

4. Statutory and planning framework

This chapter provides the statutory and planning framework for the proposal and considers the provisions of relevant state environmental planning policies, local environmental plans and other legislation.

4.1 Environmental Planning and Assessment Act 1979

The *Environmental Planning and Assessment Act* (EP&A Act) establishes the system of environmental planning and assessment in NSW. This proposal is subject to the environmental impact assessment and planning approval requirements of Division 5.1 of the EP&A Act. Division 5.1 of the EP&A Act specifies the environmental impact assessment requirements for activities undertaken by public authorities, such as TfNSW, which do not require development consent under Part 4 of the Act.

In accordance with Section 5.5 of the EP&A Act, TfNSW, as the proponent and determining authority, must examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the proposal.

Clause 228 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) defines the factors which must be considered when determining if an activity assessed under Division 5.1 of the EP&A Act has or is likely to have a significant impact on the environment. Chapter 6 of the REF provides an environmental impact assessment of the proposal in accordance with clause 228 and Appendix A specifically responds to the factors for consideration under clause 228.

4.1.1 State Environmental Planning Policies

State Environmental Planning Policy (Infrastructure) 2007

The *State Environmental Planning Policy (Infrastructure) 2007* (ISEPP) aims to facilitate the effective delivery of infrastructure across the State. ISEPP is the key environmental planning instrument which determines the permissibility of a proposal and under which part of the EP&A Act an activity or development may be assessed.

Clause 94 of ISEPP permits development on any land for the purpose of a road or road infrastructure facilities to be carried out by or on behalf of a public authority without consent. As the proposal is for road and road infrastructure facilities and is to be carried out on behalf of TfNSW, it can be assessed under Division 5.1 of the *Environmental Planning and Assessment Act 1979*. Development consent is not required.

The proposal is not located on land reserved under the *National Parks and Wildlife Act 1974* and does not require development consent or approval under *State Environmental Planning Policy (Coastal Management) 2018*, *State Environmental Planning Policy (State and Regional Development) 2011* or *State Environmental Planning Policy (State Significant Precincts) 2005*.

Part 2 of ISEPP contains provisions for public authorities to consult with local councils and other public authorities prior to the commencement of certain types of development. Consultation, including consultation as required by ISEPP (where applicable), is discussed in Section 5.4 of this REF.

The ISEPP prevails over all other environmental planning instruments except where there is an inconsistency with *State Environmental Planning Policy (State Significant Precincts) 2005* or certain provisions of *State Environmental Planning Policy (Coastal Management) 2018*. The proposal does not require consideration under these SEPPs and therefore do not require further consideration as part of this REF.

State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011

The *State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011* relates to the use of land within the Sydney drinking water catchment. Clause 12 of this SEPP requires consideration of whether or not an activity to which Division 5.1 of the EP&A Act applies will have a neutral or beneficial effect on water quality before carrying out the activity. A neutral or beneficial effect (NorBE) assessment is included in Appendix C. The assessment concluded that the proposal would have a beneficial effect on water quality.

State Environmental Planning Policy (Koala Habitat Protection) 2020

The *State Environmental Planning Policy (Koala Habitat Protection) 2020* aims to encourage the proper conservation and management of areas of natural vegetation that provide habitat for koalas to ensure a permanent free-living population over their present range. The SEPP identifies the areas of core koala habitat, encourages the inclusion of core koala habitat into environmental protection zones and requires management plans to be prepared prior to the granting of development consent within an area of core koala habitat.

The Blue Mountains LGA is listed in Schedule 1 of the SEPP as land on which this SEPP is applicable. However, the proposal does not require development consent from council as it would be assessed under Division 5.1 of the EP&A Act.

State Environmental Planning Policy No. 55 – Remediation of Land

The *State Environmental Planning Policy No.55 — Remediation of Land* (SEPP 55) provides a State-wide approach to the remediation of contaminated land for the purpose of minimising the risk of harm to the health of humans and the environment. While development consent for the proposal is not required, the provisions of SEPP 55 have still been considered in the preparation of this REF.

Section 6.4 of this REF contains an assessment of the potential contamination impacts of the proposal. While some contaminants have been observed within or adjacent to the proposal area, it is not expected that any large-scale remediation (Category 1) work would be required as part of the proposal. The proposed land use would not differ to the existing use and, therefore, would be unlikely to be affected by any potential contaminants that exist within the road corridor. Excavation of the ground would be required for the foundations of the proposed new pedestrian bridge, however any contaminated materials found within these areas would be dealt with as per the relevant procedures and safeguards outlined in the CEMP.

4.1.2 Local Environmental Plans

Blue Mountains Local Environmental Plan 2015

The *Blue Mountains Local Environmental Plan 2015* (Blue Mountains LEP) is the governing plan for the Blue Mountains LGA, including Medlow Bath. Table 4-1 summarises the relevant aspects of the Blue Mountains LEP applicable to the proposal.

Table 4-1 Relevant provisions of Blue Mountains LEP

Provision description	Relevance to the proposal
<p>Clause 2.3 Zone Objectives and Land Use Table</p>	<p>The relevant land zones described in Table 4-2 indicate that the proposal would be permitted with consent in all zones. However, as outlined in Section 4.1.1, under ISEPP the proposal is permitted without consent of council. Therefore, the consent requirements of the LEP do not apply and the proposal may be determined under Division 5.1 of the EP&A Act. The land zoning within and around the proposal area is shown in Figure 4-1: Land zoning</p>
<p>Clause 5.10 Heritage conservation</p>	<p>Clause 5.10 of the Blue Mountains LEP aims to conserve the environmental heritage of the Blue Mountains, heritage significance of heritage items, archaeological sites, Aboriginal objects and Aboriginal places within the LGA.</p> <p>There are a number of heritage items listed on the Blue Mountains LEP that are located in the immediate vicinity of the proposal including the Hydro Majestic Hotel, Medlow Bath Railway Station, Avenue of Trees, Melbourne House, Cosy Cot and Sheleagh Cottage, St Luke's Anglican Church and Medlow House located along the Great Western Highway.</p> <p>A discussion of potential impacts to local heritage is provided in Section 6.8.</p>
<p>Clause 6.12 Protected area – escarpment</p>	<p>Clause 6.12 of the Blue Mountains LEP aims to preserve and enhance the visual, cultural, natural and ecological features and values of the escarpment systems in the Blue Mountains, to limit the proportion of hard surfaces in close proximity to escarpment systems and ensure that development is designed and sited appropriately, and to encourage the retention, restoration and maintenance of areas of disturbed native vegetation.</p> <p>Land along the eastern side of the Great Western Highway within the proposal area is marked as 'Protected area – Escarpment' and any development within this area must not adversely impact the visual, cultural and ecological values of the area or introduce visually disruptive materials. The proposal involves work within the existing disturbed road corridor, which is consistent with the existing nature of the area. However, the proposal would introduce a new pedestrian footbridge over the Great Western Highway, though only a portion of the new pedestrian footbridge would be located within land marked as 'Protected area – Escarpment'.</p> <p>As outlined in Section 4.1.1, under ISEPP the proposal is permitted without consent of council. Therefore, the consent requirements of the LEP do not apply and the proposal may be determined under Division 5.1 of the EP&A Act.</p> <p>A discussion of potential impacts to landscape character and visual amenity is provided in Section 6.9.</p>
<p>Clause 6.14 Earthworks</p>	<p>Clause 6.14 of the Blue Mountains LEP aims to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.</p> <p>By virtue of clause 5(3) and 94 of the ISEPP, the proposal is permissible without development consent. Consideration of the potential impacts and mitigation measures for earthworks for the proposal is outlined in Section 6.4.</p>
<p>Clause 7.9 Medlow Bath Precinct</p>	<p>Clause 7.9 of the Blue Mountains LEP aims to encourage development within the Medlow Bath Precinct that complements and is sympathetic to the heritage significance of the Hydro Majestic Hotel, while also minimising the impact of development on escarpment areas and on land in the Zone E2 Environmental Conservation. The clause also aims to enhance the traditional streetscape character and gardens of the precinct.</p> <p>The proposal aims to reduce congestion and provide more efficient and reliable journeys for those travelling in, around and through the Blue Mountains. The proposal would also address known safety and accessibility concerns within the Medlow Bath local area, benefiting local traffic and pedestrians while also benefiting those passing through Medlow Bath. Additionally, the proposal has been designed to be contained within the existing road corridor as much as possible to result in minimal property, environmental and heritage impacts.</p>

Figure 4-1 shows the relevant section of the zoning map from the Blue Mountains LEP, with the indicative location of the proposal. The land use objectives for these zones under the LEP, and the proposal's consistency with those objectives, is detailed in Table 4-2.

Table 4-2 Relevant zone objectives

Zone	Objectives	Consistency of the proposal with the zone objective
SP2 Infrastructure Classified Road	<p>To provide for infrastructure and related uses</p> <p>To prevent development that is not compatible with or that may detract from the provision of infrastructure.</p>	<p>The proposal would provide an upgrade to the Great Western Highway to improve capacity, travel times and safety.</p>
SP3 Tourist	<p>To provide for a variety of tourist-oriented development and related uses.</p> <p>To provide tourist development that is compatible with the environmental, scenic and landscape qualities of the area.</p> <p>To enable other uses that complement tourist development without eroding the retail hierarchy of the local centres and villages.</p> <p>To promote a high standard of urban design and amenity in a high-quality landscape setting.</p> <p>To protect, manage and restore areas of high ecological, scientific, cultural or aesthetic values.</p>	<p>The Great Western Highway is the main route between Greater Sydney and Central West NSW for general, freight and tourism traffic. The proposal would duplicate the existing capacity of the Great Western Highway for a safer and more efficient link for traffic utilising the road, including tourism traffic.</p> <p>By enhancing the transport infrastructure within the existing road corridor, the proposal aims to support tourism-related industries through greater and safer access while protecting areas of high ecological, scientific, cultural and aesthetic values.</p>
E4 Environmental Living	<p>To provide for low-impact residential development in areas with special ecological, scientific or aesthetic values.</p> <p>To ensure that residential development does not have an adverse effect on those values.</p> <p>To preserve and re-establish native bushland in those areas that exhibit a predominantly bushland character, where consistent with the protection of assets from bush fire.</p> <p>To ensure that the form and siting of buildings are appropriate for, and harmonise with, the bushland character of the locality.</p>	<p>The proposal would involve an upgrade to the Great Western Highway within the existing road corridor and does not include residential development. It is not expected that the proposal would negatively impact on the objectives of the E4 zone.</p>

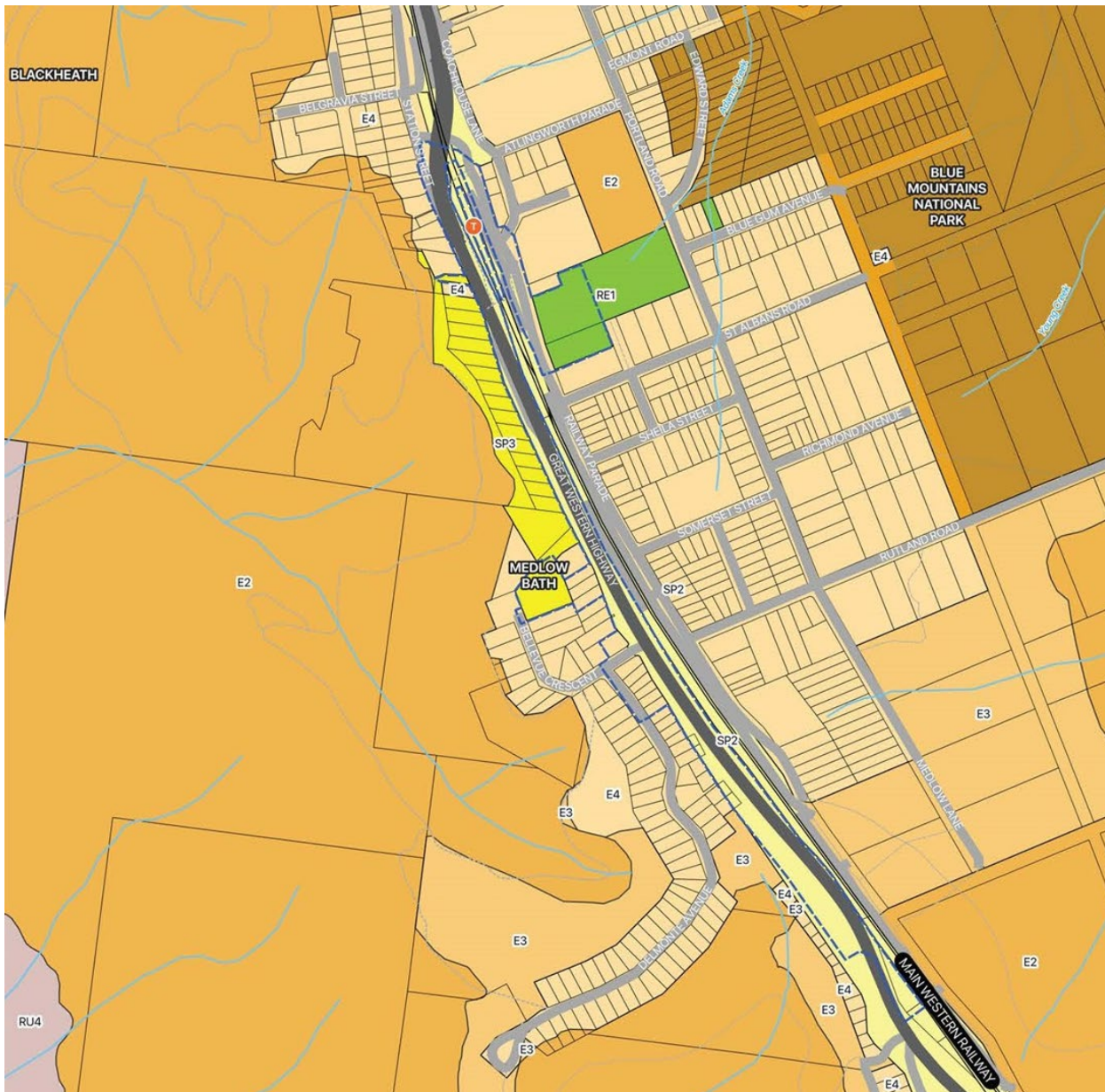


Figure 4-1: Land zoning

4.2 Other relevant NSW legislation

4.2.1 Roads Act 1993

The *Roads Act 1993* (Roads Act) provides for the classification of roads and the declaration of public authorities for both classified and unclassified roads. It also regulates the carrying out of various activities in, on and over public roads.

Under Section 138(1) of the Roads Act, consent from the road authority is required for carrying out various activities in, on and over public roads. The Great Western Highway is a classified road and requires consent from the road authority to proceed. Approval would be sought for a road occupancy licence for the temporary closure of traffic lanes and, if required, the movement of over-sized vehicles during construction. Consent to carry out work on classified roads is not required as per Schedule 2 clause 5(1) of the Roads Act.

However, a road occupancy licence would need to be obtained as necessary prior to construction commencing.

4.2.2 Crown Lands Management Act 2016

The *Crown Lands Management Act 2016* provides the legislative framework for the administration of land that is vested in the Crown in NSW. Ministerial approval is required to grant a 'lease, licence, permit, easement or right of way over a Crown Reserve'. Consultation with the Department of Industry (Crown lands division) and a community engagement strategy is required under the *Crown Land Management Act 2016* for any action affecting Crown Land use including licences and leases.

Acquisition of Crown land would not be required for the proposal, as described in Section 3.5.

4.2.3 Biodiversity Conservation Act 2016

The *Biodiversity Conservation Act 2016* (BC Act) sets out the assessment framework for threatened species and ecological communities for activities subject to assessment under Part 5 of the EP&A Act (amongst other types of development).

Under Part 7 of the BC Act, a species impact statement (or biodiversity assessment report) in relation to an activity that is likely to significantly affect threatened species (which is defined to include ecological communities, or their habitats) and the concurrence of the Environment Agency Head may be required. A biodiversity assessment has been undertaken for the proposal (refer Section 6.1) which concluded that the proposal was unlikely to have a significant impact and further assessment through the preparation of a Biodiversity Development Assessment Report is not required.

4.2.4 Heritage Act 1977

An excavation permit is required to disturb or excavate any land knowing or having reasonable cause to suspect that the disturbance or excavation would or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed. A permit is also required to disturb or excavate any land on which the person has discovered or exposed a relic. Section 139(4) of the *Heritage Act 1977* makes provision for the issuing of an exception in certain prescribed circumstances.

A major works (or standard) Section 60 approval is required for activities and works that have (or would have the potential to have) a moderate or greater impact on the heritage significance of a State heritage item. A Section 60 application would be required for proposed works within the State Heritage Register (SHR) curtilage of Medlow Bath Railway Station (refer Section 6.8). The approval would be obtained prior to works commencing.

4.2.5 National Parks and Wildlife Act 1979

The harming or desecrating of Aboriginal objects or places is an offence under Section 86 of the *National Parks and Wildlife Act 1979* (NPW Act). Under Section 90, an Aboriginal heritage impact permit may be issued in relation to a specified Aboriginal object, Aboriginal place, land, activity or person or specified types or classes of Aboriginal objects, Aboriginal places, land, activities or persons.

The NSW Department of Planning, Industry and the Environment has published the *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW* (Department of Environment, Climate Change and Water, 2010).

The due diligence process and the *Procedure for Aboriginal Cultural Heritage Consultation and Investigation* (PACHCI) (Roads and Maritime Services, 2011) has been undertaken as part of this REF and confirmed that an Aboriginal heritage impact permit (AHIP) is not required for the proposal (refer to Section 6.7).

4.2.6 Land Acquisition (Just Terms Compensation) Act 1991

Based on the concept design, it is anticipated that properties at six addresses may need to be partially or fully acquired as part of the proposal (refer to Table 3-7). All property acquisitions would be carried out in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*, which aims to guarantee just

compensation terms for land that is acquired by an authority of the State. TfNSW would continue to consult with affected landowners during the development of the proposal.

4.2.7 Contaminated Land Management Act 1997

Section 60 of the *Contaminated Land Management Act 1997* (CLM Act) imposes a duty on landowners to notify the Department of Planning, Industry and Environment, and potentially investigate and remediate land if contamination is above EPA guideline levels.

A search of the EPA list of contaminated sites in NSW on 11 February 2020 found the location of the proposal has not been declared under the CLM Act as being significantly contaminated, nor are there any contaminated sites within close proximity to the proposal area (refer Section 6.4).

Further sampling and assessment would be required during construction to determine final waste classification. Subsequent to this, any materials classified as Hazardous Waste may require treatment or an immobilisation approval in accordance with Part 10 of the Protection of the Environment Operations (Waste) Regulation 2014 prior to off-site disposal.

4.2.8 Protection of the Environment Operations Act 1997

The *Protection of the Environment Operations Act 1997* (POEO Act) provides the legal framework for the management of air, noise, water and waste pollution. Under Section 48 of the POEO Act, scheduled activities (as defined in Schedule 1 of the Act) require an environment protection licence (EPL).

Part 3.2 of the POEO Act requires an environment protection licence for scheduled development work and the carrying out of scheduled activities (as set out in Schedule 1 of the POEO Act). Clause 35 of Schedule 1 of the POEO Act applies to road construction, meaning the construction, widening or rerouting of roads. The proposal is declared to be a scheduled activity as it results in the existence of four or more traffic lanes for at least one kilometre, where the road is in a metropolitan area and is classified, or proposed to be classified, as a main road (but not a freeway or tollway) under the *Roads Act 1993*.

In addition, the POEO Act and the Protection of the Environment Operations (Waste) Regulation 2005 are the key pieces of legislation that regulate waste in NSW. They contain the requirements for managing, storing, transporting, processing, recovering and disposing of waste. Applying waste to land in NSW (such as temporary storage and reusing materials back into the construction of a road) may trigger various regulatory requirements such as the need to hold an EPL or pay the waste and environment levy. However, a 'resource recovery exemption' may be applicable for the land application if it is a genuine, fit for purpose, reuse of the waste rather than another path to waste disposal.

An exemption facilitates the use of specific waste materials outside of certain requirements of the waste regulatory framework. For each exemption, there is a corresponding 'resource recovery order' that specifies the requirements that must be met by suppliers of the material. The EPA has issued general resource recovery orders and exemptions for many materials including:

- excavated natural material
- excavated public road material
- raw mulch
- reclaimed asphalt pavement
- recovered aggregate.

These orders and exemptions may be used for the proposal without seeking approval from the EPA.

4.2.9 Waste Avoidance and Resource Recovery Act 2001

The purpose of the *Waste Avoidance and Resource Recovery Act 2001* is to develop and support the implementation of regional and local programs to meet the outcomes of a State-wide strategy for waste avoidance and resource recovery. It also aims to 'minimise the consumption of natural resources and final disposal of waste by encouraging the avoidance of waste and the reuse and recycling of waste'.

Waste generation and disposal reporting would be carried out during the construction and operation of the proposal. Procedures would be implemented during construction to promote the objectives of this Act (refer to Section 6.12).

4.3 Commonwealth legislation

4.3.1 Environment Protection and Biodiversity Conservation Act 1999

Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) a referral is required to the Australian Government for proposed actions that have the potential to significantly impact on matters of national environmental significance or the environment of Commonwealth land. These are considered in Appendix A and Chapter 6 of this REF.

A referral is not required for proposed activities that may affect nationally listed threatened species, endangered ecological communities and migratory species. This is because requirements for considering impacts to these biodiversity matters are the subject of a strategic assessment approval granted for TfNSW (former Roads and Maritime) under the EPBC Act by the Australian Government in September 2015. Potential impacts to these biodiversity matters are also considered as part of Chapter 6 of this REF.

Findings – matters of national environmental significance

The assessment of the proposal's impact on matters of national environmental significance and the environment of Commonwealth land found that there is unlikely to be a significant impact on relevant matters of national environmental significance or on Commonwealth land. Accordingly, the proposal has not been referred to the Australian Government Department of Agriculture, Water and the Environment under the EPBC Act.

Findings – nationally listed biodiversity matters (where the strategic assessment applies)

The assessment of the proposal's impact on nationally listed threatened species, endangered ecological communities and migratory species found that there is unlikely to be a significant impact on relevant matters of national environmental significance. Chapter 6 of the REF describes the safeguards and management measures to be applied.

4.3.2 Native Title Act 1993

The *Native Title Act 1993* recognises and protects native title. The Act covers actions affecting native title and the processes for determining whether native title exists and compensation for actions affecting native title. It establishes the Native Title Registrar, the National Native Title Tribunal, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements, and the National Native Title Register. Under the Act a future act includes proposed public infrastructure on land or waters that affects native title rights or interest.

A search of the Native Title Tribunal Native Title Vision website was undertaken on 14 February 2020, with no Native Title holders/claimants identified.

TfNSW would provide a notice of the proposal to NTSCORP under Section 24KA of the Act and would be invited comment on the proposal.

4.4 Confirmation of statutory position

The proposal is categorised as development for the purpose of a road and road infrastructure facilities and is being carried out by or on behalf of a public authority. Under clause 94 of ISEPP the proposal is permissible without consent. The proposal is not State significant infrastructure or State significant development. The proposal can be assessed under Division 5.1 of the EP&A Act.

TfNSW is the determining authority for the proposal. This REF fulfils TfNSW's obligation under Section 5.5 of the EP&A Act including to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of the activity.