



NSW Planning Framework: History of Reforms

by Holly Park

The first legislative framework for planning in NSW was introduced in 1945 in the form of amendments to the *Local Government Act 1919*. Dedicated environmental planning legislation was introduced with the enactment of the *Environmental Planning and Assessment Act (EP&A Act)* in 1979. The EP&A Act has subsequently been amended on numerous occasions. In 2005, the NSW Government commenced an 'overhaul' of the NSW planning system which has resulted in major reform over the past five years.

This e-brief provides a timeline of significant reforms to the NSW planning framework. References to sections of the EP&A Act are to the legislation as made or amended at the relevant point in time.

Pre-dating the EP&A Act

Prior to the introduction of the EP&A Act, planning was regulated under the *Local Government Act 1919 (LG Act 1919)*. As enacted, the Act contained limited provisions relating to town planning. Following significant pressure from the Commonwealth, the Act was amended in 1945 to provide a formalised and more systematic approach to development, with the

enactment of the *Local Government (Town and Country Planning) Amendment Act 1945*. A new Part XXIIA 'Town and Country Planning Schemes' was inserted into the Act, which enabled councils to prepare town planning schemes to control development in their municipality. This gave councils greater control over land use planning, subdivisions, building standards and road construction.¹

The LG Act 1919 was further amended by the *Local Government (Town and Country Planning) Amendment Act 1962* which amended the procedure for making planning schemes in an attempt to accelerate the plan making process. However, by the 1970s it was apparent that the planning system in NSW was both overly complex and failing to ensure that environmental factors were addressed.²

In 1974, the *Planning and Environment Commission Act* was enacted. The Act established the Planning and Environment Commission and required it to report to the Minister on the improvement or restructuring of the planning system. This report defined the key elements of what was to become the planning regime under the EP&A Act.³

The introduction of the *Environmental Planning Bill 1976* was the first serious attempt to reform and modernise the planning framework in NSW. However, the Bill was never debated and lapsed with the calling of the 1976 election.

By 1979, modernisation of the planning framework was long overdue. The second reading speech for the EP&A Bill stated:

I doubt that there can be any genuine questioning that existing legislation no longer provides the best or even adequate framework or system for environmental planning decision making.⁴

The second reading speech highlighted a range of deficiencies with the existing legislation including: a failure to integrate environmental assessment and protection into land use planning; a failure to demarcate decision making responsibilities between state and local government; and a failure to provide for meaningful public participation in the planning process.⁵

1979 - The EP&A Act

The EP&A Act passed through both Houses of Parliament in 1979 and came into force on 1 September 1980. It introduced a uniform system of environmental planning, which was described by the Government of the day as:

decision making for planned development and conservation to achieve economic and social growth within the tolerable limits and capacities of the physical environment.⁶

The second reading speech for the EP&A Bill highlighted three distinct objectives:

- to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and man made resources;
- to share government responsibility for environmental planning between the State and local government; and
- to increase the opportunity for community involvement in environmental planning and assessment.⁷

The key reforms introduced by the Act have been cited as:

- Greater prominence for environmental considerations in land use planning;
- Greater public participation in the planning process; and
- Greater emphasis on coordinating planning and development by government and private interests.⁸

As originally enacted, the EP&A Act included the following key features.⁹

Environmental Planning Instruments

Part 3 of the Act introduced a three tiered structure of environmental planning instruments for strategic planning: Local Environmental Plans (LEPs), Regional Environmental Plans (REPs) and State Environmental Planning Policies (SEPPs). The Act devolved primary responsibility for local planning issues to Local Government, with the State Government focussing on issues of State and regional significance. The Act required the preparation of an environmental study in the development of an REP or LEP.¹⁰

An environmental planning instrument could designate different classes of development into the following

categories, primarily through a zoning system:

- development permissible without consent;
- development permissible with consent;¹¹ and
- prohibited development.¹²

Environmental planning instruments under the EP&A Act differed from the regime pre-dating the EP&A Act in that they:

- Were designed to protect the environment;
- Were designed to facilitate public participation at the planning stage;
- Could cover areas larger or smaller than council boundaries;
- Permitted greater third party involvement in preventing development.¹³

Development Approval

As enacted, the EP&A Act contained two key parts relating to development approval:

- Part 4 – development requiring development consent; and
- Part 5 – activities not requiring development consent but requiring another form of government approval.

Environmental Planning Control (Part 4)

Part 4 of the Act introduced a uniform system for assessing and determining development that requires consent under an environmental planning instrument. The Act requires a development application to be submitted to the consent authority, generally the local council. The application must include information outlining the impacts that the development will have on the environment and the steps proposed to mitigate any likely adverse impacts

on the environment.¹⁴ The Act specifically requires an environmental impact statement to be undertaken for designated development.¹⁵

The EP&A Act stipulates matters that must be taken into account when determining a development application under Part 4, including the environmental, social and economic impacts of the proposed development.¹⁶ An environmental planning instrument could provide that the concurrence of a Minister or public authority is required before development consent is granted.¹⁷

Section 101 of the EP&A Act gave the Minister the power to 'call in' a particular development or class of developments and assume responsibility for determining the development application/s. This power was conferred where the Minister:

considers it expedient in the public interest to do so, having regard to matters of significance for State or regional environmental planning.¹⁸

The Minister's decision on a development application was final and there was no right of appeal of this decision by either the applicant or an objector.¹⁹ However, the applicant or the objector could require a hearing by a Commission of Inquiry prior to the Minister determining the application, the recommendations of which the Minister had to consider in determining the application.²⁰

The EP&A Act maintained the existing use rights under the LG Act 1919, which allowed the continuation, and in some cases modification, of existing uses.

Environmental Assessment (Part 5)

Part 5 of the EP&A Act relates to activities that are permissible without development consent, but which are undertaken by or require the approval of a determining authority, being a Minister or a public authority. In practice, Part 5 applies largely to infrastructure activities undertaken by a public authority, which require either self-approval or the approval of another public authority. Part 5 aims to ensure that the environmental impacts of these activities are assessed.

In determining the approval for an activity, the Act requires the determining authority to take into account to the fullest extent possible all matters affecting or likely to affect the environment.²¹ In the case of certain prescribed activities, or activities likely to significantly affect the environment, the consent authority is required to obtain and consider an environmental impact statement prior to granting approval.²²

Public Participation

One of the major reforms of the EP&A Act was the increase in public participation facilitated by the Act. It provided for community involvement in relation to environmental planning instruments;²³ certain development applications²⁴ and environmental impact statements.²⁵ It also provided for public inquiries,²⁶ appeals by objectors against the determination of a consent authority²⁷ and third party rights to initiate court action to remedy or restrain a breach of the Act.²⁸

Implementation and Enforcement

The EP&A Act also provided detailed provisions in relation to implementation and enforcement, including offences, court orders, penalties, Ministerial

directions, dispute resolution and public inquiries.²⁹

Land and Environment Court

The *Land and Environment Court Act 1979* was introduced cognate with the EP&A Act. The Act established the Land and Environment Court, which replaced the complex structure of planning boards, tribunals and the Land and Valuation Court, as the specialist court to deal with environmental, development, building and planning disputes.

The EP&A Act has subsequently been amended on numerous occasions by Amendment Acts and other legislation. The following provides a timeline of key amendments to the EP&A Act and major environmental planning instruments.

1985 - *Environmental Planning and Assessment (Amendment) Act*

The Act introduced a number of key changes to the planning regime.

Ministerial Power to Determine Applications

The Act expanded the Minister's power to call in and determine a development application to include developments that would otherwise be prohibited under an environmental planning instrument.³⁰

Development Contributions

The Act amended the provisions in relation to development contributions and introduced section 94A to the EP&A Act. Section 94A enables the Minister to give a direction to a consent authority (generally the council) in relation to the imposition of development contributions.

Part 5 – Nominated determining authority

The Act also made some significant changes to Part 5 of the EP&A Act. The definition of activity which triggered Part 5 of the EP&A Act was amended. A new section 110A was inserted into the EP&A Act which enables the Minister to nominate a single determining authority (the 'nominated determining authority') for an activity or a class of activities where the approval of more than one determining authority was ordinarily required.

Crown Developments

The Act also amended the consent authorities' role in relation to the determination of development applications made by on or behalf of the Crown. Under the amendments, the consent authority is not permitted to refuse or impose a condition on a development application submitted by or on behalf of the Crown, except with the approval of the Minister.³¹

Authorised officers – powers

The Act also introduced provisions in relation to authorised officers and powers of entry to carry out inspections for the purposes of the EP&A Act.³²

1993 - Environmental Planning and Assessment (Part 5) Amendment Act

Ministerial Approval Role

This Act amended Part 5 of the EP&A Act to provide that, where a Government agency is both the proponent and the determining authority for any activity for which an environmental impact statement is required, the Minister for Planning, rather than the government agency,

will be the determining authority. Councils were excluded from the operation of this section.³³

SEPP 34

SEPP 34 Major Employment Generating Industrial Development was also introduced in 1993. This made the Minister the consent authority for certain types of industrial development that generated significant employment.

1995 - Threatened Species Conservation Act

The *Threatened Species Conservation Act* integrated threatened species requirements into the EP&A Act. A number of significant reforms to the operation of the EP&A Act were involved, including:

- The objects of the EP&A Act were amended to include the protection and conservation of native animals and plants, including threatened species³⁴ as an object of the Act;
- Section 5A was introduced which provided a list of factors to be taken into account when determining whether there is likely to be a significant effect on threatened species;
- The EP&A Act was amended to enable environmental planning instruments to make provisions with respect to threatened species and to require them to identify areas of critical habitat;
- The requirement for a species impact statement was introduced where the development is on land that is critical habitat or the development is likely to significantly affect threatened species;
- Introduction of consultation and concurrence roles for the Director General of National Parks and

Wildlife in numerous circumstances;

- The requirement for determining authorities and consent authorities to have regard to threatened species and critical habitat when making decisions was introduced.

1996 - Environmental Planning and Assessment Amendment Act

Hierarchy of planning instruments

This Act introduced changes to the hierarchy of planning instruments, whereby, if expressly stated in the environmental planning instrument, SEPPs would prevail over inconsistent REPs and LEPs, and REPs would prevail over inconsistent LEPs.

1997 - Environmental Planning and Assessment Amendment Act

The Second Reading speech described the Amendment Act as:

the most fundamental change to the laws associated with land-use planning and assessment in New South Wales since the introduction of the Environmental Planning and Assessment Act in 1979.³⁵

Part 4

The Act reconfigured Part 4 of the EP&A Act. A new division was introduced to clarify the operation of the Part, describing the 'threefold classification' of development:

- Development that does not need consent;
- Development that needs consent; and
- Prohibited development.

Part 4 was also amended to incorporate several new categories of development, namely, state significant

development, exempt development and complying development.

State significant development was introduced to make the Minister the approval authority for projects that are declared by an environmental planning instrument to be state significant development or projects considered by the Minister to be of state or regional environmental planning significance.³⁶

Exempt and complying development were introduced with the aim of simplifying the assessment process for small-scale, routine developments. Development that is of minimal environmental impact can be identified by an environmental planning instrument as exempt development. Exempt development can be carried out without the need to obtain development consent, provided certain criteria are met.³⁷

Complying development is development that requires consent, but which can be addressed by specified predetermined development standards.³⁸ Complying development is assessed by either councils or accredited private certifiers, who provide complying development certificates to authorise the development.

Integrated Development Applications

The Act introduced provisions for integrated development, which is development that requires development consent plus another government approval under prescribed legislation (e.g. an environmental protection licence or approval to disturb a public road). Integrated development application (IDA) provisions were introduced to streamline the development process by linking the processes for granting development consent and other

approvals. IDA provisions require other government agencies to provide in principle agreement to issue the necessary approvals prior to development consent being granted, so that an integrated approval is provided. If agencies indicate that the necessary approvals will not be granted, development consent is refused.³⁹

Private Certifiers

The Act introduced a role for private accredited certifiers who, in addition to the consent authority, can issue construction certificates or complying development certificates.

Building and Subdivision Controls

The building and subdivision controls under the *Local Government Acts* were integrated into the development control regime under the EP&A Act.⁴⁰

1999 - Environmental Planning and Assessment Amendment Act

Affordable Housing

This Act introduced affordable housing provisions into the EP&A Act. It added 'the provision and maintenance of affordable housing' as an object of the Act and provided for Regulations to be made pertaining to the provision of affordable housing.

2000 - Environmental Planning and Assessment Amendment (Affordable Housing) Act

Affordable Housing

In 2000, the EP&A Act was further amended to make more detailed provisions relating to affordable housing. The Act formalised the practice of imposing an affordable housing levy.

2002 - Environmental Planning and Assessment Amendment (Anti Corruption) Act

Anti Corruption

This Act introduced anti corruption provisions into the EP&A Act. In accordance with the Act, development consent tainted by corruption can be suspended or revoked and if recommended by the Independent Commission Against Corruption, an administrator can be appointed to assume the environmental planning responsibilities of a council.

2004 - Threatened Species Legislation Amendment Act

Biodiversity Certification

This Act introduced provisions for biodiversity certification of planning instruments. It altered the operation of the EP&A Act in relation to threatened species requirements. If a planning instrument is granted biodiversity certification, development in accordance with that planning instrument will generally not require threatened species assessment.

2005 – Environmental Planning & Assessment (Infrastructure and Other Planning Reform) Act

In 2005, the NSW Government commenced major reforms of the planning process in NSW. This Act aimed to:

- reform land-use planning and the development assessment and approval system under that Act, particularly in respect of State infrastructure or other significant projects and land-use planning instruments.⁴¹

The opening lines of the Second Reading speech for the Bill stated:

The wellbeing of our economy depends on business being able to work with certainty, a minimum of risk, low transaction costs, and appropriate levels of regulation. This bill demonstrates the Government's determination to take decisive action to achieve these objectives. By establishing greater certainty in the assessment of projects of State significance and major infrastructure projects, the bill further assists in the Government's desire to afford opportunities for the private sector to participate in the delivery of our infrastructure programs. There is no doubt this bill dramatically improves the climate in which to do business in this State.⁴²

Part 3A

Part 3A was inserted into the Act to provide a new assessment and approval process for major public and private projects that would previously have been subject to the provisions of Part 4 or Part 5 of the EP&A Act. The Act defines the kind of development that may be declared to be a Part 3A project:

- Major infrastructure or other development that is considered by the Minister to be of State or regional environmental planning significance;⁴³ or
- Major government infrastructure.⁴⁴

A development can be declared a Part 3A project by the provisions of a SEPP or by a Ministerial order published in the Gazette.

Part 3A provides a streamlined environmental assessment process, with the Minister for Planning as the approval authority.⁴⁵ The provisions of Part 3A are less prescriptive than Part 4 or Part 5 assessment. The Act does not outline the process for environmental assessment under Part 3A or environmental considerations

that must be taken into account when deciding whether to grant approval. Instead, the Director General of the Department of Planning provides the environmental assessment requirements to the project proponent, outlining what matters must be addressed. The aim is for the environmental assessment to be tailored to the complexity and significance of the impacts of the project. The project proponent is required to prepare a statement of commitments outlining how the proponent intends to manage the project to minimise the impacts on the environment.⁴⁶

The Act requires an environmental assessment submitted for a project under Part 3A to be publicly exhibited and for written submissions to be received. However, in making a determination on the project, the Minister is not required to take public submissions into account.⁴⁷ The Minister can require a public inquiry into a Part 3A project⁴⁸ or assemble a panel of experts to assess any aspect of a Part 3A project.⁴⁹

A Part 3A approval can be a two phase process. The proponent can initially seek the Minister's approval at a concept plan stage, when the broad project parameters are known but the details are not yet finalised, and then seek full project approval at a later stage. This aims to provide 'upfront certainty for major projects' and to deal with fundamental issues such as site suitability early in the project planning.⁵⁰

A Part 3A approval precludes the need to obtain a range of other government approvals under different legislation (e.g. a permit under the *Fisheries Management Act 1994*). Whilst certain other approvals are still required, the

responsible government agency cannot refuse to provide the approval and the approval must be substantially consistent with the Part 3A approval (e.g. an environmental protection licence under the *Protection of the Environment Operations Act 1997*). Similarly to approvals under Part 4 and Part 5, carrying out works in accordance with an approval under Part 3A is a defence to a threatened species offence under the *Threatened Species Conservation Act 1995* or the *Fisheries Management Act 1994*.

Appeals and civil enforcement procedures are limited in relation to Part 3A projects. An objector can only bring legal proceedings challenging the decision of the Minister to grant Part 3A approval if:

- The project is not critical infrastructure; and
- There has been no approval of a concept plan for the project; and
- The project has not been the subject of a commission of inquiry or a report by a panel of experts; and
- Prior for Part 3A, the project would have been considered designated development under Part 4; and
- The Minister is not the proponent of the project.⁵¹

Critical Infrastructure

The Minister can declare any Part 3A development to be a critical infrastructure project if the Minister is of the opinion that the development is essential for the State for economic, environmental or social reasons.

The approval process for critical infrastructure projects is further streamlined, as follows.

- There are no rights of appeal for proponents or objectors against the

determination of a critical infrastructure project.⁵²

- Third party appeals under the EP&A Act and other environmental legislation in respect of critical infrastructure projects are only permitted with the approval of the Minister.⁵³
- Orders and notices, such as a stop work order under the *National Parks and Wildlife Act 1974* or an order under the *Local Government Act 1993* cannot be made so as to interfere with an approved critical infrastructure project.⁵⁴

Environmental Planning Instruments

The Act introduced provisions to standardise environmental planning instruments. Subsequently, the Standard Instrument for LEPs was gazetted in 2006.⁵⁵ The Standard Instrument provides a template for LEPs, mandating the use of standardised definitions, zones and key provisions. Only LEPs that are consistent with the Standard Instrument will be approved by the Minister. The Act also aimed to rationalise the number of environmental planning instruments.

2005 – Major Projects SEPP

The Major Projects SEPP was introduced in 2005, to accompany the commencement of Part 3A of the EP&A Act.⁵⁶ The Major Projects SEPP identified development to which Part 3A of the Act applies.

The Major Projects SEPP can also designate specified development as critical infrastructure. However, when gazetted, no critical infrastructure projects were listed.

2005 - Environmental Planning & Assessment Amendment (Development Contributions) Act

Development Contributions

The EP&A Act was further amended in 2005. This Act introduced two new methods by which developer contributions could be obtained: voluntary planning agreements and fixed development consent levies.

2006 - Environmental Planning and Assessment Amendment Act

Planning Assessment Panels

The Act expanded on the existing provisions in relation to planning administrators and provided the Minister with a new power to appoint planning assessment panels to exercise the planning functions of councils. A planning assessment panel or planning administrator may be appointed if:

- The Minister is of the opinion that council's performance is unsatisfactory; or
- The Minister is of the opinion that council is not complying with its obligations under the legislation; or
- Recommended by the Independent Commission Against Corruption; or
- The council agrees.

The Second Reading speech for the Bill outlined the rationale for these changes, stating, in relation to the high number of development applications lodged with councils:

Whilst most councils do a good job in dealing with these pressures, a small number do not. The State cannot stand idly by when some councils repeatedly fail to make timely and reasonable planning decisions....This bill is part of the Government's ongoing work to

ensure that there is greater certainty and efficiency within all levels of the planning system.⁵⁷

The legislation requires the order of appointment to specify the functions to be undertaken by the planning assessment commission or planning administrator. This can include exercising council's consent authority functions under Part 4, or its functions in relation to the creation of environmental planning instruments.

Development Contributions

The Act introduced a special infrastructure contribution which developers are required to pay in special contributions areas in addition to ordinary developer contributions.⁵⁸ Special contributions areas are areas within any declared growth centre or other areas as designated under the Act (intended to be new land release areas where major infrastructure provision is required).

The Act also required councils to submit their developer contributions plan to the Department of Planning. It empowers the Minister to direct a council to make, amend or repeal a developer contributions plan.

2007 – Infrastructure SEPP

The Infrastructure SEPP 2007 was introduced to update and simplify the planning provisions for infrastructure. It provides development approval requirements for different categories of infrastructure (based on zones). It aimed to make the provision of essential infrastructure simpler and more efficient. The SEPP replaced 20 existing SEPPs that dealt with specific categories of infrastructure.

2008 - Environmental Planning and Assessment Amendment Act

Outlining the rationale for the Act, the Agreement in Principle Speech stated:

We need to bring our planning system into the twenty-first century and better equip it to deal with the challenges of population growth, increasing urbanisation and transport needs, complex natural resource and climate change issues, the realignment of employment markets, and changing community expectations. These reforms are also intended to cut red tape and make the system simpler and more accessible, especially for mums and dads and small business.⁵⁹

'Gateway' LEP Process

The Act amended Part 3 of the Act to establish a new three-step process for making LEPs.

The initial step is the preparation of a planning proposal by the relevant planning authority (generally the council). The proposal must outline the intended effect of the proposed LEP and justify the making of the LEP. It needs to include a statement of objectives, proposed community consultation and details of proposed provisions and outcomes.⁶⁰

The second step is the 'gateway determination' by the Minister. The Minister makes an upfront determination as to whether the proposal for the LEP should proceed, as well as the community and government agency consultation requirements, the timeframe for making the LEP and whether a public hearing needs to be held. These reforms aim to streamline the LEP process and provide greater upfront certainty about what is required. Their

effect is to significantly increase the control of the Planning Minister over the LEP making process.

The third and final step is the making of the LEP.

Planning Assessment Commission

Part 2A of the Act established the Planning Assessment Commission as a new decision making body to determine Part 3A projects delegated to it by the Minister. The Minister's Agreement in Principle Speech for the Bill estimated that approximately 80% of Part 3A projects would be delegated to the Commission.⁶¹ The Planning Assessment Commission is appointed by the Minister, but is not subject to Ministerial direction or control. The Planning Assessment Commission commenced operation in late 2008.

Joint Regional Planning Panels

Part 2A of the Act also enables the Minister to establish Joint Regional Planning Panels as new decision making bodies to determine regionally significant development for particular parts of the State. Development delegated to the Planning Panels for assessment will generally be development that would previously have been assessed by council. The Panels consist of three State appointed independent experts and two council nominated members. They aim to provide 'greater transparency and objectivity'.⁶² Joint Regional Planning Panels commenced operation in mid 2009 in six regions of NSW.

Part 4 Assessment Streamlined

The Act also streamlined development assessment under Part 4 of the EP&A Act by removing redundant referrals and concurrences to State agencies and significantly reducing timeframes

for government agency concurrences. The Regulations were amended to remove 'stop the clock' provisions whereby government agencies could stop the determination period if additional information or studies were required.

Regional Environmental Plans

The 2008 Act also removed one layer of environmental planning instruments, namely REPs, from the EP&A Act. A large number of REPs have been repealed in recent years and all remaining REPs became SEPPs.

Appeals and Reviews

Changes to the review and appeal procedures under the EP&A Act were also introduced. Inserted into the principal Act was Part 2A. This introduced a new system of planning arbitrators whose role is to consider applicant appeals against council decisions on small scale development proposals, instead of the appeals going to the Land and Environment Court. The aim was to provide a non-legalistic review process to replace the existing regime whereby council reviewed their own decision. Appeals to the Land and Environment Court in respect of certain matters are restricted unless they have first been reviewed by the arbitrator or the council consents.

The 2008 Act also introduced a new right of review for third party objectors to a development. These third party review rights were made available to people directly affected by certain types of development. The Act also reduced the time for making an appeal to the Land and Environment Court in development assessment matters, from 12 months to three months.

Development Contributions

The 2008 reforms also introduced a new Part 5B which replaced 'local infrastructure contributions' with 'community infrastructure contributions'. It established a two-tier system for community infrastructure contributions. Councils can continue to levy for designated 'key community infrastructure' without Ministerial approval. However, Ministerial approval is required in order for a council to levy for, or enter into a planning agreement requiring, 'additional community infrastructure'.

Exempt and Complying Development Codes

In addition to the major reforms to the EP&A Act, the SEPP (Exempt and Complying Development Codes) was also introduced in 2008. The SEPP provided for significant expansion in the use of exempt and complying development categories.

2009 - Nation Building and Jobs Plan (State Infrastructure Delivery) Act

Nation Building and Jobs Plan

This Act was enacted to ensure the timely delivery of the infrastructure projects funded by the Commonwealth under the Nation Building and Jobs Plan. The Act applies specifically to infrastructure projects funded under this plan. The Act established a NSW Infrastructure Co-ordinator General with wide ranging powers to plan and implement the timely delivery of infrastructure projects. The Co-ordinator General has the power to streamline the planning and approval processes for infrastructure projects by exempting an infrastructure project from any development control legislation. The Co-ordinator General may also assume the responsibility for

undertaking an infrastructure project from another government agency, if authorised to do so by the Premier or a Minister.

2009-2010 – Section 94E Directions

Developer Contributions

In January 2009 the NSW Government issued a direction under section 94E of the EP&A Act, which introduced a limit on developer contributions levied by councils of \$20000/residential dwelling. Councils required the approval of the Planning Minister to levy a developer contribution that exceeded the \$20 000 limit. A number of councils, particularly in high growth areas, were granted approval to levy contributions exceeding the \$20000 limit.

In June this year the Government issued a new section 94E direction announcing further changes to local development contributions. Whilst the \$20000/dwelling limit on local government developer contributions remained, councils can no longer apply to the Planning Minister for approval to impose a levy higher than the limit. However, councils will be able to apply for special rate variations to fund legitimate council costs arising from development.

2010 - Threatened Species Conservation Amendment (Biodiversity Certification) Act

Biodiversity Certification

This Act introduced a number of changes to the biodiversity certification regime, including:

- Providing for the development of a Biodiversity Certification Assessment Methodology;

- Requiring the preparation of a biodiversity certification strategy;
- Extending biodiversity certification to include Part 3A projects;
- Conferring biodiversity certification on land rather than environmental planning instruments; and
- New enforcement provisions.⁶³

Conclusion

Since 1979 the EP&A Act has undergone significant reform, not least since the major overhaul of the planning system that commenced in 2005. The extent to which some or all of these reforms are consistent with the original aims of the Act are a matter for debate.

The planning process is subject to competing demands: on one side, there is the case for streamlining the decisions making process to achieve speedier and more efficient outcomes; on the other, there are legitimate claims for public participation and local community involvement in the planning process. Central to the debate, and to the balance that must be achieved, is the further argument for environmental protection.

¹ Hort L & Mobbs M, *Outline of NSW Environmental and Planning Law* (1979) Butterworths, Sydney; Lipman Z, *Environmental Law and Local Government in New South Wales* (1991) The Federation Press, Leichhardt; McLellan P, *Swearing in of Justice Peter McLellan as Chief Judge of the Land and Environment Court* 25/8/2003; Lipman Z and Stokes R, 'The technocrat is back: Environmental land-use planning reform in New South Wales', (2008) 25 *Environmental Planning and Law Journal* 305, 305-323.

² Pearson L, *Local Government Law in NSW* (1994) The Federation Press, Leichhardt.

³ Pearson L, *Local Government Law in NSW* (1994) The Federation Press, Leichhardt.

4 NSW Parliamentary Debates 14/11/1979 p3049.
 5 NSW Parliamentary Debates 14/11/1979 p3049.
 6 NSW Parliamentary Debates 14/11/1979 p3049.
 7 NSW Parliamentary Debates 14/11/1979 p3049.
 8 Hort L & Mobbs M, *Outline of NSW Environmental and Planning Law* (1979) Butterworths, Sydney;
 9 Some elements were carried over from the planning provisions in the LG Act 1919. Sections 41 & 57 of the EP&A Act 1979.
 10 Sections 30 (1) EP&A Act 1979.
 11 Section 31 EP&A Act 1979.
 12 Section 31 EP&A Act 1979.
 13 Hort L & Mobbs M, *Outline of NSW Environmental and Planning Law* (1979) Butterworths, Sydney.
 14 Section 77(3)(c) EP&A Act 1979.
 15 Section 77(3)(d) EP&A Act 1979. Designated development is a class or description of development declared as designated development under an environmental planning instrument (s29) or the Regulations (s158). It is generally development that is likely to have a significant impact on the environment.
 16 Section 90 EP&A Act 1979.
 17 Section 30(2) EP&A Act 1979.
 18 Section 101 EP&A Act 1979.
 19 Section 101(7) states that the Minister's decision is final and the provisions of sections 97 and 98 of the EP&A Act which grant the applicant and objectors respectively, the right to appeal the decision, do not apply.
 20 Section 101(4) & (5) EP&A Act.
 21 Section 111 EP&A Act 1979.
 22 Section 112 EP&A Act 1979.
 23 Sections 43 & 48 (REPs) and 59 & 67 (LEPs).
 24 Section 87 EP&A Act 1979.
 25 Section 113 EP&A Act 1979.
 26 Section 119 EP&A Act 1979.
 27 Section 98 EP&A Act 1979.
 28 Section 123 EP&A Act 1979.
 29 Part 6 EP&A Act 1979.
 30 Section 101 as amended by the *Environmental Planning and Assessment (Amendment) Act 1985*.
 31 Section 91A as inserted by the *Environmental Planning and Assessment (Amendment) Act 1985*.
 32 Section 117 as amended by the *Environmental Planning and Assessment (Amendment) Act 1985*.

33 Section 115 as inserted by the *Environmental Planning and Assessment (Part 5) Amendment Act 1993*.
 34 The term 'threatened species' is used to encompass threatened species, populations and ecological communities and their habitats.
 35 NSW Parliamentary Debates 15/10/1997 p822.
 36 Section 76A EP&A Act as amended by the *Environmental Planning and Assessment Amendment Act 1997*.
 37 Section 76 EP&A Act as amended by the *Environmental Planning and Assessment Amendment Act 1997*.
 38 Section 76A EP&A Act as amended by the *Environmental Planning and Assessment Amendment Act 1997*.
 39 Division 5, EP&A Act 1979.
 40 At that point in time, building and subdivision were controlled under the *Local Government Act 1993* and the *Local Government Act 1919* respectively.
 41 Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005 Explanatory Note.
 42 NSW Parliamentary Debates 27/5/2005 p16332.
 43 This could previously be assessed by the Minister under the state significant development provisions of Part 4
 44 This could previously be assessed by the Minister under Part 5 if the project proponent is also the determining authority and an EIS has been obtained.
 45 Section 75D as inserted by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*.
 46 NSW Parliamentary Debates 27/5/2005 p16332.
 47 Section 75J as inserted by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*.
 48 Section 119 as inserted by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*.
 49 Section 75G as inserted by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*.
 50 NSW Parliamentary Debates 27/5/2005 p16332.
 51 If the Minister is the proponent, the project must be subject to either a commission of inquiry or a report by a panel of experts.

- ⁵² Section 75K, 75L and 75Q of the EP&A Act as inserted by the *Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Act 2005*.
- ⁵³ Section 75T of the EP&A Act as inserted by the *Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Act 2005*.
- ⁵⁴ Section 75U of the EP&A Act as inserted by the *Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Act 2005*.
- ⁵⁵ Standard Instrument (Local Environmental Plans) Order 2006.
- ⁵⁶ The Major Projects SEPP was originally gazetted as the SEPP State Significant Development 2005 and later amended with the SEPP State Significant Development (Amendment No 1) 2005 to be renamed the Major Projects SEPP to be consistent with Part 3A.
- ⁵⁷ NSW Parliamentary Debates 28/2/2006 p20731.
- ⁵⁸ Section 94EF as inserted by the *Environmental Planning and Assessment Amendment Act 2006*.
- ⁵⁹ NSW Parliamentary Debates 15/5/2008 p7695.
- ⁶⁰ Section 55, *Environmental Planning and Assessment Amendment Act 2008*.
- ⁶¹ NSW Parliamentary Debates 15/5/2008 p7695.
- ⁶² NSW Parliamentary Debates 15/5/2008 p7695.
- ⁶³ For more information on biodiversity certification under the previous and the new regimes, please see the Parliamentary Research Service E-Brief 09/2010 *Biodiversity Certification*.

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ISSN 1838-0204