

[Act 1996 No 44]



New South Wales

# Environmental Planning and Assessment Amendment Bill 1995

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*

### Overview of Bill

The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* to remove various difficulties that have been identified with the operation of that Act so that environmental planning in the State is facilitated and requirements made by the Act may be administered in a more effective and timely way.

The proposed amendments (explained more fully below) relate to the following issues:

- altering draft regional environmental plans and draft local environmental plans,
- when environmental studies for draft regional environmental plans are to be prepared and how notice is to be given of those studies and draft plans,

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\* Amended in committee—see table at end of volume.

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- imposing conditions on development consents requiring section 94 contributions for previously created infrastructure,
- resolving inconsistencies between different kinds of environmental planning instruments,
- how approvals granted under Division 4 of Part 5 of the Act may be modified,
- removing the requirement for the Minister's consent for proceedings for offences against the Act in the summary jurisdiction of the Land and Environment Court,
- joint exhibition of a development application and a draft amendment of an environmental planning instrument to remove an impediment to the proposed development,
- allowing non-discretionary standards for development to be imposed by environmental planning instruments,
- the scope of the Minister's power to direct an inquiry by a Commission of Inquiry,
- allowing regulations made under the Act to apply, adopt or incorporate publications as in force from time to time,
- statute law revision issues,
- savings and transitional issues arising from the amendments.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days appointed by proclamation.

**Clause 3** is a formal provision giving effect to the provisions amending the *Environmental Planning and Assessment Act 1979* set out in Schedules 1-1 2.

### **Schedule 1 Amendments relating to altering draft environmental planning instruments**

The majority decision of the New South Wales Court of Appeal in *Leichhardt Municipal Council v The Minister for Planning* delivered on 17 May 1995 has thrown doubt on the extent to which a draft environmental planning instrument may be altered without the altered draft having to be re-exhibited. Because of that doubt, uncertainty has arisen about whether an altered draft instrument should be re-exhibited even if an alteration is minor.

**Schedule 1 [1]-[3]** amend sections 49 and 51 to make it clear that the Director and the Minister both have a wide power to alter a draft regional environmental plan and need not always re-exhibit an altered draft plan. (The Minister may require the Director to re-exhibit an altered draft plan under section 51 (4)).

**Schedule 1 [4] and [5]** amend section 70 to make it clear that the Minister may alter a draft local environmental plan (because of an issue of State or regional environmental planning significance) so as to change the substance of the draft plan and need not always require re-exhibition of the altered draft plan.

### **Schedule 2 Amendments relating to preparation and notice of environmental studies and draft regional environmental plans**

At present, an environmental study must be prepared before a draft regional environmental plan is prepared for the land to which the study relates. It also seems that consultation about the preparation of the study and the draft plan must take place sequentially. Both requirements (and the requirement that the Director must wait at least 40 days for a response to a request for comments) are seen to be unnecessarily restrictive, and lead to avoidable delays in the preparation of these kinds of plans.

**Schedule 2 [1]** amends section 41 to provide that an environmental study and the related draft regional environmental plan may be prepared together.

**Schedule 2 [2]** replaces section 45. Proposed section 45 allows information about such a study and plan to be notified at the same time to interested parties and reduces from 40 to 28 days the period for comments by a party notified.

### **Schedule 3 Amendments relating to section 94 contributions for infrastructure**

When granting development consent under the Act, a consent authority may impose a condition under section 94 requiring recoupment of the cost already incurred in providing public amenities or public services that will facilitate the carrying out of the proposed development.

**Schedule 3 [1]** amends section 94 so as to allow conditions to be imposed with respect to public infrastructure already provided requiring contributions that are not restricted to “recoupment of the cost” incurred in providing the infrastructure. Presently, amounts recovered under such conditions must be used to pay off any amount still owed for the provision of that infrastructure. The amended section will allow a consent authority to apply money recovered under such a condition from a developer otherwise than in repayment of any outstanding debt of the consent authority for the cost of the infrastructure.

**Schedule 3 [2]–[4]** amend sections 94 and 94A to make consequential amendments.

#### **Schedule 4      Amendments relating to inconsistencies between different kinds of environmental planning instruments**

Currently, there is no general presumption that an environmental planning instrument of a particular kind (even a State environmental planning policy) prevails over an instrument of a different kind.

**Schedule 4** replaces section 36 with a provision that allows a State environmental planning policy to prevail over an inconsistent regional environmental plan or local environmental plan, whenever made (and a regional environmental plan to prevail over an inconsistent local environmental plan, whenever made) if express provision is made to that effect.

#### **Schedule 5      Amendments allowing modifications of certain approvals**

Division 4 of Part 5 provides a scheme under which the proponent of an activity for which an environmental impact statement has been obtained is required to obtain the approval of the Minister to carry out the activity if the proponent is the determining authority for the activity. There is currently no provision for any such approval of the Minister to be modified should the proponent wish to modify the activity.

**Schedule 5 [3]** inserts proposed sections 115BA-115BB which provide for the modification of such an approval by the Minister if it is proposed to modify the approved activity so that the modified activity will be inconsistent with the original approval. Proposed section 115BB restates section 115B (4)–(6) so as to extend the current requirements for reporting and consultation relating to an application for an original approval under Division 4 to provide a system for reporting and consultation in the case of an application for modification of an approval.

**Schedule 5 [4]** inserts proposed section 115C (IA) to acknowledge that the Director is required to furnish the Minister with a report about the modified activity.

**Schedule 5 [1] and [2] and [5]–[9]** make consequential amendments to sections 115A, 115B, 115C and 115E.

**Schedule 6      Amendment removing requirement for  
Minister’s consent for certain proceedings  
for offences**

At present, the Minister’s consent is required before summary proceedings can be brought in the Land and Environment Court for an offence against the Act.

**Schedule 6** repeals section 127 (6) to remove that requirement.

**Schedule 7      Amendments providing for joint exhibition of  
development application and draft  
amendment of environmental planning  
instrument**

It would seem at present that a development application relating to prohibited development can not be advertised at the same time as a draft environmental planning instrument that would remove the prohibition, because the advertising of the application could not be in accordance with the Act, owing to the prohibited nature of the proposed development.

**Schedule 7** inserts into the Act proposed Division 4B of Part 3, which contains the following proposed sections:

Section 72I which states that the proposed Division applies in the circumstances described above.

Section 72J which declares that nothing in the Act prohibits the making or consideration by the consent authority of such a development application.

Section 72K which requires public notice of the draft environmental planning instrument and development application to be given in the same notice, and requires the periods for public inspection of the notice to be the longer of any two different periods that might have applied if separate notices had been given.

Section 72L which acknowledges that the Minister may direct a single inquiry by a Commission of Inquiry into both the draft instrument and the development application.

### **Schedule 8      Amendment allowing non-discretionary development standards for development**

Under section 90, a consent authority is required to take development standards into consideration when determining a development application, but may impose conditions on a development consent that are more onerous than the requirements of the standards.

**Schedule 8** inserts proposed section 90A which allows development standards to be made “non-discretionary” by an environmental planning instrument so that, if the standards are complied with, the consent authority is not entitled to consider the standards further and can not impose more onerous conditions than imposed by the standards.

If the proposed development does not comply with such a “non-discretionary” standard, full consideration will be required by sections 90 and 91 and an application may be made under State Environmental Planning Policy No 1—Development Standards on the basis that compliance with a development standard is unreasonable or unnecessary in a particular case.

### **Schedule 9      Amendments allowing Commissions of Inquiry of specified scope**

The Minister may direct an inquiry be held, in accordance with section 119, by a Commission of Inquiry into “the environmental aspects” of any proposed development or an activity (among other things). It is not clear whether it would be lawful for the Minister to limit the terms of reference of such an inquiry (for example, to inquire into a particular environmental aspect of relevance to proposed development or activities).

**Schedule 9 [3]** and **[4]** amend section 119 to make it clear that an inquiry may be limited to a particular part of a development proposal or activity or to a particular environmental aspect or aspects of the proposal, or in both of those ways.

**Schedule 9 [1]** and **[2]** amend sections 86A and 96 to make consequential amendments.

### **Schedule 10      Amendment allowing regulations to apply, adopt or incorporate publications as in force from time to time**

Section 69 of the *Interpretation Act 1987* limits the adoption by a regulation of a publication (such as an Australian Standard) to the publication as in force when it was adopted or on a different date specified in the regulation.

**Schedule 10** amends section 157 to allow regulations made under the Act to adopt publications as in force from time to time (so that any amendments to the publication may be adopted without an amendment of the regulation adopting the publication).

### **Schedule 11 Amendments for the purpose of statute law revision**

The following minor amendments are proposed for the purpose of statute law revision:

**Schedule 11 [1]** amends section 4 to make it clear that a reference in the Act to an owner or lessee of land extends to joint or multiple owners or lessees.

**Schedule 11 [2]** amends section 26 to remove a cross-reference to the *Local Government Act 1919* (which has been repealed).

**Schedule 11 [3]** restates section 91A (2) in a simpler form (so as to avoid an unnecessary cross-reference).

**Schedule 11 [4]** and **[5]** amend sections 92 and 93 to improve the expression and make them easier to follow. (The intention is to avoid possible confusion between the date on which a consent is granted and the date from which it operates.)

**Schedule 11 [6]** amends section 106 to make a correction necessitated by an incorrect cross-reference.

### **Schedule 12 Savings and transitional amendments**

**Schedule 12 [1]** amends clause 1 of Schedule 6 to the Act to allow regulations to be made, if necessary, of a saving or transitional nature consequent on the enactment of the proposed Act.

**Schedule 12 [2]** inserts proposed Part 3 into Schedule 6 to the Act. Clauses in the proposed Part explain how the amendments to be made by the proposed Act operate in relation to draft environmental planning instruments and development applications in the course of preparation or pending when the amendments commence.