

[Act 1997 No 152]



New South Wales

# Environmental Planning and Assessment Amendment Bill 1997

## Explanatory note

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

### Overview of Bill

The objects of this Bill are:

- (a) to introduce new planning controls into the *Environmental Planning and Assessment Act 1979*, including categories of exempt development, complying development, advertised development and development that is of State or regional significance, and
  - (b) to integrate a number of approvals under other Acts (that are related to the environmental impacts of a proposed development) with the granting of development consent under the *Environmental Planning and Assessment Act 1979*, and
  - (c) to transfer control of subdivision (currently controlled under the *Local Government Act 1919* and *Ordinance No 32* under that Act) and building approvals (currently controlled under the *Local Government Act 1993*) to the development control regime under the *Environmental Planning and Assessment Act 1979*, and
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- (d) to clarify and consolidate existing planning controls for the processing and consideration of development applications, including procedures for public participation, heads of consideration, staging of development and modification of development consents, and
- (e) to establish a regime for the certification of development during its various phases, and
- (f) to provide for the authorisation of professional associations as accreditation bodies, and the accreditation by them of accredited certifiers to exercise the functions of certifying authorities under the regime referred to in paragraph (e), and
- (g) to provide for proportional liability, together with a maximum limitation period of 10 years, for actions relating to building work and subdivision, and to require accredited certifiers and certain building practitioners to hold appropriate insurance with respect to their activities, and
- (h) to enhance the enforcement provisions of the *Environmental Planning and Assessment Act 1979* and, in particular, to enable the issuing of orders, and
- (i) to make consequential amendments to various Acts, and
- (j) to make savings provisions and provision for transitional arrangements.

## Outline of provisions

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

**Clause 2** provides that the proposed Act will commence on a day or days to be proclaimed.

**Clause 3** is a formal provision that gives effect to the Schedule of amendments to the *Environmental Planning and Assessment Act 1979*.

**Clause 4** is a formal provision that gives effect to the Schedule of amendments to the *Conveyancing Act 1919*.

**Clause 5** is a formal provision that gives effect to the Schedule of amendments to the *Local Government Act 1993*.

**Clause 6** is a formal provision that gives effect to the Schedule of amendments to other Acts.

**Clause 7** repeals the unrepealed portion of the *Local Government Act 1919* and *Ordinance No 32* under that Act.

**Schedule 1** contains the amendments to the *Environmental Planning and Assessment Act 1979*.

**Schedule 2** contains the amendments to the *Conveyancing Act 1919*.

**Schedule 3** contains the amendments to the *Local Government Act 1993*.

**Schedule 4** contains consequential amendments to other Acts.

## **Schedule 1      Amendment of Environmental Planning and Assessment Act 1979**

### **1              Preliminary matters**

**Schedule 1 [1]–[8]** deal with a number of definitions for the purposes of the *Environmental Planning and Assessment Act 1979*. In particular, the definition of *development* is extended to include the demolition of a building or work and other things that may be controlled by an environmental planning instrument as referred to in section 26 of that Act. The concepts within the definition of development are further extended by the amendments made to section 4 (2).

**Schedule 1 [9]** inserts proposed section 4B which contains a definition of *subdivision of land*.

**Schedule 1 [10]** provides that it is to be an object of the Act to encourage ecologically sustainable development.

**Schedule 1 [12]** relocates existing section 76A as it is a provision of general application and is not limited to the determination of development applications.

**Schedule 1 [17]** enables the identification in an environmental planning instrument of *advertised development*. Advertised development is development (other than designated development) that is identified as advertised development by the regulations, an environmental planning instrument or a development control plan. It is required to be publicly notified and submissions may be made in respect of it.

**Schedule 1 [21]** extends the matters that may be dealt with in development control plans.

**Schedule 1 [11], [13]–[16], [18] and [22]–[31]** make consequential amendments.

## **2 Substitution of Part 4 of, and addition of Parts 4A, 4B and 4C to, the Environmental Planning and Assessment Act 1979**

**Schedule 1 [32]** repeals and re-enacts, partly for the sake of convenience, the whole of Part 4 of the *Environmental Planning and Assessment Act 1979*. In doing so, no substantive change is made to a number of existing provisions including the provisions concerning section 94 contributions, existing uses and rights of appeal. The following is a summary of the provisions of Parts 4-4C.

### **Part 4 Development assessment**

#### **Division 1 Carrying out of development—the threefold classification**

Proposed Division 1 contains proposed sections 76–76C. It continues the existing arrangements under which environmental planning instruments may classify development as:

- (a) development that does not need consent, or
- (b) development that needs consent, or
- (c) development that is prohibited.

A new type of development that does not need consent, *exempt development* is created by the proposed Act. Exempt development is development that is identified in an environmental planning instrument as development that is of minimal environmental impact. It is not regulated by Part 4 and is not subject to Part 5 of the *Environmental Planning and Assessment Act 1979*. It cannot be carried out on land that is critical habitat or that is within a wilderness area.

Development that needs consent comprises 2 types, namely:

- (a) local development (which includes complying development), and
- (b) State significant development.

*Local development* is development that needs consent and that is not State significant development.

*Complying development* is local development that can be addressed by specified predetermined development standards. It cannot be State significant development, designated development or development that requires the

concurrence of a person (other than the consent authority or, in certain circumstances, the Director-General of National Parks and Wildlife). It cannot be carried out on land that is critical habitat, that is within a wilderness area or that comprises, or on which there is, an item of the environmental heritage.

*State significant development* is development:

- (a) that is so declared by a State environmental planning policy or regional environmental plan, or
- (b) that is of State or regional environmental planning significance and that is declared by the Minister, by notice in the Gazette, to be State significant development, or
- (c) that is the subject of a development application that the Minister has directed be referred to the Minister for determination, or
- (d) that is prohibited development that the Minister has directed be referred to the Minister for determination.

In outline, the proposed classification of development under the substituted Part may be summarised as follows:

Development that does not require development consent		Development that requires development consent		Prohibited development
Development that does not require development consent under Part 4	Exempt development, being development that is not subject to Part 4 or Part 5	Local development	State significant development	(No subcategories)
		Designated development		
		Advertised development		
		Complying development	Integrated development	

## **Division 2      The procedures for development that needs consent**

Proposed Division 2 contains proposed sections 77–83. The proposed Division does not apply to complying development (which is the subject of proposed Division 3). The provisions of this Division are supplemented and modified by Division 4 in the case of State significant development and Division 5 in the case of integrated development.

The Division defines *designated development* (without changing the existing concept).

The Division enables:

- (a) a single development application to be made for one or more of the different types of development, and
- (b) a development application (made where a council is the consent authority) to seek, in addition to development consent, approval for certain activities for which approval would otherwise be required under section 68 of the *Local Government Act 1993*.

The Division provides for:

- the notification, advertising and public exhibition of development applications
- the making and consideration of submissions concerning development applications, including submissions by way of objection
- the circumstances in which other authorities are to be consulted or their concurrence obtained in connection with the carrying out of proposed development
- the evaluation of development applications
- the determination of development applications
- the imposition of conditions
- the notification of determinations
- the review of determinations
- the requirements to be observed before work can be commenced.

### **Division 3 Special procedure for complying development**

Proposed Division 3 contains proposed sections 84–87. It enables a person who has been issued with a complying development certificate to carry out development in accordance with the certificate and the provisions of the various regulatory instruments that apply to that development.

The Division provides for:

- the terms and authority of complying development certificates
- the process for obtaining a complying development certificate
- the modification of complying development
- the duration of complying development certificates
- the requirements to be observed before work can be commenced.

#### **Division 4 Additional procedures concerning State significant development**

Proposed Division 4 contains proposed sections 88–89A. It enables the Minister to direct a council to refer a particular development application to the Minister for determination if it addresses matters of significance for State or regional environmental planning. Such a direction may be given even if the development would otherwise be prohibited by an environmental planning instrument.

#### **Division 5 Special procedure for integrated development**

Proposed Division 5 contains proposed sections 90–93B. It identifies the scope of integrated development by listing the approvals (which include consents, licences, permits, permissions and other forms of authorisation) that may be required in addition to development consent in order for a particular form of development to be carried out. Different processes apply according to whether the proposed development is local development or State significant development.

For local development, the consent authority, if it proposes to grant development consent, must obtain from each approval body the general terms of any approval proposed to be granted by it. A consent granted by the consent authority must be consistent with those general terms. If the approval body will not grant the approval, the consent authority must refuse consent. If the approval body fails to respond, the consent authority may grant consent and the approval body cannot subsequently refuse its approval.

For State significant development, the Minister, if the Minister proposes to grant development consent, must obtain from each approval body the general terms of any approval proposed to be granted by it. Any dispute between the Minister and an approval body that cannot be resolved between them as to the terms of an approval may be referred to the Premier for settlement. If the approval body fails to provide its general terms, the Minister may grant consent and the approval body cannot subsequently refuse its approval.

If development consent is granted to integrated development following the provision to a consent authority (including the Minister) by the approval body of the general terms of its approval, the approval body must grant approval to any application for its approval that is made within 3 years after the date on which the development consent is granted. The approval must not be inconsistent with the development consent.

### **Division 6      Conditions requiring contributions towards public amenities and services**

Proposed Division 6 contains proposed sections 94–94E. The Division re-enacts, without substantive change, the existing provisions of sections 94–94A of the Principal Act.

### **Division 7      Post-consent provisions**

Proposed Division 7 contains proposed sections 95–96A. It deals with the circumstances in which a development consent lapses, the extension of consents, and the modification and revocation of consents.

### **Division 8      Appeals and related matters**

Proposed Division 8 contains proposed sections 97–99. It provides for an applicant's and objector's appeals, appeals against the imposition of conditions of a development consent for the provision of security or the failure or refusal of a consent authority to release a security held by it, and the joint hearing of appeals.

### **Division 9      Miscellaneous**

Proposed Division 9 contains proposed sections 100–105. It provides for:

- the keeping by councils of registers of development consents and complying development certificates
- the limiting of challenges to the validity of development consents and complying development certificates
- the identification of mandatory procedural requirements concerning State significant development
- the revocation or regranting of a development consent following the making of an order of suspension by the Land and Environment Court
- the making of regulations for the purposes of Part 4.

### **Division 10   Existing uses**

Proposed Division 10 contains proposed sections 106–109B. The Division re-enacts, without substantive change, the existing provisions of sections 106–109B of the Principal Act.



## **Part 4A Certification of development**

Proposed Part 4A contains proposed sections 109C–109Q. It deals with the following matters:

- (a) the identification of 4 kinds of Certificates that may be issued under the proposed Part (*Part 4A certificates*), namely compliance certificates, construction certificates, occupation certificates and subdivision certificates,
- (b) the identification of the persons and bodies by which Part 4A certificates may be issued, namely consent authorities and accredited certifiers (for all certificates) and, for subdivision certificates only, local councils and Crown and related bodies,
- (c) the appointment of a principal certifying authority for all development involving building work or subdivision work,
- (d) the restrictions that apply to the issue of the various kinds of Part 4A certificates,
- (e) the rights of appeal that exist with respect to a consent authority's refusal to issue a construction certificate, occupation certificate or subdivision certificate,
- (f) other matters ancillary to the proposed certification regime.

A *compliance certificate* is a certificate to the effect that:

- (a) specified building work or subdivision work has been completed as specified in the certificate and complies with specified plans and specifications, or
- (b) a condition with respect to specified building work or subdivision work has been duly complied with, or
- (c) specified requirements of the regulations have been complied with.

A compliance certificate given with respect to an early phase of development will be able to be relied on by a certifying authority for the purpose of issuing some other Part 4A certificate with respect to a later phase of that development. In certain circumstances it will also signal the start of the 10-year limitation period for actions with respect to subdivision work to be established by proposed Part 4C.

A *construction certificate* is endorsed on building plans and specifications to certify that work carried out in accordance with those plans and specifications will comply with certain requirements prescribed by the regulations. Without a construction certificate it will not be lawful to commence any building work or subdivision work.

An *occupation certificate* is a certificate that authorises the occupation and use of a new building or a change of building use for an existing building. Proposed sections 109M and 109N will prohibit the occupation or use of a new building, and the change of use for an existing building, unless an occupation certificate has been issued for the building. In the case of a new building, such a certificate will be able to be issued only by the principal certifying authority appointed for the erection of the building. The issue of an occupation certificate will signal the start of the 10-year limitation period for actions with respect to building work to be established by proposed Part 4C.

A *subdivision certificate* is a certificate that authorises the Registrar-General to register a plan of subdivision under the *Conveyancing Act 1919*. Section 195C of that Act, as proposed to be amended, will prohibit registration of such a plan unless a subdivision certificate has been endorsed on it. In the case of a subdivision involving subdivision work, such a certificate will be able to be issued only by the principal certifying authority appointed for the carrying out of the subdivision. The issue of a subdivision certificate will signal the start of the 10-year limitation period for actions with respect to subdivision work to be established by proposed Part 4C.

#### **Part 4B Accreditation of certifiers**

Proposed Part 4B contains proposed sections 109R–109ZH. It deals with the following matters:

- (a) the authorisation of professional associations as accreditation bodies for the purposes of the Principal Act,
- (b) the accreditation of persons as accredited certifiers to exercise the functions of certifying authorities under Part 4A,
- (c) the auditing of the work and activities of accredited certifiers by the Director-General of the Department of Local Government,
- (d) the conduct of disciplinary proceedings against accredited certifiers.

Professional associations in the various fields relating to building and subdivision will be accredited under the proposed Part. These associations will have the function of accrediting private persons as, and supervising the activities of, accredited certifiers. Complaints about accredited certifiers will be investigated by the relevant accreditation body and, if found to have substance, will be referred to the Administrative Decisions Tribunal for determination. The Tribunal will be able to make various kinds of order with respect to an accredited certifier it finds guilty of unsatisfactory professional conduct or professional misconduct. These will range from cautions and

reprimands through to suspension or withdrawal of accreditation, and will include a power to order a civil penalty not exceeding 100 penalty units (\$11,000) and payment of compensation up to \$20,000.

### **Part 4C Liability and insurance**

Part 4C contains proposed sections 109ZI–109ZP. It deals with the following matters:

- (a) the apportionment of liability between the various parties in an action relating to defective building work or subdivision work responsible for the damage giving rise to an award of damages made by a court,
- (b) the imposition of a limitation period of 10 years for any person's liability for damage arising as a result of defective building work or subdivision work,
- (c) the requirement that accredited certifiers and certain building practitioners are covered by insurance with respect to their activities as accredited certifiers and building practitioners.

Apportionment of liability involves a court, in making an award for damages for damage arising from defective building work or subdivision work, determining the proportion of the damage for which each defendant to the action is liable. A defendant will not be required to pay any more than the proportion so determined, regardless of the failure of any other defendant to pay the proportion determined in respect of that other defendant. This differs from the general rule of law concerning liability in which all such defendants would be jointly and severally liable for the full amount of the damages awarded, under which each defendant underwrites the liability of each other defendant.

The imposition of a limitation period of 10 years for any person's liability for damage arising from defective building work or subdivision work is designed to address the law concerning latent defects in which the current limitation period begins to run only when the defect becomes apparent. The approach taken in the proposed provisions is to limit the period within which proceedings can be commenced to the period of 10 years running from the date on which the relevant occupation certificate or subdivision certificate is issued or, in the case of subdivision work that is carried out after a subdivision certificate is issued, from the date on which a compliance certificate is issued with respect to the completion of that work. The new rule will not extend any period of limitation under the *Limitation Act 1969*, so that the period during which proceedings may be brought may, under that Act, be shorter than the 10 years proposed.

It will be an offence for accredited certifiers and certain building practitioners to practise as such unless they are insured. Failure to be appropriately insured will also be a ground for withdrawal of accreditation, in the case of an accredited certifier. The nature and extent of the insurance cover required will be established by the regulations.

**Schedule 1 [33]** substitutes the definition of *activity* in section 110 (1) of the Principal Act to reflect the changes made to Part 4.

### **3 Addition of Part 5A to the Environmental Planning and Assessment Act 1979—development by the Crown**

**Schedule 1 [34]** inserts proposed Part 5A containing proposed sections 115G–115N. It largely preserves the existing arrangements under the *Local Government Act 1993* concerning the carrying out of Crown building work.

### **4 Enforcement powers**

**Schedule 1 [36]** inserts proposed Division 1 A, containing proposed sections 118A–118N, into Part 4. The proposed Division largely duplicates powers of entry and inspection that are currently found in the *Local Government Act 1993*.

**Schedule 1 [37]** inserts proposed Division 2A, containing proposed sections 121A–121ZP, into Part 6. The proposed Division largely transfers to the Principal Act from the *Local Government Act 1993* the powers to make and enforce orders to regulate matters relating to building.

**Schedule 1 [38]–[42]** also make amendments relating to the enforcement of the provisions of the Principal Act.

### **5 Building certificates**

**Schedule 1 [52]** inserts proposed sections 149A–149G into Part 8 (Miscellaneous) of the Principal Act. The proposed sections transfer to the Principal Act from the *Local Government Act 1993* the provisions relating to building certificates.

### **6 Miscellaneous matters**

**Schedule 1 [43]–[51]** and **[53]–[56]** make miscellaneous amendments and amendments enabling the making of savings and transitional provisions.

## **Schedule 2      Amendment of Conveyancing Act 1919**

### **Subdivision of land**

In addition to transferring the control of the developmental aspects of subdivision wholly into the *Environmental Planning and Assessment Act 1979*, a further object of this Bill is to reform the provisions concerning both the approval mechanisms for proposed subdivisions and the registration of plans of subdivision. The essential differences between the proposed legislation and the existing law are:

- (a) the abolition of the subdivision approval mechanism under Part 12 of the *Local Government Act 1919*, leaving the development consent mechanism under Part 4 of the *Environmental Planning and Assessment Act 1979* (which already applies to subdivision) as a single approval mechanism for subdivision, and
- (b) the introduction of a system of private accreditation in relation to the certification of plans of subdivision.

This Bill in relation to the subdivision of land:

- (a) amends the *Environmental Planning and Assessment Act 1979* so as:
  - (i) to make provision with respect to planning aspects of the subdivision of land, and
  - (ii) to make provision for the exercise, by persons in the private sector who are appropriately accredited, of certain supervisory functions in relation to matters associated with the subdivision of land, and
- (b) amends the *Conveyancing Act 1919* so as to make provision with respect to:
  - (i) transactions involving the subdivision of land, and
  - (ii) the registration of plans of subdivision, and
- (c) makes consequential amendments to other Acts:
  - (i) generally as a result of the proposed repeal of the remaining provisions of the *Local Government Act 1919*, and
  - (ii) particularly as a result of the proposed amendments to the *Environmental Planning and Assessment Act 1979* and the *Conveyancing Act 1919* in relation to subdivision, and
- (d) repeals the *Local Government Act 1919* and *Ordinance No 32* under that Act.

The amendments to the *Conveyancing Act 1919* to give effect to this object of the Bill are contained in **Schedule 2**.

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**Schedule 3    Amendment of Local Government Act 1993**

**Schedule 3** contains consequential amendments to the *Local Government Act 1993*.

**Schedule 4    Amendment of other Acts**

**Schedule 4** contains consequential amendments to other Acts.