planning • environment • local government

West Molonglo Urban Development Project

Discussion Paper on Infrastructure & Servicing Issues Under A.C.T & NSW Planning Legislation

Prepared for CB Richard Ellis (V) Pty Ltd
on behalf of The Riverview Group

03 June 2008

lindsay**taylor**lawyers
Level 7, 1 O'Connell Street, Sydney NSW 2000, Australia
T 02 8235 9700 • **F** 02 8235 9799 • **W** www.lindsaytaylorlawyers.com.au • **E** mail@lindsaytaylorlawyers.com.au
ABN 15 695 894 345

Table of Contents

Purpose and outline of Discussion Paper

1 This paper relates to the proposed West Molonglo Urban Development Project (**Development**) and is prepared on behalf of the developer.

2 Its purpose is to discuss a suitable regulatory planning framework within which infrastructure, facilities and services can be provided within the Australian Capital Territory (**ACT**) and New South Wales (**NSW**) in an integrated and co-ordinated manner in connection with the Development.

3 This paper is subject to certain important assumptions and qualifications, which are set out under the next heading.

4 The Development is to be carried out jointly by the Riverview Group and the Land Development Agency (**LDA**) of the Australian Capital Territory (**ACT**) (together referred to in this paper as the **Developer**) on land situated within the ACT and New South Wales (**Development Land**).

5 The part of the Development Land that is situated in NSW is within the local government area of Yass Valley Shire Council (**Council**).

6 The primary legislation governing the Development and the Development Land is:

6.1 for the ACT - the *Planning and Development Act 2007 (ACT)* (**PD Act**), and

6.2 for NSW - the *Environmental Planning and Assessment Act 1979 (NSW)* (**EPA Act**).

7 The *Local Government Act 1993* (NSW) (**LGA**) is also relevant to the Council's involvement in relation to the Development.

8 The regulatory bodies having primary responsibility for the Development are:

8.1 for the ACT – the Minister administering the PD Act and the Planning and Land Authority of the ACT (**PLA**), established under s10 of the PD Act, and

8.2 for NSW – the Minister administering the EPA Act and the Council.

9 The particular focus of this paper is whether the *PD Act* and the *EPA Act* or other relevant legislation prevents the LDA (and, where relevant, the PLA) from entering into arrangements for the cross-border provision of infrastructure, facilities and services to meet the Development.

10 The particular issues considered in this paper are as follows:

10.1 the nature and operation of the various mechanisms under the PD Act and the EPA Act under which the Developer may be required to provide infrastructure, facilities and services relating to the Development,

10.2 the nature and attributes of an appropriate regulatory planning framework, likely to be achieved through one or more agreements, enabling infrastructure, facilities and services relating to the Development to be provided:

10.2.1 in an integrated and co-ordinated manner across the whole of the Development, and

10.2.2 in a manner that harmonises the application of the planning laws of the ACT and NSW to the Development to the fullest extent practicable,

10.3 whether the LDA may, under the PD Act or otherwise:

10.3.1 enter into a joint venture arrangement with the Riverview Group in relation to the carrying out of the Development, and

10.3.2 provide infrastructure, facilities and services relating to the NSW Development, and

10.3.3 enter into arrangements or agreements with persons, either on its own or jointly with the Riverview Group, to provide infrastructure, facilities and services relating to the NSW Development,

10.3.4 enter into arrangements or agreements with the Council for the provision of municipal services (such as waste collection and recycling or water supply) to the NSW Development.

11 One other issue that is considered is whether the PLA may enter into arrangements or agreements with the Council for the provision of regulatory planning services, whether under the EPA Act or otherwise, in relation to the Development.

Assumptions & Qualifications

12 This paper:

12.1 principally deals with relevant regulatory legal issues relating to the Development in planning law,

12.2 does not deal with the application of the local government legislation of the ACT and New South Wales in relation to the proposed regulatory planning framework for the Development, except in relation to tendering and public private partnership issues under the NSW legislation,

12.3 in particular, does not consider issues relating to the levying or allocation of local government rates, taxes and charges in relation to the Development for the purpose of funding the ongoing provision of infrastructure, facilities and services relating to the development,

12.4 does not deal with commercial or other legal issues relating to the Development, including other regulatory issues under other laws of the ACT, NSW or the Commonwealth.

13 This paper is necessarily broad and general given that the information that has been provided relating to the Development, the Development Land and the infrastructure provision objectives to enable this paper to be prepared is itself broad and general. Specific legal advice should be obtained in relation to specific matters relating to the Development.

14 For the purposes of this paper, it is assumed that the Developer, or either LDA or Riverview, has a sufficient interest in, or control over, the Development Land to enable the regulatory framework discussed in this paper to be achieved. If that assumption is incorrect, this paper will need to be revised.

Summary of Key Conclusions

15 The PD Act operates to give the PLA, the Minister and the Legislative Assembly complete discretion whether to propose, prepare, proceed with, vary or make a variation to the Territory Plan (as the case may be) to make the ACT Development permissible and does not afford the Developer any right of appeal on the merits if the variation does not occur.

16 This is significant because it gives the PLA and the Minister the power, amongst other things, to require the Developer to enter into arrangements for the provision of

infrastructure, facilities and services in connection with the ACT Development before agreeing to a variation of the Territory Plan to permit the ACT Development.

17 Likewise, the EPA Act operates to give the Council and the Minister complete discretion whether to prepare, proceed with, vary or make an amendment to the Yass LEP to make the NSW Development permissible and does not afford the Developer any right of appeal on the merits if the amendment does not occur.

18 This is significant because it gives the Council and the Minister the power, amongst other things, to require the Developer to enter into arrangements for the provision of infrastructure, facilities and services in connection with the NSW Development before agreeing to the amendment of the Yass LEP.

19 The provisions of the EPA Act relating to the making of environmental planning instruments (**EPI**s) are proposed to be substantially amended by the *Environmental Planning and Assessment Bill 2008* (**Bill**). A copy of a summary of the principal provisions of the Bill is contained in the Annexure to this paper. The summary of the changes relating to the making of EPIs appears under the heading *Principal Amendments Relating to Environmental Planning*.

20 Subject to the Territory Plan and the reasonableness of the requirement in the particular case, the PD Act imposes no express requirements in relation to the nature or level of contributions that may be required as a condition of development approval towards the provision of infrastructure, facilities and services relating to the ACT Development..

21 On its face, s165(3) gives the PLA or the Minister (as the case requires) the power to grant development approval to the ACT Development subject to a condition requiring the Developer to make provision works, services or facilities on or to the NSW Development Land.

22 For the NSW Development, an EPI could be made in respect of the NSW Development Land controlling the NSW Development by requiring the provision of infrastructure, facilities and services in connection with NSW Development for the purpose of achieving one or more of the objects of the Act.

23 If the NSW Development is declared to be a Part 3A project under the EPA Act, the Minister could enter into such arrangements with, or impose such requirements for the provision of infrastructure facilities and services by, the Developer in relation to the NSW Development as could be entered into or imposed under Division 6 of Part 4 if the NSW Development was not a Part 3A Project. This is in addition to any other arrangements or requirements that the Minister could enter into or impose by reason of any statement or commitments that the Developer could be required to enter into in accordance with the environmental assessment requirements relating to the Development.

24 For the NSW Development, Division 6 of Part 4 of the EPA Act contains four different development contributions mechanisms that could be applied towards the provision of infrastructure, facilities and services in connection with NSW Development.

25 With the exception of planning agreements, it is evident that the restrictions and limitations that apply to such mechanisms under the EPA Act would make it difficult for infrastructure, facilities and services relating to the Development to be provided in an integrated and co-ordinated manner across the ACT/NSW border and in a manner that harmonises the regulatory requirements of both jurisdictions.

26 The PD Act and the *Legislation Act 2001* (ACT) allow the LDA to develop land, carry out works for the development and enhancement of land, carry out strategic or complex urban development projects and do other things necessary and convenient for those purposes.

27 Under ACT law, the LDA may enter into agreements with other persons in the exercise of its functions, including a planning agreement under s93F of the EPA Act.

28 The PD Act allows the LDA to exercise its functions alone or through subsidiaries, joint ventures or trusts or by holding shares in, or other securities of, corporations.

29 The PD Act is silent on whether the LDA may exercise its functions outside of the ACT and therefore is silent on whether the LDA may enter into a joint venture with the Riverview Group in relation to the carrying out of the NSW Development.

30 Having regard to the widely expressed scope of the LDA's functions in the PD Act and the relevant principles in the case law, a reasonable interpretation of the PD Act is that the LDA may, subject to any written direction of the Minister to the contrary:

30.1 enter into a joint venture with the Riverview Group in relation to the carrying out of the NSW Development, and

30.2 provide infrastructure, facilities and services relating to the NSW Development, and

30.3 enter into an agreement referred to in s163(3)(n)(iii) of the PD Act with the relevant Minister, either on its own or jointly with the Riverview Group,

30.4 enter into a planning agreement under s93F of the EPA Act in relation to the NSW Development, either on its own or jointly with the Riverview Group, and

30.5 enter into arrangements or agreements with the Council for the provision of municipal services (such as waste collection and recycling or water supply) to the NSW Development.

31 The PD Act allows the PLA is to provide planning services, including services to entities outside the ACT subject to the Minister's approval.

32 Therefore, the PD Act allows the PLA, subject to the Minister's approval, to provide planning services to the Council in relation to the Development. Such services could relate to (but are not limited to) the Council's functions under the EPA Act of:

32.1 preparing an amendment to the Yass LEP to make the NSW development permissible, or

32.2 preparing development controls plans under 74C of the EPA Act,

32.3 determining development applications relating to the NSW Development to enable the carrying out of the NSW development, or

32.4 negotiating a Planning Agreement for the provision of infrastructure, facilities and services relating to the NSW Development.

33 It follows from the above provisions that the Council has the power to enter into agreements or arrangements that are necessary for, or incidental to, or supplemental to, or consequential on, the exercise of its functions and which are not prohibited under any Act or law.

34 Under the LGA, the Council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.

35 The Council would ordinarily bear primary responsibility for the provision of the following kinds of infrastructure, facilities and services to the NSW Development:

35.1 head works infrastructure provided to and within the NSW Development Land, such as water supply, sewerage, drainage, roads and the like,

35.2 infrastructure, facilities and services, such as community and recreational facilities, child-care facilities, library facilities, other human services facilities,

public domain works, car parking, waste management facilities, emergency services and the like,

35.3 works for the protection and enhancement of the environment.

36 The provision of all such infrastructure, facilities and services are clearly within the Council's statutory powers. Therefore, the entering into of agreements or arrangements relating to the provision of such infrastructure, facilities and services would be necessary for, or incidental to, or supplemental to, or consequential on, the exercise of its functions and therefore a lawful exercise of its functions.

37 The Council would be prima facie required to invite tenders before it enters into any agreement with the Developer, the LDA, or the PLA for the provision of infrastructure, facilities and services relating to the NSW Development.

38 This is the case if the infrastructure, facilities and services are provided to the Council or on the Council's behalf by the Developer as an agent or contractor of the Council.

39 However, the Council is not required to invite tenders if no agreement with the Council is proposed, such as where the infrastructure, facilities and services are being privately provided by the Developer instead of the by the Council.

40 Furthermore, s55 does not require the Council to invite tenders before it enters into an agreement with the Developer under which the Developer agrees to pay a monetary development contribution or dedicate land to it free of cost to the Council towards the provision of infrastructure, facilities and services in connection with the carrying out of the NSW Development.

41 Finally, if the relevant agreement is a planning agreement under s93F of the EPA Act, it seems clear that the Council would not be required to invite tenders before entering into the agreement even if it requires the Developer to provide infrastructure, facilities and services to the Council or on the Council's behalf as an agent or contractor of the Council.

42 The Council may enter into agreements or other arrangements with the PLA in relation to the provision of planning services relating to the NSW Development. Such agreements or arrangements may be entered into:

42.1 through an enforceable agreement between the PLA and the Council outside of a planning agreement but subject to the tendering provisions of the LGA,

42.2 through a planning agreement between the PLA, the Developer and the Council but only on the basis that the PLA is entitled to be a party as a person who is *associated with* the Developer, or

42.3 under delegation from the Council.

43 Any agreements or arrangements between the PLA and the Council must be, and be seen to be, independent of the Developer and the Developer's interests. Therefore the option of providing such services through a planning agreement with the Council is inappropriate.

44 The most efficient option is for the Council to delegate to the PLA such of its functions under the EPA Act relating to the Development as it considers appropriate in the circumstances.

45 Having regard to the matters discussed in this paper, the use of one or more agreements between the Developer and the relevant regulatory bodies in the ACT and NSW (**Planning Agreement**) appears to the only suitable means to harmonise the application of the planning laws of the ACT and NSW to the Development so that infrastructure, facilities and services can be provided in connection with the Development in an integrated and co-ordinated manner.

46 The PD Act does not contain a statutory system of agreements relating to the provision of infrastructure, facilities and services by developers.

47 For the ACT Development, the Planning Agreement relating the development would be an agreement entered into under the general law.

48 For the NSW Development, the Planning Agreement would be a Planning Agreement under s93F of the EPA Act.

49 As a rule of thumb, however, it would be usual for the Developer under a Planning Agreement:

49.1 to carry out any works and, where appropriate, dedicate land, for the purposes of the provision of any on-site infrastructure, facilities and services, and

49.2 to make monetary contributions towards the cost of the provision of off-site infrastructure, facilities and services, particularly regional roads and other transport infrastructure, car-parking, public domain works, health and education facilities, library and community facilities, other human services facilities, emergency services and the like.

50 The Developer may agree in a Planning Agreement to the funding of recurrent expenditure on specified infrastructure, facilities and services by the Developer. For the NSW Development, the EPA Act specifically authorises such a benefit to be provided under a Planning Agreement.

51 As a condition of agreeing to the rezoning of the Development Land under the PD Act and the EPA Act, the relevant Planning Authorities in the ACT and NSW are likely to require the Developer to enter into one or more Planning Agreements.

52 In relation to the NSW Development, it would be usual for there to be two broad-based Planning Agreements entered into before the NSW Development Land is rezoned, as follows:

52.1 a ***State Planning Agreement*** between the Developer and the Minister relating to the provision of State regional infrastructure, facilities and services relating to the Development, and

52.2 a ***Local Planning Agreement*** between the Developer and the Council relating to the provision local infrastructure, facilities and services relating to the Development.

53 The Local Planning Agreement could be an *umbrella* agreement that:

53.1 sets out in broad terms the nature, extent and timing of the Developer's provision of infrastructure, facilities and services over the entire period of the Development, and

53.2 requires the Developer to enter into more detailed Planning Agreements or Servicing Agreements relating to the Development at different stages of the Development.

54 Nothing in the PD Act or the EPA Act prevents:

54.1 the same Planning Agreement structure being adopted for the ACT Development.

54.2 the one document setting out the Umbrella Planning Agreements for the ACT Development and the NSW Development.

55 From the point of view of the relevant Ministers, the PLA and the Council (**Planning Authorities**), the multi-tiered agreement structure provides certainty at the rezoning

stage in relation to the Developer's overall obligations relating to the future provision of infrastructure, facilities and services in connection with the Development.

56 From the Developer's point of view, the multi-tiered agreement structure:

56.1 focuses the initial negotiations between the Developer and the Planning Authorities on the provision of infrastructure, facilities and services that are necessary to obtain their agreement to the rezoning of the Development Land,

56.2 links the incurring of costs relating to the provision of infrastructure, facilities and services to the carrying out of the Development and market demand,

56.3 avoids the necessity for the Developer to conclude lengthy and complex negotiations with a variety of Planning Authorities and Servicing Authorities relating to the provision of infrastructure, facilities and services before the Development Land is rezoned,

56.4 establishes a structure for the Developer and the Planning Authorities or Servicing Authorities to further and more detailed Planning Agreements or Servicing Agreements relating to the provision of infrastructure, facilities and services to meet the Development at later times.

57 For the ACT Development, the Umbrella Local Planning Agreement need only be between the Developer and the PLA or the Minister or both.

58 For the NSW Development, if there is a separate State Planning Agreement, the parties to the Umbrella Local Planning Agreement need only be the Developer and the Council.

59 For the ACT Development, it is likely that the Umbrella Local Planning Agreement would be required to be entered before one of the following events:

59.1 the making, under s89 of the PD Act, of a technical amendment (within the meaning of s87) to the Territory Plan to declare the ACT Development Land as a future urban area under s95, or

59.2 the varying of the Territory Plan under s91 and Part 5.3 of the PD Act to include a structure plan (within the meaning of s92) for the development of the ACT Development Land as a future urban area, or

59.3 the subsequent varying of the Territory Plan under s96 of the PD Act to rezone the ACT Development Land for urban development consistent with the structure plan.

60 For the NSW Development, the State Planning Agreement and the Umbrella Local Planning Agreement would normally be required to be entered into by the Council before the Minister makes an amendment to the Yass LEP to make the NSW Development permissible on the Development Land.

61 If the NSW Development is made a Part 3A Project, the State Planning Agreement and the Umbrella Local Planning Agreement would normally be required to be entered into before the Minister approves a concept plan application for the NSW Development under s75O of the EPA Act.

Relevant Project Description & Background

The Development

62 The Development involves the subdivision and development of the Development Land for urban purposes, including:

62.1 the erection of approximately 8,000 dwellings,

62.2 the establishment of a local centre comprising retail, commercial and other land uses, and

62.3 the provision of infrastructure, facilities and services to support a projected population of approximately 20,000 – 25,000 persons.

63 The Development, including the provision of infrastructure, facilities and services, will be carried out in various stages.

The Development Land

64 The Development Land is approximately 1000 ha and partly adjoins the suburb of MacGregor on the north-western edge of Canberra.

65 Two-thirds of the Development Land is situated within the ACT (**ACT Development**). The remainder is situated within NSW (**NSW Development**).

66 The Development Land is currently primarily used for non-urban purposes.

67 The NSW part of the Development Land (**NSW Development Land**) is remote from the existing urban areas in NSW but is relatively close to the urban outskirts of Canberra.

68 The ACT part of the Development Land (**ACT Development Land**) adjoins the urban area of McGregor.

69 Access to the NSW Development Land is currently only available through the ACT. This will remain unchanged when the Project is carried out.

Infrastructure, facilities and services required in connection with the Development

70 The Developer proposes to provide infrastructure, facilities and services relating to the Development in stages linked to stages of the Development and market demand and in a co-ordinated and integrated manner across the ACT/NSW border.

71 The infrastructure, facilities and services likely to be provided in relation to the Development are likely to fall within the following categories:

71.1 head works infrastructure provided to and within the Development Land, such as water supply, sewerage, drainage, electricity, gas, telecommunications, roads and the like,

71.2 on-site infrastructure, facilities and services, such as community and recreational facilities, child-care facilities, public domain works, car parking, waste management facilities, emergency services and the like,

71.3 on-site and off-site environmental works,

71.4 off-site infrastructure, facilities and services, such as regional roads and other transport infrastructure, car-parking, public domain works, health and education facilities, library and community facilities, other human services facilities, emergency services and the like.

72 The Developer wishes to ensure that infrastructure, facilities and services relating to the Development are provided in an integrated and co-ordinated manner, despite the fact that the Development Land is situated partly in the ACT and partly in NSW and the carrying out of the Development is governed partly by the PD Act and partly by the EPA Act.

73 In that regard, the Developer:

73.1 proposes to provide physical infrastructure, facilities and services to the NSW Development Land from within the ACT,

73.2 proposes that some of the services that would ordinarily be provided by the Council to the NSW Development Land, such as waste collection and recycling, street cleaning and the like (**Municipal Services**), will be provided by the Developer on its own behalf or on behalf of the Council,

73.3 wishes to explore whether regulatory planning services can be provided to the Council by the PLA to assist the Council in the exercise of its regulatory planning functions under the EPA Act in relation to the rezoning of the NSW Development Land and the granting of development consents to the carrying out of the NSW Development.

74 To achieve the necessary integration and co-ordination, the Developer would prefer to provide infrastructure, facilities and services relating to the Development under one or more suitable agreements to which the developer, the governments of the ACT and NSW and the Council are parties.

Primary legislation and intergovernmental agreements

75 As mentioned earlier, the primary legislation governing the Development and the Development Land is:

75.1 for the ACT - the PD Act, and

75.2 for NSW – the EPA Act.

76 The LGA is also relevant to the Council's involvement in relation to the Development.

77 In 2006, the following two agreements relevant to the Project were entered into between the governments of the ACT and NSW:

77.1 a memorandum of understanding on cross-border region settlement (**MOU**), and

77.2 a regional management framework agreement (**Framework Agreement**).

78 Of particular relevance, the Framework Agreement acknowledges the importance of a co-operative approach between the two governments to cross-border issues and recognises that mutual interdependencies exist for service delivery, economic development and environmental management.

Permissibility of the Development

79 Rezoning of the Development Land is necessary in both the ACT and NSW before the Development can be approved under the PD Act and the EPA Act and lawfully carried out on the Development Land.

Permissibility of ACT Development under the PD Act

80 Section 46 of the PD Act makes provision for the Territory Plan, which applies to the whole of the ACT.

81 Section 50 of the PD Act provides that the Territory, the Executive, a Minister or a territory authority must not do any act, or approve the doing of an act, that is inconsistent with the Territory Plan. This prevents the granting of approval to a development application to carry out the ACT Development if such an approval is required by the Territory Plan and the ACT Development is not permissible development under the Territory Plan.

82 Section 136(1) of the PD Act prohibits a person from applying for approval of a development proposal for development:

82.1 that is prohibited in the relevant development table that is required to be included in the Territory Plan under s51(1)(c), or

82.2 in a future urban area that is not permitted by a structure plan (within the meaning of s92).

83 However, s136(2) does not prohibit the Territory or a territory authority from applying for approval of a development proposal for development in a future urban area that is not permitted by a structure plan.

84 Furthermore, s200 of the PD Act makes it an offence to carry out development that is prohibited by or under the Territory Plan.

85 The Territory Plan includes the Territory Plan Map, which shows the current zoning of the ACT Development Land in *Non-Urban* categories of *NUZ3 - Hills, Ridges and Buffer* and *NUZ4 –River Corridor*. The ACT Development is wholly or partly prohibited by the Territory Plan in those zones.

86 At a minimum, a change in the zoning of the ACT Development Land to permit the ACT Development requires the following:

86.1 the making, under s89 of the PD Act, of a technical amendment (within the meaning of s87) to the Territory Plan to declare the ACT Development Land as a future urban area under s95,

86.2 the varying of the Territory Plan under s91 and Part 5.3 of the PD Act to include a structure plan (within the meaning of s92) for the development of the ACT Development Land as a future urban area,

86.3 the subsequent varying of the Territory Plan under s96 of the PD Act to rezone the ACT Development Land for urban development consistent with the structure plan.

87 Other plans that may be required in relation to the ACT Development include:

87.1 a concept plan within the meaning of s93 of the PD Act, and

87.2 an estate development plan within the meaning of s94 of the PD Act.

88 Section 12(1) of the PD Act provides that the PLA is the body responsible for administering the Territory Plan and proposing variations to the Territory Plan.

89 Non technical variations to the Territory Plan (**draft Plan Variations**) are provided for in Part 5.3 of the PD Act.

90 Section 57 of the PD Act sets out the process for varying the Territory Plan, which relevantly includes the following procedures:

90.1 the PLA may prepare a draft Plan Variation under s60 or the Minister may direct the PLA to revise the Territory Plan or a provision of the Plan under s14 (1) (b),

90.2 after public consultation, the Minister may approve the draft Plan Variation or require the PLA to revise it under s76 before approving it,

90.3 the Minister must put the approved Plan Variation before the Legislative Assembly under s79,

90.4 the Legislative Assembly may reject the Plan Variation under s80, otherwise the Minister must fix a date under s83 for the plan variation to commence.

91 The processes set out in the PD Act for varying the Territory Plan do not provide for a person to make an application to the PLA to vary the Territory Plan. The responsibility under the Act for proposing variations is given to the PLA.

92 However, in practice, the PLA may and does consider applications from landowners, developers and others to vary the Territory Plan and, by operation of the PD Act, effectively becomes the sponsor of the plan variation by preparing the draft Plan Variation under s60.

93 The PD Act operates to give the PLA, the Minister and the Legislative Assembly complete discretion whether to propose, prepare, proceed with, vary or make a variation to the Territory Plan (as the case may be) and does not afford a person any right of appeal on the merits if the variation does not occur.

94 This is significant because it gives the PLA and the Minister the power, amongst other things, to require a developer who is the proponent of the draft Plan Variation to enter into arrangements for the provision of infrastructure, facilities and services in connection with development that would be made permissible by the plan variation.

95 It is therefore reasonable to assume that any agreement or other arrangement between the Developer and the PLA or the Minister for the provision of infrastructure, facilities and services to the ACT Development would be entered into in relation to the plan variation required to make the ACT Development permissible.

Permissibility of NSW Development under the EPA Act

96 The NSW Development is principally governed by the Yass Local Environmental Plan 1987 (**Yass LEP**).

97 Consideration is not given in this paper to the application of other environmental planning instruments (**EPI**s) that may regulate the carrying out of the NSW Development.

98 The NSW Development Land is located in a rural zone under the Yass LEP and, as a result, the NSW Development is wholly or partially prohibited on the NSW Development Land.

99 The provisions of the Yass LEP zoning the NSW Development Land and imposing standards, restrictions and prohibitions on the carrying out of the Development have legal effect by reason of ss76, 76A and 76B of the EPA Act. If the NSW Development is carried out in breach of the Yass LEP or any other EPI applicable to the NSW Development, there will be a breach of the EPA Act within the meaning of s122 for which civil or criminal proceedings may be brought in the Land and Environment Court under s123 or s125 (as the case may be).

100 Under s74 of the EPA Act, Yass LEP may be amended in whole or in part to rezone the NSW Development Land or otherwise to permit the carrying out of the NSW Development by the making of a subsequent EPI whether of the same or a different type.

101 If Yass Valley LEP is amended by a subsequent LEP, the Council, under s54 of the EPA Act, is responsible for deciding to prepare the draft LEP and the Minister, under s70 of the EPA Act, is responsible for making the LEP.

102 It is possible that the NSW Department of Planning may require any amendments to the Yass LEP to permit the carrying out of the NSW Development to conform to the Standard Instrument referred to in s33A of the Act.

103 Like the PD Act, the EPA Act operates to give a council and the Minister complete discretion whether to prepare, proceed with, vary or make an amendment to an LEP

and does not afford a person any right of appeal on the merits if the amendment does not occur.

104 This is significant because it gives a council and the Minister the power, amongst other things, to require a developer who is the proponent of the amendment to enter into arrangements for the provision of infrastructure, facilities and services in connection with development that would be made permissible by the amendment.

105 It is therefore reasonable to assume that any agreement or other arrangement between the Developer and the council or the Minister for the provision of infrastructure, facilities and services to the NSW Development would be entered into in relation to the amendment to the Yass LEP that is required to make the NSW Development permissible.

106 The provisions of the EPA Act relating to the making of EPIs are proposed to be substantially amended by the *Environmental Planning and Assessment Bill 2008* (**Bill**). A copy of a summary of the principal provisions of the Bill is contained in the Annexure to this paper. The summary of the changes relating to the making of EPIs appears under the heading *Principal Amendments Relating to Environmental Planning*.

Statutory Development Contributions Frameworks

107 The PD Act and the EPA Act each make provision for the granting of consent or approval to a development application subject to a requirement that the developer makes development contributions towards the provision of infrastructure, facilities and services in connection with the proposed development.

108 The discussion under this heading reveals the extent to which (if at all) the formal development contributions provisions of the PD Act and the EPA Act provide a framework under which the developer can agree or be required to provide infrastructure, facilities and services to the whole of the Development in an integrated and co-ordinated manner that harmonises to the fullest extent practicable the application of the planning laws of the ACT and NSW to the Development.

Relevant provisions of the PD Act

109 Section 162(1)(b) of the PD Act authorises the PLA or the Minister administering the PD Act (**Minister**) to approve a development application subject to a condition.

110 Section 165(2) requires such an approval to include any condition that is required to be included by the Territory Plan that applies to the ACT by virtue of s46 of the PD Act (**Territory Plan**) and not to include a condition inconsistent with a condition required to be included by the Territory Plan.

111 Section 165(3)(n) provides that an example of conditions that may be imposed on a development approval other than on an approval for a code track proposal is a condition:

> *…that stated works, services or facilities that the relevant authority considers reasonable in the circumstances –*
>
> *(i) be provided by the applicant on or to a place the subject of the approval, or on or to another place; or*
>
> *(ii) be paid for completely or partly by the applicant; or*
>
> *(iii) be provided on or to a place the subject of the approval by agreement between the applicant and the Minister responsible for the provision of the works, services or facilities.*

112 Subject to the Territory Plan and the reasonableness of the requirement in the particular case, the PD Act imposes no other express requirements in relation to the nature or level of contributions that may be required as a condition of development approval.

113 On its face, s165(3) gives the PLA or the Minister (as the case requires) the power to grant development approval to the Development subject to a condition requiring the Developer to make provision works, services or facilities on or to the NSW Development Land.

Relevant Provisions of the EPA Act

114 Parts 3, 3A and 4 of the EPA Act all contain provisions relevant to the provision of infrastructure, facilities and services in connection with development.

Provisions in environmental planning instruments under Part 3

115 Section 24 provides that, without affecting the generality of any other provisions of the EPA Act, an environmental planning instrument (**EPI**) may be made in accordance with this Part for the purposes of achieving any of the objects of this Act.

116 The objects set out in s5 of the EPA Act, include:

116.1 the promotion and co-ordination of the orderly and economic use and development of land

116.2 the protection, provision and co-ordination of communication and utility services,

116.3 the provision and co-ordination of community services and facilities,

116.4 the provision of land for public purposes.

117 Section 26 provides that, without affecting the generality of section 24 or any other provision of the EPA Act, an EPI may make provision for or with respect to, amongst other things, controlling development (whether by the imposing of development standards or otherwise).

118 It follows that an EPI could be made in respect of the NSW Development Land controlling the NSW Development by requiring the provision of infrastructure, facilities and services in connection with NSW Development for the purpose of achieving one or more of the objects of the Act mentioned earlier in this paper.

119 A typical provision would provide that consent is not to be granted to specified development unless arrangements satisfactory to the consent authority (or another specified person) exist for the provision of specified infrastructure, facilities or services relating to the development.

Major Projects under Part 3A

120 Section 75B(1) of the EPA Act provides that Part 3A applies to the carrying out of development that is declared to be a project to which Part 3A applies by a State environmental planning policy (**SEPP**) or by order of the Minister published in the Gazette (including by an order that amends such a policy).

121 Section 75B(2) provides that, amongst other things, major infrastructure or other development that, in the opinion of the Minister, is of State or regional environmental planning significance may be declared to be a Part 3A project.

122 Part 3A enables the Minister administering the EPA Act (**Minister**) to grant an approval to a concept plan application of a project application relating to a Part 3A project.

123 Section 75O (5) enables the Minister to approve a concept plan application subject to satisfactory arrangements being made, before final approval is given for the project or any stage of the project, for the purpose of fulfilling the obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F).

124 Section 75J (4) and (5) enable the Minister to approve a project application on such conditions as the Minister may determine, including a requirement that the proponent complies with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F of the EPA Act).

125 Under s75F(2) and (3), the Director-General of the Department of Planning (**DG**) is required to prepare and notify to a proponent of a Part 3A project the environmental assessment requirements for the project.

126 Section 75F(6) authorises the DG to require the proponent to include in an environmental assessment a statement of the commitments the proponent is prepared to make for environmental management and mitigation measures on the site.

127 Section 75R provides, amongst other things, that Division 6 of Part 4 of the EPA Act (***Development Contributions***) applies to Part 3A projects in the same way as they apply to development and the granting of consent to the carrying out of development under Part 4 (subject to any necessary modifications and any modifications prescribed by the regulations) but only if conditions could have been imposed under that Division in respect of the development if Part 3A did not apply to it.

128 The overall effect of the above provisions is that if the NSW Development is declared to be a Part 3A project, the Minister could enter into such arrangements, or impose such requirements for the provision of infrastructure facilities and services in relation to the NSW Development as could be entered into or imposed under Division 6 of Part 4 if the NSW Development was not a Part 3A Project.

129 This is in addition to any other arrangements or requirements that the Minister could enter into or impose by reason of any statement or commitments that the Developer could be required to enter into.

Development contributions under Division 6 of Part 4

130 Division 6 of Part 4 of the EPA Act contains four different development contributions mechanisms that could be applied towards the provision of infrastructure, facilities and services in connection with NSW Development.

131 With the exception of planning agreements, it is evident that the restrictions and limitations that apply to such mechanisms under the EPA Act would make it difficult for infrastructure, facilities and services relating to the Development to be provided in an integrated and co-ordinated manner across the ACT/NSW border.

132 The four different mechanisms are discussed below.

133 The provisions of the EPA Act relating to development contributions under Division 6 of Part 4 are proposed to be substantially amended by the Bill. A copy of a summary of the principal provisions of the Bill is contained in the Annexure to this paper. The summary of the changes relating to the making of EPIs appears under the heading *Principal Amendments Relating to Development Contributions*.

Section 94 contributions

134 Section 94(1) allows a consent authority to grant consent to the carrying out of development subject to a condition requiring either or both of the payment of a monetary contribution or the dedication of land free of cost.

135 The consent authority cannot impose a condition under s94(1) unless it is satisfied that development for which development consent is sought will or is likely to require the provision of or increase the demand for public amenities and public services within the area and only to require a reasonable dedication or contribution for the provision, extension or augmentation of the public amenities and public services concerned.

136 Section 94(3) allows a consent authority to grant consent to the carrying out of development subject to a condition requiring the payment of a monetary contribution towards recoupment of the indexed cost of providing the public amenities or public services if:

136.1 the consent authority has, at any time, provided public amenities or public services within the area in preparation for or to facilitate the carrying out of development in the area, and

136.2 development for which development consent is sought will, if carried out, benefit from the provision of those public amenities or public services.

137 Section 94(4) only allows a condition to be imposed under s94(3) to require a reasonable contribution towards recoupment of the cost concerned.

138 With limited exceptions, sections 94(1) and (3) only allow a consent authority to impose a condition requiring a once-and-for-all contribution towards the provision of public amenities and public services. It is often said that s94 only allows contributions towards the capital cost of the provision of public amenities and public services. This is probably incorrect. There appears to be no reason why a once-and-for-all contribution could not be required towards the future recurrent costs of a public amenity or public service if those costs could be calculated with reasonable certainty at the time the condition is imposed.

139 The phrase *public amenities and public services* is limited to anything provided by a council that benefits the public and for which the council concerned incurs a cost (see *Allsands Pty Ltd v Shoalhaven City Council* (1993) 29 NSWLR 596 at 608). It does not include infrastructure, facilities and services provided by the other levels of government.

140 Section 93C defines public amenities and public services to exclude water supply or sewerage services.

141 The public amenities and public services must be provided in the local government area of the council concerned (see *Parramatta City Council v Peterson* (1987) 61 LGRA 286 at 293) unless the Minister, under s94CA, approves the provision of a public amenity or public service on land in another State or Territory if the area in which the development the subject of the condition is to be carried out adjoins the other State or Territory.

142 Section 94(5)(b) allows a consent authority to accept the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition requiring the payment of a monetary contribution condition or the dedication of land free of cost.

143 Section 94B(1) and (2) operate to prohibit a council acting as a consent authority from imposing a condition under s94 unless it is of a kind allowed by, and is determined in accordance with, a contributions plan.

144 Section 94EAA allows the Minister to direct a council, in writing, to approve, amend or repeal a contributions plan in specified circumstances.

145 Section 93E(1) and (4) require a consent authority to hold any monetary contribution paid under a condition imposed under s94 of the Act and any additional amount earned from its investment in accordance with the conditions of a development consent for the purpose for which the payment was required, and apply the money towards that purpose within a reasonable time. This restriction makes s94 an inflexible contributions mechanism to meet changing infrastructure needs over the life of a long-term staged development project.

Section 94A levies

146 Section 94A(1) allows a consent authority to grant consent to the carrying out of development subject to a condition requiring the payment to it of a levy of a percentage of the proposed cost of carrying out the development.

147 Clause 25K of the Environmental Planning and Assessment Regulation 2000 (**EPA Regulation**) provides that, with several exceptions not presently relevant, the maximum percentage of a section 94A levy is 1 percent of the proposed cost of carrying out the development.

148 Section 94A(4) operates not to require any connection between the development the subject of the development consent and the object of expenditure of any s94A levy.

149 Section 94B(1) and (2) operate to prohibit a council acting as a consent authority from imposing a condition under s 94A unless it is of a kind allowed by, and is determined in accordance with, a contributions plan.

150 The restrictions on s94 contributions identified earlier in this paper generally also apply to s94A levies.

Special infrastructure contributions

151 The provisions of the EPA Act relating to special infrastructure contributions provide a statutory framework for the funding of State and regional infrastructure in new land release areas and other sites identified for strategic growth.

152 The following steps must occur before a condition requiring a special infrastructure contribution may be imposed in relation to development:

152.1 the land on which the development is proposed to be carried out must be designated a special contributions area in accordance with s94EG, and

152.2 the level and nature of contributions that may be imposed in relation to that development must be determined by the Minister in accordance with s94EE.

153 Section 93C defines a special contributions area to mean land specified or described in Schedule 5A of the EPA Act.

154 Section 94EE(1) provides that the Minister must determine the level and nature of special infrastructure contributions to be imposed as conditions of consent to development or a class of development. This power is, however, subject to several qualifications.

155 First, contributions must be for the provision of infrastructure in relation to a development or a class of development.

156 Provision of infrastructure is defined in s94ED(1) to include:

156.1 the provision, extension and augmentation of (or the recoupment of the cost of providing, extending or augmenting) public amenities or public services, affordable housing and transport or other infrastructure relating to land,

156.2 the funding of recurrent expenditure relating to the provision, extension and augmentation of public amenities or public services, affordable housing and transport or other infrastructure, and

156.3 the conservation or enhancement of the natural environment,

but does not include a reference to water supply or sewerage services.

157 Section 94ED(2) provides that infrastructure may be regarded as being provided in relation to development even though it is not provided on land within a special contributions area if, in the Minister's opinion, the provision of the infrastructure on such land arises as a result of the relevant development or class of development.

158 Second, s94EE(2) provides that in determining the level and nature of contributions:

158.1 the Minister is, as far as reasonably practicable, to make the contribution reasonable having regard to the cost of the provision of infrastructure in relation to the development or class of development,

158.2 the Minister is to consult with the Treasurer, if the cost of the infrastructure exceeds $30 million, and

158.3 the Minister is not to take into account infrastructure provided on land other than within the relevant special contributions area unless, in the Minister's opinion, the provision of infrastructure on such land arises as a result of the development, or class of development of which the development forms a part.

159 Alternatively, s94EE(3) provides that the Minister may determine the level and nature of special infrastructure contributions in the form of a levy of a percentage of the proposed cost of carrying out development or any class of development.

160 Section 94EF(1) empowers the Minister to direct a consent authority, in relation to development or a class of development on land within a special contributions area, to impose a condition on a grant of development consent requiring the payment of a special infrastructure contribution, the level and nature of which has been determined under s94EE.

161 The consent authority must comply with the Minister's direction under s94EF(1) and, if it does not, the Minister is allowed by s94EF(3) to impose the condition on behalf of the consent authority.

162 Section 94EF(5) allows consent authority, with the consent of the Minister, to accept the provision of a material public benefit (other than the dedication of land or the payment of a monetary contribution) in part or full satisfaction of a condition imposed in accordance with s94EF.

163 A condition requiring a special infrastructure contribution imposed by a consent authority or the Minister under s94EF cannot be modified without the Minister's approval.

Planning Agreements

164 Subdivision 2 of Division 6 of Part 4 of the EPA Act sets out a statutory system of planning agreements in New South Wales.

165 Section 93F(1) provides that a planning agreement is a voluntary agreement or other arrangement between one or more planning authorities and a developer under which the developer agrees to make development contributions towards a public purpose.

166 Section 93C defines a planning authority to mean a council, the Minister, the Ministerial corporation constituted under s8(1) of the Act, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974* or a public authority declared by the regulations to be a planning authority.

167 Clause 25A of the EPA Regulation declares all public authorities to be planning authorities for this purpose.

168 A developer is a person who has sought a change to an environmental planning instrument (which includes the making, amendment or repeal of an instrument (s93F(11)), or who has made or proposes to make a development application, or who has entered into an agreement with or is otherwise associated with such a person.

169 Section 93F(7) provides that any Minister or public authority or other person approved by the Minister for Planning is entitled to be an additional party to a planning agreement and to receive a benefit on behalf of the State.

170 Planning authorities may enter into joint planning agreements.

171 Development contributions under a planning agreement can be monetary contributions, the dedication of land free of cost, any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

172 Section 93F(4) provides that a provision of a planning agreement is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid under the provision.

173 Public purpose is defined in s93F(2) to include (but is not limited to):

- 173.1 the provision of, or the recoupment of the cost of providing public amenities and public services (as defined in s93C), affordable housing, and transport or other infrastructure,
- 173.2 the funding of recurrent expenditure relating to those things,
- 173.3 the monitoring of the planning impacts of development, and
- 173.4 the conservation or enhancement of the natural environment.

174 Section 93F requires planning agreements to include provisions specifying:

- 174.1 a description of the land to which the agreement applies,
- 174.2 a description of the change to the environmental planning instrument, or the development, to which the agreement applies,
- 174.3 the nature and extent of the development contributions to be made by the developer under the agreement, and when and how the contributions are to be made,
- 174.4 whether the agreement excludes (wholly or in part) the application of s94 or s94A to particular development,
- 174.5 if the agreement does not exclude the application of s94 to a development, whether benefits under the agreement may or may not be considered by the consent authority in determining a contribution in relation to that development under s94,
- 174.6 a dispute resolution mechanism, and
- 174.7 the enforcement of the agreement by a suitable means, such as the provision of a bond or bank guarantee, in the event of a breach by the developer.

175 The EPA Act does not preclude a planning agreement containing other provisions that may be necessary or desirable in particular cases, except those provisions mentioned immediately below.

176 Section 93F(9) precludes a planning agreement from imposing an obligation on a planning authority to grant development consent or to exercise a function under the Act in relation to a change to an environmental planning instrument.

177 Section 93F(10) provides that a planning agreement is void to the extent, if any, to which it authorises anything to be done in breach of the Act, or an environmental planning instrument or a development consent applying to the land to which the agreement applies.

178 A planning agreement may wholly or partly exclude the application of s94 or s94A to development the subject of the agreement.

179 Section 93F(5) provides that, in such a case, a consent authority is precluded from imposing a condition of development consent in respect of that development under s94 or s94A except to the extent that any part of those sections are not excluded by the agreement.

180 A planning agreement may exclude the benefits under the agreement from being considered under s94 in its application to development.

181 Section 93F(6) provides that in such a case, the section does not apply to any such benefit. Section 94(6) provides that if a consent authority proposes to impose a condition under s94 in respect of development, it must take into consideration any land, money or other material public benefit that the applicant for development consent has elsewhere dedicated free of cost to the consent authority or previously paid to the consent authority other than a benefit provided as a condition of development consent granted under the Act or a benefit excluded from consideration under s93F(6).

182 Sections 93E(1) and (4) require that a planning authority is to hold any monetary contribution paid in accordance with a planning agreement, together with any additional amount earned from its investment, for the purpose for which the payment was required and apply it towards that purpose within a reasonable time.

183 Section 93E(3) contains a similar requirement in respect of land dedicated in accordance with a planning agreement.

184 Section 93I(1) renders of no effect any provision of an EPI made after the commencement of that section that expressly requires a planning agreement to be entered into before a development application can be made, considered or determined, or that expressly prevents a development consent from being granted or having effect unless or until a planning agreement is entered into.

185 However, s93D provides that Division 6 of Part 4 of the Act (other than s93I) does not derogate from or otherwise affect any provision of an environmental planning instrument, whether made before after the commencement of the section, that requires satisfactory arrangements to be made for the provision of particular kinds of public infrastructure, facilities or services before development is carried out. This means that s93I does not apply to a provision of an environmental planning instrument that may have the effect of requiring a planning agreement to be entered into before development consent is granted or has effect.

186 Section 79C(1)(a)(iiia) of the EPA Act requires a consent authority, when determining a development application, to take into consideration, so far as is relevant to the proposed development, any planning agreement that has been entered into under s94F or any such draft agreement offered by a developer.

187 Section 79C(1)(d) requires the consent authority to take into considerations any public submissions made in respect of the planning agreement or draft planning agreement.

188 Section 93I(2) precludes a consent authority from refusing to grant development consent on the ground that a planning agreement has not been entered into in

relation to the proposed development or that the developer has not offered to enter into such an agreement.

189 Section 93I(3) authorises a consent authority to require a planning agreement to be entered into as a condition of a development consent but only if it requires an agreement that is in the terms of an offer made by the developer in connection with the development application or a change to an environmental planning instrument sought by the developer for the purposes of making the development application.

190 Section 93G(1) precludes a planning agreement from being entered into, amended or revoked unless public notice is given of the proposed agreement, amendment or revocation.

191 Clause 25D of the EPA Regulation makes provision for public notice to be given of an agreement to enter, amend or revoke a planning agreement together with any public notice required under the Act for the relevant proposed change to a local or regional environmental plan or development application.

192 Clause 25D(1) provides that if a planning authority proposes to enter into a planning agreement, or an agreement to amend or revoke a planning agreement, in connection with a development application, the planning authority is to ensure that public notice of the proposed agreement, amendment or revocation is given as part of and contemporaneously with, and in the same manner as, any notice of the development application that is required to be given by the planning authority by or under the Act.

193 Clause 25D(1A) provides that If a planning authority proposes to enter into a planning agreement, or an agreement to amend or revoke a planning agreement, in connection with a proposed change to a local environmental plan, the planning authority is to ensure that public notice of the proposed agreement, amendment or revocation is given:

193.1 if practicable, as part of and contemporaneously with, and in the same manner as, any public notice of the relevant draft local environmental plan that is required to be given by the planning authority under section 66 (1) of the EPA Act, or

193.2 if it was not practicable for notice to be given contemporaneously, as soon as possible after, and in the same manner as, any public notice of the relevant draft local environmental plan that is required to be given by the planning authority under section 66 (1) of the EPA Act.

194 Clause 25D(2) provides that if the Minister proposes to enter into a planning agreement, or an agreement to amend or revoke a planning agreement, in connection with a proposed change to a regional environmental plan, the Director-General is to ensure that public notice of the proposed agreement, amendment or revocation, is given as part of and contemporaneously with, and in the same manner as, any public notice of the relevant draft regional environmental plan that is required to be given under section 47 of the EPA Act.

195 Clause 25D(3) provides that the public notice of a proposed agreement, amendment or revocation must specify the arrangements relating to inspection by the public of copies of the proposed agreement, amendment or revocation.

196 Clause 25E(1) requires the preparation of an explanatory note by a planning authority which proposes to enter into a planning agreement or an agreement to amend or revoke a planning agreement.

197 Clause 25E(3) provides that the explanatory note must be prepared jointly with the other parties proposing to enter into the planning agreement.

198 Clause 25E(4) makes provision for separate explanatory notes in certain circumstances if there are two or more planning authorities involved in the agreement.

199 Clause 25E(7) provides that a planning agreement may provide that the explanatory note may not be used to assist in construing the agreement.

200 Sections 93G(3) and (4) apply where the Minister and a council, respectively, are not party to a planning agreement and require the relevant planning authority that is party to the agreement to give certain information to the Minister or the council as relevant within 14 days after the agreement is entered into, amended or revoked.

201 Clause 25D(6) of the EPA Regulation provides that if a council is not a party to a planning agreement that applies to its area, a copy of the explanatory note must be provided to the Council at the same time as the material under s.93G(4) is provided.

202 Section 93G(5) requires a planning authority that has entered into a planning agreement, while the agreement is in force, to include in its annual report certain particulars relating to the planning agreement during the year to which the report relates.

203 Clauses 25F and 25G of the EPA Regulation make provision for the keeping and public inspection of planning agreement registers. A council must keep a planning agreement register of any planning agreements that apply to the area of the council. The Director-General must keep a planning agreement register of any planning agreements entered into by the Minister.

204 Clause 25H of the EPA Regulation makes provision for planning authorities other than the Minister or a council to make planning agreements to which those authorities are party available for public inspection.

205 Sections 93H(1) and (4) permit a planning agreement or any amendment or revocation of a planning agreement to be registered if each person with an estate or interest in the land agrees to its registration.

206 Section 93H(2) requires the Registrar-General to register a planning agreement on its lodgement by a planning authority in a form approved by the Registrar-General.

207 Section 93H(3) provides that a planning agreement that has been registered under s93H is binding on and enforceable against the owner of the land from time to time as if each owner for the time being had entered into the agreement.

208 Section 93J(1) expressly excludes a person from appealing to the Land and Environment Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement.

209 Section 93J(2) provides that the removal by s93J(1) of an appeal to the Land and Environment Court does not affect the jurisdiction of the Court under section 123 of the EPA Act. Section 123(1) provides that any person may bring proceedings in the Court for an order to remedy or restrain a breach of 'this Act', whether or not any right of that person has been or may be infringed by or as a consequence of that breach. Section 122(b)(vi) provides that in s123 a reference to 'this Act' includes a reference to a planning agreement referred to in s93F.

210 Section 93K authorises the Minister for Planning, generally or in any particular case or class of cases, to determine or direct any other planning authority as to the procedures to be followed in negotiating a planning agreement, the publication of those procedures, or any standard requirements with respect to planning agreements.

211 A planning agreement will take effect in accordance with its terms. Ordinarily, the obligation to perform an agreement will arise, in accordance with the terms of the agreement, when the development to which it relates is commenced.

212 Clause 25C(2) of the EPA Regulation authorises a planning agreement to specify that a planning agreement does not take effect until the happening of certain particular events.

213 Clause 25C(3) of the EPA Regulation provides that a planning agreement can be amended or revoked by further agreement in writing signed by the parties (including by a subsequent planning agreement).

214 A planning agreement must be in writing and signed by all of the parties to the agreement. A planning agreement is not entered into until it is so signed.

Water supply and sewerage services under the Water Management Act 2000

215 Section 64 of the Local Government Act 1993 (**LGA**) provides that Division 5 of Part 2 of Chapter 6 of the Water Management Act 2000 (**WMA**) applies to a council exercising functions under Division 2 of Part 3 of Chapter 6 of the LG Act in the same way as it applies to a water supply authority exercising functions under the Water Act.

216 Importantly, this provides councils with the power to levy charges under Division 5 of Part 2 of Chapter 6 of the WMA for water management works.

217 Water management works are defined in s283 of the WMA as a water supply work, a drainage work or a flood work (each of which is separately defined in s283).

218 Section 305 of the WMA provides that a person may apply to a water supply authority for a certificate of compliance for development carried out, or proposed to be carried out, within the water supply authority's area.

219 A water supply authority is a water supply authority referred to in Schedule 3 of the WMA. Councils are given the functions of water supply authorities under Division 5 of Part 2 of Chapter 6 of the WMA by s64 of the LGA.

220 Section 306(2) of the WMA provides that as a precondition to granting of a certificate of compliance for development, a water supply authority may, by notice in writing served on the applicant for the certificate of compliance, require the applicant to do either or both of the following:

220.1 to pay a specified amount to the water supply authority by way of contribution towards the cost of such water management works as are specified in the notice, being existing works or projected works, or both;

220.2 to construct water management works to serve the development.

221 Clause 118 of the Water Management (Water Supply Authorities) Regulation 2004 provides that section 306 applies to the following types of development:

221.1 the erection, enlargement or extension of a building or the placing or relocating of building on land;

221.2 the subdivision of land, and

221.3 the change of use of land.

222 Section 306(3) of the WMA provides that in calculating any amount to be paid under section 306(2):

222.1 the value of existing water management works and the estimated cost of projected water management works may be taken into consideration, and

222.2 the amount of any government subsidy or similar payment is not to be deducted from the relevant value or cost of the water management works, and

222.3 consideration is to be given to any guidelines issued for the time being for the purposes of this section by the Minister.

Relevant Powers of the LDA relating to the Development

223 The LDA is established under s31 of the PD Act.

224 Under s32(1), the LDA is given the following functions:

224.1 to develop land, and

224.2 to carry out works for the development and enhancement of land, and

224.3 to carry out strategic or complex urban development projects.

225 Under s32(2), the LDA may exercise any other function given to it under the PD Act or another law of the ACT.

226 Section 196 of the *Legislation Act 2001 (ACT)* provides that a provision of a law that gives a function to an entity also gives the entity the powers necessary and convenient to exercise the function.

227 Section 196 would relevantly authorise the LDA to enter into agreements with other persons in the exercise of its functions, including a planning agreement under s93F of the EPA Act.

228 Section 32(3) allows the LDA to exercise its functions:

228.1 alone, or

228.2 through subsidiaries, joint ventures or trusts, or

228.3 by holding shares in, or other securities of, corporations.

229 Section 32(4), amongst other things, requires the LDA to exercise its functions in accordance with the object of the Territory Plan, set out in s48 of the PD Act, which is to ensure, in a manner not inconsistent with the national capital plan, the planning and development of the ACT provide the people of the ACT with an attractive, safe and efficient environment in which to live, work and have their recreation.

230 Section 33 of the PD Act requires the LDA to comply with directions given to it under the PD Act or another law of the ACT.

231 Section 35 of the LDA enables the Treasurer of the ACT to direct the LDA to make payments of the LDA's funds to the Territory.

232 Section 37 of the PD Act allows the Minister to give the LDA written directions about the principles that are to govern the exercise of its functions.

233 The above provisions make it clear that the LDA may enter into a joint venture with the Riverview Group in relation to the carrying out of the ACT Development.

234 However, the PD Act is silent on whether the LDA may exercise its functions outside of the ACT and therefore is silent on whether the LDA may enter into a joint venture with the Riverview Group in relation to the carrying out of the NSW Development.

235 Section 120 of the Legislation Act provides that an Act is to be interpreted as operating to the full extent of, but not to exceed, the legislative power of the Legislative Assembly.

236 Section 2(1) of the *Australia Act 1986 (Cth)* provides that the legislative powers of the Parliament of each State includes the power to make laws that have extraterritorial effect.

237 In *ASIC v Oliver Banovec (No 2)* (2007) 214 FLR 33 at 43, White J said that an express conferral of power by a statute will usually carry with it by implication the conferral of power to do that which it may fairly be regarded as incidental to, or consequential upon, those things which are expressly authorised. See also *Bunbury-Harvey Regional Council v Giacci Bros Pty Ltd* (2000) 117 LGERA 1 per Hasluck J at

21-22; *Re Sterling; Ex parte Esanda Ltd* (1980) 44 FLR 125 at 130-131 per Lockhart J; *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524 at 528; J*ohns v Connor* (1992) 35 FCR 1; *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 at 478; *Re Northern Ireland Human Rights Commission* [2002] NI 236 per Lord Hutton at [53]-[58]).

238 Various cases suggest that what is regarded as necessary or as incidental to a function conferred by a statute will be viewed liberally. See, for example, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200; *Commonwealth and the Postmaster General v The Progress Advertising and Press Agency Co* (1910) 10 CLR 457 per Higgins J at 469.

239 Having regard to the widely expressed scope of the LDA's functions in the PD Act and the relevant principles in the case law, a reasonable interpretation of s32 of the PD Act is that the LDA may, subject to any written direction of the Minister to the contrary under s37:

239.1 enter into a joint venture with the Riverview Group in relation to the carrying out of the NSW Development, and

239.2 provide infrastructure, facilities and services relating to the NSW Development, and

239.3 enter into an agreement referred to in s165(3)(n)(iii) of the PD Act with the relevant Minister, either on its own or jointly with the Riverview Group,

239.4 enter into a planning agreement under s93F of the EPA Act in relation to the NSW Development, either on its own or jointly with the Riverview Group, and

239.5 enter into arrangements or agreements with the Council for the provision of municipal services (such as waste collection and recycling or water supply) to the NSW Development.

Relevant Powers of the PLA Relating to the Development

240 As mentioned, the Developer wishes to explore whether regulatory planning services can be provided to the Council by the PLA to assist the Council in the exercise of its regulatory planning functions under the EPA Act in relation to the rezoning of the NSW Development Land and the granting of development consents to the carrying out of the NSW Development.

241 Section 11 of the PD Act provides that anything done in the name of, or for, the PLA by the chief planning executive of the PLA (appointed under s21) in exercising a function of the PLA is taken to have been done for, and binds, the Territory.

242 Section 12(1)(l) provides that a function of the PLA is to provide planning services, including services to entities outside the ACT.

243 Section 17 requires the planning and land authority to obtain the Minister's approval to the provision of planning services to somebody other than the Territory.

244 Therefore, the PD Act allows the PLA, subject to the Minister's approval, to provide planning services to the Council in relation to the Development. Such services could relate to (but are not limited to) the Council's functions under the EPA Act of:

244.1 preparing an amendment to the Yass LEP to make the NSW development permissible, or

244.2 preparing development controls plans under 74C of the EPA Act,

244.3 determining development applications relating to the NSW Development to enable the carrying out of the NSW development, or

244.4 negotiating a Planning Agreement for the provision of infrastructure, facilities and services relating to the NSW Development.

Relevant Powers of the Council relating to the Development

Power to enter into contracts for the provision of infrastructure facilities and services

245 The discussion below considers the Council's powers under the LGA and the EPA Act:

245.1 to enter into arrangements or agreements with the Developer for the provision of infrastructure, physical and services relating to the NSW Development, and

245.2 to enter into arrangements or agreements with the Developer for the provision of municipal services (such as waste collection and recycling or water supply) relating to the NSW Development, and

245.3 to enter into arrangements or agreements with the PLA for the provision of regulatory planning services, whether under the EPA Act or otherwise, relating to the NSW Development.

246 Sections 21 and 22 of the LGA gives the Council functions conferred or imposed by or under the LGA or any other Act or law.

247 Section 23 allows the Council to do all such things as are supplemental or incidental to, or consequential on, the exercise of its functions.

248 Section 23A allows the Director-General of the Department of Local Government, from time to time, to prepare, adopt or vary guidelines relating to the exercise by a council of any of its functions and the council concerned is required to take such guidelines into consideration before exercising its functions.

249 The Council is constituted as a body corporate under s220 of the LGA.

250 Part 8 of the *Interpretation Act 1987* (**IA**) applies to statutory bodies. It contains provisions stating the general attributes of statutory incorporation (for example, perpetual succession, the requirement for a seal, the taking of proceedings, etc), it provides for judicial notice to be taken of a statutory corporation's seal, it creates a presumption of regularity for acts and proceedings of a statutory corporation and contains other provisions.

251 Section 50(1)(d) and (e) of the IA provide that a statutory body may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property and may do and suffer all other things that bodies corporate may, by law, do and suffer and that are necessary for, or incidental to, the exercise of its functions.

252 It follows from the above provisions that the Council has the power to enter into agreements or arrangements that are necessary for, or incidental to, or supplemental to, or consequential on, the exercise of its functions and which are not prohibited under any Act or law.

253 Section 24 provides that a council may provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to this Act, the regulations and any other law.

254 The Council would ordinarily bear primary responsibility for the provision of the following kinds of infrastructure, facilities and services to the NSW Development:

254.1 head works infrastructure provided to and within the NSW Development Land, such as water supply, sewerage, drainage, roads and the like,

254.2 infrastructure, facilities and services, such as community and recreational facilities, child-care facilities, library facilities, other human services facilities, public domain works, car parking, waste management facilities, emergency services and the like,

254.3 works for the protection and enhancement of the environment.

255 The provision of all such infrastructure, facilities and services are clearly within the Council's statutory powers. Therefore, the entering into of agreements or arrangements relating to the provision of such infrastructure, facilities and services would be necessary for, or incidental to, or supplemental to, or consequential on, the exercise of its functions and therefore a lawful exercise of its functions.

Public-private partnership considerations

256 Part 6 of Chapter 12 of the LGA regulates *public-private partnerships* (**PPP**s).

257 Section 400B(1) of the LGA defines a PPP to be an arrangement:

257.1 between a council and a private person to provide public infrastructure or facilities (being infrastructure or facilities in respect of which the council has an interest, liability or responsibility under the arrangement), and

257.2 in which the public infrastructure or facilities are provided in part or in whole through private sector financing, ownership or control,

but does not include any such arrangement if it is of a class that has been excluded by the regulations.

258 An *arrangement* is defined in s400B(2) to include a contract or understanding.

259 A *private person* is defined in s400B(2) to mean any person other than:

259.1 the Government (including the State, the Crown and a Minister of the Crown), or

259.2 a public or local authority (including a council or a State owned corporation), or

259.3 a public sector employee or other person or body acting in an official capacity on behalf of the Government or a public or local authority.

260 Section 400E(1) provides that a council must not:

260.1 enter into a public-private partnership, or

260.2 carry out any project under a public-private partnership,

except in accordance with Part 6 of Chapter 12 of the LGA.

261 Prima facie, a planning agreement could be caught by the definition of PPP in s400B(1).

262 However, clause 408(1)(b) of the *Local Government (General) Regulation 2005* specifically excludes any arrangement arising out of the operation of Division 6 of Part 4 of the EPA Act, which includes plannings agreements, from the operation of Part 6 of Chapter 12 of the LGA.

Tendering considerations

263 Section 55(1) of the LGA provides requires the Council, amongst other things, to invite tenders before entering into agreements:

263.1 to carry out work for which the Council is responsible or may carry out,

263.2 to perform a service or to provide facilities for which the Council is responsible or may perform or provide,

263.3 to provide goods or materials to the Council,

263.4 to provide services to the Council.

264 Section 55(3) provides certain exceptions to the requirement to invite tenders, including the following:

264.1 an agreement where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, the Council decides by resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders, and

264.2 an agreement involving an estimated expenditure or receipt of an amount of less than $150,000.

265 Many planning agreements do not involve a receipt of expenditure by a council exceeding $150,000 because the developer typically provides the public benefits free of cost to the council. Therefore, many planning agreements will be exempt from the tendering requirements of s55(1) for this reason.

266 However, if the planning agreement involves an estimated receipt or expenditure of $150,000 or more, the Council would be prima facie required to invite tenders before it enters into any agreement with the Developer, the LDA, or the PLA for the provision of infrastructure, facilities and services of the kinds described earlier relating to the NSW Development.

267 This is the case if the infrastructure, facilities and services are provided to the Council or on the Council's behalf by the Developer as an agent or contractor of the Council.

268 However, the Council is not required to invite tenders if no agreement with the Council is proposed, such as where the infrastructure, facilities and services are being privately provided by the Developer instead of the by the Council in connection with the carrying out of the NSW Development.

269 Furthermore, s55 does not require the Council to invite tenders before it enters into a contract with the Developer under which the Developer agrees to pay a monetary development contribution or dedicate land to it free of cost to the Council towards the provision of infrastructure, facilities and services in connection with the carrying out of the NSW Development.

270 Finally, if the relevant agreement is a planning agreement under s93F of the EPA Act, it seems clear that the Council would not be required to invite tenders before entering into the agreement even if it requires the Developer to provide infrastructure, facilities and services to the Council or on the Council's behalf as an agent or contractor of the Council.

271 A planning agreement would be entered into between the Developer and the Council under s93F in connection with the proposed change to the Yass LEP. It could also be entered into in connection with a development application by the developer to carry out the Development. As such, it is not an agreement that can be performed by any person other than the Developer.

272 Accordingly, if the relevant agreement is a planning agreement, it would be open to the Council under s55(3) to resolve that the agreement is one where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, the Council decides that a satisfactory result would not be achieved by inviting tenders.

Power to delegate functions

273 Section 377 of the LGA allows the Council by resolution, and subject to certain specified exceptions, to delegate to the general manager of the Council or any other person or body (not including another employee of the council) any of the functions of the Council.

274 Nothing in s377 of the LGA prevents the Council from delegating its functions to a person or body outside of NSW.

275 Section 378 restricts the Council's power to delegate its regulatory functions under the LGA (but not its regulatory functions under the EPA Act).

276 The Dictionary to the LGA defines a *function* to include a power, authority and duty.

277 The Developer wishes to explore whether the Council may enter into arrangements or agreements with the PLA for the provision of regulatory planning services, whether under the EPA Act or otherwise, relating to the NSW Development.

278 As discussed earlier, the PD Act allows the PLA, subject to the approval of the Minister administering the PD Act, to provide planning services to the Council in relation to the Development. Such services could relate to (but are not limited to) the Council's functions under the EPA Act of:

278.1 preparing an amendment to the Yass LEP to make the NSW development permissible, or

278.2 preparing development controls plans under 74C of the EPA Act,

278.3 determining development applications relating to the NSW Development to enable the carrying out of the NSW development, or

278.4 negotiating a planning agreement for the provision of infrastructure, facilities and services relating to the NSW Development, or

278.5 other planning functions.

279 The LGA does not prevent the Council from entering into agreements or other arrangements with the PLA in that regard. Such agreements or arrangements may be entered into:

279.1 through an enforceable agreement between the PLA and the Council outside of a planning agreement under s93F but subject to the tendering provisions in s55 of the LGA,

279.2 through a planning agreement between the PLA, the Developer and the Council but only on the basis that the PLA is entitled to be a party under s93F(1) of the EPA Act as a person who is *associated with* the Developer, or

279.3 under delegation from the Council.

280 Any agreements or arrangements between the PLA and the Council must be, and be seen to be, independent of the Developer and the Developer's interests. Therefore the option of providing such services through a planning agreement with the Council is inappropriate.

281 The most efficient option is for the Council to delegate to the PLA such of its functions under the EPA Act relating to the Development as it considers appropriate in the circumstances.

Infrastructure Provision and Servicing Model Based on a Planning Agreement

Introduction

282 As discussed earlier, a wide-range of infrastructure, facilities and services will be required to meet the Development given the scale of the Development and relatively undeveloped nature of the Development Land.

283 As discussed earlier in this paper, the PD Act and the EPA Act allow infrastructure, facilities and services to be provided by the Developer relating to the Development by agreement with the relevant ministers or public authorities.

284 Having regard to the matters discussed in this paper, the use of one or more agreements between the Developer and the relevant regulatory bodies in the ACT and NSW appears to the only suitable means to harmonise the application of the planning laws of the ACT and NSW to the Development so that infrastructure, facilities and services can be provided in connection with the Development in an integrated and co-ordinated manner.

285 The discussion that follows sets out the nature and attributes of an appropriate regulatory planning framework based on one or more agreements that would enable infrastructure, facilities and services relating to the Development.

286 In the discussion that follows, the following terms are used:

286.1 any Minister or public authority responsible for rezoning the Development Land or granting an approval to the carrying out of the Development is referred to as a ***Planning Authority***,

286.2 any Minister or public authority responsible under legislation for providing infrastructure, facilities or services to the Development Land is referred to as a ***Servicing Authority***, and

286.3 any agreement or arrangement between the Developer and a planning authority under which the Developer undertakes to provide infrastructure, facilities and services relating to the Development as a condition of obtaining the rezoning of the development Land or approval to carry out the Development is referred to as a ***Planning Agreement***,

286.4 any agreement or arrangement between the Developer and a Servicing Authority under which the Developer undertakes to provide infrastructure, facilities and services relating to the Development for or on behalf of or instead of the servicing authority is referred to as a ***Servicing Agreement***.

Characterization of the Planning Agreement

287 The PD Act does not contain a statutory system of agreements relating to the provision of infrastructure, facilities and services by developers.

288 For the purposes of the discussion below, a Planning Agreement, in so far as it relates to the ACT Development, would be an agreement entered into under the general law relating to one or more of the following:

288.1 the making, under s89 of the PD Act, of a technical amendment (within the meaning of s87) to the Territory Plan to declare the ACT Development Land as a future urban area under s95, or

288.2 the varying of the Territory Plan under s91 and Part 5.3 of the PD Act to include a structure plan (within the meaning of s92) for the development of the ACT Development Land as a future urban area, or

288.3 the subsequent varying of the Territory Plan under s96 of the PD Act to rezone the ACT Development Land for urban development consistent with the structure plan.

289 By contrast, Subdivision 2 of Division 6 of Part 4 of the EPA Act sets out a statutory system of agreements relating to the provision of infrastructure, facilities and services by developers in connection with the rezoning or development of land.

290 Assuming a Planning Agreement is necessary or desirable in relation to the NSW Development, an important threshold question is whether the agreement must be entered into under s93F of the EPA Act or whether it could be entered into under the general law.

291 There is no clear statement of legislative intent in Subdivision 2 of Division 6 of Part 4 of the EPA Act as to whether the statutory regime of planning agreements excludes the possibility of parties entering into other kinds of agreements in the same circumstances and covering the same subject matter as planning agreements.

292 However, for the reasons set out below, that is the most likely effect of the relevant provisions in the EPA Act.

293 Section 93F(1) of the EPA Act in terms captures *any voluntary agreement or other arrangement* between a planning authority and a developer who has sought a change to an EPI, or who has made, or proposes to make, a development application under which the developer is required to dedicate land free of cost, pay a monetary contribution, or provide any other material public benefit, or any combination of them, to be used for or applied towards a public purpose.

294 Section 33 of the *Interpretation Act 1987 (NSW)* requires that a construction of s93F that would promote the purpose or object underlying the EPA Act is to be preferred to a construction that would not promote that purpose or object.

295 The object set out in s5(c) of the EPA Act is to provide increased opportunity for public involvement and participation in environmental planning and assessment.

296 The planning agreements regime in the EPA Act and the relevant provisions of the EPA Regulation involves a public participation process, which includes requirements for the public exhibition of Planning Agreements and the consideration by the Minister for Planning and councils of public submissions relating to Planning Agreements in making decisions under the EPA Act to rezone land or approve development applications.

297 Applying the object in s5(c) of the EPA Act to the interpretation of s93F would lead to the conclusion that the statutory regime of Planning Agreements excludes the possibility of parties entering into other kinds of agreements as to do so would be to defeat the evident purpose of the EPA Act ascertained by reference to its explicit objects.

298 In the event that there is thought to be any ambiguity in the proper construction of s93F(1) of the EPA Act, s34(1) of the *Interpretation Act* permits reference to the Minister's Second Reading Speech in Parliament relating to the Bill that introduced the s93F to determine the meaning of the section. See also, *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 599 where Callinan J said that, in accordance with the well settled principles of statutory interpretation, in the event that, the language of an Act were thought to be ambiguous reference should be made to the plain language of a second reading speech.

299 The Minister's second reading speech relating to the *Environmental Planning and Assessment Amendment (Development Contributions) Bill 2005* clearly indicates an intention that, in order to ensure public transparency and accountability, all agreements proposed to be entered into by developers and Planning Authorities in

the same circumstances and covering the same subject matter as Planning Agreements are to be Planning Agreements within the meaning of s93F(1).

300 It is therefore reasonable to conclude that any agreement or other arrangement entered into between a planning authority and a developer in the same circumstances and covering the same subject matter as a planning agreement must be a Planning Agreement under s93F of the EPA Act.

301 In the result, the Planning Agreement relating to the NSW Development will be a Planning Agreement under s93F of the EPA Act.

Nature of Developer's obligations

302 The nature of the Developer's provision under a Planning Agreement will differ in relation to different kinds of infrastructure, facilities and services. As a rule of thumb, however, it would be usual for a developer:

302.1 to carry out any works and, where appropriate, dedicate land, for the purposes of the provision of any on-site infrastructure, facilities and services, and

302.2 to make monetary contributions towards the cost of the provision of off-site infrastructure, facilities and services, particularly regional roads and other transport infrastructure, car-parking, public domain works, health and education facilities, library and community facilities, other human services facilities, emergency services and the like.

Recurrent Funding

303 The Developer may agree in a Planning Agreement to the funding of recurrent expenditure on specified infrastructure, facilities and services by the Developer.

304 For the NSW Development, s93F(2)(d) specifically authorises such a benefit to be provided under a Planning Agreement.

Structure of the Planning Agreement

305 The Developer proposes to carry out the Development in stages and therefore different approvals will be granted to the various stages of the Development over time under the PD Act and the EPA Act.

306 As a condition of agreeing to the rezoning of the Development Land under the PD Act and the EPA Act, the relevant Planning Authorities in the ACT and NSW are likely to require the Developer to enter into one or more Planning Agreements.

307 However, it does not follow that the Developer should be required to incur costs relating to the provision of infrastructure, facilities and services immediately upon the rezoning of the Development Land.

308 It would be reasonable to expect that a Planning Agreement would contain a broad but binding series of commitments by the Developer to provide infrastructure, facilities and services for different public purposes in connection with the implementation of future approvals under the PD Act and the EPA Act to carry out the Development.

309 In relation to the NSW Development, it would be usual for there to be two broad-based Planning Agreements entered into before the NSW Development Land is rezoned, as follows:

309.1 a ***State Planning Agreement*** between the Developer and the Minister relating to the provision of State regional infrastructure, facilities and services relating to the Development, and

309.2 a ***Local Planning Agreement*** between the Developer and the Council relating to the provision local infrastructure, facilities and services relating to the Development.

310 Whereas there is likely to be only one State Planning Agreement relating to the NSW Development, the Local Planning Agreement could be an *umbrella* agreement that:

310.1 sets out in broad terms the nature, extent and timing of the Developer's provision of infrastructure, facilities and services over the entire period of the Development, and

310.2 requires the Developer to enter into more detailed Planning Agreements or Servicing Agreements relating to the Development at different stages of the Development.

311 This multi-tiered arrangement was used in relation to the ADI Site development in Western Sydney. There, the Minister and the developer entered into a State Development Agreement, and the two councils concerned entered into more specific and detailed development agreements with the developer relating to the release of land for development and the provision of infrastructure, facilities and services to the development within specified precincts.

312 Agreement structures similar to the ADI Site development have been used elsewhere. They primarily reflect delineation between State and local infrastructure arrangements with developers.

313 A multi-tiered agreement structure could be applied to the Development to delineate arrangements required under a State Planning Agreement and an umbrella Local Planning Agreement to achieve the rezoning of the NSW Development Land and other more detailed Planning Agreements or Servicing Agreements required between the Developer and different Planning Authorities and Servicing Authorities relating to the carrying out of the Development.

314 From the point of view of the Planning Authorities, the multi-tiered agreement structure provides certainty at the rezoning stage in relation to the Developer's overall obligations relating to the future provision of infrastructure, facilities and services in connection with the Development.

315 From the Developer's point of view, the multi-tiered agreement structure:

315.1 focuses the initial negotiations between the Developer and the Planning Authorities on the provision of infrastructure, facilities and services that are necessary to obtain their agreement to the rezoning of the Development Land,

315.2 links the incurring of costs relating to the provision of infrastructure, facilities and services to the carrying out of the Development and market demand,

315.3 avoids the necessity for the Developer to conclude lengthy and complex negotiations with a variety of Planning Authorities and Servicing Authorities relating to the provision of infrastructure, facilities and services before the Development Land is rezoned,

315.4 establishes a structure for the Developer and the Planning Authorities or Servicing Authorities to further and more detailed Planning Agreements or Servicing Agreements relating to the provision of infrastructure, facilities and services to meet the Development at later times.

Parties to the State Planning Agreement

316 There appears to be no need for a State Planning Agreement relating to the ACT Development.

317 For the NSW Development, it is likely that the parties to the State Planning Agreement would be the Developer and the Minister.

318 However, s93F(7) of the EPA Act provides that any Minister or public authority or other person approved by the Minister is entitled to be an additional party to a planning agreement and to receive a benefit on behalf of the State.

Parties to the Umbrella Local Planning Agreement

319 For the ACT Development, the Umbrella Local Planning Agreement need only be between the Developer and the PLA or the Minister or both.

320 For the NSW Development, if there is a separate State Planning Agreement, the parties to the Umbrella Local Planning Agreement need only be the Developer and the Council.

321 The Minister may also be a party if he so desires but that is unlikely if there is a separate State Planning Agreement.

322 However, s93F(7) of the EPA Act provides that any Minister or public authority or other person approved by the Minister for Planning is entitled to be an additional party to a planning agreement and to receive a benefit on behalf of the State. This is also unlikely if there is a separate State Planning Agreement.

323 Nothing in the PD Act or the EPA Act prevents the one document setting out the Umbrella Planning Agreements for the ACT Development and the NSW Development.

Planning applications to which the State Planning Agreement and the Umbrella Local Planning Agreement relate

324 Assuming a Planning Agreement is necessary or desirable in relation to the rezoning of the ACT Development Land, it is likely that the Umbrella Local Planning Agreement would be required to be entered before one of the following events:

324.1 the making, under s89 of the PD Act, of a technical amendment (within the meaning of s87) to the Territory Plan to declare the ACT Development Land as a future urban area under s95, or

324.2 the varying of the Territory Plan under s91 and Part 5.3 of the PD Act to include a structure plan (within the meaning of s92) for the development of the ACT Development Land as a future urban area, or

324.3 the subsequent varying of the Territory Plan under s96 of the PD Act to rezone the ACT Development Land for urban development consistent with the structure plan.

325 For the NSW Development, the State Planning Agreement and the Umbrella Local Planning Agreement would normally be required to be entered into by the Council before the Minister makes an amendment to the Yass LEP to make the NSW Development permissible on the Development Land.

326 If the NSW Development is made a Part 3A Project, the State Planning Agreement and the Umbrella Local Planning Agreement would normally be required to be entered into before the Minister approves a concept plan application for the NSW Development under s75O of the EPA Act.

Procedure for entering into the State Planning Agreement and the Umbrella Local Planning Agreement

327 No procedure exists under the PD Act for entering into a Planning Agreement.

328 For the NSW Development, neither the EPA Act nor the EPA Regulation specifies an exact procedure for entering into a Planning Agreement.

329 However the following requirements must be satisfied for before a Planning Agreement can be entered into under s93F:

329.1 the draft planning agreement must be publicly notified in connection with the application to which it relates, and

329.2 the draft planning agreement must be publicly exhibited for at least 28 days.

330 The EPA Act and EPA Regulation require public notice and exhibition of a draft local environmental plan. Accordingly, the draft State Planning Agreement and the draft Umbrella Local Planning Agreement would need to be publicly notified and exhibited in connection with the public notice and exhibition of the draft amendment to Yass LEP.

331 It follows that for the NSW Development, the Developer's offers to the Minister and the Council to enter into the State Planning Agreement and the Umbrella Local Planning Agreement, respectively, together with a draft version of each of those agreements that is acceptable to the parties, must be achieved by the time public notice is given of the draft amendment to Yass LEP.

332 In practical terms, in relation to both the ACT Development and the NSW Development, the Developer should formulate and make its offer as soon as is reasonably practicable to allow the parties sufficient time to negotiate the final terms of the Developer's offer and the draft Planning Agreements.

333 The practical steps would be as follows:

333.1 the Developer determines sufficient details of the infrastructure, facilities and services required to meet the Development to formulate the terms of an offer relating to the State Planning Agreement and the Umbrella Local Planning Agreement,

333.2 the parties negotiate the terms of the relevant Planning Agreements,

333.3 the Planning Agreements are prepared to reflect the negotiations,

333.4 when the terms of the relevant Planning Agreements are agreed, the Developer makes an offer in writing to the relevant Planning Authorities to enter into the relevant Planning Agreement,

333.5 for the NSW Development:

333.5.1 the State Planning Agreement and the Umbrella Local Planning Agreement are each publicly notified and exhibited in connection draft amendment to the Yass LEP,

333.5.2 the relevant Planning Authority considers any public submissions made in relation to the draft Planning Agreements,

333.5.3 further negotiations occur with a view to addressing any relevant public submissions in order to produce the final version of the Planning Agreements.

333.6 The Planning Agreements are entered into when all parties to the relevant agreements have signed the Agreements.

333.7 The Development Land is rezoned.

When the Planning Agreement becomes binding

334 For the NSW development, is not entered into until it is signed by all parties. That cannot occur until it has been publicly exhibited in accordance with the EPA Act and EPA Regulation.

When the Developer's obligations must be performed

335 It would be reasonable for the terms of the Planning Agreements to tie the Developer's obligations to provide infrastructure, facilities and services relating to the Development to the implementation of specific approvals relating to the Development under the PD Act or the EPA Act or at such other times or upon the happening of such other events as is agreed between the parties.

336 The Developer can argue that such an approach is justified because the demand for the provision of infrastructure, facilities and services relating to the Development does not arise until the Development Land is developed.

337 Key considerations for Planning Authorities in that regard will be the terms of the Planning Agreements relating to:

337.1 the sale of the Development Land,

337.2 the assignment of the Developer's interest under the Planning Agreement,

337.3 novation of the Planning Agreement by the Developer to another party,

337.4 registration of the Planning Agreement on land titles (to the extent possible), and

337.5 the provision of security to the Planning authorities relating to the Developer's obligations to provide infrastructure, facilities and services under the Planning Agreement.

338 Each of the above matters is discussed further on.

339 For the NSW Development:

339.1 Another important consideration is the consent authority's power to grant consent to the carrying out of the NSW Development or a stage of the NSW Development subject to a condition requiring:

339.1.1 compliance with the Planning Agreement or any aspect of it relevant to the subject development application, or

339.1.2 the entering into of a further Planning Agreement or Servicing Agreement under s93F of the EPA Act relating to the particular stage of the NSW Development.

339.2 The second of the two powers referred to above is limited by s93I(3) of the EPA Act to a Planning Agreement that is in the form of an offer made by the Developer.

339.3 The State Planning Agreement or the Umbrella Local Planning Agreement would require the Developer to enter into further more detailed Planning Agreements or Servicing Agreements as the NSW Development proceeds. Subsequent development applications would be accompanied by an offer by the Developer to the consent authority to enter into the relevant Planning Agreement or Servicing Agreement if development consent is granted to the development application.

340 For the Development generally, the Developer's obligations relating to the provision of infrastructure, facilities and services under the detailed Planning Agreements or

Servicing Agreements could be linked to milestones or trigger mechanisms in the carrying out of the Development. For example, obligations could be tied to:

340.1 the issuing of construction certificates, subdivision certificates or occupation certificates by certifying authorities in NSW or the granting or issuing of equivalent approvals or certificates in the ACT,

340.2 the time when land on which the Developer is required to carry out public works is to be dedicated to the Planning Authority or Servicing Authority concerned,

340.3 the creation or sale of final (or *retail*) lots in the Development,

340.4 the number of dwellings built in the Development,

340.5 the time by which another aspect or part of the Development is to be carried out or has been completed,

340.6 the period of time after the relevant agreement takes effect,

340.7 the delivery requirements of the Planning authority's or Servicing Authority's capital works program or, for the NSW Development, the works schedule in the Council's s94 contributions plan.

Flexibility

341 Aspects of the Development or the infrastructure, facilities and services required to meet the Development may well change over time given the long-term and staged nature of the Development.

342 The multi-tiered approach to the use of Planning Agreements and Servicing Agreements in connection with the Development, discussed earlier, better accommodates the need for flexibility to meet those changes than a single whole-of-project Planning Agreement or Servicing Agreement.

343 The use of more than one agreement also allows the Developer to negotiate specific Planning Agreements and Servicing Agreements with different Planning authorities and Servicing Authorities at different stages of the Development.

344 The drafting of the agreements is also important to achieve flexibility. In that regard:

344.1 the type and extent of infrastructure, facilities and services to be provided by the Developer should be tied to Development thresholds or outcomes rather than being fixed or absolute, and

344.2 as mentioned earlier, the timing of the Developer's obligations to provide infrastructure, facilities and services should be linked to milestones or triggers in the carrying out of the Development rather than being fixed or absolute.

Provision of security

345 It is likely that the relevant Planning Authorities and Servicing Authorities who are parties to the Planning Agreements and Servicing Agreements relating to the ACT Development will require suitable security from the Developer relating to the Developer's obligations to provide infrastructure, facilities and services relating to the ACT Development.

346 For the NSW Development, s93F(3)(g) of the EPA Act requires a Planning Agreement to provide for the enforcement of the agreement by a suitable means, such as a bond or guarantee, in the event of a breach by the developer.

347 As a matter of statutory construction, this does not amount to a requirement that the Planning Agreements or Servicing Agreements relating to the NSW Development to

provide for bonds or bank guarantees. The suitability of the form of security relates to the Developer's obligations under the agreement. However, bonds and bank guarantees are the most common forms of security required from developers under Planning Agreements in NSW.

348 The provision of a bond or bank guarantee by the Developer in favour of the relevant Planning Authority or Servicing Authority to secure its obligations under the Planning Agreement or Servicing Agreement is potentially onerous if the value of the security is tied to the value of the Developer's obligations to provide infrastructure, facilities and services over the life of the NSW Development.

349 A more reasonable approach would be for different forms of securities to be required to be provided and released in stages as the NSW Development is carried out or for the relevant Planning Authorities and Servicing authorities to accept suitable securities to cover their legal and incidental costs in the event that proceedings for the enforcement of the Planning Agreements or Servicing Agreements are successfully taken against the Developer.

350 It follows that a means of enforcement in relation to a default by the Developer in the carrying out of works under the Planning Agreements or Servicing Agreements would be a provision authorising the Council or the Minister or their servants, agents or contractors to enter the Land and carry out the relevant works and recover the costs of so doing as a debt due in a court of competent jurisdiction.

Dispute resolution

351 It is likely that the parties to the relevant Planning Agreements and Servicing Agreements relating to the ACT Development will agree to dispute resolution provisions in those agreements.

352 For the NSW Development, s93F(3)(f) of the EPA Act requires a Planning Agreement to contain a mechanism for the resolution of disputes.

353 Mediation is the most commonly adopted mechanism. However, the mechanism should suit the nature of the dispute.

354 Disputes about technical matters are often best determined by an expert appointed by agreement between the parties, whose determination is final and binding on the parties.

355 Disputes about commercial matters are often best arbitrated, where the decision of the arbitrator who is appointed by agreement between the parties is final and binding on the them.

356 Disputes about other matters are usually best determined by an independent mediator appointed by agreement between the parties or in accordance with the terms of the Planning Agreement and subject to established mediation rules, such as those published by the local Law Society. Mediation is usually a process which either party can withdraw from at any time prior to a mediation agreement being signed. However, the mediation agreement, once signed, is usually binding on the parties.

357 A Planning Agreement cannot, however, deprive a party of any remedy available a in a court or tribunal of competent jurisdiction.

Registration on land title

358 For the NSW Development, s93H of the EPA Act allows for a Planning Agreement to be registered on the title to the land to be developed if the owner of the land and all those with an estate or interest in the land agree to its registration.

359 In practice, it is often difficult to obtain the agreement of all relevant persons to the registration of a Planning Agreement under s93H.

360 When registered, the Planning Agreement is noted as an encumbrance on the land title.

361 The effect of registration would be to make the Planning Agreement run with the land title and bind the Developer's successors in title.

362 Registration can present difficulties upon the sale of final lots in a development. Significant administrative costs can be incurred in obtaining the consent of other parties to the Planning Agreement to the removal of the notation from the title to the lot to be sold.

363 Disputes often arise at this stage between the parties to the Planning Agreement as to whether the party whose release is sought is or should satisfied that the developer has performed its obligations under the Planning Agreement satisfactorily.

364 Further, the existence of the notation on title and the potential difficulties in achieving its removal can cause anxiety to purchasers and their conveyancers and thereby deter sales.

365 An effective alternative to registration would be a provision in the Planning Agreement governing the sale of the Land by the Developer or the assignment of the developer's interest under the Planning Agreement or the novation of the Planning Agreement to another person.

366 Such a provision would, amongst other things, require the Developer to procure an agreement between its purchaser, assignee or novatee and the other party to the effect that the purchaser, assignee or novatee would be bound under the Planning Agreement in the same manner as was the Developer.

367 Such a provision would also allocate responsibility between the Developer and the purchaser, assignee or novatee for any breaches of the Planning Agreement that occur or become know after the sale of the Land.

Dr Lindsay Taylor

03 June 2008

Annexure

Environmental Planning and Assessment Amendment Bill 2008

Outline of Principal Amendments

Environmental Planning and Assessment Amendment Bill 2008

Outline of Principal Amendments

Introduction

1 The first print of the *Environmental Planning and Assessment Amendment Bill 2008* (**Bill**) has been introduced into the NSW Parliament.

2 The first print of the Bill was tabled in the NSW Legislative Assembly on 15 May 2008 and sets out amendments to the *Environmental Planning and Assessment Act 1979* (**Act**) and other legislation.

3 The exposure draft of the Bill was tabled in the NSW Legislative Assembly on 3 April 2008.

4 The Department of Planning invited public submissions in response to the exposure draft of the Bill. The submissions period ended on 24 April 2008.

5 This document outlines the principal provisions of the first print of the Bill relating to amendments to the Act[1]. It does not outline amendments to other legislation.

6 This document does not provide a critical commentary on the amendments to the Act.

Principal Amendments Relating to Environental Planning

Amendments relating to regional environmental plans

7 Provisions relating to regional environmental plans (**REPs**) will be removed. All existing REPs will be taken to be State environmental planning policies (**SEPPs**) when the amendment takes effect.

8 Provisions in existing REPs will be transferred to SEPPs or local environmental plans (**LEPs**).

9 In future, the Minister for Planning (**Minister**) will be able to make SEPPs with respect to matters of State or regional significance.

Amendment relating to local environmental plans

10 The Minister will be empowered to make LEPs in local government areas throughout NSW and in other areas of the State.

11 Specified bodies other than councils, such as public authorities, will be able to prepare LEPs. Bodies that may prepare LEPs will be referred to as *planning authorities*.

---

[1] Some explanations of provisions in the *Environmental Planning and Assessment Amendment Bill 2008* appearing in this document have been taken from the explanatory note to the first print of the Bill introduced into the NSW Parliament on 15 May 2008. This was done so where, in my opinion, that explanation is the best explanation able to be given of the provision.

12 The Minister will be able to direct which planning authority is responsible for an LEP. The relevant planning authority will be responsible for preparing a *planning proposal* regarding a proposed LEP.

13 The Minister will consider the planning proposal for the purpose of making a *gateway determination* whether to proceed with the proposed LEP and in relation to other matters.

14 Regulations will be able to be made to tailor public consultation requirements to the specific type of proposed LEP. Provision will be made for the public exhibition of the planning proposal relating to a proposed LEP in addition to the public exhibition of the proposed LEP itself.

15 The new *Planning Assessment Commission* (**PAC**), or a new *Joint Regional Planning Panel* (**JRPP**), will be able to review planning proposals in certain circumstances.

Principal Amendments Relating to Development Assessment

Planning Assessment Commission

16 The PAC will exercise functions:

16.1 under delegation from, or at the request of, the Minister, relating to Part 3A projects, development assessment under Part 4 of the Act and environmental assessment of activities under Part 5 of the Act, and

16.2 relating to applicant and third party merit reviews.

17 The PAC will also exercise functions in lieu of JRPPs in certain circumstances.

18 The PAC will have between three and eight members appointed by the Minister, who will hold office for up to three years.

19 Decisions of the PAC may not be appealed if the decision was made after a public hearing.

Joint Regional Planning Panels

20 JRPPs will be established by the Minister for specified areas.

21 JRPPs will:

21.1 exercise functions as a consent authority for development,

21.2 advise the Minister on planning and development matters or environmental planning instruments (**EPIs**), and

21.3 exercise functions relating to applicant and third party merit reviews.

21.4 JRPPs will consist of three *State members* and two *council members*, who have expertise in nominated areas and who will hold office for up to three years.

Independent Hearing and Assessment Panels

22 Councils may constitute Independent Hearing and Assessment Panels (**IHAPs**) to assess any aspect of a development application or any planning matter referred by the Council.

23 Councils must constitute IHAPs if required by EPIs.

24 The Director-General of the Department of Planning (**DG**) will provide a list of persons who may be members of IHAPs.

25 Councils are to provide staff and facilities to enable IHAPs to exercise their functions.

Planning Arbitrators

26 Planning arbitrators (**PAs**) will exercise functions relating to determining review applications (see later).

27 PAs:

27.1 must have expertise in one or more nominated areas,

27.2 must be approved by the Minister,

27.3 will be placed on a register kept by the DG,

27.4 may be included on the register for up to three years, and

27.5 will be designated for particular local government areas or kinds of development or both.

The roles of councils

28 The PAC or JRPPs must consult with councils before making a decision that significantly adversely impacts on their interests.

29 Councils are to provide the PAC, JRPPs and PAs with access to records and the use of staff and facilities.

30 Councils are required to pay the costs of the PAC, JRPPs, PAs and IHAPs where those bodies exercise functions under Part 4 of the Act with respect to development in the relevant council area.

Crown developments

31 Under the amendments proposed in the exposure draft of the Bill, consent authorities were not to refuse consent or impose conditions to development applications made by the Crown (**Crown DAs**) without the consent of the applicable JRPP. The first print of the Bill has altered that proposed amendment to provide that consent authorities must not:

31.1 refuse consent to Crown DAs without the approval of the Minister, or

31.2 impose conditions of consent unless the Minister or the applicant has given its approval.

32 JRPPs may be referred Crown DAs by councils or applicants if such applications are not determined within the prescribed time.

33 Decisions by JRPPs in relation to Crown DAs are taken to be decisions of the relevant council.

Complying development

34 Development control plans adopted by councils will no longer be able to provide for public notification requirements relating to complying development.

35 Under the amendments proposed in the exposure draft of the Bill, councils and accredited certifiers would have been able to issue complying development certificates for development that did not comply with complying development criteria in specified circumstances. The first print of the Bill omits those proposed amendments.

36 Provision will be made for public notice to be given of the issuing of complying development certificates if required by the regulations.

Security for carrying out development

37 A consent authority will be able to require, or enter into an agreement for, the provision of security to ensure compliance with a development consent during the construction phase of the development.

38 The security must be refunded, upon request, at any time after an occupation or subdivision certificate is issued for the development or after the building is first lawfully occupied.

39 Appeals may be made to the Land and Environment Court if consent authorities refuse to release security. Such appeals may be brought within six months of the date when the relevant security must be released.

Reviews of development application determinations

40 The current provisions of the Act allowing reviews of development application determinations will be removed.

41 Development application determinations will be able to be reviewed by PAs, JRPPs or the PAC in certain circumstances.

42 Reviews by PAs will be limited to relatively minor development, such as categories of residential development.

43 Applicants will be precluded from appealing to the Land and Environment Court in relation to matters that can be reviewed by PAs unless:

43.1 the relevant PA has first undertaken a review, or

43.2 the relevant Council consents to the appeal, or

43.3 the relevant PA has not undertaken the review within the prescribed time.

44 Under the amendments proposed in the exposure draft of the Bill, applicants would have been able to request:

44.1 that JRPPs review development application determinations for which councils were consent authorities and which could not be reviewed by PAs, or

44.2 that the PAC review development application determinations for which JRPPs were consent authorities.

45 The first print of the Bill omits those provisions.

Objector reviews

46 The regulations will specify classes of development in respect of which objectors will have a right of review of the development application determination.

47 The classes of development may, for example, include development that contravenes a development standard to a specified extent.

48 Objectors may only make an application for a review if:

48.1 they are not an applicant, and

48.2 have made a submission objecting to the development in accordance with the regulations, and

48.3 the person owns land within one kilometre of any point on the boundary of the land the subject of the application, or is currently occupying such land and has been doing so for at least six months.

49 Furthermore, when considering development applications, consent authorities may reject submissions objecting to the development made by objectors that they consider have been made primarily to secure or maintain a direct or indirect commercial advantage for the objector.

50 Objectors to such development may request JRPPs to review relevant development application determinations.

51 Objectors who are dissatisfied with the relevant JRPP determination may request the PAC to review the JRPP determination. The PAC's review of the determination is final.

52 Objectors' rights to bring appeals to the Land and Environment Court remain unchanged.

Regulations

53 Amendments to the *Environmental Planning and Assessment Regulation 2000* (**Reg**) set out development in respect of which objectors will have a right of review of the development application determination, being:

53.1 development applications relating to development for residential purposes that:

53.1.1 exceeds 2 storeys, or

53.1.2 contains at least 5 separate dwellings and has a site area of more than 2,000m2, and

53.1.3 exceeds an applicable development standard for height or floor space ratio by more than 25%, and

53.2 development applications relating to development for commercial, retail or mixed use purposes that:

53.2.1 is greater than 9m in height, and

53.2.2 has a site area of more than 2,000m2, and

53.2.3 exceeds an applicable development standard for height or floor space ratio by more than 25%.

Appeals to the Land and Environment Court

54 The time for bringing appeals to the Land and Environment Court in relation to development application determinations will be reduced from twelve months to three months.

55 The time for bringing appeals to the Land and Environment Court in relation to s96 modification application determinations will be increased from sixty days to three months.

Principal Amendments Relating to Development Contributions

56 The provisions of the Act dealing with s94 contributions, s94A levies, planning agreements and affordable housing contributions will be removed and replaced with new provisions.

57 The new provisions provide for community infrastructure contributions (**CICs**) and State infrastructure contributions (**SICs**).

58 A new definition of *public infrastructure* extends the meaning of public infrastructure.

59 Planning authorities will be required to have regard to *key considerations* when exercising functions in relation to development contributions, including entering into voluntary planning agreements (**VPAs**).

60 The *key considerations* that planning authorities will be required to have regard to are the following questions:

60.1 can the public infrastructure that is proposed to be funded by a development contribution be provided within a reasonable time?

60.2 what will be the impact of the proposed development contribution on the affordability of the proposed development?

60.3 is the proposed development contribution based on a reasonable apportionment between existing demand and new demand for public infrastructure to be created by the proposed development to which the contribution relates?

60.4 is the proposed development contribution based on a reasonable estimate of the cost of proposed public infrastructure?

60.5 are the estimates of demand for each item of public infrastructure to which the proposed development contribution relates reasonable?

Community infrastructure contributions

61 CICs must be authorised by a contributions plan adopted by the Council and can be levied in a similar manner to existing s94 contributions or s94A levies.

62 However, the Minister will be able to authorise councils to levy CICs if no contributions plan exists or it is inadequate.

63 CICs will be categorised as *key community infrastructure* (as prescribed by the regulations) or *additional community infrastructure*.

64 Ministerial approval will be required before contributions for additional community infrastructure may be levied.

Regulations

65 Amendments to the Reg set out the infrastructure that is *key community infrastructure* and the infrastructure that cannot be *additional community infrastructure*.

66 Key community infrastructure is:

66.1 local roads,

66.2 local bus facilities,

66.3 local parks,

66.4 local sporting, recreational and cultural facilities and local social facilities,

66.5 local car parking facilities,

66.6 drainage and stormwater management works,

66.7 land for any community infrastructure, except land for riparian corridors, and

66.8 district infrastructure of the kind referred to in paragraphs 66.1-66.8 but only if there is a direct connection with the development to which the contribution relates.

67 All other community infrastructure can be approved as *additional community infrastructure* except land for riparian corridors.

State infrastructure contributions

68 The Minister will be able to determine SICs in State contribution areas.

69 Threshold requirements will exist for the determination of SICs.

70 SICs can be levied in addition to CICs.

71 EPIs will be able to authorise the levying of SICs.

Planning agreements

72 Councils will be able to enter into VPAs for key community infrastructure without Ministerial approval.

73 However, Ministerial approval will be required for councils to enter into VPAs for additional community infrastructure.

Regulations

74 Amendments to the Reg codify the current position that where a proposed planning agreement is amended after public notice is given of the proposed agreement, but the change does not result in a significant reduction in a public benefit to be provided by the developer under the proposed agreement, no further public notice or further explanatory note is required.

Principal Amendments Relating to Certification of Development

Issuing of subdivision certificates

75 Accredited certifiers will be able to issue subdivision certificates for types of subdivisions specified in EPIs.

76 EPIs will be able to place restrictions on the issue of such certificates.

Principal certifying authorities

77 Where development involves building work and subdivision work, a principal certifying authority (**PCAs**) must be appointed for both types of work. The same PCA or separate PCAs may be appointed.

78 Changes of PCAs need not be notified to the Building Professionals Board or the consent authority for the changes to take effect, although notice must still be given to the consent authority.

Issuing of non-compliance notices by certifying authorities

79 Certifying authorities will be required to give notices if aware that non-compliant development is being carried out.

80 Such notices must specify the non-compliance and what needs to be done to rectify it.

81 Certifying authorities must notify consent authorities if notices issued by certifying authorities are not complied with.

Design certificates

82 Restrictions will be placed on the issuing of construction, occupation, subdivision and compliance certificates (**Part 4A Certificates**) in relation to aspects of development required to be designed by persons holding accreditation under the *Building Professionals Act 2005*.

83 Provision will be made for *design certificates* (**DCs**), to be issued by accredited building professionals (**ABPs**).

84 DCs will certify that an ABP prepared the design in accordance with the regulations.

85 Part 4A certificates cannot be issued for development involving alternative solution fire safety systems for class 2-9 buildings unless design certificates have been issued for the design by an accredited fire safety engineer.

Consistency with development consents

86 Accredited certifiers will be able to request advice from consent authorities as to whether the design and construction of buildings are consistent with development consents.

87 Consent authorities that respond by confirming compliance, or that fail to respond within 14 days of the request, will be precluded from challenging the issuing of construction or occupation certificates on the basis that the relevant development is not consistent with the development consent.

Enforcement

88 Consent authorities will be empowered to require persons, including developers and accredited certifiers, to answer questions and provide information regarding development. Failure to comply will constitute an offence.

89 *Stop work orders* will be able to be given to landowners or developers without the need for notices of intention to issue orders being given first.

90 Persons who are given orders can also be given a *compliance cost order* requiring them to pay all or any reasonable costs and expenses incurred in connection with the giving of the order. Such costs will include monitoring costs, compliance costs relating to the order and incidental costs.

91 Appeals will be allowed in relation to compliance cost orders.

Regulations

92 The regulations relating to certification of development will be substantially amended, including in relation to the following:

92.1 inspections before Part 4A Certificates are given,

92.2 persons who may apply for construction or occupation certificates,

92.3 consistency between construction and occupation certificates and development consents,

92.4 further limitations on the issuing of construction or occupation certificates, and

92.5 *critical stage* inspections of development (i.e., before placement of footings and before fire-resistant floors or sound insulated walls and ceilings are enclosed).

Miscellaneous Amendments to the Act

Lapsing of development consent

93 Development consent for the erection of a building, subdivision of land or the carrying out of work will lapse, even if it has physically commenced before it would usually lapse, if work is not substantially commenced within 2 years after the date on which it would usually lapse.

94 The relevant section will also be amended to allow the regulations to be made specifying the circumstances when development is or is not taken to be substantially or physically commenced.

95 Development consents that are subject to deferred commencement conditions may be extended for 1 year on application made before the original period within which it will lapse expires if the original period is less than 5 years.

Exempt and complying development

96 On 8 May 2008, the Department of Planning released exposure drafts of the:

96.1 NSW Housing Code, and

96.2 NSW Commercial Building Code (**Codes**).

97 The new Codes are part of the expansion of the scope of exempt and complying development proposed to be implemented as part of wider reforms to the EPA Act and associated legislation.

98 The period for making submissions in relation to the Codes ends on 4 July 2008.

99 The draft Codes can be found at:

99.1 http://www.planning.nsw.gov.au/planning_reforms/housing_code.asp

99.2 http://www.planning.nsw.gov.au/planning_reforms/commercial_code.asp

Other amendments

100 These also include amendments relating to the following:

100.1 places of public entertainment,

100.2 concurrence and referral requirements,

100.3 paper subdivisions.

101 The exposure draft of the Bill contained provisions relating to the acquisition of land in connection with urban renewal proposals or urban land releases. The first print of the Bill omits those provisions.

Dr Lindsay Taylor

20 May 2008