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## PLANNING SYSTEM

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### Local planning

<b>Circular</b>	PS 05–009
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<b>Related</b>	

# Changes to ministerial directions under section 117 of the EP&A Act

This Circular provides councils, other consent authorities, the planning and development industry and the community with an overview of the recent changes to ministerial directions about the local environmental plan-making system under section 117 of the *Environmental Planning and Assessment Act 1979*.

## Introduction

On 16 June 2005 assent was given to the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005 (the 'Reform Act'). The majority of the Act commenced on 1 August 2005 with the insertion of the new Part 3A into the Environmental Planning and Assessment Act (EP&A Act) dealing with the assessment and approval of major projects.

The Reform Act also includes amendments to Parts 3 and 4 of the EP&A Act to facilitate changes to the plan making framework and local development assessment. In particular, changes have been made to section 117 of the EP&A Act to enhance the Minister's power to issue directions that require the inclusion of provisions or provide the principles to be observed in the preparation of local environmental plans (LEPs) to achieve or give effect to particular planning principles, aims, objectives or policies.

These amendments will commence on Friday 30 September 2005.

## Purpose of the changes

The Reform Act changes how section 117 directions relate to the LEP-making process. These changes will, when combined with other elements of the Reform Act, provide greater clarity and direction to councils concerning the State's environmental planning objectives and reinforce the effectiveness of the local plan-making process.

## What is the effect of the changes on existing section 117 directions?

The Reform Act repeals all section 117 directions in force prior to the commencement of section 117(2A) on 30 September 2005. At this time new directions will be issued. The new directions consolidate and update the previous directions.

Additionally, the Reform Act repeals section 71 of the Act and the associated ministerial section 71 determinations, transferring the provisions that control the content and format of a LEP to the new sections 33A, 33B and 33C. These provisions provide for the preparation of standard environmental planning instruments (EPs), the setting of mandatory timeframes for new LEPs and the electronic delivery of new planning instruments.

## How does the Planning Reform Act affect section 117 directions?

The Reform Act clarifies the operation of section 117 directions through the introduction of section 117(2A). This provides that directions may:

- be given to a particular council or to councils generally
- require a draft LEP to include provisions that achieve or give effect to particular aims, principles, objectives and policies
- require a draft LEP to be strictly consistent or substantially consistent with the terms of the direction (or provide for circumstances in which inconsistency can be justified).

The Reform Act also introduces section 117(5), which prevents judicial review proceedings in any court challenging the validity of any aspect of any LEP (or draft or purported plan) relating to compliance with section 117 of the EP&A Act.

The Reform Act replaces section 66(1)(b)(ii) and (iii) of the EP&A Act, and requires, as for the repealed section, that certain documents be publicly exhibited with any draft LEP. These documents include the section 117 directions that substantially govern the content and operation of the draft LEP, and a statement declaring that a direction has such an effect.

Finally, the Reform Act amends section 68 of the EP&A Act to enable the Director-General of Planning and council to agree to the council making changes to a draft LEP, or for the Director-General to return the draft LEP so that council can make any changes, so that it accords with a section 117 direction amongst other things.

### **How will the section 117 directions relate to the Standard LEP?**

The Reform Act provides for the Governor of NSW to prescribe the form and content of standard environmental planning instruments (to be used for preparing an LEP or other EPI). In the case of LEPs, this is the Standard Instrument for principal local environmental plans (Standard LEP).

Section 117 also empowers the Minister to give directions as to the provisions to be included, or the principles to be observed, in the preparation of draft LEPs. It is envisaged that the section 117 directions will generally be utilised to implement policy objectives of State and regional environmental planning significance through the local provisions within LEPs. In this way the section 117 directions will complement the Standard LEP, providing the overall policy direction to a particular council or to councils generally.

The section 117 directions may also provide the principles to be observed in the preparation of draft LEPs (which complement the form and content prescribed by the Standard LEP) such as required consultation with public authorities over particular provisions, the appropriate use of particular zones, and so forth.

### **Can an LEP be inconsistent with a section 117 direction?**

The Reform Act provides that a section 117 direction can specify whether a draft LEP must be either strictly consistent or substantially consistent with that direction. It also allows for circumstances in which any inconsistency can be justified.

A number of the section 117 directions provide for matters where inconsistency would be justified in a draft LEP. Generally for this to be allowed in these circumstances councils are required to provide a strong case as to why a variation of the direction is warranted. Council will need to demonstrate this via:

- a strategy dealing with the particular issue prepared by council and approved by the Director-General

- an environmental study under section 57 of the EP&A Act, or
- compliance with any relevant regional strategy prepared by the Department.

The main focus of these requirements is to encourage councils to prepare draft LEPs within a strategic framework and discourage the preparation of ad hoc LEPs.

If local circumstances require a deviation from a direction, then this should be justified in the context as to how the zone or provision operates across the local government area. The Reform Act however, reinforces the importance of draft LEPs being consistent with section 117 directions through the amendment to section 68 of the Act, which allows the Director-General to return a draft LEP to a council where it has not taken into account a direction.

### **What about the transitional period until the new LEPs are required?**

The existing section 117 directions will be repealed on the commencement of the Reform Act. A set of new directions will be introduced and will carry over key policies from the old directions.

When the Standard LEP is finalised, the policy of some section 117 directions will be transferred to the Standard LEP. Over time additional section 117 directions will be introduced to bring into force key policy initiatives that flow from strategic work, such as the Sydney Metropolitan Strategy and other regional strategies.

### **What about existing draft LEPs?**

From the 30 September 2005, the section 117 directions in force prior to that date will only apply to a draft LEP that is submitted to the Director-General under section 68(4) of the Act before 31 January 2006 or is the subject of a Director-General's report to the Minister (under section 69) that is furnished before 31 January 2006.

All other draft LEPs will have to comply with the new section 117 directions as in force on 30 September 2005.

These transitional arrangements are set out in the Environmental Planning and Assessment Amendment (Planning Instruments and Development Consents) Regulation 2005, which will commence on 30 September 2005.

Councils preparing draft LEPs should ensure that their draft LEP is consistent with the set of directions that apply at the relevant time.

Where a draft LEP has been publicly exhibited and a new section 117 direction is subsequently introduced, council shall review their draft LEP in light of the new direction and ensure that their draft LEP is consistent with that direction. If this is the case and changes are made to the draft LEP, council should consider whether those changes are significant enough to warrant placing the draft LEP on public exhibition again.

## Further information

The updated and consolidated section 117 directions are available on the Department's website

[www.planning.nsw.gov.au/planning\\_reforms](http://www.planning.nsw.gov.au/planning_reforms).

For further information about section 117 directions, contact:

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### Authorised by:

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