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## PLANNING SYSTEM

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### Local planning

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<b>Related</b>	

# Changes to Parts 3 and 4 of the EP&A Act

This Circular provides councils, other consent authorities, the planning and development industry and the community with an overview of changes to Parts 3 and 4 of the *Environmental Planning and Assessment Act 1979*.

## Introduction

On 16 June 2005 the NSW Parliament assented to the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (the Reform Act).

The Reform Act includes changes to Part 3 and 4 of the Environmental Planning and Assessment Act (EP&A Act). These changes commenced on 30 September 2005.

Broadly, these changes:

- facilitate the modernisation of local environmental plans across NSW
- clarify the status of development control plans (DCPs) and promote the reduction in the number of such plans
- allow for the use of DCPs and staged development applications to achieve master planning objectives.

Amendments to the Environmental Planning and Assessment Regulation 2000 have also been made to address more detailed issues concerning development control plans, staged development applications and transitional arrangements for the introduction of the changes. These amendments are contained in the Environmental Planning and Assessment Amendment (Planning Instruments and Development Consents) Regulation 2005, which commenced on 30 September 2005.

## How do the changes affect local environmental plans?

The Reform Act contains a number of new provisions that together require the preparation of new local environmental plans (LEPs) across NSW that are more consistent in format and content.

The intent of these changes is to modernise local planning controls and make the planning system simpler to understand and use.

## The Standard LEP

Section 33A of the Act enables the development of standard instruments for environmental planning instruments (EPIs), namely State environmental planning policies, regional environmental plans and LEPs.

It is intended that this provision will be used to give legal force to the Standard LEP.

Section 33A enables standard instruments to contain mandatory provisions, instructions for preparing provisions, and discretionary provisions.

Amendments to the standard instrument will result in automatic amendment of the relevant provisions within LEPs that are in force across the State. This, when combined with electronic delivery, enables plans to be kept up to date and reflect all applicable amendments.

Use of the standard instrument is mandatory for local environmental plans, subject to the transitional arrangements outlined below. Consistency will be checked by the Department of Planning as each plan is drafted. Changes to section 65 and section 69 of the Act require the Director General to be satisfied that the draft plan is in accordance with the Standard LEP before issuing a certificate to publicly exhibit a plan, or furnishing a report to the Minister to make a plan.

The ability to prepare standard instruments will replace the need for ministerial determinations on the format of State environmental planning policies, regional environmental plans and LEPs. Therefore, the Reform Act repeals sections 38, 52 and 71 of the EP&A Act.

### **Mandatory timeframes for new LEPs**

The Reform Act provides new powers for the Minister to ensure that the modernisation of LEPs occurs in a reasonable time.

Section 33B of the Act enables the Minister to set mandatory timeframes for councils to prepare new instruments. This is achieved by allowing the Minister to create a staged repeal program for existing LEPs. The staged repeal program may:

- specify dates for the repeal of existing LEPs
- identify key milestones for the preparation of new plans, such as the submission of draft plans
- allow for the postponement of the repeal of an instrument when the making of an instrument is delayed
- establish requirements for the periodic review of LEPs and the submission of reports of each review to the Director-General.

Letters were sent to local councils in April this year providing preliminary advice from the Department of Planning about the timeframe in which new plans will be required. The Department will shortly contact councils to discuss implementation timeframes for the making of the plans. This timetable for developing new plans will be submitted to the Minister to be formalised into a staged repeal program that will commence at the same time as the Standard LEP.

New powers have been included in section 33B of the Act to enable the Minister to prepare a replacement LEP where the existing plan has been repealed, pending the making of a replacement instrument in accordance with the Reform Act provisions. Such a plan is to adopt the provisions of the standard instrument with any modifications the Minister considers necessary. The Minister must give public notice of the proposed plan and invite submissions on the draft plan.

In these circumstances the Minister can direct the local council to pay the Department's reasonable costs of making the plan. The Minister may also request the local council to provide copies of any draft plans, maps or other relevant documents held by the council that may assist the preparation of the replacement plan.

The Minister is also able to appoint a planning administrator to a council under section 118 of the Act in order to prepare the LEP, if the local council does not comply with the staged repeal program's requirements for the preparation and making of a replacement LEP.

It is intended that the Minister's new powers to make a replacement LEP or appoint an administrator would be used in exceptional circumstances, for example where a local council refuses to prepare a new plan or the delay in making the plan is unreasonable and unjustifiable.

### **LEPs will implement the State's planning objectives**

Changes have been made to section 117 in the Act in order to enhance the Minister's power to issue directions that require the inclusion of provisions in LEPs to achieve or give effect to the State Government's planning principles, aims, objectives or policies.

Under the new section 117, directions may specify that LEPs must be strictly or substantially consistent with the terms of the direction, or provide for the circumstances in which an inconsistency can be justified.

These changes will ensure the State's policy priorities, for example those identified in the State's regional strategies, are reflected in LEPs.

### **Other enhancements to the local planning process**

The Act includes a number of amendments to streamline and enhance the process for making LEPs. These changes will:

- ensure that local councils prepare new LEPs in accordance with the Standard LEP (this is verified prior to public exhibition of the draft plan and sending the plan to the Minister for approval)
- require a statement to be issued with the exhibition of a draft LEP that clarifies to the community that the plan is made in accordance with the Standard LEP
- allow the council and the Director General to agree to make changes to the draft plan after it has been submitted to the Director General under section 68
- allow the Director General to send a LEP back to council so it can amend the draft plan in accordance with a standard instrument or any directions under section 117 of the Act.

### **Electronic delivery of LEPs**

The Reform Act establishes a new power for the Minister to facilitate the electronic delivery of new planning instruments. Under section 33C, the Minister may determine standard technical requirements with respect to the preparation of instruments, plans and other documents made, referred to or adopted under the Act.

These technical requirements are presently being developed by the Department of Planning and the Parliamentary Counsel's Office.

### **Transitional arrangements for LEPs**

Transitional provisions have also been included in the Reform Act to assist in the smooth implementation of these requirements for new LEPs.

The Reform Act also enables the Regulations to include provisions that amend the savings and transitional provisions in the Act.

The Regulations include provisions that amend the Reform Act's savings and transitional provisions relating to DCPs, master plans and section 117 directions.

As a result, the savings and transitional provisions in the Act and the Regulations should be read together.

### ***Compliance with the Standard LEP***

There are a number of local councils that are already well advanced in preparing new principal LEPs, and have invested significant effort and resources into this process. Transitional provisions are included in the Act to allow councils in these circumstances to proceed with making a principal LEP that does not comply with the standard instrument. The effect of this provision is that:

- councils that have just given notice of the intent to prepare a principal LEP must comply with any imminent regional strategy and the Standard LEP (i.e. at section 54 stage)
- councils that submit a draft plan to be certified for exhibition (i.e. at section 65 stage) will be assessed on a case-by-case basis, but generally should comply with the Standard LEP
- councils with principal LEPs at post-exhibition stage (i.e. at section 68 stage) will generally be able to proceed with draft LEPs that do not comply with the Standard LEP if they meet State and regional planning policies and the council agrees to prepare a new plan that complies with the Standard LEP within 2 to 5 years.

The Department of Planning has written to local councils to advise where they may proceed with making a plan that is already well advanced.

### ***Model Provisions***

The Model Provisions and section 33 of the Act are repealed by the Reform Act. Therefore, transitional provisions are included in the Act to continue the operation of the model provisions for the purpose of existing EPIs that adopt them. They also enable the Minister to amend or revoke such provisions as necessary.

Transitional provisions have also been included in the Regulation to enable draft LEPs that have already been initiated to continue to adopt the Model Provisions provided by the repealed section 33 of the EP&A Act. This would only be relevant for draft LEPs that are not required to comply with the provisions in the Standard LEP.

### ***Section 117 directions***

The Reform Act also revokes all existing section 117 directions. A consolidated and updated set of section 117 directions was also issued on 30 September 2005. The new directions consolidate and update the previous directions but do not establish new policy.

The transitional provisions in the Regulation enable the former section 117(2) directions to continue to apply to draft LEPs that are submitted to the Director-General under section 68(4) of the Act, or those that are the subject of a report under section 69 of the Act, before 31 January 2006.

This means that any LEPs submitted to the Director-General or Minister after 31 January 2006 will need to comply with the new set of section 117 directions issued on 30 September 2005.

### ***Amendments to existing LEPs***

To achieve a single plan for each local government area, both the Department and councils will need to direct effort to strategic planning and preparation of new principal instruments. Councils have therefore been advised to avoid, where possible, resolving to prepare minor amendments to existing plans. There will be instances, however, where it is necessary to prepare a draft amending plan in advance of the new Standard LEP.

Examples of where an amendment may be necessary include the following circumstances:

- the amendment is to facilitate an employment generating activity
- existing provisions jeopardise or undermine State government policy
- the amendment implements an agreed strategic direction for development in the area, including land release or preservation of strategic corridors
- matters where the council has completed strategic work and delays in implementing recommendations would be unreasonable and inefficient.

When notifying the Director-General under section 54 of the intention to prepare an amending plan, councils will need to refer to the above criteria. Any LEP amendment will also need to be consistent with the Standard LEP as far as possible, to facilitate consolidation into the new instrument. Councils should determine exceptions on a case by case basis in consultation with the Department.

This does not impose a moratorium on amendments to LEPs, but rather a rational approach to managing available resources, to achieve planning reform objectives and good planning outcomes.

## **What other enhancements have been made to the plan making process more generally?**

### **A clearer hierarchy of planning instruments**

Amendments have been included in the Reform Act to clarify the hierarchy that generally applies between planning instruments. This will help to resolve any inconsistencies between the provisions of different planning instruments.

This means that, in the event of an inconsistency, unless otherwise provided for, State environmental planning policies will override regional environmental plans and LEPs. Regional environmental plans will override LEPs.

### Minor amendments to EPIs

The Reform Act introduces section 73A, a new provision allowing for minor amendments to be made to EPIs without complying with the procedures for making a plan. This may apply where the amendment is to correct an obvious error or make consequential, transitional or machinery amendments.

If councils have minor amendments to LEPs that fit the criteria, the Department will administer a process entailing Council notification of the proposed amendment, and, on the Department agreeing that it is minor in nature, a report to the Minister.

### How will the changes affect DCPs?

The Reform Act introduces a new Division into Part 3 of the EP&A Act to provide for the preparation of DCPs. The changes:

- encourage the reduction in the number of DCPs
- encourage local councils to review their current development control plans to ensure that they reflect current policy and are consistent with the provisions in EPIs
- clarify the relationship of DCPs to EPIs
- enable an owner of land to prepare a development control plan for a site in order to replace the need for master plans.

The Reform Act firstly moves the development control plan (DCP) provisions into a separate division of Part 3, to clarify that DCPs are not EPIs.

Section 74C provides that DCPs may be prepared by a planning authority to make more detailed provision with respect to development in order to achieve the purpose of an EPI.

Local councils may prepare a DCP under LEPs, or the Director-General may prepare such plans under State environmental planning policies and regional environmental plans.

For new DCPs prepared by local councils, the Regulations provide that a copy of the plan must be provided to the Director-General within 28 days of it being made.

The Act and Regulations also provide that copies of DCPs are to be made available for purchase, or for public inspection free of charge.

### Reduction in the number of DCPs

The Reform Act will drive the reduction in the number of development control plans applying to a site by allowing only one DCP for each planning authority to apply to a site. This means that there may be one local council and one Director-General's DCP.

To comply with this requirement, a DCP may cover the whole local government area, a precinct or a site. The provisions allow a DCP to adopt or amend the provisions of another DCP. For example, a site specific DCP would adopt or amend the provisions of other DCP that apply to the site, and then exclude that site from the area to which those other DCPs apply.

Section 74C also clarifies that a DCP may not duplicate the provisions of an EPI, be inconsistent with an instrument or contain provisions that prevent compliance with an instrument.

The Department will monitor the making of DCPs and assist councils to ensure that DCPs do not contravene these provisions in the Act. It will be important for local councils to have regard to these provisions as in future any provision in a DCP can be challenged in Court and invalidated if it is found to be inconsistent with the relevant LEP.

Transitional provisions will apply to preserve existing DCPs. These are outlined further below.

### Site specific development control plans

By widening the scope and certainty of DCPs, the Reform Act removes the need for master plans. Master plans have become a de facto fourth layer in the planning system. To simplify the system, the process of master planning can be undertaken through existing tools in the legislation – DCPs and staged development approvals.

The Reform Act partly delivers this by allowing a development control plan to be prepared by, or on behalf of, an owner of land. It also allows staged development applications to be used as an alternative to preparing a DCP where this is required by an EPI.

Section 74D states that an EPI may require a DCP to be prepared for a site before development may be carried out. The provision also provides for land pooling, by allowing an EPI to specify the number of owners within a defined area, who must jointly prepare a DCP before development can be carried out.

The policy objective of Section 74D is to prevent planning authorities from stopping development by refusing to make a DCP. The provision allows owners to submit a development application where council refuses a DCP or delays in making the DCP by more than 60 days. The usual appeal rights would be available in relation to the development application.

The Reform Act, in conjunction with changes to the Regulations, allows the planning authority to request further information from the relevant land owner and extend the 60-day time limit accordingly. This would operate where a poorly prepared DCP has been submitted, or insufficient information has been provided to enable the planning authority to make a decision.

The Regulations require the information requested by the planning authority to be necessary for the purpose of making the DCP. The information must also be related to any matters, relevant to the DCP, identified in the planning instrument. If the applicant for the DCP refuses to provide the additional information, the DCP is taken to have not been submitted. Where the owner does not respond to the request, the timeframe for making the DCP will continue to be extended.

The Regulations also allow the planning authority to determine fees for the assessment of an owner-initiated DCP. If such a draft DCP is prepared by the local council or Director-General, the owner of the land, as specified by the planning authority, must pay to the planning authority a preparation fee determined by the planning authority.

Where there is more than one owner of the land to which a draft DCP applies, and an EPI allows, the planning authority may determine that the fee payable is to be apportioned between the relevant owners.

The assessment fee or preparation fee must not exceed the reasonable cost to the relevant council, or to the Director-General or Department, of assessing or preparing the draft DCP, carrying out any associated studies and publicly exhibiting the draft DCP.

The transitional provisions also carry forward any requirement for an assessment or preparation fee to be paid by a lessee, rather than an owner, under previous clauses of the Regulations that are repealed by these amendments.

It is intended that more detailed provisions on the procedures for owner-initiated DCPs will be developed and included in the Standard LEP in the future. In addition, the Department will issue further guidance on the new DCP provisions as required.

## **What are the transitional provisions for DCPs?**

### **DCPs**

New DCPs made after the Act's commencement will generally need to be prepared in accordance with the new requirements for DCPs under Division 6 of Part 3 of the Act.

Transitional provisions in the Act deem any DCP made before 30 September 2005 to have been prepared under the amended Act. Additional transitional provisions in the Regulations provide that existing DCPs made before the Act's commencement do not have to comply with the new requirements in section 74C of the Act until a new DCP, or principal LEP that complies with the Standard LEP, is made for the same land.

The requirements in section 74C include that only one DCP may apply to a site, and that provisions in a DCP must be consistent with and not prevent compliance with a LEP (or any other EPI) applying to the same land.

Any amendment made to an existing DCP constitutes the making of a new DCP. This means that if a council makes a new DCP, or amends an existing DCP from 30 September 2005, it will need to review any other DCPs that apply to that land and make any necessary amendments to comply with section 74C of the Act.

The transitional provisions also mean that, once a council makes a new principal LEP that adopts the provisions of the Standard LEP, it will need to ensure that all DCPs applying to the same land as the LEP are consistent with the Act.

Therefore, local councils will not be required to re-make all DCPs immediately. It is expected that councils will review their DCPs at the same time as preparing amendments to existing DCPs or preparing their new principal LEP.

### **Site-specific DCPs (formerly master plans)**

Transitional provisions in the Act construe any requirement for a master plan in an environmental planning instrument in force at the Act's commencement to be a requirement for a DCP under the new section 74D of the Act.

The definition of a master plan includes a development plan, a precinct plan or another plan (other than an EPI, DCP or contributions plan) that makes provisions for or with respect to the development of land, and that has been made or adopted by the Minister or a public authority.

The transitional provisions also ensure that the requirements in such EPIs, relating to the matters to be included in, and the procedures for making a master plan, still apply to any DCP made under that EPI.

The intended effect of this provision is that new DCPs made under master plan provisions in EPIs will need to comply with section 74C, including the requirements for one DCP per site and consistency with EPIs. However, the procedures for making the DCPs are those that are set out in the EPI rather than those set out in section 74D (including the 60-day time period for the planning authority to make a decision).

The new provision in the Reform Act that allows an owner to submit a staged development application instead of a DCP (section 83C) will be available where an EPI presently requires a master plan.

### **Deemed DCPs**

Transitional provisions in the Act also deem master plans made or adopted under an EPI before the Act's commencement to be DCPs. Transitional provisions in the Regulations deem master plans lodged under a provision of an EPI, but not made or adopted at the time of the Act's commencement, to also be DCPs. These DCPs are known as 'deemed DCPs'.

The Regulations also make it clear that section 74C (4), which enables a DCP to amend, substitute or revoke another DCP, does not apply to deemed DCPs.

This means that any master plan made or lodged before the Act's commencement will be known as a deemed DCP but continue to operate under the rules for amendment and revocation that applied when it was made. It also means that master plans lodged before the Act's commencement can be made under an existing EPI but will be known as a deemed DCP and will continue to operate under the rules set by that EPI. It is expected that any Plan made under previous master planning provisions will be renamed as a DCP when it is made.

The Regulations provide that deemed DCPs will have to comply with the new requirements for DCPs in section 74C (2) and (5) of the Act once a new principal LEP that complies with the Standard LEP is made for the same land.

This means that, once a new principal LEP (that complies with the Standard LEP) is made, councils will need to review and remake their deemed DCPs (along with all other DCPs) to comply with the requirements under section 74C (2) and (5). These requirements are that only one DCP per planning authority may apply per site, and DCPs must be consistent with and not prevent compliance with a LEP for the same land.

When deemed DCPs are re-made, the replacement DCP must comply with the Act and may be amended by another DCP in accordance with section 74C (4).

Finally, the Regulations provide that a requirement in an EPI made before 31 December 2005 for a master plan will be construed to be a requirement for a DCP. This means that the master planning provisions in any EPI made before the end of 2005 will continue to apply. DCPs made under these provisions must deal with the matters identified in the EPI and be made in accordance with the procedures in the EPI.

EPIs made from 1 January 2006 will no longer be able to include master planning provisions. Instead, such EPIs will need to rely on the new DCP provisions under Division 6 of Part 3 of the Act.

### **What changes allow for staged development applications?**

The Reform Act enhances the existing provisions in Part 4 of the EP&A Act for staged approvals. New provisions establish clearer procedures for the lodgement, assessment and approval of staged development applications.

These provisions apply to local development. They are intended to allow for better strategic planning for a site and the staging of complex developments.

Section 83B provides that a staged development application may set out the concept or an overview of the proposal across the whole site, with the details of each separate component of the development to be the subject of subsequent development applications.

A first stage development application could include both the concept for the entire site and a detailed proposal for the first component of the development. This could allow development on part of the site, with detailed proposals for other parts of the development to be considered later.

The staged approval provides certainty for proponents. While any consent on a staged development application remains in force, a determination on any further development applications for that site cannot be inconsistent with the staged approval.

Only the applicant can request that a staged development application be lodged. However, where a development control plan is required for a site by an EPI, section 83C allows a staged development application to be prepared and approved as an alternative to preparing a DCP. Such a development application must contain the information required for the DCP by the EPI.

A staged development application is subject to the provisions of integrated approvals and designated development, and requirements prescribed by the Regulations.

Staged approvals are intended to be flexible and tailored to the specific needs of the consent authority and applicant. The content of the application, the information required, the assessment process and assessment fees may be varied to suit the development in accordance with the Regulation.

The Regulation allows the information required for a Staged One DA to be deferred to a later application. Therefore, the consent authority may allocate the standard information requirements to different stages of a staged development application. It is intended that the information required for a Stage One development application (DA) should be appropriate to the level of detail in the application.

The Regulations provide that only the maximum fee for a single development application may be levied for all staged development applications. This means that a consent authority may apportion the fees for a staged development application between different stages of the development.

The Regulations also contain a provision to require a notice of determination of a development application to include whether a subsequent development application is required, where a staged development application has been submitted.

The Regulations provide that Stage One development applications also do not require design verification under clause 50(1A) of the EP&A Regulation unless the DA contains detailed proposals for a residential flat development or part of that development.

The existing requirements of the Regulations to obtain a BASIX certificate for development will apply to a Stage One DA if the DA relates to the erection of, or the change of use to (e.g. an office building conversion to residential), a BASIX affected building.

## **What are the saving and transitional provisions for staged development applications?**

A new section 80 (5) has been included in the Reform Act to clarify that a consent authority does not have to refuse consent to any aspect of a development for which consent is not initially granted at Stage One, but consent may be subsequently granted at a later stage. A transitional provision has also been included in the Reform Act to ensure existing consents are not affected by this provision.

A further transitional provision clarifies that the option to prepare a staged DA instead of a DCP, under section 83C of the Act, also applies where an EPI requires a master plan to be prepared.

## **Further information**

A copy of this circular and the Environmental Planning and Assessment Amendment (Planning Instruments and Development Consents) Regulation 2005 may be accessed on the Department's website [www.planning.nsw.gov.au/planning\\_reforms](http://www.planning.nsw.gov.au/planning_reforms).

### **Authorised by:**

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### **Important note**

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.

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