A New Planning System for NSW: White Paper

Submission by Planning Institute of Australia (NSW Division)

June 2013

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 1,200 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 submission has been prepared on behalf of PIA NSW by members of the Institute.
1. SUMMARY

INTRODUCTION

- PIA commends the Government on its initiative to undertake a comprehensive review of the NSW Planning system and looks forward to continuing its involvement in providing advice on the shape of reform and its successful implementation.

- PIA supports the general principles contained in the White Paper as they adopt many of the principles of planning reform we have been advocating prior to the current Government coming into office.

- Notwithstanding the above, the much greater level of detail now outlined in the White Paper and Exposure Bills has revealed elements of the proposed system which PIA considers can and should be improved.

- PIA considers the Planning Bill 2013- Exposure Draft is not as simple, easy to understand and navigate as it could and should be. A review of its form and structure, as well as some of its substantive provisions as discussed throughout this submission, should be undertaken prior to its enactment to ensure it is user friendly and it avoids being unnecessarily complex.

- In preparing this Submission, the Institute has drawn on the experience and expertise of PIA members across State and local government, educational institutions, development and infrastructure industries and community services that will be in the front line of implementing the proposed reforms.

- This is a once-in-a-generation opportunity to achieve real reform and the State cannot afford to lose that opportunity.

IMPLEMENTATION

- PIA considers important elements of the successful implementation of the new planning system must be:
  - Significant funding and resourcing
  - A highly visible public information campaign
  - Education and training

- PIA recommends that the new planning system should be ‘switched on’ incrementally, as follows:
  - ‘Day 1’: Power to make Strategic Plans apart from local plans and to make Growth Infrastructure Plans
  - Upon commencement of all ‘core’ State Policies and Regional Plans across the State:
    All remaining sections of Act
• The Act should be fully operational in no longer than 12 – 18 months of its enactment. The initial 12-18 months prior must be used as the intensive gearing up phase for its full implementation, including:
  ➢ Formulating Standard Local Plans (including Development Guidelines), standard conditions, template community participation plans and other ‘toolkit’ items that may particularly assist smaller regional councils etc;
  ➢ Preparation of NSW planning policies;
  ➢ Information gathering, community participation, analysis, organization and budgetary reviews, e-planning development and testing by agencies and local authorities.

DELIVERY CULTURE

• PIA has championed the cause of cultural change in the NSW planning system and will assist in implementing measures to realise that change.

COMMUNITY PARTICIPATION

• PIA notes the cynicism within parts of the community about planning and development decision making and concern that it may be perpetuated in the new system. In order to restore confidence in the system it is essential that effective community participation occurs and that considerable attention to detail and resourcing will be necessary to achieve this.

STRATEGIC PLANNING

• The proposed strategic planning hierarchy is broadly consistent with PIA’s earlier submissions and we support it in principle.
• However PIA suggests refinements to some elements. This includes specifying in the Regulation a limited range of State Planning Policies that can be formulated, to avoid the current system of ad hoc and in some cases opportunistic SEPPs.

DEVELOPMENT ASSESSMENT

• PIA has consistently advocated and supports the proposed system of development ‘tracks’, with the level of assessment commensurate with its risk and complexity.
• PIA is concerned that the proposed system remains overly complex and carries forward current alternative development categories from the existing Act that fall outside the purported 5 tracks. Proposed development categories (apart from Public Priority Infrastructure) should be incorporated into the proposed Part 4 tracks.
• PIA accepts the need for Strategic Compliance Certificates as a strictly transitional measure subject to the independent oversight outlined in the Planning Bill. Their performance should however be monitored to ensure they do not become a “de facto Part 3A” mechanism.

INFRASTRUCTURE

• PIA supports the rationalization of the development contributions system and the broadening of the base of some forms of contribution to assist in housing supply and affordability.
• More explanation of the rationale and transparency on contributions formulation is required and should be made clear in the proposed Infrastructure State Planning Policy.
• Decisions by the Minister to waive contributions for certain types of development or proponents should be supported by reasons and advice to Councils where such decisions may affect the funding and implementation of local infrastructure plan.

• We look forward to the Institute’s ongoing involvement in the process of formulating the many elements of the system that remain to be resolved prior to the comprehensive implementation of the new planning system for NSW.

CONTINUING PROFESSIONAL DEVELOPMENT

• To support the desired shift in emphasis to more complying and code assessments, it is important that the Government works with education providers to ensure that there is an adequate skills base for relevant certifiers.

• PIA hopes that the reforms will ultimately result in a larger and more capable group of strategic planning professionals.

• PIA has an extensive role in industry education, working in its own right to deliver continuing professional development not only to its members but also non-members and para-professionals. PIA also has close links with the tertiary education sector and has successfully partnered with them in the delivery of ongoing professional development.
2. INTRODUCTION

Overview

PIA has been a consistent contributor throughout the Government’s review of the NSW planning system. Consistent both in the sense that our submissions on planning reforms commenced even before the current Government came into office and consistent in our messages about what the Institute hoped would emerge at the end of the process. This submission on the White Paper and Exposure Bills will pick up from where our earlier submissions left off.

The Institute is broadly satisfied with the general directions outlined in the White Paper, since much of it is consistent with our earlier submissions. We commend the Government in this sense and appreciate its willingness to embrace many of our recommendations. As an organisation whose interests are not partisan or linked to any particular interest group, but are driven only by the interests of planning for the wider ‘public good,’ we believe that a planning system well informed by the input of the Institute can operate effectively for the benefit of the whole NSW community.

The Institute is not entirely uncritical of all aspect of the proposed planning system. The White Paper and Exposure Bills necessarily move beyond the broad principles with which we largely agree, into considerably more detail as to how those principles will be achieved and implemented. This submission therefore will concentrate on those more detailed elements of the proposed system.

In particular, whilst we will address most elements of the proposed planning system described in the White Paper, we consider that it is most important that the Exposure Bills are properly reviewed and refined in the first instance. We believe the Government needs to ‘hasten slowly’ in its implementation of the new planning system to ensure its efficacy is not threatened by premature commencement. We submit that adequate (but not indefinite) time should be spent preparing for the implementation of the many elements of the new system. What cannot wait however is the enactment of the new Planning Act. Thus we submit that most immediate attention should be paid to ‘getting the Bill right’. This submission identifies parts of the Bill that we consider should be reviewed and amended prior to its enactment.

Our Members across State and local government, educational institutions, development and infrastructure industries and community services will be in the front line of implementing the proposed reforms. Their opinions on the practical systemic and implementation issues are therefore very informative as to whether or not the new system will operate as it is envisaged.

Form and Structure of the Planning Bill

This submission follows the substantive headings within the White Paper. In this introductory part of our submission, we raise some overarching matters and those dealt with in the introduction to the White Paper.

The Institute considers that while the Planning Bill 2013 – Exposure Draft (The Bill) goes some way to addressing concerns with the current Environmental Planning & Assessment Act, it has not entirely succeeded in achieving some of the principles sought by the Institute, as follows:
Whilst we accept that ‘legalese’ is part and parcel of any legislation, the drafting of the Planning Bill cannot be said to be entirely simple to navigate or comprehend (not ‘plain English’ form).

Whereas the EP&A Act in its original (1979 - 80) form was quite streamlined (and only subsequently ‘evolved’ into its current overly complex form), the Planning Bill starts from a somewhat unwieldy base. If it starts from such a base, we would be concerned as to how it might evolve into an even more unwieldy form once the inevitable amendments over time start to accumulate.

The Bill appears to be an amalgam of new simplified elements, such as Part 3 Strategic Plans (although even this contains procedural matters that might have been better placed in Regulations) and quite complex provisions in Part 4 – Development (other than infrastructure Assessment) assessment and consent. Even the heading of this Part foreshadows the disaggregated nature of what is meant to be a streamlined new all-encompassing assessment system.

As we will discuss in more detail later in this submission, the proposed assessment system is more complicated in its structure than we would wish to see. If complex legal drafting is added to an already complex structure, the ideal of introducing a streamlined system free from disputation around statutory interpretation may not be achieved.

The Bill appears to rely on numerous (12) Schedules to reduce the complexity in the substantive parts of the Bill. Given that the Schedules are integral to the understanding and interpretation of the relevant legislative provisions, it is not clear whether they reduce complexity or simply add to ‘navigational’ difficulties.

There are many sections of the Bill that are simply carried forward from the EP&A Act. We have previously supported the principle that provisions of the current Act that are operating effectively and have their meaning well understood by practitioners and the Court should not be abandoned simply for the sake of change. However, by this we did not necessarily intend that the current provisions should be carried forward verbatim where simplification may have been achieved. Some of the Schedules fall into this category. Many of the concepts retained need to be understood in the context of common law interpretations. Maintaining this approach is not a plain English or user friendly approach to understanding the planning system.

There will no doubt be reluctance by the Government to make significant structural and/or substantive changes to an Exposure Bill. However we consider that it requires some fundamental revisions for it to be ‘user friendly’, less susceptible to legal interpretive challenges and more easily adaptable where future amendments are necessary. It would be appropriate to review the form and structure of the Bill when making any changes to its substance.

**Objects of Act**

The Institute generally agrees with the proposed Objects of the Planning Bill 2013-Exposure Draft (the Bill). To add clarity and to address some concerns which have been forthcoming during the exhibition period, we recommend the following amendments and additions to the Objects:
Whilst reference is made to heritage in Object (e), it is in the context of the environment. We consider that heritage conservation warrants an Object in its own right and suggest an additional Object as follows:

- The identification, protection and management of the natural and cultural (Aboriginal, built, landscape, moveable, maritime and archaeological) heritage of NSW.

We submit that an Object on design quality is required, such as:

- Promote well designed, high quality places and buildings.

An Object on open and transparent decision making would assist in public trust and confidence in the exercise of powers under the Act, such as:

- Open and transparent decision making and appropriate opportunities for reviewing and appealing decisions.

The Objects (and other parts of the Bill) refer to “sustainable development” as opposed to “ecologically sustainable development”.

- ‘Sustainable development’ should be clearly defined in the Act
- The terms ‘environmental wellbeing’ and ‘social wellbeing’ should be also defined in the Act’s Dictionary
- The above definitions should be consistent across other Acts within Australia.

The White Paper does adequately explain why the Bill moves away from the accepted definition of ESD to the new defined objective of Sustainable Development.
3. DELIVERY CULTURE

Introduction

The NSW Government is to be congratulated for addressing the issue of delivery culture and in putting the issue up front in the White Paper. PIA has advocated for a focus on the delivery culture as a key to the successful implementation of a new planning system for NSW.

In our research towards our previous submissions, and in subsequent meetings and forums, we found wide acceptance for this approach from a broad range of stakeholders including local government, professional groups, industry bodies and the broader community, and commend those organisations that are moving to address the changes needed.

Key changes

In response to the key changes proposed in the White Paper (page 39), PIA provides the following comments:

- **Establish a Culture Change Action Group** – PIA supports this proposal. An important component of this will be regular reporting on the work of the Group and regular updates to all stakeholders (published on the Department’s website). The Action Group could also consider co-opting expertise as needed in the course of their work.

- **Roll out of training sessions in all areas of the new planning system.** PIA sees this as an essential component of successful implementation. We believe training should go beyond the key components of the Planning Bill and White Paper, and include:
  - A training needs survey and analysis;
  - A short bridging course on key components of the new planning system that retrains and reorients planning and related professionals so they can adapt to and embrace the new planning culture, possibly focusing in the first instance in providing support for planning staff in more remote locations;
  - A broader education program that explains the workings and expectations of the new system to all players – including council staff, elected representatives, developers, financial institutions and community organisations;
  - An ongoing professional development program, possibly modelled on the PLANET program in operation in Victoria;
  - Review of the content of university courses to ensure they reflect new practice;
  - Support for university teaching staff to ensure they are well placed to deliver up to date content to current and incoming students.

- **Monitor and report on the actions for culture change every two years to provide a report card on the culture of the NSW planning system** – PIA suggests this should include more frequent reporting (good news stories) and sharing of ‘best practice’ examples;
  
  *Note:* White paper page 39 says 2-yearly, and page 34 says annually – this needs to be clarified.
- Develop research, tools and data to support the new system; including access to shared data sources, to ensure consistent and independent source data, and work with established research centres to identify topics for research, and promote outcomes;
- PIA congratulates the Department on the appointment of a Deputy Director-General of Cultural Change, and the work commenced in the restructure of the Department.
- Consideration should also be given to some form of certification of planning professionals together with a requirement for continuing professional development through a professional organisation such as PIA.

Recognising local needs

In implementing the new planning system and the cultural change program, we submit that it is important to remember that one size does not fit all, and there need to be different approaches for different stakeholders and different parts of the State. It is also important to acknowledge that there are a number of local councils in particular, who are already setting and delivering high standards for the delivery of planning.

Planning professionals across the various parts of the industry will also require different approaches and different tools. Planning professionals should be supported and encouraged to lead the implementation process, particularly as they are often the closest interface with the community. To meet these local needs, a variety of delivery methods should also be considered, including online training packages.

Best practice and practical examples should be promoted and to this end, there are a number of organisations who are leaders in their fields. Current awards for excellence programs can provide case studies and living examples of good processes and outcomes. This includes the number of industry awards which are made each year, at the local, State and National level, in addition to overseas best practice.

Resourcing

The issue of adequate resourcing has been addressed elsewhere in our submissions, and we reiterate that this is essential especially to have an identified budget item for education in and beyond the implementation phase. A new set of “tools” to engage and inform the community will require resourcing. It is also important to recognise that the suite of tools will vary from region to region and potentially from community to community. Adequate training and skills development in the use of these tools should also be provided.

Embedding culture change

The intent of the planning reforms is a move to an outcomes-focussed, can-do planning system for NSW, and for this to succeed, a change in culture must be embedded across the planning system. This will include greater independence in assessments, the use of the ‘amber light’ approach to development and the development of new and clear guidelines. The high level policies are critical in setting a robust
framework and buy-in at the highest level will be critical. To this end, engagement, consultation and education are cornerstones to success.
4. COMMUNITY PARTICIPATION

Overview

The commitment of the NSW Government to increase focus on community participation at all levels of planning from NSW Planning Policies to Local Plans is acknowledged and if implemented as identified in the White Paper, will help promote a delivery culture that produces a facilitative rather than an adversarial or obstructionist approach.

The Principles outlined in the White Paper for the Community Participation Charter are supported. They would be enhanced by a clear statement of intent, or preamble, such as

“The planning system guiding the social, economic and environmental development of NSW will require a commitment to an ongoing engagement process with the community about planning decisions that affect them.
As a member of the NSW community you have the right to engage in planning for development and change.
Planning authorities, developers, and proposers of change will listen to, engage in and facilitate community participation.
Engaged citizens can see how their engagement shapes and influences decision-making.
Plans and planning processes will always incorporate meaningful community participation.”
(Developed by PIA Social Planning Chapter Workshop)

Principles for effective community participation

 A robust, realistic implementation program supported by adequate financing and resourcing is essential to creating a planning system that has community and industry confidence

 Community participation should not be a one-off event: it should be an ongoing process throughout the strategic planning and decision making process to allow for feedback, debriefing, and ongoing sharing of knowledge. This also helps to demonstrate to a community that participation is not simply an obligation the planning authorities have to fulfil.

 Community Participation Charter principles and Community Participation Plans should explicitly acknowledge the geographical constraints of the area being consulted (e.g. dispersed population of regional areas), as well as the cultural diversity of communities and need for flexibility to manage such diversity.

 The Integrated Planning and Reporting (IPR) framework for Local Government has resulted in significant development and investment in community engagement frameworks. These frameworks should be recognised and greater co-operation or appreciation of the legislative connections between planning and local government agencies should be encouraged to avoid duplication and overregulation.

 The White Paper and draft Bill are proposing a shift in active community participation elements away from the end of the process, i.e. the DA end, forward to the strategic end to create more
effective engagement. This principle is appropriate and is supported by PIA however it is imperative that the rationale and benefits of early consultation be well explained during introduction of the new system and that the Department establish early precedents of community participation that is genuine and inclusive.

- It is important that sound, participatory and representative engagement is undertaken at the strategic level otherwise local plans will be directed and informed by strategic decisions that do not represent the views and aspirations of local communities and consequently, have limited support.

- In order to develop true participatory engagement, the community and other stakeholders will need to be provided with sufficient information on what they are making planning decisions about and why they are being asked to make them.

  For example, a subregion may be asked to accommodate 10,000 new dwellings. There will need to be an explanation as to why a particular area has been identified for an increase in density. The White Paper has emphasised the need to accommodate growth as a principal driver of the new planning system. However, advocating growth for its own sake is unlikely to encourage greater community participation in strategic planning. The community needs to understand the local benefits of growth and the real consequences of not accommodating growth in their area (such as increasingly inappropriate and unaffordable housing stock, social dislocation, declining local businesses and community services, reduced funding base etc.)

- Reference should be made on the Department’s web site to best practice examples (both in Australia and overseas) of community participation methods.

- To help mitigate the risk of disconnection through ‘consultation fatigue’, participation processes should avoid duplication of discussion of issues for each strategic plan. The community also needs to see the results of the continued and ongoing requests for their participation. The concept of participation should extend to explaining actions or outcomes that the community can relate to and “see” on the ground.

- Perhaps the biggest challenge to making the shift to upfront strategic participation in the planning process is to manage community expectations.

- The level of consultation expected for a Public Priority Infrastructure development should be comparable to consultation undertaken for the North West Rail Link (Sydney).

**Specific comments on the Planning Bill**

The following comments are made in relation to specific aspects of the Planning Bill.

The duty of a planning authority to act consistently with the Community Participation Charter (s2.3) is qualified as “subject to the planning legislation”. Most of the principles are given effect by specific provisions in the Bill, creating a statutory duty to observe them. The inclusion of the qualification then brings into question the status of Charter principles which are not reflected in specific provisions.
By way of example, the provisions relating to public exhibition in Division 3 of Schedule 2 require a planning authority to publicly exhibit a planning matter and enable submissions to be made. However they do not require the authority to then consider the submissions or explain how it considered them. Inclusion of such a requirement would give effect to the principle in the Charter for planning authorities “to make decisions in an open and transparent way and provide the community with reasons for their decisions (including how community views have been taken into account)”. The qualification in s2.3 may diminish the application of this important principle.

It is noted that under s2.4 (2), the role of a Community Participation Plan (CPP) is to provide guidance on how the planning authority will undertake community participation. This is inconsistent with the language of the White Paper which suggests that a CPP will have a directive rather than advisory role.

Community trust and confidence in the new planning system could be eroded if a planning authority sought to deviate from commitments given in its CPP on the basis that they are only advisory. Requiring compliance with the CPP will help instil confidence and would encourage rigour and care in the authority’s conduct of community participation.

The Note to s2.4 (4) advises that it is intended to amend the Local Government Act by renaming the term “community engagement strategy” to “community participation plan”. The purpose and effect of this proposal is unclear. Is it intended that the provisions of the Planning Bill and Regulation relating to CPPs will apply to community engagement strategies made under the Local Government Act? If not, a confusing situation could arise whereby there are two statutory regimes for preparing the same document. The status of a CPP prepared under the Local Government Act compared to one prepared under the Planning Act would also be unclear.

Clause 2.20 of Schedule 2 gives public authorities discretion to withhold from public inspection any part of an EIS whose publication would be contrary to the public interest. Guidelines on the exercise of this discretion should be provided and the circumstances in which it is used closely constrained to ensure the principles of the Charter are respected.

Clause 2.24 of Schedule 2 indirectly enables public authorities to withhold from public view documents subject to copyright. The laws of copyright relating to planning matters are generally not well understood and this creates opportunity for authorities and applicants to avoid disclosure of documents based on a misapprehension of copyright protection. In the interests of an informed public and transparent decision making, the provision should create a presumption against copyright and an onus on the person claiming copyright to prove it. This is also important for transparency and information availability online (ePlanning).
5. STRATEGIC PLANNING FRAMEWORK

PIA continues to support the proposed structure of strategic planning framework. It is consistent with the position adopted in the Green Paper and PIA’s submissions on planning reform made in the lead up to the planning reform process.

Strategic Planning Principles

The principles are valuable and are generally supported but may benefit from clarification and testing, i.e. Principle 10 which refers to overly onerous controls. However other elements which form part of strategic planning (in addition to promoting the State’s economy and productivity (Principle 1, Clause 3.3)) should be included. Planners are concerned about planning for ‘liveable’ ‘affordable’ and ‘sustainable’ places and quality of the built environment.

PIA recommends that a new principle be incorporated in clause 3.3 of the draft Bill relating to the human dimension of planning. Liveability, environmental issues and economic activity need not be mutually exclusive. The challenge for planners is to reconcile these competing needs to create good places for people to live, work and play.

A Principle such as this may alleviate some of the concerns in the community that there is weakness of the language around environmental and social considerations. It may in turn instil confidence in the new planning system acknowledging that increased density, development and growth can and should be sustainable and with good planning, cities, towns and regions can be rich places to live, work and play.

State Planning Policies

PIA supports the idea of high level plain English planning policies setting the planning direction for the State. It is our position that there should be a single policy document, in a manner not dissimilar to the English Planning policy1.

To reduce any tension and debate in determining what policies and issues will be covered in the NSW Planning Policies, it is suggested that the Regulations include a list of topics that will be the subject of these high order policies. The concern with existing State Environmental Planning Policies is that they were created in an ad hoc fashion to fix problems and to implement policy. In other words they had specific powers but their status was questionable. Listing the relevant policies in the Regulations from the outset demonstrates they are significant and fundamental. Additional policies should only be added in the future after meaningful consultation because of their significance and not simply to provide an additional layer of policy to overcome perceived shortfalls with the adopted strategic planning framework.

A limited number of “umbrella” policies and the implementation of new policies which are consistent and prioritised against others will lead to less complexity and conflict.

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1 UK National Planning Policy Framework, published 27 March 2012
Regional Growth Plans

PIA continues to support regional planning and the introduction of the Regional Growth Plans into the Planning Bill is consistent with our previous submissions.

Regional Growth Plans imply that they will only be prepared for areas experiencing “growth”. It is assumed that these plans will be prepared across the State, including those areas not necessarily experiencing growth. It is considered more appropriate to name them Regional Plans. Regional Growth Plans (Regional Plans) should set the scene by providing the narrative to Government priorities.

The Sydney Metropolitan Strategy provides a sound foundation on which to base other Regional Plans subject to the proviso that the Government should ensure that future revisions of the Metropolitan Strategy retain fundamental principles and polices and additional detail where necessary. Through the application of “evidence based” principles it will be obvious to stakeholders why recommendations or changes occur.

Subregional Delivery Plans and Subregional Boards

PIA notes that the identification of subregions and the subregional delivery plans reflects the proposals outlined in the current planning review documents and the notion of subregions based on groups of councils which have been based on an assessment of the population and economic catchments. The practicality of subregional planning using these groupings needs to be fully tested as they may in fact make practical collaboration and administration difficult. The proposed subregions should also be reviewed following the outcomes of the current Local Government Inquiry.

The purpose and composition of the Subregional Planning Boards are supported with the following comments:

- The creation of Subregional Planning Boards is a bold move and their success will depend on clear directions and expectations, as well as adequate resourcing and financing.

- Whilst there is diversity between councils, the identified subregions should have sufficient commonality to allow a Subregional Delivery Plan to be prepared that makes sense for the subregion and which the members can identify with.

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

- The success of subregional plans will in some cases be dependent upon the level of ownership and input by certain key government agencies. The legislation should make provision for membership of certain subregional boards by members of government agencies at the Minister’s discretion where the membership by the government agency is warranted. For
example membership by the Department of Environment and Heritage of the subregional board dealing with growth areas where threatened species are a key issue.

Local Plans

The proposed Local Plan as detailed in the White Paper and draft Bill is supported and is consistent with PIA’s previous submissions. The preparation of a standard template for Local Plans will be a very important document and critical to how local planning and development assessment will occur for many years to come. PIA is keen to be involved with the Department of Planning & Infrastructure in the creation of this template.

We believe it is important to limit the transitional period for implementing the new plans. It will be a challenge for local councils (and the Department of Planning and Infrastructure) to develop new format Local Plans especially since most councils have just completed the transition into the Standard Instrument, often with financial and other assistance from the NSW Department of Planning and Infrastructure.

It is however important to have an agreed timetable for this process than perpetuating the current system. It will involve a significant effort on the part of councils and Department of Planning and Infrastructure and will require:

- Development of a new standard template
- Use of existing strategies, modification of existing standard instrument LEPs, DCPs and new standardized means of measurement
- Guidelines to be simplified to a common simple standard (i.e. unique to each council, but following the same simplified format)
- Ongoing financial and other resource assistance from the NSW Government
- Development of a training package to assist affected staff
- A group of planning practitioners to assist in the review of standard templates/guidelines and the like as a way of sharing responsibility.

In order to facilitate the new planning system councils will need to address:

- The employment of additional staff or redeployment of existing staff from statutory to strategic planning
- The retraining/education of planners, building surveyors, administrative staff, Councillors, General Managers and other affected staff
- The investigation of sharing planning services on a regional basis such as building certification
- The employment of new staff such as administrators for Sub-regional Boards and Independent Hearing Assessment Panels
- The resourcing to implement e-planning, establishment of new internal business processes, development of Local Plans and Development Guidelines.
- The consideration of sharing of planning and building staff across the industry.
Future Local Plan Template

Whilst it is not the role of the Planning Bill to detail matters such as the identification of zones and means by which detailed development assessment will be undertaken, the White Paper nevertheless envisages a planning system where:

- There is a shift to fewer and broader zones; and
- Traditional means of regulating and assessing density such as plot ratios or floor space ratios are removed.

In principle, PIA supports the move to broader and simpler zones. This has been a key element in our submissions in the past. However we believe that in the context of a new system there are more appropriate future opportunities to properly debate and explore these types of issues (i.e. the development of a future local plan template). Matters such as the creation of suburban character zones and their provision are important matters and should be developed and considered in consultation with the community, industry and local government. We also raise concerns regarding moving to a system without FSRs and the implications this may have to a mechanism that has proven successful in securing community benefits and incentivising redevelopment. It is apparent that the proposed new system has not considered the implications of removing this mechanism.
6. DEVELOPMENT ASSESSMENT

Streaming of development assessment

In our response to the Green Paper, the Institute supported a move towards a simpler, more timely and facilitative system for development assessment. We argued that this should be based on one overarching framework, supported by robust, evidence-based strategic plans developed with extensive community engagement.

We note that this remains the broad intention of the White Paper, together with object (h) in s.1.3(1) of the Exposure Planning Bill (the Bill), to promote:

“efficient and timely development assessment proportionate to the likely impacts of the proposed development”.

In our previous submission, we supported four broad tracks for assessment, derived from the DAF model - exempt, code and merit, together with prohibited. Exempt and prohibited elements in any new system are broadly accepted, noting again that the latter, if it is a ‘track’ at all, should be limited only to fundamentally unacceptable activities in a particular zone.

In general, however, it has been the Government’s intention that development proposals requiring assessment should take one of three broad streams to determination – complying, code and merit. It is therefore of concern to PIA that Part 1 of the draft Planning Bill refers to no less than nine ‘categories’ of development in s.1.13, only two of which – exempt and complying – are consistent with the ‘tracks’ identified in the White Paper.

This is not only confusing coming so early in the Bill but appears to be perpetuating the current array of development approval systems which was highlighted with concern in the 2011 Moore/Dyer review.

PIA has consistently promoted and supports the White Paper’s position that 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 should become progressively more rigorous as the risks become greater.

However, we have previously argued that even more complex proposals should be able to be accommodated within the proposed ‘merit’ track. Although this is broadly the approach taken within the White Paper, the Bill maintains some of the existing ‘categories’ of development for large projects of state / infrastructure significance. These are essentially based on the scale of projects and the determining body.

Such consideration should particularly extend to those categories of development that are proposed in the Planning Bill to sit outside Part 4 of the Bill, residing in Part 5 (with the possible exception of Public Priority Infrastructure which we accept does not involve an ‘approval’ process outside the strategic planning process). We see no reason why EIS development (which is simply Part 5 of the EP&A Act carried forward) and State Infrastructure Development should not reside in Part 4 of the Planning Bill.

In relation to Part 5 (EIS) development, we have previously submitted that this may be brought under merit (or impact) assessment in the following way. Currently, the vast majority of activities which are
the subject of Part 5 (EP&A Act) do not require an EIS and are dealt with via the mechanism of a review of environmental factors (REF). This system may be replicated if identified development falls within the ‘exempt development’ category subject to a condition that an REF is undertaken to confirm that the development “is not likely to significantly affect the environment.” Where the REF confirms that there is likely to be a significant effect on the environment (or it is clear this will be the case without the necessity of a REF), the development ‘falls out’ of exempt development and becomes merit assessed EIS development (with the potential question as to whether objector appeal rights are excluded).

We consider a much clearer and simpler structure than outlined in Section 1.13 of the Planning Bill (and which should be moved to Part 4 of the Bill, is as follows:

For the purposes of this Act, there are the following categories of development:

(a) exempt development (being development so declared by a local plan that is exempt from the assessment and approval requirements of this Act),

(b) complying development (being development so declared by a local plan that requires development consent under this Part by a consent authority or certifier),

(c) assessable development (being development requiring development consent under this Part) being the following:

(i) local development (being development so declared by a local plan that requires development consent from a local council),

(ii) regionally significant development (being development so declared by a local plan that requires development consent from a regional planning panel),

(iii) State significant development (being development so declared by a local plan or the Minister that requires development consent from the Minister),

(iv) State infrastructure development (being development so declared by a local plan or the Minister that requires development consent of the Minister)

(v) EIS assessed development (being development so declared by a local plan that requires development consent and an environmental impact statement before consent can be granted, and which gives objectors appeal rights in some cases),

Note. Some EIS assessed development may also be regionally or State significant development or infrastructure. Under the former Act, a similar category of development was called designated development.

Note. This Part does not apply to public priority infrastructure (being development so declared by the Minister under Division 5.3 of Part 5 that does not require further planning approval).

Certification at the Development Assessment Stage

To focus on those tracks in Chapter 6 of the White Paper where a third party assessment process is required, we note the Government’s intention to continue with a fully certifiable ‘complying development’ stream, as well as ‘code’ and ‘merit’ streams requiring public sector assessment and separate construction certification.
PIA has suggested in previous submissions that certification should be expanded to any quantitative and objective criteria in any of the assessment tracks. 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 complying and code assessment tracks certification would enable construction to proceed. Quantitative and objective components of the merit assessment track could be certified as part of 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.

There needs to be a statutory constraint on consent authorities from requesting detailed design and construction specifications at the development assessment stage. This is an unnecessary expense for applicants that may prefer to test the waters first and delay applying for a construction certificate until, or if, development consent is granted. Although this is an intention under the current Act, PIA members report that some consent authorities continue to require upfront construction stage details.

Complying and Code Assessment

We support the intention to achieve the delivery of most development approvals through the code and complying tracks, in 10 and 25 day time frames, within 5 years, especially given the current typology of development in NSW shown on p.121 of the White Paper. Based on experience to date, however, take up of these new options for assessment in 80% of cases will be critically dependent upon the ease of use of the relevant planning controls and development guides by applicants.

At present, more applicants still choose to lodge DAs than was intended when complying development was introduced, because it would seem that the requirements of the Codes SEPP are too complex to navigate and/or the information required is not readily accessible to certifiers. The SEPP has also been criticised in so far as it does not necessarily result in desirable development forms or development can actually be achieved in the majority of instances. Approaches that are overly prescriptive can also limit the potential of development to respond to innovation and changing market circumstances.

We remain of the view that there is the potential to streamline various tracks with suitably regulated certification arrangements, including planning and other professional certification which includes a degree of performance / merit assessment. This also seems to be canvassed at p.132 of the White Paper under the heading “Expert advice and code assessment”. We note that this is a reality for many projects in Brisbane under the ‘RiskSmart’ system. If supported by reliable state-wide e-planning data, enhanced certification arrangements should therefore remain at least as a longer term objective for the new system. This appears to be a clear option to support s.4.7 (3) of the draft Planning Bill and has also been advocated by some professional planners working in local government.

Overlap between tracks

There seems to be a potential overlap between complying development with a variation certificate granted under section 4.8 and code assessment development. For example if the complying development guidelines and the development assessment code both contain provisions for dwelling houses, with the former being more onerous or prescriptive than the later, then a variation to a
complying development standard could potentially transform a dwelling that is complying development into a dwelling that is otherwise identified as code assessment development. This would result in a development being approved as complying development that has the same shape and form as the code assessable form of development.

This overlap could be avoided if the complying development track and code/merit assessment track are mutually exclusive, that is each deal with different forms of development. For example all development for the purpose of dwelling houses is to be dealt with as complying development and all forms of multi-unit dwellings to be dealt with as code/merit assessment.

Whilst PIA supports performance-based solutions in respect of code assessment development, it may present difficulties in its practical implementation which will need to be carefully considered when formulating codes. Performance based solutions are inherently subjective and require a measure of discretion on the part of the assessor. There may be arguments between applicants and consent authorities over whether a particular development meets a performance based solution. Applicants may want to push development into the code assessment development track because the reward will be that the application does not need to be publicly notified and cannot be refused.

There also seems to be a potential overlap between the performance based code assessment track and the merit assessment track. As with the complying development/code assessment overlap, this potential grey area can be avoided if the performance based code assessment track and the merit assessment track are mutually exclusive, that is each deal with different forms of development.

Again, these issues are not raised as objections to the principle of track-based assessment generally as proposed in the Bill. Rather they are raised to highlight the need for careful and intelligent drafting of plans and codes to ensure that there is ‘up front’ clarity around how tracks operate in respect of any particular development type and circumstances.

As indicated above, a failing of the current complying development system is the difficulty that many applicants and certifiers have in determining whether it applies or not in particular circumstances. Another current example is the time consuming and costly arguments had over the current definition of “development standard”. The definition of development standard under the current legislation has drawn attention because it defines a ‘prohibited variation’ from a ‘permissible variation’.

Often there is a financial incentive attached to the success of such arguments and this, combined with the subjective nature of SEPP 1, has led applicants to invest time and money on arguing the definition.

The new system should be clear and simple and avoid the need to obtain legal advice to be sure that you are ‘on the right track’.

**Transition to faster approvals and locally-relevant Code Assessment**

PIA supports more timely assessment of routine, especially small-medium scale residential development activity. From Parts 6.2 and 6.4 of the White Paper we note the Government’s desire to see significant increases in uptake rates for complying and code assessed development, as outlined on p.123 (50% within 3 years and 80% within 5 years). These are challenging targets and success will largely depend upon resourcing the improved delivery platform envisaged in the new Local Plans.
These in turn will need to be informed by new State Planning Policies and Regional Growth Plans. Development Guides, including new planning codes, also need to be developed in consistent performance/outcome formats to inform the assessment process.

Given the crucial and strongly-advocated need for community participation in all these planning exercises, and the time required to complete related planning template reforms, close consideration must be given to the transitional arrangements and resourcing for this work.

Communities across the State are also being encouraged to expect greater participation through the New Planning System, with an enhanced role in upfront strategic planning and the development of the new planning guidelines for their local areas. If one way of achieving the desired streamlined assessments is through a state-imposed approach, as suggested as a fall-back position on p.132, then it is foreseeable that some communities will quickly become disillusioned by the failure to realise agreed outcomes from local strategic planning exercises.

To achieve the targets collaboratively there must be an acceptance that transitional arrangements using existing Standard Instrument LEPs will play a role in the success of the reform agenda. However, as indicated elsewhere in this submission, this transition period must be strictly time limited. In addition, if councils are already meeting the approval time frames sought in the White Paper for 80% of their applications, then it should not be necessary for the Government to intervene, irrespective of which ‘track’ those approvals are taking.

We also note at p.132 of the White Paper the intention to develop ‘model development guides’ and to use these as a form of template for the introduction of new local development guidelines and codes. We agree that where possible such guides could be developed for local use and adaptation on a regional or sub-regional basis. The Department’s model guides should cover both format and presentation and address issues to be avoided in codes, based on best practice examples. Regional Boards, when established, could also review and have input to draft codes.

**Locally Relevant Controls**

PIA accepts the need for local codes to work within an agreed format, and under the umbrella of standard State, regional and local planning controls, including a common terminology or ‘dictionary’ across all the relevant documents.

However, it must remain possible for local planning authorities to develop locally-relevant and responsive planning codes. In this way, it will be possible for planners to deliver on agreements and commitments established in strategic planning. This will be an important means of rebuilding trust in local communities as part of the Government’s desired delivery culture for the New Planning System.

**Managing referrals**

As part of delivering a more timely approvals system, an efficient, responsive process for managing stakeholder and agency referrals is vital.

PIA therefore supports the proposals in Part 5.7 of the White Paper and expects that current referrals in the assessment process will be reduced because new Local Plans will incorporate standard State agency requirements. Referrals should only be required where development seeks to vary standard agency
conditions. We note that deemed approval arrangements will apply (e.g. s.6.7 (6) in the Planning Bill) if no response is received from a referral authority within the designated time.

PIA also supports in principle the proposed introduction in Part 6 of the draft Bill of a One Stop Shop arrangement within Government in Part 6 of the draft Planning Bill. This appears to be an improvement on current ‘integrated development’ arrangements if it is designed to provide true integration and coordination between contributing agencies in the development assessment process. The One Stop Shop should also provide important opportunities for refining and rationalising concurrence and referral procedures going forward.

Having said this, some potential concerns about this system are:

Under the draft Bill the Minister stands in the shoes of the relevant authority. If that role is taken literally, what certainty is there that the Minister (practically his/her delegate) will have the necessary expertise in the relevant area (heritage, water management etc.) to adequately and properly fulfil the requirements of the relevant authority under the relevant Act? On the assumption that in most case the answer is “they won’t”, how will the system operate?

Some referral/concurrence agencies currently operate quite effectively and efficiently. Whilst the One Stop Shop may encourage consistency and efficiency for agencies which do not currently operate accordingly, is there a danger that the intervention of another agency (namely the Department of Planning & Infrastructure) may reduce the performance of efficient agencies?

In relation to the process for managing development approvals for councils in regional NSW, the Government should note that these councils are also the local water and sewer authorities. In assessing DAs currently, most of these Councils review local infrastructure design and capacity issues as part of the process.

In the push to obtain code assessable development consents within 25 days, it is possible that more authorities will more fully defer these considerations to the separate approval process under s.68 of the Local Government Act. This may cause additional overall timeframes for proponents, but in any case will need to be managed carefully to ensure projects are not given planning consent without adequate arrangements having been made beforehand to alert proponents to significant servicing implications. Consideration should be given to models in use in the respective Water Board areas.

**Flexibility in making and determining applications**

PIA supports the retention and expansion of arrangements in the Planning Bill to provide flexibility in moving through the approval process for applications. We note the proposed maintenance of the current arrangements for staged (including concept) consents and for deferred commencement consents in Part 4 of the draft Planning Bill. We feel that concept consents in particular offer further options for applicants as we argued in our response to the Green Paper.

We also support the ability for applicants who cannot use the complying development track to seek a variation certificate or concurrent planning approval and certification to build if that is their wish.

We note the intention to provide for a strategic review against relevant Plan objectives and community consultation process in these situations (p.133). This is important as any ‘departure’ should be carefully considered in terms of the strategic context of the relevant planning controls.
We assume there will be further details about the intended processes for partial merit assessment in the Regulation. However, in the implementation of the new system user-friendly guidelines for applicants will assist in maximising the flexibility the system is intended to achieve. In this regard we note and support the intention to develop improved application materials in Part 6.8 of the White Paper.

Consent conditions

PIA has previously suggested that a state-wide standard ‘toolbox’ of conditions of consent should be formulated by the Government to reduce the necessity for each local area to develop its own. Ideally this should be a web-based resource. This would also improve consistency and reliability of development requirements for developers and certifiers (as highlighted at p. 187 of the White Paper) regardless of location. Of course the adaptation of the standard conditions to reflect specific site circumstances and council planning controls will always be necessary. However it is hoped that ad hoc ‘customised’ conditions would be the exception to the rule.

We are pleased to see the continuation of arrangements for ‘reviewable’ conditions of consent in the proposed s.4.27 of the draft Bill, which can respond to changing circumstances and demonstrated performance in land use activities.

As part of the review of referrals, we are supportive of the proposal for State agencies to provide standard conditions to be incorporated for certain development types or within specified locations, with no concurrence required for those applications.

Miscellaneous Matters

We support the retention of existing and continuing use rights in the new system; however suggest that a review of their operation since the last amendments to the Regulation should be undertaken before simply carrying forward the existing regulations to the new Regulation.

Proposed ‘amber light’ approach for inappropriate development proposals

We note the Government intention to introduce an ‘amber light’ approach where refusal of a merit or part merit application is proposed (Planning Bill s.4.16 (4)). While this is already occurring in an informal sense within many consent authorities and that approach is supported, it remains in our view inappropriate where it is clear that a proposed development is fundamentally flawed and where no modification is likely to cure its shortcomings.

We would also suggest that any remedy or change proposed by a consent authority in this context needs to be expressed in objective terms rather than the authority having to ‘prescribe’ an outcome and potentially step into the role of the proponent.

We also believe that where changes are proposed in this context, consideration will need to be given to additional ‘stop the clock’ arrangements and the potential need for consultation with others affected by revised proposals. Without knowing the detailed regulatory arrangements proposed in connection with s.4.16 (4) it is difficult to comment further at present.
Depoliticising decision making in development control

PIA continues to support the position in the White Paper Part 6.6, which encourages decision making on merit applications to be made by appropriate, independent and expert decision makers, including delegation to planning professionals.

PIA continues to support and applauds the Government’s increasing use of JRPPs in the assessment process. However as it is now proposed to reduce the size of the Panels to only three people, the overall JRPP membership pool needs to be sufficiently large and mobile to ensure appropriate expertise is available when required.

Panels should also have the ability to co-opt specialists where required and be able to call on a range of qualified persons to ensure their growing responsibilities, including in relation to planning proposals/rezonings, can be adequately resourced.

We note the intention to “provide incentives” to councils to introduce IHAPs, for example, and even to mandate their use in the event of poor performance by local government planning authorities (p.137). We support the non-prescriptive use of IHAPs, however, given the very different circumstances of councils across NSW, consideration needs to be given to resourcing (including sitting fees and travel costs) and to those councils that are already performing efficiently with a high percentage of DA’s being determined promptly under delegation.

While noting the detailed provisions of Part 7 of the Planning Administration Bill in relation to IHAPs, PIA wishes to re-iterate some of its recommendations at Green Paper stage which do not appear to be part of proposed s.27 of that Bill, namely:

- membership of expert panels should include community representatives along with relevant experts;
- the need for stringent procedures in relation to transparency, accountability, and probity in panel operation. In particular, as we advised in response to the Green Paper, expert members serving on panels should only do so on a ‘pool’ or rotational basis, to avoid the potential for regulatory ‘capture’ in favour of frequent applicants or adverse bias against frequent applicants.

We hope this may follow in Regulations.

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

More generally, expert panels should not make policy decisions, which is the role of government. Expert panels may inadvertently become involved in making quasi policy decisions when they consider applications for strategic compliance certificates or site compatibility certificates.

Strategic compatibility certificates (SCC)
PIA supports the proposed use of strategic compliance certificates to facilitate good development as an interim arrangement only while the machinery of the new system is still being assembled. This is an important interim step to ensure that the planning system does not get bogged down in the intervening period between the making of subregional delivery plans and local land use plans.

However, PIA is concerned about the potential for the concept of SCCs to erode public trust and confidence in the planning system.

There is a view among members that the window of opportunity within which a SCC may be granted should be more confined than is currently expressed in section 4.33(b) of the Planning Bill. It has been suggested that a SCC should only be available were a local plan has not been made, rather than where the planning controls provisions have not yet been amended (which will allow a SCC to be issued even if a local plan under Part 3 of the Act has been made).

However, PIA also understands and supports a need for effect to be given to regional and subregional planning outcomes where there is a lag time before the Local Plan ‘catches up’ on an ongoing basis. At this time we are prepared to support the proposed formulation of the SCC system, subject to the prerequisites in section 4.34 of the Planning Bill for obtaining these certificates.

- That development must be genuinely consistent with identified and adopted higher order strategic plans.
- That the Director-General must refer and take advice from the Regional Planning Panels on the issue of a certificate prior to them being issued
- That the Director-General must consult in a genuine manner with the relevant local Council prior to the certificate being issued.
- It is important that the local Council and Regional Board are given sufficient time to formulate their responses when consulted by the Director-General.
- PIA will however monitor the performance of SCC’s over time and should they appear to be subject to abuse, will be likely to recommend that their operation is curtailed.

There should be no scope for a consent authority to refuse a development application on the basis of permissibility when a strategic compliance certificate has been granted. However we note and agree with the provisions of s.4.36 of the Planning Bill that the issue of a certificate would not affect the refusal or imposition of conditions on a subsequent DA on other grounds.

**Rights of review and merit appeals**

PIA notes from Part 6.9 of the White Paper the intention to retain and in some circumstances expand the bulk of the current appeal and review processes. We support the proposed introduction of a ‘fast track’ appeal process for small residential development. We submit that this should be expanded to include other minor forms of non-residential development.

In this context consideration may again be given to using selected PIA Certified Practising Planners in providing an independent review function, in the role of ‘planning arbitrators’. This was proposed by the previous government in 2008, but not enacted. This could offer an alternative dispute resolution mechanism under the umbrella of the Court, which could accredit or train experienced practitioners to act in this capacity.
The Government needs to consider the scope of an applicant’s right of merit appeal in the case of an application for development that involves part code and part merit assessment. In circumstances where a consent authority refuses the merit assessed component of an application, PIA recommends that the merit appeal to the Land and Environment Court be limited to that component, not those components of the proposal that are code assessed.

The cost to councils of defending planning appeals is a significant strain on local government resources and should ideally be reduced under the new system. Costs and risks can be reduced by sharing the obligation to defend merit appeals with Government agencies involved in the decision giving rise to the appeal. Councils may be compelled to refuse or condition development applications based on agency standard requirements / conditions.

However those agencies do not bear the risk or financial burden of defending those decisions. PIA suggests that Government agencies or the new One Stop Shop group are automatically joined as respondents to proceedings, but may file a submitting appearance, as may a council, in such proceedings.

**Enforcement/compliance arrangements**

PIA supports the open standing provisions of the draft Bill (cl 10.9) to commence proceedings for a breach of the Act. This is an important check and balance on the exercise of administrative power and spread the cost of civil enforcement of the Bill.

We also note the proposed introduction of an enhanced system of enforcement arrangements as part of the new system. The proposed range of orders outlined in the White Paper and the three tier penalty system is appropriate and appears consistent with best practice in other environmental legislation in NSW. We hope that this range of penalties, to be updated for the first time since 1999, will help to convince more people to check and where necessary obtain the necessary approvals before undertaking development and in so doing help to restore public confidence in the system.

The proposed arrangements appear to provide relevant enforcement authorities with adequate powers of investigation including the power to require answers to questions, powers of entry and powers to require production of documents and other evidence, including by audit. We support that the Planning Bill also provides mechanisms for both cost recovery for investigatory actions, together with compensation provisions where appropriate.

Education of practitioners and the community in relation to the revised legislative arrangements should form an important element in the delivery of the new system.
7. INFRASTRUCTURE

PIA has previously advocated the following principles in relation to the funding of infrastructure:

- The Act should enable certain types of planning related funding sources (contributions, value capture, planning agreements, etc.);
- Strategic Plans should be required to specify funding sources for all infrastructure to a greater or lesser level of specificity depending on the implementation horizon for the particular infrastructure – including 100% of funding of all infrastructure with a 5 year implementation horizon; and
- This funding should include all potential sources inclusive of contributions, general revenue, private funding, grants etc.

The proposed system outlined in the White Paper and the Planning Bill appears to be generally consistent with these principles, specifically:

- Contributions are enabled in the Planning Bill
- Local Infrastructure Plans (LIPs) and Growth Infrastructure Plans (GIPs) appear to provide a potential mechanism whereby funding sources other than contributions may be identified to ensure that all Regional and Subregional infrastructure identified in Regional Plans, Subregional Delivery Plans and Local Plans are fully funded. It will be important to clarify this through the mechanism of the Infrastructure Planning Policy.
- Strategic Plans should identify and plan for funding of all infrastructure within the Local Area, not just that funded via Contributions outlined in Part 4 of the Local Plan. If not, it raises the potential that infrastructure that is not able to be fully or partly funded by contributions may be excluded from local strategic planning. Local infrastructure funded through alternative sources may be no less important to the strategic planning for growth in an area and therefore should not be treated differently and left outside the ambit of the Local Infrastructure Plan.

Contributions principles

The White Paper identifies seven principles that will inform the setting of infrastructure contributions (page 164). PIA supports these seven principles but is unclear as to the relationship of those principles to the five ‘principles for infrastructure contributions’ in section 7.3 of the Planning Bill. Whilst the Bill requires local infrastructure plans and growth infrastructure plans to have regard to the five principles in Section 7.3, the White Paper states that its seven principles will guide the setting of infrastructure contributions and “will be included in the proposed NSW Infrastructure Planning Policy”. The relationship of the different principles within the Act and the State Planning Policy and how they must be considered in the administration of the proposed new contributions system is unclear and potentially confusing. Any lack of clarity in such an important and contentious area as contributions creates a foreseeable risk of legal disputation and must be clarified and simplified in the Act and any delegated instrument such as a State Planning Policy.

Part 4 of Local Plans

The proposal to have all contributions applying to an area in Part 4 of Local Plans is supported. Certainty is required to facilitate development and this will assist in providing greater certainty and a clearer
indication that contributions are simply a mechanism to implement the local and regional plan, not a separate, unrelated system.

A significant amount of work will be required to complete all the necessary studies to ascertain all contributions so that the planning system can operate in the way intended. Therefore the allocation of sufficient resources to enable this work to be carried out in a timely and robust manner will be a prerequisite to implementation.

Ministerial oversight

The Institute supports the removal of the cap on Local Infrastructure Contributions (LICs), given that Local Infrastructure Plans (LIPs) are approved by the Minister, as this provides an opportunity for independent review and consistency across the State. However, whilst Ministerial oversight is appropriate, if minor amendments to LIPs are necessary it should be possible for these amendments not to have to follow a full review process and be signed off by the Minister. A mechanism should therefore be put in place which allows minor amendments to LIPs to be approved by the Director-General (DG) or their nominee.

Types of Contributions

In order to enhance affordability and having regard to ‘intergenerational equity’, the Institute agrees in principle that the types of infrastructure for which contributions can be levied should be limited in scope. However the scope of some of the identified infrastructure items is not entirely clear in the Bill. While there are definitions provided in the Bill for the terms local infrastructure and regional infrastructure, the items described under each term are not defined. For example, in local infrastructure, the term “community facilities” is not defined. Do community facilities include only community centres, or also child care centres, youth centres, senior citizen centres, etc.? It is noted that the term “basic community facilities” is used in the White Paper, but this term has not found its way into the Planning Bill.

Similarly transport infrastructure and educational establishments under regional infrastructure are not defined. Does transport infrastructure include heavy rail, light rail, buses, ferries, etc?

If educational establishments are to be included then why not health establishments? Health and education can be argued to be equally important to a community. We accept that there may be valid reasons for such differentiation, however, this has not be adequately explained and therefore appears anomalous.

We also submit that whilst it is appropriate for Councils to be able to recoup costs associated with infrastructure previously provided, there should be some time limit placed on this to avoid infrastructure that may have been provided decades ago (and which may have been fully funded at the time though grants or other means) are not be ‘re-funded’ though retrospective contributions.

Growth infrastructure plans (GIPs)

GIPs are a major reform and are fully supported as the vehicle to ensure that infrastructure will be planned and delivered alongside housing and employment growth. GIPs will inform part of the calculation of a RIC for a given area. This is a significant step in the right direction and will address serious problems with the current system of State infrastructure contributions.
There is no information on the level of subsidy the Government will carry in GIPs, as although the special infrastructure contributions have been in place for some years, developers have never been levied more than 50% of the cost of this infrastructure. If there is a significant delay in clarifying at least base contributions for every development area of the State, the Government may lose the goodwill of developers who are willing to make a new and evolving system work. The current uncertainties in levies are a matter requiring early resolution.

**Timely application of Local Infrastructure Contributions funds**

Section 7.9(5) of the Planning Bill requires contributed money to be applied “within 3 years”, however it needs to be clarified whether this is from the time each individual contribution is paid by a developer or from when the full amount of the amount identified for a particular capital project is obtained. The former would be difficult to administer and may lead to inefficient, ad hoc expenditure on smaller piecemeal infrastructure items. If it is the latter, the 3 year time frame could be rendered ineffectual since it may take considerable time to collect the full amount. This should be clarified to confirm the relevant time period and any nominated time should be cognisant of and provide a reasonable and practical timeframe for expenditure of contributions based on the specific circumstances.

A longer period of five (5) years may be more realistic. PIA fully supports the proposed mechanism in the Bill to grant an extension where individual circumstances warrant it, to address legitimate circumstances that will inevitably arise to justify extensions beyond whatever notional time limit is specified.

**Deferred payment of Contributions**

This is a reasonable proposal as the demand for facilities and services will not be generated until occupation. It will significantly improve the cash flow for developers and may make some marginal developments viable. One issue which will need to be addressed with allowing deferred payment until land transfer is that there may not be a point of sale and in some cases. If developers decide to retain ownership and lease rather than sell their developments then the contribution would not be collected. A mechanism such as deferral until occupancy certificate may be a preferred approach.

**Limitations on contributions via Planning Agreements**

*It is proposed that planning agreement contributions can only be applied towards items listed in an infrastructure plan, affordable housing identified in a strategic plan, or ‘conservation or enhancement of the natural environment of the State.’*

The restriction of the use of Planning Agreements (PA) to requiring contributions for only those facilities in an adopted LIP or GIP will substantially limit their application and usefulness. This restriction is considered excessively rigid and may work against appropriate planning outcomes in some instances. It may well be appropriate for a PA to be entered into where there is no current LIP or GIP as it may be the most expedient way to achieve a satisfactory outcome. However, this would not be possible as the Planning Bill currently stands. Likewise, even when a Local Infrastructure Plan or Growth Infrastructure Plan is in place there may be sound reasons to enter into a Planning Agreement to achieve a desired outcome that was not envisaged when these plans were prepared. For these reasons the use of Planning Agreements should not be restricted as is proposed in the White Paper and Planning Bill.
“Satisfactory arrangements” for regional infrastructure contributions

The draft Planning Bill section 7.19 which allows a clause to be inserted into a Local Plan requiring that satisfactory arrangements for regional infrastructure contributions must be made in respect of certain types of developments is not considered appropriate. Deferring decisions to the Director-General on what is required as this provision proposes, in the absence of or outside the scope of a regional development contribution arising from a GIP and prescribed in Part 4 of the Local Plan, appears to be entirely at odds with the laudable features of that strategic GIP/regional contributions system. It does nothing to create certainty in the planning system (in fact does just the opposite).

Biodiversity offset contributions

The provisions in the draft Bill (section 7.26) must be supported by a rationale and a well thought out plan detailing how the offset contributions should function, rather than simply allowing the insertion of a condition requiring such offsets without specifying what is required and set out in the Regulations. The place for details of how these offset contributions operate is within Subregional Delivery Plans which is supported as the most appropriate level of strategic plan for this purpose.

Contributions Taskforce

The White Paper outlines the proposal to establish a Contributions Taskforce comprised of representatives from councils, state agencies and industry to provide expert advice on transitioning to a new contributions system. The creation of this Taskforce is supported. It should assist in making decisions about moving funds collected under the EP&A Act into the new infrastructure contributions system under the Planning Bill.

Appeal Rights in relation to Contributions

It is considered that the appeal rights to the Land and Environment Court are too restrictive. For example, there is a right of appeal against a local direct contribution but not against a regional contribution. The ability to challenge the validity of a contribution should exist whether the contribution is local or regional. Similarly the ability to challenge a biodiversity offset contribution is proposed to be denied in the Draft Planning Bill. Again this is considered unreasonable.

Regional drainage and open space Contributions

It is proposed to broaden the base for collection of levies by allowing contributions towards the acquisition of land for regional drainage and regional open space to be applied to all development including industrial, retail and commercial development. While it can be argued that industrial, commercial and retail development may contribute to the demand for regional drainage given that they can generate additional stormwater runoff, it is difficult to see how these types of development generate demand for regional open space.

The proposed regional growth plan contribution therefore appears to be driven more by a pragmatic mechanism to spread the costs of this expensive infrastructure to reduce the burden on developers rather than any obvious planning rationale.
The concern would be that in trying to limit the cost burden on developers to ensure that desired housing outcomes can be achieved and are not made unviable, the impost on employment generating developments is not so great as to affect their viability.

The Infrastructure State Planning Policy should be explicit and transparent as to its rationale in this regard to assist in understanding and confidence in the proposed contributions system.

**State Infrastructure Development and infrastructure contributions**

Under section 7.2 of the draft Bill, contributions can only be applied to State Infrastructure Development if it is not being carried out by a public authority.

The Institute accepts the principle that where a public authority proposes development, it may be generating a public good or benefit that may equal or outweigh the benefit generated by the local infrastructure towards which it would otherwise be required to make a contribution. This principle does, however, create potential financial administration difficulties in the local areas subject to such dispensations from ordinary contribution payments. Any decision by the Minister in relation to development by a public authority that is not required to pay a contribution in accordance with a Local Infrastructure Plan potentially creates a shortfall in the projected income generated under the plan, which must be made up by the relevant Council from other ‘non-contribution sources’.

In such circumstances it is the local council that effectively ‘pays’ for the public benefit represented by the proposed publicly provided State Infrastructure Development (SID) or other consents granted by the Minister.

The same type of development (SID) may potentially generate the same public good/benefit regardless of whether the proponent is a public authority or private developer. It also appears anomalous that ordinary contributions should be payable or not, only because the proponent is a public authority.

It is considered that the application of infrastructure contributions generally should apply to State Infrastructure or State Significant Development, whether or not the development is undertaken by, or on behalf, of a public authority. Whether the contribution is payable should not be determined by the nature (whether public or private) of the proponent of the development. However, this requirement may be waived by the Minister in relation to development only if reasons are given as to why contributions should not be payable in the particular circumstances and also identifying the relevant financial impact on the applicable Local Infrastructure Plan and/or Growth Infrastructure Plan. Where this process identifies a significant adverse impact on the LIP or GIP that may affect the ability to give effect to that Plan without alternative funding sources, the Minister should be required to consult with the Council and assist in identifying how such shortfalls may be compensated for.

**Value capture**

As outlined in our earlier submission, there is an opportunity to provide for “value capture” for capital gains associated with planning decisions. This is a valid mechanism for infrastructure planning which should be enabled through the Planning Bill. It relates to the uplift in value created by the wider community when planning decisions and public infrastructure investment bring a windfall gain to a property owner. It can be applied to generate funds for infrastructure investment. The principles for the
circumstances in which it may be applied and relevant criteria for its determination may be spelt out in the proposed Infrastructure Planning Policy.

**Transitional matters**

Some questions that arise in relation to transitioning to the proposed new contributions system include:

- When will the current section 94 caps cease? How long will the current level of discounted SICs remain? When is it expected that infill developments will be required to pay State infrastructure contributions? It can be expected that there will be a rush of applications trying to avoid inevitable contribution increases. The Government will need to give considerable attention to phase-in arrangements.
- How will the Department of Planning & Infrastructure and IPART be resourced to meet their expanded role of vetting and approving all contributions plans? Significant delays have occurred in the past where the Department was given authority to vet all draft contributions plans before they went on exhibition.
8. BUILDING REGULATION AND CERTIFICATION

PIA is pleased to see the comprehensive proposals in Chapter 8 of the White Paper in relation to building regulation and certification. These address many of the issues raised by PIA, the Building Professionals Board and others in feedback on the Green Paper. There is wide recognition in government, industry and the community that significant improvements are necessary in the regulation and performance of the building certification system in NSW.

This is especially so given the significant risks to human life as well consumer rights that can arise from poor practices in building regulation and construction.

We agree that there is a pressing need to simplify and clarify the roles and responsibilities of certifiers and councils as part of the reforms. We again encourage the Government to make this a key focus in industry education during the implementation phase.

The proposed introduction of Building Manuals and better regulatory support systems are also supported in this context.

In line with our desire to see more flexible approval processes, we support the proposals to remove detailed building and construction matters from development consents; and for building certifiers to be able to condition construction certificates and to accommodate minor changes in plans (for example, in fit outs) without the need for related development consent modifications.

The role of the Principal Certifying Authority (PCA) and commensurate liability/obligations requires better definition, particularly in relation to breaches of development consent conditions during the course of the project. This applies to council officers and private certifiers. The role of the PCA needs to be clearly defined along with the role of each professional who carries out key design, assessment, inspection and certification tasks.

PIA supports the proposal in s8.24 of the draft Bill to give certifiers the power to issue directions to owners in relation to matters that would prevent the issue of an occupation certificate. We are concerned however that a certifier’s obligations and functions under that section continue indefinitely in circumstances where an occupation certificate is never requested/obtained.

Although not directly related to the White Paper and Planning Bill, some PIA members have queried the future role of the Building Professionals Board and its relationship with other agencies.
9. IMPLEMENTING THE NEW SYSTEM

Overview

The Planning Institute believes that the way in which the proposed new planning system is introduced and implemented will be critical to its ongoing success, particularly in its ‘start up’ phase.

A successful implementation phase is critical if confidence in the planning system is to be restored within the NSW development and wider community. This is a once-in-a-generation opportunity to achieve real reform and the State cannot afford to miss that opportunity.

The Institute submits that there are several important factors that it should consider in this process to ensure successful implementation, namely:

Public information campaigns

The general public does not ‘tune into’ planning and development related issues generally until it affects them directly. The Institute recommends a serious, broadly based media information campaign across both the Metropolitan area and regional NSW to inform the community of the new system and explain and encourage all citizens to be actively involved in the Strategic Plan formulation for their region, subregion and local area.

Education and training

In the short term, local and state agencies will need to reorient their structures, resources and budgets to suit the new requirements of the Act and system, away from development assessment to strategic planning. This will necessarily involve retraining and reskilling planning and other staff.

Funding and resourcing

As discussed throughout this submission, adequate resourcing of all aspects of the implementation of the new planning system will be essential. It is to be anticipated that transactional costs for all participants in the planning system, be they government, Councils, applicants or objectors, should actually reduce in the longer term compared to the costs associated with the current somewhat cumbersome system. In this regard the Institute notes and welcomes the specific allocation in the recent State Budget towards implementation of the planning system. This commitment does need to extend beyond Year 1 of the new system.

Transitioning to the new system

The introduction of an entirely new system brings with it a great opportunity to draw a line under the faults of the past system and provide the community with a new system which will lead to more confidence in the planning in NSW. If the community simply sees more of the same through ad hoc decision making based on old policies simply carried forward, that chance of instilling hope in the new system may be lost. Once lost, it is unlikely it can be readily restored.

Given that the success of the system relies on well formulated, evidenced based strategies formulated with and accepted by the relevant communities, and since most current strategic plans in NSW do not meet those criteria, it is dangerous to introduce the ‘downstream’ elements of the system (development
codes, development tracks, infrastructure funding etc.) relying on ‘deemed’ strategies (existing SEPPs, Regional Strategies etc.). A clear timetable for implementation is essential for building confidence.

We have noted earlier in this submission our concerns about Strategic Compatibility Certificates. Whilst we accept their necessity, we submit that the more and the longer they are relied upon through extended transitional periods, the more likely it is that communities will lose confidence in the new system.

Our submission is that the new planning system should be ‘switched on’ incrementally, as follows:

‘Day 1’: Power to make Strategic Plans apart from local plans and Growth Infrastructure Plans

*Upon commencement of all ‘core’ State Policies and Regional Plans across the State: all remaining sections of the Act.*

The White Paper is silent on when all Regional Plans will have commenced, but states that all Subregional Delivery Plans will be in place within 2 years of commencement of the Act. It is realistic therefore that the full Act should be operational within 12 – 18 months of its initial commencement. Whilst this may be somewhat anti-climactic in terms of seeing the full potential of the Act realised immediately, we nonetheless consider it to be a modest and acceptable delay to ensure that the new system operates effectively over an expected timeframe of potentially decades.

This should not, however, mean business-as-usual for the rest of the system. We consider that the 12 – 18 months prior to the full ‘switch-on’ of the Act must be used as the intensive ‘gearing up’ phase for its full implementation.

Much of the necessary preparatory activity does not require legislative or regulatory change to occur. Activities that should take place in this period include:

- Formulation, in consultation with relevant stakeholders, most particularly local government, of Standard Local Plans (including Development Guidelines), standard conditions, template community participation plans and other ‘tool kit’ items that may particularly assist smaller regional councils etc.;
- Information gathering, studies, analysis etc. by agencies and local authorities to form the basis of the ‘evidence’ for evidence based local planning strategies and infrastructure plans;
- Formulation of Community Participation Plans;
- Commence community participation consistent with CPPS;
- Organisational reviews of all agencies, including structures, resource allocations, budget allocations, training programs, information material preparation and general preparation for effective ‘start date’ of new system;
- Government and local government advertising campaign (see above);
- Formulation, population and testing of e-planning systems to ensure seamless operation from effective start date;
- Development or refinement of accreditation systems for certifying professionals; and
- Piloting of certain elements of the new system.

These tasks will be time and cost consuming and will be challenging to achieve within a 12 – 18 months period, but are nonetheless considered essential if the new system is to operate effectively in the long
term and be consistent with the principles of the White Paper. This will be more difficult to achieve if the system is already operational while these tasks are being undertaken. Once again, if the new system is not seen to be operating effectively and efficiently from the beginning, confidence in it will be quickly lost.

The Institute looks forward to the opportunity of being involved in the process of implementation and transition to the new planning system.

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