

Climate-ready planning laws for NSW

Rocky Hill and beyond

Recommendations Summary



Environmental Defenders Office NSW

We recognise the traditional owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past and present and aspire to learn from traditional knowledge and customs so that together we can protect our environment and cultural heritage through law.

Environmental Defenders Office NSW

EDO NSW is the leading public interest environmental law organisation in Australia, with a formidable track record of successful Court outcomes and in driving systemic change through our policy and law reform expertise.

We provide expert, independent analysis of laws and regulations, legal education and support to communities across Australia and the Pacific, and we pursue litigation in the public interest.

Our vision is of a sustainable environment protected by law.

NSW



**DEFENDING THE ENVIRONMENT
ADVANCING THE LAW**

Executive Summary

After a summer of extreme weather, and another unequivocal IPCC report evidencing the current and predicted impacts of anthropogenic climate change, on 8 February 2019, the Land and Environment Court of NSW handed down a landmark climate change judgement. The decision in the Rocky Hill case confirmed that climate change must be in the minds of decision makers when assessing the impacts of greenhouse gas emissions on the climate, environment and people, and that decision makers are obligated to make decisions having regard to the need to limit global warming to 1.5°C above pre-industrial levels. It emphasises that “the global problem of climate change needs to be addressed by multiple local actions to mitigate emissions by sources and remove GHGs by sinks”.

This report identifies two major legal barriers to NSW taking effective action to combat climate change. The first is the lack of an effective, whole-of-government legal and governance framework in NSW for responding to climate change. The second is the failure of the NSW planning system (encompassing strategic land-use planning, environmental impact assessment and development assessment) to adequately incorporate climate change considerations into planning and development decisions.

Overcoming these two barriers with clear requirements for decision makers will provide certainty to investors, industry, proponents and the community, who are already living with the impacts of climate change.

This report recommends that NSW needs overarching climate legislation - a new **Climate Change Act** that: sets specific targets for reducing greenhouse gas emissions and increasing renewable energy; imposes duties on decision makers to reduce greenhouse gas emissions and make decisions consistent with limiting the increase in global warming to no more than 1.5°C, and puts in place processes (such as climate adaptation plans) for building resilience to the impacts of climate change.

The report makes specific **recommendations for planning law reform** including to: better integrate climate change considerations into planning decisions; strengthen strategic land-use planning; require Climate Impact Statements for major projects; and provide guidance for decision makers on how to assess whether a project will have unacceptable climate impacts.

The recommendations in this report demonstrate how we can make NSW planning laws climate ready, with clear guidance to reduce emissions and limit warming to 1.5°C; manage climate risks and protect assets, lives and livelihoods; and plan for a just transition away from fossil fuel production and use consistent with the latest IPCC advice. The future of our cities and towns depends upon it, as do the unique landscapes and ecosystems that support life as we know it.

Climate change must be in the minds of decision makers when assessing the impacts of emissions on the climate, environment and people.

Our proposal for climate-ready planning laws for NSW

Minister for Climate Change

Climate Change Division in Department of Premier and Cabinet

New NSW Climate Change Act

Key features:

- Object to limit warming to 1.5 degrees Celsius
- Emissions Reduction Target and Renewable Energy Target
- Independent statutory Climate Change Advisory Council
- Clear duties to exercise powers consistent with targets
- Climate risk assessment
- Requirements to make adaptation plans
- Monitoring against statewide indicators

Integrating climate change into the NSW planning system



Aims and objectives

- New objects relating to climate mitigation and adaptation
- Duty on decision makers to apply the objects



Development decisions

- Climate change is an explicit mandatory consideration
- Duty to refuse unacceptable impacts
- Effective consent conditions for mitigation and adaptation



Strategic planning

- New Climate Change SEPP
- Mandatory climate change requirements for plan makers
- New guidance materials and best-practice principles



Other laws and approvals

- Review and update Mining Act
- Add greenhouse gases to pollution laws
- Review other legislation for climate-readiness



Environmental assessment

- Climate impact assessment pathways
- Climate Impact Statements
- Accredited and independently appointed consultants



Compliance and Enforcement

- Mandatory greenhouse gas monitoring and reporting
- Adaptive management and continuous improvement
- Merit appeal rights

Recommendations

Part A

Overarching legal framework for responding to climate change

NSW is currently lagging on climate change law. Unlike other Australian jurisdictions, including Victoria, Tasmania, South Australia, and the ACT (and overseas jurisdictions such as the United Kingdom the Philippines and Mexico), there is no overarching climate change legislation that sets legal targets and responsibilities for reducing greenhouse gas emissions, or for making NSW more resilient to climate change. It is not enough to make high-level policy commitments (such as those in the current NSW Climate Change Policy Framework). Real action requires legal and institutional support, particularly when long-term objectives need to persist through potential changes of government and electoral cycles.

Recommendation 1

Establish a Climate Change Act

Implement a whole-of-government approach to climate change by enacting new climate change laws in NSW that deal with both climate change mitigation and adaptation in a clear and coordinated way.

A new overarching **Climate Change Act** would include:

- *Objects*: set a clear overarching objective to reduce greenhouse gas emissions and make decisions consistent with limiting the increase in global warming to no more than 1.5 degrees Celsius above pre-industrial levels. The objects should also refer to planning for a rapid and just transition away from fossil fuel production and use consistent with IPCC advice, and establishing a whole-of-government approach to addressing climate change impacts;
- *Targets*: impose duties on Government Ministers to set periodic and long-term emissions reduction targets and carbon budgets, and a legislated renewable energy target for NSW electricity use, based on expert advice consistent with internationally agreed climate goals, best available science, and the principles of ecologically sustainable development;
- *Independent expert advice*: formalise a skills-based independent statutory Climate Change Advisory Council to advise the Government and the Parliament based on the best-available science for climate mitigation, and assess and report on progress in relation to meeting targets and implementing adaptation plans; and require decision makers to act consistently with this advice;
- *Duties*: create a duty on Ministers and relevant decision makers to make decisions consistent with relevant climate change legislative objects and targets when exercising prescribed functions, particularly in relation to planning functions;
- *Risk assessment*: adopt a high-level process for statewide climate risk assessments, and require specific policies and initiatives for sectors identified at high risk from climate change impacts (e.g. housing, infrastructure, agriculture, energy, insurance);
- *Adaptation Plans*: require a statewide Adaptation Plan to be made, published, and periodically reviewed by the Minister on advice from the Climate Change Advisory Council. Sectoral and regional adaptation plans could also be made consistent with the statewide adaptation plan;
- *Monitoring progress*: Develop statewide indicators, including for emissions reduction in line with set targets, adaptation planning and climate readiness of legislation; and regularly report against those indicators;
- *Governance*: Allocate Ministerial responsibility specifically for climate change, and create a Climate Change Division in the Department of Premier and Cabinet that administers an overarching Climate Change Act (assisted by advice from the independent Climate Change Advisory Council) and supports interagency collaboration on emissions reduction and adaptation.



Part B

Integrating climate change considerations into the NSW planning system

Currently, the NSW Planning Act (*Environmental Planning & Assessment Act 1979*) contains no explicit reference to climate change, or specific provisions for mitigating greenhouse gas emissions or implementing adaptation measures. The need to consider climate change mitigation and adaptation should permeate each of the six key stages of the planning process:

- Aims and objectives
- Strategic planning
- Environmental impact assessment
- Development decisions
- Other approvals and licences
- Compliance and enforcement

Aims and objectives

The challenge: The current Planning Act contains no specific object relating to climate change and the need to reduce greenhouse gas emissions and plan effectively for climate change adaptation.

Recommendation 2

New Planning Act Object

Insert **a new object in the Planning Act to reduce greenhouse gas emissions** and limit the increase in global warming to no more than 1.5 degrees Celsius above pre-industrial levels; plan for a rapid and just transition away from fossil fuel production and use consistent with the latest IPCC recommendations; identify current and emerging risks from unavoidable climate change; and plan effectively for adaptation – in accordance with relevant climate change laws, policies, targets and best available science. This new objective would be operationalised by inserting a general duty in the Planning Act for planning authorities and decision makers, when exercising functions under the Planning Act, to make decisions consistent with the objects of the Act; and by adding specific provisions addressing climate change mitigation and adaptation at all key decision points in the planning system.

Strategic planning

The challenge: Despite recent waves of legislative reform, the Planning Act still has no explicit requirement to consider climate change in the NSW strategic planning framework – either to reduce greenhouse gas emissions, or to identify, respond to or prepare for likely climate change impacts on people, settlements, infrastructure or the environment.

Recommendation 3

State Environmental Planning Policy - Climate Change

Develop an overarching Climate Change SEPP to improve integration of climate mitigation, transition and adaptation targets and measures within the planning system. Review and update all existing State Environmental Planning Policies to ensure they meet the revised objects of the Planning Act, contribute to reducing greenhouse gas emissions in line with legislative targets, plan for a rapid and just transition away from fossil fuel production and use, and address climate change impacts and risks, including through relevant climate adaptation measures.

Recommendation 4

Mandatory consideration for plan making

Require all planning authorities to address climate change considerations when preparing and making strategic plans (SEPPs, regional plans, district plans, local strategic planning statements and LEPs). This includes a requirement that strategic plans address climate change impacts and risks and the necessary transition away from fossil fuel production, and contribute to reducing and monitoring greenhouse gas emissions across sectors - in accordance with relevant targets, best available science and up-to-date advice from a statutory Climate Change Advisory Council. Strategic plans must also adopt appropriate climate adaptation responses, including for example, planned retreat in relation to natural disaster risk, green infrastructure planning to combat urban heat island effects, and biodiversity corridors for species migration.

Recommendation 5

Guidance for plan making

Provide additional guidance, funding and support to planning authorities preparing strategic plans, including by:

- establishing principles of best practice adaptation to guide planning authorities and decision makers;
- providing the NSW Climate Change Advisory Council with specific statutory functions and adequate funding to advise NSW planning authorities on (among other things):
 - up-to-date climate change projections,
 - state and regional-level climate risks,
 - best practice adaptation measures, and
 - the adequacy of draft adaptation plans;
- developing specific Ministerial Directions on climate risk assessment and adaptation to assist councils with planning functions;
- including climate change in Local Strategic Planning Statement guidance;
- increasing guidance on, and scrutiny of, planning proposals in relation to climate change responses, including providing access to and advice on the best available science and assessing comparative performance to ensure continuous improvement;
- increasing guidance on transitioning away from fossil fuel production and use consistent with the latest IPCC recommendations; and
- requiring the pursuit of other regional development goals to be achieved consistently with emissions reduction and climate adaptation responses.



Environmental impact assessment

The challenge: The Planning Act currently fails to set clear obligations for greenhouse gas emissions and climate change impacts as part of the Environmental Impact Assessment (EIA) process. There is no standard legal provision or policy statement on how the impacts of greenhouse gas emissions are to be assessed for particular sectors or project types and there remains wide discretion and little guidance on what to do with emissions information once decision makers have it.

Recommendation 6

Establish climate impact assessment pathways

Standardise and scale climate change impact assessment requirements and processes for different development pathways. Specifically:

- Low-impact development - for low-impact development, establish a standardised assessment process for determining whether the proposed development minimises the cumulative lifetime greenhouse gas emissions from the development site and adopts best practice adaptation measures.
- High-impact development - for high-impact development (including all major projects - State significant development and State significant infrastructure projects, and designated development including development from high-emitting sectors or other development proposals at risk from climate change impacts), require consistent and independent assessment of the likely greenhouse gas emissions via a **Climate Impact Statement**.
- Establish clear EIA requirements for modification applications, including a requirement to assess the likely impacts of the modification in the context of existing impacts and operations, including cumulative impacts. A modification resulting in an increase in greenhouse gas emissions cannot be considered to be 'minimal environmental impact.'

Recommendation 7

Climate Impact Statements for major projects

In terms of **assessing emissions**, a **Climate Impact Statement** would:

- demonstrate how a project will avoid, minimise and offset emissions and achieve carbon neutrality;
- require the use of standard methods to estimate direct 'scope 1' emissions (such as fugitive methane from a coalmine), 'scope 2' emissions (such as electricity use), and up and downstream 'scope 3' emissions;
- prescribe a method to calculate the full social costs of greenhouse gas emissions (including environmental and public health costs over time); and
- estimate a range of emissions, the degree of any uncertainty: and the reasons for such uncertainty.

Assess direct and indirect greenhouse gas emissions and their impacts, including cumulative impacts and downstream emissions.

In terms of **climate adaptation**, a **Climate Impact Statement** would:

- identify the risks and potential impacts of a changing climate on the proposal and locality over the project's lifecycle;
- be required to refer to best available science (such as AdaptNSW projections), official adaptation plans, guidelines and best practice (to be developed for the relevant sector, region or development category);
- outline proposed measures to ensure the project is 'climate change ready' in relation to best available projections over the design lifecycle, and demonstrate how the project meets key resilience parameters; and
- set out a schedule for periodic reviews for adaptive management purposes to ensure best practice is maintained over the life of the project.

Recommendation 8

Greenhouse gas assessment guidelines

Publish assessment guidelines to ensure consistent, robust assessment is based on best available science. Guidelines should advise on how to assess direct and indirect greenhouse gas emissions, apply an 'avoid, mitigate and offset' hierarchy for reducing emissions, achieve best-practice carbon offsetting, and advise on best practice adaptation principles.

Recommendation 9

Accreditation of consultants

Require mandatory accreditation of environmental consultants who prepare EIA reports and Climate Impact Statements, and independent appointment of those accredited consultants.

Development decisions

The challenge: There is no explicit requirement in Planning Act for decision makers to consider climate change impacts, meaning that climate change impacts are currently considered in the context of facilitating 'ecologically sustainable development' in the public interest. The laws do not provide the necessary guidance for decision makers nor certainty for communities or industry.

Recommendation 10

Impose a duty to refuse projects with unacceptable climate impacts and risks

Impose a duty for decision makers to refuse proposals with unacceptable climate change impacts. This includes provisions to:

- Strengthen decision making requirements for development approvals and conditions, with the mandate of staying within the global carbon budget and achieving national and state targets. In particular, establish new duties to:
 - assess direct and indirect greenhouse gas emissions and their impacts, including cumulative impacts and downstream emissions;



- demonstrably consider state, national and global emissions trajectories and act in accordance with short and long-term reduction targets and the need to stay within the global carbon budget;
 - refuse projects with unacceptable impacts from greenhouse gas emissions, including high-impact development (as defined by the regulation) that is not 'carbon neutral' (including in relation to all downstream emissions);
 - impose specific conditions on development consents and mining titles to minimise emissions, meet certain standards if the project is approved, and to fully offset emissions that cannot be minimised or avoided; and
 - apply clear guidelines, rules and standards to minimise and offset emissions.
- Require decision makers to assess and respond to climate change impacts, including new duties to:
 - impose conditions to ameliorate the identified impacts of climate change;
 - refuse applications with unacceptable climate risks - this could include where climate change poses a realistic threat to the lives or safety of present or future residents, or would impose prohibitive public costs by way of emergency management, infrastructure repair or future adaptation costs or would increase threats to biodiversity; and,
 - apply best practice guidelines for climate change adaptation.

Recommendation 11

Properly assess the impact of project modifications

Require the consent authority to **consider the impacts of proposed project modification in the context of existing impacts** and operations, including cumulative impacts. A modification resulting in an increase in greenhouse gas emissions cannot be considered to be 'minimal environmental impact'.

Recommendation 12

Conditions of consent

Develop standard conditions of consent aimed at reducing emissions and ameliorating impacts of climate change. Consider introducing time-limited or threshold-bound development consents and conditions. This also involves amending NSW planning laws to clarify that development consent conditions can be updated to require continuously improved standards, whether or not a modification has been requested.

Recommendation 13

Building sustainability standards

Improve NSW building sustainability standards to:

- ensure BASIX standards account for climate change projections for the design lifecycle of buildings (for example, improve thermal comfort standards);
- expand BASIX to include new climate-ready benchmarks (beyond energy, water efficiency and thermal comfort), including by:

Add greenhouse gases as pollutants in NSW pollution control laws to recognise their contribution to environmental degradation and encourage behavioural change.

- drawing on standards set by voluntary programs and industry targets;
 - leading and developing national standards for other sustainability measures such as lifecycle emissions and waste levels; and,
 - developing standards to facilitate passive design and water sensitive urban design to improve climate resilience and efficiency.
- expand BASIX-style minimum requirements to non-residential buildings (including commercial and industrial buildings), drawing on the National Australian Built Environment Rating System;
 - expand BASIX-style minimum requirements to including retro-fitting; and,
 - support innovation and continuous improvement by introducing regular mandatory reviews and updates to BASIX and other standards every 4-5 years.

Other laws and approvals

The challenge: The planning system interacts with other relevant laws, including those relating to biodiversity conservation, pollution and waste, mining and extractive industries, bushfire protection and coastal management. These laws do not address climate change impacts in a comprehensive or adequately integrated way.

Recommendation 14

Amend the Mining Act

Review and update the *Mining Act 1992* (including provisions relating to the granting of exploration or mining titles for coal), and relevant strategic release policies, taking into consideration likely emissions in the context of drawing down a state or national carbon budget.

Recommendation 15

Introduce polluter pays requirements

Add greenhouse gases as pollutants in NSW pollution control laws to recognise their contribution to environmental degradation and encourage behavioural change. In the absence of a carbon price, this should include load-based licensing fees for greenhouse gas emissions, consistent with the polluter pays principle.

Recommendation 16

Establish emissions standards

Establish emissions standards and continuous improvement requirements for NSW power stations, based on nationally consistent standards. Standards and requirements would be enforceable conditions on Environment Protection Licences.



Recommendation 17

Ensure all relevant legislation is climate ready

Review all relevant legislation with a view to incorporating clear requirements for climate change mitigation and adaptation that integrate with requirements under the NSW planning system and any stand-alone climate legislation. The review could be undertaken by the new Climate Change Division of Premier & Cabinet on advice from the new Climate Change Advisory Council.

Compliance and enforcement

The challenge: NSW does not effectively monitor, report and enforce development approvals and conditions of consent and other licence conditions.

Recommendation 18

Greenhouse gas monitoring and auditing

Establish a comprehensive greenhouse gas monitoring and auditing register to report on individual high-impact facilities in NSW. This would draw on existing and new data (including data under the National Greenhouse and Energy Reporting Scheme (NGERS)), to track and report on approved and actual emissions.

Recommendation 19

Continuous improvement

Increase funding for climate adaptation planning, monitoring and reporting, auditing of compliance with conditions of consent, and commit to a regulatory culture of continuous learning and improvement.

Recommendation 20

Accountability

Strengthen merit appeal rights for third party objectors, by removing restrictions on merit appeals following public hearings of the Independent Planning Commission and expanding the range of the projects subject to merits review in line with recommendations of the Independent Commission Against Corruption.

**A full copy of our report is available to download at
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L5 263 Clarence St, Sydney 2000
(02) 9262 6989 / 1800 626 239

www.edonsw.org.au



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