



# Planning in NSW: Reconnecting the community with the planning system

DISCUSSION PAPER



Prepared by the Environmental Defender's Office (NSW)  
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### Introduction to Discussion Paper

This Discussion Paper is the first step in a project conceived by the Total Environment Centre<sup>1</sup> (TEC) and funded by the NSW Department of Planning (the Department). The TEC has engaged the NSW Environmental Defender's Office<sup>2</sup> (EDO) to assist in the project which will culminate in a report to inform the Department about how the public views the planning system and the nature of their experiences when engaging with the Department.

This Discussion Paper is the first step in preparing the report to the Department. It is intended to provide information about how the NSW planning system works, describe the various opportunities for public participation and primarily to aid and facilitate discussion about the public's experience with the planning system. This feedback will be used to formulate recommendations for the Department on how the planning system might be improved.<sup>3</sup>

Following release of the Discussion Paper, TEC and EDO will hold a series of public workshops around New South Wales to gain community feedback on the planning system. This feedback will then be collated and will form the basis of the final report to the Department.

The aim of the final report is to provide the Department with an assessment of how the people of NSW view the current planning system and recommend ways that the Department can help reconnect the community with the planning system.

This Discussion Paper has two sections, each focusing on a key aspect of planning:

Part 1: The NSW Planning System - describes how the system is structured and how decisions are made.

Part 2: Community Consultation and Public Participation – describes the opportunities for public participation in the decision-making process and outlines best practice approaches to public participation in planning processes.

Key questions have been inserted throughout the Discussion Paper to stimulate discussion on the key issues. These are provided at the end of each section.

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<sup>1</sup> TEC has been campaigning for environment protection in the city and country, changing government policy, advising the community and challenging business since 1972.

<sup>2</sup> The EDO is an independent non-profit community legal centre specialising in public interest environmental law.

<sup>3</sup> It is important to note that this project does not relate to engagement with local councils and bodies other than the Department of Planning.

## Key Questions

The NSW Government has declared that it is working towards implementing Australia's best planning system.<sup>4</sup> What would be the features of a best practice planning system?

If you could change anything about the current system, what would it be? Here are some questions to guide you.

### 1. Planning Law

- How important is it for you to know about the law and how to access particular provisions?
- Where would you like to be able to access information about planning laws?
- Can the Department of Planning do anything to help you understand how the law works and what right you have regarding planning decisions?

### 2. Strategic Planning

- Does the Department of Planning adequately explain the role of strategic planning in the overall planning system? For example, the significance of LEPs, SEPPs, Regional Strategies and Metro Strategies and how they interact?
- Is the strategic planning framework as straightforward as it could be?
- Can you think of ways that the strategic planning framework could be simplified?
- Is there more the Department of Planning could do to help the community understand how strategic planning works?

### 3. Development Assessment

- If you were to lodge a development application, would you know what type of development you were proposing and what type of assessment would be required?
- Who should the decision-maker be?
- Do you think the current development assessment process results in good planning outcomes?
- Can you identify areas of the development assessment process that are confusing or causing problems?
- Does the development assessment process strike a balance between economic, social and environmental interests? Can you explain your answer?

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<sup>4</sup> Department of Planning, 2009, *Improving the Planning System*, DOP website at <http://www.planning.nsw.gov.au/PlanningSystem/ImprovingthePlanningSystem/tabid/68/Default.aspx>

#### **4. Community Consultation**

- Do you think the Department of Planning does enough to consult the community on planning matters?
- What matters should the community have a say in?
- What is the best way for the Department to consult the community?
- Are you aware of when and in what manner the Department is obliged to consult the community?

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## Part 1: The NSW Planning System

### 1. Introduction

There are two levels at which the planning system operates, both of which are governed by the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000*. They are:

- Strategic planning and plan making; and
- Development assessment.

#### Planning Law

The key piece of legislation governing the NSW planning system is the Environmental Planning and Assessment Act 1979 (EP&A Act). The EP&A Act is administered by the NSW Department of Planning. The Minister responsible for the Act is the Minister for Planning (**Planning Minister**).

The main purpose of the EP&A Act is to set out the process for making local and State plans (strategic planning), and to establish rules for the assessment of development applications.

It is important to note that the EP&A Act has been significantly amended in the last 12 months. These amendments have considerably altered many of the processes under the Act.

The key amendments are:

- A new 'gateway' system for making Environmental Planning Instruments;
- The establishment of the Planning Assessment Commission to advise the Minister on proposed developments and in some cases decide whether an application should be approved;
- The establishment of Joint Regional Planning Panels to act in place of councils in relation to regionally significant development;
- Standardised State-wide exempt and complying development codes for residential and commercial development; and
- The introduction of tighter accountability mechanisms for private certifiers.

This paper includes a summary of the new processes established by the 2008/09 reforms. However, the paper also refers to the previous or 'old' system throughout, since this system is likely to be that with which the public is most familiar and has had experience engaging with.

The main parts of the EP&A Act as at August 2009 are summarised below:

**Objects** - guide decision-making under the Act. The objects are to encourage a number of environmental, economic and social outcomes, including the promotion of ecologically sustainable development, the sharing of responsibility for environmental planning between different levels of government, and to provide

increased opportunity for public involvement and participation in environmental planning and assessment.<sup>5</sup>

**Part 2** - outlines the different positions and bodies that have responsibilities under the Act. These include the Planning Minister, the Director-General, the Planning Assessment Commission (PACs), Joint Regional Planning Panels (JRPPs), and Independent Hearing and Assessment Panels (IHAPs). More information is provided about these bodies in the Discussion Paper.

**Part 3** - provides for the making and administration of Environmental Planning Instruments (EPIs), which are Local Environmental Plans (LEPs) and State Environmental Planning Policies (SEPPs).

**Part 3A** - provides a separate assessment process for major infrastructure and other projects considered by the Minister to be of regional or State planning significance.

**Part 4** - sets out the process for assessing and approving most developments in NSW.

**Part 5** - sets out the process for the environmental assessment of certain activities in which the proponent is a public authority and no development application is lodged. This Part is rarely used.

**Part 6** - provides for the implementation and enforcement of the Act by local councils and the Planning Department.

The EP&A Act is supported by the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation). Regulations provide much of the detail to support the provisions of an Act. While the Act is primary legislation made by the Parliament, the Regulation is 'delegated legislation' and is made by the Government. Provisions in Regulations are more easily changed.

## 2. Strategic Planning and Plan-making

The EP&A Act allows for the making of plans, called Environmental Planning Instruments (EPIs) to control development and to regulate competing land uses for local government areas, regions or the whole State.<sup>6</sup> The two types of EPIs that can be made are State Environmental Planning Policies (SEPPs) and Local Environmental Plans (LEPs) and.<sup>7</sup>

SEPPs and LEPs are legally enforceable documents which must be complied with like any legislative instrument. EPIs are also complemented by Regional Strategies prepared by the Department of Planning. A Regional Strategy is a strategic policy

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<sup>5</sup> *EP&A Act 1979*, s. 5.

<sup>6</sup> *EP&A Act 1979*, Part 3 (Environmental planning instruments), s. 24 – 36.

<sup>7</sup> A third type - Regional Environmental Plans (REPs) were removed by the recent planning reforms. Any existing REPs are now deemed to be SEPPs or have been subsumed into existing LEPs.

document that sets out a 25-year plan for future land use of a region and provides for environmental, housing and infrastructure needs. A Regional Strategy also implements relevant SEPPs and other State Government policies, such as the State Infrastructure Strategy 2006-7 to 2015-16. Although Regional Strategies are not legally enforceable in and of themselves, councils are required to ensure that their draft LEPs are consistent with the relevant Regional Strategy that applies to their local government area.<sup>8</sup>

Two other important strategic documents that influence planning in NSW are the 'Sydney Metropolitan Strategy' and the 'State Plan'.

The Sydney Metropolitan Strategy, *City of Cities: A Plan for Sydney's Future* (known as the Metro Strategy), released in December 2005, is a strategic policy document to guide and manage Sydney's growth over the next 25 years. The Metro Strategy will be implemented via ten subregional strategies across greater-Sydney.

The *NSW State Plan* is a broad policy document that guides decision making by the NSW Government, including the Department of Planning. It sets goals and priorities for Government action, and sets targets in some areas.

## **2.1. State Environmental Planning Policies**

### **2.1.1 What is a State Environment Planning Policy?**

A SEPP is an environmental planning instrument which addresses planning issues within the State. There are currently about 40 SEPPs in NSW. SEPPs were previously numbered but now are simply described. SEPPs can either prohibit or facilitate certain types of development in a local government area, and many SEPPs make the Planning Minister the decision-maker (consent authority) for certain types of high-impact development, or development in sensitive areas. SEPPs are a very important part of the planning system, as they usually override all other planning instruments and policies.

Examples of some of the more important SEPPs are described below:

#### *SEPP 1 – Development Standards*

This Policy enables the flexible interpretation of development standards in LEPs. For example, if a developer's proposal meets the objectives of a LEP, but not some of the standards set by the LEP, such as the floor space ratio or height restrictions, the developer can apply for an exemption from those standards (SEPP 1 objection).

However, the new Standard LEP Instrument now sets out the circumstances when a development standard in a LEP or SEPP can be varied,<sup>9</sup> and once a council implements the new standard LEP, SEPP 1 will cease to apply in that local

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<sup>8</sup> This is as a result of a Ministerial direction under s117 of the *EP&A Act 1979*

<sup>9</sup> Standard Instrument (Local Environmental Plans) Order 2006, cl. 23.

government area. The Planning Department's intention is to remove SEPP 1 once all councils have adopted new LEPs using the standard instrument.

#### *SEPP 4 – Development Without Consent and Miscellaneous Exempt and Complying Development*

This Policy permits certain development by public authorities without development consent. It also makes minor development which is auxiliary to existing development, such as fences for existing houses, permissible without consent.

#### *SEPP (Exempt and Complying Development Codes) 2008 (Codes SEPP)*

This is a new SEPP that implements the NSW Government's recent round of planning reforms as they relate to exempt complying development.

This Policy provides exempt and complying development codes, including the General Exempt Development Code for development of minimal environmental impact that may be carried out without development consent, and the General Housing Code for complying development that may be carried out in accordance with a certificate. Under this SEPP, new detached single and two-storey houses and home alterations and additions on specific lot sizes and in certain zones can be approved within 10 days, with no requirement for public notification and no opportunity for the public to make submissions.

#### *SEPP 14 – Coastal Wetlands*

This Policy provides additional protection for coastal wetlands by requiring development consent to be obtained before any clearing, draining, filling or construction of levees can take place on a mapped wetlands. These developments will also require an environmental impact statement and the agreement of the Director-General of the Department of Environment, Climate Change and Water before consent can be granted.

#### *SEPP 26 – Littoral Rainforests*

This Policy seeks to protect coastal rainforests by requiring development consent for development in or adjacent to mapped coastal rainforest areas. An environmental impact statement and the concurrence of the Director-General of the Department of Environment, Climate Change and Water may also be required under this Policy.

#### *SEPP 33 – Hazardous and Offensive Development*

This Policy contains additional requirements that must be met before development consent can be granted for hazardous and offensive industries. For example, the developer must carry out a preliminary hazard analysis, and the consent authority must consider additional matters.

### *SEPP 71 – Coastal Protection*

This Policy seeks to protect land in the coastal zone by requiring applications to carry out development in sensitive coastal locations to be referred to the Director-General of the Department of Environment, Climate Change and Water for comment, and requiring some subdivisions in the coastal zone to have master plans.

### *SEPP (Infrastructure) 2007*

This SEPP facilitates the development of State infrastructure, including telecommunications facilities, sewerage works and storm water management, and specifies when development consent is (and is not) required for such development to be carried out in certain zones.

### *SEPP (Major Development) 2005*

This Policy identifies the types of development to which Part 3A of the EP&A Act applies. The Policy also makes the Planning Minister the consent authority for these developments and for sites of State significance.

#### **2.1.2. How is a new SEPP made?**

A SEPP may address any matter that, in the opinion of the Planning Minister, is of State or regional environmental planning significance.<sup>10</sup>

The Minister may (but is not required to) publicise an explanation of the intended effect of a proposed SEPP and to seek and consider submissions from the public.<sup>11</sup>

There are special consultation procedures concerning threatened species. If threatened species, populations, ecological communities or their habitats will or may be adversely affected by the SEPP, then the Director-General of the Department of Planning must consult with the Director-General of the Department of Environment, Climate Change and Water.<sup>12</sup>

- 1. Do you understand what a SEPPs are designed to do?**
- 2. Do you know which SEPPs apply in your local area?**
- 3. Have you ever read a SEPP? If so, did you understand what it meant?**
- 4. Do you understand how SEPPs fit into the planning system? For example, do you understand how SEPPs interact with LEPs?**

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<sup>10</sup> *EP&A Act 1979*, s. 37.

<sup>11</sup> *EP&A Act 1979*, s. 38.

<sup>12</sup> *EP&A Act 1979*, s. 34A(2).

## **2.2. Local Environmental Plans**

### **2.2.1 What is a Local Environmental Plan?**

A LEP is a legal document that controls development in a local government area by prescribing the permissible land uses in particular areas, including providing for land to be set aside for industrial, commercial, residential and public or conservation purposes. LEPs govern the form and location of new development, provide for the protection of open space and environmentally sensitive areas and guide planning decisions for local government areas. LEPs are usually prepared by local councils but are ultimately made by the Minister for Planning.<sup>13</sup>

All land, whether privately owned, leased or publicly owned, is subject to the controls set out in the applicable LEP so it is a very important document. A LEP allocates 'zones' to different parcels of land. Each zone has a number of objectives, which indicate the principal purpose of the land, such as agriculture, residential or industry. Each zone also lists which developments are permitted with consent, permitted without consent or prohibited.

Traditionally, LEPs have tended to differ markedly between different local government areas, with each council creating its own zones, zone objectives and permissible uses for each zone. However, in 2005 the NSW Government changed the law to require the standardisation of LEPs using a 'standard instrument'. The standard instrument is a template outlining the form and (to some extent) content that all LEPs must adopt. All councils must use the standard instrument to prepare a new principal LEP for their local government area by 2011. So far, only a few local government areas have finalised LEPs in line with the standard instrument.

### **2.2.2 The LEP-making process**

LEPs are made under Part 3 of the EP&A Act, which sets out the plan-making process that must be followed. The process for making LEPs changed from 1 July 2009 and there are currently two different processes being followed. The process that applies in a local government area will depend on whether the relevant council commenced making a new draft LEP before or after 1 July 2009.<sup>14</sup>

Generally, councils that advised the Director-General of Planning of a decision to make a draft LEP *before* 1 July 2009 will follow the old process in line with the former provisions of the EP&A Act. All other councils will follow the new process for future LEPs. Both processes for the making of LEPs are briefly outlined below:

*Old process for making LEPs:*

1. The LEP is proposed by a local council. Alternatively, the Minister for Planning might order a council to prepare a LEP.<sup>15</sup>

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<sup>13</sup> *EP&A Act 1979*, s. 53.

<sup>14</sup> The former LEP plan-making provisions continue to apply to the making of LEPs if the council resolved to make a new LEP prior to 1 July 2009 unless the Director-General notifies the council that those provisions cease to apply. See *EP&A Regulation 2000*, cl. 12(2).

<sup>15</sup> *EP&A Act 1979*, ss. 54-55.

2. The council might carry out a local environmental study. This deals with topics like environmental conservation, housing and settlement, and suitable infrastructure development for industry. It allows the council to identify and focus on important issues.
3. The council prepares a draft LEP, sometimes with direction from the Department of Planning.
4. The council consults with relevant public authorities about the provisions of the draft LEP and may make changes based on comments from these public authorities.
5. The draft LEP is submitted to the Director-General of the Department of Planning. If the Director-General is satisfied, a certificate will be issued allowing the draft LEP to be placed on public exhibition.
6. The draft LEP is placed on public exhibition for a minimum of 28 days. The community is asked to comment on the draft LEP, along with the local environmental study (if prepared). A public hearing may be held.
7. The council considers the comments made by members of the public, and may make changes to accommodate public concerns.
8. The updated draft LEP may be re-exhibited but often it is just sent directly to the Department of Planning. The Director-General prepares a report for the Planning Minister who then decides whether or not to approve the draft LEP. The Minister may amend the LEP before approving it. With the Minister's approval, the draft LEP becomes law and is published in the Government Gazette.

*New gateway process for making LEPs:*

1. The relevant planning authority prepares a planning proposal which explains the intended effect of the proposed LEP and justifies the making of the LEP.<sup>16</sup> The relevant planning authority will usually be a local council but the Planning Minister can appoint the Director-General or a joint regional planning panel (JRPP) as the relevant planning authority.<sup>17</sup> A planning proposal is a document that explains the intended effect of the proposed LEP and also sets out the justification for making the proposed LEP.
2. At the gateway stage the planning proposal is sent to the Planning Minister. The Minister (or a delegate) will then decide whether the planning proposal is to proceed.<sup>18</sup> The role of the Minister is to act as a gateway or checkpoint to ensure that the proposal is justified before further studies are done and resources are allocated to the preparation of a plan.

The Minister will decide:<sup>19</sup>

- (a) the level of community consultation required;
- (b) which State and Commonwealth authorities will be consulted;

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<sup>16</sup> *EP&A Act 1979*, s. 55(1).

<sup>17</sup> *EP&A Act 1979*, s. 54(1).

<sup>18</sup> *EP&A Act 1979*, s. 56(2).

<sup>19</sup> *EP&A Act 1979*, s. 56(2).

- (c) the necessity for a public hearing by the Planning Assessment Commission or other body; and
  - (d) the appropriate timeframes for the various stages of the proposal.
3. The proposal is publicly exhibited. According to the Department, 'low impact' proposals will be exhibited for 14 days, others for 28 days.<sup>20</sup>
  4. The public can make written submissions and may also request that a public hearing be held.<sup>21</sup>
  5. The relevant planning authority considers the public submissions and may vary the proposal.
  6. A draft LEP is prepared by Parliamentary Counsel.
  7. The draft LEP is submitted for approval by the Planning Minister (or a delegate). With the Minister's approval, the plan becomes law and is published on the NSW legislation website.

### **2.2.3 Public notification of a draft LEP/planning proposal**

#### *Old process*

Council must notify the public about the draft LEP and explain how the public can access and inspect it. It is open to council to decide how it gives public notice of the draft LEP and also how the draft LEP will be made available to the public. However, council must give the following information:

- The place/s where the draft LEP can be inspected by the public; and
- The times during which the draft LEP can be inspected by the public

Most councils give notice via letters to residents and announcements in local newspapers. Public notice of the draft LEP must be given before or at the same time as the exhibition stage commences.<sup>22</sup>

#### *New gateway process*

At the 'gateway determination' stage, the Planning Minister decides the community consultation requirements.<sup>23</sup> Community consultation requirements will therefore be determined on a case by case basis and in some limited cases the Planning Minister may decide that the community does not need to be consulted.<sup>24</sup>

The EP&A Act says that the Minister can prescribe standard community consultation requirements in the Regulations but none have been published so far.<sup>25</sup> If standard

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<sup>20</sup> However this requirement is not set down anywhere in the Act or Regulation.

<sup>21</sup> *EP&A Act 1979*, s. 57.

<sup>22</sup> *EP&A Regulation 2000*, cl. 12. Note, this clause has now been amended and does not appear in the *EP&A Act 1979*. It is a reference to a provision before the July 1 amendments took effect.

<sup>23</sup> *EP&A Act 1979*, s. 56(2)(c).

<sup>24</sup> *EP&A Act 1979*, s. 56(3). For example, the Minister may decide that amending planning instrument does not warrant community consultation because it will not have any significant adverse impact on the environment or adjoining land. See *EP&A Act 1979*, s. 73A.

<sup>25</sup> *EP&A Act 1979*, s. 56(4).

community consultation requirements are set the planning authority must consult the community in accordance with those requirements.<sup>26</sup>

The planning proposal must be made publicly available during the period of community consultation.<sup>27</sup>

#### **2.2.4 Making a submission on a draft LEP/planning proposal**

There is usually an opportunity for members of the public to make submissions on a draft LEP/planning proposal.

##### *Old process*

Any person can make a written submission to council in respect of a draft LEP.<sup>28</sup> A submission may support or object to particular provisions in the LEP.

Also, any person who makes a written submission can request a public hearing to discuss the issues raised in a submission. The council does not have to grant this request unless it believes that the issues raised in the submission are significant enough to warrant a hearing to help the council decide how to respond to the issues raised.<sup>29</sup>

A council that decides to hold a public hearing must give notice to the public and all individuals who requested a public hearing when making submissions on the draft LEP.<sup>30</sup> The notice must contain details of the public hearing and must be given at least 21 days before the start of the public hearing.<sup>31</sup>

##### *New gateway process*

Any person can make a written submission during the community consultation stage.

A person making a submission can request a public hearing on the issues raised in the submission. The relevant planning authority may grant this request if it believes that the issues raised in the submission are of such significance that they should be the subject of a hearing.<sup>32</sup>

The relevant planning authority may arrange a public hearing on any issue whether or not a person has made a submission concerning the matter.<sup>33</sup>

A report of the public hearing is to be given to the relevant planning authority but does not have to be made public.<sup>34</sup>

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<sup>26</sup> *EP&A Act 1979*, s. 57(1).

<sup>27</sup> *EP&A Act 1979*, s. 57(2).

<sup>28</sup> *EP&A Act 1979*, s. 67. Note, this section has now been amended and does not appear in the EP&A Act. It is a reference to a provision before the July 1 amendments took effect.

<sup>29</sup> *EP&A Act 1979*, s. 68 (1) (b)

<sup>30</sup> *EP&A Regulation 2000*, cl. 14 (1).

<sup>31</sup> *EP&A Regulation 2000*, cl. 14 (2).

<sup>32</sup> *EP&A Act 1979*, s. 57 (5).

<sup>33</sup> *EP&A Act 1979*, s. 57 (6).

<sup>34</sup> *EP&A Act 1979*, s. 57 (7).

### 2.2.5 Decision maker's duty to take submissions into account

#### *Old process*

The council must consider all the written submissions it receives and the report from the public hearing (if there is one).

The council may alter the draft LEP to implement ideas raised in submissions or at the public hearing.<sup>35</sup> However, any amendments do not necessarily need to be made in response to public submissions.<sup>36</sup>

If the council does alter the draft LEP, it can choose to re-exhibit the draft (or just the altered part of it). This would involve giving public notice in accordance with the procedures set out above. However, the council does not have to re-exhibit the draft LEP after it is altered.<sup>37</sup>

#### *New gateway process*

The relevant planning authority must consider any submission made in respect of the planning proposal and the report of any public hearing.<sup>38</sup> The relevant planning authority can vary the planning proposal after considering the submission or report from a public hearing during the community consultation stage.<sup>39</sup> If the relevant planning authority does vary the planning proposal, it has to forward the revised planning proposal to the Planning Minister.<sup>40</sup>

Further community consultation on the revised planning proposal is not mandatory and is at the Planning Minister's discretion.<sup>41</sup>

In addition to altering the planning proposal, the relevant planning authority may also, at any time, request the Planning Minister to determine that the planning proposal should not proceed.<sup>42</sup>

### 2.2.6 Final approval of a LEP

#### *Old process*

Once the council is satisfied with the draft LEP, it sends the draft along with all supporting documents to the Director-General of the Department of Planning.<sup>43</sup>

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<sup>35</sup> *EP&A Act 1979*, s. 68 (3). Note, this section has now been amended and does not appear in the *EP&A Act*. It is a reference to a provision before the July 1 amendments took effect.

<sup>36</sup> *EP&A Act 1979*, s. 68 (3A). Note, this section has now been amended and does not appear in the *EP&A Act*. It is a reference to a provision before the July 1 amendments took effect.

<sup>37</sup> *EP&A Act 1979*, s. 68 (3B). Note, this section has now been amended and does not appear in the *EP&A Act*. It is a reference to a provision before the July 1 amendments took effect.

<sup>38</sup> *EP&A Act 1979*, s. 57(8).

<sup>39</sup> *EP&A Act 1979*, s. 58(1).

<sup>40</sup> *EP&A Act 1979*, s. 58(2).

<sup>41</sup> *EP&A Act 1979*, s. 58(3). Note, this section has now been amended and does not appear in the *EP&A Act*. It is a reference to a provision before the July 1 amendments took effect.

<sup>42</sup> *EP&A Act 1979*, s. 58(4).

<sup>43</sup> Supporting documents include:

- (a) Details of all submissions;
  - (b) The report of any public hearing;
  - (c) The reasons for any alterations made to the plan after the closure of the exhibition period;
- and

The Director-General and council might agree to make further changes to the draft LEP or the Director-General might return the draft LEP to council and direct council to make changes.<sup>44</sup> Either way, the draft LEP (as altered) does not need to be re-exhibited to the public to allow the public to comment on the changes.

Once the Director-General is satisfied with the draft LEP he or she prepares a report to the Minister.<sup>45</sup>

The Minister then decides whether or not to make the draft LEP an LEP.

#### *New gateway process*

Once the relevant planning authority has finalised the planning proposal, the Director-General arranges for a LEP to be drafted that will give effect to the planning proposal. The Director-General will consult with the relevant planning authority on the terms of the LEP.<sup>46</sup>

The Minister (or the Minister's delegate) will then either:

- (a) make the LEP (with or without variation of the proposals submitted by the relevant planning authority) in the terms the Minister (or delegate) considers appropriate, or
- (b) decide not to make the proposed LEP.<sup>47</sup>

### **2.2.7 Relevant Planning Authorities**

There are a number of individuals and bodies that can be nominated by the Minister for Planning as the 'relevant planning authority' for the purpose of making a LEP.

The Minister for Planning may delegate the task of preparing a draft LEP or planning proposal to a planning assessment panel, a planning administrator, the Planning Assessment Commission or a Joint Regional Planning Panel. During the period of

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- (d) A statement:
    - a. declaring that the council has complied with the public consultation provisions of the EP&A Act; and
    - b. outlining the other environmental planning instruments (such as SEPPs) and section 117 Ministerial directions that have been considered in making the draft LEP and detailing any inconsistency between the draft LEP and those instruments or directions.

<sup>44</sup> *EP&A Act 1979*, s. 68(9).

<sup>45</sup> The report sets out information such as:

- (a) Whether the draft LEP submitted is inconsistent with any relevant SEPP or relevant direction under section 117;
- (b) If there is such an inconsistency—whether the inconsistency is justifiable in the circumstances;
- (c) Whether the provisions relating to public involvement in the preparation of the draft LEP have been complied with;
- (d) The relationship between the draft LEP, and other proposed and any existing environmental planning instruments, and any relevant directions under section 117, applying to the land to which the draft LEP applies; and
- (e) Such other matters (if any) relating to the draft LEP as the Director-General thinks appropriate.<sup>45</sup>

<sup>46</sup> *EP&A Act 1979*, s. 59(1).

<sup>47</sup> *EP&A Act 1979*, s. 59(2).

appointment, the delegated body is taken to be the council in exercising the functions that are allocated to it.<sup>48</sup>

### *Planning Assessment Panels*

Planning Assessment Panels are statutory bodies,<sup>49</sup> and can exercise all the functions of councils. They can act as a consent authority (approving or rejecting development applications) and they can make LEPs and other planning instruments.<sup>50</sup>

For example, the Planning Minister appointed the Ku-ring-gai Planning Panel as a planning assessment panel in 2007 and gave it the power to make LEPs. One of the reasons the Minister gave for appointing the planning assessment panel was that the council was taking too long to make LEPs.

Each planning assessment panel will have different terms of reference and functions which are set out in the Order creating the planning panel. The Order commences once it is published in the NSW Government Gazette.

A planning panel is made up of 3-5 people appointed by the Planning Minister.<sup>51</sup> The members must have relevant skills and knowledge in planning and development matters.<sup>52</sup>

The council continues to operate as normal when a planning assessment panel is created. The planning panel only takes on some of the functions of council and can only make decisions in regard to those functions that have been delegated to it. All other functions continue to be performed by the elected council as normal but that council cannot perform the functions that are allocated to the planning panel.

### *Planning administrators*

When a planning administrator is appointed, he or she can exercise all of the functions of council.<sup>53</sup> However, the Minister may limit the functions that can be exercised by the planning administrator.

### *Planning Assessment Commission (PAC)*

The Planning Assessment Commission (PAC) is a statutory body.<sup>54</sup> The PAC can exercise certain functions of councils and the Minister for Planning where the Minister for Planning has directed it to do so. These functions include determining development applications under Part 3A if the Minister, advising the Minister on planning and development matters and EPIs and reviewing the environmental aspects of proposed developments.<sup>55</sup> The PAC can also exercise any of the functions of regional panels (see below).

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<sup>48</sup> *EP&A Act 1979*, s. 118AB(1)(b).

<sup>49</sup> Planning assessment panels are listed in Schedule 5B of the *EP&A Act*. This Schedule also sets out other provisions relating to planning assessment panels such as how they are to be formed.

<sup>50</sup> *EP&A Act 1979*, s. 118 (3).

<sup>51</sup> *EP&A Act 1979*, s.118AA (4).

<sup>52</sup> *EP&A Act 1979*, s.118AA (5).

<sup>53</sup> *EP&A Act 1979*, s. 118 (2).

<sup>54</sup> *EP&A Act 1979*, s. 23B,

<sup>55</sup> *EP&A Act 1979*, s. 23D.

### *Joint Regional Planning Panel (JRPP)*

A JRPP is a statutory body.<sup>56</sup> A JRPP can exercise certain functions of councils. It can act as a consent authority (approving or rejecting development applications) and it can make LEPs and other planning instruments.<sup>57</sup>

- 1. Is the purpose of the new gateway process clear?**
- 2. Do you understand the new gateway process?**
- 3. What do you think of the new gateway process?**
- 4. Is the gateway process an improvement on the old process?**
- 5. Are you aware that you have a right to comment on the planning proposal or draft LEP for your area?**
- 6. Did you know about the standard instrument and do you know what it means for your area?**
- 7. Do you think it is better to have standard provisions in LEPs or do you think that each council should be able to make up its own provisions?**
- 8. Do you have any concerns about the contents of the Standard Instrument?**

### **2.3. Regional Strategies**

A Regional Strategy is a 25-year land use plan for a region - an overarching strategic document that implements relevant SEPPs and informs planning decisions for a region, such as the creation of LEPs, land releases and development application assessments. It is not an EPI under the Act so unlike SEPPs and LEPs it is not legally enforceable.

In 2006, the Department released a series of seven regional strategies designed to provide planning support for key growth areas across the State. Those seven strategies are for each of the following regions: Lower Hunter, Far North Coast, Illawarra, South Coast, Central Coast, Sydney-Canberra Corridor, and Mid North Coast.

All planning proposals are required to be consistent with the applicable Regional Strategy, unless the Director-General is satisfied that the inconsistency is of minor significance and the overall intent of the Regional Strategy is still achieved.<sup>58</sup> However, Regional Strategies are not legally enforceable instruments, so the Minister can make a LEP that is inconsistent with a Regional Strategy and there is no right to appeal.<sup>59</sup>

- 1. Do you understand how Regional Strategies fit into the overall planning framework?**
- 2. Did you know there was a Regional Strategy for your area and if so do you understand what the 25-year plan is for your area?**

<sup>56</sup> *EP&A Act 1979*, s. 23G(5).

<sup>57</sup> *EP&A Act 1979*, s. 118 (3).

<sup>58</sup> Section 117 Ministerial Direction, issued 1 July 2009, at clause 5.1.

<sup>59</sup> *EP&A Act 1979*, s. 117 (2); Ministerial Direction issued 1 July 2009, at clause 5.1.

- 3. Should LEPs consistent with Regional Strategies?**
- 4. Should Regional Strategies be legally enforceable?**

#### **2.4. Sydney Metropolitan Strategy**

The Sydney Metropolitan Strategy, *City of Cities: A Plan for Sydney's Future* (known as the Metro Plan), was released in December 2005 by the Planning Department. The Metro Plan is a strategic document that guides and manages Sydney's growth over the next 25 years. Its goal is to support economic growth while balancing social and environmental impacts, and it aims to:

- enhance liveability;
- strengthen economic competitiveness;
- ensure fairness;
- protect the environment; and
- improve governance.

It is intended that the Metro Strategy will be implemented via ten subregional strategies across greater-Sydney.<sup>60</sup> The subregional strategies are currently still in draft form.

As with Regional Strategies, the Metro Strategy and the subregional strategies are not statutory instruments, so they are not legally binding. The Department is preparing a s.117 Direction to enforce the Metro Strategy – this Direction requires that planning proposals (LEPs) must be consistent with the Metro Strategy. The Department of Planning has advised that this Direction will come into force in October 2009.<sup>61</sup>

- 1. Have you heard of the Metro Strategy and the ten subregional strategies?**
- 2. Do you understand where the Metro Strategy sits within the planning system?**
- 3. What status do you think the Metro Strategy should have within the strategic planning process?**

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<sup>60</sup> Metropolitan Strategy Team, Department of Planning, telephone communication with the EDO, 6 August 2009.

<sup>61</sup> Metropolitan Strategy Team, Department of Planning, telephone communication with the EDO, 6 August 2009.

### 3. Development Assessment

Many proposed developments and activities undertaken on land will require some form of approval from a local council, the Minister for Planning or another approval body authorised under the EP&A Act.

The EP&A Act provides for three streams of development assessment which are found under Part 3A, Part 4 and Part 5 of the Act. The Department of Planning is responsible for assessing developments under Part 3A. For this reason, this Discussion Paper will focus on development assessment under Part 3A and provide only a brief overview of Parts 4 and 5.

There are 3 broad categories of development under the EP&A Act:<sup>62</sup>

- development that *does not* need consent (including exempt and complying development);
- development that needs consent; or
- development that is prohibited.

The category of development that applies to a particular proposed development is set out in the relevant LEP applicable to the local government area. However, a SEPP may apply to a proposed development and it will usually override the LEP provisions.

For example, a LEP might prohibit residential development in a particular zone. But a SEPP might allow such development if it achieves one of the SEPP's aims. This is because SEPPs tend to deal with matters of State significance and can override local planning controls in order deliver State significant development or State planning objectives.

Development that needs consent is further categorised. For example, it might be 'designated development', 'local development' or a 'major project'. Each of these sub-categories is assessed differently under the EP&A Act. The subcategory will determine the procedures for applying for development consent, the level of environmental assessment required, the notification required and any appeal rights.

#### 3.1. Part 4

Part 4 of the EP&A Act sets out the procedure for assessing and approving the majority of development applications. Councils are the decision-makers under Part 4. There are various categories of development under this Part and different processes for development assessment and approval apply to each category.

For example:

- *Exempt and Complying development* - This category of development is fairly routine development such as extensions to houses. A very simple assessment process is followed and a certificate can be issued by either a council or an accredited certifier. As noted above, the new housing code has expanded the category of developments that are complying and are not required to be assessed and publicly notified in the usual manner;

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<sup>62</sup> EP&A Act 1979, ss. 76, 76A, 76B, and 76C.

- *Designated development* - tends to be high impact development. The types of development that fit into this category are listed under Schedule 3 of the EP&A Regulation. An environmental impact statement will be required and third parties must be notified and given the opportunity to comment on the application. Those who write submissions objecting to the development can appeal against a decision to grant consent;
- *Integrated development* - is development of a type that needs extra approvals from other public authorities, such as a licence to pollute. These approvals must be obtained before consent can be granted;
- *Advertised development* - is development that needs to be publicly notified in accordance with any Development Control Plan in place.

#### *Statement of environmental effects*

An application to carry out non-designated development must be accompanied by a SEE. The SEE must indicate the environmental impacts of the development, how the impacts have been identified and the steps which will be taken to protect the environment or to lessen harm to the environment.

#### *Environmental impact statements*

An EIS is required for designated developments to give a detailed analysis of all potential environmental impacts of the development. The EIS must be placed on public exhibition for at least 30 days, during which time the public can make submissions.<sup>63</sup>

A copy of the EIS and any submissions are forwarded to the Director-General of Planning, who then reports to the consent authority.<sup>64</sup>

#### *Species impact statement*

If the development is on land containing critical habitat or is likely to significantly affect threatened species, populations or ecological communities listed under the *Threatened Species Conservation Act 1995*, then the development application must be accompanied by an SIS. Similarly, an SIS must be prepared if there is likely to be a significant impact on threatened fish or marine vegetation protected under the *Fisheries Management Act 1994*.<sup>65</sup>

After considering the environmental impacts, the consent authority can then either approve or disapprove the activity, or, if the determining authority is also the proponent, they can decide to carry out the activity, modify it, or refrain from doing it.<sup>66</sup>

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<sup>63</sup> *EP&A Act 1979*, ss. 112 and 113.

<sup>64</sup> *EP&A Act 1979*, s. 113.

<sup>65</sup> *EP&A Act 1979*, s 112(1B).

<sup>66</sup> *EP&A Act 1979*, s 112(4).

### 3.2. Part 5

Certain developments, such as the construction of roads or electricity infrastructure by public authorities, and some activities, such as mining exploration, do not require development consent under any EPIs. Therefore, the environmental impacts are not assessed under Part 4 of the EP&A Act, since that Part applies only to developments for which a development application has been lodged. For this reason, Part 5 of the EP&A Act contains a 'safety-net' which sets out a separate environmental assessment procedure that applies to activities being assessed under this Part.

Under Part 5, the Minister or other consent authority must examine and take into account to the fullest extent possible all matters which are likely to affect the environment if the activity goes ahead.<sup>67</sup>

#### *Review of environmental factors*

A consent authority usually decides whether to require a full environmental impact study by considering a preliminary environmental assessment, called a Review of Environmental Factors. This document is required as part of the standard practice of the Department and other public authorities which are bound by Part 5.

Depending on the outcome of the review of environmental factors, an environmental impact statement and possibly a species impact statement will also be required.

- 1. Are you aware of the different types of development and the different assessment procedures under Parts 4 and 5?**
- 2. If you planned to develop your property do you feel you could identify which type of development your plans would fall under and understand the procedure to be applied in assessing your proposal?**
- 3. Do you understand when an environmental impact statement is required?**

### 3.3. Part 3A

All major projects, which include a sub-category of critical infrastructure projects, are now assessed and approved under Part 3A provisions. The Planning Minister is the consent authority for all major projects and critical infrastructure.<sup>68</sup>

The main effect of Part 3A has been to remove many major projects from assessment and approval under the Part 4 and Part 5 assessment process, and to give control of these projects to the Planning Minister.

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<sup>67</sup> *EP&A Act 1979*, s. 111.

<sup>68</sup> *EP&A Act 1979*, s 75D(1).

### 3.3.1 What is a Part 3A project?

Part 3A projects are developments that, in the opinion of the Planning Minister, are of State or regional environmental planning significance, or activities where the consent authority is also the proponent and the project would have been assessed under Part 5 had Part 3A not applied.<sup>69</sup> Part 3A projects are often large government infrastructure projects, such as roads, pipelines, desalination plants and dams, but also often include private developments which range in size from minor subdivisions to major urban renewal projects.<sup>70</sup>

Part 3A has its own assessment and approval process.

### 3.3.2 How are Part 3A projects identified?

Development (or a category of development) can be declared to be subject to the Part 3A assessment process under a SEPP or a Ministerial Order of the Planning Minister.<sup>71</sup>

*SEPP (Major Development) 2005* states that Part 3A applies to developments that, in the opinion of the Minister, are of a kind described in Schedules 1, 2 or 3 or 5 of the SEPP.<sup>72</sup>

- **Schedule 1** deals with projects of a particular **type** such as intensive livestock industries, including feedlots and piggeries that employ 20 or more people, and development for the purposes of residential, commercial or retail projects with a capital investment value of more than \$100 million that the Minister determines are important in achieving State or regional planning objectives
- **Schedule 2** deals with projects on **specified sites** such as coastal areas, Penrith Lakes and Sydney Harbour foreshore site.
- **Schedule 3** deals with State **significant sites** such as the Sydney Opera House
- **Schedule 5** deals with projects that are deemed to be **critical infrastructure**.

### 3.3.3 Critical infrastructure projects

If a project has been declared as a Part 3A project, the Minister can make an additional declaration that the project is also a 'critical infrastructure project' if the Minister is of the opinion that the project is essential for the State for economic, environmental or social reasons.<sup>73</sup>

This can be done by either listing the development in Schedule 5 of *SEPP (Major Development) 2005*, or by the Minister making a Ministerial Order. Projects which

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<sup>69</sup> *EP&A Act 1979*, s 75B(2).

<sup>70</sup> *EP&A Act 1979*, s 75A definitions "major infrastructure development".

<sup>71</sup> *EP&A Act 1979*, s 75B(1).

<sup>72</sup> *State Environmental Planning Policy –Major Developments*, Clause 6.

<sup>73</sup> *EP&A Act 1979*, s 75C.

have been declared to be critical infrastructure projects include the Kurnell Desalination Plant and the Royal North Shore Hospital redevelopment site.<sup>74</sup> SEPPs do not apply to critical infrastructure projects unless the SEPP specifically states that it does.<sup>75</sup>

### **3.3.4 Exemption from other environmental laws**

Unlike other types of development, Part 3A projects are not required to comply with other environmental laws. A number of authorisations such as water use approvals under the Water Management Act 2000 are not required if a Part 3A approval has been granted.<sup>76</sup> Other authorisations have to be granted if a project has been approved under Part 3A and such an authorisation is otherwise necessary. This includes mining leases under the Mining Act 1992.<sup>77</sup>

Critical infrastructure projects are exempt from the usual range of administrative orders which can be used by public authorities to enforce other environmental laws. For example, interim protection orders and stop work orders to protect threatened species, and environment protection notices to reduce pollution, cannot be issued against a critical infrastructure project.<sup>78</sup>

The EP&A Act also excludes anyone from taking enforcement proceedings in the Land and Environment Court (Class 4 proceedings) to enforce the conditions of a critical infrastructure approval, or to remedy or restrain a breach of the EP&A Act or any other environmental law in relation to the project, unless the proceedings are brought or approved by the Planning Minister.<sup>79</sup>

### **3.3.5 How is a Part 3A project processed?**

#### *Project application*

To begin the process, the developer lodges an application with the Director-General of Planning.<sup>80</sup> Alternatively, the Planning Minister can allow, or can require, a developer to submit a concept plan.<sup>81</sup>

The purpose of a concept plan is to give a broad overview of the project by outlining what the project will entail, and whether it will be built in stages. A detailed description of the project is not required. A proponent can lodge a combined

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<sup>74</sup> *State Environmental Planning Policy – Major Developments*, cl. 6, 6A; Sch 5. There are others listed in the SEPP.

<sup>75</sup> *EP&A Act 1979*, s 75R(2)(b).

<sup>76</sup> *EP&A Act 1979*, s. 75U (1)(h).

<sup>77</sup> *EP&A Act 1979*, s. 75V (1) (c).

<sup>78</sup> *EP&A Act 1979*, s 75U(3).

<sup>79</sup> *EP&A Act 1979*, s 75T(2).

<sup>80</sup> *EP&A Act 1979*, s 75E.

<sup>81</sup> *EP&A Act 1979*, s 75M(1).

concept plan and an application for approval to carry out part of a project at the same time.<sup>82</sup>

Once a concept plan is lodged, the usual Part 3A process is followed.

When an application is lodged, the Director-General prepares Environmental Assessment Requirements (EARs) that the proponent must address. These can be changed later if necessary.

When preparing the EARs, the Director-General has to consult relevant public authorities<sup>83</sup> and have regard to any issues raised by the public authorities.<sup>84</sup> Relevant public authorities might include the Department of Environment, Climate Change and Water or the Roads and Traffic Authority.

The EARs may require an environmental assessment to be prepared by or on behalf of the proponent.<sup>85</sup> If so, the proponent must undertake an environmental assessment that addresses the key issues outlined by the Director-General. The assessment may also include a statement of the commitments the proponent is prepared to make to minimise or manage the environmental impacts of the development.<sup>86</sup>

Once the proponent has lodged the environmental assessment, the Director-General will decide whether it is adequate and ready for public exhibition. If the Director-General is not satisfied with the assessment, he or she can require the proponent to submit a revised environmental assessment addressing the inadequacies identified by the Director-General.<sup>87</sup>

If the Director-General is satisfied with the environmental assessment, he or she must make the proposal, along with the environmental assessment, publicly available for at least 30 days. During this time any person can comment on the proposal.

The Director-General prepares a report based on the proponent's environmental assessment. The report is given to the Minister for Planning and is the primary document that the Minister relies on when deciding whether to approve the project.

The Planning Minister must then decide whether to approve or disapprove the carrying out of the project. The Minister can approve the project with modifications,

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<sup>82</sup> *EP&A Act 1979*, s 75M(3A).

<sup>83</sup> *EP&A Act 1979*, s. 75F(4)

<sup>84</sup> These provisions do not apply to EARs for a concept plan. S75P

<sup>85</sup> *EP&A Act 1979*, s.75F(5)

<sup>86</sup> *EP&A Act 1979*, s.75F(6)

<sup>87</sup> *EP&A Act 1979*, s. 75H(2)

and can impose a condition of approval that the proponent complies with its statement of commitments.<sup>88</sup>

### **3.3.6 Application of LEPs and SEPPs**

In deciding whether to approve a Part 3A project, the Minister is not generally bound by the provisions of any LEP.<sup>89</sup> However, the Planning Minister can choose to take them into account in deciding whether to approve a project, and the Director-General must identify them in his or her report to the Minister.<sup>90</sup>

SEPPs continue to apply to major projects. However, if it is a critical infrastructure project, a SEPP will only apply if it expressly states that it applies to the particular project.<sup>91</sup>

- 1. Do you think it's appropriate to have a stream of development assessment to deal with major projects?**
- 2. Do you think these projects should be 'fast tracked'?**
- 3. Should there be a limit on the types of developments that can qualify as major projects?**
- 4. Do you think it is better to set the environmental assessment requirements on a case by case basis?**

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<sup>88</sup> *EP&A Act 1979*, s. 75J.

<sup>89</sup> With some exceptions such as where a Part 3A project is located within an environmentally sensitive area of State significance or a sensitive coastal location and the development would have been prohibited under the relevant LEP). See *EP&A Regulation 2000*, cl. 8N(1).

<sup>90</sup> *EP&A Act 1979*, s. 75I(2)(e), 75J(3) and 75R(3).

<sup>91</sup> *EP&A Act 1979*, s. 75R(2)(b).

## Part 2: Community Consultation and Public Participation

### 1. Introduction

The EP&A Act recognises the value of public participation in environmental decision-making. One of the objects of the Act is to:

Provide increased opportunity for public involvement and participation in environmental planning and assessment.<sup>92</sup>

A number of provisions in the EP&A Act are aimed at achieving this objective of increased public involvement in environmental planning and assessment. This part of the Discussion Paper will focus on these provisions as well as other opportunities to participate that are not prescribed in the legislation.

#### 1.1. Effective public participation

Since the EP&A Act was introduced, the NSW public has engaged in countless planning and assessment processes, adding its expertise, values and local knowledge to the decision-making process.

The ability to participate effectively in planning decisions is dependent on a number of factors, including:

- (a) Opportunity -A law that provides formal opportunities for public participation
- (b) Information -Access to sufficient information to be fully informed on the proposal and the potential impacts
- (c) Skill- Knowledge of how to participate and the skills to do so.

This Discussion Paper will assess the current planning regime to see how it facilitates effective public participation, taking into account these three factors.

#### 1.2. Levels of public participation

The public has the opportunity to participate in the planning process at three main levels:

- (a) Law making
- (b) Strategic plan making
- (c) Development assessment

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<sup>92</sup> *EP&A Act 1979*, s. 5(3).

This Discussion Paper will use case studies to demonstrate how the Department of Planning consults the public at each stage and whether the factors necessary for effective public participation are promoted by government law and policy.

### **1.3. Notification**

A key aspect of participating in environmental decision-making, whether it be at the law making stage, the strategic plan making stage or the development assessment stage, is knowing that there is a decision or a process to participate in.

Throughout this Discussion Paper we will look at the ways that the Department of Planning notifies the public of their opportunity to participate.

### **1.4. Taking legal action**

An important aspect of public participation is the ability to commence legal proceedings to challenge a decision. This Discussion Paper will highlight the opportunities available to commence legal action in different circumstances.

## **2. The Law Making Stage**

The EP&A Act (and its Regulation) is the primary piece of planning law in NSW. The Act was introduced in 1979 but it has been amended many times since then. Indeed, it seems to be amended in some way or other every Parliamentary session.

When governments introduce new laws or amend existing laws there is no formal requirement for them to consult the public beforehand.

However, the Government usually releases discussion papers and exposure bills for comment prior to the introduction of new laws.

- 1. Should the government consult the community before introducing new laws or amendments to existing laws? If so, in what circumstances should community consultation be mandatory?**
- 2. What sort of information would you like to receive from government about its proposed laws or changes to the law?**
- 3. What is the best way for them to give you this information?**

### **2.1. Comparison of different approaches to law making consultation by the NSW Government**

Because the NSW Government has a discretion as to whether it consults the public on proposed legislative changes and the extent to which it consults, the consultation that does occur can vary markedly from case to case.

This Discussion Paper will outline two past instances where the NSW Government has substantially amended the State's planning laws.

The two examples are:

- 1) The 2005 amendments where the NSW Government introduced the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005* into Parliament to amend the EP&A Act. This Bill introduced Part 3A into the planning regime as a new and alternative stream of development assessment.
- 2) The 2008 amendments where the *Environmental Planning and Assessment Amendment Bill 2008* was passed to amend the EP&A Act in a number of ways, including by introducing the new gateway process for making LEPs and the new housing codes which have increased the range of developments that are deemed to be complying development.

These two examples demonstrate two different approaches to consultation at the law making stage. Interestingly, both sets of reforms stem from the same initial round of consultation that occurred in 2003.

### **2.1.1 The 2005 reforms**

The *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill* (Infrastructure Bill) was introduced into NSW Parliament on 27 May 2005.

The Infrastructure Bill was passed by both houses of Parliament by 9 June, taking under two weeks to get through Parliament. A review of Hansard reveals that the Infrastructure Bill received significant criticism from the Opposition and Independents about key provisions in the Bill. Concern was also expressed about the lack of consultation that occurred prior to the introduction of the Infrastructure Bill. One MP, Clover Moore, stated:

I call on the Government to withdraw this legislation for appropriate consultation and urgently begin work and consultation on an integrated review of the Environmental Planning and Assessment Act.<sup>93</sup>

In the Upper House, Patricia Forsythe MLC, speaking for the Opposition, emphasised that there had been a significant lack of consultation, and a lack of time given to examine the Bill in detail.<sup>94</sup>

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<sup>93</sup> Moore, C. 2005, 'Second reading speech, *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill*', *NSW Legislative Assembly Hansard*, 08 June 2005, p. 16650

<sup>94</sup> Johnson, E. 2005 *Report on the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, p. 7

Sylvia Hale moved an amendment which would have allowed the Bill to be referred to a Parliamentary Committee for Inquiry. This would have allowed closer examination of the Bill, and would have delayed its return to debate in Parliament until the next session due to start in September 2005.<sup>95</sup>

The Upper House did not support the referral of the Bill to committee.

A number of peak community and environment groups said they were taken by surprise by the new law. This may be because the consultation that took place around the reforms occurred over a long period of time, and was targeted towards particular groups.

### *Planning Taskforces*

In 2003, the then Minister for Infrastructure, Planning and Natural Resources convened a number of Taskforces to review the planning system. From these taskforces emerged many of the ideas for amendments to the Act that have been implemented since. The Taskforces examined:<sup>96</sup>

- Statutory and strategic plan making
- Local development assessment
- Major development and infrastructure projects
- Section 94 developer contributions
- Master planning
- State Environmental Planning Policies
- The Minister's consent role.

The Major Developments and Infrastructure Taskforce was chaired by Sam Haddad and its terms of reference were to:<sup>97</sup>

1. Identify current issues and emerging trends in the assessment and approval of major developments and infrastructure projects (by both the private and public sector).
2. Develop options for an integrated, single and strategic system which addresses infrastructure, environmental planning and natural resources. The system should address administrative and /or regulatory reforms; and strategic considerations.

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<sup>95</sup> Johnson, E. 2005 *Report on the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, p. 8.

<sup>96</sup> Department of Infrastructure, Planning and Natural Resources, 2004, 'NSW Government's Response to the Recommendations from the Planning Reviews', p. 1. Available at <http://www.planning.nsw.gov.au/PlanningSystem/PlanningReform/Planningreformprogress/tabid/101/Default.aspx>

<sup>97</sup> Department of Infrastructure, Planning and Natural Resources, 2004, 'NSW Government's Response to the Recommendations from the Planning Reviews', p. 3. Available at <http://www.planning.nsw.gov.au/PlanningSystem/PlanningReform/Planningreformprogress/tabid/101/Default.aspx>

3. Recommend the elements of an integrated regime including administrative arrangements, policies and practices, to deliver sustainable outcomes and strengthen stakeholder participation.

In the Department's report responding to the recommendations of each Taskforce, the recommendations of the Major Development and Infrastructure Taskforce were left out<sup>98</sup> so there is no evidence of who comprised the Taskforce or what they recommended.<sup>99</sup>

Generally, the Taskforces were made up of relevant experts and interest groups.<sup>100</sup>

Public comment was sought on the terms of reference for all the Taskforces and, in the case of the Local Development Assessment Taskforce, on the final report.<sup>101</sup>

#### *Planning Reform Reference Group*

The DIPNR incorporated a large number of the recommendations of the Taskforces into a comprehensive 'Planning Reform Package'. The public was not consulted directly on the Planning Reform Package. Rather, on 29 March 2004 the Minister convened a Planning Reform Reference Group to consult with over the planned reforms.<sup>102</sup>

The terms of reference of the Planning Reform Reference Group were:

1. To provide advice on the proposed Planning Reform Package that responds to the Taskforce reviews of the planning system
2. To monitor progress by the Department of Infrastructure, Planning and Natural Resources in implementing the Planning Reform Package.

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<sup>98</sup> The reason given in the Report for the omission of the major development Taskforce recommendations was that they were not ready.

<sup>99</sup> We sought this information from the Department of Planning but did not receive a reply.

<sup>100</sup> For example, the Taskforce charged with looking at 'Improving Local Development Assessment in NSW' was made up of Neil Bird AM (Chair); Bruce McDonald – Penrith City Council; Peter Williams – University of New South Wales; Elizabeth Crouch – Housing Industry Association; Robert Barnaby – Masterton Homes; Julie Heraghty – Office of the Minister Assisting the Minister for Infrastructure and Planning (Planning Administration) and ex officio member; Andrew Cappie-Wood – Department of Infrastructure, Planning and Natural Resources; and Amanda Spalding – Department of Infrastructure, Planning and Natural Resources.

<sup>101</sup> Department of Planning, NSW Planning Reforms Implementation Strategy p. 1 (confidential report)

<sup>102</sup> The Reference Group was made up of Roger Wilkins -The Cabinet Office; John Pierce – Treasury; Gabrielle Kibble - Liverpool City Council; Ian Reynolds, - Blacktown City Council; Ian Costley – Mirvac; David Broyd,- Property Institute of Australia; Mary Lynne Taylor – Barrister; Jeff Angel - Total Environment Centre; Jeff Smith - Environmental Defender's Office; Sonia Lyneham, - Planning Workshop; Alice Spizzo - Department of Infrastructure, Planning and Natural Resources; Michael Astill - Department of Infrastructure, Planning and Natural Resources; Peter Cosier - Department of Infrastructure, Planning and Natural Resources; Sam Haddad, -Department of Infrastructure, Planning and Natural Resources; Les Stein - Department of Infrastructure, Planning and Natural Resources; Steve Brown, Department of Infrastructure, Planning and Natural Resources.

The Reference Group met monthly to discuss the Department's proposed reforms. The Major Development reform proposals were discussed by this reference group but there is no publicly available record to indicate what the discussion involved.

On 30 September 2004 the Minister for Infrastructure, Planning and Natural Resources publicly announced that the Department would be undertaking a major overhaul of the planning system.

The DIPNR released a number of fact sheets to inform the community broadly about the planned reforms.<sup>103</sup>

This information provided general information about the proposals. The DIPNR did not seek community feedback on the outlined amendments. Instead, the DIPNR claimed that it would "...consult with State Government agencies, local government and the community to ensure they are fully informed of the reforms."<sup>104</sup>

The next time the amendments relating to major projects were raised publicly was in May 2005 when the DIPNR released a fact sheet entitled 'NSW Government's Planning Reforms: Winning jobs and investment for NSW'. This fact sheet outlined in more detail the planned amendments - briefly describing the range of new concepts such as 'major projects', 'critical infrastructure', 'Independent Hearing and Assessment Panels' and 'Concept Plans'. However, again there was no opportunity for community feedback.

The next public notification about the amendments was to announce that the Infrastructure Bill had been passed by Parliament. A number of key stakeholders, including many peak environmental groups were notified that the Infrastructure Bill had been introduced into Parliament but the Bill was passed before these groups could effectively lobby for changes to the Bill.

No Green or White Papers were issued for public discussion, and as a result the environment movement had little more than a week to examine the details of what was being proposed. In contrast, the Minister himself saw fit to place on the Parliamentary record his thanks for "those in the various

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<sup>103</sup> They included:

- A public paper on the NSW planning reforms
- Frequently asked questions about the planning reforms
- Fact sheet – Key facts about the NSW planning system
- Fact sheet – what planning reforms mean for local government
- Fact sheet – What planning reforms mean for the community

<sup>104</sup> Department of Infrastructure, Planning and Natural Resources, 2004, 'Improving the NSW Planning System' p. 15. Available at <http://www.planning.nsw.gov.au/PlanningSystem/PlanningReform/Planningreformprogress/tabid/101/Default.aspx> as NSW planning reforms: Public Paper.

industry groups” for their participation in the formulation of the legislation.<sup>105</sup>

- 1. Did you know about the Government’s plans to introduce the Infrastructure Bill (Part 3A) before it was introduced? If so how?**
- 2. Do you think there should have been more community consultation about the introduction of Part 3A?**
- 3. What sort of consultation would have been appropriate?**
- 4. Is it appropriate for the Government to convene stakeholder groups/reference groups to consult on behalf of the community?**
- 5. Who should sit on these groups?**

### **2.1.2 The 2008 Reforms**

The *Environmental Planning and Assessment Amendment Bill 2008* (Amendment Bill) was introduced into Parliament on 15 May 2008 and was passed by both houses of Parliament by 18 June 2008. It was before Parliament for twice as long as the Infrastructure Bill.

The main difference however is the consultation the undertaken prior to introducing the Bills to Parliament. By this time, the Department of Infrastructure, Planning and Natural Resources had become the Department of Planning.

The consultation for the 2008 amendments was extensive. As with the 2005 reforms, the ideas for the reforms stemmed from the Taskforces that were convened in 2003.

When we started the reform process we engaged with communities and stakeholders. These bills have been developed following almost a year of consultation. We have listened and the common theme is that we need changes to the planning system, and we need them now. The reforms are being driven by what people are telling us about the system.<sup>106</sup>

The Department of Planning held a ‘New Ideas for Planning’ forum for the community on 14 August 2007. The forum provided an opportunity for people to hear about the latest NSW Government reforms and help shape the next generation of planning systems and outcomes.<sup>107</sup>

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<sup>105</sup> Johnson, E. 2005 *Report on the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005*, p. 4.

<sup>106</sup> Sartor, F. 2008, Minister’s Agreed to in Principle Speech, Environmental Planning and Assessment Amendment Bill 2008, *NSW Legislative Assembly Hansard*, 15 May 2008, p. 7695.

<sup>107</sup> Speakers included NSW Planning Minister - Frank Sartor; NSW Department of Planning Director-General, Sam Haddad; University of Sydney Graduate School of Government Director - Dr Geoff Gallop (former Western Australian Premier); Property Council of Australia NSW Executive Director - Ken Morrison; NSW Local Government & Shires Association President - Genia McCaffery; Queensland Department of Local Government, Planning, Sport and Recreation; Smart eDA Project Director - Catherine Anderson.

No community or environmental representatives addressed the forum. The forum was open to everyone and was attended by over 600 people. However, the Department charged \$200 to attend the forum.<sup>108</sup>

In November 2007 the Department of Planning released a Discussion Paper 'Improving the NSW Planning System' which outlined the proposed reforms.<sup>109</sup> The community was invited to comment on Discussion Paper which contained over 100 recommendations. The Discussion Paper was available from the Department of Planning's website, the Department of Planning's offices and local council offices throughout NSW. The community had 10 weeks in which to read and comment on the Discussion Paper. We note that the period for comment covered the busy Christmas and New Year period.

The Department of Planning received 538 formal submissions, an additional 124 form letters and 286 survey responses. These comments were incorporated into a Submissions Report which was released in March 2008. An independent Submission Report was prepared outlining the key community concerns with the proposed reforms.<sup>110</sup>

According to the Department of Planning community residents accounted for 33.5% of submissions, community groups 13.2% and industry 4.8%. The remainder of submissions were made by Members of Parliament, Local Government, State Government agencies and professional practitioners.<sup>111</sup>

Throughout November and December 2007 the Department of Planning undertook extensive public consultation with 11 workshops around the State - Sydney, Parramatta, Wollongong, Queanbeyan, Wagga Wagga, Dubbo, Tamworth, Ballina, Coffs Harbour, Newcastle and Wyong.

These workshops coincided with the public comment period for the Discussion Paper and provided an opportunity for the public to get more information from the Department of Planning.

Following this initial consultation, the Department of Planning released a draft

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<sup>108</sup> Some people/organisations were invited to attend for free.

<sup>109</sup> The Discussion Paper is no longer available online. To obtain a copy you may need to contact the Department of Planning.

<sup>110</sup> NSW Department of Planning, 2008, 'Improving the NSW Planning System: Community Guide' p. 6. Available at <http://www.planning.nsw.gov.au/PlanningSystem/PlanningReform/Planningreformprogress/tabid/101/Default.aspx>;

Manidis Roberts for the Department of Planning, 2008, 'Improving the NSW Planning System: Independent Report on Submissions from the Public Exhibition of the Discussion Paper'. Available at [http://www.planning.nsw.gov.au/planning\\_reforms/p/improving\\_the\\_nsw\\_planning\\_system\\_submission\\_report.pdf](http://www.planning.nsw.gov.au/planning_reforms/p/improving_the_nsw_planning_system_submission_report.pdf)

<sup>111</sup> NSW Department of Planning, 2008, 'Improving the NSW Planning System: Community Guide' p. 6. Available at <http://www.planning.nsw.gov.au/PlanningSystem/PlanningReform/Planningreformprogress/tabid/101/Default.aspx>

exposure Bill and an explanatory note on 3 April 2008. The public were permitted to make submissions on the exposure Bill with the submission period closing on 24 April 2008.

1. **Did you attend the forum? If so, what can you tell us about it? If not, why not?**
2. **Did you know about the Discussion Paper?**
3. **Did you comment on the Discussion Paper?**
4. **Did you attend the workshops?**
5. **If you didn't attend, what was the reason?**
6. **If you did attend, were you satisfied with the opportunity?**
7. **Are workshops a good way of imparting information?**

### **3. The Strategic Plan-making Stage**

This part of the Discussion Paper will look at the opportunities for public participation at the plan-making stage with a focus on Regional Strategies, the Metro Strategy and LEPs. Regional Strategies are not actually Environmental Planning Instruments. They are not legally binding but rather seek to set the broad strategic framework.

#### **3.1. Local Environmental Plans**

Councils are usually responsible for preparing LEPs. However the Minister for Planning has ultimate say as to whether the LEP actually comes into force. The Department of Planning is also responsible for introducing the recent amendments to the EP&A Act that changed the process for making LEPs. For this reason, the LEP-making process can be attributed to the Department of Planning and is therefore relevant to this Discussion Paper.

##### **3.1.1 Consultation under the gateway process**

###### *Opportunity*

The community consultation requirements are decided on a case by case basis, rather than set down in the legislation.

The community consultation requirements are decided by the gateway during the gateway determination. Feedback from the Department has indicated that the consultation period is likely to be between two and four weeks depending on the complexity of the planning proposal.

1. **Do you think it is better to have public consultation requirements set down in law or left to the Gateway to decide on a case by case basis?**
2. **How important is it to you that the process is certain?**

- 3. Have you been involved in the gateway process – If so, what was your experience with the consultation stage?**
- 4. What do you think is an appropriate time period for community consultation?**

Once the consultation requirements are set, the planning proposal will be exhibited for a specific period of time. There is nothing in the EP&A Act or the Regulation that sets out how planning proposals are to be exhibited to the public.<sup>112</sup>

It is up to the Gateway to decide on a case by case basis how the proposal is to be notified to the public and where it is to be made available.

The Minister can publish standard community consultation requirements in the Regulations but so far nothing has been published.<sup>113</sup> Where the Minister sets community consultation requirements the planning authority making the LEP must consult the community in accordance with those requirements.<sup>114</sup>

- 1. How should planning proposals be notified to the public?**
- 2. Where should planning proposals be made available for public access?**
- 3. If the Minister were to publish ‘community consultation guidelines’ what do you think they should contain?**

### *Information*

A planning proposal is a document that explains the intended effect of a proposed LEP and justifies the making of the plan. It has 4 parts

- Part 1 – A statement of the objectives or intended outcomes of the proposed LEP
- Part 2 – an explanation of the provisions
- Part 3 – justification of those objectives, outcomes and provisions
- Part 4- details of the community consultation that is proposed

Along with the planning proposal,<sup>115</sup> a number of other documents need to be exhibited, including the gateway determination,<sup>116</sup> and any studies that have been completed to support the planning proposal.

The whole planning proposal does not need to be exhibited. Detailed provisions may be summarised instead of being set out in full if the Director-General is satisfied that

<sup>112</sup> Under the old process the council had to give the following information:

- The place/s where the draft LEP can be inspected by the public; and
- The times during which the draft LEP can be inspected by the public.

In the past, most councils gave notice via letters to residents and announcements in local newspapers. Public notice of the draft LEP had to be given before or at the same time as the exhibition stage commences.

<sup>113</sup> EP&A Act 1979, s. 56(4).

<sup>114</sup> EP&A Act 1979, s. 57(1).

<sup>115</sup> EP&A Act 1979, s. 57(2)

<sup>116</sup> Setting out such things as the level of community consultation required; which State and Commonwealth authorities will be consulted; the necessity for a public hearing by the Planning Assessment Commission or other body and the appropriate timeframes for the various stages of the proposal)

the summary provides sufficient details for community consultation.<sup>117</sup> There is no requirement that further information or documentation be provided.

The Director-General may issue requirements with respect to the preparation of a planning proposal. These requirements may vary on a case by case basis.

- 1. Do you think that a planning proposals will be easier to comment on than draft LEPs?**
- 2. Do you have any concerns about the contents of planning proposals?**
- 3. Should the planning proposal be supported by any other document or information in particular?**
- 4. What sorts of requirements do you think the Director-General should attach to the preparation of a planning proposal?**

### *Skill*

There are two formal methods of public participation in the plan making process—written submissions and oral submissions at a public hearing. The ability of the public to effectively participate in the plan making process therefore depends on the skill of the public in preparing written arguments and/or presenting oral arguments before a panel.

### *Written Submissions*

Written submissions are the most common form of public participation in environmental decision-making. Submissions are meant to address the planning proposal and indicate either support for or objection to the provisions of the planning proposal.

Submissions provide an opportunity for community members to add their knowledge and expertise to the information that is before the decision-maker. The community is made up of many relevant experts including architects, planners and scientists, all of whom can have important input into the decision. However, local knowledge is important in its own right, even coming from members of the community with no relevant expertise.

This local constitutes *expertise* in local issues and in many cases it will help planners avoid mistakes of the past and plan for a better future.

It is important to harness this knowledge by encouraging the community to write submissions and ensuring that barriers to participation such as illiteracy are overcome.

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<sup>117</sup> *EP&A Act 1979*, s. 57(2)

### *Oral Submissions at Public Hearing*

If a member of the community requests a public hearing in their submission and the relevant planning authority believes that the issues raised warrant a public hearing, the relevant planning authority must arrange a public hearing.<sup>118</sup>

Public hearings are quite formal in nature. Rules of conduct apply and must be adhered to by all who attend.

Anyone can attend a public hearing but not everyone will be given an opportunity to speak.

The people that are asked to speak are chosen by the decision-maker. Time limits apply and are strictly adhered to.

There is no opportunity for members of the public to participate in the hearing unless they have been invited to address the hearing. There is no opportunity to ask questions of those addressing the hearing.

- 1. Are you aware of your right to comment on environmental planning instruments?**
- 2. Are written submissions and public hearings the best way of seeking community input on environmental planning instruments such as LEPs?**
- 3. Can you suggest other ways that the government could seek community input at the plan making stage?**
- 4. Have you ever written a submission or attended a public hearing concerning a LEP? If not, why not? If so, please share your thoughts on the experience with us.**

### *Timing of submissions*

Once submissions have been made, whether they are oral or written, the public participation in the plan-making process is complete. The planning proposal may be significantly amended before it is finalised. For instance, ideas raised during the submission period may be incorporated into the planning proposal or draft LEP or the planning authority may decide to make some of its own changes. However, the public has no right to comment on the changes that are made once the submission period has closed.

In the case of the gateway system, the LEP is not drafted until the period for public comment is closed.

- 1. When is the right time to consult the public?**
  - a. Early in the process at the 'concept stage',**
  - b. later in the process when the details are finalised,**
  - c. both**
  - d. neither?**
- 2. If changes are made after the consultation period has closed should the public be consulted again?**

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<sup>118</sup> EP&A Act 1979, s. 57(5).

### 3.1.2 Challenging the validity of LEPs

It is possible to challenge the validity of a LEP in Court. Section 35 of the EP&A Act allows any person to challenge the validity of a LEP providing they commence the legal proceedings within 3 months of the date of the LEP being published on the NSW Legislation website <http://www.legislation.nsw.gov.au>

Legal challenges to the validity of LEPs are made in the NSW Land and Environment Court. While they are not common, they do happen and are usually based on a failure to follow the correct procedure when making a LEP.

1. Did you know about the right to challenge a LEP in Court?
2. Would you consider taking legal action if you believed that a LEP had been improperly made?

## 3.2. Regional Strategies

### 3.2.1 Public Participation in Regional Strategies

#### *Opportunity*

Regional Strategies are not environmental planning instruments in that they are not, strictly speaking, legally enforceable. They are more comparable with government policy – they guide government decisions. Perhaps for this reason, the process for making Regional Strategies and particularly the process for consulting the public is not set down in legislation.

The Department of Planning<sup>119</sup> has advised that there are no departmental guidelines setting out the procedure for publicising and consulting the public on Regional Strategies. In other words, at the time the Regional Strategies were being prepared there was no centralised, coordinated plan for exhibition and consultation.

This is because the Draft Regional Strategies were predominantly prepared by the departmental staff from regional offices of the Department of Planning. It was thought that these staff members would know how to best consult with the local population and so each region devised its own strategy for consultation. Regional Strategies are a new addition to the planning framework and as they had never been done before the Department made the consultation requirements up as it went along.

1. Do you think there should be a legislated right for the public to participate in the making of Regional Strategies?

<sup>119</sup> We spoke with Andrew Jordan from the Department of Planning. Andrew worked on the Regional Strategies at the time they were being drafted and exhibited to the public.

- 2. Would you prefer the exhibition process for Regional Strategies to be set down in law or do you think it is better for the Department of Planning to develop consultation methods on a case by case basis?**

*Information*

While each region was left to devise its own exhibition and consultation methods, a number of standard principles guided the process.

For example, each Draft Regional Strategy was:

- Exhibited for 6-8 weeks
- Available on the Department of Planning's website
- Available at local council offices
- Available at the regional offices of the Department of Planning

Publicity involved:

- Media releases which were also available on the Department of Planning's website
- Posters
- The Department of Planning's media unit responding to requests for more information from local/regional media

Beyond these methods, each region devised further consultation strategies on a local basis. We are advised that such strategies may have included:

- Workshops
- Public meetings
- Mayor's meetings

- 1. Did you know the Regional Strategy for your area was being exhibited? If so, how did you find out about it?**
- 2. Did you access the Draft Regional Strategy for your area? If so, how did you access it? If not, why not?**
- 3. What were your overall views of the Draft Regional Strategy in terms of content? Was it easy to understand what was planned for your area?**
- 4. Did the consultation in your area involve any of the extra methods mentioned – such as workshops or meetings?**
- 5. Was any other method of consultation used that is not mentioned here?**
- 6. To what degree did the final Regional Strategy (if there is one) reflect the Draft Regional Strategy?**

## *Skill*

The Draft Regional Strategy for each region contained a section on the last page entitled 'have your say' which invited comments on the draft and provided contact details for comments and further information.

No further guidance was provided with regards to commenting on the Draft Regional Strategy, including the timeframe for comments.

The Department received 102 submissions on the Draft South Coast Regional Strategy, including responses from local councils, community groups, environmental groups and business groups.<sup>120</sup> More than 110 submissions were received on the Draft Far North Coast Regional Strategy.<sup>121</sup> The Department does not specify how many submissions were received for the remaining Regional Strategies.

- 1. Would you feel confident commenting on a Regional Strategy?**
- 2. Do you know how to draft an effective submission? For example, do you know how to structure a submission, do you know what sort of content is appropriate and what style should be used?**

### **3.2.2 Challenging the validity of Regional Strategies**

It is not possible to challenge the validity of a Regional Strategy in Court as they are not legally binding.

### **3.3. Sydney Metro Strategy**

There is no mandatory community consultation process for the making of the Metro Strategy or the subregional strategies. The Department carried out public consultation on the Metro Strategy, including a number of stakeholder and community forums. A Metro Strategy Discussion Paper<sup>122</sup> was also released and public submissions were sought.

With respect to the subregional strategies, the Planning Department held a number of workshops with local government that have formed the basis of understanding between the Planning Department and local councils during the development of the 10 draft Metro Subregional Strategies. The Subregional Strategies were publicly exhibited and public submissions were invited.

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<sup>120</sup>The Hon. Frank Sartor, Minister for Planning, 2007, 'Forward', *South Coast Regional Strategy*, p. 1.

<sup>121</sup> The Hon. Frank Sartor, Minister for Planning, 2006, 'Forward', *Far North Coast Regional Strategy*, p. 1

<sup>122</sup>Metro Strategy Discussion Paper. Available at [http://203.89.207.171/wrk/digitalAssets/575\\_1095223888453\\_Metro%20Strategy%20Discussion%20Paper.pdf](http://203.89.207.171/wrk/digitalAssets/575_1095223888453_Metro%20Strategy%20Discussion%20Paper.pdf)

1. Were you aware of the consultation on the Metro Strategy? If so, did you take part in it?
2. Were you aware of the consultation on the subregional strategies? If so, did you take part in them?

## 4. Development Assessment

Development Assessment is where most people get involved in the planning system. This is because development proposals have the potential to have an *immediate* impact upon an individual. It can be difficult to see how the provisions of a LEP will impact on you personally. This is because LEPs do not propose specific developments. Rather, they set parameters for possible future development. By way of contrast, development applications are actual proposals that, if approved, will take place. When a development application is lodged it is a lot easier to see how the planning system can impact on your property, values and way of life.

### 4.1. Assessing Major Projects

Many developments are assessed and approved by local councils. However, the Department of Planning is responsible for assessing and approving a class of developments known as major projects and a further category known as critical infrastructure. These types of development are assessed under Part 3A of the EP&A Act.

This Discussion Paper will look at the opportunities for public participation in the Part 3A approval process. The Department of Planning has released 'Guidelines for Major Project Community Consultation'<sup>123</sup> which briefly set out the Department's commitments regarding community consultation with regards to major project assessment. These guidelines will be referred to throughout this part of the Discussion Paper.

#### 4.1.1. Participating in major project approvals

##### *Opportunity*

Any person can comment on a Part 3A major project by making a submission during the exhibition period.<sup>124</sup>

While the law sets down a right for community participation in major project decisions, the Department encourages proponents to apply some best practice consultation principles. For example, the proponent is expected (but not required) to:<sup>125</sup>

<sup>123</sup> Department of Planning, 2007, *Guidelines for Major Project Community Consultation*, Available at <http://www.planning.nsw.gov.au/DevelopmentAssessments/Majorprojectassessments/tabid/203/Default.aspx>

<sup>124</sup> *EP&A Act 1979*, s. 75H (4).

<sup>125</sup> Department of Planning, 2007, *Guidelines for Major Project Community Consultation*, p. 3. Available at

- Consult early, particularly where the project is likely to be contentious
- Commit adequate resources to the consultation
- Clearly describe who has been consulted and what issues were raised
- Demonstrate how the issues raised during the consultation process have been addressed in the environmental assessment.

In the Director-General’s Requirements (DGRs, also known as Environmental Assessment Requirements) the Director-General often requires the proponent to carry out “adequate and appropriate” consultation. However, the Director-General might set additional community consultation requirements.

The extent to which a proponent consults the community and stakeholders when preparing the environmental assessment for a major project or concept plan application will be determined by:<sup>126</sup>

- The nature of the proposal and the extent of its likely environmental, social and economic impacts
- The level of consultation required in the DGRs
- Consultation that occurred prior to making an application to the Minister for approval of a major project or concept plan
- Whether the nature of the development will require on-going consultation once the project is constructed and has commenced operation. Where consultation is appropriate during the operational stages, the Minister may require long-term community engagement as a condition of approval.

- 1. Do you think the law provides sufficient opportunity to participate in the assessment of major projects?**
- 2. Have you ever been consulted on a major project before an application is lodged with the Department of Planning?**

### *Information*

There are no legislative requirements setting out how the Department is to notify the public when a major project is on exhibition. Instead the Department has guidelines setting out the notification requirements. According to the guidelines “an advertisement is placed in relevant newspapers informing the

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<http://www.planning.nsw.gov.au/DevelopmentAssessments/Majorprojectassessments/tabid/203/Default.aspx>

<sup>126</sup> Department of Planning, 2007, *Guidelines for Major Project Community Consultation*, p.

3. Available at

<http://www.planning.nsw.gov.au/DevelopmentAssessments/Majorprojectassessments/tabid/203/Default.aspx>

community that the project is on exhibition, providing an officer contact name for the project and informing them where to send their submissions".<sup>127</sup>

As a general rule, major project applications can be accessed on the Department's website. They often appear there before they formally go on exhibition so the public knows that a major project application has been made. The website contains a separate section listing projects that are actually on exhibition. At this stage the environmental assessment has been carried out and the environmental assessment must be made publicly available for at least 30 days.<sup>128</sup>

The EP&A Act and Regulation set out the documents that must be made publicly available. They include:<sup>129</sup>

- applications to carry out projects,
- the declaration of development as a project to which Part 3A of the Act applies or its declaration as a critical infrastructure project,
- environmental assessment requirements for a project,
- any environmental assessment that is carried out,
- environmental assessment reports of the Director-General to the Minister,
- approvals to carry out projects given by the Minister,
- applications for the Minister's approval of concept plans (and approvals of concept plans),
- requests for modifications of approvals given by the Minister and any modifications made by the Minister
- responses to submissions, preferred project reports and other material in relation to a project provided to the Director-General by the proponent after the end of the public consultation period (whether under section 75H (6) of the Act or otherwise),

The EP&A Regulation states that these documents must be made available on the Department's website. The Director-General can, however, set requirements for the documents to be made available in other locations.<sup>130</sup>

The Department of Planning has a Major Projects tracking system<sup>131</sup> which allows you to:

- Find out information on major projects which are before the Department

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<sup>127</sup> Department of Planning, 2007, *Guidelines for Major Project Community Consultation*, p. 2.  
Available at

<http://www.planning.nsw.gov.au/DevelopmentAssessments/Majorprojectassessments/tabid/203/Default.aspx>

<sup>128</sup> *EP&A Act 1979*, s. 75H (3).

<sup>129</sup> *EP&A Act 1979*, s. 75X and EP&A Regulation, cl. 8G (4).

<sup>130</sup> *EP&A Regulation 2000*, cl. 8G.

<sup>131</sup> <http://leptracking.planning.nsw.gov.au/Default.aspx>

- Make submissions on projects which are on exhibition
- Find out about determinations on projects by the Department or Minister

Major projects listed on this site are at various stages of assessment. For instance, some listed projects are only an early stage of assessment and only preliminary documents have been lodged. This allows community members to be aware of a proposal at an early stage before it is formally placed on exhibition.<sup>132</sup>

The documentation available to the public on this site includes:

- Job title
- Project type
- Project description
- Location
- Local Government Area
- Application to have the project assessed as a major project
- Declaration from the Minister for Planning that the project is a major project
- Director-General's Environmental Assessment Requirements
- Environmental Assessment (in response to the Director-General's Environmental Assessment Requirements).

The project description, along with the Environmental Assessment should outline what is proposed. The Environmental Assessment will provide details about the project itself and the anticipated impacts of the proposal on the environment.

There are no regulations setting out what the Environmental Assessment should cover as these are set by the Director-General on a case by case basis. Many Environmental Assessments are highly technical documents and you may need the help of a scientific expert in order to understand what they are saying.

Some major projects are assessed by way of Concept Plan. If this is the case, then a detailed description of the project is not required. Instead the proponent must:<sup>133</sup>

- outline the scope of the project and any development options,
- set out any proposal for the staged implementation of the project, and
- provide any other information required by the Director-General.

If a proposal is assessed by way of Concept Plan, the environmental assessment and public consultation requirements are the same as for other major projects.<sup>134</sup>

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<sup>132</sup> Department of Planning website. Available at <http://majorprojects.planning.nsw.gov.au/page/>

<sup>133</sup> *EP&A Act 1979*, s. 75M (2).

<sup>134</sup> *EP&A Act 1979*, s. 75N.

1. **Have you ever accessed the Planning Department’s major projects tracking system? If so, do you think the system is easy to use? Do you have ideas for how it can be improved?**
2. **What do you think of the amount and type of information made available to the public for major projects?**
3. **Can you think of other ways that the Planning Department could notify the public about major projects?**
4. **Do you support the idea of concept plan approvals?**

*Skill*

Public participation at the development assessment level is primarily by way of written submissions. During the exhibition period, which is 30 days, any person can make a written submission to the Director-General concerning the matter.<sup>135</sup>

The Department’s website includes an online submission form for each major project on exhibition. Submissions can also be made in writing and sent via post to the Director-General of Planning.

Another way of participating in major project decisions is by appearing before the Planning Assessment Commission. The PAC can, in some circumstances, replace the Minister for Planning as the decision-maker under Part 3A.<sup>136</sup> When this happens the PAC is an alternative decision-maker. In other cases, the PAC will examine a particular element of a development application and will act in an advisory role.

Alternatively, the Minister might refer a particular aspect of a proposal (including concept plans) to the PAC for review,<sup>137</sup> including the environmental aspects of the proposed development.<sup>138</sup>

The PAC may call a public hearing to investigate particular aspects of the proposal. It can call witnesses to appear before it and give information. The PAC must provide a copy of its findings and recommendations to the Minister and the report is to be made publicly available on the Department’s website within a reasonable time after it has been provided to the Minister.<sup>139</sup>

The Environmental Assessment document is the key piece of information that the public relies on when commenting on major project proposals.

Generally, the community has 30 days to access, read, understand and respond to an application for major project approval.

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<sup>135</sup> *EP&A Act 1979*, s. 75H (4).

<sup>136</sup> *EP&A Act 1979*, s. 23D(1)(a).

<sup>137</sup> *EP&A Act 1979*, s. 23D(1)(b)(ii).

<sup>138</sup> *EP&A Act 1979*, s. 23D(1)(b)(iii).

<sup>139</sup> *EP&A Regulation 2000*, cl.268V.

1. **Have you ever commented on a major project application? If so, can you tell us some of the challenges, if any, that you faced?**
2. **Have you ever read an Environmental Assessment document? If so, did you understand it?**
3. **Do you trust the information contained in Environmental Assessment documents? Please provide reasons for your answer.**
4. **Do you think that 30 days is enough time to comment on a major project proposal?**

#### **4.1.2 Appealing against major project approvals**

The Planning Minister's decision as to whether to approve or reject a major project application will be notified on the Department's website under 'determinations'.<sup>140</sup>

If you are unhappy with a decision to approve a major project, you may be able to appeal the decision to the Land and Environment Court of NSW. This is what is known as a 'merits appeal'. However, only objectors have the right to appeal.<sup>141</sup> An objector is a person who made a submission during the exhibition stage. Also, there is a requirement that the project be of a type that would have been designated development in the days before Part 3A was introduced. Designated development is a type of development assessed under Part 4 of the EP&A Act. The EP&A Regulation lists the types of developments that are designated development.<sup>142</sup>

You cannot appeal a project approval if the project:<sup>143</sup>

- 1) is a critical infrastructure project;
- 2) was approved by way of a concept plan; or
- 3) was the subject of a review by the Planning Assessment Commission.

What this means in practice is that many major projects will not be subject to legal challenge by way of merits appeal. Some projects that are assessed under Part 3A would not have been designated development under Part 4. Many projects are also assessed by way of concept plan. Finally, a project can be referred to a PAC at any stage of its assessment and in some cases the community will request this without being aware that it extinguishes merits appeal rights later on.

#### *Joining as a party to an appeal*

It is important to note that a person may be able to be joined as a party to an appeal brought by another party against a consent authority's determination of a development application, including an application under Part 3A. An application to be joined must be made to the Land and Environment Court and the person must be

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<sup>140</sup> <http://majorprojects.planning.nsw.gov.au/page/determinations/>

<sup>141</sup> *EP&A Act 1979*, s. 75L (2).

<sup>142</sup> *EP&A Regulation 2000*, Schedule 3.

<sup>143</sup> *EP&A Act 1979*, s. 75L (1).

able to show that they will raise an issue that would not be likely to be sufficiently addressed if the person were not joined, or that it is in the interests of justice or the public interest that they be joined.<sup>144</sup>

### *Judicial review*

An alternative way of challenging an approval under Part 3A is by commencing judicial review proceedings. This is where the legality of the decision is challenged. Any person can bring judicial review proceedings within 3 months of the decision being made.<sup>145</sup>

- 1. Did you know that you had to be an objector to bring a merits appeal against a major project?**
- 2. Did you know that referring a proposed project to a PAC for assessment extinguishes appeal rights later on?**
- 3. Do you agree with the restrictions on the rights of objectors to appeal against major project proposals?**

### **4.1.3 Critical Infrastructure**

Critical Infrastructure projects are also assessed under Part 3A. Essentially, the process for assessing them is the same as for other major projects. The main difference is that there is no right to appeal decisions to approve or reject critical infrastructure projects. This restriction applies to both merits appeals and judicial review. The rationale for the removal of appeal rights is that the project has been declared essential to the State.<sup>146</sup>

- 1. Do you agree with the idea that some projects should be assessed as critical infrastructure?**
- 2. Should the public be able to appeal against decisions to approve critical infrastructure projects?**

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<sup>144</sup> *Land and Environment Court Act 1979*, s. 39A,

<sup>145</sup> *EP&A Act 1979*, s. 123.

<sup>146</sup> Department of Planning, 2007, *Critical Infrastructure: Major project assessment system*, p. 1. Available at [www.planning.nsw.gov.au/.../pdf/Sep07%20FS7\\_CriticalInfrast.pdf](http://www.planning.nsw.gov.au/.../pdf/Sep07%20FS7_CriticalInfrast.pdf)