Submission No 184

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

Organisation: Better Planning Network Inc

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Better Planning Network Inc.

Submission to the Legislative Council Inquiry into the NSW Planning System and the Impacts of Climate Change on the Environment and Communities

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About this submission

The Inquiry Terms of Reference are extremely broad and in many respects overlap. We make no apology for some inevitable duplication, which reflects the interrelated nature of the issues and the strength of feeling in many diverse communities about failures and weaknesses in the current planning system in NSW.

It has not been possible in the time available for us to cover all of the terms of reference, but we believe that we have managed to address most issues of concern.

About BPN

The Better Planning Network Inc. (BPN) is an incorporated, volunteer-based, not-for-profit association established in 2012 in response to the then O'Farrell Government's proposed overhaul of NSW planning legislation that prioritised developer profits over the public interest. Our aim is to advocate for a robust and visionary NSW planning system designed to achieve Ecologically Sustainable Development as defined in the Protection of the Environment Administration Act 1991 (NSW). In September 2023, BPN had more than 50 member groups and individuals, and many more supporters.

The following BPN Charter is supported by many environmental and community organisations, although we acknowledge the need to update its principles to emphasise the important need for much stronger action to address our climate, biodiversity and public housing crises.

PLANNING FOR PEOPLE - A COMMUNITY CHARTER FOR GOOD PLANNING IN NSW

Our Vision

A planning system that thinks of both today and tomorrow; is built on fairness, equity and the concept of Ecologically Sustainable Development; guides quality development to the right places; ensures poorly designed developments and those in the wrong place don't get built; and protects the things that matter, from open spaces, bushland and productive agricultural land to much-loved historic town centres and buildings.

Principles

Good planning is governed by the following principles:

• The well-being of the whole community, the environment and future generations across regional, rural and urban NSW.

• Effective and genuine public participation in strategic planning and development decisions.

• An open, accessible, transparent and accountable, corruption-free planning system.

• The integration of land use planning with the provision of infrastructure and the conservation of our natural, built and cultural environment.

• Objective, evidence-based assessment of strategic planning and development proposals.

These principles will guide a planning system that:

• Respects, values and conserves our natural environment and the services it provides.

• Facilitates world-class urban environments with well-designed, resource-efficient housing, public spaces and solar access that meet the needs of residents, workers and pedestrians.

• Provides housing choice, including affordable housing and sufficient housing for the disadvantaged, in a diversity of locations.

• Celebrates, respects and conserves our cultural (including Aboriginal) and built heritage.

• Protects and sustainably manages our natural resources, including our water resources, fragile coastlines and irreplaceable agricultural land for the benefit of present and future generations while maintaining or enhancing ecological processes and biological diversity.

• Retains and protects our crown lands, natural areas, landscapes and flora and fauna for the benefit of the people of NSW.

• Gives local and regional communities a genuine and meaningful voice in shaping their local area and region, its character and the location, height and density of housing. Provides certainty and fairness to communities.

We call for a planning system that integrates short and long term social, environmental and economic considerations to create lasting benefits for communities, now and in the future. This is the concept of Ecologically Sustainable Development (ESD) as currently defined in the Protection of the Environment Administration Act 1991. ESD must be the overarching objective of the planning system.

Introduction and Overview

It is clear that the State Government's current expectations of the planning system are to increase housing supply at all costs. Other stated objectives such as mitigating and adapting to climate change, conserving biodiversity, managing water supply and quality, prioritising safety of people and property are usually considered as development constraints. Guidelines and planning legislation offer compromises or loopholes that invariably favour developers and development.

If the Government is genuinely committed to ecologically sustainable development (ESD) and intergenerational equity, then planning reform is urgent. Arguably, responding to climate change should be the *primary* objective given the existential threat it poses with adverse consequences for all other objectives.

If necessary, rates of development and targets should be reviewed and possibly reduced to satisfy the other objectives, both in particular areas or even overall (for the entire state) The State Government should not accept as a 'given' the targets agreed to under the recent 'accord' which seem to be unquestioningly based on an ultimately arbitrary level of population growth and net immigration.

Of major concern is the influence of developers on policy. The current push to fast track development and to increase supply as the only solution to address the affordable housing crisis is an example. Both the State and Federal Governments need to be honest about the fact that the fundamental problems in the housing market can only be fully addressed in the public interest by using all available levers, including fiscal policies, taxation reform and the state government moving from being a developer for profit to a housing provider in the public interest.

The perverse financial incentives that encourage property speculation and housing being primarily a financial asset rather than as shelter (a basic human right which too many in the community cannot afford or access) need to be reversed (if necessary progressively to be politically acceptable). The NSW Government urgently needs to consider a range of factors and policy levers that affect housing supply including adopting and imposing necessary tax and economic measures. Land tax, stamp duty, rates, development levies and state asset management rules, and federally, negative gearing and capital gains tax all need to be in scope for a comprehensive solution to the housing crisis.

The government must ensure planning focuses primarily on the public interest and includes:

- Incentivising the more efficient use of the existing private and public housing stock, addressing under-occupancy. Close to 50% of public housing is vacant due to lack of maintenance. Many private dwellings are vacant, not offered for rent or offered only for short term tourism related rentals. The prevalence of short term holiday lets at the expense of long term rentals affects some areas particularly hard.
- BPN is concerned that the federal government Foreign Investment regime provides perverse incentives to demolish perfectly good housing to rebuild new constructions.

The State Government should make representations to the Commonwealth for reforms that would remove these incentives, and perhaps even incentivise instead the refurbishment of older housing stock.

- Many reports exist of homes and units being left empty as overseas investors are land banking. A disincentive in the form of a tax for vacancy over a certain period must be imposed.
- Developers, both private and public, work to build what will make the most profit (housing as a market commodity) rather than building in the public interest (housing as an essential need). The private sector's focus is business profits not sustainable development. Its focus is not delivering a variety of housing types or appropriate housing for different geographic areas.
- Increasing medium density and diverse infill in existing urban areas can assist with supply of a variety of housing types, but not at the expense of tree canopy cover, deep soil planting or amenity including sensible setbacks. There is significant potential in most urban areas for increased density, but current planning controls and building standards allow for
    - unacceptable levels of tree clearing (without adequate replacement and maintenance)
    - excessive site coverage by impermeable surfaces (compounding stormwater management, pollution, biodiversity impacts and flooding impacts)
    - buildings that are not highly energy efficient
- Better use of the many brownfield sites in and adjacent to urban areas, with either direct government investment and/or incentives for the necessary rehabilitation and preparatory community infrastructure.
- Greater 'value capture' from rezoning – most rezonings (and development approvals) represent a free gift of land and property value to private landowners – a windfall gain which they have done little to deserve or earn.
- Direct government spending on public, social and genuinely affordable housing for rent – an essential complement or alternative to rent assistance for the substantial number of Australians who will never be able to afford fully commercial rents.
- Changing the government rules that require Land and Housing Corporation (LAHC) to be self funded. The self funding rule has turned the government public housing provider, in effect, into a private developer with public housing being demolished and replaced with significant high rise private housing and a very small portion of public housing that is then transferred to social housing companies.
- Providing well-planned affordable housing in perpetuity rather than giving bonuses to developers and allowing increased density in areas that cannot support it and for a limited time, not in perpetuity.

Specific terms of reference

(a) How the planning system can best ensure that people and the natural and built environment are protected from climate change impacts and changing landscapes, and in particular:

(b) (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

Many natural disasters cannot be prevented or totally predicted however it is widely accepted that increased human activities, including urban development, exacerbate risks to natural disasters. Risk of natural disasters is compounded by climate change; natural disasters occur more frequently and more severely.

"Planners working for the different levels of government or in the private sector have a responsibility to integrate planning for climate change into their work and be proactive in the development of mitigation and adaptation", Planning Institute Australia (PIA) Planning in a Changing Climate Position Statement, March 2021.

The Royal Commission into National Natural Disaster Arrangements (February 2020 https://www.royalcommission.gov.au/natural-disasters) stated, *"Good land-use planning decisions can mitigate future risks. Decisions about new developments should be based on the best information available on current and future risks"*. (Para 19.60)

The NSW government acknowledges climate change but fails to adequately address it in planning or to adequately consider the future and a worsening climate emergency. (Also see (b) (i) & (ii) below).

BPN believes the attitude of the government to prioritise, streamline and facilitate development "no matter where", in addition to the huge influence of the development industry on government, is leading to development with unacceptable risk of loss of life and property and at a heavy economic cost.

BPN recommendations:

- It is imperative that consideration of climate change risks is embedded in all aspects of land use planning and management in NSW.
- Incorporate requirements for climate change mitigation and adaptation in planning legislation requiring climate change considerations in planning decisions.
- The planning system needs to be supported by legislation that properly recognises the precautionary principle and duty of care to current and future generations by requiring much stronger climate mitigation and adaptation measures in recognition of imminent dangerous cascading tipping points.
- Identify catastrophic climate change as a key issue that needs to be considered in the assessment of planning decisions.
- Impose restrictions on development intensification in areas exposed to natural disasters.
- Increase funding for implementation of mitigation and adaptation strategies.
- Concurrence from relevant emergency services and experts is mandatory.
- Impose accountability by recognising that a decision maker who overrides the legislation or supporting advice for planning in hazard prone areas must be personally liable for any breach in his/her duty of care

Planning in flood prone areas

Australia recognises prevention is the best way to address natural disasters, however currently 90% of expenditure on floods is reparative and only 10% preventative. Increases in funding and resources are needed to implement preventive and mitigation measures including reduction in greenhouse gas emissions.

The Flood-Prone Land Package 2021 provides advice to councils on considering flooding in land-use planning. However, a provision is given for approval, in the case of inconsistency of a Planning Proposal with the guidelines if it satisfies the Secretary of the Department of Planning.

BPN recommendations:

- The precautionary principle should apply, using a realistic evidence-based risk-weighted methodology in all cases.
- Impose restrictions on urban intensification in flood prone areas.
- Require Emergency Evacuation Plans at the DA assessment stage with concurrence by NSW State Emergency Services and/or independent qualified experts.
- The majority of Councils flood planning uses flood analysis based on 1D modelling, which downplays the real extent of flooding found using 2D flood modelling. Modelling should be consistent and use 2D modelling.
- For any change to intensifying development, the flood modelling for that area must be reviewed to consider the **cumulative impact** of the planned development and the impact of extra developments or change of use on flooding.
- It is unacceptable that Department of Planning and Environment (DPE) planning decisions be permitted to accept “tolerable risk to human life, environment and property” in contradiction to their own Environment, Energy and Science Group’s advice that the State Emergency Services’ endorsement of flood emergency evacuation arrangements are considered “essential”.
- The planning system allows ultra-high rise development in flood plains with emergency evacuation plans that have not been approved by the State Emergency Services or the Department’s Environment, Energy and Science Group, as has occurred in Parramatta. It is unacceptable that such intensification of development that represents a risk to life and property is permitted, without proper consideration of existing risks and future risks including evacuation response.
- The concurrence and approval of the NSW SES and/or relevant scientists on flood evacuation is essential.
- Natural based mitigation strategies should be preferred to the use of structural interventions.

The SES has still not endorsed the Parramatta CBD Planning Proposal’s flood evacuation plan to reduce risk to life by means of high-rise building “shelter-in-place”/vertical evacuation. Improved 2D Flood Maps have since shown more than twice as many property parcels flood affected by 1% AEP and PMF events. This will undoubtedly lead to increased flood damage and significant house insurance premium increases.

The NSW planning system has obviously failed other areas with regard to flooding e.g. Lismore, along the Hawkesbury River in Western Sydney and in other areas. Risk assessment and planning must include allowance for climate prediction models, similarly for bushfires and extreme heat waves.

In July 2023, at the inaugural National Industry Roundtable for Land Use, Planning and Resilience, in response to the flood emergency of recent years, peak organisations

representing planners, builders and insurers called on state governments to urgently, overhaul their approach to land use planning to ensure no more homes are built without regard to risk on floodplains. BPN agrees with this demand and would extend this to include high fire risk areas.

Flood Management

Flood Management Australia has been lobbying the Government to spend much more on good flood planning and mitigation as an investment to reduce the much higher costs of reparation of flood damage, this does not include the enormous flood disaster social, environmental and psychological costs. Currently flood mitigation expenditure has been estimated at about one tenth of the cost of flood reparations.

Overland flooding and Stormwater Management

Stormwater management encompasses the network of pipes, impervious surfaces, pits and other devices to collect and mitigate peak water discharge. The current land use planning and legislative approvals framework is not effectively ensuring acceptable levels of stormwater management. The increase in stormwater run-off volumes and peak flow following urbanisation due to the increase in impervious surfaces can be significant.

With climate change increased precipitation intensity and volume are predicted, yet not included as a factor in the establishment of Stormwater Management Plans. Basing planning decisions (zonings and individual DAs) on stormwater management plans for individual development without considering the development within its context, surrounding topography and the existing capacity of stormwater system and predictions of intensification of precipitations with climate change is not good planning.

BPN's member groups report frustration with lack of clear accountability for stormwater aspects of development, where several agencies are involved but with no clear authority to impose or assess mitigation measures and no adequate resources provided to implement measures on public land to avoid exacerbating extreme stormwater impacts. This is further complicated with easements running on private property where the onus can be on the property owner to maintain and upgrade stormwater systems.

Case study - Stormwater in Keiraville.

Keiraville in the Wollongong area is located below the Illawarra escarpment where properties are naturally prone to some flooding. It has been reported, however, that the incidence of flooding has significantly escalated. In 1998, Keiraville experienced damaging floods and, after heavy rainfall in March and April 2022, many properties were subjected to overland flow and some property damage. Of particular concern is the cumulative impact of the growing number of multi-unit development approvals in Keiraville which, despite construction of detention pits, result in greater volumes of stormwater runoff that exceed the capacity of the ageing stormwater systems. Much of the water runs through private properties designed when the catchment land surface was much less impervious and with less runoff volumes. Other contributing factors are the erosion of the escarpment (accelerated by illegal bike tracks and feral deer), blocked culverts, blocked or broken pipes and gully pits.

Responsibility for maintenance and repair of the stormwater infrastructure lies in different cases with private property owners, local council, Sydney Water and Roads and Maritime Authority (RMS).

Stormwater systems, water volume, frequency of rainfall events and flooding are all interrelated. Flood risk management and drainage are key considerations when planning

new developments. The effect of land use on downstream flooding is not sufficiently accounted for. With lack of capacity of the existing stormwater system in addition to various ownership of parts of the stormwater system, maintenance, remediation and implementation of expensive Flood mitigation plans, damage to property and risk to lives as in the 1998 and 2022 floods in Keiraville are likely to continue.

Planning in Bushfire Prone Areas

The government response to predictions of future higher temperatures with increased frequency and intensity of fire and flood events has been to develop increased resilience of communities to fire or flood risk, vegetation management (APZ and controlled burns), incorporating specific building standards in construction and, at a local government level, mapping and development control plans. Unfortunately there are a number of problems with the current implementation of this response:

- Inadequate resources to monitor compliance or enforcement of these measures..
- Although measures to mitigate risk have been taken, they do not remove risk altogether as natural events are not entirely predictable or preventable.
- The impact on biodiversity due to mitigation measures such as Asset Protection Zones (APZ) resulting in vegetation loss with consequent loss of habitat and fauna. Ironically, the diminishing of tree and vegetation cover contributes to climate warming resulting in increased fires.
- With regard to Planning Proposal assessments in bushfire prone lands, the “performance based solutions” in the Planning for Bushfire Protection Guidelines 2019 (PBP 1.4.5) is of concern. If a development does not conform to the specifications and requirements of the NSW PBP, the Commissioner of NSW RFS can override requirements in the Guidelines and give consent. This defies the purpose of establishing guidelines and again promotes the interest of developers above protection of people and assets.

The total cost of bushfires to the economy must factor in the loss of life or injury to residents and that of emergency personnel, property and assets, in rural areas livestock and crops, the cost of equipment and emergency relief. The 2019/20 Black Summer wildfires killed 34 people and about 80 billion vertebrate animals, destroyed 2,800 homes and about 240,000 sq km of precious carbon storing bushland. The estimate cost of these fires was $80 Billion.

In the Black Summer fires the government ignored RFS and other fire fighting experts including traditional Aboriginal people warnings that more risk minimisation planning, preparatory work and fire fighting equipment was required. Government funding needs to support bushfire preparation and resources.

BPN recommendations:

- The precautionary principle should apply.
- It is critical that planning policies do *not* encourage intensification and increase the number of people and assets exposed to natural disasters, particularly vulnerable populations.
- Planners are not experts in bushfire. It is essential that concurrence for development in bushfire areas is sought from the RFS and RFS Commissioner .
- The Planning for Bushfire Protection Guidelines 2019 should not include “performance based solutions” that allow non-evidence based measures to override compliance in order to by-pass development constraints in bushfire prone lands.

- The onus for permitting development in a high risk area must be taken based on all evidence presented and up to date data and modelling, not rely solely on the proponent's submission.
- There must be a policy to restrict development (such as prohibit spot rezoning) in areas of high risk of natural disasters and impose strict adherence to the RFS guide Planning for Bushfire Protection 2019.
- Evacuation plans must take into consideration the existing population, not just additional residents
- Zoning for new development in bushfire prone areas not only results in biodiversity loss from clearing the development site, but the 2020 Bushfire Act requirements for vegetation clearance for an Asset Protection Zone result in further loss of habitat and negative impact on biodiversity.
- The concurrence and approval of the NSW SES and/or relevant scientists is essential. In the past, RFS and other fire fighting experts, including traditional Aboriginal people, were largely ignored despite warning governments that much more risk minimisation planning, preparatory work and fire fighting equipment was required.

Case study - Planning Proposal 2022-658 Re Lourdes Retirement Village, Killara

Lourdes Village, built in 1983, is a retirement village consisting of 240 units (independent living, serviced units and residential aged care facility) and the subject of a redevelopment proposal by Stocklands. It is identified as Bushfire Prone Land on Ku-ring-gai Council map. The site adjoins Category 1 Bush Fire Prone Vegetation to the south and east.

The site is located at the end of a road that is a cul-de sac, in a Heritage Conservation Area and it is bounded by bushland and a heritage listed bushland reserve. The proposal is to rezone the site from R2 to R3 with heights and FSR increased from DCP controls. The proposal which does not comply with the Planning for Bushfire Protection 2019 was approved for Gateway by the Ku-ring-gai Planning Panel and the RFS manager based on the performance based approach to compliance with the Ministerial Direction 4.3 despite strong objection and detailed up to date bushfire and evacuation risk analysis from council.

The proposal is to rezone the area from R2 to R3, increase FSR and height controls above council DCP controls. This will approximately accommodate double the existing number of residents of the retirement village by constructing high rise buildings outside the flame zone with a basement in one building to act as a refuge in case of fire. To maximise development, the proposal includes building 63 townhouses in the flame zone on the boundary of the development.

Notwithstanding the inconsistency and the analysis and modelling from council, the proposal, under the current policy, potentially could be approved.

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

Coastal Management

The new requirements and arrangements under the Coastal Management Act for preparation of Coastal Management Plans (CMP) were welcome but progress has been too slow, partly due to lack of resources. Councils are in a "catch 22" situation of needing an approved CMP to qualify for funding of works, but do not have funding to complete all the necessary work to submit a CMP for approval. In the meantime, developments continue to

be approved in areas which are likely to be subject to tidal inundation or increased coastal erosion as a result of rising sea level within the lifetime of the projects to be built.

The state government should provide further resources to Councils so they can progress and finalise the CMPs as a matter of urgency.

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

Threatened ecological communities

The current environmental legislation fails to protect threatened ecological communities or habitat. A fundamental issue is that development continues to be prioritized over the environment and planning legislation trumps environmental protection. This looks likely to continue with this present government focused on the provision of housing and sporting facilities. The number of species listed as threatened in NSW continues to rise and one of the greatest threats to these species is climate change and vegetation loss .

The impacts of climate change contribute to conditions that may directly affect vegetation and fauna but the most significant impact is a result of land clearing, fragmentation and change in water distribution caused by development and flawed environmental policies that favour development.

This is evidenced by the failure to dedicate the promised Great Koala National Park, the continuation of native forest logging and widespread community opposition to the loss of urban green space and tree canopy for the building of sports precincts – many with synthetic turf. Further, the different environmental legislations and how they interact are often very confusing, even to government officials and departments directly.

The Blue Gum High Forest classified as Critically Endangered under NSW legislation is an example of an ecological community predicted to become extinct under current legislation. The Blue Gum High forest is restricted to ridge tops in Sydney's north extending from Willoughby to Pennant Hills. Around 1% of the original forest remains. Under current legislation vegetation is being lost at a rapid rate with development. The Biodiversity Offset scheme, Self Assessment by developers, Biodiversity Development Assessment Reports and policies with no legislative weight due to a planning system contribute to the loss.

Case study - West Pennant Hills Mirvac development

The failure of environmental policies was evident at the ex-IBM site in West Pennant Hills where Mirvac Residential applied for rezoning of a large site and was given approval for residential housing in a forest that contains "Critically Endangered Ecological Communities" of Blue Gum High Forest (BGHF) and Sydney Turpentine-Ironbark Forest (STIF). Community action and cost resulted in an amended plan with 10ha of remnant forest dedicated to the NSW Government as an extension of the Cumberland Plain Forest however, 15.9 ha will be developed and endangered and critically endangered ecological community lost.

Referral under the EPBC Act

One of the mechanisms that is supposed to ensure protection of ecological values, habitat and native wildlife is referral to the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Our members have observed many instances in which the decision to refer has effectively been left to self-assessment by the developer (or their consultants), without independent assessment by Council or

Departmental Officers. In many cases, the proponent makes self-serving decisions that referral is not necessary. We submit that this undermines the intent of the Bilateral Agreement between NSW and Federal governments.

Biodiversity offsets

Another purported environmental protection mechanism is the Biodiversity Offsets Scheme, a market-based approach to biodiversity offsetting. BPN has previously made submissions pointing out the lack of integrity and widespread abuse of this scheme. The failure of this scheme is also relevant to Term of Reference (b) (iii) Biodiversity Loss.

The 2022 NSW Parliamentary Inquiry found the scheme should be reformed. The NSW Audit Office 30 August 2022 report highlighted the Department of Planning (DPE) had not effectively designed core elements of the scheme and questioned whether the operation and outcomes of the scheme were consistent with the objectives of the Biodiversity Conservation Act 2016. It further predicted only 50% of species and 59% of ecological communities currently listed as threatened in NSW would still exist in 100 years.

The Inquiry made 11 recommendations yet they have not been implemented.

The 2020 amendments to the Rural Fires Act (which allow landowners to clear land within 25 metres of the boundary with adjoining land) has had a devastating impact on tree and vegetation loss with consequent loss of habitat and fauna. We cannot contemplate saving threatened and endangered species if we continue to remove their habitat. Increasing the effectiveness of environmental protections is fundamental.

The significance of Critically Endangered Ecological Communities (CEECs) and Endangered Ecological Communities (EECs) seemingly has little or no impact on the planning processes.

Biodiversity Development Assessment Reports (BDAR's)

Local councils are under increasing pressure to approve DA's more quickly, yet often DA documents lodged are lacking in essential reports, especially for impacts on fauna and flora.

One such report that is failing to protect biodiversity is the **Biodiversity Development Assessment Report (BDAR)** which is triggered for developments which meet certain thresholds when clearing of native vegetation is occurring and the area is included on the Biodiversity Values map. It outlines how the developer proposes to avoid or minimize potential impacts on biodiversity.The BDAR identifies the number of credits to achieve a "no net loss" of biodiversity.

The principle of "avoiding harm" is not being genuinely applied in planning assessments in NSW but interpreted as "monetary compensation for loss" - the 2022 review of the Biodiversity Offsets Scheme highlighted the failure of this scheme.

The principle of "avoiding harm" must be applied with strict adherence to the objective for which it was intended – to prevent further destruction to threatened species.The concept of "Red zones" where development is not permitted should be a consideration.

The provision of housing or sporting fields is presently over-riding any negative environmental impacts that will take place if a development approval is given. There is no oversight for cumulative effects on these CEECs and EEC's and on the threatened species which are often species which are slow breeding and that only forage in particular areas as their diets are specific to certain botanical species. This includes species such as the Powerful Owl, Glossy Black Cockatoos, Grey-headed Flying Fox, numerous microbat species and many other species unique to Australia.

Definition of "remnant" vegetation in the Biodiversity Assessment Method (BAM)

Small remnants of vegetation enhance the local area and are valuable to native flora and fauna. Developers will often try and justify that only a Streamlined BDAR is necessary which is often just a desktop exercise – one ecologist approving the paperwork of another without actually visiting the site independently. This occurred at the ex-IBM site in West Pennant Hills where Mirvac Residential were given approval for a Streamlined BDAR in a forest containing hectares of CEEC of Blue Gum High Forest (BGHF) and Sydney Turpentine-Ironbark Forest (STIF) and many threatened species which subsequently was given approval to remove over 3,000 mature trees to make way for residential housing.

Streamlined assessments only assess impacts on Threatened species at risk of serious irreversible impacts (SAII). On the Mirvac site, it was argued that the value of the Critically Endangered Ecological Communities had deteriorated due to weed infestation and this was used by the developer to justify that due to its poor condition it was not valuable as a CEEC.

The developer also argued that as some of the trees had been planted and not self-seeded, the vegetation could not be considered as remnant CEEC vegetation. As there is no definition of 'remnant' in the Biodiversity Assessment Method (BAM) the community arguments failed to protect the CEEC forest on this site. Assessments were carried out by council and by the developer's consultants but despite council officers' views differing to the ecological consultants, the council reports were ignored, and the vegetation was determined as not being 'remnant' through lack of a clear definition.

Furthermore, the developer bought the property and failed to do any bush care in the CEEC so the vegetation was devalued in the developers reports which impacted on the environmental value awarded to the vegetation and ultimately, its protection. This needs to be addressed so that developers cannot state that the infestation of weeds in CEEC and EEC means its importance has been reduced.

An area containing CEEC and EEC must not be able to be deliberately neglected in order to reduce its environmental protection status.

Fauna Management Plans

A Fauna Management Plan (FMP) is the last layer of protection for wildlife on development sites and yet they are not a mandatory requirement for significant developments removing large amounts of vegetation. They are only requested as a condition of consent for DAs in response to public opposition and are in addition to the BDAR.

A spotter/catcher license would ensure that anyone handling wildlife would have the necessary training and experience to do so; that they would have experience in identifying wildlife species; that the Code of Practice would be followed and that reports for impacts on wildlife would be done across the State. Protocols would be examined and impacts on wildlife could be monitored so that if a threatened species was being harmed, protocols could be reconsidered so as to ensure the harm was prevented.

At present, FMPs that are implemented are nothing more than a paper exercise that are providing no real protection for wildlife which can literally be bulldozed when they find themselves in the way of development. Yet all native wildlife in NSW is protected by law.

A Motion was passed at the Local Government Association of NSW Conference in October 2022 (see Motion 99) that "protection of wildlife on development sites must be given greater consideration" and this was supported in a request by LGNSW to State Government in early

2023 - yet there has been no change in the protocols for wildlife handling on development sites since then.

An FMP was put in place for the Mirvac Site with strict conditions applied which included the necessity for *targeted* surveys prior to works commencing to be carried out by experts in fauna species and to put in place protections and protocols for the variety of native and threatened species that occurs across this site.

The FMP Conditions of Consent included some of the following protocols which BPN believes must be incorporated into protocols for all development impacting on wildlife through removal of essential habitat:

- Targeted surveys for known species on the site including provisions for timing of surveys and liaison with expert community groups and scientists:
- NSW Codes of Practice are to be followed;
- Top-down lopping of mature trees to ensure wildlife is not injured during felling;
- The recycling of tree hollows for use elsewhere on the site;
- The provision of species-specific nest boxes prior to works commencing;
- The consideration of timing of works to avoid breeding seasons;
- The involvement of vets to assess injured wildlife and perform euthanasia as required;
- The involvement of local wildlife rescue groups to ensure wildlife is rehabilitated if necessary;
- FMP's cannot use terminology such as 'should' but must specify that the relevant protocols 'must' be followed in line with relevant NSW codes of practice.
- The BAM method must incorporate a requirement for an FMP as a standard practice rather than a rare occurrence when stipulated by a Planning Panel.
- FMPs must incorporate standards in line with the NSW Code of Practice for Injured, Sick and Orphaned Protected Fauna in order to ensure fauna handling practices follow best practice guidelines and ensure that targeted surveys are done prior to significant vegetation clearing. A spotter/catcher license would ensure that anyone handling wildlife would have the necessary training and experience to do so; that they would have experience in identifying wildlife species; that the Code of Practice would be followed and that reports for impacts on wildlife would be done across the State. Protocols would be examined and impacts on wildlife could be monitored so that if a threatened species was being harmed, protocols could be reconsidered so as to ensure the harm was prevented.
- Clarification of exactly how POCTAA applies to these activities would provide certainty for developers and Authorising Authorities because this is presently uncertain.
- The state must implement a Spotter/Catcher Licence which effectively ensures anyone handling wildlife is suitably experienced and trained to do so. Training must be practical and require certification.
- A Code of Practice must accompany the Spotter/Catcher licence in order to ensure correct protocols are followed by consultants working for developers when vegetation clearing is occurring.
- POCTAA applies to these activities and local councils across NSW need to be advised that as the Authorising Authorities, they must ensure consultants are appropriately licensed for these Spotter/Catcher activities.

'Saving our Species' program

The NSW Government has allocated $176 million to the 'Saving our Species' (SoS) program implemented in 2016 and going through to 2026. The SOE mentions that the number of plants, animals and communities being managed under this program is steadily rising. However, this program holds no legislative weight and if development threatens an area identified as one of the SoS priority management sites, the planning process can still proceed under the Environmental Planning and Assessment Act 1979. SoS status can be ignored and an area containing threatened species can be rezoned and cleared.

This was apparent at the ex-IBM site in West Pennant Hills where Mirvac Residential were given approval for residential housing in a forest that contains Critically Endangered Ecological Communities of Blue Gum High Forest (BGHF) and Sydney Turpentine-Ironbark Forest (STIF). This development will impact detrimentally on numerous threatened fauna species yet in the Plan finalisation report 'DPIE Place Design and Public Spaces' reported, "*the Department has received detailed advice from the Environment Energy and Science Group (EES) and recognizes the importance of conserving these communities (BGHF and STIF) and species (Powerful Owl)".*

Mark Speakman, then Minister for the Environment stated, "NSW has one of the world's most diverse and beautiful natural environments"..., "yet despite our natural wealth, NSW has nearly 1000 species on the verge of extinction. The SoS program is the NSW Government's solution".

BPN recommendation: BPN believes that SoS priority management sites must be protected from rezoning for development and become designated areas protected for their biodiversity significance and to protect from future impacts of climate change and prevent threatened species extinction.

Project splitting and the problem of approval creep through separate DAs

Splitting developments into smaller individual DAs limits the understanding of the Assessing and Consent Authorities, and of local communities, of overall impacts, and also increases the effort required by all parties to respond to proposals.

Case study - Pennant Hills Mirvac development

The Hills Development Control Plan (THDCP) Residential 2012, 1.2 states**:**

Council's objectives are:

ii) Ensure that development will not detrimentally affect the environment of any *adjoining* (emphasis added) lands and ensure that satisfactory measures are incorporated to ameliorate any impacts arising from the proposed development; and**…**

v) Implement the principles of Ecologically Sustainable Development.

The Mirvac site is directly adjacent to the Cumberland State Forest, home to Powerful Owls, microbats and endangered Dural Land Snail yet even just this month (October 2023). An application was lodged for construction of a recreational facility in an area zoned C2 Environmental Conservation but was given dispensation in 2019 within Schedule 1 of THLEP 2019 for development pursuant to clause 17(2) for a "recreation area" and "recreation facility (indoor)" because of an existing multi-storey car park that will be demolished as part of the housing development.

However, the proposal includes a skate park, a half basketball court, outdoor terrace with cooking facilities with social events proposed that will have amplified or live music. Mirvac's proposed measures to limit the detrimental environmental impact involves just limiting hours of use. This is not appropriate for a forest with C2 Conservation zoning and it is inconsistent with the definition of "recreation area" or "recreation facility (indoor)".

As Mirvac lodged the DA as a separate proposal for the site, neither the BDAR and the FMP and strict conditions of consent for the original approved development on the site were included.

Developers are separating large developments into smaller individual DA's and hoping that the full impact of the works will not be acknowledged under Federal Referrals or impacts on SAII. There are still more DA's to come on this 25ha plot in West Pennant Hills with works expected to continue for several more years. The full impacts are unable to be determined when the DA documents are only presented piecemeal under separate DA lodgements.

Developers choose to lodge separate DAs for a single site so that the total or cumulative impacts are not assessed.

If a developer has bought a parcel of land with the intention to rezone and redevelop, there must be some provision for this in the planning process so that the "overall impact" on the loss of vegetation communities and impacts on fauna can be properly considered prior to any works commencing.

Council conflicts of interest as both landowner, developer, assessor and consent authority

Case Study - Westleigh Park zoning, Hornsby

Hornsby Shire Council has lodged a DA for a Regional Sporting Complex and a 7km mountain biking trail network located in CEEC of Sydney Turpentine-Ironbark Forest and in an area containing high levels of threatened flora species.

The site is a plateau surrounded by residential housing to the south and east, and endangered CEEC of BGHF and Berowra National Park to the North and West. There is Dog Pound Creek Biobank site to the north which contains the world's *only* Blue Gum Diatreme Forest – which is managed under a Biobanking agreement with Hornsby Shire Council under the Biodiversity Offsets scheme. This area is protected 'in perpetuity' yet the DA put on exhibition (DA/975/2023) suggests that this area is zoned RE1 – Public Recreation and that lighting, noise and mountain biking will be permitted if approved under the DA.

We strongly question how an area of CEEC which contains unique BGHF can have RE1 zoning when it is preserved under a Biobanking agreement for the loss of BGHF elsewhere. This truly highlights the ineffectiveness of the BOS scheme to protect biodiversity when an area that is land banked under BOS can be detrimentally impacted by development proposed by the council that manages the biobank agreement.

It is a conflict of interest that Hornsby Shire Council, the land owner, and manager of the Biobank agreement is also the developer proposing that this Regional Sports complex is approved despite the impacts it will have on critically endangered vegetation both on and around the Westleigh Park site and on the nearby National Park.

Extract from DA/975/2023 - Hornsby Shire Council - Environmental Impact Statement (page 177)

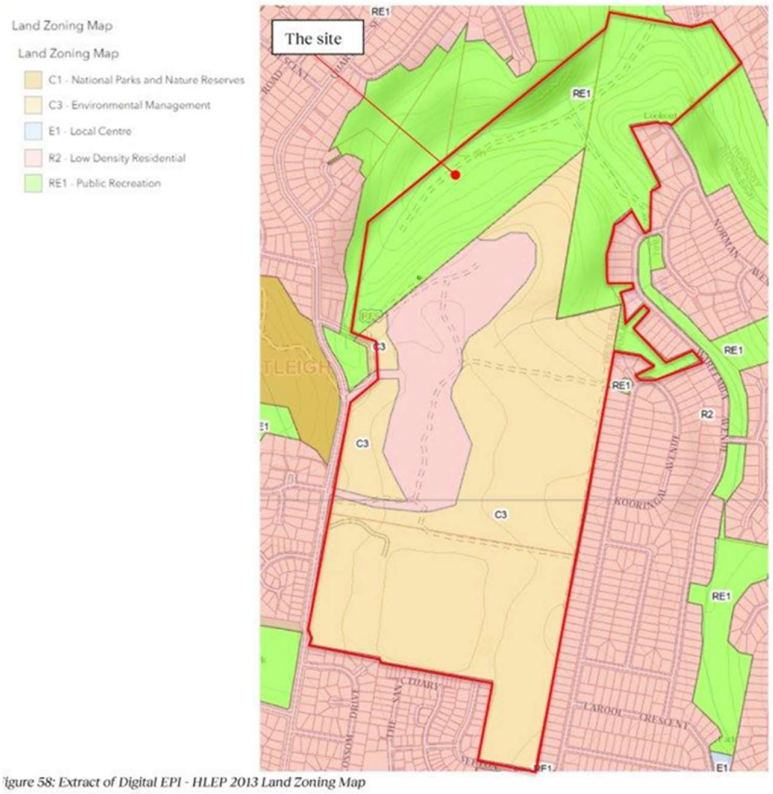

Figure 58: Extract of Digital EPI - HLEP 2013 Land Zoning Map

At Westleigh Park, as there is no RE1 zoning on the proposed development footprint for the sporting complex, Hornsby Council is bringing in the surrounding RE1 area and saying it is now part of the 'site' to facilitate the development of a sports precinct without rezoning the site. By including surrounding land which has the correct zoning, council appears to be avoiding the need to rezone the main site which is currently zoned R2 Low Density Residential and C3 Environmental**.**

BPN submits that there are major conflicts of interest where Local Councils are both the landowner and developer of proposed development sites and/or adjacent lands.

CEEC vegetation zoning

There is a proposed rezoning in Galston at Johnson Road where 2 lots containing Sydney Turpentine-Ironbark Forest are being proposed to be rezoned to General Industrial by Hornsby Shire Council. However, the community is calling for the vegetation to be given its own separate C2 Environmental Conservation zoning to protect it from any future impacts of development.

BPN suggests that all CEEC and EEC in NSW be given appropriate C2 Environmental Zoning to ensure it is protected from inappropriate clearing as part of the planning processes which allows it to go unprotected. Allowing individual local councils to determine the zoning of these endangered communities is exacerbating their extinction process.

The Precautionary Principle

The Federal Court of Australia has determined that the Precautionary Principle, under section 391(2) of the EPBC Act, must be employed when works 'threaten' environmental damage and the threat of incremental or cumulative impacts are likely.

BPN submits that the Precautionary Principle must be utilised more at local government level especially when impacts on 'critically endangered' or 'threatened' species are known. Across NSW we are seeing the fragmentation of more ecologically sensitive vegetation because the cumulative impacts are not being taken into account across a geographical area which may cross the boundaries of different local council borders.

BioNet data out of date

BioNet is the NSW government database for species tracking and collects statistics on threatened species. As recently as 4 September 2023 it was exposed as not having been updated with data from wildlife rescue groups since 2019.

Development applications using BioNet as part of their sourcing for reports will be using data that is fundamentally flawed as a basis for their continued removal of essential habitat. This is in addition to the fact that many DAs currently being approved did their flora and fauna assessments prior to the 2019/2020 catastrophic bushfires which we all recognize cost the lives of billions of native animals.

We are currently seeing the removal of areas which are the only remaining viable wildlife habitats in certain geographical areas across NSW because their planning approvals may have been given prior to the bushfires and the floods and the harm both have done to our biodiversity is still unknown.

Until an accurate understanding of the impacts of these natural disasters can be properly understood, planning approvals for areas that provide significant foraging and breeding habitats must be considered only once updated flora and fauna surveys have been conducted.

Lack of resources is impacting on the effectiveness of government record keeping and must be addressed. Data collection needs accurate recording in order to ensure developments are not being approved due to information being outdated.

Fauna and flora reports that predated the 2019 catastrophic bushfires cannot be relied upon to provide an accurate understanding of the health of a species and up-to-date studies must be undertaken before critical habitat is cleared which cannot be replaced.

BPN submits that the NSW State government needs to increase wildlife resources to ensure their website, databases and records are well maintained.

Commonwealth Referrals under the EPBC Act

The purpose of the Federal Referral process is to determine whether a proposed action will impact on vegetation that is protected under national environmental law (the EPBC Act). It was once possible for a referral to be made by local community and environmental groups but changes to policy mean they can now only be submitted by the developer or the Commonwealth, State or Territory government, or an agency that is aware of a proposed action, with administrative duties relating to the action i.e. local council.

The number of Commonwealth Referrals being lodged has substantially decreased and yet the loss of endangered ecological communities and threatened species is continuing to rise. It is untenable that these requests for oversight from the Federal Minister on protected species should only be made by these two bodies.

We need to ensure more federal referrals are lodged in order to ensure they have the effect for which they were intended – that is to protect and manage nationally and internationally important flora and fauna, ecological communities and heritage places.

Local communities are becoming increasingly frustrated at the lack of accountability with many approvals going ahead despite environmental impacts being highly concerning for local areas seeing the loss of essential green space and loss of tree canopy.

Councils often lack the resources to give appropriate due diligence to the DA process and to oversee the actual project activities as they proceed despite the fact that they are the only Authorising Authority.

The NSW Government needs to put nature protections first. Overhauling the EPBC Act and reviewing the planning processes which allow our threatened species protections to be ignored for other projects deemed essential can no longer be supported.

During the pandemic, it became clear that our open spaces and connection with nature were our sanity and our natural places are already under pressure from rising temperatures and the environmental fall out of climate change.

BPN submits that a major reset is required in the consideration of biodiversity conservation in development decisions, so that our environment is no longer sidelined.

Term of reference (b) The adequacy of planning powers and bodies, particularly for local councils , to review, amend or revoke development approvals, consider the costs, that are identified as placing the people or environment at risk as a consequence of: (i) … the cumulative impacts of development; (ii) … climate change, and natural disasters; (iii) … biodiversity loss; (iv) … rapidly changing social, economic and environmental circumstances

The NSW Government has removed much of the power of local councils to make planning decisions. Despite huge money spent and community consultation to make LEPs that have been legislated, the state government continues to impose demands for development and implement policies that override local councils' strategic planning. The result is ad hoc planning with loss of biodiversity and heritage, inadequate open space or community facilities and infrastructure that has not been planned to accommodate for the intensification of housing. The planning panels imposed by the State Government and its members appointed by the State Government frequently override the assessments of local councils, often to favour development proposals. Despite the increased demand on councils, the NSW government does not provide the necessary resources to cope or deliver the necessary facilities for the community.

Planning Panels have a conflict of interest as they work to satisfy the Minister.

Environmental and heritage legislation has become so "flexible" and compromised that even the rulings of the Land and Environment Court generally favour development or unenforceable conditions.

Planning powers should be returned to Councils who have better knowledge of their areas to plan appropriately. The NSW planning system has disenfranchised councils but left councils and communities with the costs and pressure imposed by cumulative development.

If planning bodies cannot amend, revoke, development applications it follows that without legislative changes that genuinely protect biodiversity and consider the cumulative impacts of development on vegetation and habitat, species and habitat extinctions are inevitable.

Cumulative impact - and loss of native wildlife habitat in greenfield development is a major existential issue we must confront. Cumulative impacts of tree removal, soil and seed bank in addition to developments with much greater Built upon Area resulting in hard surfaces and water run off have been reported in many areas of Sydney. Increased stormwater runoff and overland flow into catchments has a negative impact on biodiversity.

There is a severe risk that the cumulative effect of piecemeal higher density redevelopment throughout a suburb is an unacceptable overall loss of trees, given the multiple value of trees for shade, cooling, visual amenity and as a carbon sink.

To the extent that some greenfield development may still be required, measures need to be taken to ensure that the impact of habitat is not assessed in isolation from the impact of multiple developments in close proximity.

Term of reference (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

This submission contains numerous suggested reforms under other subheadings. Here we highlight some specific reforms that do not fit so readily under the other terms of reference.

Proposed changes to the Housing SEPP and Planning Systems SEPP

BPN was briefed on the status of this proposal in a Stakeholder Engagement Teams meeting in October 2023.

We wrote to the Department on behalf of our many member Groups to say that we are very concerned by the net effect of the proposed changes.

We are particularly concerned by the decision not to revisit the 'only affordable for 15 years' element. This clearly and seriously undermines the value and credibility of the initiative which should preferably provide public and ‘affordable’ housing in perpetuity. Only requiring dwellings to be offered at 80% of market rent for ’essential workers’ for a limited period and then returning them to the developer means developers profit but tenants in these dwellings will be forced to move or pay increased rent once the subsidy term ceases. Also these “affordable” dwellings are not affordable for people eligible for public and social housing.

The priority should be repairing and maintaining existing public housing so it does not sit empty. Currently 50% of such housing is empty because of a lack of repair. In addition, developers, including government agencies, should be required to include a percentage of public and social housing in developments in perpetuity. Development on public land should include at least 20% public housing. Land and Housing Corporation should be required to increase public and social housing in any redevelopment by a minimum of 20%.

BPN also submits that the principle of 30% “bonuses” on height limits and FSRs, overriding Council standards that reflect community consensus, is contrary to best practice in planning.

The application of such “bonuses” is particularly inappropriate in areas where considerable density uplifts have already been recently approved.

More generally, we oppose the new SSD approval pathway for housing projects with a CIV of more than $75 million, which will likely mean that Council and community concerns raised in consultations will be ignored.

We submit that simply focussing on supply of housing does not address many other factors contributing to lack of genuinely affordable housing, including short term holiday rental and land banking by investors who benefit more from tax concessions by keeping sites undeveloped or property unoccupied.

We are very concerned that there appears to be no provision for a component of any additional development contributions to flow through to Councils for provision of the additional community services, infrastructure and open space that will be required to meet the resultant population growth.

BPN urged the Government to take account of these significant community concerns in the final design of the Housing and Planning System SEPP changes.

The housing affordability crisis is in large part due to a cultural and political problem with governments at all levels refusing to take politically unpopular decisions to genuinely address the underlying causes which they perceive as being politically risky. This includes an unwillingness to address the issues of unsustainable migration rates, and to change financial incentives to encourage divestment of investment properties, encourage downsizing to improve utilisation of larger properties, make property ownership less appealing to foreign investors etc. Instead governments have acquiesced to the self-interested case made by the development industry to simply supply dwellings ‘at any cost’.

Nature Based Reform Solutions

NSW is facing unparalleled risks related to climate change over the next 12 years as we approach the critical threshold date of 2035 when the Climate Council states Australia should achieve net zero emissions. Some of these risks can be mitigated through the deployment of large scale flood mitigation infrastructure, especially in our harbours and coastal areas. Widespread international research has indicated that Green Infrastructure (GI), or Nature Based Solutions (NBS) can be as effective at mitigating these climate risks as traditional grey infrastructure. Additional GI and NBS produce a broad range of co-benefits including enhancing biodiversity, sequestering carbon, enhancing public health, cleaning the air, soil and water along with providing spaces for civil amenities and active transport corridors.

In the academic literature, and popular press Green Infrastructure has been defined as a primary class of infrastructure. However, in its statutory definition of State Significant Infrastructure (SSI) in the NSW Planning System, green infrastructure, Urban Green Infrastructure, or blue-green infrastructure are not included. Schedule 3 designates SSI permitted under the Policy includes infrastructure and development that is essential for the provision of public services and facilities. This specifically includes port authorities, rail infrastructure, water storage and treatment facilities, pipelines, submarine telecommunications and certain development within National Parks. It excludes any mention of Green Infrastructure (GI), Urban Green Infrastructure (UGI), Blue Green Infrastructure (BGU) or Nature Based Solutions (NBS) – all terms commonly used in the academic literature to describe the best practice methods for climate change mitigation.

If this theory-practice gap could be closed, the State of NSW would gain a powerful tool to deploy GI and NBS at scale. It would allow the state of NSW's considerable powers included in the SSI legislation to overcome the barriers of fragmentation, conflict of vision and other key barriers to implementation. It would also solve a key issue relating to mandate. There is no entity within the NSW government structure mandated to oversee the delivery of Green Infrastructure like there is for other forms of infrastructure such as highways, powerlines and water infrastructure.

With Green Infrastructure added to schedule 3, Infrastructure NSW would gain a mandate to act as the delivery agency within the State Government. The powers of SSI could alternately be utilized by other nominated delivery agencies allowing them to respond rapidly and at a large scale to the impacts of climate change on the environment and communities of NSW.

The pending Federal Government Nature Positive Act as currently drafted includes definitions of Infrastructure which includes Green Infrastructure (GI), and Nature Based Solutions (NBS).

Adjustment of Schedule 3 of the NSW Planning System to include these terms would ensure alignment with this forthcoming Federal legislation and provide NSW State Government powerful new tools to combat climate change and biodiversity loss.

Global warming impacts

Many councils in NSW, including some in Western Sydney, have declared a climate emergency and urged the NSW government to reduce emissions faster and to improve outdated building codes, as Western Sydney Regional Organisation of Councils (WSROC) has done in stating that “home design standards based on outdated climate data will drive up household energy bills and put lives at risk”.

WSROC President, Councillor Barry Calvert said in May 2023 “Homes we build today will be in place for decades to come. We must ensure we are setting Western Sydney up for success, but today we are assessing new homes against a pre-1980s climate which is simply laughable… [with the new standards] from October 2023 housing assessment will be updated to a pre-2010 climate, however, this is still far cooler than we experience today….

We assess the performance of homes with the air-conditioner on, but the homes we modelled in our study became unsafe when the air-conditioning was turned off to simulate a heatwave-induced blackout or where air-conditioning is unaffordable…..And we know that heat waves kill more Australians than bushfires, floods, and storms combined. Western Sydney has already experienced 50°C temperatures which are not compatible with human life, and their frequency is expected to increase in the future leaving more than 2 million residents at risk.”

Most air-conditioning units and solar panels reach operational thresholds of 45 and 50°C respectively. For this and obvious climate change mitigation reasons, the Sustainable Building SEPP must be amended to remove the residential thermal performance provision that prevents Councils mandating better than NatHERS 7 stars (10 is the maximum), to remove the exemption from thermal performance improvement for units below six storeys and for the North Coast climate zones, and to set maximum embedded emissions standards for building materials.

With regard to costs associated with climate change and natural disasters, it is well recognised that the costs of mitigation are much lower than the costs of repairing the damage caused by lack of mitigation. That is, “prevention is better than cure”. This was

clearly shown many years ago by British Conservative economist, Sir Nicholas Stern in his analysis that the costs of mitigating climate change are much less than the costs of not doing so.

The Mining SEPP

Another State Environmental Planning Policy that BPN wishes to raise with the Committee is the State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment (Resource Significance) 2013 ("Mining SEPP").

In 2021, the Legislative Council's Regulation Committee undertook an inquiry into SEPPs, publishing Environmental planning instruments (SEPPs) Report 8 - August 2021. This inquiry built upon the work the Regulation Committee conducted in the Delegated Legislation Inquiry of 2020. The 2021 Inquiry sought to expand upon the latter, inquiring into and reporting on policy matters beyond that of gazetted regulation and instruments. Parliamentary scrutiny of environmental planning instruments was raised and explored during the inquiry. The *EP&A Act* contains a number of provisions relating to scrutiny and transparency of environmental planning instruments by government.

However, there is a visible gap in the scrutiny of decision-making being made by the executive pursuant to the powers granted under SEPPs which needs to be examined on a more practical level. We wish to draw attention to a case study which highlights gaps in Parliamentary scrutiny of decision-making under the Mining SEPP. The case study falls directly within the terms of reference of this Committee, as it concerns executive decision-making related to a matter central to this Inquiry: water security and the proper enforcement of planning conditions imposed for the purpose of controlling water access by mines.

It is a case study of poor governance practices by the Department, reliance on blatantly incorrect legal advice, the subsequent retrospective approval of a water pipeline network and what appears to be a cover-up of who was responsible for the fiasco. Department policies need to be in place to ensure these events are not repeated. However, as there has never been adequate examination of the causes, and who was responsible for the chain of events that took place during and after the construction of the unlawful pipelines, there is serious risk that they are sure to recur.

The example below has particular relevance to the Inquiry as water security concerns grow in line with climate change and competition for water resources intensifies.

Case study - Maules Creek Mine Modifications 5 and 6 retrospective water pipeline approvals

Maules Creek Mine was approved under a condition that if it should run out of water, it should scale back production accordingly. Water was a commercial necessity for washing coal. It was also needed operationally as a dust suppressant throughout the mine. During a severe drought, the mine developed concerns about its water supply. Rather than enforce consent conditions that would reduce coal production, and thus reduce coal royalties, the Department allowed the mine to construct a water pipeline network outside of the lawful boundary of the mine to access water it was purchasing elsewhere in the Namoi River area. Despite raging objections from groups like Lock the Gate, People for the Plains and our member group the Wando Conservation and Cultural Centre, the Department defended the water pipelines as lawful, only to flip when the heat became too much and possible legal challenges to the legality emerged.

The Department stood by insisting that the pipelines were lawful as the Mining SEPP overrode the approval.

Once constructed, the Department made the mine lodge retrospective Modification applications which were brief and dealt with summarily.

Notwithstanding the Department also imposed a modest fine of $15,000.

Penalty Notice issued to Aston Coal 2 Pty Ltd (PA 10_0138, Narrabri LGA) 18 February 2020

On 28 February 2020, the Department issued a $15,000 Penalty Notice to Aston Coal 2 Pty Ltd (owned by Whitehaven Coal Limited (WCL)) for failing to seek consent for the construction of three water pipelines and associated infrastructure to supply water to the Maules Creek Coal mine. The pipelines, constructed on three separate properties and connected to the mine's water management system, were not described in the Environmental Assessment or the project approval. The ongoing use of the pipelines was approved in a modification to the approval in December 2019.

https://www.planning.nsw.gov.au/assess-and-regulate/about-compliance/inspections-and-enforcements/february-2020-formal-enforcements/penalty-notice-issued-to-aston-coal-2

The Penalty Notice states that the offence was *"failing to seek consent for the construction",* but throughout construction the Department repeatedly assured stakeholders, including local farmers competing for water resources on the water trading market, that it was lawful.

We question, therefore, if the pipelines were thought legal throughout their construction, why a penalty was imposed at all. Given the high profile of the controversy which engulfed media and several environmental groups, it seems illogical that the mine was penalised when in fact it had been emboldened to proceed with the pipeline construction on grounds stated openly on multiple occasions that planning approval was not required. Reliance for this assertion was that the Mining SEPP removed the requirement to apply for planning consent for the pipelines.

Here is an account of circumstances surrounding Modifications 5 and 6:

https://nwprotectionadvocacy.com/whitehaven-coals-water-farming-pipeline-network-under-assessment-by-planning-but-it-has-already-been-built/

An internal investigation into the unlawful construction of the pipelines was not communicated to the public.[1] [1].

A NSW Ombudsman's investigation did not adequately address the actions, legal advice, information provided to the media and public during the construction of the unlawful water pipeline network. The NSW Ombudsman simply concluded that as the pipelines had been retrospectively approved, there was no need for any further action as to the propriety of the processes and actions that had taken place. We do not agree.

We think this case study warrants the attention of the Committee, to ascertain if the mechanics of planning approval under the Mining SEPP are fit for purpose and sufficient to support lawful decision-making by the Executive. BPN requests particular attention to sources of legal advice that

[1] Source: Email from Team Leader, Resource Assessments, Department of Planning, Industry and Environment 16 September 2020 to Team Leader Compliance concerning complaint from Lock the Gate Alliance.

was given to the Dept of Planning Resource Assessments Branch which stated that the pipelines did not require planning consent in the form of modifications to the Maules Creek Mine consent. This raises serious questions about the sources and quality of legal advice being relied on by the Department and potential conflict of interest that these practices may pose. These include:

- Was this advice from the Department's lawyers, an external law firm engaged by the Department, or did the Department rely on advice provided by lawyers engaged by the proponent?
- Did the Department take the legal advice given, or did it decide not to follow it when it acquiesced to the pipeline construction?
- Is the practice of accepting legal advice from a proponent's lawyers, rather than independently, an accepted practice in the Dept of Planning?
- What is the internal policy related the aforementioned,

We are of the view that this line of inquiry will yield valuable lessons for the NSW planning system where executive decisions are made without adequate transparency.

Term of reference (d) - alternative regulatory options to increase residential dwelling capacity where anticipated growth areas are no longer deemed suitable, or where existing capacity has been diminished due to the effects of climate change.

Other parts of this submission go to this term of reference - we therefore do not repeat them here.

Term of reference (e) - any other related matters

Probity concerns

One of the main problems with the planning system and planning bodies is the disproportionate power that developers have over the process, despite objections by BPN and many community groups.

- **Developers/applicants continue to have the right to choose their own environmental and heritage consultants** to assess the impact of their proposed development and make recommendations. This is tantamount to an invitation for corruption as they that pay call the shots; the "piper calls the tune". **This clear conflict of interest arrangement must be changed** by means of an independent selection of assessors from a schedule or table of assessors and/or consultants with independently verified expertise for the specific task at hand. Selection could be on a rotating basis by a process that is fair to all parties.

- Another issue is the way probity checks are conducted for the chair, alternate chairs, independent experts, and other members of planning panels. The probity checks include a statutory declaration by each chair, expert and other planning panel member declaring they are not a property developer or real estate agent. However, a person nominating to be a Councillor is required to declare whether they are a property developer or a close associate of one and, if elected, to disclose annually whether they are such while in office. **This annual disclosure should also be required of planning panel members**.

- The Environmental Planning and Assessment Act 1979 states at s2.18 that a person is not eligible to be a member of a local planning panel if the person is a property

> developer (within the meaning of section 53 of the Electoral Funding Act 2018) or a real estate agent within the meaning of the Property, Stock and Business Agents Act 2002. Section 53(1) of the Electoral Funding Act 2018 provides that "property developer" **includes a person who is a close associate of a property developer as follows:**

53(1) Each of the following persons is a "property developer" for the purposes of this Division:

(a) an individual or a corporation if:

(i) the individual or a corporation carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit, and

(ii) in the course of that business:

(A) 1 relevant planning application has been made by or on behalf of the individual or corporation and is pending, or

(B) 3 or more relevant planning applications made by or on behalf of the individual or corporation have been determined within the preceding 7 years,

(b) a person who is a close associate of an individual or a corporation referred to in paragraph (a).

BPN notes that the Department of Planning and Environment (DPE) carries out the following probity checks as part of the selection process:

- Bankruptcy check
- Criminal history check
- Educational qualification checks
- Real estate agent check
- Political donations check
- Statutory declaration stating they ARE not a developer,

However, the definition of a property developer under the Electoral Funding Act 2018 must be clear, including past and current activity as well as of close associates.

- Also, the real estate agent checks, as shown above, are far less prescriptive than those for property developer history and future practice checks, as a real estate agent within the meaning of the Property, Stock and Business Agents Act 2002, is a narrowly defined as *"a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise), exercises real estate agent functions in the course of carrying on a business"*. The definition of Real Estate agent functions does not refer to close associates or define activity in previous years. **This loophole must be closed**.
- Likewise there is a serious loophole in the standard Councillor and Designated Person 'Disclosure of pecuniary interests and other matters' form, in that the declaration Part F simply states, *'Were you a property developer or a close associate of a property developer on the return date'*.

This also needs rectification similarly to the planning panel check regarding possible property developer connections, as well as for previous activity.

This loophole must also be closed.

Registered Environmental Assessment Practitioner scheme (REAP)

The NSW Department of Planning, Industry and Environment launched the Registered Environmental Assessment Practitioner (REAP) Scheme on Thursday 1 July 2022. From July 2022, all Environmental Impact Statements for State significant projects were required to be certified by a REAP before submission to the Department. However the scheme has some major deficiencies which affect its ability to positively impact on the quality of EIS's. These include:

REAP scheme does not apply to project modifications

The requirement for EIS is to be certified by a REAP-registered ecologist or planning professional is limited to new projects, and does not apply to modifications of conditions of consent, which usually occur within a year or two of commencement according to our observations. Therefore this is a major gap in the scheme. This is particularly the case for projects with a lengthy operational life, particularly where standards of environmental protection may have been contested at the time of assessment and are soon after challenged by proponents in the form of a modification application.

Our observation in the short lifetime of the New South Wales government's Rapid Assessment Framework is that consent modifications do not undergo satisfactory consideration of potential environmental impacts. This occurs because departmental planners do not have the remit or authority to go beyond the assertions made in EIS's, to challenge or question scientific statements, or to investigate false and misleading statements. We know this through feedback from our membership base, which includes many community groups who actively engage in planning processes and follow the progress of contested development applications.

REAP is a certification scheme not a quality scheme

It is a fundamental failing of the REAP scheme that it is based on certification of individuals to be eligible to sign off on EIS's of State significant projects. This certification is granted by the professional bodies, the Planning Institute of Australia (PIA) and the Environment Institute of Australia and New Zealand (EIANZ). It is based on experience, skills and ethical conduct of environmental and social professionals across Australia, New Zealand and the globe. Certification recognises leading practitioners in their fields and claims to give confidence to clients and the community of the quality of the EIS being submitted. However there are no feedback loops that monitor the performance of these practitioners longitudinally to ascertain whether their judgement has in fact been accurate and trustworthy and whether their judgements about the quality of predictive modelling, statements about baseline conditions, eligibility of biodiversity offsets and their potential to be rehabilitated adequately, scientific statements, have been proven to provide the confidence that the public demands.

On the contrary, the very practice of regular modifications is often due to incorrect EIS information which allowed a project to be approved on the basis of unreliable predictive modelling, false vegetation mapping, for example. These matters are of particular concern in respect of irreversible impacts, and we see this occurring in relation to groundwater impacts of resource extraction projects and biodiversity impacts universally across resources, urban planning, peri urban and regional development.

There is no practical link between certification and quality. In fact, we believe that the commercial imperative for providing favourable opinion for projects and finding ways of presenting EIS is in such a way as to minimise impacts and ensure that the consultant will have a continuing stream of work. While this may provoke some real or mock offence on the part of consultants, it is indisputable that the quality of EIS's is historically under attack by those who point out problems like incorrect parameters for predictive modelling, lack of reality testing of biodiversity offsets and local conditions, unrealistically narrow framing of the potential impact area of projects and other fundamental problems which then infect the decision to approve and the correct conditions attached.

Therefore we recommend that the reform agenda for the New South Wales planning system must include some form of quality assessment of EIS which has a longitudinal flavour and feedback loops. There must be real consequences when experts either provide false and misleading information, whether it is in the face of the document or in the underlying modelling parameters.

We ask that the committee look at a model developed in the British system, which is based on a market-based, voluntary certification system and is applied as an additional control mechanism (beyond procedural and judicial) in the United Kingdom. It is called the IEMA EIA Quality Mark certification scheme. The IEMA (Institute of Environment Management and Assessment) claims to be the largest professional body for those specialising in EIA and Strategic Environmental Assessment, not just in the United Kingdom, but also worldwide. The IEMA EIA Quality Mark began operation in April 2011 and can be sought by those organisations which produce EIS's.

Consultants with a good track record should be rewarded by being the ones promoted as excellence in EIS. This is what we think an EIA quality certification scheme would achieve over and above the REAP certification scheme. The fact that is not a hindrance, because the positive effort of some consultants to enter into a EIA Quality Mark certification scheme would also reflect on the organisation's commitment to scientifically credible EIS's.

We recommend the Committee read more about the difference between certification in the REAP form, and quality of EIS, in this article:

Bond, A., Fischer, T. B., & Fothergill, J. (2017). Progressing quality control in environmental impact assessment beyond legislative compliance: An evaluation of the IEMA EIA Quality Mark certification scheme. *Environmental Impact Assessment Review*, *63*, 160-171.

Case Study - Leard Forest biodiversity offsets for the Maules Creek mine

Leard Forest, the Leard Travelling Stock Route and surrounding farmland are hosts to the Maules Creek Coal mine and two smaller coal mines.

An Ecological Impact Assessment Report prepared for Whitehaven Coal by Cumberland Ecology, dated July 2011, was strongly criticised by many independent experts, during the assessment process and after, and was followed by a report prepared by Greenloaning Biostudies Pty Ltd entitled "Independent Peer Review of Offsets for the Maules Creek Mine Project – EPBC 2010/5566" dated 27 December 2013. The Independent Peer Review found that the original offset strategy by Cumberland Ecology was wrong, and the company was required to find additional property representing the condition class for White Box Grassy Woodland, the critically endangered ecological community present at the Leard Forest.

What's more, as of the present time even the revised offsets were rejected by the New South Wales Biodiversity Conservation Trust as being not representative of the condition

class that was promised. The example of the Leard Forest and the extent by which Cumberland Ecology's biodiversity assessment was scientifically inaccurate, continues to be very much a live issue in environmental governance as the Maules Creek mine will expect to clear more CEEC next Spring, and has even started the planning process with an intent to start expanding mining further into Leard Forest.

Yet despite the fact the Leard Forest offsets have been clearly shown to have been falsely mapped, and questionably ground-truthed, the consultant responsible for the biodiversity assessment has never suffered any investigation other than one by the Ecological Association of Australia (NSW) which conducted an internal review. This means that any unsuspecting proponent is led to have confidence consultant based on the REAP certification system. Not only that, but certification protects both the project, and the consultant, against substantive oversight by the Department. We think this is not in the public interest as it does not improve the quality of assessment.

A great deal of trust is given to consultants and experts because they are believed to have the knowledge and skills to make trustworthy predictions and scientific evaluations.

It is not unreasonable for us to ask that the reform agenda includes a system of feedback loops whereby up-to-date information about REAP consultants can be considered. It is really unacceptable to have consultants who have made such egregious errors which have led, in the case of the Leard Forest, to the clearing of CEEC with no rational reason to offset bushland, to continue to offer their services without some warning. Preferably, this kind of consultant should not be recommended.

Where the consequences of a consultant's concerted scientific opinion are catastrophic and irreversible to high conservation ecosystems, it seems opposite to the goal of improving environmental impact assessment to retain such professionals on the register.

Local Environment Plan Clause 4.6 re variations

The Department of Planning has recently revised its guidance to Councils on the interpretation and application of the Standard LEP Clause 4.6 relating to Variations to development standards. While the revised Guidelines are useful, the Department has missed the opportunity to clarify the primary test in Clause 4.6, which is whether a proposed variation is 'unnecessary or unreasonable.'

Unfortunately, the Land and Environment Court has established through successive judgements an interpretation of this test which undermines its plain meaning, which we submit was the objective of the legislation. Instead of seeing Clause 4.6 being used only in exceptional circumstances, we now see it routinely used purely to achieve commercial gain, justified by spurious arguments about design quality or vague assertions of intended local character.

Development standards such as height of buildings and floor space ratios have been set by Councils for their areas usually after careful debate and consultation about desired planning outcomes. While circumstances and context change, the appropriate mechanism for changing the standards is that of planning proposals for amendments to the LEP - not the routine granting of Clause 4.6 variation applications, which deliver windfall commercial gains to developers at the expense of agreed community standards.

We submit that Clause 4.6 needs amending to make it clear that it is to be used only in exceptional circumstances, and that 'unnecessary' and 'unreasonable' have their common lay meanings.

Land Banking and Zombie DAs (including substantial commencement)

BPN member groups have observed an increasing problem of so-called 'zombie' developments, where advantage is taken of historic approvals - often more than 10 years old) to commence construction of projects which take the community completely by surprise. When such projects commence, there is often a whole new population in the area who have no knowledge of the proposal and no opportunity to comment. Circumstances and the local environment (as well as community attitudes) may have changed radically since the original approval was given, and it is only fair that developers should have to submit historic proposals to renewed scrutiny.

Zombie DAs have often taken advantage of lax interpretation of 'substantial commencement' - in some cases works as minimal as surveying pegs or nesting boxes have been accepted by consent authorities as 'substantial commencement' sufficient to keep approvals alive.

We submit that the following changes are needed

- A significant strengthening of the definition of 'substantial commencement'
- Strict time limits on the validity of approvals, as a 'use it or lose it' incentive
- Requirements to re-advertise historic DAs more than a few years old and to accept and respond to community submissions.

Merit appeal rights

Merit appeals to the Land and Environment Court (L&E),on developments, were previously allowed for developers and the community. The community appeals were limited to process appeals several years ago.

We strongly advocate for the restoration of merit appeals for the community. Development approvals include a mix of abiding by specific rules and judgements on merit. Judgements can include a complex mix of knowledge, skills, bias, preferences and more. Appeals should be equitable with the merit appeals allowed for the community as well as developers. Ultimately the judicial system will listen, assess and provide a judgement. The separation of powers is important and should be equally accessible.

Developers are allowed to appeal the refusal of a DA by a local council on the merits of a development – arguing that it will create jobs, or provide necessary housing etc but when community groups want to challenge a DA they no longer have the option to do the same and make a 'merit-based' argument. The only options available to community groups that want to challenge an inappropriate or damaging DA is to put themselves at financial risk by fundraising or using a pro-bono legal service to request a Judicial Review or by asking for a decision by NSW Civil and Administrative Tribunal (NCAT).

However, a Judicial Review is not conducted on the merits of a development proposal – it's purely on the planning *processes* – on whether the DA has been processed correctly and all essential criteria ticked off. A recent case in North Shore Sydney was the case with the local community challenging the installation of a synthetic turf field at Norman Griffiths Oval (Natural Grass at Norman Griffiths Inc v Ku-Ring-Gai Council). However, the case by the community was lost because a Judicial Review is unable to comment on whether a development proposal has merit or will be inappropriate for the area, and not about whether synthetic turf is a safe product to install into a local residential area or consider the environmental impacts of the synthetic turf on the surrounding waterways and flora & fauna.

Advertising of DAs

Councils have considerable discretion over advertising and notice requirements for DAs - usually set out in their DCP, and also wide discretion over what level and channels of advertising to use to inform the community of development applications (DAs) under assessment.

Progressive extension of 'exempt and complying development' provisions in State planning law (specifically but not only in the SEPP (exempt and complying development) has compounded the problem by not even requiring minimal notice even to neighbours, let alone the wider community that will often be affected.

We do not take issue with the objective of streamlining development approval pathways and removing unnecessary bureaucracy, but this should not be at the expense of basic awareness of proposed changes or genuine opportunities for input. Even simple works such as decks, fences, swimming pools etc. can have dramatic effects on neighbours or even wider community amenity depending on the particular location.

Individual neighbours and community groups are finding it increasingly difficult to monitor development proposals in their local area. Some Councils have stopped publishing DAs on exhibition in local newspapers, arguing that online publication and increased digital literacy provides a sufficient alternative with substantial savings to ratepayers.

Private Certification

The system of private certification is fundamentally flawed and not operating in the public interest or meeting its objectives. The planning system can help "ensure that people and the natural and built environment are protected" by amending legislation and regulations to ban repeat offender private certifiers who approve non-compliant developments and by publicly exposing those who breach their legal responsibilities even once. Better still, legislation should restore the certifying power entirely to Councils and fund them to do this work professionally.

A recent change.org petition highlighted the problems of private certifiers. BPN supports the following petition commentary:

"Private certifiers are wrongly approving development without fear of consequences. The impacts can be devastating for homeowners, neighbours, local councils and the environment. We call upon the NSW Government to fix the private certification system.

Private certification in NSW was introduced in 1998 to fast-track simple development approvals and ease the burden on councils. Since then, it has morphed into an industry that is essentially unregulated. The shortcomings of the current system allow private certifiers to wrongly approve major developments and ignore homeowner and community concerns with impunity. This can lead to the introduction of potentially life-threatening safety hazards, severely damaged and devalued property, compromised privacy, and reduced home security.

Key problems are:

o Home builders choose their certifier. This extraordinary conflict of interest means anyone wanting to skirt around building regulations just finds themselves a dodgy certifier. There's nothing to stop them shopping around NSW until they do.

o Local councils don't have sufficient resources to intervene. The costs for councils to issue enforcement orders are considerable and rarely, if ever, fully recoverable. Further, councils are receiving hundreds, in some cases thousands, of complaints each year about private certifiers. The current laws have forced many councils to abandon their enforcement role.

o NSW Fair Trading almost never use their disciplinary power. Despite local councils receiving thousands of complaints annually about private certifiers, NSW Fair Trading has disciplined FOUR certifiers since 2020 (Certifier Disciplinary Register 13/8/2023). Even certifiers who have approved plans later invalidated in Court, or who have paid out large financial settlements to complainants, do not appear in the Certifier Disciplinary Register.

o It is extremely difficult to contest private certifiers in Court. Councils and neighbours have 90 days after approval to challenge the legal validity of development certificates. This is not long enough to investigate, raise issues with the certifier, and negotiate with them. Especially when certifiers intentionally delay negotiations. Further, the costs of legal proceedings to challenge a development are frequently more than $100,000 – of which successful applicants typically see a maximum of 60-70% reimbursed. It is unreasonable, and often impossible, for local councils and neighbours to front this sort of money. Private certifiers, on the other hand, are less concerned by legal action because they’re protected by indemnity insurance.

These flaws encourage and protect dodgy certifiers. We challenge the NSW Government to fix the private certification system.”

We add the concern that where private certifiers are employed, there is often a delay in notification of neighbours and previous objectors (or even a complete failure to notify). Consultation periods are already too short for most people to adequately consider and respond to proposed developments, and any delays only compound the problem.

Inadequate Public Value Share of Development Windfall

When developers are permitted to build more floor area and/or height more than a Local Environmental Plan originally allowed, the land value increases, sometimes by as much as $3,000 per sq metre of additional floor area. Insufficient of this increased value goes to the NSW and local governments to provide public transport, schools, hospitals, public housing, **genuine biodiversity offsets**, parks, libraries, aquatic centres and other public facilities to serve the extra people housed in developments.

The State Government’s Housing and Productivity Contributions legislation should help but where developments have an impact on community facilities, Councils should also get an appropriate development contribution. Too often developments deliver an unearned windfall to developers and land owners, but deprive communities of funds to build development-associated additional infrastructure. The planning system should not prevent planning agreements from capturing a fair public contribution from ‘land value uplift resulting from rezoning or variations to planning controls'.

Communities have been deprived of $billions of funds needed to build vital infrastructure. No council or government should be approving a very profitable development unless it is in the public interest, so BPN recommends that planning legislation and the planning agreement practice note be amended to allow a fair higher public share of land value uplift for development.

When land values rise from rezoning, it delivers huge windfall profits to land owners. It is only right and just that the community should share in those unearned profits. BPN contends that the public share ought to be sufficient to finance and build community facilities in a timely manner, that is before the construction certificate stage.

It's not as though it is unprecedented to share windfall profits. The ACT has a Betterment Levy of 75%, meaning the community can receive as much as ten times what NSW communities sometimes receive. Developers have not fled the ACT because there is still a 25% unearned profit. However, it does mean that profits that come from massive land value increases will benefit people in the ACT who will live in those new developments.

Cameron K Murray has done calculations for Australia in his "Game of Mates - How favours bleed the Nation", which suggests that **about $11 billion extra Government funding could have been made in 2014-15 alone if the ACT's 75% public share had been applied.** This money should have been in the public purse for community facilities and infrastructure to compensate for the increased demand from higher population arising from the development.

NSW Planning Portal

The State Government is placing increasing reliance on the Planning Portal as the main channel for both publicising projects and proposals and for obtaining input from interested parties.

While the Portal has many advantages, and even more potential, it also has some major design flaws and operational problems which threaten transparency and the effectiveness of public consultation. Problems include:

- the requirement for individuals to register (create an account) in order to lodge submissions, and in some cases to even access information that is intended to be publicly available. This requirement is a clear deterrent to casual or occasional users - including members of the public who may have an interest in one specific major project that affects them, but are unlikely to be repeat or regular users. Registration presents technical barriers to people on one side of the 'digital divide'. Many citizens are also now very concerned about their privacy and surrendering personal details to the government, particularly in light of repeated data breaches and particularly in circumstances where this appears unnecessary. Lodging submissions on planning matters is one such circumstance.
- We are told that from April 2024 the only way of lodging submissions or objections will be through the online portal, requiring registration and 'upload'. We strongly submit that this is unacceptable and that the Department of Planning must continue to offer alternative means of lodging submissions - at the very least through a simple email with or without attachments. A functional email address should always be available, and offered, as an option.
- Obscure and confusing structure of the Portal, leading to difficulties in navigating the website to find and use content that a person is interested in. Too much of the content and design appears to assume familiarity with the planning system, process and terminology, and even simple issues like the numbering system used for Major Projects cause confusion.

Tree canopy and urban greening

Well-managed urban forest is fundamental to optimising livability in urban areas.

The planning system must ensure that urban forest in NSW's urban areas is adequately accommodated in the planning system.

Urban forest provides significant environmental, ecological, social and economic benefits. These include but are not limited to:

- mitigating heat,
- improving air quality,
- sequestering and storing carbon,
- improving water quality,
- ameliorating stormwater impacts,
- improving physical and mental health,
- enhancing social cohesion,
- contributing to biodiversity and providing habitat and food for wildlife.

We submit that at least 30% and up to 40% urban forest canopy is the level of canopy target to which should be aspired. Currently the Greater Sydney Metropolitan Area has around 20% urban forest canopy.

The NSW planning system must address the following matters to ensure that appropriate urban forest targets are set and achieved. BPN recommends that:

- Councils should be required to specify urban forest canopy targets in their Local Environmental Plans (LEPs).
- LEPs should specify urban forest canopy targets for all land use zonings.
- State and federal government controlled property (eg. schools, hospitals, defence land, universities and TAFEs, transport corridors, power and telecommunications corridors, etc.) should be required to have urban forest canopy targets and to develop strategies to achieve those targets.
- All private land should be required to contribute to urban forest canopy.
- The planning system should introduce incentives for contributing urban forest canopy. For example, property that contributes 60% canopy could receive rate rebates compared with a similarly rated property with less than 10% canopy.
- Larger species size and increased longevity should be recognised in relevant planning instruments as significant factors in improving sustainability of the urban forest and achieving greater urban forest benefits. Consent for the removal of trees usually requires replacement trees to be planted. Often the number of new trees exceeds the number of trees approved for removal in an attempt to adequately compensate for the loss of existing canopy. However, this can have a counter-productive outcome. Ten short-lived, small stature wattle trees will provide nothing like the medium and long-term urban forest benefit that a single relatively large species size, relatively long-lived eucalypt will.
- All development should be required to be tree friendly. Buildings must be designed and constructed to tolerate soil movement that can be anticipated in a soil environment that provides up to 60% canopy. Stormwater, water supply, sewage, transport, telecommunications and power infrastructure should be designed and constructed to co-exist with the necessary green infrastructure.
- Existing urban forest canopy should be sustained for as long as possible. New and retro-fitting development should be required to fully consider and retain existing trees as much as possible. Approval should only be given to remove existing trees when a strategy to improve the urban forest canopy can be clearly demonstrated.
- The 'greening' elements of the original Design and Place SEPP should be reinvigorated.

- No more forested areas should be cleared for development - as per the Glasgow Leaders Declaration to which Australia is a signatory.

Agency concurrences

Agency concurrence should be reinstated, and the Concurrence SEPP repealed

Under the *Environmental Planning and Assessment Regulation (2000)*, an environmental planning instrument might require a state government agency to grant concurrence to an application before it can be determined, either by Council or other consent authority (such as the Planning Secretary or Independent Planning Commission). According to the Regulation, "concurrence authority means a person whose concurrence is, by the Act or an environmental planning instrument, required by the consent authority before determining a development application". The NSW *State Environmental Planning Policy (Concurrences) 2018* (Concurrence SEPP) was introduced in New South Wales in 2019 to authorise the New South Wales planning secretary to step in to the shoes of the concurrence authority and bypass the need for specialist agencies to consider, recommend and approve in relation to integrated developments and in the case of State Significant Developments.

The justification for this State Environmental Planning Policy was said to be to prevent delays in applications and resolve disputes between agencies, for example where an agency is demanding more detailed information than is provided in an environmental impact statement (clause 70AB).

The wording in clauses 70AA to 70AC provides that the planning secretary can take over if, "the approval body has failed to inform the consent authority within the relevant assessment period whether or not the approval body grants the approval". However we believe that the assumptions underlying the introduction of the Concurrence SEPP, that delays are the fault of concurrence authorities, are not made out and warrant consideration by the Committee.

The chief assumption underlying the Concurrence SEPP, as well as the NSW Rapid Assessment Framework, is that delays are purely the result of incompetent or inefficient bureaucracy. This does not adequately take into account the adequacy of environmental impact statements, and the role that this inadequacy might play in causing delays in the planning system. A point we raise below, in the context of scoping papers, is that these documents set the boundary of the environmental impact assessment that will be required of the project. If a scoping paper is lacking in a key parameter, and is allowed to proceed with unduly narrow Secretary's Environmental Assessment Requirements (SEARs), this is bound to cause problems further down the line which may be very difficult to resolve.

Adequacy of EIS must always be balanced against speed of assessment, particularly where serious, catastrophic or irreversible impacts are at stake, or affect EPBC protected Matters of National Environmental Significance.

We acknowledge that many Councils do not have the in-house expertise, or staffing capacity, to deal with complex specialist environmental assessments. However, of the approximately 15% of all development applications that we understand require referral to various State government agencies because the development requires some form of approval under additional legislation, there is still a substantial number where the concurrence of agencies such as the EPA, Water NSW, Natural Resource Access Regulator, Roads and Maritime Services, et cetera should be regarded as essential. These concurrences should not be regarded as dispensable and replaceable by planning officers who do not have in-house expertise and would by rights be referring to the specialist agency as was originally intended.

We are witnessing a large number of decision-making errors where the specialist agency advice has been overridden by planners while the goal of the Concurrence SEPP is well understood, which is to speed up development applications, perhaps the emphasis should have been to improve the quality of environmental impact statements in the first place. The box-ticking nature of the Planning department's approach to assessment of EIS's means that scientific or factual claims made by proponents are untested, even when submissions raise questions of accuracy or validity of the statements. Moreover, even when the planners call for a response to submissions, the subsequent response from proponents is often treated with scant disregard.[2]

In order to test the justification of bypassing specialist concurrence as per the Concurrence SEPP, we recommend that the Committee request some statistics about the reason for delays. For example, was the delay because the specialist agency requested further information? The Regulation envisages this situation under clause 60 "Concurrence authority may require additional information". The clause also provides for the circumstances where the applicant refuses to provide the information requested. How often has clause 60 (5) been invoked? It's a question we think that the committee should have answered because it could point to the very problem we draw attention to. If, for example, refusal to provide further information were a contributor to the delays, then an entirely different kind of policy approach is needed than the Concurrence SEPP.

Another factor that should be considered by the committee is the inadequacy of EIS's in other respects, such as the omission of impact categories in the EIS because the scoping paper was deficient. Even though a proponent may comply with SEARs, nevertheless it is conceivable that as concurrence bodies have not been included at the very early stage of planning, EIS's reach them in a state of incompletion or even error. Therefore it is not unreasonable to demand additional information and to not let developers off the hook through a broadly expressed discretion as to whether the parties made a genuine attempt to resolve the issues about the withholding of information.

Questions for the Inquiry

We suggest that the Committee request the Planning Department to provide a report with details of:

- What kind of additional information refusals have led to the stepping-in by the Planning Secretary to bypass specialist agency concurrence?
- How many instances have there been since the introduction of the Concurrence SEPP where the Planning Secretary has done so?

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[2] An example of this was a Modification sought at Maules Creek Coal mine, where the Modification Report (a substitute for an EIS, produced in-house by proponents to amend conditions of consent of a State significant project) sought approval to use the open cut pit as a landfill for tyres making reference to certain research and quoting Tyre Stewardship Australia (TSA). The modification report for Mod 8 inferred that scientific research quoted in a TSA report supported the claim that there would be no risk of leaching into the groundwater. When it was proven that the modification report wrongly attributed the scientific assertions to the TSA report, the company simply replied in its response to submissions that it was a proofreading error. Instead of reprimanding the company for providing false and misleading information, however innocent, the Department of Planning simply accepted the excuse and therefore gave encouragement to all proponents who think it is worth a try to insert false or misleading scientific claims to support a planning application.

- In those cases, what was the 'proper consideration' undertaken by the concurrence authority that was considered by the applicant to be causing the delay? E.g. Did the concurrence authority request baseline maps, groundwater data etc which the proponent has in their possession but refuse to give up for consideration by the concurrence authority?

In our experience, this is connected with another issue we wish to raise with the Committee which is decision-makers' access to information which we expand upon below.

Decision makers access to information

Information may include mapping, disclosure of all relevant modelling parameters used in any predictions, analytical data about emissions from infrastructure, et cetera. Decision-makers are continually blocked from obtaining information, particularly if it might lead to a breach of consent conditions, environmental planning licence or water access.

Barriers to access to information are a serious impediment in the conduct of an orderly planning assessment system and its ongoing regulation. In particular, we note that pollution data is accorded the status of commercial-in-confidence when this is of public importance and should not hide behind a commercial status. Examples are:

- An extractive industry is found to be emitting unlawful levels of dust. Nearby properties show there are hot spots of pollutants, but it is not easy to analyse the possible causal pathways of the pollution. The mine is not required to provide samples of its ore to enable the heavy metals signature to be identified. Here, the commercial identity of the rock samples takes precedence over (i) the protection of the mine's surrounding community from a public health hazard and (ii) the effective functioning of the EPA. The mine will withhold this information as far as legally possible,
- A coal seam gas field has consent to be built on conditions that it monitors groundwater levels. However, the company is only obligated to provide information related to drawdown and a limited number of analytes, which does not reflect the known science about chemicals of concern related to gas drilling. Here, again the company is entitled to withhold this information.
- A State significant development obtains approval on condition that it obtains biodiversity offsets. The proponent does not provide digital maps (Shapeware) to allow anyone to view vegetation class polygons at a sufficiently detailed scale. They provide A4 printed maps only. Significant hectares of critically endangered ecological community is destroyed but the proponent still refuses to satisfy the requirements of its consent conditions and secure the offsets. Two extensions are granted by the government, yet still the proponent is not required to provide digital maps at a scale that the government ecologists could assess.

At the heart of this issue is, what is a genuine attempt to resolve the refusal to provide information, and has this been tested? We hope the Inquiry will address the subject of government regulators power to investigate. This is not to say that we would take this to an extreme as to ask them to be "a detective", requiring accused polluters to make enquiries of others about matters not in their knowledge. However, if as we have seen above the Planning Secretary has the ability to usurp the Concurrence Authority in circumstances where the latter will not approve unless the applicant provides requested information. This was a very strong response to a perceived problem which has yet to be properly understood.

Questions for The Inquiry

- How big a role does access to information by the government for the purposes of assessing developments to the required standard (i.e. specifically including the precautionary principle and intergenerational equity) play in the overriding of concurrence functions?
- Will the Inquiry consider questions of serious, catastrophic and irreversibility when recommending whether access to information by government officials should be increased from the present.

The quality and adequacy of environmental impact assessment must begin at the scoping stage.

Greater clarity, and more scrutiny of parameters particularly the potential impacts area of the project, should be addressed at the earliest stage of planning. The fact that scoping papers are usually not attributed to any expert, do not have to be approved by a REAP-registered practitioner and are not part of any public exhibition process are really serious risks to the integrity of the planning system.

These documents form the basis of the Secretary's Environmental Assessment Requirements (SEARs) in the case of State significant developments. If an error takes place in the setting of the scope of the project EIS, this can lead to serious inadequacy of assessment.

Examples are:

- A mining company lodged a scoping report foreshadowing its intention to modify an existing consent. The mine proposed to build a concrete batching plant, and tyre dump, in close proximity to a building of high heritage value and its curtilage. However, the scoping report mentioned nothing of the need to consider heritage in the EIS, did not include the heritage estate on the map, and thus clearly intended to signal to the Planning Department that it would like the SEARs to be confined to other matters.
- A coal seam gas company lodged a scoping paper for a large scale high pressure gas pipeline. It did not identify potential cumulative impacts of other major projects operating contiguously.

We submit that REAP registered practitioners should be included from the pre-EIS stages of all state significant projects, and be responsible to sign off on the scope of the required assessment.

Barriers to transparency - spurious Copyright and Privacy constraints

There is an urgent need to clarify the application of copyright and privacy law to the accessibility of documentation associated with development applications, and if necessary to amend those laws to prevent spurious use of these excuses to withhold relevant information. This applies both to the general GIPA Act regime for access to information and to the specific provisions of the EP&A Act relating to availability of planning information.

State Government Guidelines make it clear that Council must apply a public interest test to all formal GIPA requests for information, and that privacy and copyright law fall into the category of 'public interest considerations' which '**may**' be taken into account in the public

interest test. They are **NOT** in the categories of information for which there is a 'conclusive presumption of an overriding public interest **against** disclosure'.

Copyright

Some Councils routinely withhold, or redact information from, documents supporting DAs, using the argument that the information is the copyright of the authors. Both Councils and applicants have also tried to stop community groups publicising information, including images and plans, even where they have been in the public domain during exhibition periods.

Just because a document is copyright does not mean that it cannot be copied, shown and used either for the purpose for which it was produced or for a 'fair use' permitted under the Copyright Act, which includes '... purpose of criticism or review…']

Consultants and other authors often automatically place a copyright notice on reports commissioned and paid for by Councils. We submit that while this is a legitimate way of protecting themselves against possible inappropriate uses by Council staff or third parties, the reports effectively become the property of the client Council and it should then be the Council that can choose to invoke copyright when making the reports available as required to third parties, including to the public where appropriate.

Copyright is often used by Councils to justify withholding or redacting information, removing documents from public repositories such as 'DA Trackers', or allowing only inspection but not copying, **even where** the copyright owner has been given prior notice that plans etc. submitted may be made public, and where there is no realistic risk of anyone breaching copyright by using the plans etc. for commercial purposes.

Councils routinely claim that they are withholding information to protect the copyright of the authors of reports without even consulting the author. We submit that in most cases, the authors of consulting reports and assessments will likely have no concern about community groups viewing and commenting on their work - which is produced partly for the purpose of public exhibition as part of a consultation process.

We submit that Councils should not make any assumption about the intended uses of copyright material - once copyright notice has been given, the onus is then on any reader or user of the document to only use it for the purpose for which it has been provided. In the case of planning matters, this purpose includes review and criticism. Any member of the public infringing copyright (e.g. by using a plan for their own design or construction, or by including copyright material in a commercial publication) would be liable, but it is not up to Councils to protect the copyright holder - they can take whatever legal action they consider appropriate in such cases.

One particularly harmful consequence of inappropriate interpretation of copyright constraints is that in some LGAs community groups do not have easy access to critical reports after the close of public exhibition periods - most documents are removed from the 'DA Tracker' websites. While the immediate need for access - to prepare submissions - has passed, there will usually be good reasons for community groups to access relevant documents during the often long period before a planning matter is brought back into the public domain at the stage of a consent determination. Groups will for instance wish to refer to supporting documents when preparing to make 'public access' presentations or otherwise brief or lobby decision makers.

In practice, the constraint can and is overcome by downloading documents during the public exhibition period (while they are on the DA Tracker), thereby keeping them available offline and locally, for subsequent use. But this 'workaround' is not only very inefficient and time consuming, but also potentially compounds any risk of copyright infringement, with multiple copies in circulation rather than having them available indefinitely (or at least until a consent determination is made) in a central repository subject to the extra security of government systems.

Privacy

Some Councils also take a very narrow and restrictive view of how NSW privacy laws apply to information in documents in the planning system**.**

Protection of individuals' privacy is often used as a reason for either withholding information or redacting documents even where the individuals concerned have been put on notice by Council that their information may be made public (e.g. when making a submission on a DA).

Unhelpful guidance on copyright and privacy

Unfortunately, the NSW Information and Privacy Commissioner has consistently given overly cautious and often ambiguous advice and guidance on these matters. This has allowed some Councils to take an obstructive approach, while others adopt a more enlightened approach which supports transparency.

We submit that a major review of the application of privacy and copyright law to the availability of information in the planning system is required.

Environmental liability insurance

Provisioning for rehabilitation and environmental liability resulting from polluting projects is a subject which warrants close attention from the Committee. The matter of provisioning, whether it be through insurance, or other financial documents, has relevance to a number of the Terms of Reference. This includes catastrophic events, but also environmental injury that results from a series of pollution events which cumulatively have serious or catastrophic impacts.

There are several levels of pollution that should be considered. together with the potential financial losses that can occur from a pollution or contamination incident. These are typically covered in the environmental protection licences of such projects. However, rehabilitation is often overseen by the Resources department. The distinction between rehabilitation and environmental liability should be more clearly defined, and gaps in provisioning should be identified.

In 2017, a NSW Audit Office Report "Mining rehabilitation security deposits" found that despite substantial increases in total deposits held, mine rehabilitation security deposits are still not likely to be sufficient to cover the full costs of each mine's rehabilitation in the event of a default. Our members observe that rehabilitation costs still remain underestimated. We think in 2023, having learned more about the legacy of pollution left by underregulated industries, particularly mining, the Committee should address whether risks of legacy pollution on a large scale is being properly accounted for. See the Report of NSW Audit Office: (https://www.audit.nsw.gov.au/media-release/mining-rehabilitation-security-deposits)

This Inquiry should include an examination of whether the processes for setting rehabilitation costs are taking into account realities such as we have witnessed in recent times - eg Royal National Park suffering chronic mine effluent deposition from Peabody's Metropolitan Mine;

growing evidence that Newcrest Cadia copper and gold mine is linked to widespread deposition of heavy metals in rainwater tanks, and many other examples where the public purse is left to pay for clean-ups.

The question is whether our framework of major project approvals adequately provides for correct estimation and provisioning for clean-up costs including statutory clean-up notices, natural resource damages, and emergency response costs. We have learned that, for example, coal seam gas companies in NSW (AGL and Santos) do not have to be insured under an APRA-regulated insurer. It is very concerning to have major public and sovereign risks unregulated by the Australian prudential financial services regulator. The decision of the NSW Government to dispense with this prudential oversight needs close examination by the Committee as it will shed light on whether State Significant Developments and indeed State Significant Infrastructure are being adequately conditioned, both at the Project Approval Stage and also in the form of related Environmental Protection Licences which we regard as inseparable.

We recommend that the NSW Auditor General be requested to appear before the Committee to explain the latest information about adequacy/inadequacy of security for rehabilitation and in particular the adequacy of financial instruments where insurance is unavailable.