Submission No 155

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

Organisation: Tweed Shire Council

Date Received: 3 November 2023

Council Reference:
Your Reference:

TWEED SHIRE COUNCIL

02 6670 2400
tsc@tweed.nsw.gov.au
tweed.nsw.gov.au
PO Box 816
Murwillumbah NSW 2484

2 November 2023

Parliament of NSW
Portfolio Committee No. 7 – Planning and Environment
SYDNEY NSW 2000

Email: portfoliocommittee7@parliament.nsw.gov.au

Dear Sir/Madam

Tweed Shire Council Submission on Planning System and the Impacts of Climate Change on the Environment and Communities

Structure of Submission

This submission is comprised of:

A. Framing Prologue

B. Responses to specific aspects of the Terms of Reference (ToR)

C. General evaluation and response to ToRs

Appendix 1 – Aggregated Recommendations by Council Staff

Appendix 2 - Submission Recommendations by the elected Tweed Shire Council

Each of the submission sections may provide topic specific ***Recommendations***, and these are aggregated as a separate appendix.

This submission addresses the Inquiry's ToRs on an interpretation that 'protection' relates to an impact arising ***from*** climate change and hence is not concerned with 'activities' that may contribute ***to*** climate change. Drawing on PIA[1] for this present context, the adaptation measures required to be considered by this Inquiry are those based on reducing vulnerability to the effects of climate change on people, the natural environment and built environment, while mitigation measures are those actions that are taken to reduce and curb greenhouse gas emissions.

Mitigation, therefore, attends to the causes of climate change, while adaptation addresses its impacts. Consequently, considering the ToRs from the perspective of adaptation and resilience, it was necessary to evaluate the effectiveness and adequacy of the present planning system having regard for such natural impacts as, and their effects upon:

[1] Planning Institute of Australia (PIA) Climate Series: *Role of Planning in Adapting to a Changing Climate*, Discussion Paper (March 2021) p2 >https://www.planning.org.au/documents/item/11209

- Urban heat / heat hazard
- Flooding
- Community resiliency
- Coastal erosion / inundation
- Landscapes
- Bushfire
- Severe weather / storm
- Cumulative decision outcomes
- Drought / extreme heat
- Habitat loss / deterioration
- Biodiversity loss
- Fire (urban & bushfire)
- Telecommunications
- Roads and transportation
- Water & wastewater infrastructure
- Human capital (resources)
- Stormwater Infrastructure

A. FRAMING PROLOGUE

The purpose of this prologue is to frame the context about which the planning system may be viewed from an opportunities perspective, as that relates to the underlying founding principles inherent in the design of the prevailing Environmental Planning and Assessment Act 1979 (EP&A Act) and how those can be reinforced to deliver amendments that are administratively purposeful and capable of delivering outcomes through land use planning.

While legislation to impose certain minimum building standards in Sydney dates to the late 1830s, and despite calls for town planning legislation as early as 1909 with the Royal Commission for the Improvement of the City of Sydney and its Suburbs, no town planning legislation came into force in New South Wales until the Local Government (Town and Country Planning) Amendment Act, 1945. This Act was modelled on the English 1932 Act, and introduced ‘zones’, and the novel idea of ‘planning schemes’, and despite numerous changes in the parent legislation no serious attempts were made to change the first NSW Act until 1974.

Prior to this, in 1963, the State Planning Authority, a new overseeing body, was created in the attempt to ensure that not only matters of local but also regional and State significance were considered in the planning process because it had become apparent by the 1970s that the planning system in NSW was both overly complex and failing to ensure that environmental factors were addressed. This body was superseded by the New South Wales Planning and Environment Commission in 1974 which was later dissolved on the passing of several cognate Bills, including the Environmental Planning and Assessment Act (EP&A Act), Land and Environment Court Act and Heritage Act, which came into force in 1980.

The Planning and Environment Commission Act, enacted in 1974 and establishing the Planning and Environment Commission, required it to report to the Minister on the improvement or restructuring of the planning system. The report defined the key elements of what was to become the planning regime under the present EP&A Act.

The Minister of the day in June 1979, The Hon., Paul Landa, then Minister for Planning and the Environment, adopted the following of Sir Henry Bland’s recommendations in concluding that "the principal purpose of any organisational and administrative arrangements for the future should be:

(a) To vest in the Minister and the executive exclusive responsibility for policy including the determination of objectives, targets within those objectives and the priorities to be accorded and the guidelines and parameter which should govern administration.

(b) To ensure that there is integrated and co-ordinated administrative machinery complete *to provide policy advice and to ensure that in the most effective, efficient and economical manner determined policy will be administered without overlap or duplication of activities and will be monitored, appraised, evaluated* and as necessary reviewed.

(c) To ensure that the machinery recognises *the in-severability of conservation, environment protection and land use planning* and provides for observance of determined policies in those fields by all departments and agencies including those whose principal purpose lies elsewhere.

(d) To make proper *provision for contributions by non-official persons sensitive of general and particular community interests and attitudes to the formulation of policy and for their involvement in its administration* and for public scrutiny of policies before they are definitely determined." [emphasis added].

These principles defined the purpose of the new Act by way of its s.1.3 'Objects' (formerly s.5) and have remained fundamentally intact to this day, although with some addition and with minor periodic revision to reflect contemporary norms. There are some essential features that were clearly intended to underpin the NSW planning system that are noteworthy because they are equally relevant today in present times than at any time before. They are:

- Integrated and coordinated delivery.
- No overlap or duplication in the administration of the policy.
- Monitoring and evaluation of delivery activities, reviewed as necessary.
- Equal consideration always of conservation, environment protection and land use planning policy, irrespective of the agencies principal purpose.
- Public participation in the formulation, finalisation, and administration of policy.

The introduction of the Environmental Planning Bill (1976) was the first serious attempt to reform and modernise the planning framework in NSW. However, the Bill was never debated and lapsed with the calling of the 1976 election. By 1979, modernisation of the planning framework was long overdue. The second reading speech for the EP&A Bill stated:

> *"I doubt that there can be any genuine questioning that existing legislation no longer provides the best or even adequate framework or system for environmental planning decision making."*

Post-1979 it was envisaged that the ground-breaking new planning legislation and the establishment of a specialist court would cement the role of the public in planning. However, since 1979 the EP&A Act has been constantly amended, with the most significant changes occurring between 2005-2010 and compounded by constant incremental change thereafter. Consequently, the extent to which the reforms have been consistent with the original aims of the Act are a matter of much debate.

Nonetheless, it is essential to acknowledge the planning system is subject to competing demands: on one side, there is the case for streamlining the decision-making process to achieve speedier and more efficient outcomes; on the other, there are legitimate claims for public participation and local community involvement in the planning process. Central to

the debate, and to the balance that must be achieved, is the further argument for greater protection of the environment, and prominent consideration of natural disasters and the need to shift toward disaster resilience in planning and thence resilient communities.

However, much of the reform of the preceding decade has been focused on streamlining assessment processes for major projects, standardising local planning, decreasing assessment requirements and timelines by expanding categories of exempt and complying development, establishing new decision-making bodies, and concentrating planning power and discretion.

This has been further overlayed by various Departmental administrative practices that run in parallel to the legislated system, such as 'flying squads' and rapid assessment teams, a 'planning delivery unit', selective acceleration programs for some private development proposals, fast track rezonings and a planning concierge, which "provides a central point of contact for investors"[2]. It has further muddied if not complicated the overall framework, disguising pre-existing transparency and accountability for the machinery of the planning system, a veil of sorts on who is doing the work, influencing decisions, and driving planning outcomes. There is no apparent broad transparency regarding potential conflicts of interest with the Department of Planning drawing heavily on the private professional consultancy sector for resourcing its various programs, not all of which may be apparent or openly disclosed.

Consequently, while many reforms sound practical in terms of efficiency and planning system through-put, they have potentially had significant negative ramifications for local communities and the environment, which represents a significant departure from the principles of the original 1979 EP&A Act.

History seems to be repeating again today, we can look back and witness the thirty years or so it has essentially taken each time a new planning Act has come into being and each time there is overwhelming evidence of each successive planning system falling into an accelerated decline as they near their 30-year lifespans, marked out by their becoming increasingly difficult to maintain and implement with each new layered amendment, many of which are mismatched, inconsistent or conflicting.

Debatably, the process of comprehensive review should have commenced midway through the decline, as the information and technology advanced quickly allowing for greater data capture and this was paralleled by a rapidly changing social and environmental conscience brought about by greater awareness of emerging domestic and global issues, but nonetheless there are also lessons to be drawn. These long timeframes should not perturb the task of meaningful review and update and nor should it lead to overreaction and calls for a total overhaul – NSW has been down this path previously with the release of the White Paper and Exposure Bills in 2013 that sought a quantum shift in the planning system – mirrored by the promise of the 'best planning system in Australia', which proved to be overly ambitious and heavily politicised and consequently predestined for the history books, despite the many innovative and contemporary aspects that might otherwise have served NSW well.

[2] Planning Concierge, NSW Department of Planning > https://www.planning.nsw.gov.au/policy-and-legislation/planning-reforms/planning-delivery-unit/planning-concierge

Recommendation:

1. The Committee should be guided by the need to make evidence-based amendments that strengthen legislation and policy in the key areas identified and not be influenced about broader matters because the present EP&A Act is oft cited as 'old' and outdated.
2. The founding principles of the EP&A Act must be reinstated to ensure there are clear roles and responsibilities, frameworks for shared responsibility and oversight or concurrence from expert organisations, public participation, and scrutiny, along with monitoring, evaluation, and review.
3. The planning system is strengthened when there is clear line of sight between the overarching objective or commitment through to the implementation and performance monitoring of decisions; and it should be written into regulation and policy at the State and regional level, to enable effective demonstration of consistency at the local level.
4. Ecologically Sustainable Development and climate change must be embedded as priorities within the Objects (purpose) of the legislation, regulations, policy and local strategies and plans, and not remain as a listed items left to compete with every other object – there must be some semblance of priority that reflects the National importance of the matter.
5. The planning system is large, diverse, and complex; the systems, practices, roles and responsibilities although appearing to be made clear by the enactment of Parliament are often then eroded through embellishment by administrative 'delegated' practices that are often viewed as circumventive and supplanted by practices that benefit certain groups or interests, rather than adding to its transparency and efficiency. It is recommended that the machinery of the planning system remain clear and unambiguous in the legislation, regulations, and policy so as to maintain and build public trust in it.

The NSW EDO[3] noted in 2010, that at an international level, Australia is signatory to several international conventions that are particularly relevant to implementing the principles of ecologically sustainable development (ESD).

The concept of sustainable development has permeated mainstream thinking over the past two decades, especially after the 1992 Earth Summit where 178 governments, including Australia, adopted Agenda 21 (UNDSD, 2006). Ten years later, the 2002 World Summit on Sustainable Development (WSSD, 2002) made it clear that sustainable development had become a widely-held social and political goal[4] – a concept developed in response to a global realisation that rates of exploitation of natural resources are not environmentally sustainable. The overarching aim of ESD is to achieve a level of

[3] Environmental Defender's Office NSW (EDO), (2010) *The State of Planning in NSW – With reference to social and environmental impacts and public participation>* https://www.pc.gov.au/inquiries/completed/regulation-benchmarking-planning/submissions/subdr090-attachment2.pdf

[4] IPCC (2018) *Perspectives on climate change and sustainability* > https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg2-chapter20-1.pdf

development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The concept of ESD attempts to make it clear that environmental impacts are no longer seen as separate from economic and social considerations. However, climate change adds to the list of stressors that may challenge our ability to achieve the ecologic, economic and social objectives that define sustainable development.

The figure below illustrates key interactions arising for sustainable development and adaptation to climate change.[5] This further highlights the difficulty arising in land use decision making where it will not always be possible to reconcile conflicting or competing issues, and a trade-off will need to be made.

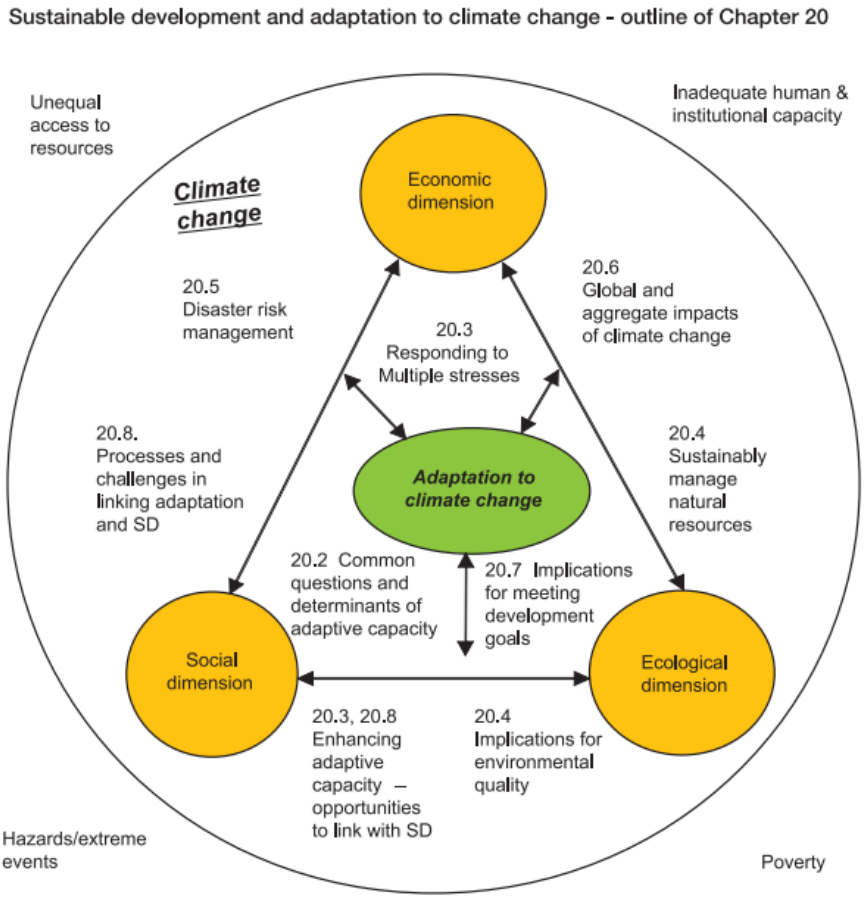

Figure 20.1. *Sustainable development and adaptation to climate change. An outline of Chapter 20 is mapped against the pillars of sustainable development. The figure is adapted from Munasinghe and Swart (2005).*

Not unlike the original framers of the EP&A Act, one of Agenda 21's key tenets is that broad public participation in policy development and assessment is essential not only to achieving sustainable development, but more broadly the task of balancing interests that arise in the formulation of policy. Participation and involvement in its administration is expected and public scrutiny of it ensures fairness and accountability.

To implement its commitments, the Australian Government negotiated with the states to develop the National Strategy on Ecologically Sustainable Development. The key

[5] Ibid p814.

emphasis of the strategy was to ensure that environmental, economic, and social considerations are integrated into government decision-making.

By way of example, The NSW Government, while committing to be more resilient to a changing climate[6], and by endorsing the Paris Agreement, as part of integrating these national climate objectives, adopted an emissions savings objective ***and adaptation objectives*** that aim to, among others:

- ensure consistency of NSW Government policy with the international and national policy context and the likely long-term direction of government and private sector action on climate change.

The National Strategy made it clear that protecting biological diversity and maintaining ecological processes is a key element to achieving ESD and to satisfying Australia's international obligations. As a result of the national strategy, the NSW Government adopted ESD, which has now been incorporated into over 60 pieces of NSW legislation, including making its presence as a listed item in the Objects of the EP&A Act.

Further, and although Australia has not signed a treaty with the World Economic Forum (WEF) to adopt their policies on climate change, noting it is a non-governmental organisation and lacking the power to enter into treaties with countries, Australia is a member of the WEF and its delegates have participated in a number of initiatives related to climate change. For example, in 2018, Australia signed the non-binding WEF Climate Pledge, which is a commitment to reduce greenhouse gas emissions and achieve net zero emissions by 2050.

Australia has also adopted several climate change policies that are aligned with the WEF's recommendations. For example, Australia has various mechanisms to price carbon, and is investing in renewable energy and energy efficiency. Australia is also working to protect and restore its natural environment and in particular biodiversity and forests, and in effect Australia is working with the WEF and other non-governmental organisations and governments to address the global climate challenge.

The WEF believes that businesses have a critical role to play in addressing climate change through taking proactive action to reduce their emissions and to invest in sustainable solutions.

As a significant product consumer and with the ability to influence client consumer product choice, the building and construction industry is very well positioned to make significant inroads towards both greater sustainability and disaster reliance in new development in such areas as:

- Onsite management of waste through recycling.
- Utilising recycled products.
- Utilising local products, reducing transportation costs and emissions.
- Promoting smaller, smarter, and functional development to meet actual need.

---

[6] NSW Government (November 2016), *Policy Framework – NSW Climate Change,* > https://www.energy.nsw.gov.au/sites/default/files/2022-08/nsw-climate-change-policy-framework-160618.pdf

- Sustainably sourced and produced products.
- Climate responsive design linked with low energy technologies.
- Nature inclusive design, through water management and nature-based cooling.
- Active transport and walkable oriented communities.
- Site selection that avoids and minimises risk exposure to high hazard areas, and land that is vulnerable or has low adaptive capacity.

As it is, there is no equivalent principal akin to ESD in the EP&A Act addressing the impact of climate change and the corresponding need to plan for disaster resilient communities, consequently there is no prioritisation to consider either ESD or disaster resilient planning as an overarching consideration of conservation, environmental protection, and land use planning.

Meanwhile, the objects of the Act, which have been added to over time, and which do include some appropriate matters, can no longer be considered cutting edge, as they once were in 1979. This provides opportunity then for the EP&A Act's underlying principle of monitoring and evaluation to respond to the call for action on climate change impact, to prioritise new planning principles that can best ensure that people and the natural and built environment are protected from climate change related impacts.

As to the Objects it is important to apprehend how they operate within the framework. Firstly, they represent listed matters with no particularity as to the priority of one over another, meaning that each is weighed equally against each other. In practice this has led to ineffective implementation reliant on the strength of arguments presented within contexts that are awash with competing and often irreconcilable factors and were the economic interest of the private or corporate citizen are often favoured for fear of eroding 'property development rights and profit' at the risk of incurring a claim for compensation, or political disfavour.

The zoning of the land itself, despite the often significant lapse in time from when it was first zoned to the day that development is proposed, is often cited as the bedrock strategic intention and hence priority typically follows in order of those matters that best support the 'strategic development intent' – it is somewhat overstated and used defensively in argument about planning and investment certainty, but has little regard for change on many fronts; environmentally, climatically, cumulatively, economically, demographically, among others. In effect the so-called certainty that it provides on the one hand, is countenanced by uncertainty on the other; invariably it is the local authority who then bears the burden along with its community, be that degraded environments, risk transfer or higher asset maintenance and servicing costs.

As noted also, below, the NSW Climate Change Adaptation Strategy (CCAS), is calling on the NSW to *Embed climate change* adaptation in NSW Government decision-making.

Secondly, there is a compelling need to include climate change considerations explicitly within the planning legislation. As the EDO [7] also noted, whilst the NSW Court decisions have gone some way to implanting climate change considerations into Part 4 (development assessment and consent), it is not so clear cut and the appellate jurisdiction

[7] Above n1.

of the Courts have overturned several cases that on first hearing were seen to be lock-step with National and state policy objectives.

The lack of clarity in the articulation and hence limited administrative effectiveness of the current climate change policy and legislation in land use planning is demonstrated further in a recent NSW Land and Environment Court matter: *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92.

The case summary is best described by Lindsay Taylor Lawyers[8] (LTL). In brief, it was a case brought by a climate action group, Bushfire Survivors for Climate Action ('BSCA'), who sought orders from the Court compelling the Environmental Protection Authority (EPA) to prepare policies and guidelines *to protect the environment* ***from the effects*** *of climate change*. LTL notes that Section 9(1)(a) of the POEA Act provides that: 'The Authority [the EPA] is required to…develop environmental quality objectives, guidelines and policies to ensure environment protection', and the EPA argued because it is subject to the control and direction of the Minister (being the Minister for Energy and the Environment) their actions should be viewed in the context of the policies adopted and implemented by the NSW state government – such as the NSW Climate Change Policy Framework, adopted in 2016, and that it was entitled to take into account NSW government policy when determining what actions it should take in the exercise of its functions under the POEA Act.

The Court rejected this argument, and upheld BSCA's primary argument, stating the duty under s 9(1)(a) of the POEA Act, in the current circumstances where significant impacts from climate change were being experienced in NSW, includes a duty to develop instruments to *ensure the protection of the environment from climate change*. Of the five EPA prepared documents the Court found that none answered to the statutory description because they did not 'ensure' the protection of the environment from climate change, it subsequently made orders requiring the EPA to 'develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change'.

Notably, LTL highlights this case as being significant because the Court has found that a public authority, under the control and direction of the Minister, has *failed to discharge its duty to protect the environment from climate change* and has directed the authority to perform that duty. LTL note further, that "along with the landmark finding in Sharma by her litigation representative *Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 – in which the Federal Court found that the Federal Environment Minister owes a duty of care to Australia's young people not to cause them physical harm in the form of personal injury from climate change – confirm the increased significance of climate change in environmental jurisprudence."

This Committee's Inquiry into how the planning system can best ensure that people and the natural and built environment are protected from climate change impacts is clearly responding to the observable fact that NSW is not adequately or effectively achieving the obligations that arise from the adoption of State policy and its translation into law on this issue and it is commended for taking this present action to review the NSW planning system.

---

[8] Lindsay Taylor Lawyers, In-Focus Series, (September 2, 2021) > https://www.lindsaytaylorlawyers.com.au/in_focus/epa-ordered-to-develop-policies-and-guidelines-to-protect-environment-from-climate-change/

Recommendation:

6. The Committee should commission a review of relevant jurisprudence to inform decisions about any proposed amendments to the planning system and make this review publicly available.

It is also undeniable that NSW is clearly lagging-behind other jurisdictions who have introduced comprehensive climate change development assessment processes, or not least have taken first steps introducing the notion of climate change as a principal consideration.

The example has been given that the UK has introduced The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (UK), which entered into force on 1 March 2010. The Explanatory Note[9] states that the Government is to produce national policy statements to establish the case for nationally significant infrastructure development, and that these will integrate environmental, social and economic objectives, including climate change commitments, for the delivery of sustainable development.

Queensland has also introduced into its Planning Act (2016), as a discreet and overriding purpose of the Act, ecological sustainability. It differs from the NSW EP&A Act in that it presents a clear prioritisation of the underlying concept of ESD, which then sets out how it is a balance that integrates a range of other described factors, and which notably introduces climate change, albeit in the reverse fashion of matters that contribute to climate change opposed to the Inquiry's ToRs which seeks to address the impact of climate change on people, the built and natural environment.

Recommendation:

7. The Committee should commission a review of relevant examples from other like planning jurisdictions to inform decisions about any proposed amendments to the planning system and make this review publicly available.

Adopting an inclusive, contemporary issues-based approach will assist with meeting key climate change recommendations and is consistent with the NSW state-wide climate adaptation plan; the NSW Climate Change Adaptation Strategy (CCAS), which was released in June 2022.

The CCAS sets out a framework for adapting to climate change now and over the long term, and it has four key objectives:

[9] Explanatory Memorandum to the Regulations made under the Planning Act 2008, Part 2 of the Conservation (Natural Habitats &c.) (Amendment) (No.2) Regulations > https://www.legislation.gov.uk/uksi/2009/2263/pdfs/uksiem_20092263_en.pdf

Well adapted built environment and infrastructure

Develop and maintain the built environment and infrastructure to prevent, withstand and recover from climate change impacts, while continuing to perform its function and serve the community. This includes developing more resilient infrastructure after disasters.

Well adapted natural environment, biodiversity, ecosystems and natural resources

Actively manage natural systems to be functional and resilient in the face of climate change by enabling adaptation that protects the environment, sustainably manages different uses and maintains ecosystems and biodiversity so they can be enjoyed.

Well adapted economy, businesses, industries and livelihoods

Manage the risks and take advantage of opportunities for our economy, businesses, industries and workers, including the creation of new jobs and industries generated by a climate-resilient future. This includes job opportunities from investment in clean technologies and infrastructure projects.

Well adapted society, government, communities, families and individuals

Society, government, communities, families and individuals have the capacity and resources to adapt to and avoid the worst impacts of climate change and to maintain wellbeing and prosperity.

The CCAS has adopted the following Principles:

- Principle 1 - Early and proactive action
- Principle 2 - Informed decision-making (EP&A Act founding principal (b))
- Principle 3 - Integrated decision-making (EP&A Act founding principle (d))

These Objectives and Principles speak to the collective responsibility for resilience, which is a key theme and outcome for the National Strategy for Disaster Resilience: *Building the resilience of our nation to disasters* (2011), and which identifies the role of government in strengthening the nation's resilience to disasters by:

- developing and implementing effective, risk-based land management and planning arrangements and other mitigation activities;
- having effective arrangements in place to inform people about how to assess risks and reduce their exposure and vulnerability to hazards;
- having clear and effective education systems so people understand what options are available and what the best course of action is in responding to a hazard as it approaches;
- supporting individuals and communities to prepare for extreme events;
- ensuring the most effective, well-coordinated response from our emergency services and volunteers when disaster hits; and

- working in a swift, compassionate and pragmatic way to help communities recover from devastation and to learn, innovate and adapt in the aftermath of disastrous events.

The strategy includes several priority action areas to achieve the objectives, with the Government having committed $93.7 million over the next eight years:

- Developing ***robust and trusted metrics and information*** on climate change risk.
    - *understand disaster risk*
- ***Completing climate change risk*** and opportunity assessments.
    - *accountable decisions*
- Developing and delivering ***adaptation action plans***.
    - *enhanced investment*
- ***Embed climate change*** adaptation ***in*** NSW Government ***decision-making***.
    - *governance, ownership and responsibility*

The NSW CCAS is a significant step forward in NSW's efforts to adapt to climate change. It provides a clear framework for action and will help to ensure that NSW is well-prepared for the challenges that lie ahead.

As noted in the Handbook[10], and reinforcing what is espoused in the CCAS and National Strategy is that land use planning that considers natural hazard risk is the single most important mitigation measure in minimising the increase in future disaster losses in areas of new development. It goes further to note:

> *Australia has a history of high consequence natural hazards such as bushfires, cyclones, floods, storms, and extreme heat, resulting in suffering and loss in a range of direct and indirect ways. Effective land use planning in areas that are subject to, or potentially subject to, natural hazards can significantly reduce the increase in disaster risk and enhance the resilience of existing and future communities.*

Planning is a multi-objective process that requires balancing development with a range of community requirements and ongoing updating of appropriate planning tools. By considering natural hazards early and through its processes, land use planning can evaluate and select land use mechanisms to treat disaster risk. It can *direct new development to suitable locations*, avoiding or reducing the exposure to natural hazards and the impact of new development on the behaviour of natural hazards.

Advocated as a foundational principle to the formulation of the EP&A Act in 1979, and resonating in all contemporary strategies for disaster resilience, to effectively consider natural hazards and manage their associated risks via land use planning, collaborative approaches across a range of sectors and capabilities are necessary, including land use planners, built environment professionals and developers, natural hazard and emergency managers, and community members and leaders.

---

[10] Land Use Planning for Disaster Resilient Communities (AIDR, 2020), p. vii > https://knowledge.aidr.org.au/media/7729/aidr_handbookcollection_land-use-planning-for-disaster-resilient-communities_2020.pdf

The first state-wide climate change risk and opportunity assessment and adaptation action plan is scheduled to be released in 2023 and this raises the question as to whether any decisions about the planning system, indeed the terms of this Inquiry, should wait for the guidance it may provide. Not least the wider industry may appreciate the opportunity to review it and be informed, whilst it is acknowledged simultaneously that there is an overwhelming volume of resources to assist in that task. This fact alone has shone a light on the disproportionate allocation of resources to an overwhelming library of research and general policy and may provide some insight as to why traction at the ground level has been slow – planning framework reforms are often under resourced and inadequately consulted relative to their role in implementing action on the ground.

In addition, and as part of improving the evidence-based decision-making framework, the Australian Government committed within the 2023 - 2024 Budget an allocated of $28 million over 2 years to deliver Australia's first National Climate Risk Assessment, and National Adaptation Plan. These will provide the analysis necessary to guide decisions and investment to manage and adapt to significant national climate risks.

Recommendation:

8. The Inquiry should wait for the release of Australia's first National Climate Risk Assessment, and National Adaptation Plan, and NSW state-wide climate change risk and opportunity assessment and adaptation action plan prior to recommending any substantive reform.
9. Amendments to the planning system that transfer further responsibility to local government or that otherwise increase the resourcing impact associated with implementing additional strategic planning or development assessment to address the impact of climate change must be adequately funded to be effective.

These are important challenges, they are interconnected, and cannot be addressed in isolation.

At a more localised level these speak to strategies for addressing urban greening, access to housing, equal access and preserving nature and culture. At this level it is more apparent as to how the broader umbrella goals and aspirations could be broken down into legible manageable actions at a state level, so that the NSW planning system can respond to and implement the desired outcomes in a way that achieves climate impact related action without causing undue environmental, economic or social harm.

Without advocating a position one way or other, an example of this is the Victorian Government’s commitment to delivering an integrated response to cross-cutting sustainable development goals (SDGs), with a performance monitoring framework for measuring them. Central to Plan Melbourne is the creation of ‘20-minute neighbourhoods’ that offer accessible, safe and attractive local areas where people can meet most of their everyday needs within a 20-minute walk, cycle or local public transport trip. This shows how the SDGs can be delivered locally, making Melbourne communities healthier, more sustainable, liveable and inclusive places to live;
https://www.dfat.gov.au/sites/default/files/sdg-voluntary-national-review.pdf

The question remains however about the clarity and transparency in the line-of-sight between the top-down agreements and objectives and the actions and aspirations making their way into state legislation and planning systems, and whether it has been to-date effective. If not, what needs to be done to bring about that line-of-sight and what tools are

required to give effect to the priority areas, now that the National and Global scene has been set and agreed.

It is seemingly beyond question that climate change adaptation and disaster risk management is a complex and challenging task to approach and address. There is no one-size-fits-all approach, and the specific reforms that are needed may vary depending on the specific circumstances of each State or areas within a state.

The strategies and reforms identified above provide a basis for thinking about how to make the NSW planning system more relatable and actionable towards climate-resilient outcomes, based on what the NSW government has committed in policy. This should commence by acknowledging where the planning system is at today, so that everyone can understand and relate to the actions and outcomes needed to bridge the gap of where tomorrow's planning system needs to be.

As a starting point and looking at what appears to be one of the greatest inhibitors to achieving better outcomes both currently under the existing planning system and going forward in making the right change, is the absence of coherent data sets and information that are provided in a format and structure that is both useable as accessible.

In NSW the environmental protection and land use planning regulatory framework has become fragmented and government agencies grossly under resourced, limiting their capacity to provide meaningful information, advice and guidance needed to support land use decisions.

It is quite evident that the founding principles of the 1979 EP&A Act were and remain current today, they merge seamlessly with the many objectives, goals and actions of the Australian, state, and various other strategies relating to the impact of climate change, disaster resilience and hazard risk management, and concerning land use planning. From these resources alone there is a sufficient robust and contemporary pool of options to guide the necessary amendments to the planning system to bring about meaningful action.

Recommendations:

10. The key commitments on which actions are needed to address the specific climate change impact should be clearly described. This should include a short description of the current impact and how the proposed actions will address the identified impact.
11. There must be a monitoring and reporting framework that addresses performance and effectiveness of the change and what the cost of that change is compared with the benefit.
12. Transparency in the evidence supporting the climate change impact and the relationship with the impact action is essential.
13. An evidence base of climate related data, mapping and assumptions must be provided to support decision making.
14. Increase regulation surrounding performance monitoring and rating associated with product sourcing and supply.
15. Set consumption thresholds and incorporate planning controls, levies, or taxes, to discourage large single residential housing and that encourages smaller fit for purpose housing that is less consumptive of materials and resources.

16. Introduce minimum thresholds for active transport within new planned housing communities and levies for smaller scaled developments that can contribute towards active transport infrastructure with the council area.

B RESPONSES TO SPECIFIC ASPECTS OF THE TERMS OF REFERENCE (TOR)

Term of Reference:

(b) the adequacy of planning powers and planning bodies, particularly for local councils, to review, amend or revoke development approvals, and consider the costs, that are identified as placing people or the environment at risk as a consequence of:

(i) the cumulative impacts of development,

(ii) climate change and natural disasters,

(iii) biodiversity loss, and

(iii) rapidly changing social, economic and environmental circumstances

Whether adequacy of planning powers for councils to review, amend or revoke development approvals exists or not depends very much on the intention to use that power for a proper purpose.

Whether the irregularity is related to climate change, loss of biodiversity, risk to property or life or any other matter is largely immaterial in the context of s 4.57 of the EP&A Act as it has an indiscriminate application.

If, however, the purpose of the power under s 4.57 is to enable a modified power specifically in relation to a prescribed matter that is, by example prioritised in some way, then the current power under s 4.57 may not be adequate for that modified purpose. The question might be – what is the purpose the modified power is intended to achieve, for example is it to discharge the level of review, lower the threshold justification or rationale for the decision, or some other reason?

The current powers of councils are somewhat confined and relate to revocation or modification of development consent under s 4.57 of the Environmental Planning and Assessment Act, 1979 (EP&A Act), only in respect of a proposed (draft) local environmental plan (LEP).

Those same powers under s 4.57 apply to the revocation or modification of a complying development certificate. The Planning Secretary has similar powers that are enlivened in respect of a proposed State environmental planning policy (SEPP).

Before revoking or modifying a consent (approval) the council must notify each person likely to be affected and allow each person to appear and show cause as to why the revocation or modification should not be effected.

Once a revocation or modification takes effect, a person aggrieved by the revocation or modification is entitled to recover from the council compensation. This consists of compensation for expenditure incurred pursuant to the consent during the period between the date on which the consent becomes effective and the date of service of the notice under subsection s 4.57(3) which expenditure is rendered abortive by the revocation or modification of that consent.

A development consent can be revoked or modified at any time before the development is completed.

This provision does not enable a council to revoke or modify a consent that has been granted by the Court or the Minister.

Extrinsic Information of Relevance

Whether considering the operation of the existing planning provisions or importantly on review with the possibility of expanding their application it is essential to have proper regard for the private individual and the protection of property rights, as much as it is to consider the purpose that is seen to be needing to be served by the planning system.

As a point of reference and information the Urban Taskforce's submission[11] to the Productivity Commission in 2010, page 7 under the heading of the "*High regulatory risk and lack of respect for property rights"* is notable to this point.

A reading of that submission in its entirety is recommended.

B1 Pros

Section 4.57 provides an opportunity for a development approval that is later found to be inconsistent with a proposed LEP to be modified or revoked to normalise an identified irregularity.

The decision to bring about this conformity to remove or lessen the degree of irregularity must be preceded and supported by a review of the development approval relative to the proposed LEP. This establishes a form of non-discretionary decision-making whereby the decision to amend or revoke a development approval is:

i. Inextricably tied to a draft LEP, and

ii. Subject to a land use rationale and justification by way of a review.

Being tied to a draft LEP provides a mechanism to expose the rational and justification for the LEP amendment itself. It is the strategic policy against which any competing interests against which the development approval is to be judged are ascertainable. Without which, a review would not be able to substantiate a decision that is unfavourable to the development approval.

The 'review' itself is a strategic policy assessment that must demonstrate that an irregularity exists, and it must elucidate the consideration of competing matters or values that give rise to this irregularity or lack of harmony, be that economic, environment, climate change, natural hazard or the like. Their identification and the rationale for favouring one outcome over another must then be clearly presented. This is essential not only for the initial decision but to assist with adjudication of any subsequent appeal against a decision.

The prerequisite requirements to a decision being made about a proposal to amend or revoke a development approval provides for transparency and accountability. It ensures that decisions have proper regard for the development approval holder and allows for

[11] Urban Taskforce, Australia (2010), *Fixing Town Planning Laws*, A Submission to the Productivity Commission in response to its issues paper: Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments > https://www.pc.gov.au/inquiries/completed/regulation-benchmarking-planning/submissions/sub059.pdf

public scrutiny. It affords procedural fairness, demands reasonableness on the part of the regulatory authority and enables public scrutiny of the decision – it is an accountable procedural process.

The process is underpinned by an appeals framework, and it affords a person aggrieved by a decision to amend or revoke a development approval to seek compensation, on limited terms.

The statutory framework prevents or not least illuminates any arbitrary, malicious or other forms of unfounded or arbitrary decision to amend or revoke a development approval.

Should it arise and upon appeal by an aggrieved person the compensable element of any such 'unreasonable' decision is likely to be greater. This should also serve as a deterrent for the regulatory authority.

In summary, the current powers under s 4.57 to review the appropriateness of an existing development approval and to amend or revoke an approval that is incongruous with a draft LEP are adequate. However, it is not the power or authority that presents a barrier, it is the cost of the review and compensation to an aggrieved person that prevents the otherwise capable operation of s 4.57.

Recommendations:

17. A sufficiently detailed practice note should be prepared to guide councils about the requirements for a 'review'. It could describe the overall process and potential areas that could give rise to legal challenge.
18. It should be made clear in the regulations that costs associated with the actions and decisions of the regulating authority must be borne by it, including any reasonable demand for an independent appraisal of a 'review' or associated study.
19. The ability of a council to review, amend or revoke development approvals that have necessitated significant private investment and raised legitimate expectations on the granting of the approval is a serious matter that demands the highest levels of assessment and oversight, this should occur at a minimum through a Planning Panel, whose members are practising professionals in land use planning disciplines.
20. The impact on the property market and for commercial investment associated with a loss of confidence owing to greater uncertainty about existing development approvals should be evaluated in advance of any amendment to widen the ambit of s 4.57.
21. To offset matters of certainty and confidence arising in association with the application of s 4.57 the Committee should consider options for land buy back by way of acquisition or tradeable development rights to ensure that the planned development yield is retained and reallocated to a more suitable site location.

B2 Cons

<u>Disclosure – accountability</u>

There is no requirement for such decisions to be recorded on a register of any kind, as they should be given the private interests that are likely to be affected by a decision and the public financing required to 'buy-back' development rights.

Cost and certainty of taking action

The fact that there is minimal jurisprudence or other evidence of s 4.57 (formerly s 96A) being used by a council to bring about conforming uses speaks volumes to the unknown and potential high cost of pursuing a conformity in the public interest.

There is no policy, guiding or practice note and the uncertainty about the process, minimum acceptable requirements for review, and to the likely costs, exposes councils to significant financial risk and thence uncertainty.

It may be contended that some of the perceived risk is removed through the draft LEP because it puts the development approval holder on notice, and their issues and contentions are likely to be agitated through submissions. It may provide an indication of the person's receptiveness to the draft LEP and the implications for their development approval and upon which agreement might be reached, thereby providing greater certainty about costs.

This is not guaranteed, and a person could be a hostile participant who firstly challenges the validity of any decision and any subsequent making of the LEP. This then elevates the level of uncertainty.

Guaranteeing a nexus

It is unclear what a legal ruling may determine when on the face of clause 4.57 there is certainty about the requirement for a draft LEP to be on foot when any review and subsequent decision is made about amending or revoking a development approval, because, despite this required nexus there is no apparent requirement for the LEP or SEPP to be made once the decision to amend or revoke a development approval is made and binding. This appears to be a flaw when the importance of the draft LEP in establishing the land planning justification could then be swept away.

Any decision in the present context and setting of s 4.57 should therefore be dependent on the draft LEP being made, i.e., once the legality of the instrument is determined by Parliamentary Counsel and the Secretary for Planning or their delegate has approved the LEP to be made (published). This will ensure the nexus established between the draft LEP, justifying a subsequent dependant decision about a development approval, is then locked to that decision. Consequently, no decision to amend or revoke a development approval should be binding until the appeal rights for an LEP process, under the EP&A Act, have expired.

Recommendations:

22. A sufficiently detailed practice note should be prepared to guide councils and include information or tools for estimating risk and costs.
23. There should be a statutory requirement imposing an obligation on a prospective aggrieved person, prior to a decision being made, to furnish account of costs likely to form the basis of a subsequent compensation claim. This must be at the cost to the regulatory body.
24. Costs associated with normalising an irregularity should be a shared responsibility where the public benefit is the protection of people, that natural and built environment, and is consistent with State policy.

25. There should be a publicly available register of any review or decision to amend or revoke a development approval.

26. There must be a legislated nexus between a decision to amend or revoke a development approval and the making of the draft LEP that was relied up to inform the prerequisite review on which the decision was made.

Financial impact on development approval holder

While the ability of an aggrieved person to seek compensation for expenditure incurred between the time when a consent is effective (operative) and the date on which notice is served on the aggrieved under s 4.57 is clear, it is questionable whether:

a. it is fair compensation having regard to development approval costs, and

b. whether there are other legal means for an aggrieved person to seek compensation.

Development applications cost tens to hundreds of thousands of dollars to prepare and includes the cost of the development application fees. It is unclear why these expenses, incurred in the pursuit of a lawful development and accepted by the regulating authority are not included within s 4.57 as a compensable component of the costs associated with the approved development.

Recommendations:

27. The costs associated with obtaining a development approval should be included within the allowable compensation.

Operational scope

There are likely to be many instances of inconsistency between development approvals and existing statutory instruments, including LEPs, across the State. Section 4.57 as shown above, does not enable the review and corresponding amendment or revocation of those.

Whilst this may be seen as a disadvantage, as discussed above, in the absence of a demonstrated irregularity and rationale that gives rise to a public benefit enabling an open approach could lead to adverse consequences on multiple fronts.

It appears that from time to time a dormitory development approval is enlivened and the location, site characteristics or the like have either become undesirable owing to other compounding land use planning processes, the vegetation has regrown, or its species class has since been recognised for its significance, the natural hazard impacts have increased or something to like effect. In some cases, the preparation of a local study and corresponding draft LEP seeking to alter the strategic land use zoning would be the appropriate approach to addressing the incongruity between the approved land use and that changed characteristic, in which case s 4.57 is enlivened.

In some cases, a specific study may demonstrate, by example, a predicted natural disaster, such as flooding or bushfire that may not have arisen or the risk of which has since intensified and that may not give rise to the need for a broader land use study or draft LEP, although those cases are likely to be rarer. In this instance s 4.57 will not be enlivened and there is no option for the council to review, amend or revoke and hence essentially stop the approved development despite the apparent risk of harm. Land

acquisition, assuming it meets the requisite requirements, is the only option but potentially raises the costs of enacting disaster resilience, significantly.

Is there a case for s 4.57 to be broadened and if so, would it be any more effective than the current provision if the real issue surrounding costs remains unchanged.

In part the issue raised above should first be considered, as that relates to the current compensation provision and the recovery of costs for pre-development approval works. This is an important matter – in the Tweed Shire there are numerous dormant development approvals that occupy land that is unlikely to meet present standards and that if reconsidered would likely be rejected in part or in whole. While some development approvals are more than 30 years of being granted that is not uniform, and the cost of some development approvals and the prior rezonings (LEP) that occurred to enable those would run to the high hundreds of thousands and in some instances over a million dollars.

Whether it is reasonably justified to cause such significant financial loss on a private citizen is a policy matter for the State government, although if reasonableness prevails it should be open to compensation, otherwise it is a punitive decision to 'buy-back' the development right on favourable terms.

Costs aside, the matter of 'need' for a review and subsequent amendment or revocation of a development approval remains the essential element irrespective of whether there is a nexus to a draft LEP. In the latter scenario above there would be no LEP. In that instance s 4.57 would need to be amended or a new provision would need to be implanted. This would need to ensure, in the absence of the strategic investigation and rationale associated with a draft LEP, that the requirements of the review and the matters to be considered and subsequently justified are explicit, as is the case by example with Part 5 'Infrastructure and environmental impact', of the EP&A Act and Regulations.

Recommendations:

28. There is a case for a broadening of s 4.57 to allow review, amendment and revocation of development approvals that are not associated with a draft LEP however, there must be clear requirements in the form of regulations detailing the minimum standards for review.

<u>Maintaining trust and confidence in the planning system and property market.</u>

The issue speaks to several key aspects, including:

- Compatibility or suitability of use relative to a natural condition, process or event.
- The priority of competing aspirations concerning the use of the land.
- The risk appetite of owner, government, community, or insurance industry
- Equitable treatment in decision making.
- Compensation
- Council resources

The private property market is largely based upon confidence and certainty. Land value reflects therefore the relative degree of what could be achieved through improvements. For example, land zoned for residential, or employment generally has a higher land price value than land zoned for non-residential or employment. This does not necessarily

correlate with what is existing on the land but what expectation there is about what could be pursued with the land – build a house or block of units, or a factory, versus growing food produce, recreation, or environmental management.

Whilst unrealised land improvements are not guaranteed owing to time-based changes in natural processes, there is a greater expectation that policy changes affecting the realisation of an improvement will not occur in a way that is seen to be unequitable or unjust, as to do otherwise would fracture the confidence in the Australian property market with deleterious implications for the national economy, prosperity, and environment.

Trust in government is paramount for effective governance, it requires that government is accountable for the decisions it makes both past and present. Trust in government would be completely fractured if an approval to allow a past land improvement was disregarded later without addressing the equitable rights of the private individual, including their right to reasonable compensation, particularly when a change in policy is anticipatory.

It should be acknowledged that there can be a public benefit with government intervention into private property if used to promote the public good. For example, the government may acquire land to build roads, schools, or hospitals or, the government may impose zoning restrictions on land use to protect the environment or prevent incompatible uses from being located near each other, or because of a risk to life or property. This could readily extend to the risk of the environment owing the impacts from climate change.

Government may use its powers to intervene in private property rights to reduce inequality and promote social justice. For example, the government may provide financial assistance to low-income homeowners to help them afford housing or, the government may impose rental controls to prevent landlords from charging excessive rents.

Government intervention in private property rights may also be used to promote economic development. For example, the government may provide tax breaks to developers who build new housing or commercial properties or, the government may acquire land to create employment parks or major recreation facilities.

There are also negative aspects to government intervention into private property rights. This may take the form of changes in land zoning that erode or remove the owners right to use or develop their land as expected, it may reduce individual freedom and force relocations depending on what the land or adjoining land is then earmarked for. Notably, a contentious point for many who have been compensated for a change or acquisition affecting their land is that they may not receive the full market value, or they are in a situation in which financial compensation alone at ‘market value’ cannot compensate for the change in lifestyle or opportunity.

Changes in the value or use of land changes in varying ways. Unrealised opportunities can be removed by the passage of time when combined with other events such as, compatibility with land improvements on adjoining land occurring first in time, natural events associated with a changing climate such as drought, flood, bushfire, or erosion.

Changes occur through progressive changes in land use planning rules, which may remove future permissibility or restrict the type or scale of use or development. Existing and continuing use rights under the NSW planning framework operate to preserve private property rights were threatened by such policy change.

Development that is approved falls into two discreet categories, there is undoubtedly more, but for present purposes development is approved and:

- Is operating within the statutory term of 5 years, or
- Is deemed to have been acted upon (enlivened) and operating indefinitely.

The latter is often referred to as 'zombie' development and an instructive discussion on that topic is provided by Lindsay Taylor Lawyers in their online publication "Zombie Development: Acting on Old Development Consents" posted on August 2, 2022: https://www.lindsaytaylorlawyers.com.au/in_focus/zombie-development-acting-on-old-development-consents/

The other essential element, particularly in terms of the compensation practices, is development that is approved and:

- Erected,
- Being erected, or
- Not commenced.

At a basic level it is quite apparent that the cost of development will be significantly different depending on the progression of an approved development. This is critical to a consideration of the role of compensation when used in combination with a statutory power to rescind or amend an approval.

Compensation alone should not however, be the sole or overriding determinant as to whether this should occur. To place lawful development and private property rights at the whim of funding availability to pay compensation would likely give rise to social injustice and destabilise the foundation of Australian property ownership, with deleterious consequences. It should only ever be used in the true sense to compensate when there is a competing priority land use or risk the magnitude of which justifies the recission or amendment, combined with expenditure of public revenue in the form of compensation.

Compensation itself should not be the reason to avoid or prevent the recission or amendment of approved development when the evidence of risk of harm is established, intervention must be weighed against the broader public interest.

To these points, the *Land Use Planning for Disaster Resilient Communities* handbook (2020) states that:

> *Land use planning requires balancing development with a range of community priorities. Community and development priorities might sometimes compete or even conflict with disaster risk reduction. Furthermore, land use planning objectives might also intersect with other government agencies' work and priorities. This implies that the typical land development processes are complex and entangled. It must be recognised that the reality of how these processes modify risk and have implications beyond the process. Decision makers are often unaware or unaffected by the implications of their decision.*

It is likely to give rise to a question about the evidence itself and whether it has the rigour to support intervention to protect the natural and built environment from the effect of climate change, assuming that there is a nexus between the established climate impact on the environment.

Having regard to the Legislative Council's Terms of Reference (ToRs) for the Inquiry, which speaks to the "impacts of climate change on the environment and communities", it must be explicitly clear, for example, in the context of climate change related disaster resilience, the power to review, amend or revoke a development approval must not arise solely to protect the natural environment because it is seen by the decision-maker in the present day context to be a better or preferred use of the land than the development approved, there must be an established nexus between the impact from climate change and the perceived necessity for a decision maker to intervene, and which must precede a decision.

Recommendations:

29. That the Portfolio Committee 7 have due regard for the Land Use Planning for Disaster Resilient Communities handbook (2020) because it outlines nationally agreed principles for good practice in land use planning to build disaster resilient communities, and it fulfils a critical role in national resilience under the policy framework established by the National Strategy for Disaster Resilience (Council of Australian Governments (COAG) 2011).
30. It is essential that the meaning of the terms 'approved development' and 'proposed development' be clearly defined to enable whether and when compensation is appropriate.
31. A review of the Just Terms Compensation legislation should be undertaken to ensure that it is fit for purpose if to be applied to development that is affected by an amendment or recission or when the planning rules are changed to disadvantage a development proposal.
32. There must be a clear set of rules establishing the evidence or justification required for a decision to be made concerning the recission or amendment of a development approval.
33. There must be an appeals mechanism for judicial review to ensure and uphold the integrity of the planning framework and the protection of private property rights.
34. The approval mechanism for government intervention of this kind must reside with the NSW government.
35. The costs associated with recission, or amendment of a development approval must not burden the approval holder and is separate to the question of compensation.
36. It is a legitimate exercise of government authority to take measures that protect the built and natural environment from the impact of climate change however, the terms on which this is permitted to occur must be clearly legislated and supported by adequate regulation that makes allowance for monitoring and reporting.

(a) developments proposed or approved:

(i) in flood and fire prone areas or areas that have become more exposed to natural disasters as a result of climate change,

(ii) in areas that are vulnerable to rising sea levels, coastal erosion or drought conditions as a result of climate change, and

(iii) in areas that are threatened ecological communities or habitat for threatened species

(c) short, medium and long term planning reforms that may be necessary to ensure that communities are able to mitigate and adapt to conditions caused by changing environmental and climatic conditions, as well as the community's expectation and need for homes, schools, hospitals and infrastructure

Short-term reforms

- Make climate change adaptation a core planning objective: The NSW planning framework should be amended to make climate change adaptation a core planning objective, alongside other objectives such as environmental protection and economic development. This would require decision-makers to consider the potential impacts of climate change on all development applications.

  However, the political make-up of a council may have a predisposition or bias that favours one objective over another and as such there needs to be clear guidance on the application of these core objectives for practitioners and elected decision makers to minimise subversion of best planning outcomes.
- Strengthen climate change risk assessment requirements: The NSW planning framework should be amended to require more rigorous climate change risk assessments for all development applications, particularly those in areas that are vulnerable to climate change impacts. This would help to ensure that development is not approved in areas where the risks are too high. This speaks to the point made within this submission that the quality of the evidence base and its currency is critical for this purpose to be achieved.
- Develop and implement climate change adaptation standards: The NSW government is working towards the development of climate change adaptation standards for different types of development or use. These standards would provide guidance to developers on how to design and construct buildings and infrastructure that are resilient to climate change impacts. This would need to be embedded into the matters for consideration within the planning framework, as a statutory requirement of the NSW government.

Medium-term reforms

- Review and update planning policies and guidelines: The NSW government should review and update all planning policies and guidelines to consider climate change risks. This would ensure that all aspects of the planning system are aligned with the state's climate change adaptation goals.
- Develop and implement climate change adaptation plans for local government areas: The NSW government should work with local governments to develop and implement climate change adaptation plans for their respective areas. These plans would identify and prioritise the climate change risks that need to be addressed and set out specific actions that will be taken to reduce these risks.
- Provide financial and technical assistance to local governments: The NSW government should provide financial and technical assistance to local governments to help them implement their climate change adaptation plans. This would help to

ensure that all local governments have the resources they need to adapt to climate change.

Long-term reforms

- Establish a dedicated climate change adaptation agency within the planning cluster: The NSW government should establish a dedicated climate change adaptation agency to coordinate and implement the state's adaptation agenda through the NSW planning system and to assist councils with on-the-ground decisions. This agency would be responsible for developing and implementing adaptation policies and programs with a planning focus, and for working with other government agencies and stakeholders to ensure that climate change adaptation is integrated into all aspects of state government and council decision-making.

C. GENERAL EVALUATION AND RESPONSE TO ToRs

Tweed Shire Council has considered scenarios for amending the planning system to ensure that people and the natural and built environment are protected from climate change impacts and changing landscapes.

Undertake planning reforms as described below to ensure that communities are enabled to mitigate and adapt to conditions caused by changing environmental and climatic conditions. This Scenario also responds to point (b) of the Inquiry's Terms of Reference, offering measures to amend and revoke development approvals for land affected by climate change.

Proposed amendments to the Environmental Planning & Assessment Act 1979:

37. Amend the Objects of the Environmental Planning & Assessment Act 1979 to recognise climate change adaptation and the NSW Net Zero Plan as key goals. Ensure consistency of these Objects across the NSW legislation. Council supports the example of the NSW EPA in giving effect to NSW's climate change goals through the EPA's regulatory functions and responsibilities of its licensees. The NSW Planning system and its agents need to do the same.

38. Amend Division 3.1 Strategic planning to accommodate climate change considerations as a required component of strategic planning framework. Instead of a major overhaul of Division 3.1, the reform can include the following components:

- Itemise climate change considerations e.g. both emissions reduction/intensity and adaptation through design and locational criteria, as a mandatory component of regional strategic plans and district strategic plans. Guidelines for how to consider and account for the emissions impact of proposed regional and local plan directions/trends will be needed.
- Given limited practical value of local strategic planning statements required under S3.9, reposition them as "local climate change action plans", requiring councils to identify mitigation and adaptation measures and ensure their practical implementation in strategic and non-strategic planning at the local level. Mandatory components of these to include urban heat mitigation, green infrastructure and urban tree canopy expansion targets. State government resourcing will be needed to analyse and develop these e.g. similar to the Energy Savings Action Plans that councils were required and funded to develop, implement and report on.

- Ensure climate change considerations are evidence-based and rely on a single point of truth for projections and modelling, for example AdaptNSW mapping (see relevant comments over page).

39. Require Statement of Environmental Effects under S4.64 of the Act and as prescribed by the Regulation to consider climate change impacts in instances of development applications meeting certain monetary or land area thresholds.
40. Amend S4.15 to clearly identify climate change projections as matters for consideration in determining a development application.
41. Amend section 4.55 modification of consents – generally to ensure that any modifications resulting in an increase that is shown to have an adverse climate change impact upon the approved development is NOT development *deemed as 'minimal environmental impact'* under s4.55(1A).
42. Update Ministerial Directions provided under S9.1 of the Act to require planning proposals and Local Environmental Plans to address climate change as mandatory considerations.
43. Ensure landscaping controls related with urban heat mitigation are enforceable.
44. Introduce sunset clauses for land banking, particularly in LGAs prone to climate events such as flooding and fires, where homes have been lost to climate events and where opportunities for homes to be relocated or rebuilt exist. Sunset provisions for approvals (concept & master plans and DAs) would assist to address legacy issues, including progressive changes to biodiversity conservation status and legislative provisions. Recommend that current provisions in relation to compensation be reviewed to accommodate the need to review land zoning and approvals based on contemporary information and changing circumstances.

Discussion points: The above reform offers a top-down, consistent package of climate change considerations, enabling transparent and evidence-based decision making at the local government level. Of importance, climate change considerations need to be based on contemporary evidence base accessible to the broader public. The "AdaptNSW" tool with climate change projections mapping is suggested as suitable. An important, and critically needed aspect of these suggested changes include enabling councils to refuse development applications on the grounds of unacceptable impacts from greenhouse gas emissions. Similarly, ensure that any modifications resulting in an increase in adverse climate change impacts are not able to be deemed as 'minimal environmental impact. At the rezoning stage the implications of such constraints should be considered to ensure that the land is labelled for possible or probable uses that demonstrate resilience to the impacts of climate change.

Proposed amendment to the Standard Instrument Order:

45. Amend the Standard Instrument Order to introduce a "Limited Development" zone similar to the one provided within the Queensland planning framework.

Discussion points: The current zoning template does not cater for land with limited environmental values and at the same time affected by climate change risks. It is noted Queensland planning system offers a "Limited development zone" with the following intent (extracted from QLD Government fact sheets):

"The limited development zone covers land that is significantly affected by a constraint that limits if or how development may occur on that land. Development in this zone will vary across Queensland. A planning scheme will identify the constraint affecting the zone and may have provisions regulating development to reflect local characteristics and to respond to their local situation. Constraints may include:

- *natural hazards such as significant flooding, meaning development on the land is too risky,*
- *past land uses, such as mining, which may also mean that the land is constrained by subsidence,*
- *contamination, limiting the ability to develop in the future."*

Proposed amendments to the SEPP framework and the overall internal consistency of the planning system

46. Multi-hazard reduction – development controls across policies (i.e., between SEPPs) need to not negate other intentions and consider a balance between, for example, vegetation removal for bushfire risk versus promoting urban tree canopy for urban cooling.
47. The current planning system promotes the continued use of private vehicles in residential environments. Through parking mandates for residential development, the planning system encourages most residents to be car users, with related impacts on climate. With support of the lead agency for public transport, Transport for NSW, incentives for alternate travel modes should be considered in appropriate mixed use urban locations where a substantive number of people live and work, and strategies formulated to put in place regular, reliable and affordable public and active transport networks to enable these incentives to be expanded across our cities, suburbs and towns. These strategies should reflect place-based research into change trends for the way people work (commuting versus working from home) and alternate transport services (on demand services and micro mobility).
48. Consistently with the above, review the Environmental Planning & Assessment Act 1979, State Environmental Planning Policies, regional plans and strategic plans to ensure consistency across each component of the planning system.

Proposed amendment to non-statutory components of the planning system

49. Ensure climate change considerations are based on evidence and modelling using AdaptNSW as a single point of truth for climate change projections. Ideally, this single point-of-truth approach would also include links to locally-specific modelling projecting flooding, bushfire risk, coastal hazards and the like. (https://www.climatechange.environment.nsw.gov.au/projections-map).
50. Through evidence-based guidelines, State Government should assist councils and the broader development industry in defining unacceptable and unmitigated risks.
51. Strengthen the planning framework by providing guidelines on climate resilient design.
52. Consider measures to identify and map areas suitable for landward regression of Threatened Ecological Communities at most risk from climate change for protection.

Discussion points: The State Government has recently adopted a new Flood Risk Management Manual and Flood Prone Land Package (both Department of Planning and Environment), which Council is required to adopt and implement. This governs the cycle of data collection at the local government level, flood studies (understanding behaviour), floodplain risk management studies (assessment of risk mitigation options), and adoption of floodplain risk management plans and implementation (funding and technical support). The process is overseen by an advisory committee of council to ensure governance and stakeholder and agency representation. This floodplain risk management process runs parallel to the NSW planning system. These flood risk documents inform environmental planning instruments (SEPPs, LEPs, DCPs). In our view this adequately addresses future flood risk. For consistency and transparency, it is important to ensure climate change modelling is available online in a "single point of truth" format.

Low lying land and land inundated by localised or more broader flooding leads to sewer systems being overloaded and failing to contain or treat sewage, Climate change resulting in more intense rainfall, sea level rise and more frequent events will increase the frequency and consequences of these failures will increase.

Note protecting land by use of levees provides a limited improvement as surface water still ponds behind them and failures frequency may not be reduced significantly. Once a levee is overtopped the entire system fails with potential for significant damage to infrastructure and the loss of the sewerage service could be weeks and months.

Additionally, significant saltwater inflow into the sewer systems will cause failure of Biological treatment processes which will take weeks and months to recover.

Least preferred option for a review

As an alternative to the package of reforms outlined above, it may be considered prudent by some to suggest that climate change adaptation and mitigation response warrants an overhaul of the planning system in its entirety, in pursuit of creating a contemporary, robust and enabling system, equipping all stakeholders with tools necessary to deal with emerging issues.

This matter was addressed in the prologue to this submission and an overhaul to meet land use planning's role in meeting the identified need is considered totally unnecessary and is the least preferred option. In part this recognises the enormous costs and lead in times to the preparation of a new planning system, as evidenced by the events that unfolded in 2013 following the public release of the government's White Paper for a new planning system.

That said, much can be done by careful design, and by example, buildings and development infrastructure need to be on a path to avoiding greenhouse gas emissions as soon as possible. Potential opportunities could include:

- Ensuring BASIX and the National Building Code codify buildings and development infrastructure that have net zero emissions and high levels of resilience to natural hazards
- Enabling rapid approval pathways or other incentives e.g., higher density allowances in the planning system for developments that demonstrate net zero emissions and high levels of resilience to natural hazards

Comprehensive reform of the planning system should consider how to deliver on net zero transport outcomes. Potential opportunities could include the requirement for transport emissions assessments in future developments to demonstrate that zero emissions transport options are accessible.

Strategic review of the planning system should also align with DPE's Blue Carbon Strategy. How Blue Carbon projects will align with the standard instrument with regard to land use definitions, permissibility in zones, compatibility with other clauses and SEPPs etc needs consideration. As blue carbon requires inundation of land, therefore blurring the right to property ownership for private landowners (due to ambulatory boundaries), if landowners cease to technically own the land, they may also lose the right to benefit from Australian Carbon Credit Units (ACCUs) (as described in *Corkill, J. R. (2013). Ambulatory boundaries in New South Wales: real lines in the sand. Property Law Review, 3(2), 67-84*).

For context, and to offer the Committee insights into climate change risks as seen at the local level, Tweed Shire Council has prepared a Climate Change Risk Assessment, appended to this submission (over page).

Risk Statements Event/cause/consequence	Adequacy of Controls overall	Likelihood	Consequence for Council assets, service delivery, program objectives	Rating
An increase in sea level causes **loss/changes to key ecosystems**, negatively impacting on plant and animal species. These loss / changes reduce ecosystem services (such as nutrient and sediment removal) from wetland, mangroves, salt marsh and littoral rainforest areas	Partially Effective	Almost Certain	Major	**EXTREME**
Ineffective decision making about existing and future urban development relating to sea level rise and coastal processes **results in more impacted population and assets (function and serviceability)**	Partially Effective	Likely	Major	**VERY HIGH**
Increased average temperature enables the **introduction and proliferation of exotic vertebrate and plant species**	Partially Effective	Almost Certain	Moderate	**VERY HIGH**
Increased average temperature change results in medium to long term/ permanent impact on biodiversity & ecosystems	Partially Effective	Likely	Moderate	**HIGH**
An increase in fire weather days (compounded by increased drought) reduces the suitable time period available for controlled burning resulting in higher risk to environmental and built assets from bushfire. Inability to conduct controlled burning will also increase the likelihood of the loss of fire dependent species and habitat.	Partially Effective	Possible	Major	**HIGH**
Changes in rainfall distribution causing **changes to biodiversity particularly during drought** resulting in pressures on Tweed's biodiversity	Partially Effective	Likely	Moderate	**HIGH**
An increase in rainfall increasing the frequency and severity of flood events causing **significant loss/damage to existing private development (built prior to contemporary standards) and implications for future housing capacity** in the Tweed	Mostly Effective	Possible	Major	**HIGH**
An increase in fire weather days increases the potential and impact of **bushfires impacting on threatened and significant areas of native, vulnerable and valuable habitat**	Partially Effective	Possible	Moderate	**MEDIUM**
An increase in fire weather days **(compounded by increased wet autumn/winter periods) reduces the suitable time period available for controlled burning** resulting in higher risk to environmental and built assets from bushfire. Inability to conduct controlled burning will also increase the likelihood of the loss of fire dependent species and habitat.	Partially Effective	Possible	Moderate	**MEDIUM**
Change in rainfall distribution **reduces the suitable time period available for controlled burning** resulting in higher risk to environmental and built assets from bushfire. Inability to conduct controlled burning will also **increase the likelihood of the loss of fire dependent species and habitat.**	Partially Effective	Possible	Moderate	**MEDIUM**
An increase in fire weather increasing the frequency and severity of bushfire events causing significant loss/damage to **existing private development (built prior to contemporary standards)**	Partially Effective	Possible	Moderate	**MEDIUM**

Risk Statements Event/cause/consequence	Adequacy of Controls overall	Likelihood	Consequence for Council assets, service delivery, program objectives	Rating
An increase in fire weather increasing the frequency and severity of bushfire events causing significant **loss/damage to existing private development with significant historic heritage values**	Partially Effective	Possible	Minor	**MEDIUM**
More hot days **challenges the thermal comfort of poorly design/built/insulated new homes** leading to heat stress or greater reliance on mechanical cooling and power consumption for residents.	Partially Effective	Likely	Minor	**MEDIUM**
An increase in rainfall increasing the frequency and severity of flood events causing significant loss/damage to **existing private development with significant historic heritage values**	Mostly Effective	Possible	Minor	**MEDIUM**
An increase in sea level causes changes to private land use due to erosion, re-alignment of shores, increased flood levels, inundation, reduced drainage, wave overtopping events and salinisation **negatively affecting landholders, residents and businesses, placing greater demand for support and response from Council program areas**	Partially Effective	Likely	Minor	**MEDIUM**
Decision making around urban planning and **existing** development relating to sea level rise and coastal processes results in claims or damage to reputation	Mostly Effective	Possible	Minor	**MEDIUM**
Decision making around urban planning and **future** development relating to sea level rise and coastal processes results in claims or damage to reputation	Mostly Effective	Possible	Moderate	**MEDIUM**
Increased average temperature challenges the thermal comfort of poorly designed/built/insulated **new** homes leading to heat stress or greater reliance on mechanical cooling and power consumption for residents, and associated greenhouse gas emissions from grid electricity use	Partially Effective	Likely	Minor	**MEDIUM**

Additional Climate Change risks associated with the provision of Water Supply and Sewerage Services related to sea level rise and changes to rainfall intensity and frequency.

Risk Statements Event/cause/consequence	Adequacy of Controls overall	Likelihood	Consequence for Council assets, service delivery, program objectives	Rating
An increase in rainfall causing more frequent/ severe weather events that result in **interruptions, delays and reworking of construction works**	Partially Effective	Almost Certain	Minor	**MEDIUM**
More frequent and severe rainfall events causes **reduced insurance caps leading to further decreases in insurance cover** and higher demand on Council funds and impacts to the community to restore or relocate assets	Not effective	Possible	Major	**HIGH**
Increasing rainfall leading to potential **higher levels of leachate generation and stormwater run off**	Mostly Effective	Likely	Minor	**MEDIUM**
An increase in variability in wet and dry weather impacts on soil moisture levels impacting on **infrastructure foundations**	Mostly Effective	Possible	Minor	**MEDIUM**
An increase in frequency and severity of floods resulting in **more frequent out of hours call outs and responses, sustained workload in recovery leading to staff fatigue**	Mostly Effective	Possible	Moderate	**MEDIUM**
Increased rainfall increases the frequency and severity of flood events causing **loss/damage to electrical supply infrastructure increasing the frequency of interruptions or loss of Council's water supply and wastewater services**	Mostly Effective	Likely	Moderate	**HIGH**
An increase in rainfall increasing the frequency and severity of flood events causing **loss/damage to Council's water supply and wastewater infrastructure** increasing the frequency of interruptions or loss of services	Partially Effective	Almost Certain	Moderate	**VERY HIGH**
An increase in rainfall intensity increasing the frequency of Council **wastewater systems operational capacity being exceeded** increasing the frequency of sewage overflows with increased risk to public health and environmental pollution	Partially Effective	Possible	Negligible	**LOW**
An increase in rainfall intensity **reducing the water quality in Council's water supply** reducing operational capacity and increasing the frequency of water restrictions and interruptions to service	Partially Effective	Almost Certain	Moderate	**VERY HIGH**
A decrease in rainfall **reducing the quantity of water available from Council's water supply** increasing the frequency of water restrictions and the need to increase water supply capacity / sources.	Partially Effective	Unlikely	Major	**MEDIUM**
A decrease in rainfall **reducing the water quality in Council's water supply** reducing operational capacity and increasing the frequency of water restrictions and interruptions to service	Mostly Effective	Almost Certain	Minor	**MEDIUM**
Ineffective decision making about existing and future urban development relating to sea level rise and coastal processes **results in more impacted population and assets (function and serviceability)**	Partially Effective	Likely	Major	**VERY HIGH**
An increase in sea level creates **more demand for works to repair or retrofit Council infrastructure in areas affected by higher tides**, higher groundwater levels, higher inundation levels resulting in potential interruptions, delays and reworking of construction works	Partially Effective	Possible	Negligible	**LOW**
More frequent and severe weather events impact on service provision and/or serviceability and an associated **loss of income** from water consumption	Mostly Effective	Possible	Minor	**MEDIUM**

Decision making around urban planning and **future** development relating to sea level rise and coastal processes results in claims or damage to reputation	Mostly Effective	Possible	Moderate	**MEDIUM**
An increase in sea level and tidal anomalies causes **inundation and saltwater contamination of Council's fresh water supply** resulting in a complete failure and loss of the water supply.	Partially Effective	Almost Certain	Major	**EXTREME**
An increase in sea level, compounded by the increased number of flooding events and tidal anomalies, increases the frequency of l**oss/damage to Council's water supply and wastewater infrastructure increasing the frequency of interruptions or loss of services.**	Not Effective	Almost Certain	Major	**EXTREME**
An increase in sea level and tidal anomalies, compounded by the increased number of flooding events, increases the frequency of **Council's wastewater systems' operational capacity being exceeded** increasing the frequency of sewage overflows with increased risk to public health and environmental pollution and loss of service for affected areas.	Not Effective	Almost Certain	Moderate	**VERY HIGH**
An increase in sea level increases groundwater levels increasing **infiltration and inflow into the wastewater gravity pipe systems** increasing the frequency of Council's wastewater system's operational capacity being exceeded increasing the frequency of sewage overflows with increased risk to public health and environmental pollution	Partially Effective	Almost Certain	Moderate	**VERY HIGH**
An increase in sea level increasing infiltration and inflow of saltwater into the wastewater gravity pipe systems results in **contamination of biological treatment process** and failure and ultimately not being unable to provide an ongoing wastewater service.	Not Effective	Likely	Moderate	**HIGH**
An increase in sea level increasing occurrence of **infiltration and inflow of saltwater increases corrosion of some assets** increasing the need for replacement of assets and therefore the cost of the water & wastewater service	Partially Effective	Likely	Moderate	**HIGH**
An increase in sea level causes **inundation of areas with a water or wastewater service resulting in system failure** and being unable to provide an ongoing service	Not Effective	Possible	Major	**HIGH**
An increase in sea level increases the frequency of **interruption to the electrical supply increasing the frequency of water restrictions and interrupts water supply to wastewater services**	Partially Effective	Likely	Major	**VERY HIGH**
Increased temperature **reduces water quality** in Council's water supply reducing operational capacity and increasing the frequency of water restrictions and interruptions to service	Mostly Effective	Almost Certain	Minor	**MEDIUM**
Increased average temperature **reduces quantity of water available and increases planned demand for water** increasing the frequency of water restrictions and the need to increase water supply capacity / sources.	Partially Effective	Likely	Major	**VERY HIGH**
Increased average temperature **increases frequency of interruption to the electrical supply increasing the frequency of water restrictions and interruptions** water supply to wastewater services	Effective	Likely	Negligible	**LOW**
Increased average temperature **increases frequency of interruption to the electrical supply** increasing the electrical supply costs thereby increasing costs for water supply and wastewater services	Mostly Effective	Likely	Negligible	**LOW**

Appendix 1 – Aggregated Recommendations by Council Staff

1. The Committee should be guided by the need to make evidence-based amendments that strengthen legislation and policy in the key areas identified and not be influenced about broader matters because the present EP&A Act is oft cited as ‘old’ and outdated.
2. The founding principles of the EP&A Act must be reinstated to ensure there are clear roles and responsibilities, frameworks for shared responsibility and oversight or concurrence from expert organisations, public participation, and scrutiny, along with monitoring, evaluation, and review.
3. The planning system is strengthened when there is clear line of sight between the overarching objective or commitment through to the implementation and performance monitoring of decisions; and it should be written into regulation and policy at the State and regional level, to enable effective demonstration of consistency at the local level.
4. Ecologically Sustainable Development and climate change must be embedded as priorities within the Objects (purpose) of the legislation, regulations, policy and local strategies and plans, and not remain as a listed items left to compete with every other object – there must be some semblance of priority that reflects the National importance of the matter.
5. The planning system is large, diverse, and complex; the systems, practices, roles and responsibilities although appearing to be made clear by the enactment of Parliament are often then eroded through embellishment by administrative ‘delegated’ practices that are often viewed as circumventive and supplanted by practices that benefit certain groups or interests, rather than adding to its transparency and efficiency. It is recommended that the machinery of the planning system remain clear and unambiguous in the legislation, regulations, and policy so as to maintain and build public trust in it.
6. The Committee should commission a review of relevant jurisprudence to inform decisions about any proposed amendments to the planning system and make this review publicly available.
7. The Committee should commission a review of relevant examples from other like planning jurisdictions to inform decisions about any proposed amendments to the planning system and make this review publicly available.
8. The Inquiry should wait for the release of Australia's first National Climate Risk Assessment, and National Adaptation Plan, and NSW state-wide climate change risk and opportunity assessment and adaptation action plan prior to recommending any substantive reform.
9. Amendments to the planning system that transfer further responsibility to local government or that otherwise increase the resourcing impact associated with implementing additional strategic planning or development assessment to address the impact of climate change must be adequately funded to be effective.
10. The key commitments on which actions are needed to address the specific climate change impact should be clearly described. This should include a short description of the current impact and how the proposed actions will address the identified impact.

11. There must be a monitoring and reporting framework that addresses performance and effectiveness of the change and what the cost of that change is compared with the benefit.
12. Transparency in the evidence supporting the climate change impact and the relationship with the impact action is essential.
13. An evidence base of climate related data, mapping and assumptions must be provided to support decision making.
14. Increase regulation surrounding performance monitoring and rating associated with product sourcing and supply.
15. Set consumption thresholds and incorporate planning controls, levies, or taxes, to discourage large single residential housing and that encourages smaller fit for purpose housing that is less consumptive of materials and resources.
16. Introduce minimum thresholds for active transport within new planned housing communities and levies for smaller scaled developments that can contribute towards active transport infrastructure with the council area.
17. A sufficiently detailed practice note should be prepared to guide councils about the requirements for a 'review'. It could describe the overall process and potential areas that could give rise to legal challenge.
18. It should be made clear in the regulations that costs associated with the actions and decisions of the regulating authority must be borne by it, including any reasonable demand for an independent appraisal of a 'review' or associated study.
19. The ability of a council to review, amend or revoke development approvals that have necessitated significant private investment and raised legitimate expectations on the granting of the approval is a serious matter that demands the highest levels of assessment and oversight, this should occur at a minimum through a Planning Panel, whose members are practising professionals in land use planning disciplines.
20. The impact on the property market and for commercial investment associated with a loss of confidence owing to greater uncertainty about existing development approvals should be evaluated in advance of any amendment to widen the ambit of s 4.57.
21. To offset matters of certainty and confidence arising in association with the application of s 4.57 the Committee should consider options for land buy back by way of acquisition or tradeable development rights to ensure that the planned development yield is retained and reallocated to a more suitable site location.
22. A sufficiently detailed practice note should be prepared to guide councils and include information or tools for estimating risk and costs.
23. There should be a statutory requirement imposing an obligation on a prospective aggrieved person, prior to a decision being made, to furnish account of costs likely to form the basis of a subsequent compensation claim. This must be at the cost to the regulatory body.
24. Costs associated with normalising an irregularity should be a shared responsibility where the public benefit is the protection of people, that natural and built environment, and is consistent with State policy.

25. There should be a publicly available register of any review or decision to amend or revoke a development approval.
26. There must be a legislated nexus between a decision to amend or revoke a development approval and the making of the draft LEP that was relied up to inform the prerequisite review on which the decision was made.
27. The costs associated with obtaining a development approval should be included within the allowable compensation.
28. There is a case for a broadening of s 4.57 to allow review, amendment and revocation of development approvals that are not associated with a draft LEP however, there must be clear requirements in the form of regulations detailing the minimum standards for review.
29. That the Portfolio Committee 7 have due regard for the Land Use Planning for Disaster Resilient Communities handbook (2020) because it outlines nationally agreed principles for good practice in land use planning to build disaster resilient communities, and it fulfils a critical role in national resilience under the policy framework established by the National Strategy for Disaster Resilience (Council of Australian Governments (COAG) 2011).
30. It is essential that the meaning of the terms 'approved development' and 'proposed development' be clearly defined to enable whether and when compensation is appropriate.
31. A review of the Just Terms Compensation legislation should be undertaken to ensure that it is fit for purpose if to be applied to development that is affected by an amendment or recission or when the planning rules are changed to disadvantage a development proposal.
32. There must be a clear set of rules establishing the evidence or justification required for a decision to be made concerning the recission or amendment of a development approval.
33. There must be an appeals mechanism for judicial review to ensure and uphold the integrity of the planning framework and the protection of private property rights.
34. The approval mechanism for government intervention of this kind must reside with the NSW government.
35. The costs associated with recission, or amendment of a development approval must not burden the approval holder and is separate to the question of compensation.
36. It is a legitimate exercise of government authority to take measures that protect the built and natural environment from the impact of climate change however, the terms on which this is permitted to occur must be clearly legislated and supported by adequate regulation that makes allowance for monitoring and reporting.
37. Amend the Objects of the Environmental Planning & Assessment Act 1979 to recognise climate change adaptation and the NSW Net Zero Plan as key goals. Ensure consistency of these Objects across the NSW legislation. Council supports the example of the NSW EPA in giving effect to NSW's climate change goals through the EPA's regulatory functions and responsibilities of its licensees. The NSW Planning system and its agents need to do the same.

38. Amend Division 3.1 Strategic planning to accommodate climate change considerations as a required component of strategic planning framework. Instead of a major overhaul of Division 3.1, the reform can include the following components:
    - Itemise climate change considerations e.g. both emissions reduction/intensity and adaptation through design and locational criteria, as a mandatory component of regional strategic plans and district strategic plans. Guidelines for how to consider and account for the emissions impact of proposed regional and local plan directions/trends will be needed.
    - Given limited practical value of local strategic planning statements required under S3.9, reposition them as "local climate change action plans", requiring councils to identify mitigation and adaptation measures and ensure their practical implementation in strategic and non-strategic planning at the local level. Mandatory components of these to include urban heat mitigation, green infrastructure and urban tree canopy expansion targets. State government resourcing will be needed to analyse and develop these e.g. similar to the Energy Savings Action Plans that councils were required and funded to develop, implement and report on.
    - Ensure climate change considerations are evidence-based and rely on a single point of truth for projections and modelling, for example AdaptNSW mapping (see relevant comments over page).
39. Require Statement of Environmental Effects under S4.64 of the Act and as prescribed by the Regulation to consider climate change impacts in instances of development applications meeting certain monetary or land area thresholds.
40. Amend S4.15 to clearly identify climate change projections as matters for consideration in determining a development application.
41. Amend section 4.55 modification of consents – generally to ensure that any modifications resulting in an increase that is shown to have an adverse climate change impact upon the approved development is NOT development *deemed as 'minimal environmental impact'* under s4.55(1A).
42. Update Ministerial Directions provided under S9.1 of the Act to require planning proposals and Local Environmental Plans to address climate change as mandatory considerations.
43. Ensure landscaping controls related with urban heat mitigation are enforceable.
44. Introduce sunset clauses for land banking, particularly in LGAs prone to climate events such as flooding and fires, where homes have been lost to climate events and where opportunities for homes to be relocated or rebuilt exist. Sunset provisions for approvals (concept & master plans and DAs) would assist to address legacy issues, including progressive changes to biodiversity conservation status and legislative provisions. Recommend that current provisions in relation to compensation be reviewed to accommodate the need to review land zoning and approvals based on contemporary information and changing circumstances.
45. Amend the Standard Instrument Order to introduce a "Limited Development" zone similar to the one provided within the Queensland planning framework.

46. Multi-hazard reduction – development controls across policies (i.e., between SEPPs) need to not negate other intentions and consider a balance between, for example, vegetation removal for bushfire risk versus promoting urban tree canopy for urban cooling.

47. The current planning system promotes the continued use of private vehicles in residential environments. Through parking mandates for residential development, the planning system encourages most residents to be car users, with related impacts on climate. With support of the lead agency for public transport, Transport for NSW, incentives for alternate travel modes should be considered in appropriate mixed use urban locations where a substantive number of people live and work, and strategies formulated to put in place regular, reliable and affordable public and active transport networks to enable these incentives to be expanded across our cities, suburbs and towns. These strategies should reflect place-based research into change trends for the way people work (commuting versus working from home) and alternate transport services (on demand services and micro mobility).

48. Consistently with the above, review the Environmental Planning & Assessment Act 1979, State Environmental Planning Policies, regional plans and strategic plans to ensure consistency across each component of the planning system.

49. Ensure climate change considerations are based on evidence and modelling using AdaptNSW as a single point of truth for climate change projections. Ideally, this single point-of-truth approach would also include links to locally-specific modelling projecting flooding, bushfire risk, coastal hazards and the like. (https://www.climatechange.environment.nsw.gov.au/projections-map).

50. Through evidence-based guidelines, State Government should assist councils and the broader development industry in defining unacceptable and unmitigated risks.

51. Strengthen the planning framework by providing guidelines on climate resilient design.

52. Consider measures to identify and map areas suitable for landward regression of Threatened Ecological Communities at most risk from climate change for protection.

Appendix 2 – Submission Recommendations by the elected Tweed Shire Council

1. Prioritisation of green infrastructure to guard against urban heat is included in the body of this report. Specific and important measures would include mechanisms to allow offset payments and increased replacement tree fees and ratios by developers as well as substantially increased fees for illegal tree removal. Of relevance is the recent South Australian Urban Forest Report interim recommendation. The report has been established due to significant net loss of canopy e.g. 75,000 trees per year in Adelaide. Causes of such loss include infill housing development without urban greening being factored in. The interim report has 13 recommendations including the fee for illegal tree removal to be increased tenfold and offset planting to be strengthened to a ratio of 3:1 and with increased offset payment required. See: https://static1.squarespace.com/static/5c57a2c2bfba3e5e4929ccf3/t/652f7247732256160550d9f7/1697608266562/ERDC+Urban+Forest+Report+No+1+signed.pdf

2. Prioritisation of protection from the changes to the natural environment are also mentioned in the report. In particular this will entail urgent resourcing and requirement of conservation zones in all shires and that they be based on independent scientific assessments.

3. Climate change impacts are currently tracking at the high impact scenario according to the latest IPCC 2022 report. We can ignore this, or we can work with our communities to make some difficult choices now, to mitigate against the future impacts. Cost benefit analysis has consistently shown that investment in mitigation measures now with regards to coastal erosion and sea level rise will far outweigh the cost of not funding these adaptation measures. The planning system needs to consider no longer allowing people to build in the flood plain or have new residential uses of land in the coastal hazard zone. It is time for governments to pivot and make the change that councils cannot do at an individual level. Alternatively, government could consider allowing only tourist uses of areas at medium term risk such as coastal hazard zones, thereby allowing current owners of such land to retain an economic return and public to have use of this land in the period leading up to it being abandoned due to climate impacts in the future.

4. In answering the inquiry question as to the adequacy of powers to revoke DA's by Council, it is believed that in all of the years, this legislation s4.57 or its predecessor s96A of the EP&A Act 1979 have been in force, it has not been enacted by a Council as far as we are aware. This is because the legislation requires (under s4.57(7)) compensation to be paid by the regulatory authority that revokes the consent. This is cost prohibitive for local Councils and effectively means that there is no legal mechanism to revoke consents even in the face of known climate or environmental risks. There is currently $4BN federally dedicated to disaster mitigation. This needs to be used to take action now to remove people from hazardous risk areas. The government needs to make available a central fund, dedicated to compensation for approval revocations, to avoid disaster recovery funding being needed into the

future. Without this, or an alternative useable legislation, Councils will be forced to continue allowing legacy approvals to be acted on even in the face of known risk.

5. No consideration of the adequacy of planning powers in the face of rapidly changing social, economic or environmental circumstances would be complete without the consideration of the introduction of zonings which are dependent on the subject development moving to construction within a defined period or an ability to rate a property according to its development potential if it has an approval in place. Both of these measures may create a way out of the current deadlock which sees land zoned for residential development in accordance with strategic growth plans and then no mechanism to force this land to be brought to market, creating an ability to landbank and disrupt the strategic planning for the provision of adequate housing.