



Australian Network of Environmental  
Defender's Offices Inc

## Productivity Commission Draft Report: Barriers to Effective Climate Change Adaptation

8 June 2012

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## Executive Summary

The Australian Network of Environmental Defender's Offices (**ANEDO**) welcomes the opportunity to comment on the Productivity Commission's Draft Report on Barriers to Effective Climate Change Adaptation.<sup>1</sup>

Our offices have significant experience in climate change-related law reform. In 2011, among other efforts, ANEDO provided submissions to Federal Government Inquiries into Australia's biodiversity in a changing climate,<sup>2</sup> the Carbon Farming Initiative,<sup>3</sup> and Australia's Clean Energy Future Legislation.<sup>4</sup> Our offices have also been heavily involved in efforts to reform planning law, and have emphasised the importance of making it more responsive to the implications of climate change.<sup>5</sup> ANEDO has previously also provided submissions to the Productivity Commission's inquiry on planning, zoning and development assessments.<sup>6</sup>

ANEDO is a network of legal offices, and we accordingly limit our comments on the discussion paper to those legal and regulatory aspects that are of direct relevance to our work. We address the information requests relating to local government (chapter 7) and relevant requests relating to planning and building regulation (chapter 8). In addressing these requests, we draw mainly on examples from the NSW planning framework.

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<sup>1</sup> [www.pc.gov.au/projects/inquiry/climate-change-adaptation/draft](http://www.pc.gov.au/projects/inquiry/climate-change-adaptation/draft)

<sup>2</sup> Australian Network of Environmental Defender's Offices, *Submission to the House of Representatives Standing Committee on Climate Change, Environment and the Arts Inquiry into Australia's Biodiversity in a Changing Climate*, 5 August 2011, [www.edo.org.au/policy/110805aust\\_biodiversity.pdf](http://www.edo.org.au/policy/110805aust_biodiversity.pdf).

<sup>3</sup> Australian Network of Environmental Defender's Offices, *Submission to the Senate Environment and Communications Legislation Committee Inquiry into the Carbon Farming Initiative Bills*, 8 April 2011, [www.edo.org.au/policy/110408carbon\\_farming\\_initiative.pdf](http://www.edo.org.au/policy/110408carbon_farming_initiative.pdf).

<sup>4</sup> Australian Network of Environmental Defender's Offices, *Inquiry into Australia's Clean Energy Future*, 22 September 2011, [www.edo.org.au/policy/110922clean\\_energy\\_future.pdf](http://www.edo.org.au/policy/110922clean_energy_future.pdf).

<sup>5</sup> See, for example, Environmental Defender's Office (NSW), *Submission to the Review of the NSW Planning System (Stage 1)*, 4 November 2011, [www.edo.org.au/edonsw/site/pdf/subs/111104review\\_nsw\\_planning\\_stage\\_1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf); Environment Defenders Office (Vic) and Victorian National Parks Association Inc., *Submission in Response to Coastal Climate Change Advisory Committee Issues and Options Paper February 2010*, 12 May 2010, [www.edovic.org.au/law-reform/submissions-and-issues-papers/coastal-climate-change](http://www.edovic.org.au/law-reform/submissions-and-issues-papers/coastal-climate-change).

<sup>6</sup> Australian Network of Environmental Defender's Offices, *Submission on the Productivity Commission Issues Paper – Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, 16 July 2009, [www.edo.org.au/edonsw/site/pdf/subs/100716productivity\\_commission.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100716productivity_commission.pdf) and *Submission on the Productivity Commission's Draft Research Report – Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, 1 April 2011, [www.edo.org.au/policy/110401planning\\_submission.pdf](http://www.edo.org.au/policy/110401planning_submission.pdf).

Information request 7.1 states:

*The Commission notes the current arrangements in New South Wales to limit the legal liability of local governments through the Civil Liability Act 2003 (sic) (NSW) and the Local Government Act 1979 (sic) (NSW), and seeks further information on whether this approach (or alternatives) could fully address the legal liability issues facing local governments in other jurisdictions when dealing with climate change adaptation.*

***Uncertainty regarding local government reliability is a barrier to effective adaptation to climate change.***

ANEDO supports the development of nationally-consistent regulation of local councils' legal liability for climate change impacts, provided that this regulation is effective in motivating councils to be proactive about climate adaptation. In our view, statutory provisions for limiting council liability in NSW currently do not fully address the legal liability issues faced by local councils in responding to climate change. For this reason, we do not recommend the nation-wide adoption of these standards.

Part 5 of the NSW *Civil Liability Act 2002* contains a range of provisions that limit the liability of public authorities, including councils. Significantly among these, the Act provides that an act or omission of a council does not constitute a breach of statutory duty unless it is so unreasonable that no other council with that council's function could properly consider it reasonable.<sup>7</sup> Additionally, where a council has a special statutory power (that is, a power granted under a statute that it couldn't otherwise exercise), it will similarly not be held liable for an act or omission in relation to that power unless it was so unreasonable that no other council in that council's position could properly consider that act or omission to be reasonable.<sup>8</sup> The Act also limits the circumstances where a council can be held liable for a failure to exercise its function to prohibit or regulate an activity.<sup>9</sup>

Furthermore, with some exceptions the Act exempts councils from liability for failure to warn of an obvious risk. These exceptions include, relevantly, where a person has asked a council for information or advice about the risk, or where the council is required by law to provide a warning.<sup>10</sup>

Further protections are extended to local councils under the *Local Government Act 1993* (NSW). Local councils are exempted from liability for the good faith provision of advice, or a good faith act or omission, in relation to risks of flood, risks to coastal zones posed by coastal hazards, or bushfire risks.<sup>11</sup> The Act details a number of activities that are covered by these exemptions, including the preparation of environmental planning instruments and coastal zone management plans.<sup>12</sup> The Act further sets out guidance for what can constitute 'good faith'. It includes compliance with manuals prepared by the council, and published in

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<sup>7</sup> *Civil Liability Act 2002* (NSW), s 43.

<sup>8</sup> *Civil Liability Act 2002* (NSW), s 43A.

<sup>9</sup> *Civil Liability Act 2002* (NSW), s 44.

<sup>10</sup> *Civil Liability Act 2002* (NSW), s 5H.

<sup>11</sup> *Local Government Act 1993* (NSW), s 733(1)-(2A).

<sup>12</sup> *Local Government Act 1993* (NSW), s 733(3).

the NSW Government *Gazette*, in relation to land liable to flooding, coastline management or bushfire risk.<sup>13</sup>

In ANEDO's view, while such provisions may provide some protection to councils seeking to undertake climate change adaptation strategies, their operation risks generating counter-productive outcomes. As set out above, the *Civil Liability Act* shields councils from liability in respect of their statutory duties in all but the most manifestly unreasonable circumstances. These provisions derive from the *Wednesbury*<sup>14</sup> test commonly utilised in administrative law, in situations where the decision-maker, unlike councils, has no personal interest in the decision.<sup>15</sup> In the administrative law context in Australia, the *Wednesbury* standard is made out extremely rarely, and it has been suggested that translating this standard to tort law means that there are very few situations in which councils will be liable for negligence in the exercise of their powers.<sup>16</sup> Similarly, the statutory provisions curtail council liability in relation to possible nuisance claims.<sup>17</sup>

While we are in favour of measures that will promote best-practice climate risk management among councils, application of the liability shield provisions in the *Civil Liability Act* has wide-ranging consequences. In the context of climate change, the provisions shield councils from liability in relation to a broad range of actions that can be construed as not manifestly unreasonable. Consideration of both the rapidly evolving nature of scientific evidence relating to likely climate change impacts and the political debate surrounding interpretation of this evidence suggests that provisions such as those in the *Civil Liability Act* are likely to protect councils which fail to act appropriately in relation to climate change risks, just as much as they are likely to protect councils that are proactive in this regard.

We therefore recommend that any statutory provisions relating to local government liability for climate change adaptation be framed narrowly, and be clearly targeted at promoting proactive, strategic, evidence-based efforts to respond to climate change adaptation implications. Such provisions must be framed with regard to considerations of climate justice. For example, the coastal impacts of climate change are likely to bear most heavily on vulnerable communities, such as Indigenous groups, retirees renting in caravan parks, and those dependent on public facilities. In relation to Indigenous groups, the impact of sea level rise in areas such as the Torres Strait, and the need for urgent government action, is well understood.<sup>18</sup> Such legal mechanisms as are available for challenging council actions on climate change allow individuals to argue against council policies that restrict their rights,<sup>19</sup> but do not necessarily promote decision making that takes into account the interests of the

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<sup>13</sup> *Local Government Act 1993* (NSW), s 733(4)-(5). For example, a manual relating to coastal zones is the NSW Government's *Guidelines for Coastal Zone Management Plans* [www.environment.nsw.gov.au/coasts/101019guidelinesczmps.htm](http://www.environment.nsw.gov.au/coasts/101019guidelinesczmps.htm).

<sup>14</sup> The *Wednesbury* test takes its name from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>15</sup> See Greg Weeks, 'A Marriage of Strangers: the Wednesbury Standard in Tort Law' (2010) 7 *Macquarie Journal of Business Law* 131, 140, 142.

<sup>16</sup> Greg Weeks, 'A Marriage of Strangers: the Wednesbury Standard in Tort Law' (2010) 7 *Macquarie Journal of Business Law* 131, 140-141.

<sup>17</sup> See *Coastal Councils and Planning for Climate Change: An Assessment of Australian and NSW Legislation and Government Policy Provisions Relating to Climate Change Relevant to Regional and Metropolitan Coastal Councils*, Report prepared for the Sydney Coastal Councils Group by the NSW Environmental Defenders Office, 2008, [www.sydneycostalcouncils.com.au/sites/default/files/coastalcouncilsplanningforclimatechange.pdf](http://www.sydneycostalcouncils.com.au/sites/default/files/coastalcouncilsplanningforclimatechange.pdf).

<sup>18</sup> See, for example, Australian Human Rights Commission, 'Case Study 1: Climate Change and the Human Rights of Torres Strait Islanders', *Native Title Report 2008*, [www.hreoc.gov.au/social\\_justice/nt\\_report/ntreport08/index.html](http://www.hreoc.gov.au/social_justice/nt_report/ntreport08/index.html); Mark Roy, *Pressure Builds on Sea Walls*, Torres News Online, 06 September 2011.

<sup>19</sup> See, for example, *Byron Shire Council v Vaughan*; *Vaughan v Byron Shire Council* [2009] NSWLEC 88; *Byron Shire Council v Vaughan*; *Vaughan v Byron Shire Council* (No 2) [2009] NSWLEC 110.

community as a whole in dealing with climate change risk. It would be detrimental to implement a liability shield that further disenfranchises vulnerable groups from the ability to push for climate policies that can account for the needs of all residents.

#### Information Request 8.1

Information request 8.1 states:

*To what extent do current state and territory land-use planning frameworks facilitate or impede the use of different land-use planning tools, such as time-limited development approvals or 'triggers'? What changes are required to state and territory planning frameworks to address any impediments?*

Land-use planning frameworks are directly relevant to climate change adaptation in at least two important respects. The first of these concerns strategic planning for the long-term allocation of land to different purposes. The second involves decision-making on individual development applications by relevant consent authorities.

***Lack of robust strategic planning based on comprehensive data is a barrier to effective adaptation to climate change.***

In relation to the first, strategic planning involves setting long term goals and targets for a region based on comprehensive information and data. Effective responses to climate change, including climate change adaptation, will not be achieved without robust strategic planning. Strategic planning includes the use of a broad range of planning tools, targeted at different levels of regional specificity. These include State plans, regional strategies, and local environmental plans.

At the State level in NSW, *NSW 2021: a Plan to Make NSW Number One* is an overarching document setting out the broad goals of the NSW government for the ten-year period to 2021. While the document is not a land-use planning framework, it is worth noting that it is among the government's goals expressed in this plan to minimise the impacts of climate change in local communities. This includes assisting local government, business and the community to understand and minimise climate change impacts. Among the government's strategies is to complete fine scale climate change projections for NSW, which are to be available to councils and the public by 2012, and to work with government agencies and universities to deliver improved climate projections for NSW and the ACT.<sup>20</sup> Provided that these climate change projections are based on best-available scientific data, they can form a valuable resource to improve strategic land-use planning in a way that is responsive to the likely impacts of climate change. Development of a planning framework that can respond adequately to climate change mitigation and adaptation imperatives is an integral component of minimising climate change effects in local communities. Strategic planning initiatives in NSW presently fail to meet this goal.

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<sup>20</sup> NSW Government, *NSW 2021: A Plan to Make NSW Number One*, <<http://2021.nsw.gov.au/environment-communities>>, Goal 23.

***Planning frameworks limiting innovation are a barrier to effective adaptation to climate change.***

Local government plays a crucial role in climate change adaptation, not least through its central role in development approvals and local-level planning decisions. There is a concern that, at least in NSW, measures to improve the consistency of environmental planning across local government areas will diminish the capacity for councils to take innovative action in the face of climate change adaptation imperatives.

In 2006, the NSW state government introduced the *Standard Instrument: Principal Local Environmental Plan* (Standard LEP), designed to ensure uniformity of Local Environmental Plans. In relation to coastal zones, the Standard LEP provides a list of objectives for development in coastal zones, including ‘to recognise and accommodate coastal processes and climate change’, through implementation of the NSW Coastal Policy.<sup>21</sup> The Standard LEP also requires that in relation to development in coastal zones, councils cannot grant consent unless satisfied that the proposed development will not be significantly affected by coastal hazards, or have a significant impact upon coastal hazards.<sup>22</sup> Coastal hazards include coastal or tidal inundation, and erosion.<sup>23</sup>

ANEDO supports the inclusion of clauses of this nature in planning policies. In NSW, however, further action could be taken to ensure that the Standard LEP promotes the adoption of best practice climate change adaptation strategies by all local councils. The Standard LEP limits the additional provisions that a council can include in its LEP. Councils cannot include provisions that are inconsistent with mandatory provisions in the Standard LEP.<sup>24</sup> This may mean that councils are unable to implement provisions that are stricter than the LEP. Policies that, for instance, privilege bicycle and pedestrian friendly development at the expense of cars and car parking, or solar power in place of conventional generation, may become more difficult for councils to implement as a result of the Standard LEP.<sup>25</sup> There are comparable barriers to improved water and energy efficiency standards because LEPs are overridden by the requirements to comply with BASIX housing construction standards. The limitations of BASIX are discussed in greater detail below, in relation to Information Request 8.3.

We recommend that planning frameworks capable of accounting appropriately for, and implementing, climate change adaptation imperatives be prepared at State or Territory level. This will decrease the uncertain, piece-meal results engendered by relying on local council planning guidelines to ensure that climate adaptation is adequately incorporated in planning decisions.

***Lack of clear State legislation is a barrier to effective adaptation to climate change.***

Climate adaptation policies must also be set at the state, rather than local, level. Robust state laws are needed to set out a strategic, comprehensive system of climate adaptation. Such laws should include planned retreat policies in regions of high vulnerability, buffer zones in local planning policies, restrictive zonings, measures to build ecosystem resilience (such as dune re-vegetation), early warning systems and emergency response plans. ANEDO welcomes

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<sup>21</sup> *Standard Instrument: Principal Local Environmental Plan*, cl 5.5(1)(b).

<sup>22</sup> *Standard Instrument: Principal Local Environmental Plan*, cl 5.5(3)(d).

<sup>23</sup> *Coastal Protection Act 1979* (NSW), s 4.

<sup>24</sup> Robert Ghanem and Kirsty Ruddock, ‘Are New South Wales’ Planning Laws Climate-Change Ready?’, (2011) 28 *Environmental and Planning Law Journal* 17, 23

<sup>25</sup> See Robert Ghanem and Kirsty Ruddock, ‘Are New South Wales’ Planning Laws Climate-Change Ready?’, (2011) 28 *Environmental and Planning Law Journal* 17, 24.

endeavours to set national standards for climate change adaptation for settlements and infrastructure.<sup>26</sup>

***Lack of clear requirements for decision-makers is a barrier to effective adaptation to climate change.***

At the level of development consent for individual projects, ANEDO is firmly of the view that under any planning framework, decision-makers must be explicitly required to consider the climate change impact of any proposed development. State planning laws are presently inadequate in this regard.

In NSW, the development assessment framework is set by the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**) and associated Environmental Planning Instruments. This framework has proven to be ill-suited to responding to the imperatives of climate change adaptation. A particular barrier to adaptation is that NSW planning laws contain no mandatory requirement that climate change adaptation effects be considered.<sup>27</sup>

The EPA Act governs the majority of decision-making on whether approval should be granted for new developments. Most development is assessed under Part 4 of the Act. Section 79C sets out the factors that a consent authority must take into account in deciding whether to approve a development. Among these conditions, the consent authority must take into account the likely environmental impacts of a development, along with the public interest.<sup>28</sup> Beyond these considerations, there is no explicit requirement that the climate change impacts of a development be considered, or alternatives contemplated.<sup>29</sup>

Where development assessment is not required under Part 4 of the Act, there may nonetheless be a requirement to undertake environmental assessment under Part 5. Under Part 5, the decision-maker is required to consider ‘to the fullest extent possible’ all the likely effects of the development on the environment.<sup>30</sup> One factor to be taken into account in this consideration is the ‘impact on coastal processes and coastal hazards, including those under projected climate change conditions’.<sup>31</sup>

In October 2011, the NSW Government introduced new provisions for assessment of State significant development and State significant infrastructure.<sup>32</sup> These provisions replace the old, controversial, Part 3A of the EPA Act, which set out assessment requirements for major projects. Similarly to Parts 4 and 5, there is no explicit requirement for the consideration of climate change impacts within these provisions or in the *Environmental Planning and Assessment Regulation 2000*.

The lack of legislative provision for the consideration of climate change impacts has led to increased reliance on the Courts to read in climate change as a necessary consideration in

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<sup>26</sup> Currently being undertaken by Standards Australia: see [sdpp.standards.org.au/ActiveProjects.aspx?CommitteeNumber=BD-103&CommitteeName=Climate%20Change%20Adaptation](http://sdpp.standards.org.au/ActiveProjects.aspx?CommitteeNumber=BD-103&CommitteeName=Climate%20Change%20Adaptation).

<sup>27</sup> See Environmental Defender’s Office (NSW), *Submission to the Review of the NSW Planning System (Stage 1)*, 4 November 2011, [www.edo.org.au/edonsw/site/pdf/subs/111104review\\_nsw\\_planning\\_stage\\_1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf), 19-21.

<sup>28</sup> EPA Act, s 79C(1)(b).

<sup>29</sup> Robert Ghanem and Kirsty Ruddock, ‘Are New South Wales’ Planning Laws Climate-Change Ready?’ (2011) 28 *Environmental and Planning Law Journal* 17, 27.

<sup>30</sup> EPA Act, s 111.

<sup>31</sup> *Environmental Planning and Assessment Regulation 2000*, cl 228(2)(p).

<sup>32</sup> These are contained in Division 4.1 of Part 4 of the Act, and in Part 5.1 of the EPA Act.

planning approvals. The history of cases in this area demonstrates that the Court's power in this regard is highly limited.<sup>33</sup>

Planning Acts in every State and Territory should ensure that climate change impacts are a mandatory consideration for decision-makers at all levels. Any legislative provisions to this effect must be accompanied by mandatory guidelines that codify a process for assessing projects that are likely to challenge climate adaptation goals, such as developments in coastal regions or in bushfire-prone regions. The guidelines must be given legislative force.<sup>34</sup> Additionally, responding to climate change mitigation and adaptation should be incorporated as an objective of all planning laws. In order to be effective, such objectives should be operationalised in all such planning laws. Strategic planning should be undertaken at State, regional and local levels to identify likely climate change scenarios and develop response plans in a timely and effective manner.

***Lack of fast-track options for green development is a barrier to effective adaptation to climate change.***

Beyond simply requiring that decision-makers consider climate change implications when making decisions, we also advocate for measures to encourage proactive innovation in building and planning that is green and adaptation-focused. For example, in Queensland the government has developed a 'Green Door' policy that aims to accelerate decisions for development proposals that are deemed to be the most sustainable in Queensland. Green Door projects are expected to demonstrate exceptional performance across four Green Door principles that identify key sustainability outcomes. These principles are: exemplary planning processes; ecological processes (including improved potable water use; reduction in waste; increase in ecosystem quality and production of energy from renewable sources and a reduction in carbon footprint); economic development and community wellbeing.<sup>35</sup> The Green Door policy is sited within the legislative context of the *Sustainable Planning Act 2009* (Qld), the purpose of which is to seek ecological sustainability through management of the development process.<sup>36</sup> We advocate the implementation of similar incentives throughout Australia. Significant efficiency gains can be made through processes that streamline approvals for forward-looking, efficient, climate-adapted planning proposals. We would recommend that such policies also implement mechanisms that will progressively discourage development that is not sustainable in the context of a changing climate.

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<sup>33</sup> For example, in *Minister for Planning v Walker* [2008] NSWCA 224, the NSW Court of Appeal overturned a Land and Environment Court ruling that had invalidated a concept plan approval on the basis that the Minister had failed to consider whether the flood risk at the site would be exacerbated by climate change. See, however, in South Australia, *Northcape Properties Pty Ltd v District Council of Yorke Peninsula* [2008] SASC 57.

<sup>34</sup> See Environmental Defender's Office (NSW), *Submission to the Review of the NSW Planning System (Stage 1)*, 4 November 2011, [www.edo.org.au/edonsw/site/pdf/subs/111104review\\_nsw\\_planning\\_stage\\_1.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/111104review_nsw_planning_stage_1.pdf), 22.

<sup>35</sup> See Growth Management Queensland, *Green Door Information Paper*, July 2011, available at [www.dlqp.qld.gov.au/development-applications/green-door.html](http://www.dlqp.qld.gov.au/development-applications/green-door.html). The Green Door policy

<sup>36</sup> *Sustainable Planning Act 2009* (Qld), s 3.



Information request 8.3 states:

*The Commission is seeking submissions on gaps or overlaps between land-use planning and building regulations that may act as barriers to adaptation.*

***Lack of national sustainability standards are a barrier to effective adaptation to climate change.***

There is a close link between improved sustainability and climate change adaptation. As the Commission's Draft Report points out, mitigation activities assist in meeting future adaptation costs.<sup>37</sup> Increased mitigation in the present means that adaptation activities required in the future are likely to be less severe. Additionally, climate change is likely to lead to increased uncertainty of rainfall; greater extremes in temperature and more severe droughts.<sup>38</sup> Adaptation to such impacts will therefore require a planned and sustainable use of water resources. Coping with extremes in temperature is likely to require increased energy use in the form of heating and cooling of buildings, along with innovations in thermal conservation. Innovative use of renewable energy sources, and particularly solar energy, is likely to diminish the costs of these adaptive activities.

***The limitations of current building standards form a barrier to effective adaptation to climate change.***

ANEDO supports the adoption of building regulations that are responsive to changing consumption and technological circumstances, and that promote the use of best-practice building sustainability standards by local authorities. We also encourage development of a national standard that meets these goals. These sustainability standards should have regard to water and energy consumption at all stages of a building's life cycle. This includes consideration of the embedded energy involved in the creation of building materials, and in the activities of construction and demolition of buildings. Having regard to these inputs is essential in light of findings that the building sector accounts for some 23% of Australia's greenhouse gas emissions, by 2007 figures.<sup>39</sup> It should also include consideration of water-sensitive landscaping, and transportation design.<sup>40</sup>

In NSW, the principal building regulation relating to sustainability is known as BASIX. It is contained in the *State Environmental Planning Policy (Building Sustainability Index – BASIX) 2004 (BASIX SEPP)*. While the intent of BASIX is welcome, its potential to override more innovative and progressive environmental planning instruments is problematic. The BASIX SEPP overrides any environmental planning instrument that is inconsistent with it.<sup>41</sup> In particular, it invalidates the provisions of any environmental planning instrument or development control plan that aims to reduce consumption of mains water; reduce

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<sup>37</sup> Australian Government Productivity Commission, *Barriers to Effective Climate Change Adaptation: Productivity Commission Draft Report* [www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0007/116539/climate-change-adaptation-draft-report.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0007/116539/climate-change-adaptation-draft-report.pdf).

<sup>38</sup> As noted in the Draft Report, 34-40.

<sup>39</sup> See Australian Sustainable Built Environment Council, *The Second Plank – Building a Low Carbon Economy with Energy Efficient Buildings*, 2008, 8.

<sup>40</sup> Amelia Thorpe and Kirsty Graham, 'Green Buildings – are Codes, Standards and Targets Sufficient Drivers of Sustainability in New South Wales?' (2009) 26 *Environmental and Planning Law Journal* 486, 494.

<sup>41</sup> *State Environmental Planning Policy (Building Sustainability Index – BASIX) 2004*, s 7.

greenhouse gas emissions or improve the thermal performance of a building to which BASIX commitments apply.<sup>42</sup>

BASIX applies to all residential developments in NSW that cost \$50,000 or more. This includes alterations and additions to existing dwellings. BASIX imposes a range of energy and water efficiency targets. At their most stringent, these targets require energy and water use reductions of 40% over existing dwellings. Multi-unit residential developments of over 6 storeys are only required to meet reduction targets of 20%. The targets are set by comparison to average NSW water consumption and greenhouse gas emissions as at 2002-03.<sup>43</sup>

As EDO NSW has previously argued, the BASIX tool should be expanded and improved. Among its shortfalls are its inapplicability to multi-use housing, and the fact that it incorporates trade-offs that may reduce its benefits over the long term. For example, BASIX may allow for solar-powered appliances to be traded off against weaker building standards.<sup>44</sup> Among its other limitations, it is problematic that BASIX prevents consent authorities from imposing tighter water and energy use limits on residential buildings. This is particularly limiting given that, despite technological advances that have facilitated the achievement of existing BASIX goals, the BASIX targets have not been tightened since 2006. The existence of BASIX, meanwhile, prevents local authorities from taking individual action to improve sustainability in building design.<sup>45</sup> An improved BASIX standard should be extended to other building types, such as industrial and commercial buildings.<sup>46</sup> The NSW Government has also enacted the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, which includes the NSW Housing Code. The Housing Code sets certain development standards for housing in NSW, including generous maximum floor spaces. It also provides that new housing must comply with BASIX.

As examination of the NSW BASIX provisions demonstrates, building sustainability codes must be continually updated to reflect changes in technology and developments in sustainability best practice. They must also leave room for the adoption of more stringent standards by local authorities. Failure to do so will result in rigid policies that hinder, rather than facilitate, progress in achieving optimal climate change adaptation outcomes.

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<sup>42</sup> *State Environmental Planning Policy (Building Sustainability Index – BASIX) 2004*, ss 8-9.

<sup>43</sup> Nicholas Landreth, Kevin WK Yee and Scott Wilson, 'Assessing the Effectiveness of Building Simulation to Regulate Residential Water Consumption and Greenhouse Gas Emissions in New South Wales, Australia, *Proceedings of Building Simulation 2011: 12<sup>th</sup> Conference of International Building Performance Simulation Association, Sydney, 14-16 November*, 2859, 2864.

<sup>44</sup> Amelia Thorpe and Kirsty Graham, 'Green Buildings – are Codes, Standards and Targets Sufficient Drivers of Sustainability in New South Wales?' (2009) 26 *Environmental and Planning Law Journal* 486, 489.

<sup>45</sup> Amelia Thorpe and Kirsty Graham, 'Green Buildings – are Codes, Standards and Targets Sufficient Drivers of Sustainability in New South Wales?' (2009) 26 *Environmental and Planning Law Journal* 486, 489.

<sup>46</sup> See Environmental Defender's Office NSW, *Submission on the Discussion Paper for the Metropolitan Strategy Review – Sydney Towards 2036*, 30 April 2010, 4, <[www.edo.org.au/edonsw/site/pdf/subs/100430metro\\_strategy.pdf](http://www.edo.org.au/edonsw/site/pdf/subs/100430metro_strategy.pdf)>.