Submission
No 114

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Organisation:	Nature Conservation Council of NSW - Planning Committee
Name:	Mr James Ryan, Mr John Jeayes, Ms Anne Reeves, Ms Lorraine Cairns and Cate Faehrmann
Telephone:	02 9279 2466
Date received:	10/07/2009

Nature Conservation Council of NSW
The voice for the environment since 1955

Level 2, 301 Kent Street, Sydney NSW 2000
Ph: 02-9279 2466 **Fax:** 02-8026 8301
Email: ncc@nccnsw.org.au
Web: www.nccnsw.org.au
ABN: 96 716 360 601

8th July 2009

The Hon Tony Catanzariti MLC
Committee Chair
Standing Committee of State Development
Parliament House
Macquarie Street

SYDNEY NSW 2000

Re: Submission to Inquiry into the NSW Planning framework

Introduction

The Nature Conservation Council of NSW (**NCCNSW**) welcomes the opportunity to provide this submission to the NSW Parliamentary **Inquiry into the New South Wales Planning framework.**

The Nature Conservation Council is the peak environment organisation in NSW. We work closely with 120 member groups, local communities, government and business to ensure a positive future for our environment.

We would like to thank the NSW Parliament for the opportunity to be involved in the Inquiry.

Yours sincerely,

James Ryan
On behalf of the NCCNSW Planning Sub-committee

Nature Conservation Council of NSW

NATURE CONSERVATION COUNCIL

of

NSW

Submission to NSW Parliament

Inquiry into the New South Wales planning framework

Inquiry into the New South Wales planning framework

TERMS OF REFERENCE

1. That the Standing Committee on State Development inquire into and report on national and international trends in planning, and in particular:

(a) the need, if any, for further development of the New South Wales planning legislation over the next five years, and the principles that should guide such development,

(b) the implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales,

(c) duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and New South Wales planning, environmental and heritage legislation,

(d) climate change and natural resources issues in planning and development controls,

(e) appropriateness of considering competition policy issues in land use planning and development approval processes in New South Wales,

(f) regulation of land use on or adjacent to airports,

(g) inter-relationship of planning and building controls, and

(h) implications of the planning system on housing affordability.

2. That the committee report by 14 December 2009.

THE NATURE CONSERVATION COUNCIL of NSW

The Nature Conservation Council of NSW **(NCCNSW)** is the peak environmental organisation within NSW.

We are a non-profit, non-government organisation representing 120 community environment groups across NSW.

We work to conserve the integrity and diversity of nature. We strive to achieve an ecologically sustainable society through advocacy, education, research, understanding and community empowerment.

As the state's peak environmental organisation since 1955, the Nature Conservation Council of NSW works closely with member groups, local communities, government and business to ensure a positive future for our environment.

We facilitate large-scale awareness and education campaigns, in addition to producing original research and publications.

This submission is authored by the NCCNSW Planning Committee, consisting of Don White, James Ryan, John Jeayes, Anne Reeves, Lorraine Cairns and Cate Faehrmann.

Contents

Executive Summary

The NCCNSW believe planning in NSW is not performing the function outlined in the objectives of the *Environment Planning and Assessment Act NSW* 1979 **(EP&A Act).**

The current phase of reforms has been focused on 'speeding up the process' and making development approvals quicker. The NCCNSW believe that the use of this narrow criteria to 'measure' the planning system is reducing the effectiveness of the planning system. While we welcome the State Plan aim of cutting unnecessary 'red tape' we do not believe cuts which result in poorer planning, and possibly greater expense in the future, are justified.

There is an urgent need to implement qualitative monitoring of the NSW Planning reforms. The community of NSW need to have the data available by which the total effectiveness of the planning reforms can be measured as opposed to simply measuring the speed of approval and the monetary value of approvals.

The NSW Government has invested significant resources into reforming the interface of threatened species management and the land use planning regime via the development of a 'Bio Banking Scheme' and 'biocertification' of Local Environment Plans. However two other methodologies, being seven part tests in Part 4 Assessments and separately a *Principles for the use of biodiversity offsets in NSW* are also endorsed by the NSW Government.

No less than four separate regimes exist for protecting biodiversity not including the Part 3A process which bypasses all four and effectively creates a fifth regime.

The NCCNSW argue that having four separate schemes for biodiversity conservation plus Part 3A is confusing for both communities and developers. As a result with regard to biodiversity the planning system in NSW is inconsistent, ad hoc, lacks transparency and fails to effectively protect biodiversity.

In NSW the planning regime is materially contributing to the decline in biodiversity.

Finally current planning law is not moving to accommodate the challenges of climate change. Climate change already is the single biggest driver of land use constraints. Despite this the planning system in NSW has not developed a regulatory framework to guide developers and consent authorities to a safe and consistent planning outcome.

List of recommendations

- **Recommendation 1. The *Environment Planning and Assessment Act NSW* 1979 (EP&A Act) should adopt the principles of ecologically sustainable development (ESD) as its primary objective as defined by the *Protection of the Environment Administration Act* 1991.**

- Recommendation 2. Public participation in the NSW planning regime should be restored to the levels established by the EP&A in 1979.

- **Recommendation 3. That NSW Government upholds and supports a public service that aims always to give the most thorough and unbiased advice, reversing the trend of politicizing the senior public service through rewards those who maintain a positive perception of the government at the expense of good planning outcomes.**

- Recommendation 4. That major project assessment be conducted by consultants appointed by either the Department of Planning (DoP) or The Department of Environment and Climate Change (DECC) at arms length from the developer with cost recovery being billed by the Council to the developer.

- **Recommendation 5. That Part 3A is abolished and replaced by a statutory process for Councils to assess major projects. The statutory process should specify the principles of ESD as a mandatory consideration.**

- Recommendation 6. NSW should adopt a standard methodology for assessing and mitigating development impacts on our biodiversity. Ministerial discretion to vary the outcomes of this standard should not exist.

- **Recommendation 7. Joint Regional Planning Panels (JRPPs) should be abandoned as they advantage development interests over community interests.**
- Recommendation 8. If the Government persists with JRPPs, then the Code of Conduct should at least be the equivalent of that which applies to Local Government.
- **Recommendation 9. The Government should consider option to prohibit former DoP staff working for private enterprise on the same project as they have been working on for the Department.**

- Recommendation 10. The EP&A Act is revised so as to include a regime of Environmental Assessment which is conducted at arms length from the applicant (but on a cost recovery basis) in order to provide more accurate and up to date information accompanying DAs. This will result in faster assessment times.

- **Recommendation 11. The DoP collect sufficient data from all DAs processed in NSW to enable an assessment of the impacts on biodiversity resulting from the planning system in NSW. Such data could include; the number of hectares of native vegetation destroyed, the number of DAs which have had either minor or significant impacts on threatened species, the amount of offsets conditioned, and the quality of offsets.**

- Recommendation 12. The NSW Government urgently needs to adopt and apply a risk averse standard of predicted sea level rise in making planning decisions.

- **Recommendation 13. The NSW Government consider legislative measure to ensure its existing policies to reduce dispersed patterns of settlement, car dependency and maximize access to public transport, are implemented.**

3.0 Addressing the Terms of Reference

3.1 a)the need, if any, for further development of the New South Wales planning legislation over the next five years, and the principles that should guide such development,

3.2 Current Directions in NSW

The NCCNSW believes there is a strong case for changes to the planning legislation within the next five years. In particular the 2005 Part 3A planning reform is causing great concern in NSW and is resulting in poor environmental outcomes.

3.3 Aims of Planning System

If we fail to plan, we are planning to fail.

The objectives of the *EP&A Act* are to promote social and economic welfare at the same time as promoting a better environment. The *co-ordination* of services, protection of threatened species, affordable housing and ecologically sustainable development **(ESD)** are also objectives. These objectives are not prioritized.

The aim of any planning system in a democratic society must be to achieve the best mix of outcomes for the whole community while at the same time not reducing the capacity of our environment to sustain us and future generations.

The NCCNSW believes that the primary function of planning is to meet this objective. In essence this is the principle of ESD.

ESD does not place the needs of the environment above those of social or economic development. Rather ESD seeks a balance between these needs.

Intrinsic to ESD is the value of consultation and participation. To ensure the best outcome for all stakeholders any planning system must have consultation as a core value. If as a society we believed consultation could be dispensed with, we would also believe bureaucrats would always make the best decisions for us and there would be no need for an elected democracy.

Given we have a strongly democratic society we should also have a strongly participatory planning system.

Recommendation 1. The EP&A Act should adopt the principles of ESD as its primary objective.

Recommendation 2. Public participation in the NSW planning regime should be restored to the levels established by the EP&A Act in 1979.

3.4 Part 3A

The NCCNSW believes Part 3A should be abolished. In our opinion there is no more contentious issue in the community than the Part 3A legislation. This addition to the EP&A Act has created enormous acrimony and led to demonstrations which have included people who have never publicly protested before.

Public perceptions of the Part 3A process have included;

- the idea that none, or very few, of these projects are ever rejected
- approvals favour large companies who can afford to make donations to political parties
- the process is overly politicized with little or no merit assessment.
- Decisions are made remotely from local communities who are affected, which communities find it hard to get access to the Planning Minister while large developers have easy access.

In addition to the lack of access by NCCNSW member groups, we are highly concerned by the lack of capacity in the (DoP) to make valid assessments of environmental impacts. The DoP relies on the DECC to provide advice on biodiversity and climate change issues. However the NCCNSW believes the increasing politicization of the NSW public service has contributed to a lack of willingness for senior public servants to give unflinching advice even in circumstances in which the advice does not match Government objectives or policy.

Recommendation 3. That NSW Government upholds and supports a public service that aims always to give the most thorough and unbiased advice, reversing the trend of politicizing the senior public service through rewards those who maintain a positive perception of the government at the expense of good planning outcomes.

Following are some examples where the DoP has made decisions which cannot be justified on environmental grounds and which have also not been justified on economic or social grounds.

Example 1: Huntlee

The Huntlee New Town (MP 07_0064) development 57km west of Newcastle comprises 7500 housing lots over a total of 853ha. It is the largest single residential development in NSW. The concept plan was approved on February 9th 2009.

This development will destroy 50% of the range an extremely rare plant (*persoonia pauciflora)* found only at this location and which is listed as critically endangered at both the State and Federal level. During the public exhibition period the Government received expert submissions that the development will place the plant at a real risk of extinction. Despite receiving no credible evidence which supported the proposition the development could occur as proposed without significantly increasing the risk of extinction the Minister gave approval for the project.

While the proponents and the Government made much of the fact that the decision involved approx 5000ha in offsets, the reality is that these offsets constitute largely mountainous country which does not compensate for the ecological values which will be lost as a result of the development. In fact DECC wrote to DoP suggesting an assessment of the offered offsets should take place to ensure due diligence[1]. The assessment did not occur.

In summary the Minister gave approval to a development which will place a critically endangered plant at real risk of extinction in the following circumstances;

- no credible evidence to support the decision on ecological grounds
- without the capacity to make an expert evaluation
- without commissioning an independent report
- the tokenistic 'offset' conditions were not based on any published principles of conservation offsetting such as those published by DECC[2], or established in the Biobanking Assessment Methodology[3], or via the Native Vegetation Act.

The decision was made on a completely ad hoc basis without any scientific justification and in a way which lacked transparency.

This is a highly unsatisfactory outcome.

---

[1] DECC correspondence to DoP, DECC ref. FIL07/14486

[1]Principles for the use of biodiversity offsets in NSW, DECC, October 2008

[3] BioBanking Assessment Methodology, DECC July 2008

A member group of the NCCNSW is currently challenging the Ministers decision in the Land and Environment Court over the adequacy of this decision. However the NCCNSW's concern is not with the ultimate lawfulness of the decision but rather how it can be that Part 3A decisions are being made without reference to scientific information and without a credible analysis of the environmental likely impacts.

Example 2: Hunter Employment Zone

The Hunter Employment Zone **(HEZ)** near Kurri Kurri in NSW is a large industrial estate totaling 876ha which is almost entirely forested with Endangered woodland.

The Minister recently approved a 120ha section for development under Part 3A (MP 07_0128).

A particular feature of the industrial section of the Hunter Employment Zone is that it is known use as a breeding location for the critically endangered Regent Honeyeater. This species is so at risk of extinction that Taronga Zoo has implemented a captive breeding program to try and prevent their extinction.

That being the case the development (and consequent destruction) of a known and successful breeding habitat is highly controversial.

Following strong comments made during the public exhibition regarding the proponents Fauna Assessment, which failed to significantly mention the Regent Honeyeater, the proponent provided an independent assessment[4]. This assessment by Biosis Research concluded there would be a significant impact on the Regent Honeyeater as a result of the development.

This Part 3A assessment is a clear example of a process whereby;

- an ecological consultant engaged frequently by a developer gave an unsatisfactory assessment of potential impacts,
- an independent consultant who is not heavily dependent on property developers for income gave a thorough and contradictory assessment which concluded there would be significant impacts from the development on biodiversity.

Recommendation 4. That major project assessment be conducted by consultants appointed by either DoP or DECC at arms length from the developer with cost recovery being billed by the consent authority to the developer.

[4] Assessments of Significance for Regent Honeyeater within the Hunter Employment Zone (HEZ), October 2008, Biosis Research.

Subsequently the Minister's approval included a monetary amount of $340,000 and the possible dedication of 10ha for permanent conservation to assist the conservation of Regent Honeyeaters.

This decision demonstrates again the ad hoc nature of decisions made under Part 3A with regard to conservation. The amount of both land and money in the consent conditions do not comply either with the principles for biodiversity offsets, nor the Biobanking Assessment Methodology.

Had the Minister followed either of the above methodologies an offset of far greater than 10ha would have been determined.

In both the Huntlee and HEZ examples it can be seen that Part 3A decisions do not follow a set procedure of environmental assessment and lack consistency.

It can also be seen that the system of allowing the proponent to engage Environmental Consultants to produce reports is fundamentally failing to provide both the DoP and the public with appropriately objective information.

Of the four methods (three statutory and one policy) of assessing and then ameliorating impacts on biodiversity;

- Part 4 assessment of a seven part test leading to a Species Impact Statement,
- Biobanking,
- Conservation Offsets,
- Bio certification of LEPs,

the Part 3A process follows none.

The methodology used by the Minister is ad hoc, lacks transparency, and is at odds with the published methodology of the NSW Government. It is in conflict with the guiding principles of 'A New Biodiversity Strategy for NSW'[5] and aims of the 'Environment for Living' section of the NSW State Plan[6].

- **Recommendation 5. That Part 3A is abolished and replaced by a statutory process for Councils to assess major projects. The statutory process should specify the principles of ESD as a mandatory consideration.**

[5] October 2008, DECC, still in draft form

[6] NSW Government 2006

The evidence shows that Part 3A is producing appalling outcomes for biodiversity in NSW, and is in fact contributing to species decline.

Example 3: Sandon Point

The Sandon Point Concept Plan approval was initially made void by the Land and Environment Court, but subsequently upheld by the Court of Appeal. This decision concerned the extent to which climate change needs to be taken into account into account where it is relevant (eg coastal developments) as well as the principles of ESD with regard to endangered ecological communities.

While the NSW Court of Appeal decision to uphold the Sandon Point Concept Plan might initially appear to favour the NSW Government approach. In fact the decision simply said ESD was not a mandatory consideration in *Concept Plan* approvals but would be in Part 3A *Project* approvals (or any development assessment for that matter).

The NSW Urban Taskforce (representing some larger developers in NSW) described the Court of Appeal decision as a 'pyrrhic victory'[7].

While paying lip service to the issues of climate change and ESD the Urban Taskforce makes it clear it does not support consideration of the principles of ESD.

It is a problem for NSW that major developer associations do not want the environment considered in a balanced way with social and economic considerations.

No project applications have yet been approved at Sandon Point although they are currently being assessed. The question that must be asked is, at the time of determination, will the NSW Planning Minister simply consider the principles of ESD for the purpose of preventing a further legal challenge and then approve a development which is harmful to the environment? Or will some real consideration be given?

Whatever the eventual result at Sandon Point the evidence so far points to the Ministerial discretion available via Part 3A as leading to environmentally damaging decisions.

If NSW is actually genuine about maintaining and improving it's environment, then it is imperative that planning decisions, particularly Part 3A and major decisions, adopt a consistent standard which is scientifically justifiable, via which assessments of biodiversity impacts are made and then mitigation measures are determined.

Such standards might include the Biobanking methodology or the Seven Part Test of Significance and Species Impact Statement. The critical issue is there should be no

[7] NSW Urban Taskforce media release 24/9/08, attachment A to this submission.

Ministerial discretion to impose conditions which vary from those produced by the above standards (with the possible exception of critical public infrastructure decisions).

Ministerial decisions which use discretion to vary outcomes arrived by transparent and peer reviewed methodologies simply risk exposure to corruption and developer lobbying.

Recommendation 6. NSW should adopt a standard methodology for assessing and mitigating development impacts on our biodiversity. Ministerial discretion to vary the outcomes of this standard should not exist.

Example 4. Moonee Glades

The Moonee Glades development (Major Project 06_0143) was approved in February 2009. The 524 lot coastal subdivision is contains extremely sensitive coastal heathland and Endangered woodland. It is immediately adjacent to the Solitary Islands Marine Park in that it abuts Moonee and Skinners Creeks just north of Coffs Harbour.

Some of the largest sea grass beds in Moonee estuary and Solitary Islands Marine Park occur immediately adjacent to the development in the creek. Despite this no assessment of potential impacts on these important fish breeding refuges occurred.

The Marine Park Authority asked for assessments to take place (Revised Preferred Project Report) but the Department of Planning accepted an explanation from the proponent that as there was a water management plan in place which would maintain the quality of runoff water no assessment was required.

Moonee Glades was approved after the Minster took the extra-ordinary step approve the whole development as a project – even though the application and public exhibition was for a Concept Plan and only the first few stages of the overall Project.

The extra stages were given Project Approval without public advertising or exhibition.

This action seems to hold the publics' right to participate in planning decisions in contempt.

There will be more comments on Moonee Glades in this submission in the section addressing Climate Change.

Part 3A Conclusion

The NCCNSW believe the Part 3A process is plagued with inconsistency, a lack of transparency and a failure to protect biodiversity in NSW.

Part 3A decisions show no pattern using an accepted method of assessing the impacts of development on biodiversity, and certainly no standard transparent method of arriving at offsets or amelioration measures.

Part 3A decisions are characterized by inadequate Flora and Fauna assessments conducted by the proponent and which do not, as a rule, look broadly enough at the issues, or seriously consider cumulative impacts.

In our view there can be seen a contrast in effectiveness between Part 3A assessments and Part 4 assessments.

Part 4 Assessments of large projects with potentially significant impacts on threatened species would trigger a Species Impact Statement (SIS). The Director Generals Requirements for SISs were determined by the DG of DECC. Thus Government Staff with relevant expertise were in charge of not only setting the requirements but also of assessing the adequacy and degree of compliance of the final SIS with the DGRs.

In contrast the Department of Planning do not have expertise is setting Environmental Assessment Requirements (EARs) as they relate to biodiversity impacts, and have shown a willingness to let clearly inadequate assessments be publicly exhibited and used for decision making purposes.

3.5 Joint Regional Planning Panels

JRPPs have only commenced from July 1st 2009. At the time of writing no determinations had been made by a JRPP.

JRPPs will consider all local development which is valued between $10m and $100m, with the Minister retaining discretion to consider development of above $50m under Part 3A.

JRPPs will replace local Councils as the consent authority for this bracket of development. However a local Council will still conduct the assessment report and be the body which is a respondent in Court should the determination be challenged.

The NCCNSW has previously made submissions regarding JRPPs to the Department. Our concern is that the removal of decision making from local authorities reduce the access of our member groups to the decision makers.

Decision making which is undertaken by the Minister or Department (Part 3A) or by expert Panels (IHAPs and JRPPs) tend to favour the development industry which can employ professional consultants and lobbyists with access to senior Government members.

The NCCNSW is opposed to taking decision away from local Councils and in particular opposed to JRPPs making determinations without meeting in the local Council area[8].

Recommendation 7. JRPPs should be abandoned as they advantage development interest over community interests.

Secondly the NCCNSW is concerned that the Code of Conduct for JRPPs requires a lower standard that that required by Local Government.

The NSW Local Government Code of Conduct requires any Councillor who has received a campaign donation of $1000 or more to declare a 'significant' conflict of interest and not participate in the vote. Unfortunately the JRPP Code only requires a Panel member to consider whether they have a conflict if they have received a campaign donation.

A JRPP member may have a conflict of interest and stay and vote on an issue if either the Minister or the Panel decides they can. This standard is also lower than that required of Local Councillors who are required to leave the Chamber and not vote without exception if a significant conflict exists.

The NCCNSW does not believe the JRPP Code of Conduct with lower standards regarding campaign donations and in which members with serious conflicts of interest may still vote, are in the best interests of our member groups.

Recommendation 8. If the Government persists with JRPPs, then the Code of Conduct should at least be the equivalent of that which applies to Local Government.

Example of centralized decision making advantaging development interests.

A good and clear example of how remote decision making advantages developers over local communities can be seen in the Huntlee New Town Assessment.

During the Huntlee Part 3A process a Departmental Officer visited the Sweet Water Action Group in 2007 to hear their concerns regarding the Environmental Assessment Requirements.

The same person is listed as an author of the proponents Preferred Project Report dated April 2008[9].

[8] Cl. 5.2 of the JRPP Operating Procedures indicate meetings do not have to occur in the Local Council area in which the development is proposed.

[9] Preferred Project Report, Huntlee New Town, JBA Urban Planning Consultants P/L April 11th 2008.

It is presumed that at some stage between working for the DoP on the Huntlee proposal the person accepted private employment with the consultant engaged by the Huntlee proponent and then proceeded to act on behalf of the proponent - on the same Part 3A development on which they had worked as a Departmental Officer.

The development industry's ability to engage professional consultants, who may be familiar with the workings of the Department, gives them greater ability to lobby effectively.

Recommendation 9. The Government should consider option to prohibit former DoP staff working for private enterprise on the same project as they have been working on for the Department.

3.6 Standardised LEP's

The introduction of Standardised LEPs was aimed at making it easier for developers to make proposals across a range of Council areas.

The downside of Standard LEPs is that the same circumstances do not apply across NSW.

There are multiple examples of the Standard LEP reducing protection for the environment.

One such example has been in the Ryde LGA where bushland previously zoned for environmental protection had been proposed to be converted to E3 zone. Under the E3 zone various infrastructure works (such as a sewerage plant) would have been permissible.

In the Cessnock area vegetation protections applying to the HEZ have been deleted from the Draft Standard LEP at the direction of the Department of Planning. The existing vegetation protection had been written in to the HEZ LEP as a result of the public consultation process and the fact that over 90% of the site is forested with Endangered Ecological Communities and the site is highly environmentally sensitive.

The changes directed by the Department of Planning do not take into account local conditions and will result in a second rate outcome for the environment.

3.7 Stop the Clock

As part of the planning reforms the NSW Government plans to introduce a practice of streamlining development assessment under Part 4 of the Act. This involves requiring Consent authorities to either reject the DA or request further information within 7 days, or 14 days if the consent requires concurrence.

After that time no further information can be requested.

Although scheduled to begin in July the proposal has not yet been implemented.

On a prima facie basis the NCCNSW support this proposal. Our member groups experience many instances where inadequate Flora and Fauna assessments are submitted with a development applications. In some instances the assessments are not just sloppy, they are manifestly incorrect.

Typically a Council only becomes aware of the inadequacy of the Flora and Fauna assessment when knowledgeable individuals in the community make a submission during the public exhibition period. Under the proposed reforms it would be too late to request further information at this point and, depending on the severity of the shortcoming, the Council may well have to reject the DA or risk making a determination with inadequate information.

The NCCNSW believe this process will have the effect of, a) increasing the quality of DA markedly as developers improve their performance to avoid a refusal, and b) greatly increase the time taken to approve DAs as some DAs will require multiple applications before finally being approved.

On reflection the NCCNSW considers this is an inefficient mechanism for the purpose of improving Development assessment, and one which is likely to create frustration in the development community.

A more efficient path for the assessment process to take would be for the NSW Government to create a register of accredited consultants (ecologists, bushfire assessors, geo tech, traffic engineers etc) which the Council engaged on a rotating basis to conduct the appropriate studies. The Council would then invoice the applicant for the studies.

In this scenario the applicant pays the same amount of money as they would had they engaged the consultants themselves (except in cases where a cheap and substandard report had been commissioned). The consultants are paid by the Council and are not beholden to the developer for payment or their next job and therefore provide more objective information. And finally as consultants inexperienced in the local area would not be accredited the Council is unlikely to have to request further information and supplementary reports.

This concept is similar to that advocated in **Recommendation 4** except it would be applied to Part 4 assessments.

Recommendation 10. The EP&A Act is re-written to include a regime of Environmental Assessment which is conducted at arms length from the applicant (but on a cost recovery basis) in order to provide more accurate and up to date information accompanying DAs. This will result in faster assessment times.

Conclusion

The NCCNSW believe the current planning system in NSW is not protecting biodiversity or resulting in ecologically sustainable development.

The emphasis by the Government on increasing the speed of approvals appears to be at the expense of supporting objective and credible assessments of environmental impact.

In fact the evidence suggests the NSW Government is contributing to the decline in biodiversity in NSW.

The Need for Monitoring

The NCCNSW believe the NSW Government is heading down a dangerous path. While the Government claims there is a pressing need to[10];

i) speed up development approvals,
ii) prevent development being refused by Councils for 'political' reasons via taking determinations out of politicians hands,
iii) capping the amount which can be levied for community infrastructure.

There is no corresponding data by which the Government can show the environment and resident amenity is being either protected or enhanced.

Whilst there are indicators by which the Reforms can be measured in terms of speed and dollar value, there is no program in place to monitor the reforms impacts on biodiversity or community satisfaction.

For example it is currently possible to collate data which tells how many DAs have been lodged in NSW, what their dollar value was and how long they took between lodgment and determination.

What can't be told from data collected is; How many hectares of native vegetation were lost as a result of the development? Of the vegetation lost how much constituted an Endangered Ecological Community? Where threatened species were involved what offsets were conditioned? Of the offsets how many were like for like offsets?

Recommendation 11. The Department of Planning collect sufficient data from all DAs processed in NSW to enable an assessment of the impacts on biodiversity resulting from the planning system in NSW. Such data could include; the number of hectares of vegetation destroyed, the number of DAs which have had either minor or significant impacts on threatened species, the amount of offsets conditioned, and the quality of offsets.

[10] Planning reforms bills guide, Department of Planning, May 2008

4.0 Addressing Terms of Reference

b) the implications of the Council of Australian Governments (COAG) reform agenda for planning in New South Wales,

The NCCNSW believes the COAG agenda to encourage a streamlined development assessment agenda with increasing the use of 'complying' development to speed up approvals will make the same mistakes as the NSW Planning Reforms. That is there is an assumption that quicker equates to better quality. Whereas it is clear to the NCCNSW that quicker decision making with more discretion available to the Minister is resulting in poor quality planning decisions.

5.0 Addressing Terms of Reference

c) duplication of processes under the Commonwealth Environment Protection and Biodiversity Act 1999 and New South Wales planning, environmental and heritage legislation,

The NCCNSW believes there is value in diversity. Currently there exists a bi-lateral agreement between NSW and the Commonwealth regarding assessment of species listed under both State and Federal regimes.

There may be some advantages in having a bilateral agreement if there was more consistency in the NSW assessment of environmental factors. However as discussed earlier in this submission the assessment in NSW, particularly of major projects, is characterized by ad hoc decision making which lacks transparency.

If the NSW assessment process was more specifically linked to the principles of ESD and the Minister was required to adhere to a defined methodology, and to provide explicit reasons if an approval varied from the nominated methodology, then it may be possible to support a bilateral or joint approach.

However in the current climate a joint approach is likely to see the Commonwealth just adopting and repeating the inadequate assessment of the NSW Government.

6.0 Addressing Terms of Reference

d) climate change and natural resources issues in planning and development controls,

6.1 Sea Level Rise

There is an urgent need in NSW for legislative change which acknowledges the issue of climate change in planning decisions.

At present there is a great deal of confusion in the wider community and among consent authorities as to how climate change can be managed in planning decisions.

The current case law seems to endorse a position that ESD is a recognized part of 79C(e) considerations, ie the public interest, but refrains from directly making ESD as a mandatory consideration when determining State Significant Site applications or Concept Plans[11].

The Government has also issued the *Draft Sea Level Rise Policy Statement*[12] discussion paper which predicts a 40cm sea level rise by 2050 and 90cm by 2100. These figures have been criticized as being too little and lagging behind current estimates. The evidence so far seems to consistently be on the high side of past predictions by the International Panel on Climate Change. The IPCC has properly taken a conservative approach with regard to reliability of data and modeling, but as the data base is continually being refined and improved, subsequent modeling, with inevitable time lag, makes it clear that a strongly precautionary approach is needed when long term plans are being considered

Given that planning decisions have effect over a long period of time it is clearly to the advantage of the community to take a cautious and risk averse approach when considering new developments which are either at risk of sea level rise or will impact on wildlife corridors which allow species migration over time.

Despite this the NSW Government seems averse to refusing development based in climate change issues.

The NCCNSW wrote to the Minister for DECC and DoP in April this year expressing our concern regarding the lack of firm guidance in planning decisions. The following quote from the *Draft Sea Level Rise Policy Statement* illustrates the Departments lack of resolve to provide guidance.

> *"The benchmark is not intended to be used to preclude development of land projected to be affected by sea level rise. The goal is to ensure that such development recognises and can appropriately accommodate the projected impacts of sea level rise on coastal hazards and flooding over time, through appropriate site planning and design."*

An example of this lack of firm policy can be seen in the Moonee Glades Major Project 06_0143 approval.

---

[11] Minister for Planning v Walker [2008] NSWCA 224 (24 September 2008)

[12] DECC, February 2009.

Much of that site is subject to flooding, tidal inundation and sea level rise. Despite this the approval was given in February this year for a development footprint based on a sea level rise of 69cm by 2100.

The Departments Project Assessment Report explicitly acknowledges that the DECC *Floodplain Risk Management Guideline - Practical Consideration of Climate Change, Department of Environment and Climate Change, 2007* documentation of sea level rise of up to 91cm by 2100 was available to the proponent. However the 91cm sea level rise possibility was not adopted by the proponent, and the lower level of 69cm was accepted by the Department and Minister.

Adding further to the mess, if Moonee Glades had been a Part 4 assessment the NSW Floodplain Development Manual would have been followed via which filling of the flood/sea change affected areas would not have been endorsed without compensating the hydraulic capacity of the floodplain elsewhere.

Another example of development at critical risk of sea level rise is the West Yamba rezoning proposal.

This 127ha proposal is currently only 1m above the mean hide tide mark and has been adopted by the Clarence Valley Council and sent to the Planning Minister for consent.

West Yamba is a town in which the high tide comes up through the storm water drains already. It is also a town to which there is only one access road which is also subject to flooding and closure by accidents.

The West Yamba Risk Management Study[13] states that 1.34 cubic metres of fill will be required to secure the 127 ha at a suitable height above sea level. This has been estimated as requiring one truck load of fill every eight minutes for 9 years.

It appears to the NCCNSW that NSW needs to urgently adopt credible planning legislation for coastal development. The two examples above show a lack of policy direction and guidance from the NSW Government is resulting in inconsistent and inappropriate decisions such as the two above.

Recommendation 12. The NSW Government urgently needs to adopt a risk averse standard of predicted sea level rise by 2100 and apply this standard consistently.

[13] P.39

6.2 Urban Sustainability

In addition to considering sea level rise in coastal development, the issue of climate change requires greater emphasis on urban sustainability to assist in lowering our carbon footprint.

The DoP has well developed policies to integrate land use planning with transport considerations. These are contained in a series of documents summarized in *Integrating Land Use and Planning (ILUP) 2001*[14].

This policy aims to have development which;

- *increases access to public transport, walking and cycling*
- *encourages people to travel shorter distances and make fewer trips*
- *reduces car dependency.*

ILUP Overview says on page three;

> *Land use planning practice should result in urban development and change that moderate car reliance so that other measures to reduce car use and the environmental impact of transport will be effective and affordable.*

and;

> *The siting of trip-generating development in dispersed locations carries significant community and environmental costs.*

and;

> *Councils or consent authorities wishing to depart from these directions should only do so within the context of a local or regional strategy that meets the state government's integrated land use and transport objectives.*

Further;

> *New residential areas provide an opportunity to 'get it right from the start'. To promote more viable public transport and reduce car dependence, it is important that the location, density, design and development (including staging) of new residential areas maximise access to public transport.*

and;

[14] NSW Department of Planning webpage

The state government has adopted a target minimum density of 15 dwellings per hectare for new residential release areas. This will slow the consumption of land and ensure there are enough people to support viable and effective public transport services.

Yet despite these policies designed to reduce car dependency, greenhouse gas emissions, and minimize community and environmental costs, NSW is still approving dispersed Greenfield developments without corresponding provision of sufficient public transport.

Of note is the decision to not provide the Metropolitan Strategy North West Release area with a heavy rail line.

In contrast to the ILUP policy the Regional Strategies have consistently endorsed 25 year plan for land release which have reinforced a dispersed low density pattern of settlement of approx. 10-12 dwellings per ha instead of the foreshadowed 15. These settlements have little hope of being serviced by regular public transport in the future without substantial government subsidy, and little hope of reducing car dependency.

At Huntlee in the Hunter Valley a new release area for 20,000 located 57km west of Newcastle and approximately 40km east of the mining industry, residents will be almost entirely dependent on road transport despite being adjacent to an existing rail line and railway station. This is because there has been a refusal to commit either the Government or the proponent to provide services extra to the 4 per day which currently exist.

Despite adopting policies to reduce greenhouse gas and car dependency the DoP is failing to implement these in planning decisions.

Recommendation 13. The NSW Government consider legislative measure to ensure its existing policies to reduce dispersed patterns of settlement, car dependency and maximize access to public transport, are implemented.