Submission No 32

INQUIRY INTO PLANNING SYSTEM AND THE IMPACTS OF CLIMATE CHANGE ON THE ENVIRONMENT AND COMMUNITIES

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The Chair
NSW Legislative Council
Portfolio Committee No 7 – Planning and Environment

Dear Madam/Sir

Submission – Inquiry into the planning system and the impacts of climate change on the environment and communities

I wish to make a submission to the inquiry into the planning system and its role in affecting the impacts of climate change on the environment and communities.

This submission considers the adequacy of planning powers and planning bodies to review development approvals, taking into account the cumulative impacts of development, climate change, natural disasters, biodiversity loss and changing social, economic and environmental circumstances. It suggests planning reforms that can support communities in mitigating and adapting to conditions caused by changing environmental and climatic conditions. The submission draws from extensive experience with the operation of the NSW planning system.

This submission comprises three parts as follows:

1. A discussion of the functions of the NSW planning system and its distinct elements.
2. Summary of climate change and biodiversity issues and deficiencies of current approaches.
3. Recommended future actions for land use responses to climate change and biodiversity loss.

Reference documents referred to in the submission are also included as attachments.

1 Functions of the NSW Planning System

The NSW planning system is much more than simply legislative requirements. It comprises an interrelated network of elements that need to be considered both individually and collectively in relation to the Inquiry terms of reference.

The purpose of the system is primarily to support appropriate and efficient planning for land, infrastructure and natural resources in the public interest. It provides a system of planning and impact assessment for proposed development and change, and processes for approval of new development. Significantly, there are at least 15 different pathways for development approval, depending on the scale, purpose and specific provisions that are applicable, and thus multiple concurrent planning systems.

The NSW planning system has changed over time, and progressively expanded in complexity. Much more is expected of the system now than in the past, with significant time and resources expended in navigating the approval system (for both rezonings and development assessment) rather than supporting effective implementation of the objects of the legislation. The focus of the system is increasingly on processes rather than practical outcomes.

Different elements that combine to form the current planning system are summarised in the following table. It is useful to consider each element in relation to its impact on effective planning for climate change, biodiversity and community risk.

Table - NSW Planning System Elements

Planning system element	Explanation	Comments
Legislative provisions	States objects, scope and powers	Legislative requirements have progressively become more complex over time, especially the incorporation of building requirements and major project approvals
Regulation	Supports legislation in outlining how it operates, and regulatory requirements	Operational provisions to support the implementation of the Act
Strategic and policy plans and planning	Processes for identifying desired outcomes and documentation in plans	An important part of the legislative framework since its introduction, often not resourced or evidence based, and poorly integrated into the system
Planning instruments	Implementation mechanism for policy and strategic plans. Include state, regional and local instruments	State environmental planning policies are generally issue based and overlap with local and regional instruments, sometimes inconsistently. Issues arise as a result of the interaction of planning instruments at different scales
Standard instrument LEP order	Standardises permissibility provisions including land use definitions and matters to consider in approvals	The scope of local planning instruments remains based on planning schemes prepared under former Part XIIA of the Local Government Act 1919 originally adopted in the late 1940s to reflect UK practice

Development control plans	Place-based and locally specific place development guidelines for consideration in development applications. Also regulate vegetation clearing through vegetation permits	Important policy and practice documents at the local scale implemented by Councils
Supporting data & information	Data and information to support the implementation of the system (eg flood mapping, risk data, biodiversity and population data)	Information supporting planning practice is variable and often inconsistent, especially in relation to key spatial data such as flood information, bush fire risk mapping, and biodiversity values
Planning authorities	Number of different authorities with powers and functions under the legislation (eg Minister, Department, Councils, Independent Planning Commission, local and regional planning panels, Greater Cities Commission)	The number of different planning authorities and their roles is confusing and influences planning outcomes
Administrative culture & practices	Include staff practice, IT systems, compliance requirements, etc (includes planning portal)	Administrative practices and systems significantly affect the efficiency of the planning system, and transparency
External legislative links	The planning system includes external regulatory links and referral requirements (eg BC Act, RF Act, etc)	Relationships between the planning system and other legislative requirements is confusing and adds complexity (eg integrated development approvals, and exemptions from approval)
Community engagement processes	Public participation plans and exhibition requirements	Community involvement is a key object of the legislation and essential for effective planning
Staff and occupational skills & training	Skills of professional 'Planners' and related occupations underpin operation of the system, together with education and training systems	Planning skills underpin the effective operation of the system. However, many aspects of the planning system are not directed by professional planners, and nor is there any qualification requirement for practitioners. The Planning Institute of Australia has a registered planner scheme but this is not mandatory. See recent state of the profession report
Legal & administrative oversight & review	Independent review authorities and appeal processes (eg Independent Commission Against Corruption and Land and Environment Court)	External agencies are responsible for interpreting legislative requirements and development appeals, and overseeing ethics and probity matters

Many issues with the operation of the planning system result from its administration rather than the legislative and regulatory framework. Importantly, deficiencies exist in implementing effective climate change, biodiversity and community risk responses in relation to:

1. *Strategic and policy plan preparation* – There is lack of priority for long term issues in strategic land use planning, especially in regional and local strategies. In addition, such strategies are often poorly researched and written, with an effective life of often 5 years or less.
2. *Planning instruments* – While planning instruments have potential to be highly effective in regulating land and in responding to climate change and biodiversity issues, they are unfocused, highly complex, inflexible and unable to respond to contemporary and locally specific situations. This is largely a result of NSW Government administration of the process and the standardisation of plan provisions in 2006.
3. *Standard Instrument Local Environmental Plan requirements* - Standard Instrument local environmental plan provisions limit regulatory action at the local scale, and affect effective local planning and the flexibility to respond to local circumstances. (*See Fallding & Kelly 2023*)
4. *Planning authorities and approval pathways* - The number of different planning authorities and inconsistent approaches between these authorities and multiple approval pathways hinders effective application of the planning system.
5. *Supporting data and information* – Data to support land use planning is highly variable across NSW and often poorly integrated into regulatory planning frameworks. This is the case in relation to consideration of development on flood prone and bushfire prone land and accompanying risk assessment and mapping. In these cases mapping is primarily for identifying approval process requirements rather than desired outcomes.
6. *Professional planning skills* – Planners often lack training and skills in directing appropriate responses to climate change, and in considering biodiversity and community risk in either strategic planning or development assessment. For example, the quality and scope of strategic plans is generally poor.

2 Deficiencies of current approaches

Land use and land management play an important role in carbon emissions. Critical climate change response issues that need to be addressed through the planning system are:

1. Implementing measures to achieve at least carbon neutrality in the built environment, transport and land use, including assessment of carbon emission impacts of land use change, and carbon offset measures.
2. Identifying and adapting to risks associated with climate change including increased floods, storms, bushfires, and heat.
3. Preventing further loss of biodiversity and native vegetation and allowing natural systems to evolve in response to change, and implementing biodiversity offsets.
4. Supporting community health and well-being through the provision of built, natural and social infrastructure that is efficient, equitable and sustainable.

5. Facilitating links between spatial plans and the use of economic instruments to support measures that mitigate climate change, respond to its impacts, and support conservation of biodiversity and the functioning of natural ecosystems.
6. Setting limits on land use and development in inappropriate locations, and limiting the provision of infrastructure, services and investment to promote efficiency (eg supporting beneficial urban congestion).

The current NSW land use planning approach is not fit for purpose for the challenges outlined above that will increasingly be faced over coming decades. Specific issues impacting on its effectiveness are:

1. The planning system does not effectively prioritise competing objectives, or recognise that fundamental issues such as mitigating climate change and protecting biodiversity are both more important, and less reversible than other competing objectives (such as provision of housing). An appropriate planning framework for dealing with climate change is required, based around clear objectives, strategic plans, regulatory instruments and land management practice. (*See Fallding 2021*).
2. The system relies substantially on local environmental plans to regulate development, and has evolved from regulatory planning instruments based on 'use' of land and historic definitions, rather than being objective or impact based, and allowing a response to future issues, risks, or development purpose and outcome.
3. Planning instruments are currently ineffective in articulating or fostering desired development and appropriate standards (eg no net loss of biodiversity), and local plans are constrained by the standardisation required by the Standard Instrument Local Environmental Plan provisions. (*See Fallding & Kelly 2023*)
4. The current planning system focuses on new development, whereas the challenges faced in the future require changes in both the operation and renewal of existing development (eg retrofitting for energy efficiency, and land resubdivision for efficient redevelopment), as well as new approaches to the assessment and approval of new development (eg considering carbon impacts, protecting natural systems, and securing biodiversity offsets).
5. Opportunities for local environmental plans to effectively respond to these issues need to be identified and introduced, including introducing net zero emissions and nature positive development as plan objectives, together with introduction of appropriate standards and regulatory requirements for the assessment of development, and recognition of these plans in the application of financial instruments such as land rates and taxes, insurance, and incentive programs.

3 Recommended reforms to address climate change and biodiversity loss

The planning system will need to adapt and modify existing mechanisms in order to effectively deal with current and future issues. Notably, the legislation currently provides for significant flexibility in the scope and operation of planning instruments, yet their operation is limited by continuing past administrative practice and entrenching inflexibility through the Standard Instrument LEP in local provisions.

Therefore, a focus of the review of the planning system should be consideration of the adequacy, appropriateness and potential for improvements to planning instruments made under the current legislation.

The following recommendations are made:

1. ***Disentangle legislative complexity*** – Ideally, the legislative framework would be simplified so there is more focus of effort on planning outcomes and less effort on differentiating and following complex approval processes. This requires identifying fundamental elements required of the land use planning system and building simpler and more comprehensible approval processes that prioritise issues such as protection of biodiversity and assessment of carbon emissions.

   A focus for progressively disentangling the planning legislation should be removing building and construction provisions into a separate Act and removing complex interactions with other legislation. For example, an alternative legislative framework could be considered along the following lines:

   - An Environmental Planning Act primarily dealing with strategic planning (infrastructure, investment, land use, natural resources, and conservation) establishing planning regions, preparing environmental planning instruments and regulatory requirements, enabling linked financial mechanisms with regulatory provisions.
   - A Development & Management Approvals Act dealing with process for impact assessment and planning and management approvals for development and ongoing activities, including provisions relating to native vegetation clearing, and carbon and biodiversity offsets. Ideally a consistent approval process should apply to all natural resource management approvals.
   - A Building Standards & Approvals Act to regulate building standards and construction requirements, and redevelopment. This would include provisions for energy efficiency, whole of life cycle material use, including demolition of buildings, recycling of buildings, and waste management.
   - A Land & Vegetation Management Act to deal with vegetation management, soils, bush fire hazard reduction and infrastructure maintenance and non-development related vegetation issues.

2. ***Prioritise climate change and biodiversity in regional plans*** - Climate change, biodiversity and community risk issues should be a priority in strategic land use planning. New regional plans are suggested with a structure based on pillars of (1) regional settlement structure and public infrastructure provision, (2) conservation values and protecting ecological function, (3) goals that link to state and national priorities (including net zero carbon emissions, regional economic development and resilience).

3. ***Rethink local environmental plan provisions and scope*** – Opportunities to innovate in local planning instruments should be available, specifically by removing standard instrument LEP provision requirements, including climate change and biodiversity objectives, identifying present and future risk, and removing the requirement for land use zoning. Local plans can support financial mechanisms that incentivise the achievement of desired objectives

(eg local government rates, taxes, insurance costs, biodiversity offsets and carbon offsets) and are linked to land through plan provisions identifying levels of service, risk and development opportunity, and management practice.

It would be appropriate to experiment with a new local environmental plan approach that is regionally consistent rather than state consistent, and applies model provisions rather using a standard instrument plan. Development permissibility could be based around extent to which regional priorities are achieved, environmental standards, local service & public investment standards, ecological planning settings, and land suitability and risk levels. Permissibility and approval would be based on impact assessment and also take into account existing considerations such as the public interest and suitability of the site.

4. ***Apply the subsidiarity principle in planning*** - There has been too much centralisation of planning which limits the capacity of the system to innovate and respond to change, and to provide locally relevant solutions. Increasing centralisation is contrary to the original intent of the Environmental Planning and Assessment Act 1979 and is a key factor in the loss of local resilience in climate change adaptation.

5. ***Facilitate review and revocation of past approvals*** – It is desirable to improve the capacity of planning authorities to revoke or revisit inappropriate past zoning decisions and development approvals (arising from changes such as fire or flood risk, adequacy of infrastructure services, or biodiversity values). This would enable progressive transition from legacy land use and approvals in cases where where circumstances have subsequently changed.

Thank you for the opportunity to make a submission in relation to these important issues being considered by the Inquiry.

Please contact me if you have any queries or require further details in relation to this submission.

Yours sincerely

Martin Fallding - Principal

27 October 2023

Attachments:

Fallding, M (2021) Land use planning & climate change: Getting the framework right, *New Planner*, September 2021

Fallding, M & Kelly, A H (2023) Complex, practical or inflexible? Unravelling the background and consequences of the NSW standard instrument local environmental plan, *Australian Planner* 59(1):14-25