DEVELOPMENTS IN NEW SOUTH WALES

Amendments To Part 5 Of The *Environmental Planning And Assessment Act 1979*

In the March 1994 issue the amendments to Part 5 of the *Environmental Planning and Assessment Act 1979* Part 5, as amended by the *Environmental Planning and Assessment (Part 5) Act* 1993 were discussed. By s 2 of the amending Act, commencement of those provisions was to take place on a date to be proclaimed. Proclamation of the amending provisions took place on 22 April 1994: see Government Gazette No 58, 15 April 1994, p 1607.

The Environmental Planning And Assessment (Amendment) Act 1994

On 1 July 1994 further amendments made to the *Environmental Planning and Assessment Act* 1979 *(EPAA)* by the *Environmental Planning and Assessment (Amendment) Act* 1994 - which was passed by Parliament on 13 May 1994 and assented to on 30 May 1994 - commenced: see Government Gazette No 88, 1 July 1994, p 3237. The amendments effect a number of major alterations to the EPAA.

1. Consultation under s 45

Section 45 has been amended to stipulate the extent to which the Director of Planning must consult with councils, public bodies, and other persons in the preparation of environmental studies (ES's) and draft regional environmental plans (draft REPS). Section 45(2) now provides that the Director must provide certain information to these bodies namely

a) the reasons for preparing the ES or draft REP
b) the proposed aims, objectives, policies and strategies of the ES or draft REP
c) a description of the land the subject of the ES or draft REP; and,
d) the types of matters to be dealt with in the ES or draft REP

The Director may provide any other information he considers "would assist the understanding" the ES or draft REP: s 45 (3).

Persons to whom information is required to be provided under s 45(2) have 40 days in which to make comments on the ES or draft REP to the Director: s 45(4). Any comments made within time must be considered by the Director and the consultation required by s 45 is only complete upon the Director having considered any such comments: s45(5)

2. Determination of development application under s 91.

A new sub-section, s 91(3B) has been inserted into the EPAA in order to clarify the position in relation to the inclusion of performance-based conditions in consents granted subject to conditions under s91(1)(a).

There has been an element of doubt as to whether the existing provisions of S 91 encompassed the imposition of performance-based conditions in consents stipulating that the development consented to was to meet certain outcomes or objectives. Section 91 (3B) overcomes any doubts by making express provision enabling a condition of a consent to stipulate the outcomes or objectives that the development or a part of it is to achieve and the criteria against which such outcomes and objectives are to be assessed. The condition may also specify the means by which the outcome or objective is to be achieved.

Section 91 (3B) has retrospective effect and extends to any such conditions imposed under s 91 prior to the commencement of s 91 (3B): see Schedule 6, Part 2, Clause 2.

3. Determination of Crown development application under s 91A

Section 91A has been completely replaced. The new 91A provides a new procedure for the determination of development applications by the Crown and "prescribed persons" under the EPAA. "Prescribed persons:" for the purposes of s 91A are public authorities (not being councils) public utilities, universities and technical colleges, and the Totalisator Agency Board: see *Environmental Planning and Assessment Regulation 1994, Clause 66*

Section 91A applies equally in respect of applications for the modification of consents under s 102 of the EPAA where the Crown or a "prescribed person" is concerned: S 91A(13). Accordingly s 91A does not affect the appeal rights of applicants under ss 97 or 102(5) of the EPAA: s 91A(14).

Section 91A(2) now enables the applicant to have its application determined by the Minister for Planning if the application has not been determined by the consent authority within a maximum p eriod of 60 days from lodgment of the application. The consent authority may, however, refer the application to the Minister also.

Certain obligations are imposed on applicants, consent authorities, the Minister and the Director once the referral provision in s 91A(2) has been activated. The referring party must notify the other party of the referral in writing (s 91A(3)), the consent authority must provide the Minister with information pertaining to the application (s 91A(4)), the Minister must then notify the Director in writing of the referral (s 91A(5)), and the Director must then convene a meeting between the applicant and the consent authority (s 91A(6)). The meeting is mandatory and is designed for the purpose of negotiating a determination of the application that is in accordance with the EPAA and which is acceptable to the parties: s 91A(6)).

Where agreement is reached the Director must prepare a report of the agreement in which the date by which the consent is to be granted must be specified: s 91A(7). Accordingly the consent authority must grant the consent in accordance with the report by the date so specified: s 91A(8). Should the consent authority fail to grant consent by the date specified in the report, it is deemed to have done so: s 91A(12)(a).

Where agreement between the parties is not reached, the Minister must determine the application in accordance with s 91A(9), by either

(a) approving or refusal of the consent;
(b) approving the imposition of conditions proposed by the consent authority and the date by which the application must be determined
(c) refusing to agree with the consent authority's proposed refusal and allowing it 40 days to submit any conditions it may wish to impose. At the expiry of the 40 days the Minister must notify both parties whether he approves of the imposition of any such submitted conditions, or any other conditions which may be imposed with the Minister's approval. The consent authority must then determine the application by the date notified by the Minister
(d) refusing to agree with any proposed conditions of the consent authority and specifying the date by which the application is to be determined

As with situations where agreement is reached but the consent authority has not determined the application within the time specified by the Minister in his report so that it is deemed to have been determined on that date, so too in situations where agreement has not been reached and the application has not been determined by the consent authority by the time specified by the Minister: s 91A(12)(b) and (c).

It should be noted that s 91A is still premised on the same limitation expressed under the former section, namely that the power of a consent authority to refuse or impose conditions on the Crown or a "prescribed person" in respect of development consents is subject to the control of the Minister in the form of his written approval: s 91A(1).

The new s 91A has retrospective effect in respect of development applications made but not determined at the date of commencement: see Schedule 6, Part 2, Clause 3.

Environmental Planning And Assessment Regulation 1994

The *Environmental Planning and Assessment Regulation* 1994 (the 1994 Regulation) commenced on 1 September 1994 and replaces the *Environmental Planning and Assessment Regulation* 1980 (the 1980 Regulation); see Government Gazette No 108, 26 August 1994, p 4740 et seq.

It is proposed here simply to set out the main Part and Divisional headings of the 1994 Regulation so as to provide some indication of what is included in it. Much of the 1994 Regulation is in the same form as the 1980 Regulation and covers the same subject matter. However, there are changes to the structure and layout of the 1994 Regulation from that contained in the 1980 Regulation.

The main Part and Divisional headings are as follows:

Preliminary

-Consultation with the Department
-Consultation with concurrence with other authorities
-Public participation
-General

Development Control Plans (DCP's)

-Preparation of DCP's by councils
-Public participation
-Approval of DCP's
-Amendment and repeal of DCP's
-DCP's made by the Director
-Public access

Contribution Plans (CP's)

-Preparation of CP's
-Public participation
-Approval of CP's
-Amendment and repeal of CP's
-Accounting
-Public access

Existing Uses

Development Applications

-General requirements for applicants
-Designated development (Schedule 3)
-Environmental impact statements
-Public participation (designated development)
-Public participation (advertised development)
-Public access
-General

Development Consents (DC's)

-Notices of determinations
-Lapsing of DC's
-Modification of DC's
-General

Environmental Assessment under Part 5 of the *Environmental Planning and Assessment Act*

-Circumstances requiring an environmental impact statement
-Environmental impact statements (EIS's)
-Public participation
-Public access
-General

Fees and Charges

-Fees for development applications
-Other fees and charges

Register of Development Applications

Miscellaneous

Schedule 1 - Areas affected by Government Coastal Policy
Schedule 2 - Environmental Impact Statements
Schedule 3 - Designated Development
Schedule 4 - Section 149 Certificates
Schedule 5 - Forms Dictionary

SCHEDULE 3 - DESIGNATED DEVELOPMENT
Environmental Planning And Assessment Regulation 1994

Schedule 3 of the Environmental Planning and Assessment Regulation 1980 was revised and gazetted on 17 June 1994 and commenced on 1 July 1994: see Government Gazette No 80, 17 June 1994, p 2925. The revisions as made have not been included in the *Environmental Planning and Assessment Regulation* 1994 (see immediately above)

The major changes associated with the revision involved increases in the thresholds in a number of categories, the introduction of performance and locational factors into thresholds, and a requirement that consideration be given to the changes in overall environmental impact where the development involves alterations or additions to existing developments.

In order that an alteration or addition to an existing development be considered a designated development the consent authority must be of the opinion that the alteration or addition "significantly increases the environmental impacts of the total development compared with the existing or approved development": Schedule 3, Part 2, Clause 1. Informing such an opinion there are three major areas which the consent authority must consider, namely:

(a) the impact of the existing development
(b) the likely impact of the proposed alterations or additions
(c) any proposals to mitigate environmental impacts and to facilitate compliance with relevant standards and codes of practice:
Schedule 3, Part 2, Clause 2.

Schedule 3, as revised, applies to all development applications lodged with a consent authority after 1 July 1994.

ENVIRONMENTAL OFFENCES AND PENALTIES ACT 1989 - Commencement Of Uncommenced Provisions

Pursuant to s 31 of the *Environmental Offences and Penalties Act* 1989 (the EOPA) had effect and contained various savings and transitional provisions. Clause 10 of Schedule 3 provided that:

> *"The provisions of sections 121B(2) and 131AB(5) and Division 4B of Part 5 of the Justices Act 1902, as amended by the amending Act, do not apply to any conviction or order made before the appointed day".*

By Government Gazette No 88, 1 July 1994, p 3238, the "appointed day" has been proclaimed to be 4 July 1994 and accordingly the provisions referred to in Clause 10 of Schedule 3 now apply to convictions under the EOPA as and from that date.

The provisions referred to in Clause 10 concern appeals in relation to environmental offences. Section 121B(2) of the *Justices Act* 1902 cuts off any right to appeal to the District Court in relation to any order made on conviction for an environmental offence as defined in Division 4B. Section 131AB(5) similarly removes any right of appeal to the District Court in respect of any sentence imposed for an environmental offence as defined in Division 4B. "Environmental offence" is now defined in s 131AD of the *Justices Act* 1902.

Division 4B of the *Justices Act* 1902 is a new Division dealing specifically with the appeal rights of persons convicted of environmental offences under the *Justices Act* 1902. Essentially, Division 4B now provides that any appeal in respect of any order or sentence imposed for an environmental offence is to be made to the Land and Environment Court.

CONSEQUENTIAL AMENDMENTS

1. Increased Jurisdiction of the Land and Environment Court

The jurisdiction of the Land and Environment Court has been increased by the coming into force of a number of Acts which effect amendments to the jurisdiction of the Land and Environment Court.

(a) *Irrigation Corporations Act 1994* (Assented to on 2 June, 1994)

The Class 5 jurisdiction of the Court under s 21 of the *Land and Environment Court Act* 1979 has been increased to allow the Court to hear and determine "proceedings under the *Irrigation Corporations Act* 1994": see Schedule 3 to the *Irrigations Corporations Act 1*994

The Irrigation Corporations Act 1994 is expressed to be an Act "to reform management of irrigations systems in New South Wales", essentially through the establishment of State owned corporations and to enable irrigation scheme areas to be owned and managed by private corporations: see s 3 of the Act

(b) *Fisheries Management Act 1994* (Assented to on 2 June 1994)

This Act increases the Class 3 and Class 4 jurisdiction of the Land and Environment Court by amendments to ss 19 and 20 respectively.

The Class 3 jurisdiction of the Court now enables it to hear and dispose of matters under ss 44 or 202 of the *Fisheries Management Act* 1994.
(the FMA). Section 44 is concerned with share management fisheries and allows compensation to be claimed by shareholders in circumstances where the share management fishery has been omitted from Schedule 1 of the FMA. Persons entitled to compensation but dissatisfied with the amount offered or delay in its payment may appeal to the Land and Environment Court under s 44(6) of the FMA. Section 202 enables persons to appeal to the Land and Environment Court in respect of decisions of the Minister regarding dredging and reclamation work under Division 3 of the FMA.

The Class 4 jurisdiction of the Court now enables the Court to hear and dispose of proceedings under s 282 of the Fisheries Management Act 1994. Section 282 provides for civil enforcement to remedy or restrain breaches of the FMA by any person.

2. Reduced Jurisdiction of the Land and Environment Court

Section 18(a) of the *Land and Environment Court Act* 1979 has been amended to remove from the Class 2 jurisdiction of the Court appeals or objections under s 82 of the *Local Government Act* 1993: see *Local Government Legislation (Miscellaneous Amendments) Act* 1994, Schedule 19.

This amendment effectively prevents an appeal being made to the Court against a council's determination of an objection to the application of regulations or a local policy to a particular activity for which approval is sought. However, it is still possible to appeal against those matters by appealing against the council's determination of the application for the relevant approval.

3. Powers of the Land and Environment Court.

Section 39(6) of the Land and Environment Court Act 1979 has been amended by the Local Government Legislation (Miscellaneous Amendments Act) 1994, Schedule 19. The amendment means that the Court will be able to determine an appeal against a council's determination of an application for approval without consulting the bodies that would have to be consulted by the council in determining any such application.

Courts Legislation (Mediation And Evaluation) Act 1994

This Act amends the *Land and Environment Court Act* 1979 in relation to the early referral of matters for mediation or neutral evaluation, other than in respect of criminal proceedings, provided the parties agree to this course.

The original Bill was introduced into the Legislative Council of 5 May 1994 and into the Legislative Assembly on 11 May 1994. It was passed by both Houses on 16 September 1994. The Act awaits assent, but this is expected to occur by the beginning of October.

Consideration of the provisions of this Act will be discussed in the next issue.

Lachlan Roots
BEc LLB (Hons)
Court of Appeal (NSW)

DEVELOPMENTS IN WESTERN AUSTRALIA

Environment Protection Act 1986
Environmental Protection Authority and Steedman's Ex Parte Robin Chapple

Robin Chapple, an environmental consultant and member of People for Environmental Protection, a scientific and community based group, today instigated action in the Supreme Court against the Environmental Protection Authority and its Chairman, Dr Ray Steedman.

The action stems from the Authority's decision to withdraw from its Public Environmental Review level of assessment of the Department of Resource Development's Draft Burrup Peninsula Land Use and Management Plan.

Initially the Authority set a level of assessment at Public Environmental Review but some two weeks later set aside that decision, citing "legal impediments" as the reason. An EPA letter notifying parties of the revocation, advised that the Draft Plan did not constitute a "proposal" for the purposes of section 38 of the Environmental Protection Act 1986.

Mr Chapple is concerned that if this decision is allowed to go unchallenged then the Environmental Protection Authority might as well permanently hang up the "out to lunch" sign.

The writ calls for an order to compel the Authority to assess the proposal and for certain declarations regarding the law and denial of natural justice. A speedy trial of the issues is expected.