THE NSW PLANNING SYSTEM:
A WAY FORWARD

Paper prepared by the NSW Division of the Planning Institute of Australia.
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The Planning Institute of Australia (PIA) is the peak body representing professionals involved in planning Australian cities, towns and regions. The Institute has around 4,500 members nationally and around 1,300 members in New South Wales. PIA NSW plays key roles in promoting and supporting the planning profession within NSW and advocating key planning and public policy issues. This paper has been prepared on behalf of PIA NSW by Members of the Institute.
The NSW Planning System: A Way Forward

1. Introduction

The Planning Institute of Australia (NSW Division) is pleased to have the opportunity to make this submission to the NSW Government’s review of the NSW Planning System.

Whilst this submission deals specifically with the new planning legislation, PIA’s view is that legislative reform is only one of the elements of the wider planning reform exercise that is urgently required in NSW. The complete package of planning reforms, which PIA submits should be undertaken concurrently are:

1. The planning legislation review.
2. A comprehensive (appropriately resourced and administered) strategic planning policy formulation process driven from the State and regional planning levels.
3. A comprehensive review of governance arrangements affecting all planning functions on a whole-of-government and local government basis.
4. A comprehensive program to promote positive cultural change within State and local planning and planning related authorities to set the framework to enable a new Act to be most effectively and efficiently implemented.

The Government has requested those making submissions to give consideration to key areas, relating to:

- the objectives and philosophy of a new legislative structure,
- plan making,
- applications for development, and
- conciliation, mediation, neutral evaluation, review or appeal.

We have structured our submission around these 4 key areas, addressing them specifically in Sections 2 to 5. We have also addressed the additional issues of governance and administration and funding in Sections 6 and 7. These latter topics are inextricably linked to the 4 key subject areas, but we consider they warrant separate attention.
2. **Objectives and Philosophy of the Act**

2.1 **Key Issue**

*What should be the underpinning objectives and philosophy of a new legislative structure?*

2.2 **Scope and philosophy of a new Planning Act**

Planning and planning related functions are embedded in a wide range of Acts and regulations of the State, not just the Planning Act. A precursor to any legislative review is to determine the scope of matters and functions addressed within the Planning Act. PIA does not envisage that every planning related function will be incorporated in the one Act, else it will become completely unwieldy. Rather it should seek to ensure that the Planning Act retains primacy for whole of government planning functions and those other Acts and regulations with planning functionality are consistent with and generally subservient to the Planning Act.

Prior to the NSW Election, PIA outlined a number of overarching principles for a new Act (in contradiction to the current Act), which remain valid:

- A logical structure and easily understood provisions;
- Meaningful objectives that the rest of the Act is geared towards achieving, not just a series of ‘motherhood’ statements;
- The ability to proactively and quickly respond to changing circumstances without endlessly changing the Act;
- Processes (for plan making, consultation, appeals, development assessment) the complexity of which is proportionate to the complexity of the issue;
- Roles and responsibilities of decision makers logically and clearly defined;
- Procedures that promote co-operative rather than adversarial decision making;
- Requirements for strategic plans that balance and properly integrate State and local, public and private interests and are accompanied by administrative and funding strategies that facilitate their achievement over time;
- Development decisions guided by those strategic plans rather than vice versa; and
- Development decisions based on merits rather than legalities, and outcomes rather than processes.

This submission outlines a series of propositions as to how these principles might be given expression under the new Act. In so doing, it is PIA’s position that whilst the current Act is flawed, not every aspect of it is flawed and indeed many aspects are operating effectively and have been tried and tested in the Courts. PIA considers that effective elements of the current Act may be carried forward. However, the new Act cannot be a simple ‘rebadging’ of the current one. The new Act requires a fundamentally new and different emphasis and those elements carried forward must ‘bend to’ that new form, not *vice versa*.

Whilst the submission is divided into distinct discussion topics (addressing the key issues of the Review and broadly representative of the main Parts of the current Planning Act), these should not be viewed as separate and exclusive parts of the new Act. Indeed, a major premise of our submission is that all parts of the Act are necessarily integrated.
Planning involves, simply put, managing societal progress from where it is now to where the community desires it to be in the future. The provisions of the Planning Act should be directed to facilitating tangible planning outcomes and not focus on processes and prohibitions.

Consequently, this submission places the emphasis on plan making and plan implementation. Most other elements of the Act (including assessment, funding and administrative activities associated with public and private infrastructure and development projects) are necessary, consequential functions in the plan implementation process, not separate, unrelated activities. We see the Act containing enabling provisions (not policy content which should be left to delegated instruments) covering the following activities:

<table>
<thead>
<tr>
<th>Function</th>
<th>Elements of the function</th>
<th>Provisions of the Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning</td>
<td>Identify desired future outcomes &amp; how those outcomes are to be achieved</td>
<td>Establish a vertically integrated hierarchy of Strategic Plans (State, regional, local), prescribing:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Content</td>
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<tr>
<td></td>
<td></td>
<td>▪ Plan making processes (including public participation)</td>
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<td></td>
<td></td>
<td>▪ Roles and responsibilities for implementing the Plans (whole-of-government involvement, levels of government &amp; private sector)</td>
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<td>▪ Funding mechanisms to implement the Plans (public and private)</td>
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<td>▪ Performance monitoring mechanisms</td>
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<tr>
<td>Design</td>
<td>Guidelines for designing places, infrastructure and development</td>
<td>Prescribed contents and plan making processes for design guidelines (for public and private development, public domain and infrastructure)</td>
</tr>
<tr>
<td>Permissions to proceed</td>
<td>A system of permissions to proceed with public and private development</td>
<td>Establish an ‘tracked’ assessment system for proposed development and infrastructure based on the complexity and impact risk profile, including:</td>
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<tr>
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<td>▪ Prohibited development</td>
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<td>▪ Exempt development</td>
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<td>▪ Certified development</td>
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<td>▪ Assessable development</td>
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<td>▪ Application requirements for each application track</td>
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<tr>
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<td></td>
<td>▪ Assessment/consent roles and responsibilities</td>
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<tr>
<td></td>
<td></td>
<td>▪ Certification systems</td>
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<tr>
<td></td>
<td></td>
<td>▪ Process and public participation requirements</td>
</tr>
<tr>
<td></td>
<td></td>
<td>▪ Assessment criteria (by reference to Plans, Guidelines and impact assessment)</td>
</tr>
</tbody>
</table>
Permits and conditions

Review and appeal processes

**Construction**
- Systems to ensure construction standards are adequate
- Provisions relating to construction processes and standards

**Enforcement**
- Systems to regulate and control breaches of the Act
- Provision including:
  - Fines
  - Orders
  - Legal action

In line with our earlier comment on the scope of the content of the Planning Act, it is arguable that the last two elements in this table, construction and enforcement, could conceivably be removed from the Planning Act to separate Acts (e.g. all environmental enforcement mechanisms could be incorporated in the Protection of the Environment Operations (POEC) Act 1997. There are arguments in favour and against removing these elements from the Planning Act and whilst raising the issue for consideration through the reform process, PIA does not have a settled position on it at this stage.

2.3 **Objectives - general propositions**

PIA considers the role of the objectives of the Act should be to:

- Define the scope of the Act.
- Provide relevant, meaningful and (where practicable) measureable objectives to guide the substantive provisions of the Act and delegated instruments.
- Provide a means by which actions under the Act will be monitored and measured.

All substantive provisions of the Act and delegated instruments under the Act should have a direct link to one or more of the objectives.

Following are some examples of objectives, relevant to the various elements of the Act discussed in the submission.

2.4 **Example objectives**

**Scope of the Act**

To establish an Act to:

- Manage the interrelationships of land uses, resources and the environment within the State.
- Strategically plan for future growth and change within the State.
- Support the timely delivery of public facilities, infrastructure and services to meet community needs.
- Promote sustainable development.
- Regulate construction and subdivision activity.
- Provide mechanisms for judicial and other reviews of decisions made under this Act.
- Provide for the enforcement of this Act.
• To provide appropriate funding and governance mechanisms to support this Act.

**Strategic Planning objectives**

To establish a hierarchy of ‘vertically consistent’ and compatible State, regional and local planning policies that:

• Identify and provide appropriate protection of the natural and built heritage of the State.
• Identify and plan for the implications of changes to the natural environment and climate over time.
• Identify and plan for the implications of changes in human activity over time.
• Facilitate productive, competitive and livable communities with access to jobs, infrastructure, affordable housing and services.
• Promote the retention and growth of productive rural and urban industrial capacity.
• Identify how plans and policies will be implemented and their performance measured.
• Promote sustainable development, balancing environmental, social and economic factors to best serve the public interest.

**Development and conservation objectives**

• To promote development consistent with the achievement of State, regional and local planning policies.
• To promote development that appropriately balances public and private interests.

**Administrative objectives**

• To provide guidelines for administrative decision making that promote certainty, whilst maintaining merit based and flexible assessment of activities under this Act (where applications are required).
• To promote the simplest and most efficient and effective administrative and regulatory processes and policies commensurate with the level of potential risk and impact associated with the matter being handled (including the extent of public notification, consultation, delegated decision making and the like).
• To co-ordinate and integrate, where practicable, decision making on planning and development matters across all agencies with roles and responsibilities affecting land use planning within the State.
• To encourage public involvement in policy making.

**Funding objectives**

• To establish clear and certain funding mechanisms for activities under this Act.
• To ensure that all policies made under this Act include provisions which identify the means by which the administrative processes and outcomes of those policies are to be funded over their operational life.

**Enforcement and review objectives**

• To establish a review system for administrative decisions made under this Act.
• To establish a system through which compliance with this Act may be subject to judicial or other enforcement.
3. **Strategic Planning**

3.1 **Key Issue**

*How should plan making be undertaken - at what levels and what are the types of plans that should be made; what participatory rights should exist during the plan making process; how should the plans that are made give effect to the philosophy and objectives underpinning the legislative framework; and what other instruments and the like should be used?*

3.2 **General propositions**

- Proper strategic planning is fundamental to a successful planning act.

- Leadership from State Government and the Department of Planning & Infrastructure needs to be provided in the form of costed, evidence based and clear strategic plans that are transparently made, considered and adopted so as bind all lower order plans and other government agencies in so far as their decisions relate to ‘higher order’ planning considerations.

- Minimum requirements for plan making, consistent across all levels of plans, should be established incorporating best practice such as the European Strategic Environmental Assessment (SEA) approach.

- Public participation and government agency ‘sign off’ in strategic plan making is fundamental. This will reduce issue by issue debate and considerations as part of individual development assessment and will allow appropriate ‘Exempt and Certifiable’ development to be identified (see Chapter on development assessment).

- Funding mechanism for the achievement of the planning outcome for each plan is to be considered and incorporated into each relevant plan. These funding mechanisms need not require developer contributions but should identify where the funding will derive from (and if provision has been made for it). This will require agencies such as Treasury and the RTA etc to be involved in the preparation and ‘sign off’ of the plans.

- All property information, planning related data and planning controls should be accessible from a central/State Government maintained data management system, freely accessible to all agencies and the public. This information should form the platform for wider ‘e-planning’ applications across the State.

3.3 **Introduction of a hierarchy of plans and cornerstone plans**

- A new Act should provide for a hierarchy of plans (all of which have statutory force and are binding in nature and on those plans below them in the hierarchy).

```
A State Plan
  ↓
Regional Plans
  ↓
Local Plans
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State Plan

- A State Plan would be a cornerstone planning document that is prepared by the Department of Planning & Infrastructure with government agencies and endorsed\(^1\) by an Independent Professional Commission (potentially following public hearings). The State Plan would then be adopted or endorsed by Parliament. This would ensure that the State Plan would become a key planning document that (like legislation) will exist and maintain its status through successive governments.

- The State Plan will identify the ‘big planning’ issues for NSW including for example:
  - The planned NSW population for the next 25 years;
  - The planned distribution of population within NSW;
  - The location of capital and regional cities;
  - Matters such as transport, industry and employment strategies for NSW;
  - Major infrastructure to be developed between and connecting regions; and
  - Natural resource management, water supply, etc.

- All regional and local plans will need to be consistent with and facilitate the State Plan.

Regional Plans

- Regional Plans will be prepared by the Department of Planning & Infrastructure in consultation with Councils and will be made by the Minister. The Act should provide for a Sydney Metropolitan Plan which should establish itself as an enduring plan for Metropolitan Sydney\(^2\).

- Like the State Plan there should be ability for significant public debate and potentially public hearings and endorsement by the Independent Professional Commission. This level of debate and rigour is necessary in order to fulfil the binding nature of the Regional Plans on other government agencies and subsequently upon local plans.

- The regional plans will identify and set regional objectives and outcomes, including:
  - Dwelling and employment targets and requirements;
  - Broad regional land use plans designed to achieve these targets and requirements;
  - Regional infrastructure needed to meet these targets and requirements; and
  - Funding models and methods.

Local Plans

- Local Plans will be prepared by local government (consistent\(^3\) with and to facilitate the relevant regional plan)\(^4\). The Minister will ensure consistency with relevant regional plans and must give concurrence to Local Plans prior to coming into operation.

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\(^1\) See for example, the right of veto to Regional Plans in section 56 of the Western Australian Planning and Development Act 2005.

\(^2\) See for example, Perth Metropolitan Regional Scheme. Gazetted in 1963 and still the primary Perth Planning Document.

\(^3\) See for example, the requirement for all local plans to be amended within 90 days of the making of a regional plan in order to be consistent (section 29 of the Sustainable Planning Act 2009 (Qld)).

\(^4\) The relationship of Local Plans under the Planning Act with Community Strategic Plans developed under the Integrated Planning and Reporting requirements of the Local Government Act 1993 should be considered.
Whilst public participation in local plans is essential, there will be circumstances where the amendment of a local plan to respond to a change in a regional plan will not require public review. This is consistent with the principle that public consultation and consideration will occur at the regional planning level and consideration of the same issue (once determined) at the local plan level is not warranted.

3.4 A focus on strategic planning

- In the preparation of Regional and Local plans, the Act should provide for a requirement to engage in strategic planning in the preparation of plans\(^5\). The Act will set matters prescribed to enable good planning in regional and local plans. Whilst the Act should be an enabling Act, there must be a general level of matters that need to be addressed in each plan to ensure that real strategic planning is undertaken. This will better ensure consistency of plan making between governments and from Council to Council.

- In addition to strategic planning matters, the Act should require mandatory provisions for:
  - Funding and governance within regional and local plans;
  - Roles and responsibilities for implementing the plans;
  - Measurable KPIs for all plans;
  - Review for all plans; and
  - Annual Plan Reporting Mechanisms (similar to annual reporting requirement for local government under LGA 1993 and POEA 1997).

3.5 Whole of government commitment to plan making

- A key requirement of State and Regional plans will be the fact that they will be prepared with and conjunction with other government agencies such that on adoption they will bind other government agency decisions and policy as they relate to planning matters.\(^6\)

- Agency review and signoff (even if by way of veto) is to be sought at the plan making stage to reduce and discourage ongoing policy assessment on a development by development basis.\(^7\)

- The Act will require Treasury to cost State and Regional Plans and provide for or identify funding mechanisms required to deliver plans (including private or public funding). These funding mechanisms will be identified with each of the relevant plans. A similar costing and auditing approach (not necessarily by Treasury) should apply to local infrastructure at the local plan level.

\(^5\) See for example section 20 and section 88-90 of Sustainable Planning Act 2009 (Qld).

\(^6\) For example, see section 2.5A of the Integrated Planning Act 1997 (Qld). Regional Plans including the SEQ Regional Plan binds all state agencies.

\(^7\) For example see EPA review and sign off of Regional Plan in WA pursuant to section 38 and 39 of the Planning and Development Act 2005 (WA).
3.6 Principles for development plans and guidelines

- All information on development for any parcel of land is to be contained in the following documents:
  - Local Environmental Plan, which incorporates regional policy development requirements and high level planning controls (land use criteria, density, infrastructure requirements etc). Also identify applicable development track for types of development on sites, including consent authority, and
  - Local Development Guidelines, which contain more detailed guidelines and procedural requirements.

- Current “development controls” in LEPs and DCPs are often couched in negative terms; what cannot be done through strictly legally defined terms and (not always but often) a ‘tick the box’ assessment approach against multiple numerical and other standards. This may be designed to provide certainty for the participants in the system, but is often aimed at preventing the ‘lowest common denominator’ development rather than facilitating good development. Clearly this hasn’t happened, with applications of moderate complexity often determined on a legal definitional rather than a planning merit basis and excessive time and money spent to obtain uncertain outcomes, the planning outcomes of which often have not benefited from the process. Legal challenges (often on legal drafting and procedural issues) are many.

- Drafting should be facilitative not wholly negative. Identify what are the desired outcomes.

- Limit prohibited development as much as possible. Fundamentally inappropriate uses should be prohibited, but most inherently unsuitable land use types will not pass a merit assessment and do not require outright prohibition. On the other hand, it enables some uses that may fall into an otherwise prohibited land use that have merit, to be assessed subject to more onerous assessment pre-conditions, rather than requiring unnecessarily time and cost consuming rezoning processes.

- LEP’s should outline desired settlement patterns, the ‘carrying capacity’ of the land, rural and other economic activity areas, social and physical infrastructure, environmental and heritage protection etc. Land uses should where ever possible carry their plain English meaning. Development assessment should be based principally on planning merit not legal advice to determine permissibility and procedures.

- It is appropriate to establish some base line standards (such as density and height) to provide ‘valuation certainty’ on land, however development guidelines should be more performance based rather than prescriptive – approval should be relatively certain if performance standards are achieved rather than only if all the reasons for refusing the application have been avoided.
4. Development Assessment

4.1 Key Issue

How should applications for proposals for development be assessed and determined - including whether or not there should be different streams for different types of development proposals; who should make the decisions and at what level should those decisions be made; and what external rights for participation in the assessment system should be provided for other persons or interest groups?

4.2 General propositions

- The key to a successful development assessment system lies in well formulated strategic plans (see “Strategic Planning” Section). This discussion paper assumes that this is the case.

- Development assessment should generally be led by strategic planning, not lead it. This creates certainty and consistency at the assessment stage for developers and communities. However, the development assessment system should allow enough flexibility to accommodate ‘good ideas’ that were not anticipated at the strategic planning stage, subject to appropriate checks and balances.

- Avoid the use of the term Development “Control,” which connotes ‘restricting’ all development, when the aim should be ‘facilitating’ appropriate development.

- Provisions relating to all forms of development assessment should be encompassed within one overarching assessment system within the Act (no separation into the current Parts 3A, 4 and 5).

- Specific information on development assessment criteria, consent authority, process and public participation requirements for all development on any parcel of land to be contained in one Local Environmental Plan and one Local Development Guideline (see more discussion below).

- The extent of required development assessment should be commensurate with the risk associated with the development. Risk includes potential environmental impacts or departures from established strategic policy settings. Assessment criteria, procedural requirements, and public scrutiny become progressively more rigorous as the risks become greater.

- A track/stream assessment system based on these principles should be adopted (see table over page).

- Certification of specified quantitative and objective criteria should be permitted and automated/electronic application systems encouraged (see more below).

- BCA compliance, structural engineering etc should remain as a separate certification system and not be considered at the development assessment stage.
4.3 **Development Tracks**

Our suggested tracks (based on a modified form of the DAF recommendations\(^8\)) are set out below:

<table>
<thead>
<tr>
<th>Development type</th>
<th>Requirements</th>
<th>Public notice</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Exempt</strong></td>
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<tr>
<td>Applies to development that has low impact beyond the site and raises no policy considerations.</td>
<td>No application, assessment or consent needed.</td>
<td>Nil</td>
</tr>
<tr>
<td><strong>Prohibited</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Development that cannot proceed because it is fundamentally inappropriate in the relevant context.</td>
<td>No application, assessment or consent needed.</td>
<td>Nil</td>
</tr>
<tr>
<td>Prohibited development should be limited to as few as possible fundamentally inappropriate uses.</td>
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<tr>
<td><strong>Certifiable</strong></td>
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<td></td>
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<tr>
<td>Combines DAF’s ‘Self assess’ and ‘Code assess’ tracks.</td>
<td>Requires assessment against a set of quantitative criteria (in all cases) and performance based criteria (in some cases) which, if met, can always proceed under a standard consent. Assessment certified by private certifier or consent authority.</td>
<td>Nil</td>
</tr>
<tr>
<td>May include larger range of activities undertaken by State or local authorities than apply to private developments.</td>
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<td></td>
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<tr>
<td><strong>Assessable</strong></td>
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<tr>
<td>Combines DAF’s ‘Merit’ and ‘Impact assess’ tracks.</td>
<td>Requires assessment against a set of quantitative and performance based criteria which may be certified by private certifier as being met and if so, require no further assessment against those criteria. Also requires merit and impact based assessment undertaken by consent authority. Application requirements, assessment criteria, process requirements and consent authority will vary depending on the risk profile and/or policy non-compliance of the development (see below).</td>
<td>Public notice may be needed based on adopted policy of consent authority.</td>
</tr>
</tbody>
</table>

4.4 Certifiable elements of development

- For all tracks requiring any form of review against quantitative and objective criteria, compliance may be certified by an accredited certifier. Certifiers should hold Certified Practicing Planner (CPP) accreditation (for quantitative and objective development criteria) or Building Practitioners Board (BPB) accreditation (for quantitative and building/BCA criteria).

- In the case of the “Certifiable Development” track, this is the whole development. Certification would enable construction to proceed. In the case of “Assessable Development” this certification would be the first element of the assessment (the other being the merit assessment by the consent authority). Those elements that may be certified are zoning and numerical guidelines such as building height, setbacks, floor area etc. Once certified, the consent authority must accept the certified information.

- This certification process lends itself to an electronic system (similar to BASIX certification). Certifiable components of Statutory Plans should be contained electronically and calculations by the certifier are entered electronically against each component. Certifiable development certificates could be generated automatically on this electronic platform.

4.5 “Assessable development” procedures

- An example of how a system for “assessable development” that matches procedural requirements to the risk profile of the development might operate is shown below.

<table>
<thead>
<tr>
<th>Potential profile</th>
<th>impact/risk</th>
<th>Assessment requirements</th>
<th>Assessment/consent body¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low-moderate/local</td>
<td>Low-moderate/local</td>
<td>Lodge with Council Limited if any public notice Assessed against local assessment criteria (with incorporated regional requirements)</td>
<td>Council delegate</td>
</tr>
<tr>
<td>High/local</td>
<td>High/local</td>
<td>Lodge with Council Public notice Assessed against local assessment criteria (with incorporated regional requirements) Mandatory independent review and public hearing if development identified as being generally not suitable on that land</td>
<td>Council or Independent Local Assessment Authority (may be delegated if IHAP/public hearing not required)</td>
</tr>
<tr>
<td>Local policy variation</td>
<td>Low-high/regional</td>
<td>Lodge with Council or State Planning Department (TBC) Primary assessment against Regional policy and assessment criteria, secondary consideration against local assessment criteria. Public notice Mandatory independent review and public hearing if development identified as being generally not suitable on that land</td>
<td>State Planning Department or Independent Regional Assessment Authority (may be delegated to Council if IHAP/public hearing not required)</td>
</tr>
<tr>
<td>High/State</td>
<td>High/State</td>
<td>Lodge with State Planning Department</td>
<td>Minister for Planning or</td>
</tr>
</tbody>
</table>
Primary assessment against State and regional policy and assessment criteria, secondary consideration against local assessment criteria

Public notice

Mandatory independent review and public hearing if development identified as being generally not suitable or prohibited on that land

1. Indicative only, delegations levels generally not appropriate for inclusion in Act. In all cases private certification of compliance with quantitative and object development criteria is possible.

- External referrals are generally not required because LEP & LDG are required to incorporate standard State authority conditions (see “Strategic Planning” discussion). Referral is only required where development seeks to vary standard State authority conditions. Deemed approval if no response (allowing for requests for additional information which ‘stop the clock’) is received within designated time.

4.6 Types of Assessable Applications

- At the applicant’s discretion, approvals may be sought for:
  - Partial consent, or
  - Full consent.

- An applicant may choose only to apply for consent for certain elements of a proposal. The approval authority cannot require additional information on matters for which consent is not sought. If partial consent is granted, a separate (full) consent is required before the development can commence. A complete assessment of the full DA is required, but the development cannot be refused on grounds involving a matter for which partial consent has been granted. The purpose is to enable applicants to obtain certainty over certain aspects of a development without necessitating the full documentation required for a full DA. Examples might be:
  - Consent may be requested for a building envelop on the land which may vary the height limit for the area. The consent authority may require information on shadowing or view loss, but cannot request information on traffic, drainage or other matters not related to the issue of building height. A full DA for a building for which partial consent for a building of a certain height has been obtained can be refused for any reason except the height of the building.
  - A permit may be required under other Acts (currently ‘integrated development’). The applicant may seek partial consent which does not include that other permit. The full consent will not operate until that third party agency permit is issued.

- Crown agencies should retain a right to challenge Council decisions on refusals and conditions and may escalate unresolved disputes to State Planning agency or Independent Professional Commission for resolution.
5. **Appeal / Review Rights and Enforcement**

5.1 Key Issue

*What should be the availability of conciliation, mediation, neutral evaluation, review or appeal from determinations concerning development proposals and at what stages during the assessment and determination process should they be able to be accessed and by whom?*

5.2 General propositions

**Underlying purpose of appeal/review rights**

- Appeal/review rights are necessary in a public law statute such as a Planning Act in order to ensure integrity, certainty and public confidence in the planning system. There should be a correlation between an appeal right and the risk of a decision undermining the integrity, certainty and public confidence in the planning system.

**Appeals by applicants**

- Applicants require certainty of process. Certainty about the outcome of a determination may not be possible, however economic development requires the right to have a decision determined by an independent arbitrator. Development application determinations for more complex proposals involve a high degree of discretion. An appeal right is a means of providing an applicant certainty about how that discretion will be exercised and by whom. For that reason an applicant for consent should have a right of appeal, on the merits, against a consent authority’s determination of a development application.

- The ability for applicants in a merit appeal to amend a development proposal during the course of the appeal continues to have the potential to undermine public confidence in the appeal process. To the extent that this can be addressed in the Planning Act (as opposed to the Court Act and case management procedures) mechanisms need to be considered that encourage applicants to exhaust all possible amendments at the DA stage.

- A right of merit appeal against refusal of a CDC application may not be necessary given that CDC applications are assessed against objective criteria and the risk of a poor discretionary decision is limited. There are disadvantages in allowing appeals against refusals of CDC applications: certifiers could be discouraged from offering services if they are at risk of the expense of defending an appeal. Certainty for applicants can be provided in other ways such as a statutory obligation on a certifier to issue a CDC if a proposal complies with the objective criteria.9

- Applicant initiated requests to modify Strategic Plans should not be subject to merit appeals. In Chapters 3 and 4 we proposed that prohibitions in Strategic Plans are strictly limited to manifestly obnoxious uses. Consequently, unlike the current statutory planning system which places restrictive zonings and legal permissibility at the front end of development assessment, planning merit should be the primary determinant of development assessment. If that system is adopted in the new Act, appeals against ‘spot rezonings’ would be unnecessary. All other (non-prohibited) uses will be generally subject to appeal rights.

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9 See for example s85A(7) of the EP&A Act
• Should instead, prohibited uses remain prevalent, there should be a right of appeal by an applicant in respect of spot rezoning decisions, since they are effectively development assessment rather than strategic planning decisions.

• The right of review to the consent authority, such as currently provided by section 82A of the EP&A Act, should continue in a new Act. Section 82A is working.\(^\text{10}\) An application for review of a decision is less costly than court proceedings and allows the applicant and consent authority to maintain control of the process and outcome. Barriers\(^\text{11}\) to applications for internal review should be removed.

• That appeals should be determined against the same policies and objective rules and tests as the original decision is supported but will require legislative intervention to overturn current case law that requires applications to be determined against the law as it exists at the time of determination of the appeal.\(^\text{12}\)

### Third-party appeals – judicial review

• A third party should have open standing to question the validity of any administrative decision purportedly made under a new Act. This reflects the common law and ensures public confidence and integrity in the system. The current appeal provision in section 123 of the EP&A Act should be carried through in some form to a new Act. There should be no exclusions.

### Third-party appeals - merits

• A third party right of appeal on the merits may be necessary to ensure public confidence and integrity in the planning system. A right of appeal by a third party may be appropriate for development:
  - where the risk of corruption is high;\(^\text{13}\)
  - that departs, significantly, from policy;
  - that falls within a “conditional permissibility” category of development.

• Third party appeals should not be permitted where:
  - Discretion is limited (ie for development assessed against objective criteria).
  - Development has undergone a rigorous consultation process, such as a public enquiry, and the 3\(^{rd}\) party did not make an objection at the public consultation stage.\(^\text{14}\)
  - The 3\(^{rd}\) party is a trade competitor or has no interest affected by the decision.
  - The appeal is assessed to be vexatious.

• Some Australian states have very liberal 3\(^{rd}\) party merit appeal rights. Victoria for example, allows appeals against almost all decisions to be appealed by a third party and, consequently, has a significant number of appeals.\(^\text{15}\) This requires an extremely efficient appeal process, which is administered by the Victoria Civil and Administrative Tribunal.

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\(^{10}\) Department of Planning Development Performance Monitor.

\(^{11}\) Such as the exclusion of applications for integrated development from the right of review.

\(^{12}\) Sofi v Wollondilly Shire Council (1975) 31 LGERA 416

\(^{13}\) In 2007 ICAC recommended 3\(^{rd}\) party merit appeals for DAs: relying on significant SEPP 1 objections; where a council was both applicant and consent authority or on land owned by the Council; involving major and controversial development; involving planning agreements.

\(^{14}\) See for example section 75L of the EP&A Act

\(^{15}\) in 2009-2010 the relevant Tribunal in Vic dealt with 3,326 appeals compared to 577 in NSW and 679 in QLD
The practices and process of the NSW Land and Environment Court (which result in time consuming and expensive appeals) do not presently engender themselves to a significant enlargement of 3rd party appeals, without the potential of bogging down decision making.

- That appeals should be determined on an inquisitorial rather than adversarial basis is beyond the scope of a Planning Act. Amendments to the Court Act coupled with changes to the Court rules and practices to implement such a system are endorsed.

Conciliation, mediation, neutral evaluation

- Processes such as conciliation, mediation and neutral evaluation should continue to occur in a formalised manner under the Land and Environment Court legislation and associated procedures rather than as part of the original development assessment process under the Planning Act. Attempting to introduce these as formal steps in the original assessment stage may only create additional and unnecessary procedures and associated uncertainty, delays and costs. These procedures occur informally now and where existing, are successful where there is a bone fide attempt by both parties to seek a resolution. This should continue and be encouraged as part of a well administered development assessment process, rather than being imposed by legislative requirement.

Enforcement Powers

- A system of local level civil enforcement orders (similar to s121B of the current Act) is essential.

- A breach of the Act should include a breach of development consent or an order.

- The Act must provide authorised officers with adequate powers of investigation including the power to require answers to questions, powers of entry and powers to require production of documents.

- The current division between departmental powers of investigation and council powers of investigation is confusing and apparently unnecessary.

- A mechanism for cost recovery for investigatory actions is required.

- The current penalties system should be reviewed to ensure that fines reflect the seriousness of the offence rather than apply a simple two tier fine system. There is a perception by some applicants/owners that the delays and associated holding charges inherent in the current approvals processes creates a view that it is easier and cheaper to take the risk and pay the fine than obtain necessary approvals. Improvements to processes through the Act may help this; however, breaches of the legislation if not effectively and efficiently brought to account undermine the public confidence in the system when offenders seem to get off “lightly” or not be brought to account.

- The option to prosecute in the Local Court or the Land and Environment Court is useful.

- The local level civil enforcement orders should include the power to require the preparation and implementation of remediation plans in the case of unauthorised clearing of vegetation.
6. Governance and Administration

6.1 General propositions

- The purpose of prescribed procedures under the Act is to implement externalities (the outcomes of the stated objectives of the Act). All processes and procedures should be subject to this purposive test - to demonstrate how they contribute towards and most effectively and efficiently achieve the objectives of the Act. Any that do not ‘pass this test’ have no place in the Act.

- It should be clear who is responsible for administering each process and procedure (or who has rights under those procedures) in the Act.

- The Act must provide a capacity to monitor the performance of each stakeholder’s responsibilities.

- Stakeholder responsibilities should be allocated to enable single-handed dealing with that process or procedure to avoid matters passing through multiple stakeholders and blurring ultimate responsibilities. This involves allocating responsibilities according to the complexity, scope and risk of the function.

- The following table provides examples (not a comprehensive list) of the roles, responsibilities and rights of the various stakeholders in terms of various activities under the Act.

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Responsibility (selected examples)</th>
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| Parliament                | - Enact planning legislation  
- Allow or deny Regulations  
- Allow or deny the State Plan  
- Approve State budget allocations to implementation of State, regional and other plans |
| Court (& Tribunal)        | - Development appeals  
- Judgements on points of law  
- Enforcement of Act |
| Government                | - Endorse State Plan |
| Planning Minister         | - Responsible for administration of Planning Act and planning law reform  
- Direct the strategic planning for and preparation and regular reviews of State Plan and regional strategic plans  
- Invite and coordinate input of other Ministers to State Plan and regional plans  
- Responsible for implementing State Plan and regional plans  
- Concurrence to local statutory plans (LEPs)  
- Resolution of disputes between agencies  
- Determine State significant development  
- Removal of council planning powers & appointment of administrators  
- Delegation of functions under the Act |
| Other Ministers           | - Responsible for respective Ministry’s input to State and regional plans and implementation of whole-of-government planning functions prescribed by the Planning Act |
| D-G Planning              | - Day to day management of administration of Planning Act  
- Monitoring performance of implementation of the Planning Act and delegated instruments under the Act  
- Recommendations to Planning Minister on his/her planning functions (as described above)  
- Undertake Ministerial delegations |
| Other DGs                 | - Responsible for respective Departments’ input to State and regional plans and |
whole-of-government planning functions prescribed by the Planning Act

| State Independent Panels (PAC) | • Conduct inquiries and reviews as directed by Minister  
                                • Review and endorsement of State Plan  
                                • Determine State significant developments |
|-------------------------------|--------------------------------------------------------------------------------------------------------------------------------|
| Regional independent panels  | • Review and endorsement of regional strategic plans  
                                • Determine regionally significant developments |
| Council                       | • Direct the strategic planning for and preparation and regular review of local plans, in consultation with local community  
                                • Responsible for implementing local plans  
                                • Prepare and adopt development design guidelines  
                                • Determine non-policy compliant local developments |
| Council delegates             | • Determine developments under delegation  
                                • Certify 'certifiable development'  
                                • Undertake enforcement action |
| Private Certifiers            | • Certify 'certifiable development'  
                                • Certify qualitative and objective criteria for 'assessable development' |
| Community                     | • Involved in formulation, performance monitoring and review of all levels of strategic plans and design guidelines  
                                • Submissions on notifiable development applications  
                                • Private development proponents  
                                • Private finance for infrastructure  
                                • Initiate third party objections (where available) to applications and legal actions for breaches of the Act |
7. Funding

7.1 General propositions

- The purpose of revenue raising provisions under the Act is a means of implementing the adopted planning strategies made under the Act, not an end in itself.

- The Act should be flexible enough to accommodate all potential infrastructure funding mechanisms within the ambit of a Planning Act (including State, regional and local level developer levies, voluntary agreements, value capture (betterment) mechanisms, user pays etc).

- Strategic plans must include an integrated strategy for full funding of the Plan’s proposals, which can include any of the revenue raising mechanisms under the Act, but also include other funding sources such as general revenue, special rates, grants, self-funded by operational revenue, State or local (Treasury approved) bond issues, full or part private financing etc.

- The specific method of funding particular infrastructure or other elements of a strategic plan (whether State, regional or local) is a policy decision for the planning body (not prescribed by the Act). Depending on the nature of the proposals, the funding could be entirely from developer contributions, a combination of Federal grants and State infrastructure budget funding, or any other combination of sources. The only requirement under the Act should be that every element of the strategic plan with an implementation horizon of say 5 years should identify the funding sources which will amount to 100% of the estimated implementation cost.

- The Act should continue to enable planning bodies to charge reasonable fees and charges for services (development assessment, certifications, plan copying, enforcement recovery etc) with an obligation to ensure they are at a level which enables equitable participation in the planning system by all stakeholders.

- The Act should retain appropriate accounting provisions to ensure transparent and accountable management of funds.