NSW Planning Law Changes 2017
Key Issues summary to assist in FOKE members' submissions.
Deadline for submissions is 31st March 2017.
Submissions can be made by mail or online, go to
Legislative Updates/Get Involved

The full detail of the amendments can be viewed on the NSW Planning website at planning.nsw.gov.au/Legislative-Updates

The Environmental Planning and Assessment Act 1979 is the primary legislation which establishes the system of environmental planning and assessment in NSW. The NSW Government is proposing to amend this legislation to promote confidence in the NSW planning system and reduce its complexity.

The NSW Government is proposing to amend our State planning laws by

- updating the Act's objects and structure,
- clearer public participation requirements and timeframes,
- reforms to state and local decision-making panels,
- speeding up decisions on large and small developments,
- changes to building certification, infrastructure impact and assessment, and
- the manner of reviews and appeals as well as rationalising former 'Part 3A' major projects pathway.

This summary concerns itself with the areas most applicable to Ku-ring-gai.

Preliminary comments:
The four underlying strategic objectives appear well-designed. These are

- to enhance community participation;
- to promote strategic planning;
- to increase probity and accountability in decision- making; and
- to promote simpler, faster processes for all participants.

However, there is a lack of detail as to how these are to be achieved, especially from a community perspective. The proposed amendments are to be supported by changes to the EP&A Regulations which are yet to be released. As we can surmise, the devil is in the detail! **Any submission must request that these regulations need to be viewed prior to their introduction not only in order to see its impact, but also to ensure there are no unintended consequences.**

New Objects of the Bill:
The Objects of the Bill have been updated, however a number of concerns remain:

- Current objects to encourage land for public purposes, utilities, community services and facilities are removed. These need to be re-instated.
- The Act's current object to 'encourage ecologically sustainable development' (ESD)' has been watered down to 'facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations'. The ESD object should be rewritten to 'achieve' ESD by 'implementing' ESD principles in decision-making, or acting 'consistently' with them. It should refer to 'effectively integrating short and long term considerations, not simply 'relevant' considerations, not unlike the wording within the Biodiversity Conservation Act 2016 (NSW).
- The Object to promote *'timely delivery of ….housing opportunities'* reflects NSW Planning's push for faster processing of development applications and expanding the number of complying developments. This is at odds with good planning outcomes, including the new

objects to promote 'good design' and the management of natural and built heritage.

- Objects for the protection of habitats of native animals and plants are omitted and need to be included.
- There is no new object to address climate change, as evidenced by increased beachfront erosion and more intense storms, and respond to NSW Government's recent target of net-zero emissions by 2050.

Community Participation

Each Council, or planning authority, will need to prepare and exhibit a community participation plan. The plan will set out how and when the planning authority will undertake community participation on a range of planning functions – preparing environmental planning instruments, assessing development applications and environmental impact assessments.

Though FOKE applauds this strategic community engagement, again there are issues that need to be rectified:

- Importantly, there is no guarantee the principles will be reflected in a community plan, as planning authorities are only required to consider the principles when formulating the plan, not implement them or show how their plan complies.
- Further, the provisions of a community participation plan are only mandatory if the provision is identified by the plan as mandatory. Mandatory requirements will include minimum public exhibition and notification periods, giving reasons for decisions, and other matters identified in individual plans.
- The exhibition periods for public exhibitions will be a minimum of 28 days, and only 14 days for development applications.
- Decision makers within Councils will be required to give public notice of the reasons for certain decisions made with regard to development approvals, including how the community views were taken into account. However, it is unclear what the community recourse is to appeal such a decision.
- Importantly, this prior requirement does not apply to exhibiting or amending State Environmental Planning Policies (SEPPs). It is within the SEPPs that the State Government allows the greatest number of complying developments, such as the Draft Medium Density Code to allow medium density housing such as terraces, townhouses or small blocks of flats as complying development within R2 residential zones. **This community notification, exhibition and consent must apply to all development applications under a community engagement plan. To exclude the most intrusive and contentious areas from such a regime is nothing short of underhanded.**

Development Assessment

FOKE supports the revision to improve the current misuse of modifications of development consents. Planning Authorities, including Councils, will no longer be able to retrospectively approve a modification to a development consent (where works completed did not meet the development approval). More clarification on how this will operate in the field is still required if it is aimed to encouraging greater compliance with approved development consents.

Complying Development

Changes to the complying development regime include the requirement that the certifier give notice of such a development to the relevant council and neighbours prior to issue including a copy of the plans and how it meets standards. Currently neighbours are not provided with plans and documentation. However, neighbours still do not have any legal right to make a submission for any amendment or issue they have with such a development. This should be rectified if there is to be community confidence in the complying development regime.

Similarly, larger scale complying developments do not currently require public exhibition for community comment. This similarly needs to be changed.

Though State Planning has sought not to go down the path of the detested 'code assessable' development category of the failed 2013 reform proposals, the categories of housing and other complying development have been expanding ever since.

If NSW Planning is seeking community confidence in its planning regime, this needs to be addressed, including but not limited to:

- Ensuring community engagement on zoning, place and design standards
- Avoiding cumulative impacts which are all too visible as the consequence of complying development without due consideration of community impact, both visual and amenity based.
- Improving enforcement action and governance of private certifiers to avoid poor quality construction, overdevelopment and design
- Ensuring leading practice sustainability standards

Local Planning Panels

A number of councils currently use Local Planning Panels for complex development approvals. The way they are to operate is recommended to be standardized. However, the draft Bill does not require the panel members to have a range of expertise to bring to such a panel. Similarly, how will community representatives be identified (and should these include councilors), how to ensure independence of panel members to ensure that they act in the public interest. These are oversights that need to be addressed.

Independent Planning Commission (IPC)

The Planning Assessment Commission is to be renamed as above. In its new form the IPC will no longer have a review role in assessing State Significant Development. But otherwise much remains unchanged in its role.

The area of concern is that Public hearings will continue to remove merit appeal rights to the Land and Environment Court, which is a much more rigorous review and assessment of a development than through the Commission.

It is about time that following a public hearing, if not satisfied, the public should be allowed to commence a merit appeal to the Land and Environment Court (as recommended by ICAC).

Existing appeal rights will be curtailed if the Commission holds a 'public hearing' on a project when directed by the Minister. Concurrently, the Bill proposes to extend developers' rights to internal review of refusals or conditions on large or complex projects.

This exacerbates the existing difference in rights between developers and residents which reduces public confidence in NSW Planning and makes decision-making less inclusive and less robust.

Concluding Note

These proposed changes to the EP&A Act aim to increase community participation to help influence high level principles and strategies but at the expense of more restrictive and less community rights at the local and neighbourhood level. This is where the previous 2013 NSW Proposed Plans similarly failed, as it is at the local community and neighbourhood level where a greater participation is sought on development issues.