



PLANNING SYSTEM

Act and regulation changes

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Related	

Commencement of provisions: offences, penalties and enforcement

This circular is to advise councils, government agencies, industry and the community of changes to offences, penalties and enforcement provisions under the *Environmental Planning and Assessment Amendment Act 2014* and the *Environmental Planning and Assessment Amendment (Offences and Enforcement) Regulation 2015*.

1. Introduction

The *Environmental Planning and Assessment Amendment Act 2014* (Amendment Act) was passed by Parliament on 19 November 2014. The Amendment Act introduces significant reforms to the offences, penalties and enforcement regime under the *Environmental Planning and Assessment Act 1979* (EP&A Act). The changes include:

- the consolidation of Department and council investigative and enforcement powers; and
- substantially increased maximum penalties for offences under the EP&A Act.

The purpose of the *Environmental Planning and Assessment Amendment (Offences and Enforcement) Regulation 2015* (Amending Regulation) is to support the provisions of the Amendment Act relating to offences, penalties and enforcement. The Amending Regulation includes savings and transitional provisions for the Amendment Act. Most significantly it includes a revised schedule of penalty notice offences consistent with the new penalty regime under the Amendment Act.

Most of the provisions in the Amendment Act and Amending Regulation relating to the new offences, penalties and enforcement regime commence on 31 July 2015. However, there are delayed commencement dates for the following provisions:

- the revised penalty notice offences and amounts under the Amending Regulation commence on 14 August 2015, and can be issued in respect of offences committed on or after that date; and

- on 30 September 2015 provisions in the Amendment Act and Amending Regulation commence relating to:
 - the offence of providing false or misleading information in connection with a planning matter; and
 - the definition of 'persons associated with each other' for the purposes of disclosure of political donations and gifts.

2. Changes under the Amendment Act

New three tier offence regime

The Amendment Act introduces a new three tier system of penalties for offences, classified according to the severity of the offence (sections 125A, 125B and 125C). It also introduces new maximum penalties for those offences.

Tier 1:

Applies where it is established that an offence was committed intentionally and caused, or was likely to cause, significant harm to the environment or the death of, or serious injury to, a person. These offences may include carrying out development without approval or breaching conditions of approval.

The maximum penalties are:

- \$5 million for corporations, with a further \$50,000 for each day the offence continues; and
- \$1 million for individuals, with a further \$10,000 for each day the offence continues.

Tier 2:

Applies to most offences against the EP&A Act. It includes offences such as carrying out development without approval, or breaching conditions of approval where the offences were committed unintentionally (i.e. without the aggravating factors of Tier 1 offences). Some offences which previously attracted a lower maximum penalty will now be Tier 2 offences, such as occupying or changing the use of a building without an occupation certificate.

The maximum penalties are:

- \$2 million for corporations, with a further \$20,000 for each day the offence continues; and
- \$500,000 for individuals, with a further \$5,000 for each day the offence continues.

Tier 3:

Applies to lesser procedural and administrative-related offences (for example, knowingly providing false or misleading information in an environmental monitoring or audit report).

The maximum penalties are:

- \$1 million for corporations, with a further \$10,000 for each day the offence continues; and
- \$250,000 for individuals, with a further \$2,500 for each day the offence continues.

The new maximum penalties for offences under the EP&A Act commence on 31 July 2015 and apply to offences committed on or after this date.

Maximum penalty for offences against the Regulation

The maximum penalty for an offence against the Regulation under section 125(2) of the EP&A Act remains \$110,000, subject to any provision that prescribes a different maximum penalty for a particular offence (section 125D).

Under the Amending Regulation the maximum penalty for certain offences relating to fire safety and signs on development sites will be increased to the default maximum penalty of \$110,000.

Local councils will have the same investigative powers as the Department

The Amendment Act consolidates the investigative powers of council and Departmental officers (now known as 'investigation officers') in new Division 1C, Part 6 of the EP&A Act. Under this new Division, council investigation officers will have the same powers as Departmental investigation officers. These include the powers to:

- enter non-residential premises without first giving written notice to the owner or occupier (section 119D(1));
- require information or records for the purposes of an investigation, whether or not the officer is also entering premises (section 119J); and
- seize items that an investigation officer suspects are connected with an offence (section 119F).

Investigation officers may also enter residential premises with written notice to the owner or occupier (section 119E). An 'occupier' of premises is defined as the person with management or control of the premises, including a tenant or other lawful occupant who is not the owner.

Council investigation officers may apply the new investigative powers to all existing and new investigations from 31 July 2015.

Council officers holding an existing authorisation to exercise enforcement powers on 31 July 2015 will be considered to be council investigation officers under the amendments, due to savings and transitional provisions.

Extended time to commence proceedings for offences

From 31 July 2015, councils will be able to prosecute offences within two years of an offence coming to a council investigation officer's attention, rather than within two years of the date the offence was committed (section 127A(5A)).

Alternative sentencing options in the Land and Environment Court

From 31 July 2015, the Land and Environment Court will have a range of alternative sentencing options available to apply to guilty criminal offenders whose sentences have not yet been determined (section 126(2A)). Consistent with the *Protection of the Environment Operations Act 1997*, the Court will be able to impose various orders in addition to, or as an alternative to, a monetary penalty for planning offences. These will include orders:

- to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence, including orders to reverse or rectify any unlawful development or activity related to the commission of the offence;
- enabling a public authority to recover certain costs and expenses it has incurred as a result of the commission of the offence;
- requiring the offender to pay back any monetary benefits gained by committing the offence;

- requiring the offender to give public notice of the offence, for example in local or regional newspapers;
- requiring the offender to carry out public environmental projects or social or community activities for the benefit of affected communities; and
- requiring the offender to attend training or other courses.

A court order to carry out an environmental restoration or enhancement work or program can also be supported by requiring financial assurances from the offender for the work or program.

Offence of providing false or misleading information

The Amendment Act creates a new offence under the EP&A Act of providing information in connection with a planning matter that the person knows, or ought reasonably to know, is materially false or misleading (section 148B, which replaces the false and misleading information offence under clause 283 of the EP&A Regulation). The offence attracts a Tier 3 maximum penalty (i.e. \$1 million in the case of a corporation and \$250,000 in the case of an individual) and commences on 30 September 2015.

New section 148B of the EP&A Act, together with clause 285B of the EP&A Regulation (inserted by the Amending Regulation), clarify that a person who provides information in connection with a planning matter may include:

- an applicant for a consent, approval or certificate under the Act;
- a consultant engaged by an applicant;
- a proponent of proposed development who provides information in connection with a formal request to a planning authority for the making of an environmental planning instrument in relation to the proposed development; and
- a person who provides information required because of a condition of development consent, a transitional Part 3A project approval or a State significant infrastructure approval (other than a monitoring or audit report required under section 122C).

Savings and transitional provisions specify that the new offence of providing false or misleading information will apply to all information supplied by a person in connection with a planning matter on or after 30 September 2015. This is irrespective of the date on which the relevant application or request was made, or consent, approval or certificate was issued.

Disclosure of political donations and gifts

Section 147 of the Act currently requires:

- persons making relevant planning applications to declare, if reportable, political donations or gifts have been made by a person financially interested in the proposal (including an associate of the person); and
- persons making relevant public submissions relating to a planning application to declare, if reportable, political donations or gifts have been made by that person, or an associate of that person.

The Amendment Act clarifies that the meaning of 'persons associated with each other' for the purposes of section 147 includes directors of related companies, as well as related companies (section 147(8)).

The new definition of 'persons associated with each other' applies to all disclosures of reportable political donations and gifts made on and from 30 September 2015, whether the relevant planning application or public submission was made before or after 30 September 2015.

3. Changes under the Amending Regulation

Revised schedule of penalty notice offences

Under section 127A of the EP&A Act, authorised persons may issue penalty notices for offences against the EP&A Act or EP&A Regulation specified in Schedule 5 of the Regulation.

The Amending Regulation adds new items to the list of penalty notice offences and increases the penalty amount for most offences.

Officers authorised by the Minister or the Secretary (generally Departmental officers) will be able to issue the highest penalty notices of \$15,000 (to corporations) and \$7,500 (to individuals) for:

- carrying out a transitional Part 3A project, designated development, State significant development or State significant infrastructure without the relevant approval or consent; or
- a breach of any conditions of approval of these types of development.

Council officers and police officers will be able to issue penalty notices of \$6,000 (to corporations) and \$3,000 (to individuals) for the same offences. If these officers have issued such a notice, they should immediately notify the Department to ensure a consistent approach to enforcement. Notification should be by email to the address: compliance@planning.nsw.gov.au

The next most serious offences will be subject to penalty notice amounts of \$6,000 for corporations and \$3,000 for individuals. Examples include carrying out development without development consent or in breach of any conditions, or failing to comply with an order issued under section 121B of the EP&A Act. Less serious offences have lower penalty notice amounts.

The new penalty notice offences provisions will come into effect on 14 August 2015. Existing penalties will continue to apply to offences committed before this date. The State Debt Recovery Office codes for existing offences will remain unchanged for these offences, and a new set of codes will apply for offences on and from 14 August 2015.

Authorised persons for the issue of penalty notices

Clause 284 of the EP&A Regulation prescribes authorised officers of the Department, councils, authorised fire officers from Fire and Rescue NSW and NSW Police to be authorised persons for the purposes of section 127A of the EP&A Act. Different authorised persons are empowered to issue different penalty notices.

Clause 284(4) of the EP&A Regulation specifies the offences for which only Ministerial or Departmental authorised officers may issue penalty notices. These offences are generally certification offences and offences in relation to State significant infrastructure. Council authorised officers, police officers and authorised fire officers may not issue penalty notices for the offences listed in this clause.

From 14 August 2015, under clause 284(3)(e) and (5) of the EP&A Regulation, authorised fire officers from Fire and Rescue NSW will be able to issue penalty notices for fire related offences. The authorised fire officer should notify the relevant council on issuing a penalty notice under the EP&A Act, in the same way that authorised fire officers currently:

- notify the relevant council when they issue orders under section 121B (section 121ZE); or
- provide the relevant council with a fire safety inspection report (now section 119T(4)).

Extension of utilities orders to backpackers' accommodation and boarding houses

The EP&A Act currently enables the Local Court and the Land and Environment Court to issue utilities orders to illegal brothels where the owner or operator has failed to comply with a brothel closure order. The utilities order directs water, electricity or gas providers to cease servicing the premises. The changes made

by the Amendment Act and Amending Regulation expand the power of the Land and Environment Court to issue utilities orders against persons who fail to comply with orders to cease the use of premises as backpackers' accommodation or a boarding house (section 121ZS of the EP&A Act and clause 285 of the EP&A Regulation).

These amendments will commence on 31 July 2015. The new provisions will apply to a brothel closure order or an order to cease use of premises as backpackers' accommodation or a boarding house that was made before 31 July 2015, but only if the order has not been complied with on or after 31 July 2015.

Further Information

The Amendment Act, Amending Regulation and Commencement Proclamation are available at www.legislation.nsw.gov.au

For further information please contact the Department of Planning and Environment's information centre on 1300 305 695.

Department of Planning and Environment circulars are available from <http://www.planning.nsw.gov.au/circulars>

Authorised by:

Carolyn McNally
Secretary

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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