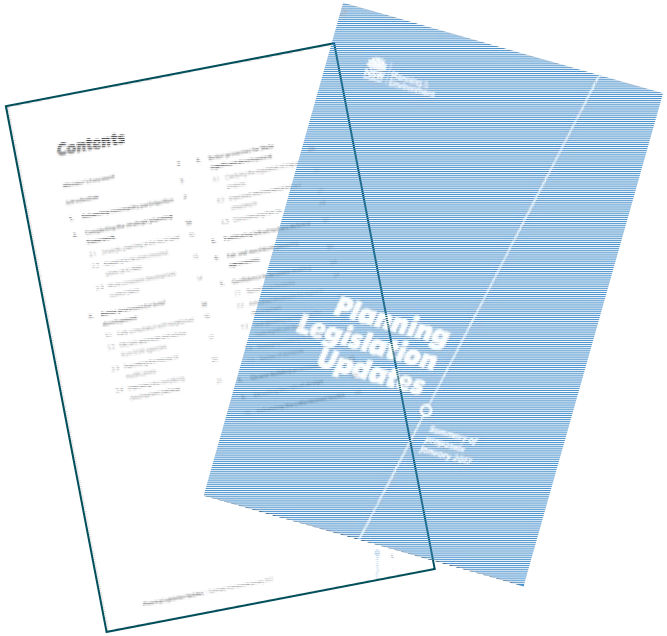


"These updates aim to build greater confidence in the planning system by enhancing community participation, strengthening upfront strategic planning and delivering greater probity and integrity in decision-making"

background 3 of 6

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

- Greater Sydney Commission (not being reviewed)
- **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. This will include the lodgement of all DAs and will be extended to include planning proposals
- **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 updates will make the system simpler and faster for all participants and help ensure that growth across NSW is carefully planned into the future"

background 4 of 6

The key objectives and initiatives of the proposals include:

Community participation	Enhancing community involvement in the key decisions that shape our cities, towns and neighbourhoods	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	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	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	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

"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"

background 5 of 6

Stakeholder engagement leading to the release of the draft legislative proposals was undertaken by NSW Planning:

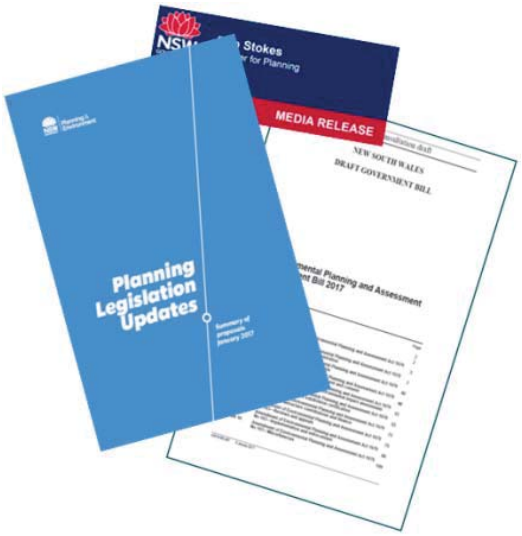
- Targeted stakeholder consultation in:
  - Sydney, Parramatta, Queanbeyan, Gosford, Newcastle, Tamworth, Griffith, Coffs Harbour, Wollongong and Dubbo
  - Discussion forums held during May and June 2016
  - Attended by more than 370 representatives of councils, practitioners, industry, environmental and community groups
  - Views of targeted stakeholders also sought through a follow-up survey, in additional to direct correspondence being received from a range of other stakeholders
- Tweed did not participate in the pre-release consultation
- A Stakeholder consultation report was released along with the draft Bill, Bill guide and summary of proposals

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

background 6 of 6

Following the same themes this workshop will speak to a sample of the key areas of interest:

- Enhancing community participation through introduction of mandatory '***community participation plans***'
- Completing the '***strategic planning framework***'; at the local planning level
- Modernising and maintaining '***local strategic planning***' policy
- Confidence in decision-making; ***'local planning panels'***
- Improving '***local development'*** processes for a simpler, faster, and transparent system:
- Improving ***'complying development'*** pathways
- Clearer ***'building approvals'*** provisions
- Enhancing ***'enforceable undertakings'*** for improved compliance outcomes
- Better processes for ***'State significant development'***



"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"

Workshop Format-Information

This workshop has been prepared to raise Councillors' awareness of the broad nature of current planning amendments under consideration for the EP&A Act

- The information is a snap-shot of select proposals
- The 'Officers' views on the suitability of the proposals is not being presented
- The Officers will answer any questions about the proposed amendments or clarify what the current rules are, where they exist
- Given the limited detail supporting many of the proposals it may not be possible to provide specifics of the impact of some proposals, as such these matters should be raised through a submission reply
- This workshop will be used to guide a submission response, which will be reported to a future Council Meeting
- A final note: the terminology, phrasing and messaging in the presentation is 'lifted' and based on the draft Planning Documents, not on the individuals views or opinions of Staff

Post workshop enquiries or suggestions should be referred to the General Manager or Director Planning and Regulation

community participation 1 of 2

New community participation plans (CPP)

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

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.

- Planning authorities must prepare a CPP
- It must have regard to the guiding principles in the Act
- They can include mandatory and discretionary provisions for setting the minimum requirements
- They may require longer periods of notification than otherwise specified in the legislation and the format for consultation
- To avoid duplication they do not need to be separate from a community strategic plan prepared under the LGA 1993 if all the same requirements are met
- CPPs can only be challenged within 3 months of their publication
- Planning authorities will be required to report on the implementation of their CPP in accordance with the Regulations

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.

community participation 2 of 2

Notices and 'reasons' for decisions

As part of the introduction of the requirement for community participation plans, it is also proposed to update the current minimum public exhibition requirements:

- It is proposed all local development will be exhibited for 14 days

Additional to public consultation is a new mandatory requirement for giving notice of specified decisions and providing reasons for them:

- Notification of decisions and reasons must be given for:
  - Development application determinations
  - Modification of development applications
  - In relation to an activity under Pt5 and when a EIS is obtained
  - State significant infrastructure determinations / mods

The statement of reasons should be proportionate to the scale and impact of the decision

- They may need to include a summary page for complex matters
- Highlight key considerations such as matters to mitigate impacts or concerns
- To be taken into account in any future decision / modification of a project

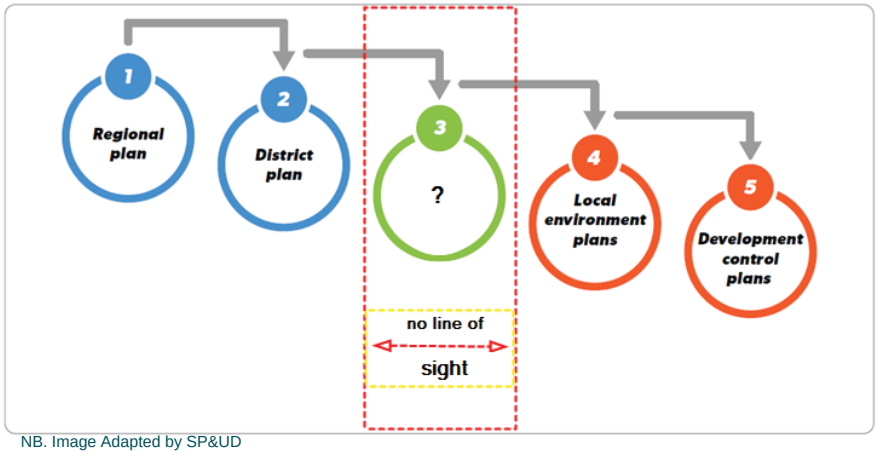
"This will help community members to see how their views have been taken into account"

strategic planning framework

A key part of the agenda for improving the NSW planning system has been to strengthen strategic planning, to create a 'line of sight' between policy

- Strategic plans set the vision and context for an area in consultation with the community
- This helps guide the efficient use of and distribution of resources
- Collaborating with community elucidates the demand for services
- Regional and District Plans are now part of the Act, these must identify:
  - The basis for strategic planning having regard to economic, social and environmental matters
  - A vision statement and objectives
  - Strategies and actions for achieving these
  - A monitoring and reporting framework
- The Act contains provisions to enable Regional Plans to be introduced in the future, to establish the line of sight between regional policy and local objectives through new local *'strategic planning statements'*

Figure 2: Completing the line of sight in strategic planning



NB. Image Adapted by SP&UD

"There is currently a missing piece of the hierarchy of strategic plans in the EP&A Act"

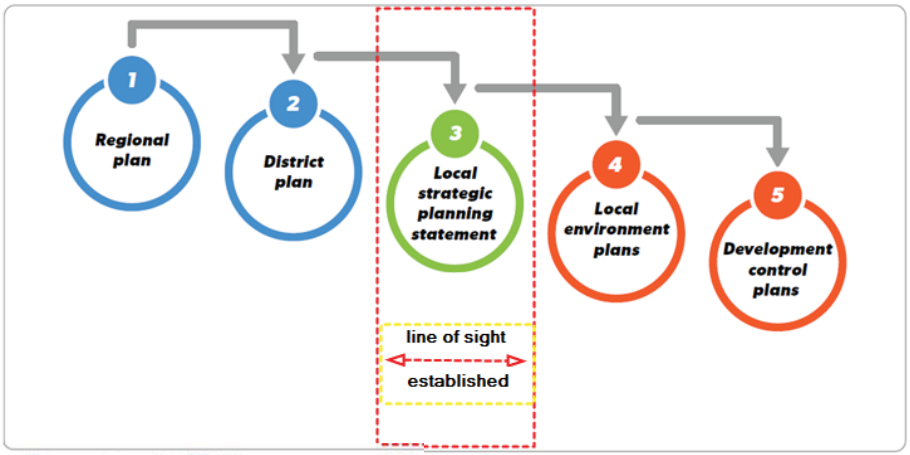
local strategic planning 1 of 4

Aligning with State and Regional Priorities

Local strategic planning statements will create a bridge between regional strategic policy and the local LEP where the objectives will be implemented

- Many Councils prepare land use strategies to inform the overarching Community Strategic Plans (LGA 1993)
- The planning amendments provide an opportunity to extend the line of sight in strategic planning from the regional to local level and at the same time draw on local land use values and priorities set out in the CSP
- They are intended to be accessible and easy for the community to understand
- They will be published on the Government's new Planning Portal alongside LEPs
- Once in place the statements will be used and considered as part of informing rezoning decisions and guiding new development
- Planning statements will provide the direction for modelling DCP controls and guidelines, for example on local character

Figure 2: Completing the line of sight in strategic planning

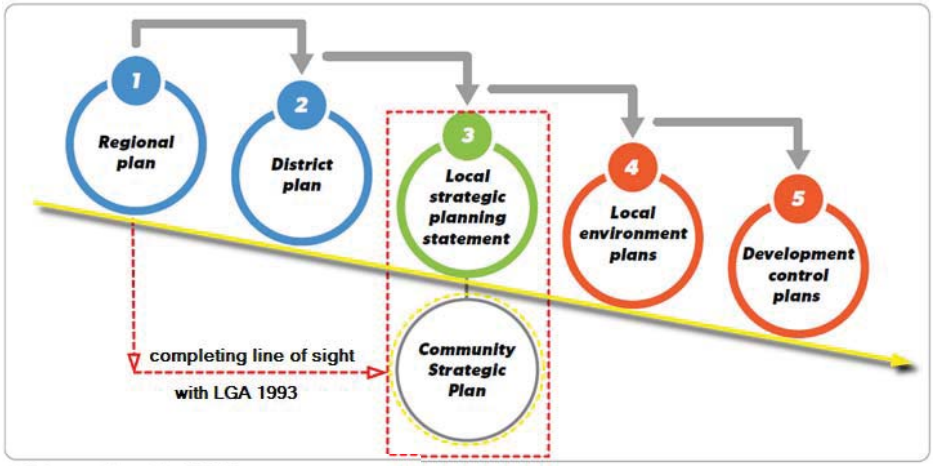


NB. Image Adapted by SP&UD

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

local strategic planning 2 of 4

Aligning Regional and Community Priorities



NB. Image Adapted by SP&UD

"The vision should reflect relevant elements of visions in both the regional plans, as well as the objectives and values in the council's Community Strategic Plan as they relate to land use"

Strategic planning must be well-connected and bridge strategic planning policy under the EP&A Act with the community strategic planning under the LGA 1993

- Planning statements tell the story and context of the local government area
- They explain how the Regional strategic priorities are given effect locally
- They align goals and actions in the CSP with the objectives and priorities in the Regional Plans and LEPs
- They will have a 20 year horizon
- To ensure statements and LEPs remain current regular audits at 5 year intervals is proposed
- Statements can be updated every 4 years to align with the integrated planning and reporting processes

local strategic planning 3 of 4

Modernising Development Control Plans

Strategic planning must be well-connected and bridge strategic planning policy under the EP&A Act with the community strategic planning under the LGA 1993

- Planning Reforms in 2006 brought about the standardisation of Local Environmental Plans across NSW
- Current planning reforms propose to standardise Development Control Plans
- These new proposals are aimed at providing consistency and ease of use
- The wide array of differing DCPs across the State in terms of format, structure, controls limits opportunity to embed these controls into the NSW Planning Portal
- Spatially representing DCPs in the Portal is important for bringing about a single point of access for information about land, and linking these meta data with the approvals pathways
- DCP provisions will remain a matter for councils

- The standard format will be developed in consultation with councils
- Tweed has already expressed an interest and held discussions with the Department about being part of a small working group
- An online library of model provisions will be developed by this working group

"This will improve consistency across local councils and improve user navigation of the planning system and its controls"

local strategic planning 4 of 4

Fair and consistent planning agreements

The legislative framework for planning agreements has been in place for over a decade and has assisted planning authorities and developers to deliver a wide range of public benefits in association with development

- The legislative framework for planning agreements is broad and flexible, and allows significant potential for innovative or unique delivery of public benefits and infrastructure
- The Government is already developing a clearer policy framework for the role and use of planning agreements, having recently exhibited a proposed ministerial direction, revised practice note and planning circular
- The Bill further clarifies and strengthens the Minister's power to make a direction about the methodology underpinning planning agreements
- Specifically the exhibited suite of draft documents recommended that councils prepare their own local 'voluntary planning agreement policy', so that the 'local' community's needs and priorities for infrastructure can be broadly defined
- Developers would know in advance the kind of public benefit that they might volunteer and that should be generally acceptable to the council
- Council's Strategic Planning & Urban Design Unit have commenced the preparation of a local 'VPA' Policy

- The DP&E has engaged with Councils regarding further amendments to the Act
- A new bill is expected to be released in coming months regarding the publication of draft DCPs and CPs on the NSW Planning Portal, and commencement of final plans only when published to the Portal
- This increases the importance of an agreed standard structure and format, and links to spatial datasets

local planning panels 1 of 3

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

- NSW Government is aiming to depoliticise and improve the thoroughness and quality of decision-making and, over time, increase community confidence in the planning system
- It believes this can be achieved through enhancing the probity and accountability of decision-making in the planning system

Changes to current Independent Hearing and Assessment Panel provisions:

- Basic rules about constitution, membership and functions
- Allow the application of consistent performance reporting requirements

Amendment Bill provisions:

The Minister or the Planning Secretary may establish the following panels as a NSW Government Agency, appoint the chairperson and other members, and specify their function, although any such panel is not subject to their direction or control:

1. Panning Ministerial Corporation
2. Independent Planning Commission
3. Sydney district and regional planning panels
4. **Local planning panels**

local planning panels 2 of 3

Better local decisions

The Government's aim is to deliver better local decisions through promoting the consistent use of local planning panels and establishing tools to ensure experts make decisions where needed

- A number of local councils over the last two decades have established independent hearing and assessment panels (IHAPs)
- Their role is to provide independent, expert advice and recommendations to councils exercising planning functions, or to exercise those functions on behalf of the council
- 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
- These are typically used to determine development applications over a certain value or which have attracted a high number of objections

The proposal is to update the existing provisions and bring all local planning panels under one framework

- In addition to the Minister being given the power to direct a council to appoint a local planning panel (where it is warranted) the council may constitute one or more local planning panels for the whole or any part of the area of the council

local planning panels 3 of 3

Composition of panels

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.

"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"

Making local development processes simpler and faster, particularly speeding up housing approvals, is one of the goals of the legislative updates

The NSW Government has committed to ensuring that 90 per cent of housing approvals are processed within 40 days, with key proposals to achieve this:

- Encouraging early consultation with neighbours (noting there is also a proposal for a 14 day public notification for all local development)
- Improving the integrated approvals process within those other approvals agencies
- Closing the loop on the retrospective approval of unauthorised development works
- Exploring incentives to encourage applicants of local development to consult early with neighbours
- Improving and expanding the use of the Planning Portal to streamline online payments to different agencies, ensuring required notifications at each stage of the process, and publication of decisions

"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"

local development 2 of 4

Secretary's 'Step-in powers'

In high natural hazard areas like Tweed it is fairly common for local development to also require a concurrence approval from a State agency, and for this to add considerable uncertainty or delay to an application

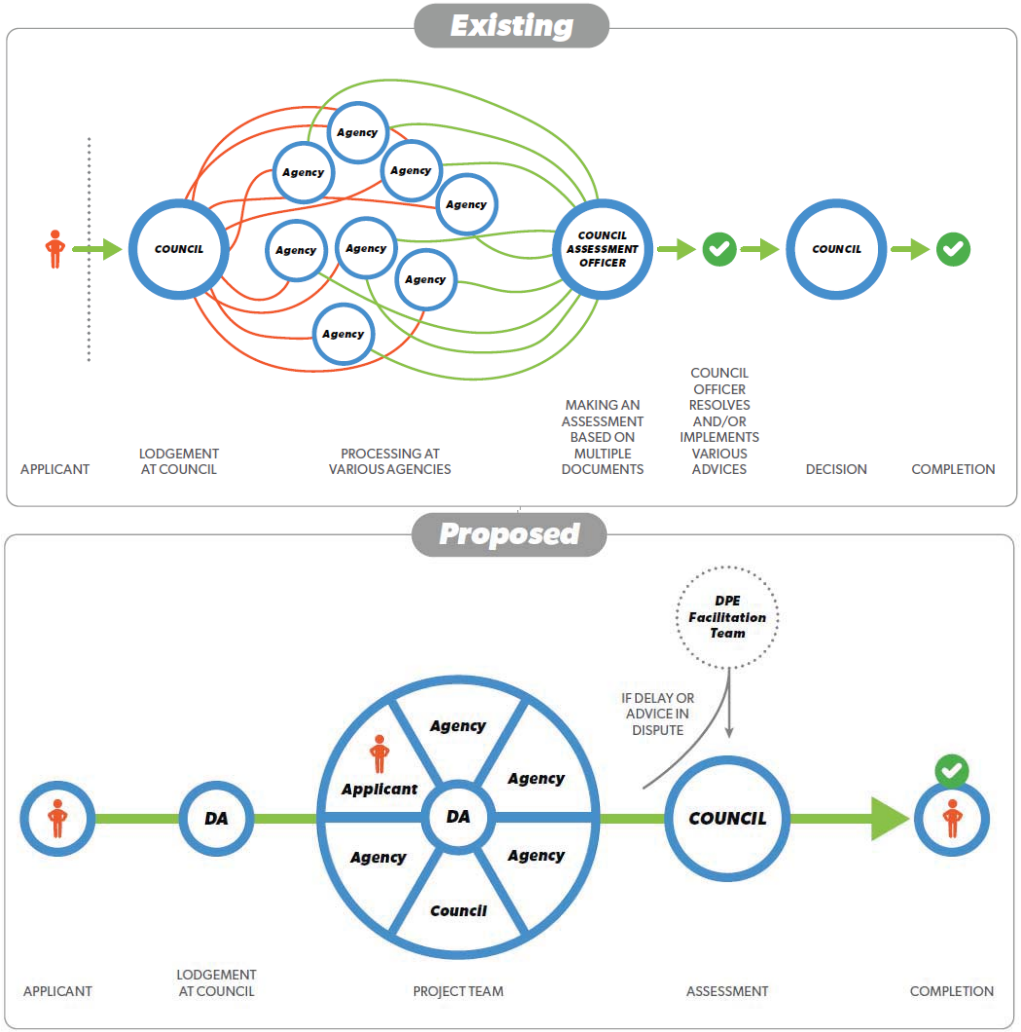
State agencies play an important role in local development within NSW providing about 8,000 pieces of advice each year. About 10 per cent takes longer than 40 days, increasing costs for applicants and in turn may deter investment

- Integrated process can be improved to make agencies more accountable
- To ensure they participate in a timely and productive manner
- There is the potential to save applicants about 11 days
- There is a proposal to enable the Secretary of the Department to 'Step-in' to give advice, concurrence or general terms of approval if:
    - An agency has not provided or refused the advice or approval
    - There is a conflict between two or more agency advices
- These are 'reserved powers' to be exercised at the Secretary's discretion
- The Secretary will have 'regard' to 'State Assessment Requirements'; a statutory policy to guide the Secretary's decisions.
- This power does not apply to State significant development or infrastructure or activities falling under Part 5 of the Act

"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"

local development 3 of 4

Figure 3: The existing and proposed concurrence and referral workflows



"We will continue to update requirements so as to minimise costs and delays for all stakeholders"

local development 4 of 4

Preventing a class of misuse of s96 Modifications identified by the L&E Court in 2000'

It is widely accepted that despite its clear purpose to modify development under a consent or correct minor errors or misdescriptions on the record, the EP&A Act has permitted the lawful retrospective approval of unauthorised works under s96 since at least the year 2000

- New legislative proposals will revert the legislation to its original intended principle and prevent retrospective approval for modification works already completed, with limited exception to correct a minor error or misdescription or miscalculation
- Unauthorised works outside of the new scope may be subject to enforcement action, such as demolition, or require a new building certificate
- In addition, there is a proposal for reasons for decision to be given (discussed earlier) and these will need to be considered when a modification is assessed and likewise reasons for the decision are recorded

"Some councils have raised concerns that there has been an increase in the number of developments that are being built without the appropriate approvals"

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.*

complying development 1 of 4

Complying development is a rapidly growing approvals pathway for development that is considered (at the State level) to be 'low impact' and is largely regulated through State Planning Policies and implemented by private certifiers and councils

- To be compliant the proposal should fully meet the standards
- This pathway leads to shorter approval times, greater certainty about permissibility and 'reduced administrative costs'
- Government recognises that current standards can be overly complex and compliance enforcement for private certifiers is confusing and sometimes ineffective
- Notable proposals to address some of the concerns with complying development include:
    - Ensuring development meets the standards
    - Amending neighbour / council notification of proposals
    - Introducing a 'sensitive' class to be certified by council only
    - A new investigations power (stop work 7 days)
    - Aligning differences between CDCs and DAs
    - Imposing a compliance levy

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*

complying development 2 of 4

Meeting the Standards

The Government proposes to amend the EP&A Act to make it clear that, where a CDC is inconsistent with the relevant standards in the State Policy, it can be declared invalid

- At present, a CDC may effectively approve development that is outside the relevant standards
- The Court has ruled that it is the accredited certifier's opinion of satisfaction that prevails so long as it is reasonable
- That means limited recourse against inconsistent CDCs 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

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*

complying development 3 of 4

Improved information for councils and neighbours

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

- CDC have been determined by the State as 'low impact' development
- Greater transparency would improve confidence in the system
- Presently the lack of information provided by certifiers makes it difficult for anyone to satisfy themselves that a proposal has met the standards
- This will be addressed by:
  - Requiring certifiers intending to issue a CDC (in metro areas) to provide information to council and direct neighbours demonstrating compliance
  - In all instances requiring certifiers after issuing a certificate to give copies to direct neighbours at the same time it is provided to council

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

- 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
- Limited to categories of development where councils are best-placed to decide whether a complying development proposal meets the standard
- Give councils increased visibility over sensitive complying development in their areas, and help them to improve their monitoring and enforcement functions.

complying development 4 of 4

Enforcement and monitoring

Councils are the responsible authority for ensuring complying development is carried in compliance with the rules, including CDCs issued by private certifiers

- This class of development occurs very quickly, limiting the time available to investigate matters of non-compliance
- It is proposed to remedy this with a new investigative power to issue a stop work order for 7 days
- the power will be limited to genuine complaints about building work **not** complying with a CDC
- To assist Councils it is proposed to establish a ‘compliance levy’ as part of the ordinary fee structure
- This levy can also be extended to development applications
- The levy will be remitted to councils to resource investigation and enforcement activity under the EP&A Act

building approvals

Conformity of and conditions on construction certificates (CCs)

At present there are varying rules operating that effectively condone if not allow inconsistency of CCs with development approvals, and that prevent conditions attaching to the CC

- There is a proposal that a construction certificate must be consistent with the development Consent, this requirement will be removed from the Regulation and inserted into the Act itself
- The Court will be given the ability to declare a CC invalid if inconsistent with the consent
- Proceedings to seek such a declaration will be limited to three months after the construction certificate has been granted
- Similarly there is a proposal to allow conditions to attach to a construction certificate
- The planning Bill amendments will bring together the key provisions relating to building regulation and certification into a single part of the EP&A Act (Part 6)
- Administration of Part 6 is to be allocated to the Minister for Innovation and Better Regulation – improving oversight of building laws within the one portfolio

"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."

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*

enforceable undertakings

This is 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

- This method provides greater flexibility to the regulating authority to achieve a suitable compliance response
- It requires the consent holder to enter into a legally enforceable agreement with the authority
- The Court can enforce the agreement if needed and raise the severity of offence of non-compliance if Orders are then breached
- It can provide a faster and more cost effective option than prosecution and lead to outcomes of remedy opposed to fines which are punitive

"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"

state significant development 1 of 2

Transferable conditions

Sometimes conditions are duplicated across more than one approval creating parallel regimes that regulate the same impacts (e.g. mining and energy projects currently have multiple agencies regulating their dust, noise, blasting, biodiversity, and other impacts); applicant at local and State level

- In these cases conditions of consent may no longer apply, because they are substantially consistent with conditions subsequently imposed under other regulatory approvals or licences
- To address this, the Act proposes the notion of 'transferrable conditions of consent', which is a practice of allowing a subsequent regulatory authority to impose its requirements at the later time when granting another regulatory authorisation (eg. environmental protection licences or mining lease)
- This means the 'condition of consent' is effectively updated over time without actually amending the original consent, which would need to be sought by the person having the benefit of that approval
- Responsibility for enforcing these conditions will then lie with the NSW Government agency regulating the licence, lease or other approval rather than the original consent authority
- This does not change the requirements when determining a development application; conditions of consent will still need to address the impacts of the development as a whole at that time

"The change will also remove confusion regarding which government agency is regulating which aspect of the development"

state significant development 2 of 2

Discontinuing Part 3A

In 2011, the NSW Government repealed Part 3A of the EP&A Act, 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 on 1 October 2011

- Part 3A continues to apply to certain projects approved or pending at the time of its repeal
- Modifications to applications previously approved under Part 3A are still being accepted; they are subject to a much broader modification power (section 75W) than under the SSD provisions of the EP&A Act (section 96), which requires development to be 'substantially the same' as the development originally approved
- It is proposed that the the transitional arrangements in the EP&A Act will be repealed
- Current Part 3A projects will be transitioned to a new development pathway as illustrated in Box 8, once it is discontinued
- the ongoing effect of approved Part 3A concept plans will be preserved

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

Answers?