ENVIRONMENTAL PLANNING AND ASSESSMENT (MISCELLANEOUS AMENDMENTS) ACT 1992 No. 90

NEW SOUTH WALES

TABLE OF PROVISIONS

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Act No. 90, 1992

An Act to amend the Environmental Planning and Assessment Act 1978 with respect to the effect and modification of development consents, to increase penalties for offences against that Act and in other respects; and for related purposes. [Assented to 2 December 1992]

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Environmental Planning and Assessment (Miscellaneous Amendments) Act 1992.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Principal Act

3. The Environmental Planning and Assessment Act 1979 is referred to in this Act as the Principal Act.

Amendment of Environmental Planning and Assessment Act 1979 No. 203

4. The Principal Act is amended as set out in Schedule 1.

Explanatory notes

5. Matter appearing under the heading "Explanatory note" in Schedule 1 does not form part of this Act.

SCHEDULE 1—AMENDMENTS

(Sec. 4)

PART 1—ABOLITION OF ADVISORY CO-ORDINATING COMMITTEE

AMENDMENTS

(1) Section 19 **(Advisory Co-ordinating Committee):**

Omit the section.

(2) Section 45 **(Consultation):**

Omit section 45 (b).

(3) Schedule 2 **(Advisory Co-ordinating Committee):**

Omit the Schedule.

SCHEDULE 1—AMENDMENTS—*continued*

It is not necessary for there to have been any consultation with the Advisory Co-ordinating Committee under section 45 of the Principal Act before the completion of an environmental study or a draft regional environmental plan which, in either case, was in the course of preparation immediately before the abolition of that Committee.

EXPLANATORY NOTE

Section 19 of the principal Act establishes the Advisory Co—ordinating Committee and Schedule 2 to that Act provides for its composition. The proposed amendments the Committee which is not now seen to be necessary and removes its principal function recognised by the principal Act (namely, to be consulted in accordance with section 45 in connection with the preparation of draft regional environmental plans).

PART 2—DEVELOPMENT CONTROL PLANS TO SUPPLEMENT REGIONAL ENVIRONMENTAL PLANS

AMENDMENTS

(1) Section 51A:

After section 51, insert:

Development control plans

51A. (1) The Director may prepare a development control plan, or cause such a plan to be prepared, for a part or parts of the land to which a regional environmental plan or a draft regional environmental plan applies, if the Director considers it necessary or desirable to provide more detailed provisions than are contained in the plan or draft plan for that part or those parts of the land.

(2) The format, structure, subject-matter and procedures for the preparation, public exhibition, approval, amendment and repeal of such a development control plan are to be as prescribed by the regulations.

(3) Such a development control plan must generally conform to the provisions of the regional environmental plan or draft regional environmental plan which applies to the land to which the development control plan applies.

SCHEDULE 1—AMENDMENTS—*continued*

(4) A development control plan prepared in accordance with this section must be available for public inspection, without charge, at:

(a) the head office of the Department; and

(b) any regional office of the Department situated within the region to which, or to part of which, the regional environmental plan or draft regional environmental plan applies.

(2) Section 72 **(Development control plans):**

(a) In section 72 (2), after "repeal of", insert "such".

(b) From section 72 (3), omit "A", insert instead "Such a".

(3) Section 90 **(Matters for consideration):**

From section 90 (1) (a) (iv), omit "72, applying", insert instead "51A or 72 that applies".

TRANSITIONAL

Sections 51A and 90 of the Principal Act, as amended by this Act, extend to regional environmental plans that had been made, and to draft regional environmental plans in the course of preparation, before the commencement of section 51A.

EXPLANATORY NOTE

Development control plans may be made by local councils under section 72 of the Principal Act to make more detailed provisions than are contained in a local environmental plan or a draft local environmental plan. Proposed section 51A will allow the Director to prepare (or cause to be prepared) development control plans that will make more detailed provisions than are contained in a regional environmental plan or a draft regional environmental plan.

The provisions of a development control plan of either kind will be required to be taken into consideration under section 90 when a consent authority determines a development application relating to land to which the developmeat control plan applies.

Amendments are made to section 72 to avoid possible confusion between requirements relating to the different kinds of development control plans.

SCHEDULE 1—AMENDMENTS— *continued*

PART 3—PUBLIC EXHIBITION OF ALTERED DRAFT LOCAL ENVIRONMENTAL PLANS BY COUNCILS

AMENDMENT

Section 68 **(Consideration of submissions):**

After section 68 (3A), insert:

(3B) The council may (but need not) give public notice of and publicly exhibit, wholly or in part, a draft local environmental plan that has been altered pursuant to subsection (3). The provisions of this section and sections 66 and 67, with any necessary adaptations, apply to any such exhibition of a draft plan, but not so as to require a further certificate under section 65.

TRANSITIONAL

Section 68 (3B) of the principal Act, as amended by this Act, extends to a local environmental plan that was in the course of preparation and that had not been forwarded under section 68 (4) of the Principal Act to the Secretary of the Department of Planning before the commencement of subsection (3B).

EXPLANATORY NOTE

A local council may amend a draft local environmental plan after considering submissions from the public and matters raised at any public hearing conducted in respect of any such submission. Proposed section 68 (3B) will empower a council to advertise and exhibit any amended draft plan so that further submissions may be sought from the public and further public hearings into those submissions may be conducted.

PART 4—EXTENSION OF TIME FOR COMMENCEMENT OF CERTAIN DEVELOPMENT CONSENTS

AMENDMENTS

Section 93 **(Date from which consent operates):**

After section 93 (4), insert:

(5) Despite any other provision of this section, a development consent is taken to become effective and operate from such date as may be fixed by:

SCHEDULE 1—AMENDMENTS—*continued*

(a) a court (whether or not the Land and Environment Court) that finally determines an appeal on a question of law which confirms the validity of, or results in the granting of, the consent; or

(b) the Land and Environment Court, if the validity of a consent granted by that Court is confirmed by, or the consent is granted by that Court as a result of, such a final determination made by another court that has not fixed that date.

TRANSITIONAL

Section 93 (5) of the Principal Act, as amended by this Act, extends to an appeal pending at the commencement of that subsection.

EXPLANATORY NOTE

The proposed amendment will allow a court that finally determines an appeal on a question of law which confirms the validity of, or results in the granting of, a development consent to fix a date different from that which would otherwise apply for the start of the period within which the development authorised by the consent must commence.

The Land and Environment Court may fix such a different date if a development consent granted by that Court is confirmed by such a final determination, or that Court is required to grant a consent because of such a final determination, and the other court does not fix a date.

PART 5—LAPSING OF EXTENDED DEVELOPMENT CONSENTS

AMENDMENTS

Section 99 **(Lapsing of consent):**

(a) Omit section 99 (1) (a) (i), insert instead:

(i) within 2 years after the date on which the consent became effective in accordance with section 93 or 101 (9) (the "prescribed date"), if subparagraphs (ia) and (ii) do not apply; or

(ia) by the end of the further period of 12 months (if any) approved by the consent authority or, in the event of an appeal, allowed by the Court under subsection (3) or (4), if subparagraph (ii) does not apply; or

SCHEDULE 1—AMENDMENTS—*continued*

(b) From section 99 (3), omit "3 year period for the purposes of subsection (1) (a) (i)", insert instead "further period of 12 months for the purposes of subsection (1) (a) (ia)".

(c) After section 99 (4), insert:

(4A) A further period of 12 months may be approved by the consent authority or allowed by the Court in determining an appeal even though 2 years has expired after the prescribed date.

(4B) A further period of 12 months commences to run from the later of the following:

(a) the second anniversary of the prescribed date;

(b) the date on which the consent authority approved the further period or, if the Court has allowed the further period in determining an appeal, the date on which the Court determined the appeal.

TRANSITIONAL

Section 99 of the Principal Act, as amended by this Act:

- extends to a development consent that was granted within 2 years before the amendment of that section by this Act; and
- applies to any 3 year period approved, whether or not because of an appeal, under section 99 (3) of the Principal Act (before its amendment by this Act) for a development consent granted within that 2 years, as if approval of the 3 year period were approval or allowance of a further period of 12 months under that subsection, as substituted by this Act.

EXPLANATORY NOTE

In most cases, a development consent will lapse if the development which it allows is not commenced within 2 years after the date on which the consent became effective. A consent authority is given the power to approve a 3 year period in the limited circumstances set out in section 99 of the Principal Act. However, by the time the issue of whether a 3 year period should apply has been finally decided on appeal, them may not be sufficient time to take advantage of the extension.

The proposed amendments to section 99 will allow a person who has been granted a further year to commence development the benefit of a full 12 months from the date on which the usual 2 year period expires or from the date on which the further year is allowed, whichever is the later of those dates.

SCHEDULE 1—AMENDMENTS— *continued*

PART 6—PROCEDURE WHEN APPLYING FOR MODIFICATION OF A DEVELOPMENT CONSENT GRANTED BY A COURT

AMENDMENTS

Section 102 **(Modification of consents):**

(a) After section 102 (1), insert:

(1A) In the case of a development consent referred to in section 93 (4) that is the result of an appeal, a copy of such an application is to be lodged by the applicant with the council of the relevant area or with such other person as may be prescribed by the regulations.

(b) From section 102 (2), omit "the consent authority has first given notice, as prescribed", insert instead "notice has been given, in accordance with the regulations".

TRANSITIONAL

Section 102 of the Principal Act, as amended by this Act, applies to an application for modification of a development consent only if it is made after the commencement of section 102 (1A).

EXPLANATORY NOTE

When an application is made under section 102 of the Principal Act for modification of a development consent, certain procedural steps (such as the giving of notice of an application for the modification of a consent authorising designated development) must be followed by a council if the council granted the consent.

The proposed amendments are directed at requiring the council of the area in which development is intended to be carried out (or, where there is no such council, a person nominated by the regulations) to take those procedural steps in the case of an application to modify a consent for that development which was granted by the Land and Environment Court on an appeal.

SCHEDULE 1—AMENDMENTS—*continued*

PART 7—FEE PAYABLE FOR APPLICATION FOR MODIFICATION OF A DEVELOPMENT CONSENT

AMENDMENT

Section 102 **(Modification of consents):**

Before section 102 (2), insert:

(1B) An application under this section must be accompanied by the fee as prescribed by the regulations.

EXPLANATORY NOTE

The amendment requires an application for modification of a development consent to be accompanied by a fee fixed by or determined in accordance with the regulations.

PART 8—MATTERS FOR CONSIDERATION WHEN DETERMINING AN APPLICATION FOR MODIFICATION OF A DEVELOPMENT CONSENT

AMENDMENT

Section 102 **(Modification of consents):**

After section 102 (3), insert:

(3A) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 90 as are of relevance to the development the subject of the application.

TRANSITIONAL

Section 102 (3A) of the Principal Act, as amended by this Act, extends to an application for modification of a development consent pending at the commencement of that subsection.

EXPLANATORY NOTE

A development consent may be modified under section 102 of the Principal Act on the application of the applicant for the consent or a person entitled to act on the consent. It is proposed by the amendment that, when an application for modification of a development consent is being determined, the consent authority must give consideratation to the same matters listed in section 90 of that Act as are required to be considered when an application for development consent is determined.

SCHEDULE 1—AMENDMENTS—*continued*

PART 9—EFFECT OF NEW PROHIBITION OR REQUIREMENT FOR DEVELOPMENT CONSENT ON SCOPE OF FORMER CONSENT

AMENDMENT

Section 109B:

After section 109A, insert:

Saving of effect of existing consents

109B. (1) Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.

(2) This section:

(a) applies to consents lawfully granted before or after the commencement of this Act; and

(b) does not prevent the lapsing, revocation or modification, in accordance with this Act, of a consent; and

(c) has effect despite anything to the contrary in section 107 or 109.

(3) This section is taken to have commenced on the commencement of this Act.

EXPLANATORY NOTE

Section 107 of the Principal Act allows, subject to the restrictions set out in that section, the continuation of a use of land (referred to as an "existing use") that was previously being carried out lawfully but that, because of an environmental planning instrument, becomes prohibited.

Section 109 of the Principal Act allows, subject to the restrictions set out in that section, the continuation of a use of land (referred to as a "continuing use") that was previously being carried out lawfully but that, because of an environmental planning instrument, becomes unlawful unless it is authorised by the grant of development consent.

The amendment is only directed at casts in which a use of land was, before an environmental planning instrument prohibited the use or required it to be authorised by a development consent, lawful because it was authorised by a consent that had already been granted.

SCHEDULE 1—AMENDMENTS— *continued*

Proposed section 109B is intended to make it clear that such an environmental planning instrument does not have the effect of prohibiting, or requiring a further development consent to authorise, the carrying out of the use in accordance with the terms of the consent as in force from time to time.

As an example, the amendment would apply to make it clear that a person who had obtained development consent for mining the whole of a parcel of land and had commenced mining part of the parcel would not be prevented from mining the rest of the parcel by an environmental planning instrument:

- that came into effect before mining of the rest of the parcel had commenced; and
- that prohibited or made a new requirement for development consent to authorise the mining of the rest of the parcel.

PART 10—ADDITIONAL GROUNDS FOR PUBLIC INQUIRIES

AMENDMENTS

(1) Section 86A:

After section 86, insert:

Effect of inquiry by Commission of Inquiry on determination of development application

86A. (1) This section applies after a consent authority receives notice from the Secretary that the Minister has directed that an inquiry be held, in accordance with section 119, with respect to the environmental aspects of proposed development the subject of a development application.

(2) The consent authority must not determine the development application in so far as it relates to proposed designated development.

(3) The consent authority must not determine the development application in so far as it relates to proposed development that is not designated development until:

(a) the inquiry has been held; and

(b) the consent authority has considered the findings and recommendations of the Commission of Inquiry and any comments made by the Minister that accompanied those findings and recommendations when they were forwarded to the consent authority.

SCHEDULE 1—AMENDMENTS—*continued*

(2) Section 88 **(Restrictions on determination of development application for designated development):**

(a) From section 88 (2), omit "subsection (3)", insert instead "section 86A".

(b) Omit section 88 (3).

(3) Section 89 **(Determination of development application for designated development after inquiry by Commission of Inquiry):**

From section 89 (1), omit " , as referred to in section 88 (3), directed that an inquiry be held", insert instead "directed that an inquiry be held by a Commission of Inquiry".

(4) Section 96 **(Circumstances in which consent is deemed to have been refused):**

(a) From section 96 (1) (a), omit "paragraph (b) or (c)", insert instead "paragraph (b), (c) or (d)".

(b) From section 96 (1) (b), omit "paragraph (c)", insert instead "paragraph (c) or (d)".

(c) At the end of section 96 (1) (c), insert:

; or

(d) in respect of development (not being designated development) into the environmental aspects of which the Minister has directed an inquiry under section 119—within a period of 40 days or, in the case of development referred to in section 78, within a period of 60 days after the Minister has complied with section 119 (8),

(5) Section 119 **(Public inquiry):**

(a) Omit section 119 (1) (b), insert instead:

(b) the environmental aspects of any proposed development the subject of a development application, whether or not it is designated development;

SCHEDULE 1—AMENDMENTS—*continued*

(b) After section 119 (7), insert:

(8) If the inquiry was held into the environmental aspects of proposed development (other than designated development) the subject of a development application, a copy of the findings and recommendations, and of any comment that the Minister may consider appropriate to make on them, must be forwarded by the Minister:

(a) to the consent authority having the function of determining the application; and

(b) to any public authority whose concurrence to the granting of consent to the application is required.

TRANSITIONAL

Sections 86A, 88, 89,96 and 119 of the Principal Act, as amended by this Act, extend to an application for development consent pending immediately before the amendment of those sections by this Act.

EXPLANATORY NOTE

Section 119 (1) (b) of the Principal Act presently allows the Minister to direct that an inquiry be held only with respect to the environmental aspects of any proposed designated development the subject of a development application referred to in section 88 (3) of that Act.

Proposed section 119 (1) (b) will provide for the Minister to direct that an inquiry be held with respect to the environmental aspects of any proposed development that is the subject of a development application made under Part 4 of that Act, whether or not it is designated development. A copy of the findings and recommendations of the Commission forwarded to the Minister will be required to be forwarded to the consent authority concerned.

Proposed section 86A will prevent a consent authority:

- from determining a development application relating to any proposed designated development the subject of such an inquiry (which will be determined by the Minister); and
- from determining a development application relating to other development the subject of an inquiry unless it has considered the findings and recommendations of the Commission and any comments on them made by the Minister.

Consequential amendments are proposed to sections 88,89 and 96 of the Principal Act because those sections reflect the present situation where an inquiry can be directed only in more limited cases than those proposed by the amendments to section 119.

SCHEDULE 1—AMENDMENTS—*continued*

PART 11—INCREASES IN PENALTIES

AMENDMENTS

Section 126 **(Penalties):**

(a) From section 126 (1), omit "200 penalty units", insert instead "1,000 penalty units".

(b) From section 126 (1), omit "10 penalty units", insert instead "100 penalty units".

(c) From section 126 (2), omit "20 penalty units", insert instead "100 penalty units".

EXPLANATORY NOTE

The current maximum penalties for an offence against the Principal Act for which the penalty is not otherwise specified is 200 penalty units ($20,000) and a further daily penalty of 10 penalty units ($1,000). The amendments will increase them to 1,000 penalty units ($100,000) and 100 penalty units ($10,000), respectively.

An offence against the Principal Act includes an offence against an environmental planning instrument, such as a local environmental plan or regional environmental plan made by the Minister for Planning or a State environmental planning policy made by the Governor-in-Council.

The maximum penalty for an offence against the regulations made under the Principal Act is 20 penalty units ($2,000). The amendments will increase it to 100 penalty units ($10,000).

Provision for the use of penalty units is made in section 56 of the Interpretation Act 1987.

PART 12—EXPANDED JURISDICTION OF LOCAL COURTS AND LAW REVISION

AMENDMENTS

Section 127 **(Proceedings for offences):**

(a) From section 127 (1)–(3), omit "court of petty sessions held before a stipendiary magistrate" wherever occurring, insert instead "Local Court constituted by a Magistrate".

(b) From section 127 (3), omit "$2,000", insert instead "$10,000".

SCHEDULE 1—AMENDMENTS—*continued*

EXPLANATORY NOTE

A Local Court currently has jurisdiction to deal with offences against the Principal Act and to impose a maximum penalty of $2,000. It is proposed to increase that maximum to $10,000.

The amendments also update references to courts of petty sessions and stipendiary magistrates (which are already required to be read as references to Local Courts and Magistrates) as a matter of statute law revision.

[Minister's second reading speech made in—

Legislative Council on 18 November 1992

Legislative Assembly on 24 November 1992]