



Environmental Planning and Assessment Amendment Act 2017

*Public exhibition report
March 2018*

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Introduction

Objectives

The NSW Government is committed to delivering a planning system that is straightforward and ensures high-quality decisions and planning outcomes.

We have now completed an extensive policy review including consultation with stakeholders and public exhibition of proposed changes to the *Environmental Planning and Assessment Act 1979* (the EP&A Act).

The updates package restructures the EP&A Act into 10 clear parts, making the legislation easier for users to navigate, understand and apply. The new EP&A Act includes:

Modernising the objects of the Act

- Updating the language of the objects of the EP&A Act, and including new objects promoting good design of the built environment, sustainable management of heritage, and the proper construction and maintenance of buildings.

Enhancing community participation

- Requiring planning authorities to prepare and implement community participation plans that detail how they will engage with their community. These plans will have to regard community participation principles set out in the EP&A Act.
- Requiring decision makers to give reasons for planning decisions, which must then be considered in any proposed modifications to the approval.

Promoting upfront strategic planning at the local level

- Introducing local strategic planning statements that provide a clear line-of-sight from regional and district plans to local environmental plans (LEPs).
- Requiring councils to undertake regular LEP checks to ensure they remain responsive to current strategic planning objectives and local matters, such as demographic changes or an increase in infrastructure investment.
- Allowing the creation of a standard format for development control plans to make local requirements easier to navigate and apply.

Strengthening and streamlining local development processes

- Ensuring NSW agencies give advice and approvals in a timely way by giving the Secretary of Department of Planning and Environment (the Department) the reserve power to step in where there is delay or conflict in advice.
- Deterring unauthorised works and the misuse of modifications by providing councils with the ability to charge an additional fee for the consideration of modification applications.
- Encouraging confidence in complying development through better information for councils and allowing complying development certificates to be declared invalid if they do not apply the development standards.
- Introducing new compliance tools, such as a stop-work power and compliance levy, to provide councils with the powers and resources required to ensure complying developments meet community expectations.

Less complex processes for State Significant Development (SSD)

- Creating a mechanism to transfer conditions from the development consent to an environment protection licence, or other approval, to reduce regulatory duplication and better manage environmental impacts.
- Providing the Minister for Planning with clearer powers to update conditions relating to monitoring and environmental audits.

- Clarifying that conditions can impose financial securities to fund the decommissioning and rehabilitation of sites.
- Ending the transitional arrangements for Part 3A projects. All remaining projects will be modified under the SSD or infrastructure pathways.

Facilitating infrastructure delivery

- Ensuring environmental planning instruments provide concurrence or notification to public authorities on developments impacting infrastructure corridors, which will protect these areas from inappropriate development.
- Providing the Minister for Planning with the power to direct the methodology used by councils when entering into voluntary planning agreements.

Improving community confidence in regional and State decision making

- Changing the emphasis of the Planning Assessment Commission to its independence and determinative functions. It is now to be called the Independent Planning Commission.
- Removing unnecessary duplication in Commission processes, and create a new format for public hearings that improves community participation and better interrogates proposals and assessments.
- Removing the duplicated review function, where the Commission may be asked to both review and then determine the same proposal. This is expected to save between 70 and 160 days in the assessment process, while maintaining assessment rigour.

Consolidating building provisions

- Consolidating the complex building provisions into a single part of the EP&A Act, which greatly enhances usability and reduces red tape.
- Introducing measures to ensure construction is consistent with approved plans, protecting the integrity of the planning system and giving the community confidence that what is approved is what is built.

Elevating the role of design

- Including a new object for good design in the built environment. This is supported by Better Placed: an integrated design policy for the built environment of New South Wales.

Strengthening compliance and enforcement

- introducing enforceable undertakings, which are a powerful enforcement tool that enable breaches of the EP&A Act to be fixed, compensated or efficiently prosecuted.

The changes will help to create a system that balances different views and values and accommodates growth in a way that produces improved planning outcomes. The changes to the EP&A Act sit alongside other initiatives the Government has already taken to deliver a better built environment for NSW.

The benefits for the people of NSW will be better amenity and livability, more connected communities and enhanced enjoyment and protection of the local environment and heritage.

Drafting the Bill

In May 2016, the NSW Government announced it was updating the EP&A Act with the stated goal of building community confidence in the planning system by:

- implementing a simpler and clearer EP&A Act and planning system
- enhancing community participation
- strengthening upfront strategic planning
- streamlining assessment processes
- delivering greater probity and integrity in decision-making.

The EP&A Act has been amended some 150 times in the decades since its establishment. While it still provides a solid foundation for NSW's planning system, there is a need to remove the unnecessary complexity that has built up over the years and return the focus to delivering transparent processes that enable best practice planning outcomes.

To assist in identifying priority improvements and to effectively complete the review of the EP&A Act, the Department consulted stakeholders on what measures could improve community confidence in the planning system.

The consultation was held over two stages.

Stage 1 – initial consultation on issues and options

The Department conducted an initial round of targeted stakeholder consultation, with the objective of engaging with stakeholders on the scope of legislative reform, obtaining fresh feedback on issues with the planning system and testing some options for addressing those issues.

This included 10 roundtables in Queanbeyan, Gosford, Newcastle, Tamworth, Griffith, Coffs Harbour, Wollongong, Dubbo, Parramatta and Sydney. These were attended by 368 representatives from councils, industry, practitioners, community and environmental groups. The roundtables were complemented by a targeted online survey that received 185 responses.

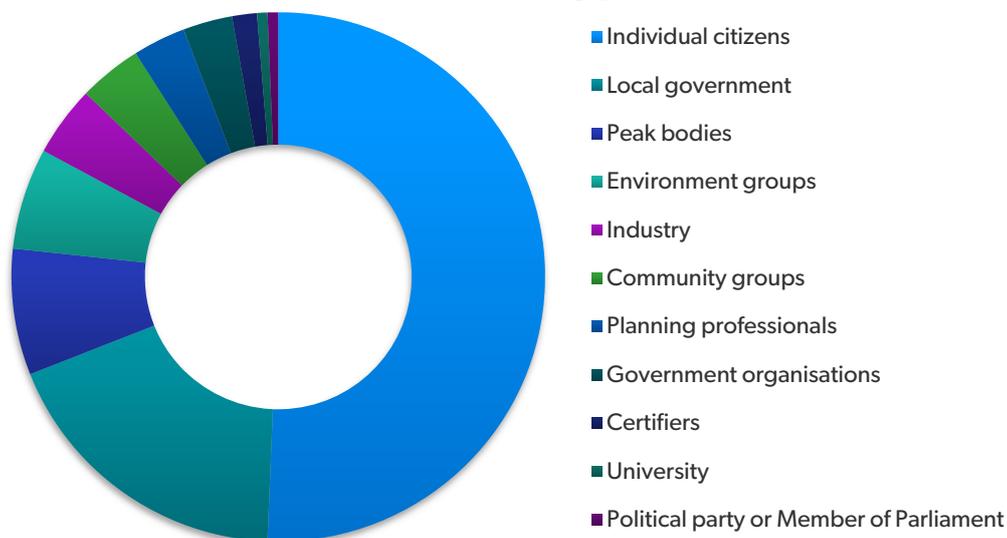
Feedback from this stage helped filter and shape proposals. The robust discussions and the exchange of views and new ideas were invaluable in the policy development process and facilitated the drafting of the draft exhibition Bill.

Stage 2 – formal consultation on proposals

The draft Bill and explanatory consultation material were released for public exhibition on 9 January 2017, with submissions closing on 31 March 2017.

The Department received 478 submissions from 468 stakeholders, including individuals, peak bodies, environmental and community groups, industry, planning professionals and local councils. Approximately 60 per cent of NSW councils made a submission.

Legislative Updates - submissions by stakeholder type



During the exhibition period, the Department held stakeholder information sessions in Parramatta, Sydney, Wollongong, Dubbo, Ballina, Albury, Orange, Queanbeyan, Newcastle and Tamworth that were attended by 291 representatives from key stakeholder groups.

Report purpose

This report provides an overview of the formal submissions received from the community and stakeholders during the exhibition of the draft Bill and explains how it was changed because of the feedback.

Overview of feedback

Response overview

Individuals and groups providing feedback did not always agree on the way forward, but the Department has listened and carefully considered all views in our proposed changes to the exhibition Bill that were made before it was enacted as planning law. To achieve this, the content of every submission was categorised according to which reform objective it addressed and analysed as positive, neutral, negative or making a suggested change. All requests for changes to the draft Bill were considered.

Overall, most of the responses agreed with the broad changes proposed for the EP&A Act, as it was agreed that the changes would improve the workability of the planning system. However, there was some concerns with aspects of the updates and there were several suggested changes.

Table 1 provides an overview of feedback received from the different stakeholder groups during the exhibition period.

Table 1 – Stakeholder response overview

Stakeholder	Overall feedback
Community and environment groups and individuals	<p>Supported the key elements in the package to update the EP&A Act including enhanced community participation, improved strategic planning, better local development assessment processes and elevating the role of design.</p> <p>Provided many alternatives for updating the EP&A Act, including the expansion of third party merit appeal rights, establishing ecologically sustainable development (ESD) as the primary object of the EP&A Act, add a climate change object and introduce a health object.</p> <p>Made a range of suggestions not directly related to the EP&A Act, particularly in relation to the expansion of complying development codes.</p>
Industry stakeholders	<p>Generally supported the overall legislative updates package.</p> <p>Supported proposals that streamlined and simplified the planning system and those that increased certainty and robustness of planning decisions, such as the use of IHAPs, standard format Development Control Plans (DCPs) and transferrable conditions. Requested including the code assessable pathway first raised in the 2013 reforms to the planning system.</p> <p>Expressed concerns about any increased costs and delays in the planning system from proposals such as the introduction of a compliance levy and ending the transitional arrangements for Part 3A projects.</p>
Planning professionals	<p>Strongly supported the package to update the EP&A Act.</p> <p>Strong support for the Local Strategic Planning Statements as an innovative mechanism for determining the vision and planning priorities for a community.</p> <p>Suggested much of the detail on how the proposals will affect the planning system was left to the <i>Environmental Planning and Assessment Regulations 2000</i> (the regulations) and that it is hard to provide specific comments, or form a view on a proposal until this detail is made available.</p>
Local Government	<p>Generally supported the major elements of the update including enhanced community participation, improved strategic planning and streamlined local development processes.</p> <p>Suggested that the proposals should not negatively affect council resources, result in a cost shift or increase administrative burden.</p> <p>Requested to be involved in the detailed design and implementation of proposals.</p>

Based on the feedback received, the Department has developed additional clauses, or modified the draft Bill's existing content. When no change is proposed, the requested changes were already or better met under different legislation, will be addressed in regulations and guidelines, are outside the scope of the review of the EP&A Act or not directly relevant.

All changes are in line with the objective of updating the EP&A Act and building on recent policy, operational and legislative improvements to the NSW planning system.

Changes to the Bill

How feedback changed the Bill

In response to stakeholder feedback during the public exhibition stage, changes were made to the draft Bill, ranging from re-wording to better achieve the objectives of a process, to the inclusion of new proposals to broaden the scope and proposed changes to better capture new considerations required for a modern planning system.

Objects of the Act

What was originally proposed

To modernise the objects of the EP&A Act, rather than changing the intent or effect of the objects, and to introduce a new object to promote good design in the planning system.

The responses to changing the objects of the Act were mostly in favour of the objects proposed in the exhibition Bill. There were a number of request for new objects of the Act, including:

- promoting business, employment and economic outcomes
- promoting housing affordability and opportunities
- promoting resilience to climate change and reducing greenhouse gas emissions
- promoting strategic planning
- promoting the proper construction and maintenance of buildings
- promoting the management of natural hazards.

During the exhibition period, the Department received many submissions requesting that a health object and an object on climate change and greenhouse gas emissions be adopted. However, after careful consideration it was decided not to progress with these as individual objects, as the current objects already address these matters.

For example, health considerations in the planning system are achieved through the design of the built environment and are already assessed as part of environmental impacts such as pollution. This is demonstrated through the recent release of Government Architect's integrated design policy, *Better Placed*. The policy lists health as the first of six NSW Government priorities to be addressed through good design.

Additionally, climate change and greenhouse gas emissions are already considerations of the planning system through the following objects:

- facilitating ecologically sustainable development
- protecting the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats.

The changes to the objects of the Acts are summarised in the table below:

Table 2 – Changes to the objects

Changes to the Bill	Case for change
Include an object promoting the proper construction and maintenance of buildings	<p>During the public exhibition of the draft Bill, many stakeholders compared the draft Bill's new objects to those proposed in the Planning Bill 2013, and argued that objects along the lines of the building object from the 2013 Bill should also be included.</p> <p>It is also considered that the revised EP&A Act include a specific object promoting the proper construction and maintenance of buildings.</p>

Building provisions make up an important part of the EP&A Act. Well-designed and constructed buildings and public spaces support communities. They promote safety, public health and sustainability, and can foster a strong sense of community, social equity, integration and identity.

A clear building object supports the safety of building construction and building performance being considered as part of assessment and decision-making processes under the EP&A Act. The inclusion of a new object is important given the NSW Government's focus on building and fire safety.

Object d – reinstate the objective of maintaining (as well as delivering) affordable housing.	Important in guiding the operational provisions under the EP&A Act and State Environmental Planning Policies (SEPPs) that aim to provide, maintain, retain and regulate affordable housing.
Object e – amend the object to refer to ecological communities and habitats.	Consistent with the Biodiversity Conservation Act 2016.
Object h – introduce a new object to promote the safe construction and maintenance of buildings.	Building safety is a key consideration of the EP&A Act and the planning system.

Community participation

What was originally proposed

Many initiatives were proposed that, if adopted, would enhance community participation in the planning system. This includes the following new requirements under the EP&A Act:

- preparation of community participation plans
- consideration of the community participation principles
- provision of a statement of reason for decisions.

Most responses to changes to the community participation section of the EP&A Act were in favour, with qualified support coming from some key stakeholders. There were requests for refinements or additions covering the Community Participation Plan (CPP) process and requirements.

In response to this feedback, the following amendments have been made to the community participation requirements:

Table 3 – Changes to community participation

Changes to the Bill	Case for change
<p>(Schedule 2[2], proposed new schedule 1 of the Act, in the exhibition Bill).</p> <p>In schedule 1 (Mandatory community participation requirements), specify that the minimum public exhibition period for a local strategic planning statement is 28 days.</p>	<p>Many stakeholders requested clear provisions on how the community would be consulted during the preparation of Local Strategic Planning Statements.</p> <p>There should be a mandatory minimum exhibition period for a Local Strategic Planning Statement, as for other strategic planning documents in the Act.</p> <p>The 28-day period is consistent with community participation plans, planning proposals and draft DCPs.</p>

Changes to the Bill	Case for change
<p>(Schedule 2[2], proposed cl. 6 of new schedule 1 of the Act, in exhibition Bill).</p> <p>Allow community participation plans to set a shorter, or no public exhibition period. 14 days will remain the default, but councils will be able to stipulate minimum exhibition periods for different types of developments (excluding complying development).</p>	<p>Requested by many stakeholders, particularly councils, as many smaller DAs are not currently exhibited. Requiring all DAs to be exhibited for 14 days would increase average approval times.</p>

Strategic planning

What was originally proposed

The exhibition Bill proposed to enhance local strategic planning by requiring councils to develop Local Strategic Planning Statements (LSPS) which outline council's land use vision. The LSPS will align regional and district plans with council's community strategic plans and set the context and rationale for development controls in council's LEP and DCPs. The new requirement will complete the planning hierarchy from state to local level.

Stakeholders and the community were generally supportive of the strategic planning sections of the draft Bill and saw merit in creating a link between local, regional and state-based planning. They also believed it would create greater community understanding of the rationale of setting zoning and development controls in response to actions resulting from district or regional plans. Concerns were raised about LSPSs introducing a new layer of planning that would not meet the objective of simplifying planning in NSW and the possibility they would restrict development or other lawful activity.

Accordingly, strategic planning provisions have been amended as follows:

Table 4 – Changes to strategic planning

Changes to the Bill	Case for change
<p>Councils must prepare and make a LSPS and review the statement at least every seven years.</p>	<p>The minimum review period was increased from at least five to at least every seven years to be more flexible and provide councils options to tie into relevant review periods, such as their LEP or community strategic plan.</p>
<p>Strengthen ward-based planning by giving ward councillors opportunity to participate in the preparation of the provisions of the LSPS that deal with the ward and endorse these provisions.</p> <p>The Minister may direct that the endorsement of those provisions is not required in specified circumstances (for example, because of the small number of persons living in the ward).</p> <p>Enhance ward-based planning by requiring councils, in preparing their LSPSs, to consider land- use priorities and actions at the ward level.</p> <p>The Secretary's requirements may provide that:</p> <ul style="list-style-type: none"> – LSPSs may have specific chapters on wards – Individual ward councillors must be consulted to determine whether there are any strategic needs specific to their wards. <p>Councils must expressly seek input from residents of a ward on strategic needs specific to their ward.</p>	<p>If the council area is divided into wards, the councillors of a ward are to be given a reasonable opportunity to participate in the preparation of the provisions of the statement that deal with the ward and to endorse their consistency with strategic plans applying to the ward.</p> <p>This facilitates strategic planning at the ward level in a way that fits into the hierarchy of strategic plans. The needs of the ward must still be considered in the context of the needs of the broader local government area and district.</p>

Changes to the Bill	Case for change
Clarify that, when councils are developing their LSPS, the statements should take into account the council's community strategic plan (CSP) to the extent the CSP is consistent with regional and district plans (Schedule 3.1[20] of the draft Bill).	<p>CSPs will be a critical input to local strategic planning statements, and councils will be encouraged to align these as much as possible.</p> <p>The proposed clarification will ensure that, where regional or district plans conflict with the CSP, the regional/district plan prevails for the purposes of the council's local strategic planning statement.</p>

Planning Panels

What was originally proposed

The exhibition Bill proposed a discretionary model for local planning panels (panel), formally known as Independent Hearing and Assessment Panels (IHAPs), in that provided councils with the reserve power to establish a panel. However, in August 2017 the Government passed legislation that adopted a mandatory model for the establishment of panels in all Greater Sydney Region councils and Wollongong City Council.

The mandatory model was adopted because these panels bring a range of benefits to the planning system, including:

- reducing the risk of conflict of interest and corruption, by ensuring that development decisions are made by people who are independent to developers
- better planning outcomes as development applications are determined on their technical merits by qualified experts, in line with the planning controls that apply in local areas
- elevating the role of the council to focus on strategic planning that the delivers on the community's goals and priorities.

The mandatory model included many provisions aiming to reduce conflicts of interest and improve the transparency of their decision-making. These include:

- banning property developers and real estate agents from sitting on a panel (where property developer is defined under the Electoral Funding, Expenditure and Disclosures Act 1981, and real estate agent is defined under the Property, Stock and Business Agents Act 2002)
- requiring meetings to be held in public and electronically recorded, with recordings available on the council website.

These measures are being extended to other planning panels, such as Sydney district panels and regional planning panels. As such, the following amendment have been made:

Table 5 – Changes to Planning Panels

Changes to the Bill	Case for change
<p>Amend the EP&A Act relating to Sydney district and regional planning panels to:</p> <ul style="list-style-type: none"> – ban property developers and real estate agents – require public meetings to be open, make electronic recordings and require that these recordings are publicly available <p>prevent members from participating in a deliberation or a decision on a matter where an interest has been disclosed.</p>	<p>It is proposed to extend these requirements to the regional and district panels, to ensure consistency between the local and regional panels.</p> <p>Regional planning panels and Sydney planning panels are established by the EP&A Act as the consent authorities for regionally significant development.</p> <p>The proposed new division 2.4 and schedule 2 of the EP&A Act will set out provisions relating to planning bodies including regional planning panels and Sydney planning panels. These provisions are substantially the same as those in the current EP&A Act. They set out the requirements for membership of the regional planning panels and Sydney planning panels, among other things.</p> <p>The changes are not expected to affect the current membership of the regional panels.</p>

Modifications

What was originally proposed

One of the basic principles of the NSW planning system and the EP&A Act is that a development consent can only be modified:

- to correct minor errors, misdescription or miscalculations
- to an extent such that the consent authority is satisfied the development has not significantly changed.

This principle ensures that developments are built to be consistent with how they were planned and approved. Over time, this principle has been eroded by the granting of retrospective approvals for works that go beyond the original consent.

It was proposed to amend the EP&A Act to prevent planning authorities, including the courts, from approving a modification in relation to works already completed, other than in limited circumstances (schedule 4.1[15] of exhibition Bill).

Stakeholders were divided on this proposal. While the policy objective was acknowledged as sound, stakeholders identified that removing retrospective modification approvals meant there was no pathway to regularise very minor or justifiable modifications.

Many stakeholders felt if this was to be the case, the framework for building certificates should be reformed to allow refusal of non-complying/un-authorized works. As a result, it is proposed to restore this pathway but introduce the ability to charge higher fees for retrospective section 96 applications as an alternative deterrent.

Based on this feedback, the modification provisions have been amended as follows:

Table 6 – Changes to modifications

Changes to the Bill	Case for change
<p>Allow planning authorities to impose deterrence fees for considering modification applications that relate to works already completed.</p> <p>The quantum/methodology for the deterrence fees will be set in the regulation.</p>	<p>While the rationale for the original proposal was supported by many stakeholders, most councils did not support the prohibition on retrospective modifications. They prefer to retain a process whereby such works can be regularised and subject to appropriate consultation and conditions. Instead, many councils sought the ability to deter retrospective modifications through the application of a fee.</p> <p>This proposal will be implemented through the upcoming Review of the EP&A Regulation.</p>

Enforceable undertakings

What was originally proposed

To give regulators greater flexibility in improving compliance, the draft Bill proposed to give the Department the ability to enter into enforceable undertakings with holders of a development consent.

Enforceable undertakings are a commonly used tool that can improve compliance outcomes in cases where fines or prosecutions may be less useful. These give a regulator the power to enter into an agreement that then requires the consent holder to rectify harm that has occurred and to commit to improved behaviours in the future.

If the consent holder then breaches the terms of the agreement, the regulator can efficiently apply to the court to enforce those terms.

In the exhibition draft Bill, the proposal to enter an enforceable undertaking applied only to the Secretary of the Department. Councils requested that the power to enter these arrangements be extended to other consent authorities.

Compliance orders can be issued by enforcement authorities to restrain breaches of a planning approval.

Accordingly, the following amendments to enforcement powers have been made:

Table 7 – Changes to enforcement

Changes to the Bill	Case for change
<p>(Schedule 9.1[1], of exhibition Bill)</p> <p>Extend the enforceable undertaking provisions so that councils can also negotiate enforceable undertakings to ensure applicants comply with the conditions of local development consents</p> <p>The Secretary of the Department will still sign off on any enforceable undertakings.</p>	<p>The mechanism of enforceable undertakings was widely supported by stakeholders, and many councils requested that they can access this new mechanism.</p> <p>The requirement for the Secretary to approve enforceable undertakings negotiated by council to ensure the terms of the undertaking are reasonable for all parties.</p>

For more information

The Department has prepared a guide to the updated *Planning and Assessment Act 1979*, which is available at: <http://www.planning.nsw.gov.au/Policy-and-Legislation/Environmental-Planning-and-Assessment-Act-updated>.

The updated Act commenced on 1 March 2018 with most of the changes discussed in this report coming into effect from this date. Others will take longer to come into effect as they require further guidance and consultation.

For further information, please call our Information Centre on 1300 305 695 or email the team at: legislativeupdates@planning.nsw.gov.au.