Environmental Planning and Assessment Amendment Bill 1999

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* (the Act) so as:

(a) to remove any doubt that the provision and maintenance of affordable housing is an object of the Act, and

(b) to remove any doubt that environmental planning instruments may be made for or with respect to providing and maintaining affordable housing, and

(c) to extend the range of purposes for which development funds established for development areas may be used to include urban and regional improvement programs, and

(d) to ensure that an application to modify a development consent is compared with the development consent as originally granted, not with the development consent as modified by previous modifications (if any), and

(e) to give councils greater control over the notification and advertisement of applications to modify development consents for certain kinds of development, and

(f) to make other miscellaneous or minor amendments to the Act, the *Environmental Planning and Assessment Regulation 1994* and the *Environmental Planning and Assessment Model Provisions 1980*.

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 to be appointed by proclamation, except Schedules 5, 6 and 7 [5], which commence on the date of assent.

Clause 3 is a formal provision giving effect to the amendments to the *Environmental Planning and Assessment Act 1979* (the Act) set out in Schedules 1–6.

Clause 4 is a formal provision giving effect to the amendments to the *Environmental Planning and Assessment Regulation 1994* set out in Schedule 7.

Clause 5 is a formal provision giving effect to the amendments to the *Environmental Planning and Assessment Model Provisions 1980* set out in Schedule 8.

Schedules

Schedule 1 makes amendments to the Act that expressly recognise affordable housing as a matter that may be provided for under the Act, but only to remove any remaining doubt that affordable housing is a matter that can be provided for under the current objects of the Act.

The Bill proposes to amend the objects of the Act to include "the provision and maintenance of affordable housing" (**Schedule 1 [2]**). A definition of "affordable housing" as "housing for very low income households, low income households or moderate income households" is inserted

into the Act (**Schedule 1 [1]**). The means by which such households will be identified are to be prescribed by the regulations or provided by environmental planning instruments. To this end, **Schedule 1 [4]** adds to the general regulation-making power in the Act a power to make regulations for or with respect to the purposes and objectives of affordable housing, including the means for determining whether a household is a very low income, low income or moderate income household.

In addition, the regulations will be able to specify means for determining housing costs payable for affordable housing, and will also enable the Minister by order to determine matters relating to affordable housing (such as the income levels that qualify a household as "very low income", "low income" and so on, or the percentages of household income that may be payable as housing costs for affordable housing).

Schedule 1 [3] removes any doubt that an environmental planning instrument, such as a local or regional environmental plan, may deal with the provision and maintenance of affordable housing, and regulate matters relating to affordable housing.

Schedule 2 amends the Act so as to expand the range of purposes for which Development Funds may be used.

Under the Act, development areas may be constituted, and money held in a Development Fund in respect of the area may be used for specified purposes. **Schedule 2 [3]** extends the purposes for which development funds may be used, after consideration of the likely future applications of such funds for other purposes, to include programs to improve public amenity by enhancing open space or the public domain, or providing infrastructure or facilities.

The remaining items in Schedule 2 make consequential amendments to the Act. **Schedule 2 [1]** allows the Minister administering the Act (who is incorporated as a corporation sole under section 8 of the Act for the purposes of exercising certain functions) to exercise functions for the purposes of the application of development funds. **Schedule 2 [2]** prevents delegation of the Minister's functions relating to development funds.

Schedule 3 amends the Act in relation to the modification of development consents.

Schedule 3 [1] and **[6]** make amendments that give councils some control over requirements for notifying or advertising applications to modify development consents. Currently the *Environmental Planning and Assessment Regulation 1994* (clause 72A) sets out the requirements for advertising an application for modification of a development consent. The Bill proposes to limit the kinds of development to which the modification application advertisement requirements in the Regulation apply (Schedule 7 [3]). For other kinds of development, councils will be able to adopt development control plans that set out the advertisement requirements for a modification application for particular kinds of development in that council's area. A development control plan will be able to provide that no notification or advertising is required for applications to modify specified development.

To this end, **Schedule 3 [1]** expands the range of matters that a council's development control plan can deal with to include providing for the notification or advertising of an application for the modification of a development consent for specified development. **Schedule 3 [6]** provides that a development consent may be modified if, among other matters, the modification application has been notified in accordance with any applicable regulations or development control plan.

Schedule 3 [4] establishes a simplified procedure for applications to modify a development consent where the proposed modification is of minimal environmental impact. These modification applications may not need to be the subject of consultation with other bodies. Amendments consequential to this amendment, and to clarify the operation of the section, are made by **Schedule 3 [2]**, **[3]** and **[7]**.

Schedule 3 [5] reverses the effect of the decision of the Land and Environment Court in *North Sydney Council v Michael Standley & Associates Pty Limited* (1998) 43 NSWLR 468 that when a consent authority is considering an application to modify a development consent, it is to

compare the development as proposed to be modified with the development as it has previously been modified (if at all). The proposed amendment ensures that the development as proposed to be modified is compared with the development to which consent was originally granted.

Schedule 3 [8] provides a new right of appeal against a determination of a consent authority of an application to modify a development consent to carry out State significant development. Currently there is no right of appeal against such a determination. The proposed amendment would allow a person who has applied to modify a consent to carry out State significant development to appeal to the Land and Environment Court against a determination of that application, unless the development consent was originally granted after an inquiry into the development by a Commission of Inquiry. **Schedule 3 [9]** makes a consequential amendment.

Schedule 4 makes miscellaneous amendments to the Act to streamline its operation.

Schedule 4 [1] clarifies that a document created or kept in electronic form can be an "original document", a term used in section 150 (Evidence) of the Act.

Schedule 4 [2] and **[7]** deal with the stage of development by which a long service levy must be paid. Currently, section 80 (10A) provides that any long service levy (or instalment of such a levy) payable is to be paid by the time development consent is granted. This subsection is proposed to be repealed (**Schedule 4 [2]**), and instead any long service levy is to be paid by the time a construction certificate for the development is issued (**Schedule 4 [7]**).

Schedule 4 [3] removes an anomaly relating to appeals against a decision to grant consent to designated development. Section 83 (1) (b) currently provides that if an objection was made to an application to carry out designated development, the development consent does not take effect until 28 days from the date that consent was granted. This gives an objector time to lodge an appeal under section 98. However, if consent to designated development was granted following an inquiry by a Commission of Inquiry, there is no right of appeal against the granting of consent (section 80 (8)). Section 83 (1) (b) is therefore proposed to be amended so that a consent to carry out designated development that was granted following an inquiry by a Commission of Inquiry takes effect when consent is granted, and not after 28 days.

Schedule 4 [4] amends the long service levy payment pre-condition for the issue of a complying development certificate to make it consistent with the amendments set out in Schedule 4 [2] and [7].

Schedule 4 [5] enables regulations to be made for or with respect to advertising, including the display of advertisements and the erection of advertising structures.

Schedule 4 [6] expands the range of matters that may be certified in a compliance certificate issued by a consent authority or an accredited certifier. The amendment allows a compliance certificate to certify that development complies with standards or requirements (including design of the development) specified in the certificate.

Schedule 4 [8] clarifies that if a development consent to a subdivision is a "deferred commencement" consent, the applicant must comply with the requirements relating to the deferred commencement and also any other conditions of the development consent.

Schedule 4 [9] expands the range of circumstances in which an accredited certifier may issue a certificate for development. Currently an accredited certifier is not permitted to issue a certificate where he or she is "associated" with the council of the area in which the development is to be carried out. A certifier employed by a council is "associated" with the council. The amendment allows a certifier employed by a council to issue a certificate for development to be carried out in that council's area if the council is not the consent authority for the development and the certifier is acting in the course of his or her employment with the council.

Schedule 4 [10] deals with parties to an action for damages arising from building work or subdivision work. The proposed amendment would ensure that third parties joined to the proceedings by the defendant may be required by the court to contribute to the payment of any damages, even if those parties were not directly sued by the plaintiff.

Schedule 4 [11] creates a simplified procedure for a public authority to apply for a modification

of a Minister's approval to correct a minor error, misdescription or miscalculation in the approval. The Director-General of the Department of Urban Affairs and Planning is required to report to the Minister on such a modification application (**Schedule 4 [12]**).

Schedule 4 [13] expands the purposes for which entry onto residential premises may be authorised to include an inspection for the purposes of issuing a building certificate for the premises. Building certificates are issued by councils with respect to the state of a building, and once issued the council is estopped from issuing an order requiring, or taking proceedings for, the demolition or rectification of building work, encroachments or other matters. The amendment prevents tenants or owner-occupiers of residential premises frustrating the issue of a building certificate.

Schedule 4 [14] provides a dispute resolution procedure for disputes between public authorities about specified matters where neither of the disputants is a council. Such a dispute may be submitted to the Premier. **Schedule 4 [15]** makes consequential amendments.

Schedule 4 [16] expands the range of persons who may be ordered by a council or other person acting as a consent authority to alter or remove any advertisement or advertising structure. Currently such an order may only be made to the person who caused the advertisement to be displayed, or the owner or occupier of the premises on which it is displayed. The amendment would allow an order to be made to the person who paid for the printing of the advertisement, or the person who paid or otherwise rewarded the person who caused the advertisement to be displayed.

Schedule 4 [17]–[18] increase the monetary penalties for an offence against the Act or the regulations, and **Schedule 4 [19]** increases the monetary penalty that a Local Court can impose for an offence against the Act.

Schedule 4 [20] expands the range of matters for which fees may be prescribed or determined under the regulations to include:

- supplying any product, commodity or publication, and
- issuing any certificate, requirement or direction, and
- allowing admission to any building.

Schedule 4 [21] and **[22]** extend the statutory exemption from liability in relation to contaminated land to councils and accredited certifiers issuing complying development certificates. The current exemption for councils applies only in relation to development applications.

Schedule 5 makes amendments to the Act of a statute law review nature.

Schedule 5 [1] and **[2]** remove references to a repealed provision, and update a reference to the Traffic Authority of New South Wales.

Schedule 5 [3]–[5] clarify that in submitting a draft regional or local environmental plan, the Director-General, a council or the Minister may exclude provisions of the plan, or parts of the land to which the plan applies, or both, for later consideration.

Schedule 5 [6] clarifies that if State significant development would be subject to Part 5 but for section 76A (8), the State significant development may be carried out with development consent.

Schedule 5 [7]–[9] replace references in the provisions dealing with determination of development applications to an "objection" with references to a "submission", for greater consistency of language with section 79 (5). That subsection provides that a submission with respect to a development application may be a submission by way of objection.

Schedule 5 [10] replaces outdated cross-references dealing with requirements to obtain the concurrence of the Director-General of National Parks and Wildlife to certain activities proposed to be carried out by a public authority.

Schedule 5 [11] clarifies the pre-conditions with which a public authority proposing to carry out certain activities must comply before seeking the Minister's approval to carry out the activities. The proposed amendment makes it explicit that an authority is required to obtain a

species impact statement before seeking approval if the activity is in respect of land that is "critical habitat" or is likely to significantly affect threatened species, populations or ecological communities.

Schedule 5 [12] similarly clarifies the pre-conditions with which a public authority must comply before seeking a modification of the Minister's approval. The proposed amendment makes it explicit that an authority is required to obtain a species impact statement if the proposed modification requires a further environmental impact statement, and if the activity as modified is in respect of land that is "critical habitat" or is likely to significantly affect threatened species, populations or ecological communities.

Schedule 5 [13] and **[14]** correct minor drafting discrepancies.

Schedule 5 [15] and **[16]** remove references to the Darling Harbour Authority and the Sydney Harbour Foreshore Authority to ensure that the Minister is the sole consent authority for land in the Darling Harbour Development Area and the Sydney Cove Development Area unless otherwise specified in an environmental planning instrument.

Schedule 6 deals with savings and transitional provisions.

Schedule 6 [1] allows savings and transitional regulations to be made with respect to the proposed Act, and another Act. **Schedule 6 [2]** contains savings and transitional provisions for certain amendments proposed to be made by the Bill to the Act.

Schedule 7 makes amendments to the *Environmental Planning and Assessment Regulation 1994*.

Schedule 7 [1] and **[2]** make amendments to clause 71A and 72 of the Regulation consequential to the amendments made by Schedule 3 [1], [4] and [5].

Schedule 7 [3] amends clause 72A of the Regulation to specify the kinds of development for which applications to modify the development consent must be notified or advertised in accordance with the Regulation. This amendment supports the amendments made by Schedule 3 [6].

Schedule 7 [4] inserts proposed clause 72B in the Regulation, which provides that applications to modify development applications (other than applications provided for by Schedule 7 [3]), are to be notified or advertised in the same way as the original development application, unless a development control plan made by a council provides otherwise. Proposed clause 72C provides that applications to modify development consents that are of minimal environmental impact are to be notified in accordance with any applicable development control plan.

Schedule 7 [5] makes an amendment consequential to the amendment made by Schedule 5 [10] and prescribes the manner in which the concurrence of the Director-General to certain activities is to be sought and obtained.

Schedule 7 [6] updates the definition of "drinking water catchment" in Schedule 3 to the Regulation to refer to declared or proclaimed catchment areas, removing the current reference to "potable groundwater supply bore".

Schedule 8 makes amendments to the *Environmental Planning and Assessment Model Provisions 1980*.

Schedule 8 [1] and **[2]** remove definitions that are now located in section 4 (1) of the Act.

Schedule 8 [3] replaces an outdated reference to the "Department of Environment and Planning".

Schedule 8 [4]–[6] and **[9]** replace outdated references to Acts that have been renamed or repealed.

Schedule 8 [7] replaces an outdated reference to the "Housing Commission of New South Wales".

Schedule 8 [8] and **[10]–[12]** replace outdated references to the "Traffic Authority of New South Wales" and the "Commissioner for Main Roads".

Schedule 8 [13] and **[14]** replace outdated references to a "Pastures Protection Board" and the "Water Resources Commission".