

Submission on the Inquiry into Current and Future Impacts of Climate Change on Housing, Buildings and Infrastructure

16 August 2017

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The NSW Young Lawyers Environment and Planning Law Committee makes the following submission in response to the Inquiry into Current and Future Impacts of Climate Change of Housing, Buildings and Infrastructure

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Environment and Planning Law Committee (**Committee**) comprises of a group of approximately 690 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

1. The EPBC Act should include impacts of development on climate change within the MNES framework.
2. The application of NABERS should be enhanced by more extensive regulatory oversight and by further promotion of EUAs to encourage retrofitting.
3. Australia should implement a federal ETS to meet Australia's commitments under the Paris Agreement. Housing, building and infrastructure measures to reduce emissions should be rewarded under this scheme.
4. In the NSW context, the Committee recommends that a SEPP be implemented to specifically manage assessment of development to determine impacts on climate change. This SEPP should provide clear mandatory considerations for consent authorities and processes for the carrying out of these assessments. This SEPP could also include a State framework for an ETS complimentary to, or in the absence of, a federal ETS.
5. In the NSW context, LEPs and DCPs should require assessment of the impacts of climate change in the development assessment process, complementing any equivalent SEPP provisions. These LEPs and DCPs should incorporate the assessment tools within the 2011 Guide to Climate Change Risk Assessment for NSW Local Government.
6. Where conservation cannot be achieved, measures that improve the ability of biodiversity offsetting to mitigate future impacts of climate change should be developed.

7. The Committee approves of Australian Standards requiring consideration of impacts to property and life as a result of climate change, however considers that regular updating of standards is required to ensure that standards remain fit for purpose.
8. Australian Standards should include measures to ensure buildings are designed in a more sustainable way to ensure that they are not only able to perform in the current environment, but can also withstand likely scenarios in changed conditions in the future.
9. Australian Standards should include preventing property damage occasioned by climate change as part of their goals, to the extent that this would help to protect lives.
10. The process for updating Standards should be based on a precautionary approach and in consideration of the worst-case scenario. This assessment should be based on best practice scientific data.
11. Policies and mechanisms should be developed to encourage and educate developers on how to use EUAs to their advantage, in order to promote their uptake.
12. State infrastructure should be required to comply with state and federal climate change legislation and policies, including any ETS adopted. A precautionary approach based on a worst-case scenario should be taken especially where there is high risk associated, such as with the National Electricity Market.
13. Insurance companies should be encouraged to disclose policies on climate change and manage climate change risks through insurance policies.

Introduction

The Committee thanks the Senate Environment and Communications References Committee for their invitation to comment on the Inquiry into Current and Future Impacts of Climate Change on Housing, Buildings and Infrastructure (the **Inquiry**).

The current and future impacts of climate change include increased temperatures, fire events, drought, daily rainfall, tropical cyclones and sea levels. These impacts will have consequences for housing, buildings and infrastructure, as well as on the environment and the Australian community more generally. This submission will focus on the following areas of climate change regulation, in both the Federal and the NSW context:

- Environment, climate change and planning laws;
- Biodiversity regulation;
- Buildings;
- Infrastructure; and
- Insurance.

1. Environment, Climate Change and Planning Laws

The Committee is of the view that Federal, State and Local environment and planning laws should provide increased regulation for climate change to manage current and future impacts on building, housing and infrastructure.

High-level legislative and policy guidance should be provided by our federal legislation in accordance with our international commitments under the Paris Agreement to reduce emissions to 26-28 per cent on 2005 levels by 2030. This should filter down through state and local legislation. Climate change impacts are often felt locally and so federal and state climate change legislation and policy should be reflected and implemented at a local level.

The Committee understands that there may be political barriers to achieving this goal. However following the Government's adoption of 49 of the 50 recommendations of the Finkel Review and the expected release of the Climate Review later this year, the Committee maintains hope for bipartisan support on climate change regulation.

The key piece of environmental legislation at the federal level is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Under the EPBC Act, assessment and approval of developments that will have or that are likely to have a significant impact on a Matter of National Environmental Significance (**MNES**) is required either by the federal government or by the relevant State under a bilateral assessment agreement. However, the currently listed MNES' do not specifically refer to climate change.¹ To properly integrate consideration of climate change impacts in federal legislation, the Committee submits that climate change impacts should be referred to in the MNES framework.

Recommendation: The EPBC Act should include impacts of development on climate change within the MNES framework.

The *Building Energy Efficiency Disclosure Act 2010* (Cth) requires commercial buildings above a certain floor space to meet energy efficiency requirements through National Australian Built Environment Rating System (**NABERS**) certification scheme.² The Committee is of the view that this scheme is an effective tool in ensuring buildings are designed and constructed to best mitigate climate change impacts. However, to best achieve this, there should be more extensive regulatory oversight of the NABERS scheme by the NSW Office of Environment and Heritage.

Further, the capacity of the NABERS scheme to improve mitigation of climate change within existing buildings, rather than just new or relatively new buildings, would be improved by the promotion of retrofitting through environmental upgrade agreements (**EUAs**).

Recommendation: The application of NABERS should be enhanced by more extensive regulatory oversight and by further promotion of EUAs to encourage retrofitting.

The *National Greenhouse Emissions Reporting Act 2007* and *Carbon Credits (Carbon Farming Initiative) Act 2011* (**CFI Act**) requires reporting of emissions and purchase of credits to offset these emissions. Notably, the *Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017* (Cth) seeks to amend the CFI Act in

¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 3.

² *Building Energy Efficiency Disclosure Act 2010* (Cth) ss 13-13A.

relation to the operation of the crediting element of the Emissions Reduction Fund to address implementation issues primarily for savanna fire management projects in Northern Australia.³

While these legislative instruments go some way to mitigating current and future impacts of climate change, the Committee considers that development of a federal Emissions Trading Scheme (**ETS**) is required for Australia to meet its commitments under the Paris Agreement. Further, if an ETS was implemented in Australia it is conceivable that future proofing housing, building and infrastructure from the effects of climate change could also generate credits under this scheme.

Recommendation: Australia should implement a federal ETS to meet Australia's commitments under the Paris Agreement. Housing, building and infrastructure measures to reduce emissions should be rewarded under this scheme.

Federal legislation should be reflected in state and local environment and planning law and policy. Focusing on New South Wales, the *Environmental Planning and Assessment Act 1979* (NSW) provides a legislative framework for the assessment of impacts of development at a state and local level.

Last year, the NSW Government released its NSW Climate Change Policy Framework, which sets aspirational long-term targets to achieve net-zero emissions by 2050 and to ensure that NSW is more resilient to a changing climate. While the Committee welcomes this development in policy guidance, it considers that such policy goals should be incorporated into state and local environmental planning instruments.

In the NSW legal framework, the key drivers for addressing climate change in relation to development, including through efficiency are:

- the *Environmental Planning and Assessment Regulation 2000* (NSW) and State Environment Planning Policy (Building Sustainability Index: BASIX) 2004 (**BASIX SEPP**), which provide detail on the requirements for BASIX building efficiency certificates for BASIX affected buildings including one or more dwellings but not hotels or motels;⁴ and
- the proposed new *Coastal Management State Environmental Planning Policy*, which will provide Local Councils with a tool to regulate development and manage risks of natural hazards along our coastline.⁵

However, the Committee is of the view that a specific State Environmental Planning Policy (**SEPP**) should be developed to provide a clear and broad-scale framework to require and manage the assessment of impacts on climate change in the development application process. This SEPP should provide both processes for how this assessment should be carried out, and clear mandatory considerations for consent authorities. This SEPP would also provide a means to create a State framework for an ETS complimentary to, or in the absence of, a federal ETS.

³ Explanatory Memorandum to the *Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017* (Cth).

⁴ *Environmental Planning and Assessment Regulation 2000* (NSW) cl 3.

⁵ *Standard Instrument (Local Environmental Plans) Amendment (Coastal Management) Order 2016* (NSW) under the *Environmental Planning and Assessment Act 1979* (NSW).

Recommendation: In the NSW context, the Committee recommends that a SEPP be implemented to specifically manage assessment of development to determine impacts on climate change. This SEPP should provide clear mandatory considerations for consent authorities and processes for the carrying out of these assessments. This SEPP could also include a State framework for an ETS complimentary to, or in the absence of, a federal ETS.

Local Environment Plans (**LEPs**) should also contain provisions to future proof against climate change impacts. LEPs currently require consideration of the effect of climate change in relation to coastal land use, bushfire and flood planning, and in some cases include for consideration the 'projected changes as a result of climate change'.⁶ However, this should be improved by requiring consideration of the impacts of climate change on all development within the LEP Standard Instrument. Local Councils should be encouraged to implement these provisions in LEPs.

Development Control Plans (**DCPs**) often take into account climate risk and vulnerability, such as flood event planning. The Committee supports these provisions in DCPs. However, the Committee is of the view that the inclusion of provisions relating to climate risk and vulnerability in LEPs, with further information to complement existing provisions in DCPs, would improve the ability of the legislative framework to anticipate and mitigate against climate change impacts.

The Committee submits that provisions relating to climate risk and vulnerability should be based on the NSW Government's 2011 Guide to Climate Change Risk Assessment for NSW Local Governments, which provides some direction for Councils to identify and prioritise climate change risks to council assets, operations and services.⁷

Recommendation: In the NSW context, LEPs and DCPs should require assessment of the impacts of climate change in the development assessment process, complementing any equivalent SEPP provisions. These LEPs and DCPs should incorporate the assessment tools within the 2011 Guide to Climate Change Risk Assessment for NSW Local Government.

2. Biodiversity regulation

Loss of biodiversity is identified as a threat to government assets and infrastructure through reduced recreation and tourism.⁸ Federal biodiversity laws are governed by the EPBC Act with a focus on biodiversity offsetting, to offset impacts to matters of national environmental significance such as threatened species and ecological communities.⁹

In NSW, recent reforms to biodiversity laws have encouraged biodiversity offsetting to mitigate and offset impacts of development. The objects of the *Biodiversity Conservation Act 2016* (NSW) (**Biodiversity Act**)

⁶ *Standard Instrument – Principle Local Environmental Plan* (NSW) cl 5.5(1)(b)(iv); *Sydney Local Environmental Plan 2012* (NSW) cl 7.15(1)(b).

⁷ Office of Environment and Heritage, 2011, *Guide to Climate Change Risk Assessment for NSW Local Government*, Office of Environment and Heritage, Sydney:
<http://climatechange.environment.nsw.gov.au/Adapting-to-climate-change/Local-government>.

⁸ NSW Office of Environment and Heritage, *Guide to Climate Change Risk Assessment for NSW Local Government* 2011, page 27.

⁹ Department of Sustainability, Environment, Water, Population and Communities (October 2012) '*Environment Protection and Biodiversity Conservation Act 1999, Environmental Offsets Policy*', Australian Government.

include the support of biodiversity conservation in the context of a changing climate,¹⁰ and the Committee notes that the provisions of the Biodiversity Act are to be complemented by the NSW Climate Change Policy Framework.¹¹

While the Committee supports conservation of biodiversity being a primary objective,¹² it is of the view that biodiversity offsetting should be encouraged as a measure under an ETS to mitigate future impacts of climate change, but only where avoiding or otherwise mitigating the impacts cannot be achieved.

Recommendation: Where conservation cannot be achieved, measures that improve the ability of biodiversity offsetting to mitigate future impacts of climate change should be developed.

3. Buildings

The Building Code of Australia (**BCA**) requires compliance with Australian Standards for safety, health, amenity, and sustainability.¹³ Consideration of potential impacts of climate change are incorporated through Australian Standards regulating building design and construction to address extreme weather conditions, periodic reviews, and investigations after disasters.¹⁴

The Committee submits that Australian Standards should be updated regularly to ensure that building and design measures are up to date and fit for purpose. This could be achieved by explicitly incorporating considerations of climate change risks as part of building assessment. The Committee also submits that Australian Standards should seek to ensure that buildings are designed in a more sustainable way to ensure that they are not only able to perform in the current environment, but can withstand likely scenarios in a future altered by climate change.

Recommendation: The Committee approves of Australian Standards requiring consideration of impacts to property and life as a result of climate change, however considers that regular updating of standards is required to ensure that standards remain fit for purpose.

Recommendation: Australian Standards should include measures to ensure buildings are designed in a more sustainable way to ensure that they are not only able to perform in the current environment, but can also withstand likely scenarios in changed conditions in the future.

¹⁰ *Biodiversity Conservation Act 2016 (NSW)* s 1.3.

¹¹ Second Reading Speech for the Biodiversity Conservation Bill 2016 (NSW), 16 November 2016 (Mark Speakman).

¹² See our previous submission on the Draft Biodiversity Conservation Bill 2016 and Draft Local Land Services Amendment Bill 2016, available at

<https://www.lawsociety.com.au/cs/groups/public/documents/internetyounglawyers/1188675.pdf>.

¹³ Australian Building Codes Board, *Building Code of Australia – Volume One* (at May 2016) ('BCA') Introduction.

¹⁴ 'Resilience of Buildings to Extreme Weather Events – Final Paper' (Discussion Paper, Australian Building Codes Board, 2014) 7.

It is also noted that the BCA focuses on protection of life, and less in areas such as property damage.¹⁵ This could be problematic in situations of greater frequency of extreme weather events, if procedures are not in place to re-house, before the next extreme weather event, those who may be displaced.

Recommendation: Australian Standards should include preventing property damage occasioned by climate change as part of their goals, to the extent that this would help to protect lives.

The Committee acknowledges it may be difficult for Australian Standards to be updated where future impacts of climate change are uncertain. However the Committee submits that a best practice precautionary approach based on a worst-case scenario should be taken to manage this risk.

Recommendation: The process for updating Australian Standards should be based on a precautionary approach and in consideration of the worst-case scenario. This assessment should be based on best practice scientific data.

The BCA and BASIX SEPP only apply to certain new buildings and works and do not cover older properties that have not been changed before these instruments came into effect.¹⁶ Under the *Local Government (General) Regulation 2005* (NSW), Local Councils can enter into agreements to retrofit old buildings to be more energy efficient at a financial benefit to the developer over the long term using EUAs.¹⁷ The Committee understands EUAs are being used with increasing popularity in other states including Victoria. The Committee submits that policies and mechanisms should be developed to encourage greater uptake of EUAs.

Recommendation: Policies and mechanisms should be developed to encourage and educate developers on how to use EUAs to their advantage, in order to promote their uptake.

4. Infrastructure

Infrastructure development in Australia is governed by State environment and planning law such as, in NSW, the *State Environmental Planning Policy (State and Regional Development) 2011* (NSW). Legislative regimes should require that State infrastructure comply with state legislation and policy on climate change and any applicable ETS. With respect to electricity infrastructure, climate resilience should be at the forefront given the distance the infrastructure covers and security risks involved.¹⁸ Distributed energy is one way to manage this risk however the Committee submits that this option should be considered against the priority to maintain a competitive National Electricity Market that provides electricity at reasonable cost to consumers.

Recommendation: State infrastructure should be required to comply with state and federal climate change legislation and policies, including any ETS adopted. A precautionary approach based on a worst-case scenario should be taken especially where there is high risk associated, such as with the National Electricity Market.

¹⁵ 'Resilience of Buildings to Extreme Weather Events – Final Paper' (Discussion Paper, Australian Building Codes Board, 2014) 10.

¹⁶ NSW Office of Environment and Heritage, *The Building Code of Australia* (BCA) <<http://www.environment.nsw.gov.au/resources/heritagebranch/heritage/bcadda.pdf>>.

¹⁷ *Local Government (General) Regulation 2005* (NSW), part 5A.

¹⁸ *Independent Review into the Future Security of the National Electricity Market: Blueprint for the Future*, Commonwealth of Australia 2017.

5. Insurance

The insurance industry will likely be affected by climate change through increased claims, reputational damage, decline in insurance affordability, and an increase in uninsurable sectors or geographies.

The role of insurance is to assist policyholders to recover from losses, such as those caused by extreme weather events. With their expertise in risk management insurers play a critical role in managing the risks associated with climate change. Accordingly, the Committee submits that insurance companies should be encouraged to disclose policies on climate change and manage climate change risks through insurance policies.¹⁹

Recommendation: Insurance companies should be encouraged to disclose policies on climate change and manage climate change risks through insurance policies.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the invitation to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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¹⁹ Ian Edwards and Francis Grey (October 2015) *“Insurance and Climate Change Disclosure in Australia: A review of publicly-disclosed climate change-related policies and statements of the Australian insurance sector”* World Wildlife Fund, at p 4.