Local Government
Association of NSW

Shires Association of NSW

LGSA SUBMISSION ON THE *REVIEW OF NSW PLANNING SYSTEM ISSUES PAPER*	
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Executive Summary

The Associations support the open and transparent process taken by the Planning Review Panel over the course of the review to date and acknowledge the extensive consultation exercise conducted by the Panel to obtain stakeholder and community feedback. Having listed a raft of issues arising from the extensive consultation process, the Associations see the next step being to debate how to achieve genuine reform of the planning system, rather than drawing too great a focus on 'fixing' the current legislation.

The key issues/core principles that need to be addressed in the new planning system and the legislation designed to support it include:

- Decision making - rather than focusing on questions about the roles of *existing* decision making bodies (panels, councils, Planning Assessment Commission, the Minister, etc) some consideration of what should be the appropriate forums/levels and processes for making development decisions would be beneficial in the first instance. Only when this is decided, can the detailed procedural questions be addressed.
- Review and reform of building regulation and certification to complement the planning system – the current review is principally focused on 'planning' however, building regulation is an integral component of the planning system and many Local Government and industry practitioners, including the Building Professionals Board[1], report that needs further reform.
- Strengthening and integrating strategic planning by formalising agreements between agencies and identifying opportunities for partnerships between different levels of government. This includes integrating strategic plans with infrastructure planning by requiring State and regional plans to be costed and funding mechanisms (including private or public funding) identified to deliver plans.
- A simpler system - Meeting the Planning Minister's request for the new planning system to enable users of the system to "press a few buttons and know exactly what was intended for that particular parcel of land and what can or cannot be done with it" i.e. a simplified development assessment process, and make it quicker and easier to navigate.
- A more flexible and adaptable system within a 'standardised' framework – Designing a system that provides for a uniform framework for plans across the state, while allowing land use planning decisions to be made within the local context, not a standardised 'one size fits all' approach.
- Retaining the philosophy of public participation and involvement and agreeing on when and how this should occur, to achieve community acceptance and endorsement of plans and strategies.
- Retaining the practice and philosophy of community and infrastructure contributions.

It is clear that a number of matters raised in the *Issues Paper* cannot be resolved without further analysis, active deliberation and debate among key stakeholders. A number of issues would benefit from a selection of expert working groups to look at the issue in more detail as part of this process, and the Associations seek an undertaking from Government that it will actively engage with Local Government in the next step of developing the Green and White Papers.

This submission provides responses to key questions of interest and relevance to Local Government that have been posed in the *Issues Paper*. It does not attempt to address each and every one of the 238 questions posed in the Paper.

[1] Building Professionals Board Submission to NSW Planning Review, 4 November 2011

1 Introduction

The Local Government Association of NSW and Shires Association of NSW (the Associations) are the peak bodies for NSW Local Government.

Together, the Associations represent all the 152 NSW general-purpose councils, the special-purpose county councils and the regions of the NSW Aboriginal Land Council. The mission of the Associations is to be credible, professional organisations representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW. In pursuit of this mission, the Associations represent the views of councils to NSW and Australian Governments; provide industrial relations and specialist services to councils and promote Local Government to the community.

The Associations thank the NSW Minister for Planning and the Planning Review Panel for the invitation to make a submission in response to "*The way ahead for planning NSW*?"- *Issues Paper of the NSW Planning System Review*. This submission canvasses issues associated with the NSW planning framework that are of particular relevance and interest to Local Government.

2 Purpose

The Associations note that this review will examine planning law as it is set out under the *Environmental Planning and Assessment Act (EP&A Act) 1979* along with the broader planning system, and is divided into three stages:

- A listening and scoping stage to identify the key outcomes and principles for a new planning system, and the publication of an 'Issues Paper' for public comment;
- The preparation of a Green Paper with policy options in regard to the future planning system and the basis of a legislative scheme; and
- The release of draft legislation and a White Paper setting out the Government's new framework for the NSW Planning System.

We understand that feedback is sought in response to the *Issues Paper*, which reflects the matters raised in the consultation phase, and we note that the *Issues Paper* does not seek to set the vision or details for the new planning system and that this will be developed during the next phase of the review.

This submission provides responses to key questions of interest and relevance to Local Government that have been posed in the *Issues Paper*. We emphasise that it does not attempt to address each and every one of the 238 questions posed in the Paper. We have focused on the key issues and views of our members. For example, the submission does not address questions posed in Chapter E ('Appeals and Reviews; Enforcement and Compliance') as to date these matters have not been raised by our members as a major issue in responses to the *Issues Paper*. We ask that the Planning Review Panel does not interpret silence or 'nil comment' on a particular question/issue as being either an approval or disapproval.

While the Associations are peak bodies that represent the broad views of Local Government, many councils across the state will also choose to represent their own respective opinions and experiences in their own submissions. Therefore the views presented by the Associations may not necessarily be consistent with the responses of each individual councils. We ask that the Panel takes into account these individual councils' views along with the matters raised by the Associations.

The structure of this submission generally follows the format used for the *Issues Paper*, but is prefaced with some general comments about the *Issue Paper* and the review process.

3 General Comments

3.1 Fundamental Reform in a New Planning System

While the Associations acknowledge the extensive consultation exercise conducted by the Panel to obtain stakeholder and community feedback, first and foremost, this phase of the process should ideally provide a vehicle for debate about how to achieve genuine reform of the planning system. Drawing too great a focus on 'fixing' the current legislation at the expense of a wider debate about the fundamental principles of a new system, risks derailing the important step of generating discussion and agreement on what should be the guiding principles and objectives underlying the new system and a basic model for the legislation.

The key issues/core principles that need to be addressed in the new planning system and the legislation designed to support it include:

- Decision making - rather than focusing on questions about the roles of *existing* decision making bodies (panels, councils, Planning Assessment Commission, the Minister, etc) some consideration of what should be the appropriate forums/levels and processes for making development decisions would be beneficial in the first instance. Only when this is decided, can the detailed procedural questions be addressed.
- Review and reform of building regulation and certification to complement the planning system. The current review is principally focused on planning, however building regulation is an integral component of the planning system and many Local Government and industry practitioners, including the Building Professionals Board[2], report that building regulation needs further reform.
- Strengthening and integrating strategic planning by formalising agreements between agencies and identifying opportunities for partnerships between different levels of government.
- A simpler system - Meeting the Planning Minister's request for the new planning system to enable users of the system to "press a few buttons and know exactly what was intended for that particular parcel of land and what can or cannot be done with it" i.e. a simplified development assessment process, and make it quicker and easier to navigate.
- A more flexible and adaptable system within a 'standardised' framework – Designing a system that provides for a uniform framework for plans across the State, while allowing land use planning decisions to be made within the local context, not a standardised 'one size fits all' approach.
- Retaining the philosophy of public participation and involvement and agreeing on when and how this should occur, to achieve community acceptance and endorsement of plans and strategies.
- Retaining the practice and philosophy of community and infrastructure contributions.
- Integrating strategic plans with infrastructure planning by requiring State and regional plans to be costed and funding mechanisms (including private or public funding) identified to deliver plans.

3.2 Next Stage of the Planning Review Process and Ongoing Implementation

The Associations support the open and transparent process taken by the Panel over the course of the review to date. Most importantly and at the outset it is critical to agree on the objectives and model/structure for the new legislation and the overall system. The *Issues Paper* has posed questions about these matters, however the extent and level of consultation intended for these and other issues in the next phase of the review (i.e. the Green Paper) is unclear. A number of matters raised in the *Issues Paper* should be subject to active deliberation and debate. The Associations assume this will occur as part of the next phase of the review, and we seek an undertaking from Government that it will actively engage with Local Government in developing the Green and White Papers. A number of issues would benefit from a selection of expert working groups to look at these issues in more detail as part of this process.

[2] Building Professionals Board Submission to NSW Planning Review, 4 November 2011

4 Overview of Key Local Government Issues

4.1 State and Local Governments Working Together

The Associations welcome the NSW Government's commitment to improve the relationship with Local Government and we look forward to an ongoing and productive partnership. The significance of this relationship is reflected in one of the objects of the current Act i.e. "to promote the sharing of the responsibility for environmental planning between the different levels of government in the State". The Associations would expect that this object will endure in new legislation.

The Associations are keen to work with the Government on the many challenges facing this State in the area of urban and regional planning and development. The Associations acknowledge the positive changes to planning introduced by this current Government to date and the open dialogue with the Associations to date.

Recommendation:
The Associations recommend that the new legislation acknowledges the important relationship between, and responsibilities of each sphere of government by retaining in some form the current object "to promote the sharing of the responsibility for environmental planning between the different spheres of government in the State".

4.2 A Flexible System within a Standardised Framework

There appears to be a consensus across Local Government, industry, environmental groups and the community on the need for comprehensive reform of the planning system in NSW to bring it into the 21st century. The Associations strongly support calls from all sectors for a reduction in the 'red tape' that surrounds the current planning system and reforms that improve transparency and lead to greater accountability in planning and development decisions. However, sound planning principles should not be sacrificed for the sake of expedience. Shortening average development assessment times for example, must not come at the expense of consistent, transparent and appropriate assessment. Additionally, implementing planning objectives requires equity amongst all stakeholders and relies on all participants having access to the relevant information as well as remaining well informed. The overriding goal of any reforms to the NSW planning system must be to assist in the achievement of sustainable built form and more liveable communities.

Standardising Documents and Forms
The Associations note that the Issues Paper contains various references to suggestions of standardising some documents and forms within the planning system, with the express aim of simplifying and speeding up processes. The key questions related to greater standardisation are:

Key Questions:	*C33.Should there be a standard template for DCPs?* *D24. Should there be standard development application forms that have to be used in all council areas?* *D4 How should concurrences and other approvals be speeded up in the assessment process?* *D86. Should there be a range of standard conditions of consent to be incorporated in development approvals?* *E14. How can enforcement be made easier and cheaper for consent authorities?*

The Associations support measures to improve clarity and legibility in the planning system. This includes adopting common approaches to the delivery and format of local plans, guidelines and forms – including Development Application (DA) lodgement forms and zoning certificates.

The Associations agree that consistency of development conditions across the State could be improved with some form of 'template' of development consent conditions in the form of guidelines by the Department of Planning and Infrastructure to assist councils. However, the Associations would not support the *mandating* of standard conditions of consent for similar reasons to those that have characterised the debate about the adoption of the local environmental plan (LEP) Standard Template.

The issue is not having a common Template that applies common definitions of zones and activities, but rather the debate has been on the level of compliance that is required when applying the LEP Template to a local context. The debate has been with the detail not so much the theoretical framework. The same contention applies in relation to standard conditions of consent, in that given the broad range of circumstances that individual councils deal with, mandating standardised conditions would be problematic across the broad range of local areas, and hence flexibility to apply variations between standard conditions is appropriate.

The Associations are supportive of common templates and approaches that may assist councils when developing a Development Control Plan (DCP) or code, conditions of consent and reviewing forms and zoning certificates. However it is strongly suggested that any approach to standardise local codes and other material must acknowledge the need to respect the differences that will fundamentally make such plans a product of their local context.

Considerable work has already been undertaken by many councils in developing common forms that has generally been applied when the technology has been upgraded. A sizeable number of councils already share common forms – including DA lodgement forms and zoning certificates and many others.

The issues in applying further standardisation cover:

- The level of resources required by councils to change to formats that have already been tailored to the current technology or context and by doing so will provide no tangible advantage to that council;
- Agreeing to a format that is suitable for all IT systems and contexts;
- Developing a model set of conditions that applies to all DAs and council areas;
- Developing a DCP format that applies to the range of issues that DCPs cover – given that some councils have very simple and concise DCPs and other councils require a much more detailed planning response; and
- The level of compliance that is expected from applying standard forms and policies and who 'polices' the system.

Recommendation:
The Associations recommend that:
- Standard conditions of consent should not be mandatory, however to improve consistency of development conditions across the State a template of model development consent conditions could be provided in the form of guidelines to assist councils.
- If further standardisation of planning matters is recommended by the Panel, the Associations recommend that a Local Government working group be established to overview the level of work already undertaken in this area and provide advice on where benefits to the sector can be made. Otherwise any changes may be considered to be counter productive.

4.3 Strengthening Local Government Capacity

The capacity of Local Government to meet its current and future obligations in relation to the NSW planning system is directly related to the broader issue of the financial sustainability of Local Government in NSW.

Local Government is facing financial stress resulting from a narrow revenue base, restraints on rate revenue, a lack of equitable share in tax revenue, a major infrastructure renewal backlog and increasing community expectations for facilities and services. Planning and other reform programs legislated by the NSW Government but required to be implemented and administered by NSW councils, generally fail to recognise and account for the cost and resourcing impacts on councils and their communities. These impacts are exacerbated by the financial constraints on councils, the ongoing and piecemeal nature of planning reform agendas and the shortage of skilled planners and development professionals, particularly in the rural areas of NSW. The previous planning reforms in NSW have had an almost singular focus on regulatory changes.

Little attention has been paid to strengthening the capacity of State agencies and Local Government to better carry out their planning and development roles.

Recommendation:
The Associations recommend that the Planning Review Panel considers mechanisms in the NSW planning system and legislation that would support a greater focus on:

- Sharing knowledge and information through the development of best practice planning codes and guidelines;
- Improvements to business processes including greater investment at the state level in e-planning related initiatives (we have welcomed the NSW Government's recent commitment of $4.3 million to expand and extend the current e-housing code program, in which the Associations are a partner);
- Initiatives to address skills shortages in planning and development, particularly in rural areas; and
- Strengthening the financial and resource base of Local Government in NSW.

4.4 Integrated Planning and Infrastructure Provision

'Integration' is a recurring theme in the planning system. The Associations echo the observations of many stakeholders during this review process, that better integration is essential and is applicable in multiple levels, layers and disciplines of government. For example, integration of:

- Strategic planning across State government agencies (e.g. metropolitan and regional plans, catchment plans etc);
- Referrals and concurrences (for development approvals) at the State level;
- Australian, NSW and Local Government planning and funding of regional and local infrastructure;
- Land use planning and community strategic planning at the local level; and
- Infrastructure provision, both across State agencies (i.e. involved in service delivery and planning) and up and down between State and local service providers.

Integrated planning
Strategic land use plan making and policy development in NSW, particularly at the state and regional level, is poorly integrated with other planning processes, such as:

- Planning and provision of funding for infrastructure to meet the needs of growing communities;
- Natural resource planning; and
- Broader community planning that is taking place under the new planning and reporting framework (known as Integrated Planning and Reporting/Community Strategic Planning) currently being introduced to NSW Local Government.

The new Local Government integrated planning and reporting (IPR) system has replaced councils' Management Plan, Social Plan and Annual Reporting requirements with an integrated framework. The Community Strategic Plan sits at the top of the planning hierarchy. The purpose of the plan is to identify the community's main priorities and expectations for the future and to develop strategies for achieving these goals. Reference is made to the Associations' November 2011 submission in which we noted that the review of the NSW (land use) planning system is a unique opportunity to align land use planning at the regional and local level with the new integrated planning framework (and Community Strategic Plans) being adopted by councils. It is important that the Community Strategic Plan and asset plans are consistent with strategic land use planning. These two significant strategic planning processes within councils – community strategic planning and land use planning – need further examination to identify where the potential gaps and overlaps currently exist, and to recommend changes that could help achieve greater efficiencies and integration.

The Associations would support steps to identify the potential gaps, linkages and/or overlaps between these two parallel planning frameworks at the local level. This is discussed in detail in section 7.3.1 of this submission.

Integration of land use planning and infrastructure programs
At present governance structures, particularly those involved in major service and infrastructure delivery are strongly centralised within State Government agencies. This impedes the effective delivery of those services, fails to address local issues and militates against local involvement and participation. The result is disjunction between land planning processes and infrastructure programs, resulting in a lag between land development and infrastructure provision i.e. a mismatch between what has been decided for an area of land and what is committed for service delivery to that area. At both the State and local levels the planning system needs to address this gap between development planning and infrastructure provision.

4.5 Principles and Direction

The Associations see the following themes as guiding the priority and direction for developing and implementing a new planning system:

- *Community rights* - Public participation and involvement should be retained as objectives in the Act and be fundamental components of the planning system, as well as being extended to include consultation on SEPPs;
- *Equity* - Greater emphasis should be given to social equity issues and social impact assessment.
- *Probity* - Embedding transparent processes and systems that have checks and balances in place to minimise corruption and probity risks;
- *Flexibility and adaptability* - Allowing land use planning decisions to be made within the local context, not a standardised 'one size fits all' approach.
- *Simplicity and efficiency* - A simplified development assessment process, and make it quicker and easier to navigate. The efficiency of the system could be improved by reducing the layers of approvals hierarchies, planning instruments and the ever-increasing matters that are required to be assessed;
- *Clarity of roles and responsibilities* - The planning system should make clear the respective responsibilities of the three spheres of government. Recognition should be given to Local Government having the primary role in planning for the local area. Local management and development control should not be undertaken at the State (i.e. Department of Planning and Infrastructure) level. There should be a positive working relationship fostered between the three spheres;
- *Capacity building* - Provisions are needed to strengthen Local Government capacity to meet its obligations (e.g. funding and coordinating planning studies that form part of the LEP process; e-planning will be reliant on the capacity of councils (particularly smaller councils), working with State agencies, to deliver technological advances); and
- *Integration* - There should be greater integration of all facets of planning at the NSW State level. The local planning process should be integrated with Community Strategic Planning under the *Local Government Act*, which is currently a separate planning system for local communities. Even if all planning is not integrated into a comprehensive system there needs to be a central repository where this fragmented system can be explained and better understood.

Recommendation:
The Associations recommend that the Planning Review Panel consider applying the following guiding principles for planning in NSW, which have been adopted by the Associations:

1. The aim of all planning and infrastructure decisions should be to achieve:
   - economic growth;
   - social justice:
   - environmental sustainability;
   - equitable access to housing and employment;
   - optimum quality of life for local communities.
2. Strategic metropolitan and regional planning is best carried out at a regional level in a partnership between Local and State Government.
3. Local Government should have a lead role in planning for local communities with other spheres of

government as it is:
- best placed to inform the planning process of the needs and expectations of local communities;
- democratically accountable to local communities; and
- the advocate for its community to other spheres of government.

4. Local Government should retain autonomy in the making of local planning decisions.
5. Adequate financial resources must accompany the devolution of planning powers and responsibilities to Local Government.
6. All spheres of government have reciprocal obligations to recognise and respect the legitimate objectives and strategies of each other.

4.6 Subordinate Legislation (SEPPs, Regulations etc)

It is not clear from the matters raised in the *Issues Paper* whether this planning system review will include or recommend a review of subordinate legislation (such as SEPPs and EP&A Regulations). SEPPs in particular have played a significant role in the delivery of planning policy in NSW and have been a major source of conflict and confusion. A review of the overall planning system should not ignore SEPPs. Likewise, the EP&A Regulations require comprehensive review as part of the delivery of a new planning system for NSW.

Recommendation:
The Associations strongly recommend that a review of the 'subordinate' regulatory documentation forms part of the schedule of implementation of reform of the new planning system.

5 Response to Chapter A - Introduction

5.1 Principles and Objectives for New Planning Legislation

Key Questions:	*A1. What should the objectives of new planning legislation be?* *A2. Should any overarching objectives be given weight above all other considerations?*

Refer to section 6.1 of this submission.

5.2 Flexibility and the Planning System

Key Questions:	*A3.Should there be strict controls in plans?* *A4. Should applications that depart from development controls be permitted?* *A5. What should the test be for a proposed variation?*

Development controls in plans should be clear with defined objectives, but they should also be capable of variation against those defined objectives, particularly if it can be demonstrated that an improved outcome can be achieved. Variations to development controls could be acceptable provided there was to be a neutral impact or an improvement, taking into account the objects of the Act.

5.3 Strategic Planning

Key Questions:	*A6. Should new planning legislation provide a framework for regional strategic planning processes? If so, how should appropriate regions be determined for strategic planning?*

Refer to section 7.4 of this submission.

5.4 Community Involvement

Key Questions:	*A9. In a new planning system, how can we improve community participation opportunities? How can we improve consultation processes for plan making and development assessment?* *C3. Should new legislation prescribe a process of community participation prior to the drafting of a plan?* *C19. Should there be statutory public participation requirements when drafting SEPPs?*

	D25. What public notification requirements should there be for development applications? *D26. How can the community consultation process be improved?* *D129. If there were to be such a guide prepared, who should have the responsibility for its preparation and what participation and consultation processes should be undertaken in its development?* *F4. What actions can be undertaken by bodies preparing strategic plans to increase community engagement with the planning system?*

The Associations emphasised the importance of public involvement and participation in our November 2011 submission. Consultation in the 21st century is much more than simply the use of public notices in the press.

It is generally held that maximising public participation and involvement at the plan making stage is the most effective and optimum time to facilitate community engagement. However, there are challenges as to how to effectively engage communities and obtain their absolute 'buy-in' at this early stage. Although it is acknowledged that it is more effective to involve communities early in the *robust and transparent* plan making stage so that their views can be integrated into local plans, there is an expectation from most communities that they should be involved at *all* levels of decision making (i.e. both in the plan making and the development assessment process).

Councils' engagement with their communities on planning matters is highly professional. Many councils lead the way in providing outstanding practice in engaging with communities during the preparation of planning studies prior to the preparation of an LEP. Many councils undertake thorough and formative consultation processes, well before an LEP is prepared and officially placed on public exhibition. They use up to date professional communication techniques and public engagement processes to ensure that relevant issues are targeted and stakeholders' views are collated and fed back to communities for further analysis.

It is not appropriate to prescribe the process of community participation in legislation, only to require that it must be done prior to drafting of a plan. There are many consultation mechanisms that could be considered, and a number of examples of outstanding public consultation work by councils that could be used as best practice examples of community involvement.

With regard to public participation and SEPPs, the legislation does not provide for public participation in the formulation of SEPPs, which effectively allows the Government to circumvent public participation and community debate on key policy matters. The Associations assert that the public participation philosophy embodied in the existing legislation should be retained for all aspects of the plan-making process and extended to apply to SEPPs.

Recommendation:
The Associations recommend that the legislation include a requirement for community participation prior to and as part of drafting of plans, including SEPPs, (should they still to exist in the new system).

5.5 Provision of Infrastructure and Community Facilities

Key Questions:	*A10. How should levies to pay for local and state community infrastructure be set?* *A11. What alternatives to – or additional funding sources for – such infrastructure should be considered?*

Refer to section 8.16.1 of this submission.

5.6 Development Decision-Making

5.6.1 Principles

The Associations believe the decision making framework should be underpinned by the following principles:

- Open and accountable government, transparent processes and community participation are fundamental to achieving good planning outcomes.

- Local and State Government each have a role to play in planning for and managing the sustainable development of local communities in NSW, their shared constituency.
- Land use planning and development assessment processes should facilitate accountable, transparent and consistent decision making based on the legitimate interests of all stakeholders.
- The principle of subsidiarity should apply when considering the most appropriate spheres of government for determining major infrastructure projects and other developments.
- Councils and their communities should have a significant voice in planning decisions about major projects and sites of state significance.
- The powers of the Minister for Planning in relation to the assessment and determination of major projects should be balanced by a system of independent review; clearly defined and objective criteria for the declaration of major developments, sites of significance and critical infrastructure projects; and statutory protocols covering key aspects of the assessment and decision-making process.

5.6.2 Decisions about Regional and State Significant Development

Key Questions:	*A12. Who should decide regionally significant development and local development applications?* *D2. What development should be designated as State significant and how should it be identified? Should either specific projects or types of development generally be identified as State significant?* *D3. What type or category of development, if any, should be identified as regionally significant to be determined by a body other than the council?* *D31. How should State significant proposals be assessed?* *D62. Who should make decisions about State significant proposals?*

The planning approval process for State significant developments should be transparent and accountable. Applicants and third parties should know how and why a decision has been made. The new legislation and planning system must ensure there is a robust framework within which those responsible for decisions on these projects can operate with transparency, probity and due process. The recent changes to decision making processes for State significant developments have been welcomed by the Associations, however there are a number of areas which still need to be refined as part of the review of the planning system:

- Clarify and simplify roles of different decision making bodies (for example, the Minister, Planning Assessment Commission (PAC), Joint Regional Planning Panels (JRPPs), councils) - The Associations believe that the new planning system should provide increased independence and a larger role for the PAC and a lesser role for the Minister in determining applications, with councils being charged with responsibility for determining developments that are local in scale.
- Reduce complexity and overlap - The new State and Regional Development SEPP cannot be read and understood without detailed reference to the legislation (i.e. *EP&A Act 1979* and *EP&A Amendment (Part 3A Repeal) Act 2011*), and has potential crossovers with other SEPPs (e.g. Infrastructure, Exempt and Complying, Transport Corridors etc.).
- Review capital investment value (CIV) thresholds – The CIV dollar thresholds offer a reasonable approach for their relative simplicity, although it is arguable whether these are the most relevant criteria for determining state significance and whether the current thresholds are too low.
- Consultation – The Associations expect to see provisions for consultation specifically with the relevant local council in relation to state significant development.

Many of the procedural issues surrounding the exercise of power involving decisions about regionally or state significant developments were considered in a 2010 report by the Independent Commission Against Corruption (ICAC) on Part 3A and the former SEPP Major Development[3]. The Associations endorse the findings of the ICAC report and would support an assessment regime for decisions about genuine state significant developments based on the following key recommendations in this report:

[3] ICAC 'The Exercise of Discretion under Part 3A of the Environmental Planning and Assessment Act and the State Environmental Planning Policy (Major Development) 2005, December 2010

- Reconstitution of the PAC in line with the ICAC recommendations relating to tenure, Parliamentary or independent oversight of appointments and governance arrangements;
- A reduced role for the Minister in determining applications.

With regard to regional decision making, the new planning system needs to have in place an agreed model that enables decisions to be made by local community representatives who are democratically accountable, within a clear, robust and formalised procedural framework that mirrors that required for council decision making. The Associations acknowledge that there is support in many sectors for a regional model based on the use of JRPPs, however we have concerns with JRPPs as they currently operate (see section 5.6.4 below for details).

Whatever model is adopted for determining projects of regional and state significance, the Associations would advocate an emphasis on tribunal-style hearings, limits on representation and venues in local/regional areas to ensure accessibility to such a review process. Resident access to these bodies would be considered essential. In addition, in accordance with the above-mentioned principles, any regional decision-making framework must be supported with clear, mandatory guidelines that formalise meeting procedures (e.g. meeting structure, putting of motions, 'public hearing' process, acceptance of additional information) and ensure that regional decisions are made with the same transparency, accountability and probity obligations that apply to council decisions.

Recommendation:
The Associations recommend that the decision-making framework/model for determining projects of regional and state significance should:
- Adopt tribunal-style hearings and limits on representation and venues in local/regional areas.
- Be supported with clear, mandatory guidelines that formalise meeting procedures (e.g. meeting structure, putting of motions, 'public hearing' process, acceptance of additional information) and ensure that regional decisions are made with the same transparency, accountability and probity obligations that apply to council decisions.

5.6.3 Planning Assessment Commission

Key Questions:	*D65. What decisions should the Planning Assessment Commission make? Should the Commission's processes be inquisitorial or adversarial?* *D66. What should be the processes required for hearings of Planning Assessment Commission panels?* *D67. Should a local member be on any Planning Assessment Commission panel considering a proposed development?* *D68. If so, should this be a mandatory for all commission panels?* *D69. Should the development assessment criteria for the Planning Assessment Commission be the same as for any other development assessment process?*

The Associations hold the view that the Planning Assessment Commission (PAC) should be a truly independent body, and mechanisms should be embodied in the legislation to ensure the PAC operates in a transparent and independent manner. The Associations support the new structure that has been put in place for the PAC, with the Minister delegating responsibility for all private projects that are State significant to the PAC for determination. However, delegation to the PAC remains at the discretion of the Minister, and members of the PAC are still appointed by the Minister. To maintain transparency and minimise the risk for undue influence in the development process, the legislation should ensure that checks and balances are put in place to further limit Ministerial discretion in relation to the PAC procedures.

The Associations endorse the following measures already put in place for the PAC by the NSW Government:

- The Minister delegating responsibility for all private projects that are State significant to the PAC for determination.
- Powers being given to the PAC to hold public hearings in certain circumstances.

- A mix of full-time and part-time members, and an additional pool of long-term casual members to increase the depth and breadth of experience.
- New procedures to increase transparency and accountability e.g. all significant PAC determinations are to be made in public.
- A two term limit of six years (in total) placed on the appointment of permanent members, including the chairperson, in line with a recommendation of ICAC.

Recommendation:
The Associations recommend that:
- The new planning legislation should retain the above procedures which strengthen governance arrangements for the PAC and improve transparency;
- The legislation provides that the PAC be required to conduct proper hearings, with an appropriate level of public involvement and participation, and provide detailed written reasons, addressing the issues put before it and justifying its recommendations to the Minister.
- The necessary additional administrative resources are allocated to support the PAC's greater workload.

5.6.4 Joint Regional Planning Panels

Key Questions:
A12. Who should decide regionally significant development and local development applications?
A13. Should Joint Regional Planning Panels decide development applications? If so, which applications should the panels decide? Who should identify these?
A14. Should councils be able to apply to be exempt from the Joint Regional Planning Panel process?
B16. What provisions should there be for independent decision making?
B17. What should be the role of the Minister in a new planning system?
D3. What type or category of development, if any, should be identified as regionally significant and be determined by a body other than the council?
D70. Should a new planning system include Joint Regional Planning Panels?
D73. Should a council be able to refer a matter to a Joint Regional Planning Panel for determination even if the matter would not ordinarily fall within the jurisdiction of such a panel?
D78. Should a council be able to apply to the Minister to be exempt from a JRPP?

The Associations acknowledge the breadth of views that have been expressed about the use of JRPPs for development determination. While there has been support for these regional decision making bodies from many sectors, the Associations maintain that JRPPs are an unnecessary additional decision making body that is exercising a role that could be performed by councils or the PAC. The Associations' concerns with JRPPs as they currently operate are:

- It is unclear whether a JRPP is acting as an independent hearing body, an appointed council, a representative of the State Executive branch or some other form of decision making authority;
- There is no specific requirement to provide due process or reasons for decisions of JRPPs, posing a high potential risk;
- There are none of the transparency provisions of independent hearing and assessment panels (IHAPs), with JRPPs having permanent, known members who are potentially open to local pressures and no real body to which they are accountable (except in the most indirect way) or to monitor their performance.
- The Minister or council can dismiss nominees at any time for no stated reason. There is no judicial type protection. Members could be under considerable pressure to do the Minister's or council's bidding even if they cannot be officially directed. This stands in contrast to the protection given to the now disbanded Commissioners of Inquiry.

The Associations acknowledge that changes introduced in 2011 by the State Government to increase the threshold for developments going to JRPPs and to amend the process for appointing the Chair of these panels, have been a positive step. The Associations hold the view that these regional panels are effectively acting like a council without even the need to present at an election. Without a clear framework for their process and procedures, JRPPs may:

- Undermine local decision making and local accountability;
- Add another layer of bureaucracy and complexity to the DA process;
- Potentially reduce legitimate community participation in the development process;
- Place extra costs on councils as they will be required to meet the administrative costs and fees associated with the establishment and servicing of the JRPPs; and
- Provide no identifiable benefits to developers or the community.

If regional decision making bodies are to be maintained (JRPPs or an alternative model) for dealing with 'regional' and supra-council development matters, they need to be established within a robust framework of equity, transparency and accountability, consistent with that which is already required and expected of local council meetings. In practice, the actual operational procedures of each JRPP vary considerably from one panel to the next, and there is lack of clarity and understanding about roles, responsibilities and probity requirements.

As an alternative to the JRPP model, the Associations would prefer to see the convening of duly constituted regional panels comprised of representatives appointed by the relevant councils. That is, the councils that will be significantly affected by the development or that have a stake in the development. This would ensure that these decisions are made by local community representatives who are democratically accountable. Ideally, regional decisions would be made within the context of an agreed and publically accepted regional plan; having a regional plan in place would enable any decision making body – be it a council or other regional body – to make decisions that are consistent with the agreed regional plans.

In addition, clear, mandatory guidelines need to be in place to formalise meeting procedures (e.g. meeting structure, putting of motions, 'public hearing' process, acceptance of additional information) and ensure that regional decisions are made with the same transparency, accountability and probity obligations that apply to local council decisions.

As stated in section 5.6.2 above, whatever the model adopted for regional (and state) significant decision making, the Associations would advocate an emphasis on tribunal-style hearings, limits on representation and venues in local/regional areas to ensure accessibility to such a review process. Resident access to these bodies would be considered essential.

5.7 Complying Development

Key Questions:	*A15. Should any changes be made to complying development and the process of approving it?* *D4. What development should be exempt from approval and what development should be able to be certified as complying?* *D5. How should councils be allowed local expansions to any list of exempt and complying development?* *D6. Should there be a public process for evaluating complying development applications?*

The Associations support exempt and complying development principles for appropriate development types. However, there are issues with the current set of exempt and complying provisions that need to be addressed, in particular, that the criteria for complying development (currently permitted through a number of SEPPs and council plans/policies) are fragmented and sometimes difficult to interpret.

In addition, a one-size fits all approach is often inappropriate and in certain circumstances councils should have a greater role in tailoring the type and size of complying development to suit their local areas (such as where heritage or environmental sensitivity are unique features of the locality). The Environmental Defenders Office (EDO), in its submission to the planning review[4], has referred to examples of community concerns about the Exempt and Complying Code being not appropriate in some local areas. The new planning system should include a practical and streamlined process that would enable enough flexibility to

[4] *Submission to the Review of the NSW Planning System (Stage 1)*, Environmental Defenders Office, November 2011

allow exempt and complying development categories to be tailored to take into account local circumstances and to include local exemptions and variations.

Local Government input will be essential in this process to ensure that the any changes to standard categories of complying development in the future:

- Will not override the local context (e.g. specific coastal conditions) and will remain in step with local planning objectives and standards;
- Are not 'broad brush' and will not lead to a lowering of planning performance standards by overriding environmental, planning and heritage controls applicable to precincts and localities;
- Are not so prescriptive that they would discourage diversity and innovation in design;
- Retain the opportunities for local residents to have a say in the development process;
- Manage the involvement of private certifiers to ensure accountability and probity of the certification system; and
- Do not increase the potential for errors and omissions in the certification process.

The Associations support the principle of widening exempt and complying provisions for appropriate development types. However, to increase the amount of complying development, and to provide greater certainty to certifying authorities and applicants, the new planning system must reassess the length and complexity of development standards, the number of applicable policies and the ability for certifying authorities to determine compliance with those standards. The costs and benefits of introducing training for certifying authorities on how to interpret complying development provisions should also be investigated.

With regard to allowing a public process for evaluating complying development, this would appear to defeat the underlying principle of complying development, in that a development is 'complying' if it satisfies a set of pre-determined criteria. If objections were received in relation to a development which meets all of the pre-determined criteria, this could create difficulties for the certifier (private Accredited Certifier and particularly Council).

It is also submitted that development assessment would benefit from introducing assessment tools (based on objective criteria) that would enable greater objectivity to be applied to assessment and decision making. This principle of objective assessment has been successfully adopted for the BASIX system, and there are also examples under related environmental laws of efforts to develop objective decision-making tools. These have been referred to in detail by the EDO.[4]

Recommendation:
The Associations recommend that:
- The new planning system includes a practical and streamlined process that would enable flexibility to allow exempt and complying development categories to be tailored to take into account local circumstances and to include local exemptions and variations.
- Local Government input will be essential in any process to review and/or widen the categories for exempt and complying development.

5.8 Building Certification

Key Questions: *A16. What changes should be made to the private certification system?*
A17. How can private certifiers be made more accountable?
D117. Should private certifiers have their role expanded and, if so, into what areas?
D118. Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?
D119. Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?
D120. Should there be a requirement for rectification works to remove unacceptably impacting non-

compliances when these are actually built rather than leaving an assessment of such non-compliances to either a modification application assessment or to the Court on an appeal against any order to demolish?
D121. What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?

The Associations provided detailed comments about the private certification system in our November 2011 submission. We acknowledge ongoing improvements to the regulatory framework for private certification, and expect that provisions will be retained to allow Local Government certifiers to continue to carry out their certification functions. Councils have established checks and balances within their internal processes to enable council staff to meet the requirements of the current regulatory framework for certification.

The Associations note that the Issues Paper has reported a wide range of questions about the private certification system and limited enthusiasm for a return to a council-only inspection and certification system. The Associations provided comments on the private certification system in our November 2011 submission.

The Associations echo the Building Professionals Board's desire for "a new legislative structure and building regulation system that provides:

- Clear requirements;
- A clear structure;
- Development that delivers planning expectations ;
- Accountability for work done;
- Clear enforcement obligations; and
- Compliant and safe buildings." [5]

One of Local Government's main concerns is that the level of consistency between the development consent and ultimately what is signed off with the issue of an occupation certificate, can vary significantly. Councils are concerned that it is not uncommon for developments to be occupied and issued with an occupation certificate without the conditions and requirements of the consent having been completely satisfied. This situation arises because the Accredited Certifier is not "required" to verify that a particular matter has been satisfied prior to issuing an occupation certificate.

With respect to council certification, we maintain the view that provisions must be retained to allow Local Government certifiers to continue to carry out their certification functions. Councils have established checks and balances within their internal processes to enable council staff to meet the requirements of the current regulatory framework for certification.

While we support the Government's objectives for ongoing improvements to the regulatory framework for private certifiers, dealing with complaints and problems arising from sites under the control of accredited private certifiers continues to be a major issue for Local Government and a source of constant aggravation to councils. The various amendments to the *EP&A Act* have certainly led to improvements to address the problems that have arisen since the introduction of private certification. However, some fundamental flaws in the system remain to be resolved. These issues have been comprehensively identified by the Building Professionals Board[6].

The Associations have identified the following concerns from the Local Government perspective that need further investigation and resolution:

- An issue that councils have with the State Government's complying development provisions is that the resultant increase in privately certified work may significantly increase councils' regulatory role, to

[5] Building Professionals Board Submission to NSW Planning Review, 4 November 2011
[6] Building Professionals Board Submission to NSW Planning Review, 4 November 2011

ensure that the community is not disadvantaged by some private certifiers failing to address their concerns and legitimate expectations.

- There are currently no mechanisms for councils to fund this impost on their regulatory role and these costs may not be able to be adequately funded from councils' current revenue sources.
- It was never intended that councils would 'police' the private certifiers, and as competitors in this process, this outcome is an unintended consequence which conflicts with competition principles.
- Councils have had ongoing problems with the liberal interpretation adopted by many certifiers to clause 145 'not inconsistent with consent'. A definition of this term is essential to resolve ongoing issues for Local Government.
- The respective roles of council as the 'approving authority', council as 'certifier', private certifiers, and the BPB need to be clarified and refined to ensure there are no overlaps, gaps or potential implications for the spirit of competition.
- It appears that there is a need for a 'checking' or 'auditing' role to monitor and regulate the work of private certifiers. Currently this function is defaulting to councils, because of their legal powers and in the absence of any other authority charged with this responsibility. The BPB only responds to complaints.
- Councils are charged with both a certification role (in competition with private certifiers) while still retaining regulatory powers to issue orders on private certifiers.
- No powers of the BPB to issue orders and to conduct random checks of private certifiers.
- Some councils are having to rely on taking a bond up front from applicants, to cover any of the costs they may incur to follow up and deal with complaints, issue orders etc against private certifiers.

As part of the overall review of the planning system, a comprehensive analysis and review of the current integrated planning and building system is needed. To fully address the complex and extensive challenges that remain unresolved, this process requires input and advice from Local Government and relevant industry experts and practitioners.

An area of reform that needs to be further considered is the integration of the regulation of building professionals. The system is currently fragmented, with various agencies (including the BPB and NSW Department of Fair Trading) regulating practitioners involved in design, approval, construction and certification work within the construction industry. Other practitioners covering professions such as engineering and trades have little or no government accreditation and are largely self-regulated.[5] The Associations note the BPB's paper on the benefits of establishing a building commission in NSW based on a single agency model adopted in other jurisdictions.

The legislation should include provisions to ensure that the principal contractor and other professionals involved in the design and construction of a building are accountable for their work and activities and hold professional indemnity insurance accordingly. Currently, the only person in the whole development process that is being held accountable and is required to hold insurance – is the Accredited Certifier (including Council). However, a certifier can not reasonably take on responsibilities and liabilities of the whole design and construction team and each and every contractor.[7]

Recommendation:
The Associations recommend that:

- The new planning system retains provisions to allow Local Government certifiers to continue to carry out their certification functions.
- A working group be established, with the BPB, key representatives from all stakeholder groups, and with an independent Chair, to investigate the issues and make recommendations to be considered in the planning review process.
- The Planning Review Panel consider the merits of a building commission model for the NSW planning system, along the lines of that proposed by the BPB.

[7] *Submission to NSW Planning System Review,* Roman Wereszczynski, Randwick, February 2012

5.9 Changes to Zoning

Key Questions:	*A18. Should there be a right of review or appeal against a council decision concerning the zoning of a property?* *A19. Should there be any distinction between a council decision to change a zoning and a council refusing an application to change the zoning?* *A20. If there is to be a right of appeal or review of a council zoning decision, who should decide that appeal or review?*

The existing provisions and procedures for public consultation already provide mechanisms to ensure that relevant issues are targeted and stakeholders' views are obtained during the rezoning process, and there is a concern that the introduction of appeal rights in the rezoning process could bring the planning process to a standstill as a result of the potential for litigation and debate that could ensue. This outcome would counteract the goal of speeding up the planning and development process.

5.10 Environmental Impact Statements

Key Questions:	*A21. What are appropriate measures that might be implemented in a new planning system to create public confidence in the integrity of environmental impact statements (and their supporting studies) for major development projects?* *D36. How can the integrity of an environmental impact statement be guaranteed?*

The integrity of environmental impact assessment (EIA) is a cornerstone of the planning system, not only for public confidence, but also for positive long term planning outcomes. The new legislation should include provisions for EIA that ensure that planning decisions are informed by rigorous and independent environmental assessment processes.

The Associations consider that greater emphasis can be placed on reducing the perception of 'pro-development' assessment, through:

- Breaking the link between assessment advice and financial reward – Establishing a list or a panel of accredited environmental assessors held within the Department of Planning and Infrastructure would be a first step towards achieving this. Such a system would need to have appropriate review, auditing and performance/complaints monitoring procedures to maintain a high level of integrity of both the process and the assessors on the list.
- Providing greater opportunity for peer review of assessments - A Peer Review Panel could be used for external auditing and quality assurance (including assessing the accuracy of EIAs for developments that meet certain criteria, ensuring compliance with ongoing management conditions and assessing mitigation measures) as a mechanism for increased accountability.
- Strengthening strategic level environmental assessment.
- Improving the access to and use of data and information generated by the environmental assessment of development proposals.

Recommendation:
It is recommended that consideration be given to the following measures:
- Requiring EIA documents to cite the consultant/authors' names and qualifications, and their authors to provide a statement to qualify their impartiality.
- Investigating the possibility of introducing a peer review and/or accreditation system for EIAs.

6 Response to Chapter B

6.1 Objects and Philosophy Underpinning the Planning Framework

Key Questions:	*B1. What should be included in the objectives of new planning legislation?* *B2. Should ecologically sustainable development be the overarching objective of new planning legislation?* *B3. Should some objectives have greater weight than others?* *A1. What should the objectives of new planning legislation be?* *A2. Should any overarching objectives be given weight above all other considerations?*

Any new planning system should **retain and strengthen the core objectives of the existing planning system**, and should incorporate the following:

- Providing opportunities for public involvement and participation in land use planning and development decisions;
- Promoting the appropriate sharing of responsibilities for land use planning between Australian, NSW and Local Governments;
- Encouraging ecologically sustainable development;
- Fostering economic growth; and
- Encouraging the proper management, development and conservation of natural resources, social equity and the built environment.

These principles, based on the current objects of the *Environmental Planning and Assessment Act 1979*, provide a foundation for a comprehensive set of principles for the new Act, particularly if they can be accordingly reflected and delivered in the substantive parts of the Act.

The objects of the Act should be kept minimal and high level, along the lines of the current objects of the Act. The greater the number of objectives, the more likely is the tendency or necessity to give weightings to different objectives.

The Associations would oppose giving some objectives different weightings from others because of the equity and practical challenges this would introduce. For example, the appropriate weightings to be assigned to specific objectives would vary between different development applications depending on the nature of the proposed development and the site. . Secondary objectives and more specific outcomes should flow out of a limited number of high level objectives, and the existing objects of the Act provide a good basis for these high order objectives.

Recommendation:

- The Associations recommend that the existing objectives of the *EP&A Act 1979* be retained and strengthened.
- The objects of the Act should be kept minimal and high level.

6.2 Structure of New Planning Legislation

Key Questions:	*B10. Should there be one act or separate acts for different elements of the planning system?* *B11. What should be in regulations?*

The Associations support the view of PIA NSW that certain elements of the current Act may be carried forward, but that the new legislation should not be a simple 'rebadging' of the current one. As discussed in section 3.1 of this submission, the new legislation requires a rethink of what should be the fundamental principles underlying the new system, before a decision about what form this should take (i.e. a single or separate acts) should be made.

Suggestions for the legislation to be separated into two or more acts reflect the distinct split in planning systems between plan making/policy development and development assessment. They also demonstrate the mix of views about whether the building certification system should be separated from planning.

Calls to 'separate' the legislation appear to be driven by the desire for a simpler system. However, there is doubt as to whether simply separating the legislation (for example, into one act for planning and one for development assessment/control) would necessarily make the system clearer and easier to understand/operate. There may be merit in separating legislation in different planning and development assessment acts. However, with calls from all sectors for greater integration of land use planning, catchment management, water resource management systems and development proposals at a regional-scale, having an act of parliament dedicated to plan making would best see real benefits if it was to also seek to consolidate some of the planning processes captured in other pieces of legislation. By separating these elements into separate acts, there is a risk that the overall process/system of planning could become more disjointed, given that there are already other pieces of legislation which have a role to play in strategic/regional planning and plan making.

The building control and certification provisions within the current legislation and EP&A Regulation are fragmented, making it difficult to navigate and increasing the risk of misinterpretation. The new legislation should be drafted so as to simplify and clarify the requirements and make the legislation easier to navigate for practitioners. At a minimum, this could be achieved by consolidating the building control and certification provisions within the *EP&A Act* into the one chapter of the new legislation. The question of whether building regulation and certification requirements should be contained in a separate act from planning legislation would require consolidation of building provisions in other relevant Acts, such as the *Home Building Act 1989.* This appears to be beyond the scope of this current planning system review.

With respect to the regulations, the Associations take the view that provisions in the *EP&A Act* should be kept at a high level, with the detailed guidelines and procedural requirements (i.e. those that actually require statutory force) consolidated into the supporting regulations. The complexity created by having various procedures spelled out across the Act, regulations and SEPPs makes the 'layers' increasingly more difficult to read, understand and administer. (For example the State and Regional Development SEPP cannot be read and understood without constant and detailed reference to the legislation (i.e. *EP&A Act 1979* and *EP&A Amendment (Part 3A Repeal) Act 2011*). The Associations question the logic of placing some procedural requirements in the *EP&A Amendment (Part 3A Repeal) Act 2011* and some in SEPPs.

6.3 Reviews of New Planning Legislation and Planning Instruments

Key Questions:	*B12. Should there be a statutory requirement to review legislation periodically? If so, at what interval?* *B13. Should there be requirements to periodically review other planning instruments and maps?* *C6. Should plans and associated maps have prescribed periodic reviews?* *C7. At what suggested intervals should such reviews occur?*

The Associations support an independent review of planning legislation to be undertaken every five years. However, any such review should be mindful of the need to maintain certainty and confidence within the planning system, particularly for the industry sector, given the long planning horizon of some major developments.

The new legislation should establish a clear process for such reviews and should specify that they:

- Are independent of Government; and
- Provide for consultation with community and stakeholders.

Planning instruments need to remain relevant and contemporary, so the new legislation should also require that regular review clauses be incorporated in environmental plans and instruments. Review periods should reflect the significance and intended period of application of the plan or instrument. As an alternative to basing the timing of such reviews on set timeframes, consideration could be given to basing the timing of reviews around certain trigger points being reached.

Including provisions for regular review of the Act and planning instruments must include identification of accountabilities and 'audit' mechanisms to ensure that such reviews take place within the specified

timeframe. Any review of legislation or planning instruments should also incorporate an assessment as to what extent the relevant objectives and aims are being achieved.

Recommendation:
The Associations recommend that provisions be included in the new legislation to require:
- An independent review of the legislation every five years;
- Review of planning instruments in accordance with milestones set according to the particular planning instrument; and
- Accountabilities to be identified for undertaking the above reviews.

6.4 Information Technology and a New Planning System

Key Questions: *B14. Should the information available about land on a central portal be able to be legally relied upon, if there is the ability for it to be certified for accuracy?*
B15. Would this be able to replace section 149 Planning Certificates?

Information should not be provided if its accuracy is in question or it cannot be legally relied on. The availability of data/information on a single portal has the potential to be a powerful tool. However issues that would need to be addressed should such a portal be legally binding include the accuracy of currently held data and the resources required to accurately and regularly maintain that data.

The content of section 149 certificates should be reviewed as part of the planning system review, regardless of whether or not a central information portal is adopted. Some councils report that standardisation has led to an excess of irrelevant information in section 149 certificates.

6.5 Decision Making

Key Questions: *B16. What provisions should there be for independent decision making?*
B17. What should be the role of the Minister in a new planning system?

Local and State Government each have a legitimate role to play in land use planning and development assessment processes, and the principle of subsidiarity should apply. Local Government maintains it is best placed to make decisions about the needs and expectations of local communities, and while there may be a role for 'independent decision making' in some circumstances, this should be minimised by establishing accountable, transparent and consistent decision making processes, with clear roles and responsibilities for land use planning and development assessment.

The powers of the Minister for Planning in relation to the assessment and determination of major projects should be balanced by a system of independent review, clearly defined and objective criteria for the declaration of major developments, sites of significance and critical infrastructure projects, and statutory protocols covering key aspects of the assessment and decision-making process.

Refer also to section 5.6 of this submission.

7 Response to Chapter C – Making Plans

7.1 A State Planning Commission, Planning Advisory Board

Key Questions: *C1. Should there be an independent State Planning Commission to undertake strategic planning? Or should there be an independent Planning Advisory Board?*

Local Government supports the strengthening of the strategic planning process, at the regional, state and local level to develop more informed, useful and detailed strategic land use plans.

At the state and regional levels strategic planning is ultimately a State government responsibility under the current system. Effective strategic planning process at these state and regional levels should be a whole-of-government approach with 'buy-in' from all relevant State agencies, as well as Local Government and other relevant stakeholders. Any consideration of alternative governance structures, such as a State Planning Commission or independent advisory board, must ensure that appropriate accountabilities and resources are allocated to effect this holistic approach.

There is a view that strategic land use planning at the regional scale should be one of the core businesses of the Department of Planning and Infrastructure. However, criticism has been levelled that under the current regime, too much focus in the Department has been on development assessment, at the expense of genuine and comprehensive consultation and strategic planning.

Recommendation:
The Associations recommend appropriate actions to strengthen the delivery of strategic land use planning at both the State and regional levels, which may include consideration of alternatives for a revised governance structure, provided the role of Local Government is factored in to any new structural framework and is understood by all parties.

7.2 Regional Organisations of Councils

Key Questions: *C2. Should regional organisations of councils be recognised in new planning legislation?*

Regional organisations of councils (ROCs) currently exist in a variety of forms and perform a diverse range of services and activities which vary from region to region. While some ROCs focus on advocacy, others perform a role in providing and/or coordinating shared services for groups of councils and some focus their attention on commercial ventures. They are voluntary organisations and vary widely in strength, resources and level of activity. Each is constituted and administered differently, and membership may vary from time to time.

The Associations therefore hold the view that providing statutory recognition of ROCs in planning legislation would not be appropriate. In their current form ROCs do not necessarily have the structure and stability to take on statutory roles and responsibilities that may be expected of them. Consideration of whether to provide statutory powers/responsibilities to ROCs within the planning legislation would be a matter for extensive Local Government consultation.

Recommendation:
The Associations recommend that:
- Statutory recognition of ROCs, as currently constituted, in planning legislation would not be appropriate.
- Extensive Local Government consultation would be necessary should the government wish to consider providing statutory powers/responsibilities to ROCs within the planning legislation.

7.3 Plan Making

7.3.1 Process

Community Participation

Key Questions: *C3. Should new legislation prescribe a process of community participation prior to the drafting of a plan?*

Refer to section 5.4 of this submission.

The public interest

Key Questions: *B9. Should 'public interest' be defined? If so, what should it say?*
C4. Should there be required consideration of the 'public interest' in the plan making process?
D87. Should new planning legislation make it possible for public interest conditions to be imposed that went beyond the conditions that immediately relate to a particular development?

Does 'public interest' mean the 'net interest of the NSW public' or the local interest of the immediately-affected community? While the concept of the 'public interest' is supported in principle, a definition may be difficult to apply in practice. For the concept to be practically and applied in the plan making or assessment phase, a definition would need to be clearly spelled out, with steps and guidelines to define exactly how the concept of 'public interest' is to be applied.

Regular reviews

Key Questions:	*C6. Should plans and associated maps have prescribed periodic reviews?* *C7. At what suggested intervals should such reviews occur?* *B12. Should there be a statutory requirement to review legislation periodically? If so, at what interval?* *B13. Should there be requirements to periodically review other planning instruments and maps?*

Refer to section 6.3 of this submission.

Co-ordination with planning under the *Local Government Act*

Key Questions:	*C8. How can new planning legislation co-ordinate with council planning under the Local Government Act?*

Under the current Integrated Planning and Reporting (IPR) framework, the council's LEP and any amendments to it should be consistent with the Community Strategic Plan. The theory is that if adequate consultation has been undertaken the LEP should reflect the same community directions and priorities identified in the Community Strategic Plan.

The Associations emphasise the importance of linking the Community Strategic Plan and the LEP; one must inform the other and it is essential that they are consistent. These two significant strategic planning processes within councils need further examination to identify where the potential gaps and overlaps currently exist, and to recommend changes that could help achieve greater efficiencies and integration.

Measures that could be introduced to better integrate these processes might include:

- Provisions in the new planning legislation that link the LEP development and review process to the community strategic planning cycle (at an appropriate frequency);
- Considering ways in which the LEP process could apply similar approaches as those being adopted for IPR (e.g. Quadruple Bottom Line approach);
- Widening the requirements for a Community Engagement Strategy within the IPR framework so as to incorporate the LEP process; and
- Revising IPR provisions or develop guidelines for councils to ensure that their planning processes under the IPR provisions incorporate a legitimate and formal role for all relevant disciplines (e.g. land use/town planning, building, environmental) in the development of the IPR Community Strategic Plans;
- Including a specific requirement for the Community Strategic Plan to address residential development, housing needs, urban form and density, access to employment and services, transport and major infrastructure planning;
- Development of 'best practice' guidelines by the Departments of Planning and Infrastructure and Local Government; and
- Identifying what mechanism(s) can be put in place to ensure that the LEP is consistent with the Community Strategic Plan (e.g. is there a role for an agency, or independent body to 'check' the LEP against the Community Strategic Plan as part of the gateway process?)

Recommendation:
The Associations recommend that the Planning Review Panel recognises the need for measures to more effectively integrate the frameworks for Local Government Community Strategic Planning and local land use

plan making, and makes recommendations about steps to:
- identify potential gaps and overlaps that currently exist between these parallel processes; and
- recommend changes that could help achieve greater efficiencies and integration at the local level

Refer also to section 4.4 of this submission.

7.3.2 Content of Plans

Climate Change

Key Questions: *C11. Should there be a requirement for plans to address climate change?*

Plans should address all relevant environmental considerations and changes, of which climate change is just one. It is not considered necessary to single out one particular issue over any other environmental, social or economic issue. Practice notes, guidelines, section 117 directions and other directions from the Department of Planning and Infrastructure are suitable mechanisms to outline relevant environmental, social and economic considerations to be included in plan making and environmental studies.

Biodiversity

Key Questions: *C12. Should biodiversity and environmental studies be mandatory in the preparation of plans?*

Local Government supports the argument for mandating that biodiversity and environmental studies be required in the preparation of plans, however the provisions should recognise that there may be circumstances where the scope, scale and sensitivity of a plan may not necessitate this level of assessment.

7.3.3 Aboriginal cultural landscapes

Key Questions: *C13. How should landscapes of Aboriginal cultural heritage significance be identified and considered in plan making?*

The current planning system provides for the inclusion of Aboriginal culture and heritage provisions in the standard instrument LEP template. It also addresses these matters through the expansion of heritage conservation objectives via a section 117 Direction that requires relevant planning authorities to facilitate the conservation of Aboriginal areas, objects, places or landscapes identified by an Aboriginal heritage survey, when preparing their planning proposals. In practice, this means that Aboriginal culture and heritage values and considerations may only be only captured if a local council has undertaken an Aboriginal heritage study. The NSW Aboriginal Land Council has commented that such studies appear to have been approached with differing methodologies, with the result that they are of varying quality, and implementation by councils is not consistent.[8]

The Associations are supportive of efforts to effectively recognise Aboriginal culture and heritage in local, regional and state environmental plans, and support that its members consult with Local Aboriginal Land Councils (LALC's) to ensure that this occurs, although this is not binding on local authorities.

Recommendation:
The Associations recommend that:
- Aboriginal landscapes and cultural reserves should be developed and adopted under protocols established with key agencies and LALCs.
- The Department of Planning and Infrastructure be requested to develop guidelines (including a consistent methodology for and contents of Aboriginal heritage studies), and that these should be developed and adopted in close consultation with the NSW Aboriginal Land Council, Local Government and key agencies.

[8] *The NSW Aboriginal Land Council's submission to Planning Review Panel: Review of NSW Planning System*, November 2011

7.4 Strategic Planning

7.4.1 A statutory framework and legal status of strategic plans

Key Questions: *A7. Should strategic plans be statutory instruments with greater weight?*
C14. Should new planning legislation provide a statutory framework for strategic planning?
C15. Should strategic plans be statutory instruments that have legal status?
C16. How can the implementation of strategic plans be facilitated?

A statutory framework which flows from a clear set of legislative objectives, in priority order, will facilitate good and consistent planning decisions and should enable flexibility to adapt to local needs and expectations. A matter that is currently unclear is the hierarchy of, and relationship between, different State and regional plans/strategies, which plans have statutory force and which plans prevail over others. Without a consistent and logical flow-down from State level strategic and regional plans to LEPs, DCPs and individual development assessments, the outcomes of the higher level plans cannot be fully achieved, and there is potential for overlap, contradictions between different plans and hence, confusion in the way they are interpreted and applied. The legislation and planning system should be clear and consistent about the hierarchy and statutory/non-statutory status of these plans.

There are arguments on both sides as to whether higher level strategic plans (such as regional plans) should have statutory force. Strategic plans need to be implemented using a wide range of mechanisms, one of which is development control, and some would argue that strategic or structure plans, do not need to be prepared in accordance with legislation. However, mechanisms are needed to better enable these higher level strategic plans to be enforced and for these to be linked into the delivery of regional planning activities, services, infrastructure etc. In the absence of strong, committed, coordinated and integrated planning and infrastructure provision across government agencies, there is a case for giving these higher level plans statutory force; once adopted or endorsed by Parliament, this would ensure that the State Plan would become a key planning document that (like legislation) will exist and maintain its status through successive governments.

However, rather than focusing on making State level strategic and regional plans statutory, there is merit in looking at the current administrative and governance structures between State agencies, with a view to considering options that formalise agreements between agencies and opportunities for partnerships between different levels of government. There are examples of strategic regional planning models in other State jurisdictions (e.g. Queensland) that may be worth investigating. A more rigorous and regular evaluation and review process for State level strategic and regional plans would also go a long way to strengthening the strategic planning process.

Recommendation:
- Rather than focusing on making State level strategic and regional plans statutory, the Associations recommend that the current administrative and governance structures between State agencies be reviewed with a view to considering options that could formalise agreements between agencies and offer opportunities for partnerships between different levels of government.
- The Associations recommend that the new planning system incorporate provisions for a regular evaluation and review of State level strategic and regional plans.

7.4.2 Geographic area

Key Questions: *C17. To which geographical regions should strategic plans apply – catchments or local government areas?*

While a catchment-based approach to regional planning may have advantages for regional planning from an *environmental* perspective, regional planning must also take into account the *social* and *economic* communities of interest within 'regions'. These 'communities of interest' (i.e. population distribution and cultures, settlements, demographics, economic centres) do not necessarily coincide with water catchments.

Recommendation:
The Associations recommend that regions should represent groupings of Local Government areas with regional boundaries that are defined using a combination of criteria, that can take into account the social, economic *and* environmental (water catchment) factors that characterise a geographic region.

7.5 Environmental Planning Instruments

7.5.1 State Environmental Planning Policies (SEPPs)

Key Questions: *C18. Should there be State environmental planning policies? If so, should they be in a single document? Or should they be provisions in a local environmental plan?*
C19. Should there be statutory public participation requirements when drafting SEPPs?
C20. Should a SEPP be subject to disallowance by Parliament?

The NSW planning system is characterised by a multi layered system of controls that regulate land use and development, and despite recent reforms aimed at reducing the quantity of plans, their complexity and avoid duplication, the system is still enormously complex. It is difficult for landowners to readily identify and understand the planning controls relevant to their property.

SEPPs have played such a significant role in the delivery of planning policy in NSW that a review of these planning mechanisms cannot be ignored in the overall planning system review. Particular SEPPs have been a major focus of community and council criticism of the planning system. The Associations support the inclusion of provisions in the new legislation to ensure that SEPPs are subject to both public exhibition and parliamentary scrutiny.

Recommendation:
The Associations recommend that:
- There should be a single plan for a given area that incorporates all the SEPPs relevant to that area.
- The public participation philosophy embodied in the existing legislation for all aspects of the plan-making process should also apply to SEPPs.
- SEPPS should be subject to parliamentary scrutiny.

7.5.2 Local Environmental Plans (LEPs)

Key Questions: *C21. Should there be a review process to deal with issues arising between the Department and councils that relate to the preparation of local environmental plans?*
C22. Should there be a legislative provision to establish this?
C23. How should rezonings (planning proposals) be initiated?
C24. How can amendments to plans be processed more quickly?
C25. Should there be a right of appeal or review for decisions about planning proposals?
C26. Should there be a right for a landholder to seek compensation for the consequences of a rezoning of their land?
C27. When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?

The introduction of the Standard Instrument LEP Template was key among the changes introduced by the Department of Planning and Infrastructure to streamline plan making in NSW. The Associations accept in principle that a level of standardisation is necessary across councils on the format, structure and content of comprehensive LEPs. However, Local Government does not support the level of standardisation imposed by the rigorous implementation of the Template across rural, regional and metropolitan councils.

The level of standardisation presently imposed by the Department of Planning and Infrastructure:

- oversimplifies local planning controls and transfers some controls to DCPs where their standing becomes advisory rather than statutory;
- fails to address local expectations and issues; and

- fails to recognise council planning staff expertise and experience.

Allowing more flexibility within the Template will not erode the principles of simplicity, legibility and consistency between plans. Tailoring LEPs to account for local differences based on good planning principles will increase flexibility while still maintaining certainty and clarity for all stakeholders. The greater use of electronic mapping and online access to planning instruments can assist in achieving these objectives.

In addition, the LEP process could be streamlined and accelerated by giving councils the responsibility to sign off on certain LEPs that meet an agreed set of criteria, and to make minor amendments to LEPs without the need to involve Parliamentary Counsel.

In the absence of a revised set of standard templates being formulated that would address the need for greater flexibility within the Standard Instrument LEP, the Associations would support a formalised review process being established to deal with issues arising between the Department and councils relating to the preparation of LEPs, with an independent body, such as the Planning Assessment Commission, performing the 'mediation' function.

With regard to suggestions about compensating landowners, there should not be a right for a landholder to seek compensation for the consequences of a rezoning of their land. The consultation process should provide for potentially affected landholders to input to the process and voice any concerns, which are then taken into consideration in the context of all other issues before the plan is finalised.

Recommendation:
The Associations recommend that:
- Consideration be given to developing an alternative to the current single Standard Instrument LEP model to effectively address the different needs of metropolitan, coastal and rural councils. It is recommended that Department of Planning and Infrastructure be required to review the Standard Instrument LEP template, with input from Local Government, with a view to developing a number of templates that would reflect the different needs of metropolitan, rural and coastal local government areas.
- A review process is formalised, with an independent body such as the PAC performing the 'mediation' function, to deal with issues arising between the Department and councils relating to the preparation of LEPs, which could be activated as a last resort, if agreement cannot be reached relating to the preparation of an LEP.
- Provisions be included in the new legislation to formalise the role, responsibilities and timeframes in the process of consulting with government agencies.

7.5.3 Consulting government agencies when making or amending an LEP

Key Questions: *C27. When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?*

The Associations would support formalising the role of government agencies and the consultation process for plan making, along the lines suggested in the *Issues Paper*, such as by:

- Requiring comments from agencies to be made publically available;
- Providing the opportunity for agencies to respond to submissions; and
- By formalising a process of dispute resolution and review.

Recommendation:
The Associations recommend that provisions be included in the new legislation to formalise the role, responsibilities and timeframes for government agencies being consulted in the plan making process.

Refer also to section 8.13 of this submission.

7.6 Development Control Plans and Other Instruments

Key Questions:	*C32. What should be the legal status of a DCP?* *C33. Should there be a standard template for DCPs?*

Councils generally undertake detailed research and public involvement in developing and adopting DCPs. These plans are used to help achieve council objectives for appropriate development. The Associations noted in our November 2011 submission that it may be worth considering whether DCPs could be made more determinative so that once they are adopted by a council they are required to be substantially followed.

Currently, the non-statutory status of DCPs is seen by some as enabling a degree of flexibility in decision making and allowing policy issues to be addressed and responded to as they arise. However, in the context of simplifying planning and development assessment processes, some have argued for consideration to be given to consolidating the provisions of DCPs and LEPs into a single document, which could have provisions relevant to individual land parcels. If this were the case, the question of what legal status should be assigned to DCPs becomes superfluous. Without the application of technology to facilitate this approach however, this would result in an unwieldy set of provisions and would not be practical or workable.

(Refer also to comments made in section 4.2 of this submission with regard to standardising DCPs.)

7.7 Planning Issues Across Council Boundaries

Key Questions:	*C34. How should new planning legislation facilitate cooperative cross-border planning between councils?*

The Associations endorse the principle that the concerns of both councils need to be considered in any decision making process about planning or development. Cross-border planning between councils, including the development of regional and sub-regional plans by the NSW Department of Planning and Infrastructure, should be carried out at a regional level in a partnership between Local and State Government. To date there has been the lack of engagement of Local Government in the development of the strategies that directly affect local communities. A stronger regional approach would also assist in addressing Local Government's concerns about the impacts of major development proposals where the proposal is located in one council areas but the cumulative and downstream impacts have the potential to extend to neighbouring Local Government Areas.

Recommendation:
The Associations recommend that;

- cross-border planning between councils should be carried out at a regional level in a partnership between Local and State Government; and
- decisions on developments of genuine regional significance or a supra-council nature should be made by convening a duly constituted panel comprised of representatives appointed by the relevant councils.

7.8 Other Matters

7.8.1 Aboriginal reserves

Key Questions*:*	*C35. Should a program be developed to integrate Aboriginal reserves properly into a new planning system and, if so, how should that program be developed and what timeframe could be targeted for its implementation?*

LALCs have been working with the Australian Government since 1998 to work towards facilitating the subdivision of all former Aboriginal reserves and missions in NSW, however there have been obstacles in the NSW planning system to achieving these outcomes. The NSW Aboriginal Land Council is best placed to respond to matters of the management and planning for these lands.

7.8.2 Provision of Land for Registered Clubs

Key Questions:	*C36. Should developers of greenfield residential land release areas be required to make provision for a registered club and associated facilities?*

There should be no special provision made for registered clubs in local plans. These commercial facilities should be treated the same as their other commercial counterparts, such as hotels and shopping centres.

8 Response to Chapter D – Development Proposals and Assessment

8.1 Types of Development

Key Questions:	*D1. How should development be categorised?*

There is a need for a new approach to the system of development approvals under the *EP&A Act* that simplifies and better integrates the separate sets of development assessment criteria and processes that apply to major projects, local development and complying developments.

The Associations recognise the need for a development assessment system that caters for large public sector infrastructure projects and major developments that clearly are of state or regional significance, however, planning reforms should aim to improve the efficiency of the DA assessment and decision making process without compromising local accountability and public participation.

We note that some stakeholders are calling for the planning system review to consider the recommendations of the Development Assessment Forum[9] (DAF) which was formed in 1998 to recommend ways to "streamline development assessment and cut red tape - without sacrificing the quality of decision making".

The DAF did some valuable work on development assessment and in 2005 developed the *Leading Practice Model for Development Assessment* which recommended ten leading practices to achieve greater efficiency and clarity. The Associations generally support the principles underlying the DAF Model, with the exception of its failure to recognise the important role that elected representatives play in the decision making process. As discussed in sections 4.5 and 8.14.7, local autonomy in decision making is a fundamental principle for planning decisions that should be retained.

PIA NSW[7] has proposed a modified form of the development tracks recommended by DAF, which warrants further consideration as a workable and simpler alternative.

Recommendation:
The Associations recommend that categorisation and streaming of development assessment along the lines of what was proposed in the DAF model should be further investigated, with input from Local Government, as a workable approach for simplifying the development assessment process.

8.1.1 State and Regional Significant Development

Key Questions:	*D2. What development should be designated as State significant and how should it be identified? Should either specific projects or types of development generally be identified as State significant?* *D3. What type or category of development, if any, should be identified as regionally significant to be determined by a body other than the council?* *D31. How should State significant proposals be assessed?* *D62. Who should make decisions about State significant proposals?*

Refer to section 5.6.2 of this submission.

[9] *A Leading Practice Model for Development Assessment in Australia*, Development Assessment Forum (DAF), March 2005 - http://www.daf.gov.au/reports_documents/doc/DAF_LPM_AUGUST_2005.doc

8.1.2 Exempt and Complying Development

Key Questions:	*D4. What development should be exempt from approval and what development should be able to be certified as complying?* *D5. How should councils be allowed local expansions to any list of exempt and complying development?* *D6. Should there be a public process for evaluating complying development applications?*

Refer to section 5.7 of this submission.

8.2 Existing Use Rights

Key Questions:	*D10. Should a new planning system reinstate the ability to convert one nonconforming use to another, different nonconforming use?* *D11. Should existing nonconforming uses be permitted to intensify on the site where they are being conducted (subject to a merit assessment)?* *D12. Should existing nonconforming uses be permitted to expand the boundaries of their present site (subject to a merit assessment)?* *D13. Should properties with existing nonconforming uses have access to exempt and complying development processes?* *D14. When there is a change in zoning of the land, should an application be able to be made to a council for a declaration of the nature and extent of an existing use?*

The expansion of existing use rights, as it would appear to be suggested here, would contradict the intent and underlying principle of existing use rights and is therefore not supported. Local decisions should be made by Local Government, where possible and appropriate, and where existing use rights remain there should be no right of appeal against a council decision with regards to the zoning of a property.

8.3 Flexibility in requiring an environmental impact statement

Key Questions:	*D19. Where a small scale proposal requires an environmental impact statement, should it be possible to seek a waiver?*

While flexibility should be inherent in the system to ensure the ability of councils to achieve the most appropriate planning outcomes, the environmental impact assessment should not be dismissed. A sliding scale of assessment depending on the scale and nature of development is a more appropriate system.

8.4 Development Application Process

8.4.1 Pre-development

Key Questions:	*D21. What provisions, if any, should be made for pre-lodgement processes?*

Many councils actively encourage applicants to have a pre-DA meeting with officers of the council. Depending on the scale of the DA, councils will charge fees for advice. Generally there are two approaches to how a pre-DA meetings are managed. These are:

- The meeting is informal and minutes are not taken so that advice can be general and based on preliminary concept plans; or
- Advice is specific and feedback is given in writing to specific plans and often larger fees are required.

While pre-DA meetings are helpful, they are not necessarily the panacea for the DA process and may not be necessary in all cases. However, giving some formal recognition of pre-lodgement processes, with provision to charge fees where appropriate may provide improvements. The form and details of pre-lodgement processes however, should not be too prescriptive and should be left to the council's discretion.

To avert potential delays with concurrence issues later, there may be benefits in involving representatives from key agencies at the pre-DA meeting, as wider issues may be able to be addressed that may interrelate to council requirements.

Recommendation:
The Associations recommend:

- Practice that encourages a more efficient and workable DA assessment process;
- The use of pre-DA advice where appropriate, without it being prescriptive about the form that this should take;
- Other state agencies being in attendance at the pre-DA meetings, where appropriate; and
- That pre-lodgement meetings be managed having regard to the scale and importance of the DA.

8.4.2 Making an Application

Key Questions: *D23. How can the application process be simplified?*
D24. Should there be standard development application forms that have to be used in all council areas?

Refer to section 4.1 of this submission for comments on standardising forms.

8.4.3 After Lodgement of Development Application

Key Questions: *D25. What public notification requirements should there be for development applications?*
D26. How can the community consultation process be improved?

Refer to section 5.4 of this submission.

8.5 Development Assessment Processes

8.5.1 A quicker process

Key Questions: *D27. Should deemed approvals take the place of deemed refusals for development applications?*

Applications may not be determined within 40 days of receipt for a variety of reasons, and the current protection provided by deemed refusals provides adequate recourse for applicants who feel their application has not been assessed with adequate timeliness.

8.5.2 A less expensive process

Key Questions: *D30. How can unnecessary duplication of reports and information seeking be eliminated from the development process?*

Duplication of documents may be minimised by the lodgement of application documentation in an electronic format, and some councils are moving towards this goal. The Associations advocate and support e-planning mechanisms such as this to improve the management and streamlining of the development process, and have partnered with the Department of Planning and Infrastructure with the introduction of the Electronic Housing Code and e-planning roadmap.

8.5.3 State significant development

Key Questions: *D31. How should State significant proposals be assessed?*

Refer to section 5.6.2 of this submission.

8.5.4 Council as an applicant

Key Questions:	*D34. Should councils undertake self-assessment?* *D35. Should councils undertake self-determination?*

Many council applications are simple straightforward applications that can be managed by experienced staff and referred to council for determination. Councillors are required under their Model Code of Conduct to assess matters fairly, diligently and with integrity.

Where council applications are large or potentially controversial council currently apply certain practices such as:

- Employee an external planner to assess and advise on the DA;
- Refer the DA to a nearby council to assess independently; or
- Determined by a JRPP where it is over $ 5M.

It is important that councils retain discretion on how to manage these DAs so that unnecessary red tape is not developed around DAs that are minor and inconsequently. Councils Code of Practice ensures that these matters are appropriately managed.

8.5.5 EISs and assessment reports prepared by the applicant

Key Questions:	*D36. How can the integrity of an environmental impact statement be guaranteed?*

Refer to section 5.10 of this submission.

8.5.6 Architectural review and design panels

Key Questions:	*D37. Should new planning legislation make provision for councils to appoint architectural review and design panels?*

The Associations support the use of non-mandatory advisory Design Review Panels (DRPs) by councils. However, we oppose the model for DRPs as prescribed under SEPP 65 and recommend that DRPs should be established outside the legal confines of the SEPP. Reference to DRPs should be removed from the SEPP and replaced by guidelines for councils when establishing a Design Review Panel.

These 'Guidelines for Design Review Panels' should include the following principles:

- the Minister cannot require a council to adopt a DRP;
- a council may establish a DRP in association with another council;
- the membership of DRPs should be appointed and managed by the council/s. Members need to meet certain professional requirements and the number should be determined by the council having regard to the type of application;
- that the councils should determine the range of activities that are required to be referred to the Panel and the general role of the panel in the planning process; and
- fees should be de-regulated and applied by councils based on the scale and complexity of the proposed activity.

Other mechanisms for providing advice to councils on design issues as an alternative to Design Review Panels should be further explored by the Department, in consultation with the Associations.

Recommendation:
The Associations recommend that:
- design review panels should be established outside the legal confines of SEPP 65; and
- reference to design review panels should be removed from SEPP 65 and replaced by guidelines for councils, prepared by the Department of Planning and Infrastructure in consultation with Local Government.

8.5.7 Additional Specific Matters Suggested for Development Assessment

Project (commercial) viability

Key Questions:	*D39. Should the economic viability of a development proposal be taken into account in deciding whether the proposal should be approved or in the conditions for approval?*

While economic viability should be considered as part of the plan-making process, it should not be a factor in determining development applications. It is not the role of the decision maker to refuse or amend development applications based on their perceived economic viability.

Mandating the amber light approach?

Key Questions:	*D40. Sometimes there are changes that would rectify problems with a proposal and thus permit its approval. Should it be mandatory during an assessment process for the consent authority to advise of this?*

These matters can be appropriately discussed in the pre-lodgement process or throughout the assessment process and do not need to be mandatory. More often than not, there are changes that would make an unacceptable proposal acceptable, thus allowing approval. Where these changes can be addressed by conditions of consent they should be. Where the changes are more significant the applicant is normally requested to amend their application.

Impacts beyond the immediate locality of a site

Key Questions:	*D43. How can the planning system ensure that the impact of development that is remote from but directly affecting a community is taken into account in the assessment process?*

In the present system such matters would ordinarily fall under a JRPP or the PAC, and would be considered on a regional basis.

Cumulative impacts

Key Questions:	*D44. Should a consent authority be required to consider any cumulative impact of multiple developments of the same general type in a locality or region? Should this be a specific requirement in assessment criteria?*

It is the concern of Local Government that the collective impact of a number of major (resource) proposals is not assessed, and often only the Local Government Area where the proposal is located is given the opportunity to participate in the process, whereas the cumulative impacts of individual applications often extend to neighbouring Local Government Areas.

The cumulative issues are particularly poignant in relation to social impacts. Individually, one major resource development might bring economic benefits to a region or Local Government Area, with the impact on infrastructure and services able to be accommodated by the local community along with the assistance of contributions from the mine proponent. However, *cumulatively*, resource developments have a direct impact on the liveability (specifically noise, dust and visual amenity) and social elements of a locality. Nevertheless, no extensive or quantifiable assessment of this impact is generally undertaken in the decision making process for such proposals.

The Associations consider that resource development companies should be required to review community and regional activities in their *entirety* and to identify cumulative impacts. This would allow unrelated projects that may increase the need for accommodation or resources in an area to be considered (e.g. a coal seam gas project, a mine extension and exploration activities occurring at the same time). A community impact statement is suggested as a possible tool that that could be used by resource development companies in identifying cumulative impacts.

While the Associations have answered this question in the context of resource developments, the comments generally apply to all high impact developments.

Recommendation:
The Associations recommend that:

- The assessment of each application for resource development includes consideration of the cumulative impacts, which could be assessed using a tool such as a community impact statement.
- The process for assessing and consulting on each application for resource development formally includes neighbouring Local Government Areas for consideration of individual cumulative impacts within the sub-region.

Risk of natural disaster as an assessment criterion

Key Questions:	*D51. Should there be a specific assessment criterion that requires risk of damage as a consequence of either short-term natural disasters or long term natural phenomenon changes to be included in development assessment?*

These criteria should be picked up by other legislation and instruments, for example the Building Code of Australia, relevant fire regulations, and provisions for flooding and other disasters.

8.6 Council Performance Measurement

Key Questions:	*D56. What are appropriate performance standards by which council efficiency can be measured in relation to development assessment? (p 71)* *D57. Should there be random performance audits of council development assessment?*

The Associations acknowledge that some stakeholders and members of the public have expressed concerns about Local Government performance in the development assessment and determination processes, with criticism directed at the length of time it takes to process applications. This issue can be partly attributed to concurrence issues, however, it also needs to be noted that the proportion of applications going before councillors is small, relative to the total number of applications determined each year; in practice, 95 percent of DAs determined by councils are actually decided under delegation by professional planning staff.

The Associations strongly support e-planning initiatives as the most viable means of improving efficiencies within the DA process. Many councils have adopted on-line DA tracking and on-line advertising of DAs, which assists both applicants and communities in understanding, and councils fast tracking, the DA process. The Associations support further measures that improve lodgement and assessment processes, such as the Electronic Housing Code (EHC)[10] project that will assist applicants in lodging complying developments under the NSW Housing Code.

Currently, there are a number of practices in place to overview council performance that are supported, such as:

- Positive business practices implemented by councils to advise on, manage and fast track DAs.
- The Local Development Performance Monitoring Report (Department of Planning and Infrastructure) that records data on DA performance times on every council.

[10] http://www.ehc.nsw.gov.au/

- Deemed refusal times where the applicant can take a matter to an alternative decision maker, where it has not been finalised in a reasonable time.
- Recent mediation and conciliation dispute resolution practices that have been set up by the Land and Environment Court for small DAs.

With the above measures already in place, there is no need for 'random audits'.

Other improvements that are supported include:

- Ready access to pre DA advice.
- Adjusting the process to return the emphasis of DA assessment process to focus on planning issues not building matters.
- Provisions that would compel State agencies to provide pre DA and timely advice.
- Professional advice and support being accessible by councils from the Department of Planning and Infrastructure on procedural issues associated with complex 'one off' DAs- akin to a 'helpdesk'.

In conclusion, there are two trends that have occurred simultaneously and steadily since the inception of the Act in the late 1970s. Both the information and scope of plans and associated planning controls have expanded substantially – applying a larger range of legal and policy requirements on the average DA. In addition DAs have moved away from being decisions in principle on land use matters, to mostly comprise detailed development proposals to respond to the level of regulation required and to avoid later issues at the construction stage. Both these trends have combined to now require a considerable level of detail at the DA stage. This needs to be addressed and to do so the reforms need to consider:

- what changes can be introduced to reduce the layers of plans and associated planning controls that apply to one parcel of land; and
- how the DA process could be altered so that councils can provide an 'in principle decision' to the planning issues with the assessment of the building issues to occur in a subsequent approval.

Recommendation:
The Associations recommend that the Planning Review Panel consider:
- Reducing the layers of plans and associated planning controls, that apply to one parcel of land and where possible require higher order plans to be subsumed into the 'local plan' . This would assist in reducing conflicts and competing objectives in differing plans and lessen the ambiguity that current applies at the development assessment process; and
- Introducing a process/procedures that would enable councils to provide an 'in principle decision' to the planning issues relevant to the DA by relegating the assessment of the building issues to a subsequent approval.

8.7 Concurrences and Other Approvals

Key Questions:	*D58. How should concurrences and other approvals be speeded up in the assessment process?* *D59. What approvals, consents or permits required by other legislation should be incorporated into a development consent?* *D60. Should a council be able to delegate to a concurrence authority power to impose conditions on a development consent after the council approves the proposal?* *D61. Should there be some penalty on a council if a referral to a concurrence authority has not been made in a timely fashion?* *D63. What concurrence decisions should be able to be delegated?* *D64. Should there be a model instrument of delegation?* *C27. When local environmental plans are being made or amended, how can transparency and opportunities for negotiation be improved during consultation with government agencies?*

The system of referrals to State agencies needs to be improved and streamlined without compromising the quality of assessments. Possible considerations are:

- Reviewing referrals and concurrences to remove unnecessary or outdated requirements;
- Requiring state referral agencies to publish their assessment criteria and performance data in the same way that local councils are required to report on their performance; and
- Not allowing for deemed approvals within shortened time frames, given the potential to compromise environmental assessments.

A council should not be able to delegate to a concurrence authority power to impose conditions on a development consent after the council approves the proposal. This would have significant impacts on the goal of improving certainty in the planning system.

8.8 Decision Making

Refer to section 5.6 of this submission for a discussion in response to questions in Chapter D relating to decision making on State significant development, the PAC and JRPPs.

8.8.1 Development across or impacting across council boundaries

Key Questions:	*D76. Should it be possible to constitute a Joint Regional Planning Panel with a single representative of each of the affected councils to consider and determine a significant development proposal that extends across the boundary between two local government areas?* *D77 If located entirely within one local government area, should a significant development proposal that is likely to have a significant planning impact on an adjacent local government area be determined by such a two council panel?* *C34. How should new planning legislation facilitate cooperative cross-border planning between councils?*

Refer to section 7.7 of this submission.

8.8.2 Aggregation of developments on different sites to attract jurisdiction of a JRPP

Key Questions:	*D79. Should aggregation of multiple proposals to bring them within the jurisdiction of a Joint Regional Planning Panel be banned if, separately, they would not satisfy the jurisdictional threshold?*

The Associations are opposed to the aggregation of multiple proposals as suggested here, unless a strong nexus could be demonstrated between them.

8.8.3 Council resolutions to Joint Regional Planning Panels

Key Questions:	*D80. Should an elected council have the right to pass a resolution to supplement or contradict the assessment report to a Joint Regional Planning Panel?*

Councils should have the right to pass a resolution to supplement or contradict the assessment report to a JRPP. Allowing councillors to contribute to the decision making process provides useful feedback to the Panel on community views, without delaying the process.

Current practice allows councillors to make a submission on a DA, after the assessment report has been finalised, both as a body and as individuals. This practice is supported by the Associations for the following reasons:

1. It is considered that the views of councillors can assist the Panel in their deliberations.

2. There are advantages in capturing the views of the full council (without the councillors who sits on the JRPP being present), rather than relying on individual submissions from councillors, for the following reasons:
    - Council as a body provides a more representative view of community leaders on the DA, by enabling the matter to be debated taking into account the range of views within council;
    - the Councillor feedback captures the 'ordinary persons' view of the proposed development; and
    - Councillors are able to overview the work of the councils to ensure that appropriate standards are maintained, as well as protecting staff from 'shouldering the responsibility' on providing advice on controversial DAs. This ensures that regulatory functions are well managed and probity risks are minimised.

8.8.4 Council Decision Making Processes

Key Questions:	*D82. Should elected councillors make any decisions about any development proposals?* *D128. Should there be a guide prepared to explain to councillors what their roles are in the development proposal assessment and determination process and how it is appropriate that they fulfil that role?* *D129. If there were to be such a guide prepared, who should have the responsibility for its preparation and what participation and consultation processes should be undertaken in its development?*

The Associations affirm that Local Government should have a lead role in planning decisions that affect local communities as it is:

- best placed to inform the planning process of the needs and expectations of local communities;
- democratically accountable to local communities; and
- the advocate for its community to other spheres of government.

The principles of local autonomy and democracy should be respected, by retaining councils' role on local planning matters, supported by advisory panels where considered appropriate. Within a framework of well developed and comprehensive regional and state planning instruments, positive local autonomy can coexist with other levels of decision making.

Council decision making can be enhanced through increased access to training on the role of the respective determining authority (e.g. councillors, delegated staff) in the DA process and encouraging councils to adopt a policy of giving reasons when DA decisions are made contrary to staff recommendations.

Recommendation:

- In accordance with the principles of local democracy, the Associations recommend retaining councils in their decision making role on local planning matters.
- The Associations support actions that would assist in clarifying the roles of all participants in the decision making process (assessment officers, elected representatives, Department officers, Ministers, and independent bodies) which would be beneficial in assisting the general public to better understand what councils do and their role in the planning and development process.
- To enhance council decision making, the Associations recommend:
    - increased access to training on the role of councillors in the DA process; and
    - encouraging councils to adopt a policy of giving reasons when DA decisions are made contrary to staff recommendations.

8.8.5 The Central Sydney Planning Committee

Key Questions:	*D81. Should the Central Sydney Planning Committee be established under legislation for a new planning system or should it remain established by a provision of the City of Sydney Act?*

The Associations refer endorse the City of Sydney Council's position with regard to the Central Sydney Planning Committee (CSPC), as follows:

> The Central Sydney Planning Committee is unique to the City of Sydney and should remain established by a provision on the *City of Sydney Act*. It should however be clear in the new Act that the CSPC is effectively the JRPP for City of Sydney. Other local councils could not emulate the circumstances of the CSPC (sufficient applications to warrant a dedicated committee, national importance enough to warrant the most senior State executives, full integration into the host Council, and a high caliber professional staff). It is still not possible to make the JRPPs consistent with the CSPC for these same reasons (senior State executives cannot be spread so thin, not enough turnover in any one Council to warrant a dedicated committee etc).[11]

8.8.6 Giving Reasons for a Decision

Key Questions:	*D83. What should be the requirement for a decision making body to give reasons for decisions – in particular as to why objections to a proposal have not been accepted?* *D84. If a council resolves to approve a development proposal where the assessment report recommends rejection, should the council be obliged to provide reasons for approval of the development?*

Concerns are sometimes raised where a council decision differs from the recommendation of the planning staff, however this is rare in practice. While submissions made by residents are thoroughly considered by council staff during the assessment process, it should not be assumed that the staff recommendation is the final advice, given that additional information and debate may be presented at the council meeting (e.g. presentations or submissions by the applicant and/or objectors, discussion and debate amongst Councillors). A small proportion of DAs are 'borderline' where the decision could go either way. Sometimes council officers can be too close to the process and can be overly cautious about the detail, when the application in principle is reasonable. In these cases councils may overturn the advice of their staff.

At the full council meeting, planning issues raised by the objections are debated and possible amendment to plans considered. In this open forum the public is clearly able to observe the debate and hear the reasons that lead to council's final decision. Addressing each objection in a council resolution is therefore considered unnecessary and would not necessarily provide any additional appreciable benefit to the stakeholders.

8.9 Development Conditions

8.9.1 Standard Conditions of Consent

Key Questions:	*D86. Should there be a range of standard conditions of consent to be incorporated in development approvals?*

Refer to section 4.2 of this submission for comments on standardising council documents in general.

8.9.2 Public Interest Conditions

Key Questions:	*D87. Should new planning legislation make it possible for public interest conditions to be imposed that went beyond the conditions that immediately relate to a particular development?*

Refer to section 7.3.1 of this submission.

8.9.3 Reviewable Conditions

Key Questions:	*D88. Should nominated conditions of consent be able to be reviewed at regular, specified intervals?*

[11] ***New South Wales Planning System Review - Issues Paper*** *Submission to Tim Moore and Ron Dyer – Joint Chairs of Review* Council of the City of Sydney, February 2012

The impact of a particular development or activity (e.g. licensed premises, entertainment venues, restaurants, commercial and industrial developments) can change over time, resulting in amenity and other impacts on neighbours/localities. Councils are then placed in a position of having to deal with conflicts over operational matters such as parking, loading, deliveries, noise and waste collection. The provisions of the *EP&A Act* and Regulations and/or other legislation (e.g. *Protection of the Environment Operations Act 1997*) do not always provide an adequate mechanism to deal with operational matters and amenity impacts which may change over the life of a development.

Ideally, the planning legislation would include provisions to enable certain specific consent conditions to be reviewed at set intervals. Suggested mechanisms to achieve this might include:

- The ability to impose specific additional conditions through the consent process; and
- Provisions to issue a notices/orders directing compliance with a certain conditions.

Such provisions would need to be set within a framework of procedural fairness and give the owner/operator a right of appeal to the Land & Environment Court, if it was considered that such additional or renewed conditions or requirements were unreasonable.

8.9.4 Climate Change And Time Limited Consents

Key Questions:	*D89. Should it be possible to grant a long-term time-limited development consent for developments that are potentially subject to inundation by sea level rise caused by climate change?*

The legislation should not prohibit the ability and flexibility of councils to offer time-limited consents for certain developments in areas that may be affected by climate change in the future. There are examples (such as in Eurobodalla Shire) where time-limited consent has been granted, to enable the land to be productively used in the short to medium term but still take into account longer term potential impacts of sea level rise as a result of climate change. The advantage of this approach is that it would allow the land to continue to be used in the short term, but allowing for that use to cease or be reviewed after the agreed period of time, to take account of new data about sea level rise/climate change.

8.9.5 Performance Bonds or Financial Sureties

Key Questions:	*D91. Should new planning legislation make it possible to impose performance bonds or sureties unrelated to the protection of public assets?* *D92. If so, should there be any restrictions on the reasons for which such bonds or sureties could be required?*

The new legislation should provide expanded provisions to enable councils to impose performance bonds or sureties unrelated to the protection of public assets, in such circumstances as where rectification of noncompliance or non-performance of a developer may not be able to be funded readily, or may fall on an innocent landholder or potentially the local council. The principle is also considered applicable to the rehabilitation of mine sites and wind farms once they cease operation.

8.9.6 Conditions on Construction Plans

Key Questions:	*D94. If there is to be a more concept based development application process, should councils have the power to impose conditions on construction approvals?*

There are mixed views within Local Government as to whether the imposition of conditions on construction approvals would be beneficial. Some councils argue that this could complicate the construction certificate process and others hold the view that imposing such conditions (particularly those that relate to compliance with the Building Code of Australia) would assist in streamlining the process. The Associations' view is that further consideration of this matter will be needed, along with clarification of the role and responsibilities of certifiers, if there is to be a concept-based development application process introduced.

8.10 Infrastructure contributions

8.10.1 Community and State Infrastructure Contributions

Key Questions:	*D95. Should IPART be given a general reference to examine and make recommendations about how any shortfall in development contributions plans for necessary community infrastructure should be funded? (p85)* *D96. Should IPART be given a reference to make recommendations about what should be the extent, standard and nature of community infrastructure works that should be included in contributions plans?* *D97. In light of the particular circumstances that might apply to the area covered in a contributions plan, should IPART be given a standing reference to enable councils to apply for variation to the cap on community infrastructure contributions?* *D98. Is it reasonable to require IPART to undertake a detailed analysis of each contributions plan developed by councils?* *D99. Would it be preferable to give IPART a general reference to develop an appropriate plan preparation methodology and approach to construction costing for community infrastructure contributions plans?* *D100. Should IPART be given a reference to make recommendations as to when community infrastructure contributions should be available? Should this include recommendations as to whether a delayed payment system should apply and, if so, at what development stages payment should be made?* *D101. Should there be a requirement for councils to publish a concise, simply written, separate document on community infrastructure funds collected and their proportionate contribution to individual elements in the council's contributions plan?* *D102. Should IPART be given a reference to consider whether or not guidelines and/or mandatory requirements should be set for councils about community infrastructure prioritisation and levels of community infrastructure funds permitted to be available?* *A10. How should levies to pay for local and state community infrastructure be set?* *A11. What alternatives to – or additional funding sources for – such infrastructure should be considered?*

The Associations endorse the position taken in the Issues Paper that community infrastructure levies will continue in a new planning system. The introduction of section 94 (s94) contributions in the *EP&A Act 1979* was an enlightened initiative of the then State Government. The underlying principles are soundly based in equity and efficiency, consistent with the Act's objectives.

Section 94 plans are a transparent and disciplined mechanism for raising revenue for infrastructure. The principles of nexus and apportionment are rigidly applied under the framework that ensures that contributions are applied to infrastructure specified under the s94 plan.

The Associations acknowledge the need for measures to increase housing affordability and are open to further discussion about how the process of applying infrastructure contributions can work most effectively. However, it is imperative to recognise that the quality of the assets purchased through developer contributions is important to the creation of liveable suburbs.

The introduction of the $20,000 cap for established areas and the $30,000 cap for greenfields areas effectively removes any need for IPART to have a role in determining s94 plans that fall under the caps.

IPART already has a role in reviewing plans that already exceed these caps or propose to do so.

8.10.2 Appeals Against Reasonableness of Development Contributions

Key Questions:	*D104 and E7. Should any appeal be allowed against the reasonableness of a development contribution, if it has been approved by the Independent Pricing and Regulatory Tribunal?*

A contribution does not need an appeal process if it has already been independently reviewed by an expert body such as IPART.

8.10.3 Contributions for Development Modifications

Key Questions:	*D105. Should developer contributions apply to modifications of approved development?*

Where a modification of a development is significant enough to satisfy tests of increasing demand for community facilities, the Associations consider that councils should have the right to levy additional contributions.

8.10.4 Regionally-Based Community Facilities

Key Questions:	*D106. Should regional joint facilities funded by developer contributions shared between councils be encouraged?*

Where suitable opportunities arise and there is agreement between councils, the funding of regional joint facilities by developer contributions could be shared between councils.

8.11 Modifications of approved developments

Key Questions:	*D107. What should be the permitted scope of modification applications?* *D108. Should there be a limit to the number of modifications applications permitted to be made?* *D109. Should any modification be able to be approved retrospectively after the work has been done?* *D110. If so, should retrospective approval be confined only to minor changes and not more substantial ones? Should this be the case even if major changes leave the development substantially the same development as the one originally approved?* *D111. Should minor modification applications made to Planning Assessment Commission or Joint Regional Planning Panel approvals be decided without a public hearing?* *D112. Should councils be able to deal with minor modification applications to major projects?*

By inference, modification to development should not be significant nor result in the development being substantially different from the original development overall. There should not necessarily be any limitation on the number of *minor* amendments (i.e. those that do not alter, or increase the size and scope of the development), however, it may be appropriate to consider limiting the number of modifications permitted if modification is likely to result in incremental additions, expansion or increase in the size or scale of the development.

Modifications need to be able to be processed quickly so that building work on a site can proceed efficiently. It may be helpful to separate modifications into those that are primarily of a building nature and those that need a planning review. This may allow applications to be more appropriately allocated to staff and where minor fast tracked. Two categories of modifications could be considered that are generally categorised as:

- Minor/insubstantial modifications that are primarily of a building nature; or
- Major changes of a more substantive nature that requires re-advertising and a planning review.

A preliminary list of criteria for ‘minor modifications’ may include the:

- DA consent having been approved in the last 5 years;
- Modification does altered a condition of development consent or any other planning matter:
- Changes are substantially internal;
- Changes have minimal impact on the building envelope
- Changes have minimal impact on the facade of the development; and
- Changes only marginally affecting the floor area of the development.

Major modifications are those changes that exceed the above criteria and hence require a planning assessment.

Modifications are made to most developments to one degree or another during the course of construction and there needs to be a practical and effective way of assessing, determining such modifications retrospectively. Retrospective approvals should be confined to work which does not substantially alter the development, or result in any increase or expansion of the development. Otherwise it would defeat the purpose and integrity of the legislation and proper planning process. One suggestion may be to introduce a single process to better manage retrospective modifications through the Construction Certificate process. e.g. a modified Construction Certificate should be able to be issued for work covered in a retrospective modified consent, which would also enable an Occupation Certificate to be issued for the work (which is currently not the case).

8.12 Development Consents

Key Questions:	*D114. Should the 'substantially commenced' test for ensuring the ongoing validity of development consent be retained?* *D115. If the present test was not retained, what new test should replace it?* *D116. How long should development consents last before they lapse?*

Provisions for substantial commencement (or 'physical commencement' as referred to in section 95 of the current Act) must be retained in the new planning legislation and a test of 'substantial commencement' should apply to development consents, that is sufficiently stringent to guarantee the development would proceed to completion within a reasonable timeframe. However, clarity is needed as to what constitutes 'substantial commencement'.

To address concerns that the current provisions which enable minimum work to be undertaken to effectively preserve the development consent, it would be appropriate to consider reducing the period for lapsing of consents to less than five years. If a more stringent test for commencement were to be applied, and/or the time period for lapsing of consents was reduced, provisions could also be made for applicants to apply to the consent authority for an extension of time, provided the applicant can demonstrate good cause against certain specific criteria.

Recommendation:
The Associations recommend that substantial commencement provisions must be retained in the new planning legislation and a test of 'substantial commencement' should apply to development consents.

8.13 Development Compliance and Certification

8.13.1 Private Certification

Key Questions:	*D117. Should private certifiers have their role expanded and, if so, into what areas?* *D118. Should private certifiers be permitted, in effect, to delegate certification powers to other specialist service providers and be entitled to rely, in turn, on certificates to the certifier from such specialist professions?* *D119. Should certifiers be required to provide a copy of the construction plans that they have certified (as being generally consistent with the development approval) to the council to enable the council to compare the two sets of plans?* *D120. Should there be a requirement for rectification works to remove unacceptably impacting non-compliances when these are actually built rather than leaving an assessment of such non-compliances to either a modification application assessment or to the Court on an appeal against any order to demolish?* *D121. What statutory compensation rights, if any, should neighbours have against a certifier who approves unauthorised works that have a material adverse impact on a neighbouring property?*

Refer to section 5.8 of this submission.

8.13.2 Changes to Development Approval Plans

Key Questions:	*D122. Should construction plans be required to be completely the same as the development approval and not permitted to be varied by a private certifier for construction purposes?*

Requiring Construction Certificate level plans and specifications at Development Application Stage is unreasonable, costly and would impede the development process. Councils have progressively been requiring an increased level and amount of detail, information and reports at the DA stage as a result of the introduction of the Construction Certificate provision, because the DA stage provides the only opportunity to address the proposed development. The result is that the DA process has become increasingly more complex, onerous and costly.

Councils should be able to require specific additional plans or details post-development consent, including the ability to impose additional relevant conditions. If councils knew that they could consider a particular matter (e.g. drainage or landscaping) at a later date, without being determined by an Accredited Certifier, it would be possible to reduce the level of technical detail and information required at DA stage.

Refer also to section 5.8 of this submission.

8.13.3 Choosing a Certifier

Key Questions:	*D123. Should developers be permitted to choose their own certifier?*

A key reason for discontent with the private certification process has been a concern about potential conflicts of interest with developers being able to choose their own certifier, although it is acknowledged that this issue probably arises in relation to the practices of a minority of private certifiers.

Alternative measures are needed to improve the levels of accountability and auditing of certifiers, and the suggestion of a 'cab rank' approach may be one option to consider. However certifiers have varying degrees of expertise, qualifications, specialisation, competence and service fees, and these are matters for the owner or client to consider when engaging a certifier. Having a list maintained by the Building Professionals Board or relevant council could present potential liability issues if the certifier turns out to be unsuitable or incapable of providing the required level of knowledge and service for the particular project.

8.13.4 Occupation Certificates

Key Questions:	*D125. Should Interim Occupation Certificates have a maximum time specified and, if so, how much time should this be?* *D126. Should a certifier issuing a Final Occupation Certificate be required to certify that the completed development has been carried out in accordance with the development consent?*

Prior to the introduction of private certification, it was usual practice for councils' building surveyors to check and ensure compliance with the development consent prior to granting a satisfactory final inspection or issuing a certificate of occupation/classification. If a development is not completed in accordance with the consent issued, this defeats the purpose of the consent and the reasons for the imposition of the conditions. It is expected that private certifiers would check that the requirements of the consent have been reasonably satisfied, in the same way that councils' building surveyors did in the past. However, as detailed previously (refer to section 5.8 of this submission) there is often inconsistency between the consent and the actual development that is finally approved with the issue of the occupation certificate.

To help provide greater certainty that part or all of a development has been checked against relevant consent conditions, the new legislation should include provisions to require an occupation certificate not to be issued (interim or final) if the development is inconsistent with the consent. An Occupation Certificate (interim or final) should not be able to be issued if the development (whole or part) is inconsistent with the consent. In addition, consideration should be given to limiting an Interim Occupation Certificate to a period of 1 year, unless otherwise approved by the consent authority through an appropriate assessment process.

Recommendation:
The Associations recommend that provisions be included to ensure that an occupation certificate (interim or final) should not be able to be issued if the development (whole or part) is inconsistent with the development consent.

8.13.5 Role of Councillors in the Planning Process

Key Questions:	*D128. Should there be a guide prepared to explain to councillors what their roles are in the development proposal assessment and determination process and how it is appropriate that they fulfil that role?* *D129. If there were to be such a guide prepared, who should have the responsibility for its preparation and what participation and consultation processes should be undertaken in its development?*

Refer to comments in section 8.8.4 of this submission.

8.13.6 Community Consultative Forums/Committees

Key Questions:	*D131. Should there be specific statutory obligation to require the establishment of (and the procedures for) community consultation forums to be associated with major project developments?*

The appropriateness of having a community consultative forum may vary from location to location and for different types of development. Many companies use a suite of measures to keep their communities informed, and community consultative committees (CCCs) are only one mechanism used by these companies to engage with the broader community. Provisions requiring the establishment of (and the procedures for) some form of ongoing community engagement (such as a community consultative forum) for major project developments could be included in a model set of development conditions. However, for the reasons discussed above, they should not necessarily be imposed by way of a specific legislative obligation.

In relation to the operation of community consultative forums, there are currently no clear standardised guidelines to ensure that the process for appointing committee members and running these committees is transparent and equitable. The result could be that these committees may not end up being truly characteristic of the communities they purport to represent, with potentially negative consequences for the quality of the dialogue of the forum meetings.

Recommendation:
The Associations recommend that the Department of Planning and Infrastructure be requested to develop clear guidelines for companies to follow when they are required to establish and operate community consultative forums as part of their consent conditions.

8.13.7 Calculating Fees

Key Questions:	*D133. What fees should councils receive for development applications?* *D134. When and how should council development application fees be reviewed?*

The current system of regulated planning fees means that councils are not able to fully recover the costs of their planning functions. Cost recovery actually deteriorated with regulated fees remaining static for over a decade. An effective and efficient planning system needs to be adequately resourced and planning legislation and regulations need to provide for full cost recovery.

These fees should be reviewed annually along with all other council fees and charges, and should be deregulated and determined by councils.

9 Response to Chapter F – Implementation of the New Planning System

9.1 Role of Department

Key Questions:	*F1. What should be the role of the Department in implementing a new planning system? Should the role and resourcing of regional offices be embraced? And, if so, in what respects?*

The Associations strongly argue that the Department's regional offices should be supported, appropriately resourced and given greater autonomy to develop supportive working relationships with Local Government and make decisions that affect regional locations.

9.2 Role of Councils

Key Questions:	*F2. What should be the role of councils in implementing a new planning system?*

As indicated in a number of recommendations in this submission, Local Government has a fundamental role to play in the implementation of the planning system and this role will continue in the new system. Please refer also to sections 4.1, 4.2, 4.3 and 8.13.5.

9.3 Culture of the Planning System

Key Questions:	*F3. What can be done to ensure community ownership of a new planning system?*

As with any other effective public consultation exercise, a well-planned and comprehensive consultation program that utilises a diverse range of communication mechanisms will be crucial to gaining community ownership of the new planning system. Interested and engaged members of the community need to be given multiple and varied opportunities to hear, absorb and respond to ideas for a new planning system in NSW. The language and techniques used in these communications must be kept simple and non-technical.

9.4 Public Participation

Key Questions:	*F4. What actions can be undertaken by bodies preparing strategic plans to increase community engagement with the planning system?* *A9. In a new planning system, how can we improve community participation opportunities? How can we improve consultation processes for plan making and development assessment?* *C3. Should new legislation prescribe a process of community participation prior to the drafting of a plan?* *C19. Should there be statutory public participation requirements when drafting SEPPs?* *D129. If there were to be such a guide prepared, who should have the responsibility for its preparation and what participation and consultation processes should be undertaken in its development?*

Refer to section 5.4 of this submission.

9.5 Better Co-Ordination

Key Questions:	*F5. What changes can be put in place to ensure more effective cooperation between councils, government agencies, the community and developers within the planning system?*

Refer to section 4.1 of this submission.

9.6 Probity

Key Questions:	*F6. What checks and balances can be put in place to ensure probity in the planning system?*

There are already rigorous systems in place to reinforce probity in the planning system in respect to the role of Local Government.

Councils operate under the highly prescriptive Local Government Code of Conduct which alerts elected members and staff to their obligations relating to probity, and regular training is used to reinforce this. Use of internal and external auditors provides rigour to the measures applied.

There are other measures in place to help ensure probity within the planning system, such as the ICAC. The ICAC in December 2010 recommended reforms to address some of the potential probity and transparency issues associated with the operation of Part 3A of the *EP&A Act* and the SEPP Major Development. The Associations recommend that the Panel consider these recommendations of ICAC, along with the recommendations of its more recent report entitled *Anti-corruption Safeguards and the NSW Planning System* for appropriate measures to strengthen public accountability and resist changes that centralise power and reduce transparency and accountability.

Suggestions of involving an independent person in the planning process would introduce additional costs which would need to be funded in some way, adding potential costs. Councils have existing Codes of Conduct for staff and councillors which establish requirements of conduct for council officials in carrying out their functions.

9.7 Information Technology and E-planning

Key Questions: *F7. How can information technology support the establishment of a new planning system?*

Many councils and the Department of Planning and Infrastructure are already utilising information technology to support the planning system. For example:

- Electronic lodgement and tracking of DAs;
- Web based mapping tools to interact with zoning maps; and
- Community consultation that is undertaken on line.

Information technology, if developed expertly and with the appropriate commitment of resources, has the potential achieve significant increases in efficiency, effectiveness and transparency in the planning system, such as by making it possible to capture a single digital record of controls that would apply to each land parcel and providing easy logical public access to this information.

9.8 Monitoring and Evaluating Objectives

Key Questions: *F8. Should the new planning system contain mechanisms for reporting on and evaluating objectives of the legislation?*

The Associations support the concept of evaluating performance against objectives in the legislation and we submit that there are already monitoring systems in place that could be refined to more accurately address objectives (e.g. performance reporting by councils).

10 Conclusion & Recommendations

The Associations support the open and transparent process taken by the Planning Review Panel and acknowledge the work involved to report on the range of issues that have been raised over the course of the review to date. However, drawing too great a focus on 'fixing' the current legislation risks derailing the opportunity to discuss and agree on how to achieve genuine reform of the planning system. The Associations would like to see opportunities for a wider debate about what should be the guiding principles underlying a new system. We submit that agreement is needed first and foremost on the fundamental principles of the new system which should then guide the approach on how to achieve genuine reform.

It is clear from the number and complexity of the issues presented in the paper and the diversity and number of submissions from stakeholders that there is still a need for active deliberation and debate in many areas. Some issues, such as the regulation of the building and certification industry, are matters that require a comprehensive review in their own right, and may have implications for other statutory instruments (e.g. the current review of the Building Professionals Act, where many of the requirements that impact the building certification system are closely interlinked with the planning legislation). The extent and level of consultation intended for the next phase of the review (i.e. the Green Paper) is also unclear. The Associations seek an undertaking from Government that it will actively engage with Local Government in the next step of developing the Green and White Papers.

Finally, the Associations note the intention of the Minister for Planning and Infrastructure to establish an Expert Panel and a Stakeholder Reference Group to assist with the planning system review. These expert groups should be tasked at the outset to advise on what should be the objectives and model/structure for the new legislation and the overall system. In addition, it is strongly argued that a number of issues would benefit from a selection of workshops and/or working groups to look at certain issues in more detail as part of this process. From the Associations' perspective, once a model or outline for the new legislation is determined, the issues requiring further detailed consideration will include:

- Integration and streamlining of the multiple layers of plans, from SEPPs to LEPs and DCPs;
- Building certification;
- Management models/structure for regional planning;
- Structures and processes for decision making about development control; and
- Public involvement - when and how to engage with the community, in both the planning and development assessment processes.