



NSW PLANNING REFORM

Submission to the NSW Department of
Planning by the Urban Development
Institute of Australia NSW

JANUARY 2008

1. The Case for Reform

UDIA NSW commends the Department of Planning on the release of the Discussion Paper *Improving the NSW Planning System* and welcomes the opportunity to comment. The *Discussion Paper* generated significant interest and UDIA NSW has consulted extensively with its Committees and six Regional Chapters to generate a submission that reflects the interests of the broader urban development industry.

The inefficiencies and constraints of the current NSW Planning System provide a compelling case for widespread and comprehensive reform. Unreasonable delays and complex decision making processes have been eroding housing affordability and creating a serious disincentive for investors in this state. BIS Shrapnel recently reported that dwelling commencements in this state reached a near 50-year low in 2006/07 (29,300). This translates to a significantly reduced demand on the NSW Planning System, yet still the average development application takes 75 days to be assessed. Even with record low numbers of dwelling starts, the planning system is overwhelmed.

Genuine reform must be concerned principally with providing certainty, transparency and the timeliness necessary to facilitate sustainable development. UDIA NSW has identified the current plan making process and development assessment framework as two functions of the System exhibiting the broadest scope for improvement and has made recommendations it believes will assist in providing a policy framework that provides for the creation of affordable, sustainable and liveable communities

2. Development Assessment and Review

UDIA NSW is encouraged by the broad scope of the proposed reforms to the development assessment hierarchy and reiterates the compelling need to depart from the current framework. The intent of the reforms are fundamentally supported however a number of improvements have been identified that UDIA NSW believes should be adopted to take advantage of this opportunity.

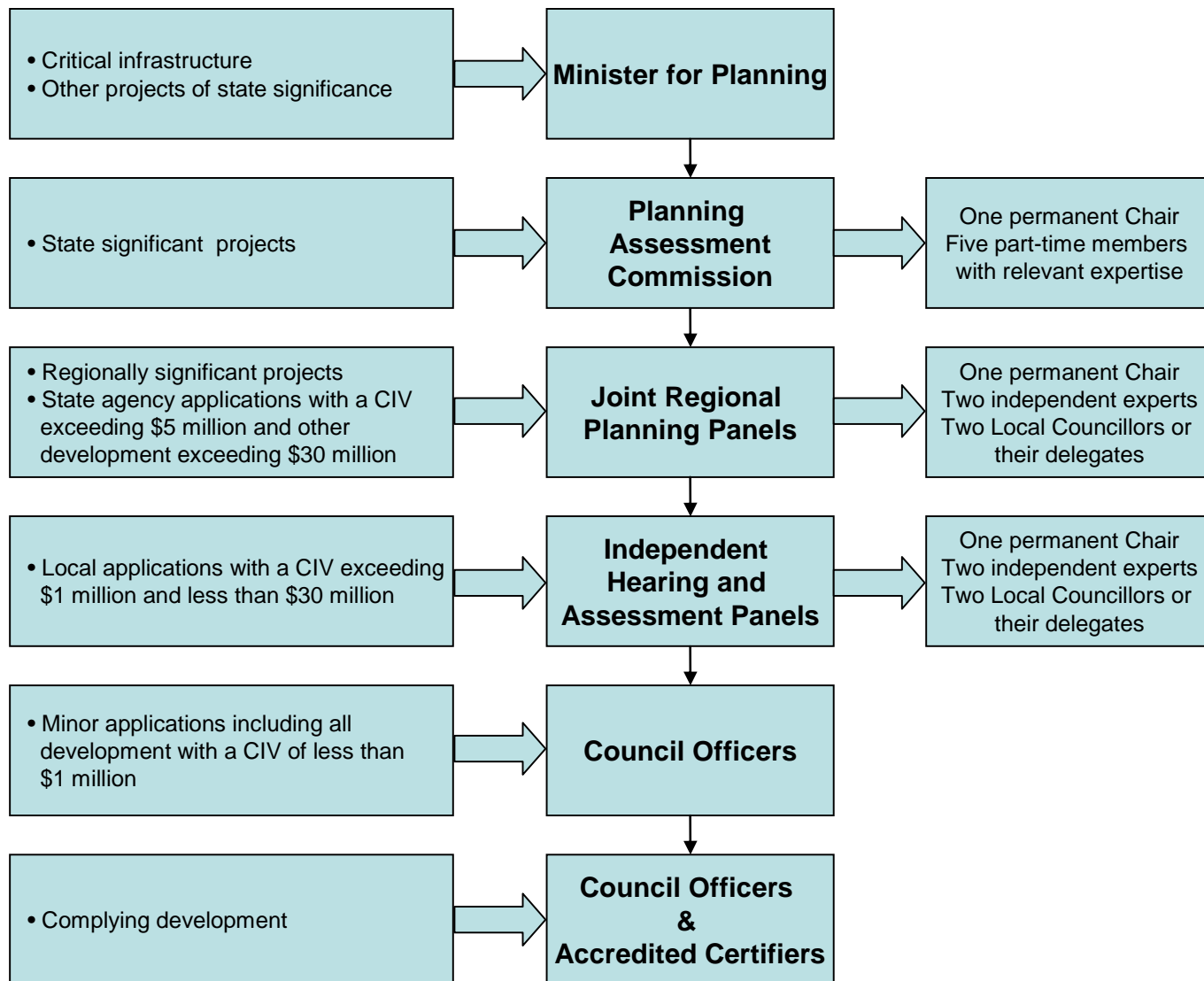
UDIA NSW contends that the reforms should focus on providing clear demarcation between the various levels of decision making to provide certainty and consistency for stakeholders. The proposed hierarchy of decision making bodies introduces additional and unnecessary layers into the assessment system, with eight different streams proposed. The proposal effectively increases the degree of complexity and obfuscates the need for separation of powers at all major decision making levels.

UDIA NSW believes that the assessment hierarchy must be rationalised to provide a more efficient and navigable system for industry stakeholders. This must include explicit demarcation between the levels of assessment and clearly defined roles and responsibilities. All levels within the hierarchy must be charged with a determination role to avoid unnecessary and likely conflicts between the advice provided by an appointed expert panel and the consent authority.

UDIA NSW proposes a Development Assessment Hierarchy which offers a greater degree of transparency, certainty, accountability and consistency in decision making. The UDIA NSW model rationalises the quantum of consent authorities from the eight

proposed in the *Discussion Paper* to six and seeks to clearly demarcate the hierarchy between different levels of assessment. The UDIA NSW proposed Assessment Hierarchy provides for the separation of powers at both State and Local Government that ensures clear roles for elected officials, minimises conflicts of interest and matches and skills and responsibilities.

DEVELOPMENT ASSESSMENT HIERARCHY – UDIA NSW PROPOSAL



RECOMMENDATION 1

The UDIA NSW Proposed Development Assessment Hierarchy be adopted to provide separation of powers at all major levels of decision making and to satisfy the industry's desire for greater certainty, transparency, and consistency in decision making.

The success of the proposed hierarchy will largely be determined by their constitution and on the commitment of both State and Local Government to ensure sufficient and ongoing resourcing. It is important to acknowledge that in NSW, the current planning system provides for an environment where investment decisions are often determined by Councils with little expertise or experience in the economics and inherent complexities of development. This is highly undesirable for a state that has recently recorded the lowest number of dwelling commencements in fifty years.

Structural improvements to the assessment hierarchy will be negated if the panels and the Commission are not resourced by relevant and necessary expertise. It also important to ensure that Local Government Councillors are empowered to reflect the community's vision for the LGA, manifested in their role in the decision making process for regionally significant and larger local applications. This is best utilised in balance with the expertise and experience of independent panel members.

Planning Assessment Commission

The introduction of Part 3A has achieved reasonable success in establishing a suitable framework for the assessment of state significant proposals but has thus far failed to satisfy objectives of certainty, transparency, efficiency or, timeliness. The proposed creation of a Planning Assessment Commission (PAC) represents a further opportunity to progress towards achieving these objectives through the separation of powers. Increased delineation between the democratically elected representatives and the decision makers, offered through the creation of the Commission, is necessary to improve continuity and transparency.

Joint Regional Planning Panels

UDIA NSW supports the establishment of Joint Regional Planning Panels (JRPPs) to determine regionally significant development applications. The Department of Planning is commended for formally recognising the regional implications of certain development applications and the importance of expertise and transparency in decision making at this level.

UDIA NSW suggests that the threshold of a capital investment value of \$50 million is too high for the identification of regionally significant development applications. It is understood that only twenty four applications were received in the last year that would have exceeded this threshold. The capital investment value of many of the types of developments prescribed in Schedule 1 of the *State Environmental Planning Policy (Major Projects) 2005* is less than \$50 million, being in the range of between \$10 million and \$30 million. UDIA NSW recommends that the threshold be lowered to \$30 million for non-Government agency development applications to be determined by the JRPPs.

UDIA NSW suggests that the boundaries used for the various Regional Strategies provide a suitable indication of regional challenges and development pressures and could be used for the spatial demarcation between the various Regional Panels. However it is important to retain a level of flexibility for developments within an influence beyond the regional boundary.

In terms of the constitution of JRPPs, it is important to provide an appropriate balance between industry expertise and the role of locally elected representatives. It must be acknowledged that the use of Panels to determine both regionally significant and larger local DAs does not preclude local Councils from important decision making, it simply provides for a balance between utilising the necessary expertise to understand the inherent complexities of development and the implementation of the community's vision. In this regard, UDIA NSW supports the proposed constitution of JRPPs in the *Discussion Paper*.

RECOMMENDATION 2

UDIA NSW recommends that the threshold be lowered to \$30 million for non-Government agency development applications to be determined by the Joint Regional Planning Panels.

Independent Hearing and Assessment Panels

The role of Independent Hearing and Assessment Panels (IHAPs) will be fundamental to the success of the proposed reforms in providing an independent, efficient and effective assessment process for local development in NSW. UDIA NSW is concerned that the role proposed for IHAPs in the *Discussion Paper* essentially obfuscates the rationale for their existence and merely duplicates the council officer's role in providing recommendations to Council.

UDIA NSW contends that local decision making is one of the more significant constraints to the planning system, with politicised determinations, lack of expertise for decision makers, and the potential for conflicts of interest providing impediments to an efficient and effective process. The establishment of IHAPs to determine local development creates a separation of powers that is needed to provide greater transparency and continuity in decision making.

Separation of powers at local government would then afford the elected Councillors more opportunity to focus on strategic planning. Furthermore, it would negate opportunities for distortion of the planning process created by the perceived impact of political donations by developers. There is little incentive for the misuse of donations, especially at the local government level if the influence of individual Councillors on the development assessment process is contained.

UDIA NSW recommends that IHAPs determine all local development applications between the range of a CIV of \$1 million and \$30 million. Ultimately the quality and effectiveness of the IHAPs will be determined by their constitution. Structural improvements to the assessment hierarchy will be negated if the Panels do not provide

an appropriate balance between the necessary expertise and local Council representation.

RECOMMENDATION 3

Independent Hearing and Assessment Panels determine all local development applications between the range of a Capital Investment Value of \$1 million and \$30 million.

RECOMMENDATION 4

UDIA NSW recommends that the IHAPs consist of:

- *One expert/independent presiding member;*
- *Two expert/independent members from an accredited register endorsed by the Department of Planning;*
- *Two elected Councillors or Council delegates.*

Local Council Assessment

UDIA NSW advocates effectively local decision making undertaken by Council officers with relevant expertise and experience. The importance of this function within the assessment hierarchy is reflected in the number of development applications that are of a capital investment value of less than \$1 million, and should not be understated.

UDIA NSW anticipates that the creation of independent assessment bodies in the Joint Regional Planning Panels and IHAPs will likely empower planning professionals to exercise greater use of their expertise and experience in assessing the merits of a development application and making a recommendation on its determination. This is a departure from anecdotal reports of instances where recommendations to Council are framed in the context of anticipated Council decisions and/or voting preferences.

UDIA NSW contends that greater delegation will not undermine the important democratic legitimacy of decision-making within local Councils, it will simply ensure that Councillors' time is appropriately targeted.

RECOMMENDATION 5

Council officers determine all development applications (other than complying development) with a capital investment value of less than \$1 million.

Part 3A Assessment

The introduction of Part 3A of the EP&A Act has achieved reasonable success in providing an effective assessment process for projects of state significance. One of the major benefits of the Part 3A process is the provision of a consolidated assessment process, negating the need for multiple approvals for any number of Government

agencies. UDIA NSW contends that this consolidated process must be adopted for all levels of development assessment.

Part 3A does have significant benefits over the preceding arrangement and accordingly retains considerable favour within the industry, however a number of limitations pose a constraint to the long term benefit of the process if not addressed. The current preliminary assessment process to determine whether a project does in fact require the Minister's consent does not provide a sufficient level of certainty for many of the industry's more significant investors.

UDIA NSW members have expressed frustration at their application bouncing between Council and State Government for months before receiving a determination on whether indeed is suitable for Part 3A. That is before the actual development assessment process can begin.

UDIA NSW contends that greater clarity is required so that proponents are able to determine whether a project requires Part 3A assessment or not, without requiring a preliminary assessment from the Director General. Clearly defined thresholds are required to provide certainty of process for proponents and a more efficient use of Department resources in assessment.

RECOMMENDATION 6

Clear articulation of thresholds for development that requires Part 3A assessment be provided to provide greater clarity and certainty of process for development proponents.

Integrated Development Assessment

A notable omission from the proposed reform recommendations in the *Discussion Paper* is the matter of integrated development assessment (IDA). The Department has explicitly acknowledged the constraints on the efficiency and effectiveness of the NSW Planning System that many concurrence requirements create, yet has failed to use this opportunity to propose comprehensive improvements.

The current legislative provisions implicitly provide opportunity for government agencies to act as de facto consent authorities, with veto control over development applications. As a result, development applications are increasingly being determined on the basis of single issue agendas, such as the preservation of native vegetation or perceived bush fire risk. UDIA NSW members advise of significant difficulties in dealing with the Catchment Management Authorities and the Rural Fire Service in particular in this regard. Development applications must be considered in the context of a range of externalities and the potential benefits to be created for the community, not simply on one factor.

UDIA NSW contends that integrated development assessment and concurrence requirements should be amended to correct this anomaly within the planning system and the authority to provide development consent for all development applications be given to the Minister for Planning and delegated accordingly. The current framework is at

variance to the range of proposed reforms to the planning process and is contrary to best-practice governance.

One of the major contributors to delays IDA process is the unwillingness of local Councils to be exposed to what is a perceived liability risk if a decision on a development application is made in the absence of advice from the relevant Government agency. UDAI NSW contends that reform is needed to provide for a framework that prescribes that when agency consultation is required it must be reinforced by timeframes and 'deemed to comply' provisions. To support local efficient decision making and to ensure that concerns regarding exposure to liability are minimised, UDIA NSW recommends reforms that indemnify local Councils from prosecution when determinations have been made in good faith.

RECOMMENDATION 7

The need for dual consents under the Integrated Development Application process be removed and replaced with a referral system that is reinforced by deemed to comply provisions once prescribed consultation timeframes have not been met.

RECOMMENDATION 8

Local Councils be indemnified from prosecution when development applications are determined in good faith in the absence of timely agency advice where referrals have been formally initiated.

Section 96 Modifications

The proposed limits for S96 Modifications are not supported and do not sufficiently recognise the inherent complexity of development, regardless of the scale. The limits may also encourage or result in unauthorised works, particularly if the alteration to the approved plans is minor.

The limit for smaller developments fails to take into account that construction can be complex despite the scale and that difficulties can arise during this process that could not have been anticipated. In relation to major development, the limit of ten modifications is arbitrary in comparison to with small development applications. A small scale development could be for a single two storey dwelling and a large scale development could be a thirty storey residential tower. UDIA NSW contends that there is no basis on which to prescribe that the latter should or would only generate twice the number of modifications to the consent than a single dwelling house should or could.

UDIA NSW contends that the concerns expressed in the *Discussion Paper* with regard to incremental change or creeping development are not well founded. The creep effect of modifications to the original consent was overcome by amendments to s96 of the EP&A Act on 1 June 2006 following the Court of Appeal's decision in *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468. Section 96(2)(a) currently provides that the development as modified is required to be substantially the same as the development for which consent was originally granted.

The effect of this is that the development proposed to be modified for say a seventh time is to be compared with the development application as approved, not the development as modified by the sixth modification application.

RECOMMENDATION 9

Proposed arbitrary limits to the number Section 96 Applications that can be made be abandoned.

3. Changing Land Use and Plan Making

The Plan Making process in NSW is described in the *Discussion Paper* as lacking a strategic, outcome focussed approach. There is an acute need for plan making to be more responsive to demand. It should emphasise the role that market signals play in ensuring the efficient conversion in the use of land. Consent authorities require a positive approach to applications for changes to land use, particularly where there is limited or no likelihood of demonstrable harm. This approach would permit greater flexibility of land use that would better respond to often rapid changes in market conditions.

The LEP process has proved unnecessarily constraining and consent authorities have endeavoured to stymie proposed land use changes on the basis of their own often misguided assessment of demand. It is very easy to misinterpret the market's motives if the observer does not have a financial interest in satisfying the demands of the market. This action was criticised in the *Barker Review of Land Use and Planning (2006)* in the United Kingdom;

It is not the role of local planning authorities to turn down development where they consider there to be a lack of market demand or need for the proposal. Investors who are risking their capital and whose business it is to assess likely customer demand are better placed than local authorities to determine the nature and scale of demand.'

The use of a *Gateway System* notionally has the potential to generate greater efficiencies in the LEP process, providing the front-loading of the justification. The assessment of the proposal then translates into genuinely streamlined procedures, and not a de-facto duplication of government agency consultation. There is a need to recognise that consultation with Government agencies, in many cases, provides one of the more significant constraints to the timeliness of the plan making process.

The role of Government Agencies under s62 of the EP&A Act in providing advice or concurrence to a draft LEP, has been recognised in the *Discussion Paper* as in need of clearer articulation and direction. This is supported by anecdotal evidence from many industry participants. The current framework provides insufficient consistency and transparency, with Government agencies adopting a quasi consent role rather than meeting their legislative obligation, which prescribes that a public authority:

- (a) shall, if requested in writing to do so by the council, furnish such information and provide such assistance as it deems proper to assist the council in the preparation of the study or plan, and
- (b) shall notify the council of any information or any actual or proposed activity or work that, in its opinion, is relevant to the study or plan...

UDIA NSW understands that there is a certain level of consistency across the range of matters considered by the agencies in reviewing draft Plans. The process would be greatly improved if standard LEP conditions were developed, published and provided upfront in the *Gateway System* to avoid the kind of 'eleventh hour advice' that is mentioned in the *Discussion Paper*. This approach would provide a greater degree of certainty, consistency and transparency in the plan making process.

UDIA NSW strongly supports prescribed timeframes to complete LEPs and to particular milestones within that process, but contends that they must be reinforced by predetermined outcomes for failure to meet the required timing for responses to those milestones. Specifically, in terms of agency consultation, UDIA NSW recommends that failure to respond to a request for comments within 28 days, should result in that agency's response to the draft LEP as being determined as 'deemed to concur'. Any comments or objections received after this time could be referred to either the Planning Assessment Commission or Joint Regional Planning Panel, but only if a significant case was made for the late submission. The need to respond on time and avoid the duplication and additional work in putting a case for consideration would focus the attention of the agencies on only the most significant of issues. The role of Councils in meeting timeframes should also be regulated, with relevant responsibilities in the Part 3 process to be given prescribed milestones and 'called-in' by the Joint Regional Planning Panel or Planning and Assessment Commission if they are not achieved.

The role of Parliamentary Counsel in the plan making process is not well understood by many industry participants, yet in numerous cases legal drafting at the final stages of a rezoning or comprehensive review is cause for significant delay. The proposed 'one stop shop' provides some desired stimulus for more efficient legal drafting of LEPs and the elimination of the inherent inconsistencies in the intent of local plans and the legal document that is gazetted. UDIA NSW recommends that Parliamentary Counsel be involved earlier in the plan making process, with legal drafting the responsibility of the NSW Government.

RECOMMENDATION 10

NSW Government Agencies consulted under s62 of the Environmental Planning and Assessment Act 1979 prepare and publish a suite of standard LEP Conditions to provide greater certainty, consistency and transparency in the plan making process.

RECOMMENDATION 11

Mandatory timeframes be prescribed for different stages in the plan making process and reinforced by 'deemed to concur' provisions in the case of Government agency consultation.

RECOMMENDATION 12

Where Councils fail to meet their response milestones, 'call-in' powers for the Joint Regional Planning Panels and Planning and Assessment Commission should be available.

RECOMMENDATION 13

UDIA NSW recommends that Parliamentary Counsel be involved earlier in the plan making process, with legal drafting the responsibility of the NSW Government.

4. Exempt and Complying Development

The expansion of exempt and complying development provisions is supported as is the provision for a mandatory code. It will save time and costs for small scale development and the increase in the use of certification will provide for more targeted allocation of Council resources to assessment of more complex applications.

A review of exempt and complying development codes should not only include the scope of the types of development which should be exempt or complying, but it must also include the general criteria that must be satisfied before development can be exempt or complying. For example, *State Environmental Planning Policy No. 60 (SEPP 60)* (cl.7(2)(a)(ii)) and many council development control plans require that to be exempt development or complying development the proposed development must be more than 1 metre from any easement: of SEPP 60. This criterion often has the effect of immediately eliminating many types of development as exempt or complying development even where there is no impact or likely impact on the easement.

RECOMMENDATION 14

A review of exempt and complying development codes should not only include the scope of the types of development which should be exempt or complying, but it must also include the general criteria that must be satisfied before development can be exempt or complying.

5. Building and Subdivision Certification

The development industry is sustained by relationships between various stakeholders that are built on trust and the knowledge that commissioned work is undertaken in an ethical and thoroughly professional manner. This includes the relationships between developers and certifiers. Prescribing limits on the number of construction or complying development certificates that can be issued to any one client or involving any one builder or developer by an accredited certifier is a regressive approach that belies the integrity of the overwhelmingly vast majority of the development industry.

UDIA NSW acknowledges that there are some adverse perceptions about certification within the generally community and the NSW Government is compelled to generate faith and trust in the scheme. Accordingly, as an alternative to prescribing nominal limits as above mentioned, it is recommended that the quantum of certifications issued to one particular client be limited to 75% of the total certifications issued by the certifier over a two year period. This two year timeframe acknowledges the nature of staged development and the importance of continuity in process when a developer is utilising the services of a certifier. It would be highly undesirable for delays to be generated in the development subdivision simply because a certifier is prevented from undertaking further work, having reached an arbitrary threshold for that particular year.

RECOMMENDATION 15

To assist in addressing perceived conflicts of interest between certifiers and clients, it is recommended that the quantum of certifications issued to one particular client be limited to 75% of the total certifications issued by the certifier over a two year period.

6. Conclusion and Recommendations

UDIA NSW is encouraged by the proposed reforms and in comprehensive consultation with its membership, believes significant improvements can be made the NSW Planning System. It is important to acknowledge that NSW has been constrained by a complex and inefficient regulatory framework and genuine reform is essential to provide a framework that facilitates sustainable development.

UDIA NSW believes that reform to the Planning System must be provided with the strategic objectives of increased certainty, transparency and consistency. UDIA NSW has made the following recommendations it believes will assist the NSW Government in achieving these objectives and thereby improving the NSW Planning System for all stakeholders:

1. The UDIA NSW Proposed Development Assessment Hierarchy be adopted to provide separation of powers at all major levels of decision making and to satisfy the industry's desire for greater certainty, transparency, and consistency in decision making.
2. UDIA NSW recommends that the threshold be lowered to \$30 million for non-Government agency development applications to be determined by the Joint Regional Planning Panels.
3. Independent Hearing and Assessment Panels determine all local development applications between the range of a Capital Investment Value of \$1 million and \$30 million.
4. UDIA NSW recommends that the IHAPs consist of:
 - One expert/independent presiding member;
 - Two expert/independent members from an accredited register endorsed by the Department of Planning;
 - Two elected Councillors or Council delegates.
5. Council officers determine all development applications (other than complying development) with a capital investment value of less than \$1 million.
6. Clear articulation of thresholds for development that requires Part 3A assessment be provided to provide greater clarity and certainty of process for development proponents.
7. The need for dual consents under the Integrated Development Application process be removed and replaced with a referral system that is reinforced by deemed to comply provisions once prescribed consultation timeframes have not been met.

8. Local Councils be indemnified from prosecution when development applications are determined in good faith in the absence of timely agency advice where referrals have been formally initiated.
9. Proposed arbitrary limits to the number Section 96 Applications that can be made be abandoned.
10. NSW Government Agencies consulted under s62 of the Environmental Planning and Assessment Act 1979 prepare and publish a suite of standard LEP Conditions to provide greater certainty, consistency and transparency in the plan making process.
11. Mandatory timeframes be prescribed for different stages in the plan making process and reinforced by 'deemed to concur' provisions in the case of Government agency consultation.
12. Where Councils fail to meet their response milestones, 'call-in' powers for the Joint Regional Planning Panels and Planning and Assessment Commission should be available.
13. UDIA NSW recommends that Parliamentary Counsel be involved earlier in the plan making process, with legal drafting the responsibility of the NSW Government.
14. A review of exempt and complying development codes should not only include the scope of the types of development which should be exempt or complying, but it must also include the general criteria that must be satisfied before development can be exempt or complying.
15. To assist in addressing perceived conflicts of interest between certifiers and clients, it is recommended that the quantum of certifications issued to one particular client be limited to 75% of the total certifications issued by the certifier over a two year period.

UDIA NSW

Who We Are

UDIA is the voice of development. We represent the industry which develops new communities and proudly advocate for its interests. We pursue access to land for development, encourage the creation of a positive regulatory environment, and seek to moderate the burden of taxes and charges on our customers. We believe in affordable, sustainable, and liveable communities.

Urban development contributes \$15 billion worth of activity to the State economy each year. UDIA NSW represents the leading industry participants with over 520 corporate members.

UDIA was established in New South Wales in 1963 and operates as a non-profit institute for the benefit of its member's throughout Australia, with divisions in New South Wales, Queensland, South Australia, Victoria and Western Australia.

UDIA NSW is a progressive organisation driven by its members. Our President, Council, Chapters and Committees, Executive Director and staff ensure that we give members and sponsors maximum value for their investment.

UDIA NSW's goals are to:

- Promote high standards for the urban development industry;
- Promote respect for the inherited and natural environment while creating quality, dynamic built environments;
- Ensure the skills which make up the membership of the Institute will be applied to principles of good planning, efficient land utilisation and sustainability of resources for future generations;
- Institute a continuing education and research program to support and assist the industry and for the benefit of others associated with urban development; and
- Promote greater understanding in the community on the role and achievements of the urban development industry.

What We Do

UDIA NSW engages in a range of activities which include:

- **Advocacy** - Lobbying government so that urban development can be undertaken positively and creatively for the widest benefit;
- **Learning** - Keeping members and associates up to date on critical industry issues and best practice through seminars, conferences and communications. Our regular UDIA journal;
- **Innovation** - Encouraging innovation and excellence through the annual *UDIA NSW Awards for Excellence* and giving exposure to the best in contemporary development throughout the year; and
- **Better Business** – Providing opportunities for business networking and learning.