

EDO

Planning and development

2016



Information, not advice

- The information contained in this workshop is a guide only and is no substitute for legal advice relating to your particular issue.

Session overview

- Legal framework for planning and development
- Compliance and enforcement
- New planning reforms announced

LEGAL FRAMEWORK FOR PLANNING AND DEVELOPMENT

EDDO

Land Use Planning, the Environment and Development

- *Environmental Planning and Assessment Act*
 - *Environmental Planning and Assessment Regulation*
 - State Environmental Planning Policies
 - Multiple can apply to a single location or DA
 - Local Environmental Plans
- Note interaction with other laws e.g. threatened species, coastal management, native vegetation, pollution, etc.

EP&A Act – Objects: s5

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

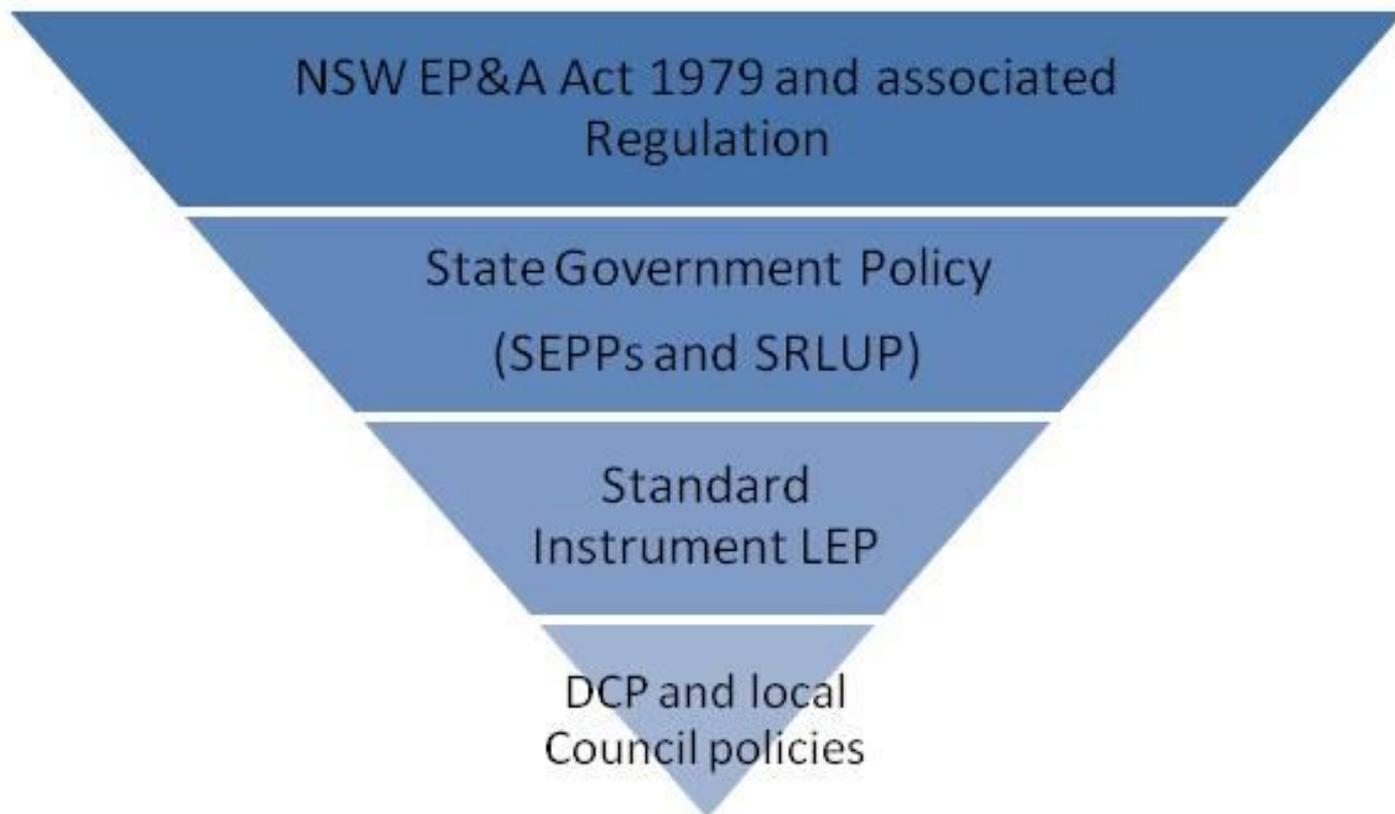
(v) the provision and co-ordination of community services and facilities, and (cont.)

EP&A Act – Objects: s5

- (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
 - (vii) ecologically sustainable development, and
 - (vii) the provision and maintenance of affordable housing, and
- (b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
- (c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

Regulatory Context and Hierarchy

- The EP&A Act establishes a regulatory hierarchy to share responsibility between State and local governments as well as creating opportunity for public participation.



EP&A Act – State Environmental Planning Policies (SEPPs)

- Environmental planning instruments which address planning issues within the State.
- Mandatory consideration under s 79C e.g. littoral rainforests, koalas, coastal protection.
- The practical effect of a SEPP is sometimes to take power away from local councils in order to prohibit certain types of development in an area or to allow certain types of development even where local controls prohibit it.
- SEPPs sometimes make the Planning Minister (who can delegate to the PAC) the decision-maker for the types of development they relate to e.g. SSD & SSI.

EP&A Act – Local Environmental Plans (LEPs)

- Environmental planning instruments which address planning issues within a LGA.
- Establish the legal framework for planning and development.
- LEPs guide planning decisions for LGAs (e.g. zoning).
- Can be multiple LEPs within a single LGA.

EP&A Act – Local Environmental Plans

- Part 3 Division 4 sets out how LEPs are to be made and amended.
- Councils prepare LEPs (planning proposals).
- Only the Minister has the power to make LEPs.
- The *Standard Instrument Local Environmental Plan* is the template for all LEPs in NSW.
- Section 57 requires community consultation as required by the Minister prior to making of LEP (s56).
- LEPS guide development by establishing the objectives of particular zones that must be observed in development assessment.

EP&A Act – Making of LEPs can be challenged: s 123

- Making a final LEP which is different to the planning proposal exhibited to the community can give rise to legal challenge.

“The absence of environmental protection zonings in the final LEP fundamentally altered the nature of the proposal as a whole,” and therefore the final LEP was not a “product of the process” set out in the law.

- *Ryan v The Minister for Planning* [2015] NSWLEC 88.

Development Control Plans (DCPs)

- DCPs provide guidance to the determination of a development by giving effect to LEP, facilitating permissible development and achieving the objectives of land use zone objectives: s 74BA.
- Draft DCPs must be made publicly exhibited for at least 28 days: Regulation Part 3.



Assessment pathways

- Part 5 (environmental assessment)
- Exempt and Complying
- Part 4, including:
 - Local
 - Advertised
 - Integrated
 - Designated
- SSD (Part 4) and SSI (Part 5.1) – assessment at State level i.e. Department/Minister/PAC



EP&A Act – Evaluation of development applications

79C Evaluation

(1) Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

(a) the provisions of:

- (i) any environmental planning instrument, and
- (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
- (iii) any development control plan, and (cont.)

EP&A Act – Evaluation of development applications

...

(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and

(v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

Species impact statements – s 78A

- Industrial development in the Hunter Economic Zone
- Important breeding site for critically endangered Regent Honey Eater
- EIS was not conducted despite presence of habitat for species on site.
- Community group successfully challenged development approval
- Court held that consideration of an SIS was an essential precondition of the authority to grant development consent.
- Species impact statement required where an application is in respect of development on land that is, or is a part of, critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats (s 78A).



Image: *Dean Ingwersen/Birdlife Australia*

Aboriginal heritage

- Councils must consider development impact on areas including Aboriginal heritage – approval can be challenged if impacts are not adequately considered.
- In *Anderson v Ballina Shire Council* (2006) NSWLEC 76 approval of a bike track was challenged by the community because the council had not properly taken the relevant consideration of Aboriginal community views on the cultural value of the site into account.

Stopping the clock

54 Consent authority may request additional information

109 Days occurring while consent authority's request for additional information remains unanswered

(1) Any day that occurs between the date of a consent authority's request for additional information under clause 54 and:

(a) the date on which the information is provided to the consent authority, or

(b) the date on which the applicant notifies, or is taken to have notified, the consent authority in writing that the information will not be provided,

whichever is the earlier, is not to be taken into consideration in calculating the number of days in any of the assessment periods.

Deemed refusals

113 Applications taken to be refused (Reg)

(cf clause 70B of EP&A Regulation 1994)

- A development application is taken to be refused if a consent authority has not determined the application within:
 - 40 days, except in the case of designated or integrated development
 - 60 days, in the case of designated development, integrated development, or development for which the concurrence of a concurrence authority is required.
- This is taken from the date that the DA is lodged.

Review of determination

82A Review of determination

- (1) If the consent authority is a council, an applicant may request the council to review a determination of the applicant's application, other than:
- (a) a determination to issue or refuse to issue a complying development certificate, or
 - (b) a determination in respect of designated development, or
 - (c) a determination in respect of integrated development, or
 - (d) a determination made by the council under Division 4 in respect of an application by the Crown.

Review of determination

82A Review of determination

(2) A council must, on a request made in accordance with this section, conduct a review.

(2A) A determination cannot be reviewed:

(a) after the time limited for the making of an appeal under section 97 expires, if no such appeal is made against the determination, or

(b) after an appeal under section 97 against the determination is disposed of by the Court, if such an appeal is made against the determination.

- S 97 appeal by applicant within 6 months of notice of determination or deemed refusal.

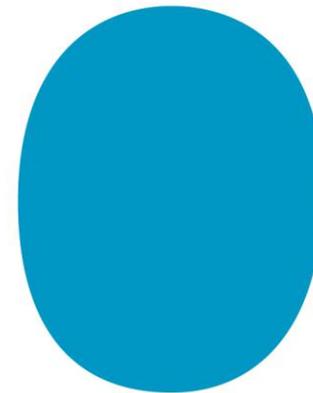
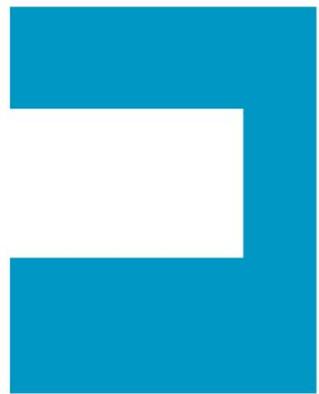
Review of determination

- Fees for request for review listed in Regulation cl 257 – sliding scale depending on cost of development.
- Public participation in review – application must be notified or advertised in accordance with DCP, or for a period not exceeding 14 days, but otherwise in the same manner as the original development application was notified or advertised (Reg cl 113A).
- Council must give written notice to an applicant of the result of a review under section 82A of the Act as soon as practicable after the review is determined (Reg cl 123G).

EP&A Act Enforcement (Part 6)

- Council can give orders under s 121B re non-compliance
 - Notice must be given before order is given (s 121H).
 - There are appeal provisions.
 - Cost recovery provisions if Council needs to undertake the work itself (non-compliance with order)
 - Breach of an order is an offence.
- Penalty notices for minor offences
 - (s 127A and Reg.)
- Prosecution or civil enforcement
 - significant offences
 - Tier 1, 2, 3 (Division 4).
- ‘Open standing’
 - public rights to bring civil enforcement or judicial review.

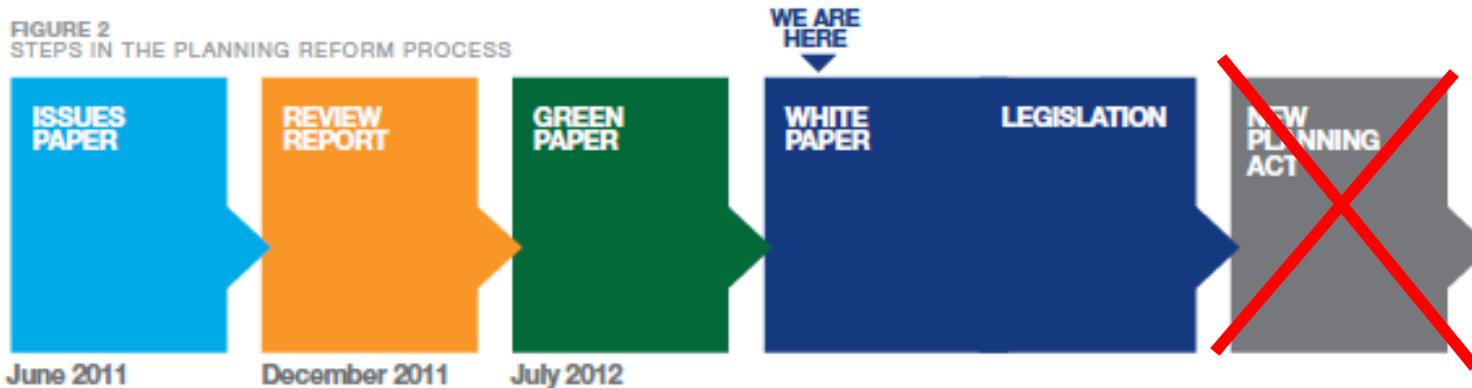
NEW PLANNING REFORMS ANNOUNCED



Planning Bill 2013...

- Following the failure of the *Planning Bill 2013* to pass through both houses of Parliament, the NSW Government intends to amend the *Environmental Planning and Assessment Act 1979* (the EP&A Act).

FIGURE 2
STEPS IN THE PLANNING REFORM PROCESS



2016 Planning Reforms

- In 2016, the Government intends to amend the EP&A Act with a focus on the following areas:
 - Community engagement
 - Development pathways
 - Environmental assessment
 - Reviews and appeals
 - Administration
 - Language and accessibility

2016 Planning Reforms

- Changes to building laws will be included in EP&A amendments to be released for comment in late 2016
- ‘Environmental assessment improvement project’ on exhibition until 27 November 2016
- ‘Improving voluntary planning agreements’ on exhibition until 27 January 2017
- draft Medium Density Design Guide on exhibition until 12 December 2016
- Draft exposure rewrite of *Building Professionals Act* flagged for release for comment in early 2017