



Planning &
Environment

NSW Code of Practice for Authorised Network Operators

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1. Introduction and Statutory Context

1.1 Status of this document

This Code is the approved Code under cl 244K of the *Environmental Planning and Assessment Regulation 2000* (**EP&A Regs**).

This Code takes effect from the date upon which its approval by the Minister is published in the Gazette or on such later date as is specified in the approval published in the Gazette.

For the purposes of cl 244K(4) of the EP&A Regs, this Code is to continue in force until it is varied or revoked in accordance with the EP&A Regs.

1.2 The statutory scheme and background to the introduction of this Code

The NSW Government will lease part of NSW's transmission and distribution network to private interests. These privately managed network businesses are referred to as Authorised Network Operators (**ANOs**) by the *Electricity Network Assets (Authorised Transactions) Act 2015* (**Authorised Transactions Act**). As at the date of commencement of this Code, ANOs include Transgrid, Ausgrid and Endeavour Energy.

The NSW Government has prescribed the ANOs as prescribed determining authorities for the purposes of s 111A of the *Environment Planning and Assessment Act 1979* (**EP&A Act**) and the definition of "public authority" under s 4(1) of that Act. That prescription allows an ANO to be a Part 5 Determining Authority for Development for the purposes of an electricity transmission or distribution network. As a determining authority, an ANO can assess and self-determine Activities that are not likely to significantly affect the environment and are conducted by or on behalf of the ANO for the purpose of electricity transmission or distribution.

In addition, by virtue of an ANO's status as an Electricity Supply Authority under the *State Environmental Planning Policy (Infrastructure) 2007* (**ISEPP**), certain of its activities will be subject to Part 3, Division 5 of the ISEPP. Part 3, Division 5 of the ISEPP, amongst other things, permits an ANO to undertake Development for the purpose of electricity transmission or distribution on any land without consent (with some exceptions for land reserved under the *National Parks and Wildlife Act 1974*, and provides that certain Development in connection with an electricity transmission or distribution network is exempt Development.

An ANO's access to the "without consent" provisions of the ISEPP and its role as a Part 5 determining authority go hand in hand, as access to those ISEPP provisions is accompanied by the duty to consider an Activity's impact on the environment. The legal source of this duty is the prescription of each ANO as a determining authority.

Development under Part 5 is referred to as an Activity under the EP&A Act. While Part 5 Activities do not require development consent under Part 4 of the Act, consideration of an Activity's environmental impact is required by section 111 of the EP&A Act. This is accompanied by section 112, which requires an Environmental Impact Statement (**EIS**) to be prepared if an Activity is likely to significantly affect the environment.

Under current arrangements, if an EIS is required, the Activity is declared to be State Significant Infrastructure (**SSI**). Once declared as SSI, Part 5.1 of the EP&A Act is triggered and the Activity can no longer be self-determined but rather is determined by the Minister.

Similarly, if the environment is likely to be significantly affected, but the scope of this likely impact arises from:

- the Activity being on land that is, or is part of Critical Habitat; or

- a likely impact on a Threatened Species, **Population** or Ecological Community or their Habitats, (including those in connection with fish and marine vegetation),

the ANO is required to prepare a Species Impact Statement (**SIS**) and obtain the concurrence of the CEO of the Office of Environment and Heritage (**OEH**) and/or the Secretary of the Department of Trade and Investment, Regional Infrastructure and Services (**DTIRIS**).

This Code regulates an ANO's decision making process that leads up to determining whether an EIS or SIS is required. However, processes and requirements associated with preparing and submitting those documents are outside of the scope of this Code.

The Authorised Transactions Act inserted Division 9 into Part 14 of the EP&A Regs. Clause 244K in Division 9 provides that this Code may make provision for or with respect to the exercise by an ANO of its functions under section 111 of the EP&A Act in respect of an "activity for the purposes of a transacted electricity transmission or distribution network". The words in quotation marks are defined non exhaustively in clause 244J as including:

... activities (within the meaning of Part 5 of the Act) for any one or more of the following purposes:

- (a) development for the purposes of the construction, maintenance or operation of a transacted electricity transmission or distribution network,
- (b) geotechnical investigations relating to a transacted electricity transmission or distribution network,
- (c) environmental management and pollution control relating to a transacted electricity transmission or distribution network,
- (d) access for the purpose of the construction, maintenance or operation of a transacted electricity transmission or distribution network,
- (e) temporary construction sites and storage areas, including temporary batching plants, the storage of plant and equipment and the stockpiling of excavated material.

1.3 Why this Code has been prepared

Enabling the ANOs to continue to assess the impacts of Activities under Part 5 is essential for the continued delivery of the ANOs' core business and the efficient construction, operation and maintenance of the electricity infrastructure required to meet NSW's energy needs.

The Government has developed this Code to ensure that assessments under Part 5 are conducted appropriately and in a manner that supports proper environmental assessment including appropriate community consultation.

1.4 Purpose

The principal purpose of the Code is to provide for how ANOs must exercise their assessment and self-determination powers under Part 5 of the EP&A Act when conducting environmental assessments.

The requirements of the Code are largely based on the existing environmental assessment practices of the Former Network Operators which are considered to be best practice. These practices have been established over a long period of time, are well documented, and have led to the development of cultures within the businesses that support robust environmental assessment.

Key outcomes sought by codifying these practices include:

- providing visibility around environmental assessments conducted under Part 5 and ensuring the ANO documents the steps associated with a determination;
- identifying best practice for environmental assessment to ensure current levels of environmental assessment are maintained;

- ensuring existing community expectations about how assessments will be conducted, and how the community will be consulted, are met; and
- ensuring an Activity determination provides clear, practical and enforceable conditions, where a conditional determination is appropriate.

The duty under section 111 of the EP&A Act to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of carrying out an Activity is at the heart of Part 5. It applies to every aspect of a proposed Activity and applies at every stage of the assessment and approval process. When considering the likely impact of an Activity on the environment, ANOs are required to take into account the environmental factors listed in clause 228(2) of the EP&A Regs. These are listed at Box 1. Those factors must be considered under this Code, regardless of whether there are any applicable general or specific guidelines in force under cl 228 of the EP&A Regs.

It is the ANO's responsibility to consider these duties and obligations when undertaking environmental assessments in accordance with this Code.

This Code provides a framework for the decision making process under Part 5.

The Code addresses the following key points:

- Procedures for carrying out assessments;
- Requirements for documentation;
- Protocols for consultation;
- Protocols for the availability of documentation to stakeholders;
- Capabilities required; and
- Auditing and compliance arrangements.

Box 1: Statutory provisions regarding EIA

Section 111 (1) of the EP&A Act

For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

Clause 228(2) of the EP&A Regs

[The following factors are listed under cl 228(2) of the EP&A Regs]

- (a) any environmental impact on a community,
- (b) any transformation of a locality,
- (c) any environmental impact on the ecosystems of the locality,
- (d) any reduction of the aesthetic, recreational, scientific or other environmental quality or value of a locality,
- (e) any effect on a locality, place or building having aesthetic, anthropological, archaeological, architectural, cultural, historical, scientific or social significance or other special value for present or future generations,
- (f) any impact on the habitat of protected fauna (within the meaning of the *National Parks and Wildlife Act 1974*),
- (g) any endangering of any species of animal, plant or other form of life, whether living on land, in water or in the air,
- (h) any long-term effects on the environment,
- (i) any degradation of the quality of the environment,
- (j) any risk to the safety of the environment,
- (k) any reduction in the range of beneficial uses of the environment,
- (l) any pollution of the environment,
- (m) any environmental problems associated with the disposal of waste,
- (n) any increased demands on resources (natural or otherwise) that are, or are likely to become, in short supply,
- (o) any cumulative environmental effect with other existing or likely future activities,
- (p) any impact on coastal processes and coastal hazards, including those under projected climate change conditions.

The Code has been developed in consultation with the Former Network Operators and relevant NSW Government Agencies.

1.5 Scope

The Code applies to all ANOs identified in the Authorised Transactions Act.

Compliance with the Code is required as a licence condition for an ANO under the *Electricity Supply Act 1995* (**ES Act**).

An ANO's role as a Determining Authority is in respect of the assessment and self-determination of proposed Activities to be carried out:

1. by that ANO; or
2. on behalf of that ANO, including where an Activity is to be carried out by an ASP on behalf of that ANO.

An ANO's role as a Determining Authority does not extend to the assessment and determination of Activities proposed to be carried out by third parties otherwise than on behalf of that ANO.

This Code is not retrospective and compliance with this Code is not required in respect of any Activity for which environmental assessment under Part 5 of the EP&A Act was commenced by an ANO prior to commencement of this Code.

This Code covers assessment for Activities that fall under Part 5 of the EP&A Act. While the Code may be useful to help to determine an appropriate assessment pathway, Activities that fall into the following categories have specific requirements that are not addressed by this Code:

- exempt or complying Development;
- Part 4 Development applications;
- SSI proposals; and
- activities that require the preparation of an EIS or a SIS or both.

In instances where an ANO's Activity falls within one of these pathways, the ANO should review the relevant Environmental Planning Instrument (**EPI**) and (where applicable) consult the relevant consent authority to determine the next steps.

1.6 Compliance with this Code

Compliance with this Code is a condition of an ANO's licence issued under the ES Act. A breach of this Code by an ANO is sanctionable as a breach of a licence.

IPART is responsible for monitoring an ANO's compliance with this Code. Part 5 of this Code addresses the audit and reporting requirements that must be followed to facilitate IPART's monitoring of compliance with this Code.

1.7 Definitions

Refer to Appendix A for definitions.

2. Environmental Impact Assessment (EIA)

2.1 Environmental Assessment Framework

When assessing the environmental impact of a Part 5 Activity, an ANO is obliged to:

- fulfil its section 111 duty under the EP&A Act; and
- address, as part of fulfilling that duty, the environmental factors listed in clause 228(2) of the EP&A Regs.

The Code provides a framework for the environmental impact assessment (**EIA**) and determination process and sets out how these obligations should be undertaken and documented in order to achieve positive environmental outcomes on the ground. There are five stages to this process:

- Stage 1 – The preliminary assessment;
- Stage 2 – Assessment and evaluation;
- Stage 3 – The preparation of EIA documentation;
- Stage 4 – Determination by an authorised person; and
- Stage 5 – Implementation.

Section 2 of this Code outlines the requirements for each stage of the assessment and self-determination process. Importantly, this section identifies the outcomes an ANO must achieve in its assessment documentation.

A key obligation for an ANO under this Section 2 of the Code is to ensure the outcomes identified are appropriately documented.

2.2 Stage 1: The preliminary assessment

The object of Stage 1, the preliminary assessment stage, is for an ANO to classify the proposal into one of the following six classes under this Code. It is emphasised that an ANO should be open to revisiting a conclusion reached in Stage 1 at a later stage in the process, if warranted in any particular case.

1. **Class 1:** The proposal is not subject to the EP&A Act because it does not amount to "Development" or an "Activity" under that Act. No further assessment is required under this Code.
2. **Class 2:** The proposal is subject to the EP&A Act, but is nonetheless not assessable under Part 5 of the EP&A Act, for example because it is:
 - the subject of an existing development consent;
 - exempt Development;
 - subject to s 110E of the EP&A Act; or
 - not Development that is permissible without consent (with the consequence that it must be assessed under Part 4 of the EP&A Act).

This Code does not apply to Class 2 proposals.

3. **Class 3:** A Summary Environmental Report (**SER**) must be prepared for the proposal.

4. **Class 4:** A Review of Environmental Factors (**REF**) must be prepared for the proposal.
5. **Class 5:** A SIS but not an EIS is required for the proposal. In this situation, the ANO is the determining authority for the proposal, but subject to it having to obtain the concurrence of the CEO of OEH (and/or the Secretary of DTIRIS, in connection with fish or marine vegetation). The proposal is within the scope of this Code. A REF must be prepared for the proposal, and the ANO is required to comply with the public consultation requirements under s 113 of the EP&A Act.
6. **Class 6:** The proposal is SSI by reason of falling within the scope of Item 1(1) of Schedule 3 of the *State Environmental Planning Policy (State and Regional Development) 2011*.

Each of the six classes is described below in sections 2.2.1-2.2.6 of this Code.

When carrying out the Preliminary Assessment Stage, the first step an ANO must take is to confirm the proposal can be assessed under Part 5 of the EP&A Act (that is, the ANO must decide whether or not the proposal falls into Class 1 or Class 2). This is where an ANO considers the relevant EPIs and other legislation to determine the appropriate assessment pathway for the proposal.

When determining which of the six classes under this Code the proposal falls within, the proposal must be considered in its entirety. For instance, when assessing whether a proposal is exempt or complying Development, an ANO must consider any ancillary impacts caused by the Activity. This includes considering factors such as impacts from access to the site and any clean-up required. This means that while the core component of the Activity may be exempt (e.g. maintenance of access trails), related issues such as securing access to the site may have impacts that must be considered.

Often it will be obvious from the outset to which class under this Code a proposal belongs. In instances where this is not the case, ANOs should consult section 2.3 of this Code to see what further investigations may be required to determine the appropriate assessment pathway. Similarly, section 2.3 and its accompanying Appendix B provide guidance about legislative and environmental triggers that may move a proposal from one class under this Code to another (e.g. a trigger might have the effect of moving an Activity from standard Part 5 assessment (Class 3, Class 4, or Class 5) into a EIS assessment pathway (Class 6)).

The flowchart which is **Figure 1** depicts the five stages of the EIA, determination, and implementation process and how the Code does or does not regulate Classes 1-6.

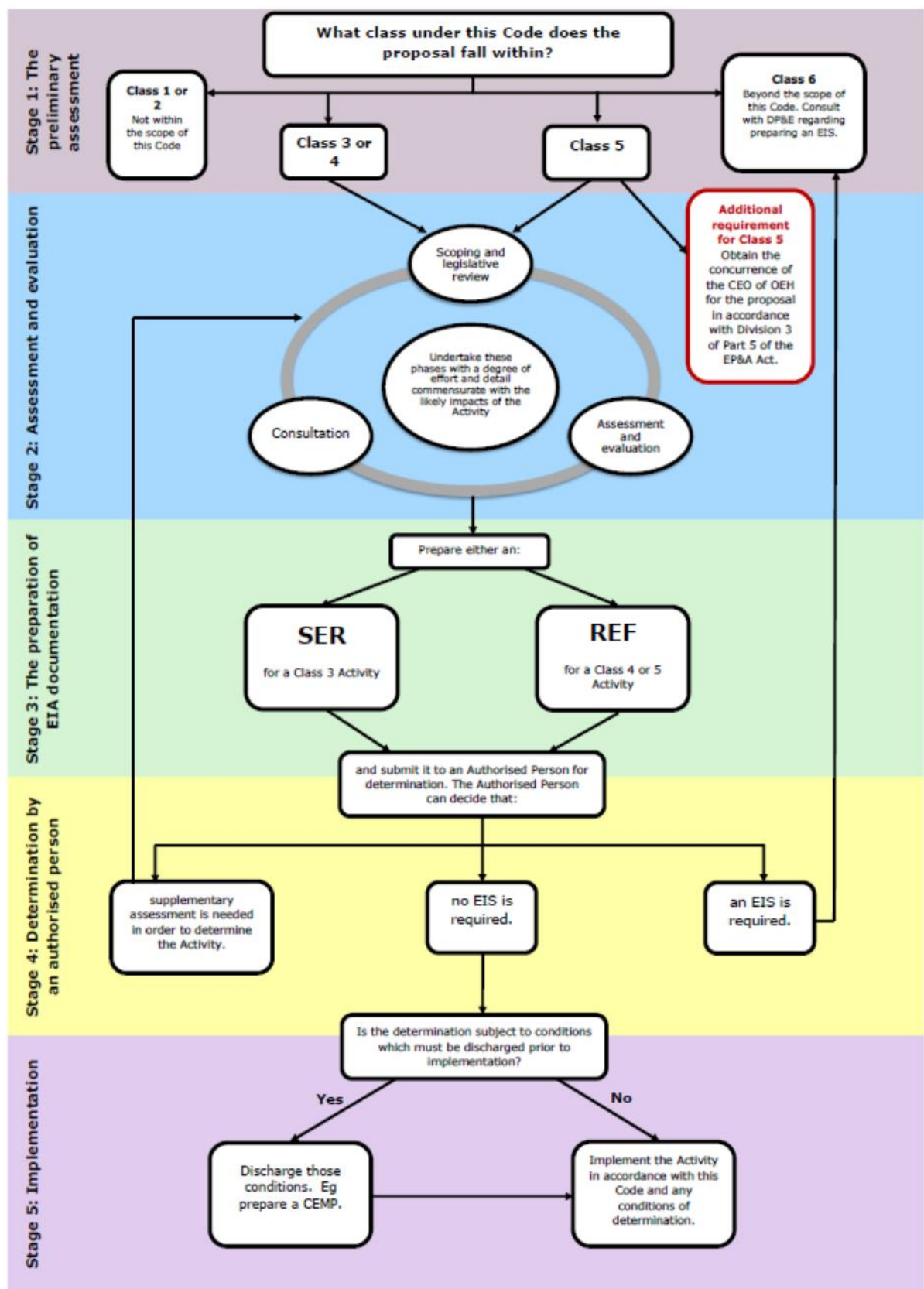


Figure 1

2.2.1 Class 1: The proposal is not subject to the EP&A Act It is important to note that many actions carried out by or on behalf of ANOs will not comprise "Development" or an "Activity" under the EP&A Act. For example, the demolition of a temporary structure is excluded from the definitions of Development and Activity under the EP&A Act.

Further, the law recognises that it is not the purpose or intention of the EP&A Act to regulate every action on land. The definitions of a "Development" or an "Activity" under the EP&A Act must be interpreted in a commonsense manner, so as to determine whether, as a question of fact and degree in the particular circumstances, a particular proposal will fall within those definitions. Among other things, it may be relevant to consider the essential nature of the acts involved and their relative magnitudes of scale and intensity.

It is recommended that each ANO prepares its own internal procedures, protocols or guides to assist in determining whether a proposal falls within Class 1 or Class 2. However, it is not a requirement of this Code for an ANO to do so.

2.2.2 Class 2: The proposal is not assessable under Part 5

It is also important to note that some proposals are subject to the EP&A Act but not assessable under Part 5 of that Act. Such a proposal is a Class 2 proposal under this Code.

By way of a non-exhaustive list of examples, Class 2 includes a proposal which is:

- the subject of an existing development consent;
- subject to s 110E of the EP&A Act;
- exempt Development (under clause 43 of the ISEPP, such as emergency works to maintain or restore a supply of electricity); or
- Development which is not permitted without consent (and as a consequence must be assessed under Part 4 of the EP&A Act).

Class 2 proposals are beyond the scope of this Code.

It is recommended that each ANO prepares its own internal procedures, protocols or guides to assist in determining whether a proposal falls within Class 1 or Class 2. However, it is not a requirement of this Code for an ANO to do so.

2.2.3 Class 3: A SER must be prepared for the proposal

In the event that a proposal does not fall within Classes 1, 2, or 6, Class 3 will be the most common mode of EIA undertaken under this Code. That is, it is intended that the vast bulk of proposals to which this Code applies will be assessed through the SER process.

To belong to Class 3, a proposal must be expected on a reasonable basis to have impacts which are:

1. minor; and
2. neither extensive nor complex.

2.2.4 Class 4: A REF must be prepared for the proposal

To belong to Class 4, a proposal must:

1. fall outside Classes 1 and 2 (see above);
2. fall outside Class 3 because the proposal:

- a. is expected on a reasonable basis to have impacts which go beyond minor impacts; or
 - b. is expected on a reasonable basis to have impacts which are extensive and/or complex; or
 - c. both (a) and (b) above; or
 - d. is for any other reason considered by the ANO, in its discretion, to be a proposal for which it is appropriate for the ANO to produce a REF. For example, an ANO may decide it is appropriate to prepare a REF for a proposal that is likely to be of considerable interest to the public;
- 3. fall outside Class 5 (see below); and
 - 4. fall outside Class 6 (see below).

2.2.5 Class 5: A SIS, but not an EIS, is or are required for the proposal

A proposal belongs to Class 5 if a SIS, but not an EIS, is required for a proposal. The ANO is the determining authority for a Class 5 proposal. However, the concurrence of the CEO of OEH (and/or, in connection with fish or marine vegetation, the Secretary of DTIRIS) is required for a Class 5 proposal in accordance with Division 3 of Part 5 of the EP&A Act. Amongst other things, under Division 3 of Part 5 of the EP&A Act, the ANO is required to comply with the public consultation requirements under s 113 of the EP&A Act.

A REF must be prepared for a Class 5 Proposal.

2.2.6 Class 6: An EIS is required for the proposal

A proposal belongs to Class 6 if the ANO considers that an EIS is required for the proposal. Section 112 of the EP&A Act provides that an EIS will be required if the proposed Activity "is likely to significantly affect the environment".

In such a case, the proposal cannot be self-determined by the ANO because it is declared to be SSI under Item 1(1) of Schedule 3 of the *State Environmental Planning Policy (State and Regional Development) 2011* and, for that reason, requires the Minister's approval.

Item 1(1) of Schedule 3 of the *State Environmental Planning Policy (State and Regional Development) 2011* has the effect that an Activity will be SSI if it meets the following description [emphasis added]:

Infrastructure or other development that (but for Part 5.1 of the Act and within the meaning of Part 5 of the Act) would be an activity for which the proponent is also the determining authority **and would, in the opinion of the proponent, require an environmental impact statement to be obtained** under Part 5 of the Act.

A Class 6 proposal falls outside the scope of this Code.

2.3 Stage 2: Assessment and Evaluation

The object of Stage 2, Assessment and Evaluation, is for the ANO, pursuant to s 111 of the EP&A Act, to develop an understanding of the receiving environment, examine the interaction of the Class 3, 4, or 5 proposed Activity with the environment and then identify the nature, scale and extent of likely impacts.

The Stage 2 process under this Code for Class 3, 4, and 5 proposals is divided into three phases:

- Phase 1 - Scoping and legislative review (see Sections 2.3.1 and 2.3.2 of this Code)
- Phase 2 - Assessment and evaluation (see Sections 2.3.3, 2.3.4, and 2.3.5 of this Code)

- Phase 3 - Consultation (see Sections 2.3.6, 2.3.6, and 2.3.8 of this Code)

These phases are often interrelated and/or occur simultaneously. They have been laid out in this Code in sequential order for the purposes of structure, but do not necessarily need to be applied in this sequence in practice. Further, in practice, it is likely that Stage 2 will be completed contemporaneously with Stage 3, which is the preparation of the EIA documentation which documents the Stage 2 process.

Often the nature of the Activity will dictate how detailed the assessment process will need to be. For instance, a Class 4 Activity will require a more intense level of investigation and assessment than a Class 3 Activity. While the degree of consideration may differ according to the Activity, in every case the ANO must achieve the outcomes outlined in Sections 2.3.2, 2.3.4, and 2.3.7, of this Code.

2.3.1 Phase 1 - Scoping and legislative review

This phase of the assessment process is where an ANO describes the proposed Activity, justifies its need and begins to map the potential environmental triggers associated with the Activity and resources required to conduct the assessment. In the case of a Class 4 or 5 Activity, this phase should also include an assessment of alternative options considered.

To clarify the scope of the Activity, the ANO may wish to consider the legislative provisions applicable to the Activity, resources required, possible consultation requirements and a desktop review of the proposed site using tools such as Geographical Information System mapping that identify any environmental triggers.

In some cases it may be clear from this early stage what the likely degree of environmental impact will be and the corresponding level of assessment. If this is not clear, the results of the preliminary investigation may necessitate revisiting the conclusion arrived at during Stage 1. Consideration of recent projects that could serve as a precedent may also be useful.

2.3.2 Outcomes from phase 1

This scoping phase may occur in conjunction with other phases of the assessment process. However, as a minimum, compliance with this Code in relation to this phase will be demonstrated if an ANO's final EIA documentation produced during Stage 3:

1. contains a plain English description of the Activity including its geographic location, relationship to the site environment, an identification of landowners, and a description of current land uses;
2. explains the need for the Activity and its justification including an assessment of any alternative options considered;
3. documents the ANO's consideration of whether early community consultation is required; and
4. assesses the resources required for Stage 2 of the EIA process under this Code. This can range from an identification of appropriate data sets, field work and mapping tools, through to specialist expertise that may be needed for Activities with more complex impacts.

2.3.3 Phase 2 - Assessment and Evaluation

This phase is focused on drawing together the necessary data, resources and expertise required to conduct a rigorous and structured assessment of an Activity's environmental impacts. The scope of the assessment and evaluation phase will be dictated by the complexity of the likely environmental impacts of the proposed Activity.

The two key elements of phase 2 are information gathering and assessment.

(i) Information gathering

An ANO must use this phase to extend upon the work started in phase 1 and confirm whether any other licences or approvals are required and/or if the Activity is regulated by other NSW or Commonwealth legislation. It is the responsibility of the ANO to identify the relevant legislative requirements that may be triggered by an Activity. For convenience, a non-exhaustive list of common NSW and Commonwealth statutory approvals and environmental triggers that may be relevant is supplied in Appendix B.

Similarly, it is also an ANO's responsibility to ensure it is using the best available information to identify the extent and nature of impacts. This includes conducting field work (if required), investigative studies, and being aware of information that other agencies supply (including Threatened Species mapping) that must be considered as part of the assessment process.

Information collection should also include an examination of the potential community impacts from the Activity. For that reason, it will often be appropriate for phase 2 to occur simultaneously with phase 3 (consultation).

(ii) Assessment

When undertaking an assessment, the ANO should ensure that the assessment is informed by appropriate resources and expertise. It is a requirement of this Code that an ANO:

- utilises staff with the appropriate expertise to competently assess impacts and, in the case of an Activity which is likely to have more complex impacts, ensuring that the necessary skill and expertise is available; and
- ensures that up-to-date tools and data sets are used to assess environmental assets, risks and features within an area.

The identification of an Activity's environmental impact is the key goal of this phase. As such, the assessment processes of ANOs should be flexible enough to allow for the conclusion reached in Stage 1 to be revisited as necessary in the face of evidence gathered during Stage 2. That is, an ANO should be open to reclassifying the Activity into a different class under this Code. Having appropriately trained and qualified staff collect and assess information about impacts and risks helps facilitate this. The assessment process must be allowed to operate in a manner that does not present barriers to Activities moving between classes if necessary.

Finally, an ANO must adequately document all aspects of the assessment process including:

- identifying the information collected and environmental impacts identified;
- identifying resources and expertise used; and
- outlining the assessment and consideration of impacts and how they informed any conditions that may be proposed.

This documentation will in any case be required to discharge the ANO's obligations under this Code in relation to Stage 3, and also to ensure that the information collected by the ANO is adequate to support any audits and can be made publicly available if required (see sections 4 and 5 of this Code below).

The ANO's role as a Nominated Determining Authority

The ANOs may be nominated determining authorities (**NDAs**) under the EP&A Act.

In cases where multiple determining authorities are required to grant licences or approvals under Part 5 before an Activity can proceed, there is an established process under the EP&A Act for nominating one of the relevant determining authorities to be responsible for preparing environmental assessment documentation. Other determining authorities can use this documentation to assess the likely impacts of an Activity before determining whether a specific licence or approval should be granted. Having a NDA removes the need for multiple environmental assessments to be conducted by different agencies for the same Activity.

Compliance with this Code will ensure the assessment documentation prepared by the ANO as a NDA is robust and can be relied on by other agencies. In some instances an agency may still be required to conduct its own assessment of the likely environmental impact of an activity (e.g. some Activities proposed in National Parks or wilderness areas).

For projects where impacts are extensive and/or complex, an ANO acting as an NDA must consult with relevant agencies throughout the assessment process. This will ensure the assessment documentation contains all necessary information for agencies to make a determination for a licence/approval.

2.3.4 Outcomes from phase 2

The assessment and evaluation phase may occur in conjunction with other phases of the broader assessment process as outlined in this section. However, as a minimum, compliance with this Code in relation to this phase will be demonstrated if an ANO's final EIA documentation produced during Stage 3:

1. confirms the appropriate assessment and approvals process (ie whether the Activity falls within Class 3, 4, 5, or 6 under this Code);
2. confirms if another licence or approval is required or if the Activity is regulated by other State or Commonwealth legislation;
3. when the ANO is performing the NDA role, ensures the environmental assessment information for the Activity addresses all factors agencies will need to consider to determine whether a separate licence or approval can be issued;
4. records, for an Activity where the ANO is acting as an NDA, that the ANO consulted with agencies to clarify any specific information that should be covered by the assessment documentation;
5. contains adequate information to identify the extent and nature of the individual impacts associated with the Activity. This must include identifying any potential community impacts;
6. provides evidence that it has been prepared by persons appropriately trained to consider and assess the impacts of the Activity; and
7. records the steps taken by the ANO to address the outcomes required to be achieved under this Code. Notably, the EIA documentation must record information collected about potential impacts, and assessment and consideration of these impacts.

2.3.5 Phase 3 - Consultation

It is emphasised that this Code regulates only those public consultation obligations of an ANO which relate to EIA undertaken by an ANO as a Part 5 Determining Authority. Nothing in this Code is to be taken to limit any public consultation obligations arising from other aspects of an ANO's business.

ANOs must abide by the general law in relation to community consultation and notification, including the provisions in the ISEPP, the EP&A Act and the ES Act relating to public notification. In

this Code, for convenience, notification and consultation requirements in force from time to time under the general law are referred to as **General Law Consultation Requirements** while the additional consultation requirements imposed on ANOs under this Code are referred to as **Additional Consultation Requirements**.

2.3.6 Additional Consultation Requirements for Class 4 and 5 Activities

This section of this Code sets out the Additional Consultation Requirements which an ANO must follow when undertaking EIA for a Class 4 or 5 Activity. For the avoidance of doubt, nothing in this Code has the effect that an ANO is not subject to General Law Consultation Requirements in respect of any Activity.

An ANO must develop a Consultation Protocol

Within three months of this Code commencing to apply to an ANO, the ANO must publish on its website a protocol setting out the Additional Consultation Requirements it will observe when conducting EIA for Class 4 and 5 Activities in respect of consultation with, and notification of, both Government Agencies and members of the public (a **Consultation Protocol**).

A Consultation Protocol developed by an ANO must:

- incorporate the interim Additional Consultation Requirements for Class 4 and 5 Activities which are set out in this Code, in respect of consultation with the Secretary and Government Agencies;
- commit the ANO to comply with Additional Consultation Requirements in respect of consultation with members of the public for Class 4 and 5 Activities, based on the nature and complexity of environmental impacts, having regard to the Public Participation Spectrum developed by the International Association for Public Participation (IAP2), and consideration of the interim Additional Consultation Requirements under this Code; and
- describe the procedure that the ANO will follow in order to decide what Additional Consultation Requirements in respect of consultation with members of the public will apply to a particular proposed Class 4 or 5 Activity.

Until and unless a Consultation Protocol comes into force through being published on the website of an ANO, the ANO must abide by the interim Additional Consultation Requirements set out below. ANOs are encouraged to develop a Consultation Protocol which provides for a more tailored and efficient approach to consultation than that provided for by the interim Additional Consultation Requirements below.

A Consultation Protocol, once in force, can be varied in two ways. First, an ANO must vary its Consultation Protocol if it is requested to do so by IPART, within a reasonable timeframe nominated by IPART. IPART may only request a variation to a Consultation Protocol if:

1. IPART receives a complaint which identifies a deficiency in an ANO's consultation practices as a Determining Authority, either generally or in relation to a particular Activity; or
2. reporting by an ANO under section 5.2 of this Code discloses a breach or potential breach of the Code relating to an ANO's consultation practices as a Determining Authority, or otherwise discloses a deficiency in those practices; or
3. an audit conducted under section 5.3 discloses a breach or potential breach of the Code relating to an ANO's consultation practices as a Determining Authority, or otherwise discloses a deficiency in those practices.

Secondly, an ANO may vary a Consultation Protocol from time to time by publishing a revised Consultation Protocol on its website. However, an ANO cannot vary a Consultation Protocol in a

manner which is inconsistent with a previous variation requested by IPART, unless it has IPART's written agreement to do so.

Interim Additional Consultation Requirements for Class 4 and 5 Activities

The following interim Additional Consultation Requirements apply to Class 4 and 5 Activities (ie where a REF must be prepared) until and unless a Consultation Protocol is in force.

1. In respect of consultation with Government Agencies, the ANO must:
 - a. write to each of the Government Agencies the ANO considers relevant to:
 - i. describe briefly the proposed Activity, including its location;
 - ii. describe briefly the types of environmental impacts which the ANO reasonably apprehends (from Stage 1 of the EIA process under this Code) that the proposed Activity may have;
 - iii. invite the agencies to make submissions on the proposed Activity to the ANO by a nominated date, no earlier than 20 business days from the date of the correspondence; and
 - iv. provide the contact details of a nominated contact person at the ANO to receive submissions in writing;
 - b. in a case where a proposed Activity is intended to be carried out within, or partially within, Strategic Transport Land, there is an objection to the proposed Activity from a Government Agency, a basis for that objection is that the proposed Activity is claimed to materially interfere with a Government Agency's present or future provision of transport infrastructure, and that claim is particularised in the objection by reference to a plan or strategy which has been adopted by a Government Agency:
 - i. write to the Secretary to explain the nature of the objection by the Government Agency and the ANO's position on that objection, and to request the Secretary's written advice in relation to the objection; and
 - ii. defer the final discharge of its duty under s 111 of the EP&A Act until either:
 - A. the Secretary provides written advice in relation to the objection; or
 - B. fifteen business days pass from the date upon which the Secretary received the ANO's written notice;
 - c. take into account any submissions received from a Government Agency regarding the proposed Activity and any advice received from the Secretary regarding the proposed Activity, and document, during Stage 3, how this was done;
 - d. in the case of a proposed Activity that is intended to take place within, or partially within, an Environmentally Sensitive Area of State Significance:
 - i. notify the Secretary in writing that it proposes to carry out the Activity in an Environmentally Sensitive Area of State Significance; and
 - ii. describe briefly the proposed Activity, including its location; and
 - iii. identify the Environmentally Sensitive Area of State Significance in question.

- e. in the event that the Activity ultimately takes place, write to each Government Agency that made a submission regarding the Proposed Activity to state:
 - i. when the ANO expects to commence the Activity; and
 - ii. how the Government Agency can obtain a copy of the EIA documentation and Decision Statement for the Activity from the ANO's website; and
 - f. in the case of an Activity involving construction work, within 20 business days of the construction phase being completed, notify in writing any Government Agency that had previously requested notification of the completion of construction.
2. In respect of consultation with members of the public, the ANO must:
- a. publish a notice on its website and in a newspaper which circulates in the region of the location of the proposed Activity, or in NSW generally (where appropriate), which:
 - i. describes briefly the proposed Activity, including its location;
 - ii. describes briefly the types of environmental impacts which the ANO reasonably apprehends (from Stage 1 of the EIA process under this Code) that the proposed Activity may have;
 - iii. invites members of the public to make submissions on the proposed Activity to the ANO by a nominated date, no earlier than 20 business days from the date of the publication of the notice; and
 - iv. provides the contact details of a nominated contact person at the ANO to receive submissions in writing;
 - b. take into account any submissions received from a member of the public regarding the proposed Activity and document during Stage 3 how this is done; and
 - c. in addition to (a) and (b) above and the General Law Consultation Requirements:
 - i. consider whether, and to what extent, further measures are appropriate for the Activity in respect of consultation with members of the public;
 - ii. in considering whether, and to what extent, further consultation measures are appropriate for the Activity in respect of consultation with members of the public, have reference to the IAP2 spectrum; and
 - iii. document its consideration of whether, and to what extent, further consultation measures are appropriate for the Activity in respect of consultation with members of the public in such a way that a reasonable person reviewing the documentation could understand how the ANO reached its conclusions on the subject, and why the ANO considers that those conclusions are consistent with the IAP2 spectrum.

Designated Strategic Transport Land

The Secretary may designate any land as Designated Strategic Transport Land for the purposes of this Code by causing notice of the designation to be published in the Gazette.

The Secretary may, by notice published in the Gazette, in relation to any Designated Strategic Transport Land, terminate its status as Designated Strategic Transport Land.

A notice designating land to be Designated Strategic Transport Land, or terminating the status of any land as Designated Strategic Transport Land, will be effective for that purpose if it:

1. contains a statement to the effect that it is a notice given for the purpose of designating land to be Designated Strategic Transport Land under this Code, or terminating the status of land as Designated Strategic Transport Land for the purposes of this Code, or both; and
2. identifies the land the subject of the notice in such a way as to enable a reasonable person in the position of an ANO to ascertain the location of the land. By way of example, and without limitation, the notice may identify the land:
 - a. by reference to an existing plan created by the Department or any other Government Agency or local government authority; or
 - b. by reference to a plan created by the Department specifically for that purpose.

The Department will provide each ANO with a copy of any notice in relation to Designated Strategic Transport Land which is published in the Gazette, as well as a copy of any plan which is referred to in such a notice.

2.3.7 Outcomes from phase 3

As a minimum, in order to comply with this Code, an ANO's final EIA documentation produced during Stage 3 must show evidence that:

1. the ANO has used all reasonable endeavours to determine what the applicable General Law Consultation Requirements are;
2. the ANO has met its General Law Consultation Requirements; and
3. either:
 - a. the ANO has complied with the relevant aspects of a Consultation Protocol which is in force under this Code and applies to the Activity in question; or
 - b. if no such Consultation Protocol applies, the ANO has complied with the interim Additional Consultation Requirements which are applicable to the Activity under this Code.

Further, it is a requirement of this Code that an ANO must keep written records of all consultation undertaken pursuant to this Code. The system employed to maintain such records is a matter for each ANO to determine. However, such records must be:

1. kept for five years after the communication to which they relate took place;
2. be capable of being produced to a third party within a reasonable time frame, being in no case longer than 20 business days; and
3. kept to a standard where a reasonable person inspecting the records could understand the essential nature of the communications that took place without reference to any material extrinsic to the records.

2.4 Stage 3: Preparation of EIA documentation

The object of Stage 3 is for the ANO to use the assessment and evaluation conducted during Stage 2 to prepare EIA documentation that, when presented to an authorised person, enables that person to discharge the duty under s 111 of the EP&A Act on behalf of the ANO. The EIA documentation prepared during Stage 3 must enable the authorised person to undertake the

determination function in respect of a Class 3, Class 4, or Class 5 proposal with a degree of effort and detail that is commensurate with the scope and likely impacts of the Activity.

As a general rule, Part 5 assessment follows a risk based approach, requiring a more detailed assessment to be made for Activities that:

- are expected to have impacts that are complex;
- affect a large number of people;
- have a number of likely environmental impacts or a single significant impact; and/or
- have environmental impacts that are medium to high risk.

2.4.1 Types of assessment documentation

ANOs must document the EIA process for Class 3, 4, and 5 Activities using the SER and REF as a model. This Code is not intended to prescribe that these documents be structured or titled in a particular way. That is intended to be a matter for an ANO to determine itself. It will not be a breach of this Code if an ANO fails to produce a document titled or structured in a particular way, so long as it produces a document or documents which satisfy the minimum requirements specified in sections 2.4.2 and 2.4.3 below.

2.4.2 Summary environmental report (SER)

Where a proposal for an Activity falls within Class 3 under this Code, a SER must be used to document the outcomes of the Part 5 assessment. It is expected that the SER will continue to be the most common level of assessment for ANOs under this Code.

Given the SER addresses environmental impacts which are reasonably expected to be minor and neither extensive nor complex, it does not need to be highly technical or delve exhaustively into each of the Activity's impacts. Rather, it should clearly and convincingly demonstrate that environmental impacts are sufficiently unlikely or sufficiently insignificant that further investigation and documentation are not warranted.

Without limiting any of the mandatory outcomes identified in Sections 2.3.2, 2.3.4, and 2.3.7 of this Code, a SER must contain the following:

- ***The proposed Activity*** - The SER should clearly describe the Activity that is proposed and any mitigation measures to be implemented. ANOs are encouraged to develop a standard set of environmental management measures to adopt in each SER, and to publish these on their website.
- ***The proponent, determining authorities and any required approvals*** - The SER should identify the proponent and all determining authorities and required approvals for the Activity.
- ***The environment of the Activity*** - The SER should provide adequate description of the environment of the site and the surrounding area to demonstrate the relationship between the Activity and its environment.
- ***The impacts of the Activity*** - The SER should identify any environmental impacts the Activity may have. This need not be detailed, but should state the outcomes of any investigation, identify any potential environmental impacts and explain why the environmental risk from potential impacts is low. This section should include a summary of the data sets and sources an ANO consulted when preparing the SER.
- ***Consultation*** - the SER must record the consultation undertaken for the purposes of preparing the SER in accordance with Section 2.3.7 of this Code.

- **Summary and conclusions** - This section should provide an overall picture of the environmental impacts of the Activity and the basis for concluding that further environmental assessment is not warranted. This section should also include any mitigation measures or ongoing maintenance requirements the SER has identified as necessary during construction and/or across the life of the Activity.

2.4.3 Review of environmental factors (REF)

As with a SER, a REF is a document produced to record an ANO's assessment of the environmental impacts of a proposed Activity. The REF can serve two purposes:

- Where it is unclear whether the proposed Activity is likely to significantly affect the environment, preparing a REF can assist in determining whether an EIS and/or a SIS should be prepared. In this sense, a REF can be a precursor to an EIS, or a precursor and adjunct to a supplementary REF and SIS.
- Where it is clear that the proposed Activity is not likely to significantly affect the environment, or where the ANO decides on the basis of the contents of a REF that a proposed Activity is not likely to significantly affect the environment, the REF serves as the primary document showing that the ANO has examined and taken into account the Activity's environmental impacts.

Without limiting any of the mandatory outcomes identified in Sections 2.3.2, 2.3.4, and 2.3.7 of this Code, a REF must contain the following elements:

- **The proposed Activity** - The REF must clearly describe the Activity that is proposed, including the nature and purpose of the Activity and the sites where the Activity is to take place. All aspects of the proposed Activity should be described in sufficient detail to demonstrate the Activity's potential for impacts on the environment. The REF should discuss whether there are any viable alternatives to the proposed Activity and any mitigation measures to be implemented.
- **Certification** - The REF must contain a statement signed and dated by the person with principal responsibility for preparing the REF (being an employee or agent of the ANO) that "I certify that I have prepared the contents of this REF and, to the best of my knowledge, it is in accordance with the Code approved under clause 244K of the *Environmental Planning and Assessment Regulation 2000*, and the information it contains is neither false nor misleading".
- **The proponent, determining authorities and any required approvals** - The REF should identify the proponent and all determining authorities and required approvals for the Activity.
- **The environment of the Activity** - The REF should include a description of the environment of the site and the surrounding area, with a focus on aspects of the environment that are of particularly high value, sensitive to impacts of the type the Activity will have, or of importance to the community. The REF must identify and describe Threatened Species, Populations and Ecological Communities that are likely to occur in the area affected by the Activity.
- **The impacts of the Activity** - The assessment of the potential impacts of the Activity are the most important part of a REF. The REF should document likely environmental impacts for all phases of the Activity and describe their extent, size, scope, intensity and duration. As a minimum, the REF should document consideration of each of the factors listed in clause 228(2) of the EP&A Reg and document consideration of each of the factors listed in section 5A of the EP&A Act in relation to Threatened Species, Populations and Ecological Communities (including fish and marine vegetation), and their Habitats. This section should also detail the sources and data the ANO relied on when preparing the REF.

- **Mitigating measures that will apply to the Activity** – In the development of the REF, an ANO may conclude that the Activity should be modified or adapted so that certain measures designed to mitigate the environmental impacts of the Activity are observed. These mitigating measures should be documented in the REF.
- **Summary of impacts** - The REF should include a section that summarises the individual impacts of the Activity and provides an overarching view of the impact of the Activity on the environment.
- **Consultation** – The REF must record the consultation undertaken for the purposes of preparing the REF in accordance with Section 2.3.7 of this Code.
- **Conclusions regarding an EIS and/or a SIS** - The REF should describe: (1) whether the Activity is likely to significantly affect the environment, in which case an EIS is required; and (2) whether the Activity is likely to significantly affect Threatened Species, Populations, Ecological Communities or their Habitats, in which case a SIS is required. The REF should describe the reasons for these conclusions and may reference the more detailed impact assessments in the body of the REF in support. In instances where the REF has been prepared by a third party it is important to note that irrespective of the conclusion of the REF, an ANO is ultimately responsible for deciding whether a proposed Activity is likely to significantly affect the environment.

2.5 Stage 4: Determination by an authorised person

Objects of Stage 4

The object of Stage 4 is for an authorised person, on behalf of the ANO, to:

- discharge the ANO's duty as a determining authority under s 111 of the EP&A Act by considering a Class 3, 4, or 5 proposal based on the EIA documentation prepared during Stage 3; and
- produce a Decision Statement.

The determination is to be based on the assessment and evaluation conducted by the ANO in Stage 2.

As stated throughout this Code, during Stage 3 the ANO is required to have documented the steps it took throughout the preceding steps in the EIA process including material that supports the scoping, assessment and consultation processes within the SER or REF. In Stage 4, these documents form the evidentiary basis of a determination.

What types of decision can the ANO make under this Code?

If the authorised person has considered a SER, the authorised person may decide on behalf of the ANO:

1. that no EIS or SIS is required to be prepared in respect of the subject Activity. Such a decision may be conditional or unconditional. If the decision is conditional, the conditions must be recorded in the Decision Statement. If a decision of this type is made, the Activity may proceed in accordance with the decision without further EIA;
2. that either an EIS or a SIS or both is or are required in respect of the subject Activity; or
3. that there is insufficient information contained in the SER for the authorised person to discharge the duty under s 111(1) of the EP&A Act such that either:
 - a. a supplement to the SER; or

- b. a REF;

should be prepared.

If the authorised person has considered a REF, the authorised person may decide on behalf of the ANO:

1. that no EIS or SIS is required to be prepared in respect of the subject Activity. Such a decision may be conditional or unconditional. If the decision is conditional, the conditions must be recorded in the Decision Statement. If a decision of this type is made, the Activity may proceed in accordance with the decision without further EIA;
2. that either an EIS or a SIS or both is or are required in respect of the subject Activity; or
3. that there is insufficient information contained in the REF for the authorised person to discharge the duty under s 111 of the EP&A Act such that a supplement to the REF should be prepared.

2.5.1 Outcomes from Stage 4

The determination should occur after the assessment and evaluation phase and after any consultation required to inform the determination has been conducted. This does not limit ongoing community consultation and communication that may be required throughout Stage 5 (implementation). When making a determination, the ANO must achieve the following outcomes.

1. A determination must be made by an appropriately authorised person. This person must not be the same person who conducted the assessment.
2. The determination must be documented in a written statement signed by the authorised person on behalf of the ANO. For simplicity, this Code will refer to this statement as a **Decision Statement**. Under this Code, the form of a Decision Statement is left as a matter for the ANO to determine. For a SER a Decision Statement can be a brief statement, perhaps using a standard form which is completed by the authorised person and adapted as necessary to fit the requirements of each particular case. For a REF a more detailed Decision Statement is required, in the nature of a report which documents the authorised person's engagement with the REF, including the documentation of consultation with agencies and the public, and explains clearly the reasons why the key conclusions in the REF were or were not accepted.
3. The Decision Statement must satisfy at least the following basic requirements.
 - a. The Decision Statement must state the decision. The types of decisions available to the authorised person to make on behalf of the ANO are set out above under the heading "What types of decision can the ANO make under this Code?";
 - b. The Decision Statement must expressly state whether or not the decision made by the authorised person on behalf of the ANO is a conditional decision.
 - c. If a conditional decision is made, the Decisions Statement must record:
 - i. the conditions of the decision; and
 - ii. the reasons why these conditions are required.

2.6 Stage 5: Implementation

2.6.1 When may implementation commence?

Stage 5 begins when a Class 3, 4, or 5 Activity has been the subject of a determination in Stage 4, which allows the Activity to proceed without further EIA. Implementation must not occur until:

1. a determination is made which allows the Activity to proceed without further EIA; and
2. in a case where the determination is subject to certain conditions being observed before implementation begins, those conditions being observed.

For the avoidance of doubt, nothing in this Code authorises an ANO to commence implementing an Activity without first obtaining all licences and approvals required by law. For example, this Code does not authorise implementing an Activity without first obtaining an Environment Protection Licence under the Protection of the *Environment Operations Act 1997*, in circumstances where such a licence is required.

2.6.2 Implementation documentation

An ANO must document its implementation of an Activity which is subject to this Code in accordance with this section. The purpose of implementation documentation is to address how environmental impacts will be managed during and after the construction or other implementation process for the Activity. As mentioned throughout this Code, the degree of detail required in this document will depend on the scope of the Activity and the nature of its impacts. An ANO is free to determine how it presents this information.

For Class 3 Activities (ie with impacts that are expected on a reasonable basis to be minor and neither extensive nor complex), construction impacts or ongoing maintenance requirements can be considered as part of the SER. That is, it is acceptable under this Code for no separate implementation documentation to be prepared for a Class 3 Activity, if impact mitigation procedures have been built into the SER prepared during Stage 3.

For Class 4 and 5 Activities (ie with impacts expected to go beyond minor and/or with impacts expected to be extensive or complex) the ANO must prepare an implementation document which is separate to the REF. The objective of the implementation documentation for a Class 4 or 5 Activity is to serve as a practical reference document that enables the ANO to ensure that any:

- measures designed to mitigate the environmental impacts of the Activity adopted during Stage 3; and
- conditions of the determination made during Stage 4;

are observed during implementation and, where applicable, after implementation is complete.

An ANO may choose to prepare a CEMP to meet this objective, but the form of the implementation documentation is a matter for the ANO.

In addition, an ANO may, at its discretion, appoint an Environmental Management Representative, who is responsible for monitoring the implementation and ensuring it complies with any applicable conditions, safeguards or mitigation measures.

An ANO must have in place a structured approach to its environmental management, for example, procedures, training, records, inspections, objectives and policies.

2.6.3 Outcomes from Stage 5

Where an Activity is to be implemented by the ANO or by a third party on its behalf, the ANO must adequately document how the Activity will be implemented. As a minimum, the ANO must achieve the following outcomes:

1. construction/implementation of an Activity must not occur until a determination for the Activity has been made under Stage 4 which allows the Activity to proceed without further EIA;
2. in a case where the determination is subject to a condition requiring the ANO to prepare documentation prior to the commencement of implementation, such as a CEMP or the like, that documentation must be prepared before implementation of the Activity commences;
3. the documentation outlined in 2 above should be reflective of an Activity's scope and impacts and be detailed enough that personnel working on the site are clear about any conditions, safeguards, or mitigation measures which must be observed; and
4. for Class 4 and 5 Activities with conditions of determination, or measures designed to mitigate the environmental impacts of the Activity adopted during Stage 3, an ANO must record, at the conclusion of the construction phase of an Activity, how and whether those conditions and measures were observed. How this outcome is achieved is a matter for the ANO, but, the documentation must be sufficient to enable a reasonable person who reads the documentation to understand, without reference to any extrinsic material, whether the conditions and measures in question were observed, and the nature of and reasons for any non-compliance.

The above outcomes must be achieved whether the Activity is implemented by an ANO itself, or by a third party on behalf of the ANO, such as an ASP. For the avoidance of doubt, the outcomes do not apply to an Activity not implemented by or on behalf of an ANO.

3. Modifications

Sometimes the parameters of an Activity change in response to issues raised by stakeholders, or in response to new information, or some other consideration which results in the modification of the Activity.

3.1 Modification of an Activity prior to a determination

If a proposed Activity is modified in a material way before Stage 4 (determination) and the modification would increase the environmental impacts of the Activity overall, the ANO must repeat the steps outlined in Stage 2 (ie the scoping and legislative review, assessment and evaluation, and consultation phases) in respect of the modification to the proposed Activity, and also produce an addendum to the SER or REF or alternatively a new SER or REF, if a SER or REF has earlier been finalised.

3.2 Modification of an Activity after a determination

A determination made under this Code can be modified by an authorised person issuing a further Decision Statement.

If the proposed modified Activity would have increased environmental impacts compared to the Activity the subject of the original Decision Statement, Stages 1-3 must be followed in respect of the modification before any such further Decision Statement is permitted to be made.

A Decision Statement modifying a determination must state the reasons for the modification.

3.3 Consultation for modifications

Where an Activity is modified, either before or after a determination has been made in respect of the Activity, such that the ANO carries out further consultation for the Activity, only the aspects of the Activity which are proposed to be modified in a material way are required to be the subject of that further consultation.

Further, a Consultation Protocol in force under this Code can provide for specialised Additional Consultation Requirements that apply when:

1. a proposed Activity is modified before a determination is made in Stage 4; or
2. an existing determination under this Code for an Activity is modified.

4. Retention of and access to EIA Documents

4.1 Background and purpose of this section

The Former Network Operators were subject to the *Government Information (Public Access) Act 2009* (**GIPA Act**). Being subject to the GIPA Act meant the Former Network Operators were required to either proactively release and/or provide access to documents related to the exercise of their functions. The GIPA Act provides for this access as the public interest is served by allowing members of the public to have access to information about Government decision making processes.

With the transfer to private management, an ANO is no longer subject to the GIPA Act. However, an ANO's continued role as a determining authority under Part 5 and its delivery of an essential service to NSW means there is an ongoing public interest in the public having access to documents of ANOs relating to EIA.

Consistently with s 111A(2)(d) of the EP&A Act, the purpose of Section 4 of this Code is to mandate a simple set of obligations which ANOs must observe regarding retaining and facilitating access to their documents which relate to EIA.

4.2 What documents are subject to Section 4 of this Code?

Five types of documents are the subject of Section 4 of this Code. They are:

1. all SERs and REFs which are prepared by an ANO under this Code, are submitted to an authorised person for determination, and the consideration of which leads to the issue of a Decision Statement that has the consequence that an Activity is permitted to be implemented without the need for an EIS. For the purposes of Section 4 of this Code, these documents are referred to as **Final EIA Documentation**. For clarity:
 - a. a draft version of a SER or REF is not Final EIA Documentation;
 - b. a version of a SER or a REF which is never submitted to an authorised person for determination is not Final EIA Documentation;
 - c. a document which is adopted as part of a SER or REF (whether formally adopted as an appendix, annexure etc, or implicitly adopted because the analysis in the SER or REF relies on the document) is Final EIA Documentation; and
 - d. a SER or a REF which is submitted to an authorised person for determination is not Final EIA Documentation if the authorised person:
 - i. has not made a determination in respect of the SER or REF; or
 - ii. made a determination that had the consequence that the Activity the subject of the SER or REF could not proceed, or could not proceed without an EIS;
2. drafts of SERs and REFs which are the most current version of a SER or a REF at the time when an application for access to a draft version of a SER or REF is received under s 4.5 of the Code;
3. all Decision Statements issued by an authorised person under this Code;
4. any records of consultation undertaken by an ANO pursuant to this Code. For the purposes of Section 4 of this Code, these documents are referred to as **Consultation Documentation**;

5. any implementation documentation which is produced by an ANO in accordance with Section 2.6.4 of this Code. For the purposes of Section 4 of this Code, these documents are referred to as **Implementation Documentation**. For clarity:
 - a. any documentation produced by an ANO in accordance with Section 2.6.4 of this Code for the purpose of recording how the conditions of a determination of a Class 4 or 5 Activity were met is subject to Section 4 of this Code.

4.3 What documents must an ANO retain?

An ANO must retain:

1. Final EIA Documentation, for at least five years from the date upon which a Decision Statement relating to the Activity the subject of the document was issued;
2. a Decision Statement issued under this Code, for at least five years from the date the Decision Statement was issued;
3. Consultation Documentation, for at least five years from the date the communication recorded in the document in question was made; and
4. Implementation Documentation, for at least five years from the date the implementation of the Activity to which the document in question relates was completed.

An ANO must retain the most current draft of a SER or a REF until the earlier of:

1. the time when it ceases to be the most current draft of a SER or a REF, because it is replaced as such; or
2. five years from its creation.

The system employed to manage the documents required to be retained by Section 4 of this Code is a matter for each ANO to determine. However, the system must enable an ANO to produce any document required to be retained by Section 4 of this Code to a third party within 20 business days.

4.4 What documents must an ANO publish on its website?

It is a requirement of this Code that an ANO publishes on its website, and makes available for download without cost copies of:

1. all Final EIA Documentation for Class 4 and 5 Activities, within 20 business days of the issue of a Decision Statement relating to the Activity the subject of the document;
2. all Decision Statements for Class 4 and 5 Activities, within 20 business days of issue;
3. any Final EIA Documentation or Decision Statement for a Class 3 Activity which is released to a member of the public under Section 4 of this Code, within 20 business days of release;
4. this Code as in force from time to time, within 20 business days of commencement or modification; and
5. any Consultation Protocol in force from time to time under this Code which relates to the ANO in question.

The above documents are the minimum which must be published under this Code. ANOs are encouraged, but not required, to publish such other documents as will facilitate public participation in EIA undertaken by ANOs under this Code.

4.5 The process by which members of the public can apply for access to documents

Any member of the public may apply to an ANO for access to a document or documents which is or are subject to Section 4 of this Code. Upon such an application being received by an ANO, it is a breach of this Code for the ANO to fail to provide the applicant with a copy of the document/s sought by the application within 20 business days except to the extent that one or more of the circumstances below applies.

1. The application is not a valid application because it does not meet the following formal requirements:
 - a. it must be in writing sent to or lodged at an office of the ANO;
 - b. it must clearly indicate that it is an application under this Code;
 - c. it must be accompanied by payment of \$30 as an application fee;
 - d. it must state a postal address as the address for correspondence in connection with the application; and
 - e. it must include such information as is reasonably necessary to enable the document/s applied for to be identified.
2. The application seeks a document other than a document which the ANO to which the application is addressed is required to retain under Section 4 of this Code, or a document which, to the best of the ANO's knowledge after making reasonable attempts to investigate the matter, does not exist.
3. The application seeks a document to which Schedule 1 of the GIPA Act would apply, if the ANO in question was subject to that Act.
4. The ANO has written to the applicant within 20 business days of receiving the application to advise that the ANO expects that the application will take more than one hour to process, and that the ANO has decided to impose a processing fee on the applicant based on a reasonable estimate of how long it will take for the ANO to process the application.

In such a case, the ANO is only obliged to provide the applicant with the applied for document/s if the applicant pays the imposed processing fee within 20 business days of the ANO giving notice in writing of the imposition of the processing fee. If the applicant pays the imposed processing fee, the ANO must produce the applied for document/s within 20 business days of payment.

A processing fee imposed by an ANO is not to exceed \$30 for each employee-hour or part thereof required to process the application beyond the first hour. The correspondence advising the applicant of the imposition of a processing fee must contain an explanation as to how the processing fee has been calculated including an estimate of how the ANO employee who processes the request will spend his or her time in processing the request.

5. The ANO believes on reasonable grounds that the application is frivolous or vexatious.

Further, and despite section 4.3 above, it is a breach of this Code for an ANO to cease to retain a document which is sought by a member of the public in accordance with this section 4.5 after the ANO receives the application seeking that document.

4.6 How must an ANO respond to a request for access to a document under Section 4 of this Code?

An ANO must respond to a request for access to a document under Section 4 of this Code within 20 business days of the application being made by:

1. providing a copy of the applied for document/s to the applicant by any reasonable means; or
2. writing to the applicant for the purpose of imposing a processing fee; or
3. writing to the applicant to decline to provide the applied for document/s.

If the ANO writes to the applicant to decline to provide the applied for document/s it must briefly explain in writing why it has done so, by reference to the applicable provision of this Code.

An ANO is not required to respond to an application it reasonably believes is frivolous or vexatious, or where the ANO is unable to contact an applicant.

4.7 What action can an applicant for access to a document take if it is dissatisfied with an ANO's decision?

A person who is dissatisfied with a decision of an ANO to decline to grant access to a document applied for under Section 4 of this Code can apply to IPART for a direction that the ANO is to provide the person with access to the document/s in question. An ANO is deemed to have declined to grant access to a document or documents if it fails to respond to a request for access in a manner required by this Code within 20 business days of an application for access being made.

An application to IPART for such a direction must:

1. be in writing addressed to an office of IPART;
2. attach:
 - a. the original application to the ANO; and
 - b. any response to the application from the ANO; and
3. contain such further information as is necessary for IPART to understand the reasons why the person applying for the direction considers that IPART should make the direction.

IPART must consider an application for a direction under Section 4 of this Code. At its discretion, IPART may direct an ANO to provide any person with a copy of a document which is subject to Section 4 of this Code. Such a direction must be in writing, and must be copied to the person who applied for the direction to be made.

It is a breach of this Code for an ANO to fail to comply with a direction of IPART under Section 4 of this Code.

5. Monitoring and enforcing compliance with this Code

5.1 Responsible regulator

Compliance with this Code is a condition of an ANO's licence under the ES Act.

IPART is responsible for monitoring and enforcing compliance with this Code.

5.2 Compliance reporting

Immediate reporting

An ANO must report a serious breach of this Code to IPART as soon as reasonably practicable after the ANO becomes aware of the breach. A serious breach includes a breach which has, or is likely to have, a material adverse impact on the environment.

Unless otherwise agreed by IPART, immediate reporting of a serious breach of this Code by an ANO is to be achieved by telephone, followed by a more detailed report in writing to be provided by a date required by IPART.

Periodic exceptions-based reporting

By 30 April each year (or such other date agreed to in writing by IPART), an ANO must provide a report to IPART which records:

- any breach of the Code which occurred over the preceding year;
- the ANO's explanation for the breach and a description of measures implemented to avoid a recurrence of the breach; and
- data on any complaints received by the ANO about EIA related matters in the preceding year.

5.3 Auditing

IPART may audit an ANO's compliance with this Code by either:

1. conducting an audit itself; or
2. requiring an ANO to nominate a suitably qualified person who, if the nomination is approved by IPART, will conduct the audit and provide a report to IPART at the expense of the ANO.

Audits may be conducted periodically or as "spot audits" in response to a particular possible breach of the Code.

An ANO must cooperate fully with an auditor. This duty to cooperate includes a duty to facilitate access to premises, to provide access to documents requested by an auditor, and to make personnel available for interview by an auditor.

Appendix A

Definitions

Definition of specific terms

In this Code, except in so far as the context or subject-matter otherwise indicates or requires:

Activity has the same meaning as that prescribed by s 110(1) of the EP&A Act.

Additional Consultation Requirements has the meaning attributed to it under Section 2.3.6 of this Code.

ANO means Authorised Network Operator which has the same meaning as that prescribed under the Authorised Transactions Act.

ASP means Accredited Service Provider, a person with accreditation under Part 3 of the *Electricity Supply (Safety and Network Management) Regulation 2014*.

Authorised Transactions Act means the *Electricity Network Assets (Authorised Transactions) Act 2015*.

CEMP means Construction Environmental Management Plan.

Classified road has the same meaning as under the *Roads Act 1993*.

The Code means this approved Code under cl 244K of the EP&A Regs as in force from time to time.

Consultation Documentation, for the purposes only of Section 4 of this Code, has the meaning attributed to it under Section 4.2 of this Code.

Consultation Protocol has the meaning attributed to it under Section 2.3.6 of this Code.

Decision Statement means a document which formally records a determination made by an authorised person on behalf of an ANO during Stage 4 of the EIA process required under this Code.

Department means the Department of Planning and Environment.

Designated Strategic Transport Land means land designated as Strategic Transport Land by the Secretary in accordance with this Code.

Determining Authority has the same meaning as that prescribed by s 110(1) of the EP&A Act.

Development has the same meaning as under the EP&A Act.

DTIRIS means the Department of Trade and Investment, Regional Infrastructure and Services.

EIA means Environmental Impact Assessment and is an environmental assessment process followed to demonstrate compliance with section 111 of the EP&A Act for Activities. (EIA is not to be confused with EIS.)

EIS means Environmental Impact Statement. (EIS is not to be confused with EIA.)

Electricity Supply Authority has the same meaning as under the ISEPP.

Environmentally Sensitive Area of State Significance has the same meaning as under the *State Environmental Planning Policy (State and Regional Development) 2011*.

EPI means Environmental Planning Instrument and has the same meaning as under the EP&A Act.

EP&A Act means the *Environmental Planning & Assessment Act 1979*.

EP&A Regs means the *Environmental Planning and Assessment Regulation (2000)*.

ES Act means the *Electricity Supply Act 1995*.

Final EIA Documentation, for the purposes only of Section 4 of this Code, has the meaning attributed to it under Section 4.2 of this Code.

Former Network Operators means the publicly owned businesses which operated NSW's electricity transmission and distribution network pre-lease.

General Law Consultation Requirements has the meaning attributed to it under Section 2.3.6 of this Code.

GIPA Act means *Government Information (Public Access) Act 2009*.

Government Agency means:

- a. a public authority constituted by or under an Act;
- b. a government Department;
- c. a statutory body representing the Crown;
- d. a statutory State owned corporation (and its subsidiaries) within the meaning of the State Owned Corporations Act 1989; or
- e. a person, not being an ANO, prescribed by the EP&A Regs for the purposes of the definition of "public authority" under the EP&A Act.

Habitat and **Critical Habitat** have the same meaning as under the EP&A Act.

IAP2 means International Association for Public Participation.

Implementation Documentation, for the purposes only of Section 4 of this Code, has the meaning attributed to it under Section 4.2 of this Code.

ISEPP means *State Environmental Planning Policy (Infrastructure) 2007*.

Minister has the same meaning as under the EP&A Act.

NDA means Nominated Determining Authority, a determining authority nominated by the Minister in accordance with section 110A of the EP&A Act.

NSW means New South Wales.

OEH means the NSW Office of Environment and Heritage.

Rail corridors map has the same meaning as under cl 78 of the ISEPP.

REF means a Review of Environmental Factors and , depending on context, can refer to a type of documentation of an EIA process, or the process itself.

Secretary, where that term is used in section 2.3.6 of this Code, has the same meaning as under the EP&A Act.

SER means Summary Environmental Report and depending on context, can refer to a type of documentation of an EIA process, or the process itself.

SIS means Species Impact Statement has the same meaning as under the *Threatened Species Conservation Act 1995*.

SSI means State Significant Infrastructure and has the same meaning as under the EP&A Act.

Strategic Transport Land means land:

- a. which is reserved or zoned under an EPI for the purposes of a classified road;
- b. which is:
 - i. within an area marked "Zone A" on a Rail Corridors Map;
 - ii. within an area marked "Zone B" on a Rail Corridors Map; or
 - iii. land to which cl88A or cl88C of the ISEPP applies;
- c. within an area referred to in either cl 6.10(1) of Appendix 7 or cl 6.10(1) of Appendix 12 of the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*;
- d. which is reserved or zoned under an EPI for the purposes of a "Public Transport Corridor" or
- e. Designated Strategic Transport Land.

Threatened Species, Populations and Ecological Communities and related terms have the same meaning as under the EP&A Act.

Appendix B

Legislative and Environmental Triggers

In discharging its duty as a Determining Authority under s 111 of the EP&A Act an ANO must "examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of" the Activity in question. This Appendix contains a list of potential triggers which, if relevant to a particular case, may require that an ANO carries out particular investigations and assessment to discharge the duty under s 111.

This list may also be helpful to ANOs in determining whether an Activity is regulated by other State or Commonwealth legislation.

It is emphasised that this list is non-exhaustive and is intended as a guide only.

- Principles of Ecological Sustainable Development.
- Proximity to items of national environmental significance.
- Precautionary Principle.
- Potentially affecting Threatened Species, endangered Ecological Communities, etc, including fish and marine vegetation.
- Working near marine vegetation (mangroves, seagrass beds, etc.) or dredging a water body.
- Working within a conservation area , National Parks estate, etc.
- Impacting State, Local or s170 register (Non-Aboriginal) heritage.
- Potentially affecting Aboriginal heritage, a potential Aboriginal deposit (PAD) or native title.
- Working near protected wetlands and rainforests.
- Working within a drinking water catchment area.
- Working within State forests / area subject to forest agreement.
- Altering ground water, water bodies, etc.
- Discharging to stormwater or sewer.
- Siting oil filled equipment within 40m of a sensitive area or within 5m upstream of a drain.
- Working within areas with contaminated land.
- Impacting hollow bearing trees.
- Decommissioning substations with either evidence of contamination, a history of spills / leaks or where the land use will change (sale / end of lease).
- Impacting high value Habitat.
- Koala Habitat .
- Clearing native vegetation.
- Electric and Magnetic Fields (EMF) and Prudent Avoidance.

- Bushfire risk and vegetation management.