Legislation Update – The New Environmental Planning and Assessment Act 1979

On 1 March 2018 the new Environmental Planning and Assessment Act 1979 commences. The new Act is a complete overhaul of the old Environmental Planning and Assessment Act 1979.

The overriding purpose of the new Act is to improve the planning system through faster, simpler processes, enhanced strategic planning, to improve community confidence and participation, and enable more balanced and transparent decision-making.¹

Rationalisation of the old Act was long overdue, with amendment upon amendment upon amendment over the years, which saw new sections squeezed in between existing sections. Although not quite resembling the awkward section number system contained in Local Government Act 1919 before its repeal in 1993, or the Corporations Act 2001, the old Act had become quite cumbersome - section 121ZKA in point.

Many of the provisions of the old Act are carried forward, unchanged, into the new Act. New section numbers for some of the more frequently used sections of the old Act are listed below. There are some entirely new provisions contained in the new Act. This article focusses on some of the changes in the development assessment and certification parts for the new Act.

New Structure and Numbering System

The explanatory note that accompanies the new Act says that the new Act re-organises, revises and simplifies the provisions of the old Act by:

- moving matters of detail (particularly savings and transitional provisions) to the regulations under the principal Act, and
- re-arranging the provisions of the principal Act with new Parts dealing with administration, appeals and infrastructure contributions, and
- re-writing in plainer and less complex terms provisions relating to planning administration, building and subdivision certificates and criminal and civil enforcement, and
- clarifying the provisions of the principal Act that give rise to criminal sanctions, and
- implementing a decimal divisional and section numbering system.

There are 10 Parts to the new Act. Plan making and development assessment remain in Part 3 and Part 4 respectively in the new Act. Part 5 continues to deal with the environmental impact of activities. The new Part 6 contains provisions concerning certification, previously contained in the old Part 4A and Part 4C, sections 109C to 109ZL. The new Part 7 is titled infrastructure contributions

¹ Minister’s second reading speech, Hansard 18 October 2017.
and finance, and contains the former developer contributions provisions. All appeal and enforcement provisions are contained in **Part 8** and **Part 9** respectively.

The most significant change is one of structure and form - the provisions of the new Act are now based on a decimal divisional and numbering system. Section numbers start with 1.1 and progress in increments of 0.1. The last section of the Act is section 10.16.

The Department of Planning and Environment has prepared a conversion guide identifying old to new section numbers, which can be found on the [Department’s website](#).

A comparison of the more common sections is listed below:

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We have prepared a comparison table of the **building and certification sections** of the new and old Acts, which can be found on our website.

**Commentary on Selected New Provisions**

**Designation of “Consent Authority”**

The identification of the consent authority for particular classes of development, formerly dealt with in environmental planning instruments, is now dealt with in Division 4.2, sections 4.5 to 4.8 of the new Act. The consent authority is the body who has the authority to issue a development consent under Part 4 of the new Act (s4.2(2)).

Depending on the class and location of the proposed development, the consent authority will be either:

- the Independent Planning Commission
- the Sydney district of regional planning panel for the area
- a public authority (other than a council)
- the local council for the area

The powers of a Council as consent authority are significantly limited under the new Act. Section 4.8 of the new Act provides that where a Local Planning Panel has been established, the council’s power
as consent authority **must** be exercised by that panel or a delegate of the council, and **not** the councillors (section 4.8). Certain functions such as the assessment of applications and the determination of modification applications remain with the Council (s4.8(3)).

**Development Assessment**

The development application process remains the substantially the same under the new Act, including the process for State significant development and designated development. Of particular note is section 4.15(1), which is identical to the former section 79C(1).

The former requirements in respect of development control plans (s79C(3A)) are identical to the new section 4.15(3A).

**Determination of Applications**

Two new types of conditions of consent may be imposed. One is a condition that “specified conditions in the consent “cease to have effect on the issue of an authorisation under another Act relating to that development (or any part of it)”. The other is a condition to secure or guarantee funding for or towards the carrying out of works or programs required by or under the consent (see sections 4.17(4A) and (4B)).

The Planning Secretary has a new power in respect of applications for integrated development to “act on behalf of an approval body” in certain circumstances (section 4.47(4A). The decision of the Secretary is taken to be the decision of the approval body.

**Modification Applications**

An important change has been made in respect of modification applications. The consent authority for such application must take into consideration “the reasons given by the consent authority for the grant of the consent that is sought to be modified” (section 4.55(3)). This is designed to stop applicants obtaining approval for development in segments that would be unacceptable if proposed in the original application. It will be interesting to see how this new section is applied.

**Certification**

Certification remains substantially the same under the new Act, with some exceptions. There is a subtle but significant change to the requirement to appoint a principal certifying authority. The new Act (section 6.6) provides that a development consent does not authorise building work until a PCA is appointed. Previously the Act prohibited the commencement of building work until the PCA was appointed (section 81A(2)(b)).

The significance in section 6.6 is that a person who commences work without appointing a PCA is liable to be prosecuted for carrying out work without consent and, more importantly, all subsequent work carried out pursuant to the consent is unlawful. The consequences of this new requirement are potentially far reaching, for example work carried out in breach of section 6.6 will not qualify as building work for the purposes of lapsing of the development consent.

The new Act introduces the concept of an “owners building manual”, which is a document that is prepared and provided to the owner of a class of building prescribed by the regulations prior to issue of the occupation certificate (section 6.27).

As discussed in our article dated **20 November 2017**, the new Act now enables a certifier to issue a complying development certificate subject to a **deferred commencement condition**. The power to issue such a certificate is found in section 4.28(9A) of the new Act. The section as enacted is
identical to the Bill as analysed in our article. Certifiers should take note of the limitations on deferred commencement conditions discussed in our article.

The Court now has a new power to declare a complying development certificate invalid (section 4.31). The power may only be exercised if proceedings are commenced within 3 months of the date of the certificate and “the certificate authorises the carrying out of development for which the Court determines that a complying development certificate is not authorised to be issued”. It remains to be seen how this is applied by the Court, but it appears to allow the Court to stand in the shoes of the certifier and determine for itself whether the certificate should have been issued.

If you need further advice on the requirements of the new Act please contact us at Planning Law Solutions.

This article is not intended to be legal advice. For further information about this case note or any planning law advice or representation in the Land and Environment Court, please contact Planning Law Solutions.