benchtv
a benchmark production

Précis Paper

2018: Planning Law Review

A discussion of the effects of the implementation of the *Environmental Planning and Assessment Amendment Act 2017* (NSW).

Discussion Includes

- Key changes
- Local planning bodies
- Planning approval authorities
- Community participation
- Construction certificates
- Complying development certificates
- Developer contributions to infrastructure
- Enforcement provisions

Précis Paper

2018: Planning Law Review

1. In this edition of BenchTV, Josie Walker (Barrister – Frederick Jordan Chambers, Sydney) and Breellen Warry (Partner – Holding Redlich, Sydney) discuss the amendments that will occur to the *Environmental Planning and Assessment Act 1979* (NSW) through the implementation of the *Environmental Planning and Assessment Amendment Act 2017* (NSW).

Key Changes

2. The amendments brought about by the *Environmental Planning and Assessment Amendment Act 2017* (NSW) (EP&A Act) will commence from 1 March, 2018. However, you will still need to consider the saving and transitional provisions that have also been published in order to work out when each specific provision will be effective.

3. There will be some changes to enforcement commencing from March 1 2018, other changes effecting community participation, requirements to make local planning statements, and so on will be implemented later in 2018. Other provisions will be implemented over the course of 2019 and 2020.

4. There is a new 10 part structure to the EP&A Act, the introduction of decimal numbering, and many of the section numbers from the old Act have changed. To assist with this new structure there are some guides and a table that does have a quick reference guide to the new sections and the corresponding previous provisions which are available on the Department of Planning and Environment website.

5. The mandatory considerations have been carried over wholesale into the new Act. Determination authorities will still be considering the same factors when determining development applications, but it will now be under s 4.15, instead of s 79C.

Local planning bodies.

6. The Act introduces two new categories of local plan making bodies:
    1) The planning proposal authority which drafts the plans, and
    2) The plan making authority which makes the plan

7. This closely mirrors the former structure of the Act where local councils were mostly responsible for drafting plans, and the Minister was responsible for making plans.

8. Defining these new bodies creates more flexibility to assign these functions to different entities. Local councils will continue to be responsible for drafting local environmental plans, however the plan making authority can be the Minister, the Greater Sydney Commission, or potentially the local council itself.

9. Strategic plans have been a part of the planning arena for a long time. The state government has made a lot of plans, for example to guide the growth of Sydney for the decades to come, but traditionally these plans were policy documents and they did not have a statutory framework.

10. In 2015, district and regional strategic plans were introduced as statutory mechanisms, with a requirement to advertise them. They became mandatory in the sense that local environmental plans had to be consistent with the district and regional plans. Now there is a new requirement where local councils are also required to make a local strategic planning statement.

11. Local strategic planning statements are not required to be prepared until 1 July 2019 for councils in the Greater Sydney region, and 1 July 2020 in all other cases.

12. Section 3.9 of the new Act provides that local strategic planning statements have to state the planning priorities for the area, and they must be consistent with state and regional strategic plans. What will be included in these statements is not yet clear, but more detail will become available once the Department releases its guidelines for preparing these statements.

Planning approval authorities

13. There has been some slight name and function changes in the approval bodies. Rather than the Planning Assessment Commission there will be the Independent Planning Commission. The Independent Planning Commission will have similar functions to the Planning Assessment Commission – they will be responsible for assessing certain types of State Significant Development applications.

14. For example, where the applications have not been made by a public authority and are highly contentious, or where the council has made an objection, these applications will be dealt with by the Independent Planning Commission.

15. Joint Regional Planning Panels have been replaced with the Regional Planning Panels. As before, the Planning Panels will be responsible for determining Regionally Significant Development.

16. The thresholds for what is considered a 'Regionally Significant Development' has changed, and will now be located in a State Environment Planning Policy (SEPP). For example, the determination of a capital investment value has increased from $20 million to $30 million.

17. It will be compulsory for Councils within the greater Sydney area and Wollongong to have a planning panel. These will be Local Planning Panels, rather than what is currently known as the Independent Hearing Assessment Panels. For other councils it will be voluntary for them to have a planning panel.

18. Where there is a Local Planning Panel in place, they will be responsible for determining applications such as where the applicant is associated with council. They will also be responsible for determining contentious developments, for example where an application has received more than 10 objections from different households. Applications accompanied by a voluntary planning agreement will also be determined by Local Planning Panels.

Community participation

19. Enhancing community participation has always been a key theme as part of the planning reforms. There is almost a universal expectation that development applications will be notified, however under the old Act there was no mandatory statutory requirement for all development applications to be notified.

20. This will change with the amending Act, under which there is a minimum requirement for all local development applications to be advertised and for there to be a public submission period for 14 days. It is not guaranteed that this will be universal because councils also need to prepare consultation plans, and those can reduce advertising and consultation requirements for local development.

21. The community consultation plans will consolidate in one place all of the consultation requirements in relation to council's functions.

22. It seems likely that council's will stick to minimum notification requirements required under the Act. They will move some of their existing consultation requirements from development control plans into this community consultation plan.

23. Another change concerns integrated development. Integrated development is development where in addition to acquiring development consent, the proponent requires another approval under another Act, for example: mine safety approval, a bush fire safety certificate, or a pollution license.

24. Under the current system the development consent cannot issue until the other approval authority gives its general terms of approval, which shows what the terms of the license or certificate will be. It has been the case that if approval bodies are slow in issuing those approvals, it can hold up the consent process.

25. The Act now creates a power for the Secretary of the Department of Planning to intervene and issue that approval on behalf of the approval body. However, that will only be for selected powers which will be nominated in the regulations.

26. As this decision must be made by the Secretary of the Department of Planning, it seems likely that it is a power that will be used in relation to fairly significant development applications.

27. When approving a modification application, the concerned authority will have to consider the reasons for the initial grant of consent. There will be a requirement for decision makers to publish their statement of reasons when issuing a development consent.

28. The issuing of consent is still discretionary, but it just provides an additional layer of consideration for the consent authority to consider the reasons for the initial consent as a factor that may influence whether a modification should be made.

Construction certificates

29. There has been a new certificate introduced in the new Act called a sub-division Work Certificate. Previously you could get a construction certificate both for building works and sub-division works, even though those works are quite different in some respects, and require different checks.

30. There are now two different types of certificates available:
    1) Construction certificate for building, and
    2) Sub-divisions works certificate for sub-division works

31. This allows for more specific requirements tailored to each kind of work that is to be conducted.

32. Previously development consent did not authorise the commencement of development until you had a construction certificate. The new Act simply provides that a construction certificate or a sub-division works certificate is required for the commencement of work. This could have significance for the law around lapsing, and whether works commenced prior to the issue of a construction certificate is effective to prevent the consent from lapsing.

33. There is a new provision which empowers the Land and Environment Court to invalidate a construction certificate if the certificate is inconsistent with the development consent to which it relates.

34. In *Burwood Council v Ralan Burwood Pty Ltd and Ors* [2014] NSWCA 404 it was held that the construction certificate that was inconsistent with the development consent was not automatically invalid even though the regulations do provide that a construction certificate should be consistent with the underlying development consent. This means that a council or a third party could challenge a construction certificate on the grounds of inconsistency.

35. This power is limited in two ways:
    1) It is a discretionary power meaning the holder of the construction certificate would still have the ability to argue that it should not be declared invalid if, for example, the changes do not have any negative effects.
    2) A construction certificate can only be declared invalid in proceedings commenced within 3 months of the issue of the construction certificate. This is problematic because often these anomalies do not become apparent until the building is actually built.

36. There is, however, an additional power conferred on councils to issue a stop work order on complying development for up to 7 days. Councils can then consider during that period whether to take more formal enforcement action.

<u>Complying development certificates</u>

37. Complying development certificates are becoming slightly more like development consents in some ways, because there is going to be the power to issue complying development certificates subject to a deferred commencement condition.

38. A complying development certificate is a certificate to the effect that if development is carried out in accordance with certain standards it will be complying development, and therefore does not require development consent. The government has signaled that it wants more development to be processed in this way which would reduce the burden on councils to assess development applications.

39. In *Trives v Hornsby Shire Council* [2015] NSWCA 158 it was held that if the certifier formed the opinion that development was complying development, then that decision was not reviewable by the Court. This caused a lot of concern within councils and the local community that eccentric opinions by certifiers could lead to a development being treated as complying development, which had not been the intention.

40. There is now a provision in the new Act which allows the Court to declare a complying development certificate invalid if the Court forms the view that the development is not actually complying development.

41. That power, like the power relating to construction certificates is quite limited because proceedings to challenge the complying development certificate would have to be commenced within 3 months of the issue of the complying development certificate, and it is a discretionary power.

42. This does increase the risk that certificates could be challenged, but in practice it is probably only going to be used in fairly clear cases where there is some kind of inconsistency. It does put the onus on the certifier to really think about whether a development is complying or not.

Developer contributions to infrastructure

43. The government has opened up the ability for special infrastructure contribution, which is a contribution imposed by the state towards state infrastructure. This can now be imposed in relation to complying development.

44. A planning agreement can also be entered into in conjunction with complying development. The definition of planning agreement now includes reference to complying development.

45. This means that in future where there is development, there will be the ability for the state to recoup contributions towards that kind of development. There has been an additional direction power for the Minister to impose directions around the method of calculating and looking at the types of contributions that can be secured under planning agreements.

46. Currently that is all we have, but there was a package of policy reforms introduced for consultation during the course of 2017. In the future we may see the introduction of further policy and directions by the Minister which will help to guide the process when the agreements are being negotiated.

Enforcement provisions

47. In recent years we have seen the introduction of a tiered system for penalties, depending on the severities of the type of breaches, similar to what is seen in the *Protection of Environment Operations Act 1997* (NSW).

48. Penalty provisions are staying the same as they were only introduced roughly 2 years ago. However enforceable undertakings are now being introduced. This is a mechanism that was originally introduced in the *Protection of Environment Operations Act 1997* (NSW), and is now being extended to the *Environmental Planning and Assessment Amendment Act 2017* (NSW). The Minister or the Department of Planning can enter into an enforceable undertaking with a person who is carrying out development.

49. While the Act does not specifically say it only be entered into in the case of someone breaching the Act, this seems to be the intention of the provision. Enforceable undertakings will be entered into as a mechanism alternative to taking enforcement action under the Act to bring developments into compliance with the Act.

50. Breach of an enforceable undertaking is not an offence under the Act, however the Court does have strong powers to ensure that people comply with enforceable undertakings. For example, orders that people pay compensation for damage caused by breaching an enforceable undertaking, and people can be required to repay any profits made as a consequence of breaching an enforceable undertaking.

51. To enforce an enforceable undertaking does not require any proof that there was a breach of the Act initially, it just has to be proved that the undertaking has been breached. Currently councils have not been given the power to enter into enforceable undertakings, however a council can recommend to the Department that an enforceable undertaking should be entered in to.

52. Previously any breach of the Act was a criminal offence, but now under the new provisions a breach of a provision is only a criminal offence if a penalty is specified in the provision itself.

53. The old Schedule that dealt with all of the saving and transitional provisions for Part 3A has now come out of the Act. There are some new provisions about how Part 3A is to be dealt with in the savings and transitional regulation that has been published. This means that projects that were previously approved under Part 3A will be transitioned to either State Significant Development or State Significant Infrastructure provisions.

54. Where you have an existing Part 3A approval, you can no longer modify it under the old s 75W power, which was previously the case. This means that you will have to rely on the new equivalent of the old s 96 of the Act to modify that approval, meaning you are constrained by the test set out in this power.

55. There is now what is termed a 'cutoff date', so any applications to modify under Part 3A approval were lodged by 1 March 2018 can still continue to be determined under s 75W,

provided that enough information was submitted. There is also a requirement that it has to be determined or resolved by 1 September 2018.

56. There will be a requirement for all development control plan's (DCP's) to follow a particular standard and overview which will be published by the Department. Currently in NSW we have 400 different development control plans which all look and sound slightly different, which can be difficult to navigate. The government is seeking to consolidate all DCP's. Currently we do not know what this is going to look like, but this will be developed in future consultations with councils.

BIOGRAPHY

Josie Walker

Barrister – Frederick Jordan Chambers, Sydney

Josie has extensive experience in environmental and planning law gained in both New South Wales and Western Australia. Before coming to the Bar she worked as a solicitor for 12 years. In that time, she acted for developers, government authorities, public interest groups and traditional owners in many high-profile matters. Josie is noted for her in-depth understanding of environmental and planning law and application of administrative law principles. She specialises in judicial review matters and complex advices.

Breellen Warry

Partner – Holding Redlich, Sydney

Breellen is a Partner within the Property and Projects team at Holding Redlich and specialises in environmental, development and planning and natural resources law. Breellen has particular expertise in providing practical, strategic legal advice on Federal and State planning and environmental approvals processes for major projects, including under the *Environmental Planning and Assessment Act 1979* (NSW) and the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). Breellen also handles litigious matters relating to developmental appeals, judicial review and environmental prosecutions in the Land and Environment Court.

BIBLIOGRAPHY

Cases

Burwood Council v Ralan Burwood Pty Ltd and Ors [2014] NSWCA 404

Trives v Hornsby Shire Council [2015] NSWCA 158

Legislation

Environmental Planning and Assessment Act 1979 (NSW)

Environmental Planning and Assessment Amendment Act 2017 (NSW)

Protection of Environment Operations Act 1997 (NSW)