The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION

THOMSON REUTERS

REDFERN LEGAL CENTRE PUBLISHING

Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

19 Harris Street, Pyrmont NSW 2009
First edition published by Redfern Legal Centre as *The Legal Resources Book (NSW)* in 1978.
First published as *The Law Handbook* in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014
Fourteenth edition 2016
Fifteenth edition 2019

Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

ISBN: 9780455243689

This edition is up to date as of 1 October 2019.

The Law Handbook is part of a family of legal resource books published in other states:
Vic: *The Law Handbook* by Fitzroy Legal Service, ph: (03) 9419 3744
SA: *Law Handbook* by the Legal Services Commission of South Australia, ph: (08) 8111 5555
Qld: *The Queensland Law Handbook* by Caxton Legal Centre, ph: (07) 3214 6333
Tas: *Tasmanian Law Handbook* by Hobart Community Legal Service, ph: (03) 6223 2500
NT: *The Northern Territory Law Handbook* by Northern Territory Legal Aid Commission, Australasian Legal Information Institute and Darwin Community Legal Services, ph: (08) 8982 1111

Editor: Newgen Digitalworks
Product Developer: Karen Knowles

Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

23

Environment and Planning

Ian Ratcliff – Solicitor

Graeme Wiffen – Formerly of the School of Law, Macquarie University

[23.10] This chapter looks at various aspects of our environment and the laws relating to it: how land use is planned and controlled, how biodiversity is protected, how heritage is recognised and protected, the laws relating to pollution and what a person can do if they want to take action on an environmental issue.

PLANNING CONTROLS

[23.20] The usual aim of land use planning controls is to try to find a balance between competing interests in land. This can be very difficult. There may be competing environmental and developmental interests to resolve, or competing local and state interests – and because land use planning affects people's lives in a very direct way, passions often run high. Planning in NSW reflects these tensions.

The main Act dealing with land use planning in NSW is the *Environmental Planning and Assessment Act 1979* (NSW), which imposes planning controls at two levels.

The first level is a broad "forward planning" level driven by environmental planning instruments (EPIs) and strategic plans. Strategic plans set out the vision and objectives for an area. EPIs set out the general planning requirements for the area they apply to.

The second level is a site-specific level, at which development consent or some other type of approval may be required for a particular development or activity. This is often referred to as *development assessment* or *development control*.

Environmental planning instruments

[23.30] Environmental planning instruments (EPIs) are dealt with in Pt 3 of the *Environmental Planning and Assessment Act*. They set out the general planning requirements for the area they apply to.

People need to know what these requirements are if, for example, they are buying or selling land, having a dispute with a neighbour, trying to stop a development from going ahead or planning their own development proposal.

Part 3 of the *Environmental and Planning Assessment Act* also sets the framework for strategic plans. These strategic plans do not have the same legal force as EPIs, but set the agenda for planning decisions in their region or district. Planning authorities must give effect to strategic plans in any new planning proposal.

[23.40] Types of EPIs

There are two types of EPIs:

- state environmental planning policies (SEPPs); and
- local environment plans (LEPs).

SEPPs and LEPs can apply to the same piece of land.

If there is inconsistency

Where there is inconsistency, a SEPP prevails over a LEP. SEPPs can also amend the provisions of a LEP.

The provisions of EPIs are legally binding on government and developers in relation to the land to which they apply.

Environmental shorthand

- DA: development application;
- EIS: environmental impact statement;
- OEH: Office of Environment and Heritage;
- EPA: Environment Protection Authority;
- EPI: environmental planning instrument;
- LEP: local environmental plan;
- SEPP: state environmental planning policy;
- DCP: development control plan;
- BDAR: biodiversity development assessment report.

[23.50] State environmental planning policies

State environmental planning policies (SEPPs) set out the planning controls that the Minister for Planning believes are of state or regional significance. They are prepared by the Department of Planning, Industry and Environment at the direction of the minister.

Examples of SEPPs

Some SEPPs are:

- SEPP 1, which allows for a relaxation of development standards, such as height restrictions. A developer may be able to get consent even though some *standards* set by an EPI are not met, as long as its objectives are met;
- SEPP 19, which provides protection for urban bushland;
- SEPP 33, which regulates hazardous and offensive development;
- SEPP 44, which seeks to protect koala habitat;
- SEPP 55, which regulates the remediation of contaminated land;
- SEPP (Coastal Management) 2018, which manages forward planning and development in the coastal zone;
- SEPP (Housing for Seniors or People with a Disability) 2004, which aims to increase the supply of housing for older people and people with disabilities;
- SEPP (Infrastructure) 2007, which expands the areas in which particular classes of infrastructure development can occur, with or without development consent;
- SEPP (Mining, Petroleum Production and Extractive Industries) 2007, which contains particular rules for assessing the development of those resources;
- SEPP (Exempt and Complying Development Codes) 2008, which aims to provide streamlined assessment processes for development that complies with specified development standards.

SEPPs often operate by changing the application of a LEP – for example, by removing development restrictions or imposing consent requirements that do not exist under the LEP.

[23.60] Local environment plans

LEPs are generally prepared by local councils. However, the minister can also direct the Department of Planning, Industry and Environment or a Sydney District or Regional Planning Panel to make a LEP in certain circumstances. LEPs are approved by the Minister for Planning, and may apply to all or part of the land under a council's control. They are the main instruments used to control development in a local area.

LEPs may be affected by SEPPs; it is always necessary to check any SEPP that may be relevant.

What LEPs do

LEPs divide land into different zones and indicate what types of development are allowed in each zone.

Spot rezoning

If a LEP prohibits development in a particular area, developers sometimes ask councils to rezone the relevant site to allow the development to go ahead. This is called spot rezoning.

Reserving land for public purposes

An EPI can reserve land for public use such as a park, road or school. Public land owned or managed by a local council must be classified as either *community land* or *operational land* under the *Local Government Act 1993* (NSW). Community land is ordinarily land open to the public, such as a park, bushland reserve or sportsground, while operational land may be held by the council as an asset or used for other purposes such as a works depot or garage. A council must make a plan of management for every piece of community land in its area.

If an EPI reserves privately owned land, that land must be kept or acquired for the reserved purpose, and the EPI must state:

- which public authority must acquire it;
- how the owner can take action to have it acquired.

The acquisition value of the land is based on what the land would be worth if it were not reserved.

[23.70] Making EPIs

Because EPIs establish principles and legal rules for future development, it is important that the community is aware of proposals to create or amend them.

The procedure for making EPIs varies slightly between SEPPs on the one hand, and LEPs on the other. The details of these procedures are found in Pt 3 of the *Environmental Planning and Assessment Act* and Pt 2 of the *Environmental Planning and Assessment Regulation 2000* (NSW).

Standardising LEPs

From 31 March 2006, LEPs were required to be prepared in accordance with the *Standard Instrument (Local Environmental Plans) Order 2006* (NSW). This document prescribes the form and content of LEPs throughout NSW. New model clauses are adopted by the Department of Planning, Industry and Environment from time to time.

The standard LEP instrument contains standard definitions, zones, clauses, land use table and format that all local councils in NSW have to adopt in the LEPs that cover their local government area.

The standard LEP includes mandatory and optional provisions. All LEPs must incorporate the mandatory provisions before they can be publicly exhibited or recommended for gazettal.

A number of LEPs that were made before 2006 do still remain in force. It is important to look at the specific terms of those LEPs, if you are trying to find out if development can occur in a particular location, or what restrictions apply to the development.

SEPPs

SEPPs can be prepared by the Minister for Planning and approved by the Governor without being advertised or being put out for public comment.

The minister may provide for public participation, but is not obliged to do so.

When they take effect

SEPPs take effect when they are published on the NSW legislation website (www.legislation.nsw.gov.au).

LEPs

When a draft LEP is being prepared, a number of additional steps must be taken.

Planning proposal

The local council or other relevant planning authority must first prepare a planning proposal that explains the intended effect of the proposed LEP and sets out the justification for making it. This will include the objectives, an explanation of the provisions in the proposed LEP, draft maps and the proposed community consultation process.

Gateway determination

The planning proposal will be sent to the Minister for Planning. The minister will decide at this stage whether the LEP should proceed and what the environmental assessment and community consultation process will be for the LEP (if any). The Minister will also need to decide if the proposal has to go to the Greater Sydney Commission for comment.

Community consultation

If the minister decides that there should be some form of community consultation, the planning proposal must be made publicly available. A summary of the detailed provisions can be published, if this provides sufficient detail for the purpose of community consultation.

There is no minimum period specified for community consultation. This will depend on the decision of the minister. However, the normal community consultation period is 28 days. During the consultation period, members of the public can make a written submission to the planning authority.

Public hearings

At the discretion of the Minister, the community consultation period for LEPs may be followed by a public hearing. This is set out in the Gateway Determination.

Consideration of public submissions

The planning authority will consider any public submissions and any report from a public hearing. It may decide to make changes, based on those submissions or other factors, and the draft LEP may then be submitted to the minister for approval. On rare occasions, an amended proposal may go through a further community consultation period.

When they take effect

LEPs take effect when they are published on the NSW legislation website (www.legislation.nsw.gov.au).

Making a submission

There is no particular format for public submissions about EPIs or strategic plans; a letter setting out a person's point of view will do. See [23.650] for hints on organising and setting out such a letter.

Appeals

Appeals on the merits

It is not possible to appeal the making of an EPI or strategic plan *on the merits* (or facts). For example, a member of the public has no right of appeal against the content of an EPI on the basis that it provides inadequate environmental protection. Nor can a developer appeal on the facts against a decision to refuse an application for a spot rezoning.

Procedural appeals

Under s 9.45 of the *Environmental Planning and Assessment Act*, it is possible for any person to mount a procedural appeal against an EPI. This is called *seeking judicial review*; it challenges the validity of the EPI or strategic plan on the basis that there has been a breach of the requirements that apply to the making of the EPI or plan.

Procedural appeals must be commenced within three months of the EPI being published on the NSW legislation website (www.legislation.nsw.gov.au) or, for strategic plans, within three months after they are published on the NSW Planning Portal.

[23.80] Finding out which EPIs apply

To find out which planning instruments apply to a particular piece of land, a person can apply to the local council for a *planning certificate* issued under s 10.7 of the *Environmental Planning and Assessment Act*.

Councils will charge a fee to provide this certificate.

Further details, or information about larger areas, can be obtained from the council, which should keep a copy of all relevant strategic plans, current EPIs and *development control plans* (DCPs) (see [23.90]).

The council should also have a master map showing current zonings and other controls. These are all available for public inspection at council premises during business hours.

The full text of most environmental planning instruments and their maps is available online at www.legislation.nsw.gov.au. Most councils' LEPs and DCPs are also available on their websites. The NSW Planning Portal at https://www.planningportal.nsw.gov.au/ also allows you to search for planning information about individual properties.

Uses of public land

People are sometimes concerned when a council leases out part of a park to a private entity. On the other hand, a community group or sporting club may wish to lease an area of public land.

Community and operational land

Under the *Local Government Act*, land under the "care, control and management" of a council must be classified as either community or operational land. (There are a number of exceptions to this, including public roads and land regulated by the *Crown Land Management Act 2016* (NSW).)

Community land (eg, a public park) has to be kept for use by the general public, while operational land (eg, land held as an investment, or a council works depot) does not.

This classification is important as it determines the degree of difficulty with which land may be taken from public use by sale, leasing or other means.

Restrictions on use of community land

Community land may not be sold, nor may it be leased or licensed for more than 21 years.

It may only be leased or licensed for more than five years if public notice of the proposed lease or licence is given and, where objections are received, the Minister for Local Government gives consent.

No such restrictions apply to operational land.

Reclassification of community land

Community land may be reclassified as operational land by a LEP or, rarely, by council resolution. In either case, public notice must be given and a public hearing held into the proposed reclassification.

Management of community land

The use and management of community land must be regulated by a plan of management. Until a plan of management is adopted, the nature and use of the land may not change.

The plan of management must categorise relevant areas of the land under categories such as bushland, park and "general community use".

Core objectives are set out for the management of each category of land, and a plan of management can set further objectives for particular areas of land.

The plan of management is also required to set out performance standards for the management of the land, and the means by which these standards can be achieved.

Community land must be used and managed in accordance with the plan of management that applies to it. Under the *Local Government Act*, anyone can bring an action to enforce provisions of the plan.

[23.90] Other planning documents

Development control plans

Development control plans (DCPs) are planning documents that deal with the matters raised in LEPs, but in more detail. They are not EPIs. They are used as a guide to the application of LEPs. They are not legally binding, but they must be taken into account when a development application is being considered.

DCPs often set out development standards and restrictions that development must comply with, such as restrictions on the height of buildings, floor space ratios, building setbacks, minimum block sizes, vegetation clearance, or development on a foreshore or in a heritage area. They may also identify when a council will advertise or notify proposed development.

Councils usually make DCPs without the involvement of the Department of Planning, Industry and Environment. However, the Minister for Planning can direct a local council to make, amend or revoke a DCP. The procedures for making them are set out in Pt 3 of the *Environmental Planning and Assessment Regulation*.

Some EPIs require the making of a DCP before development can occur. An alternative in those circumstances is to lodge a *concept development application* (see [23.140]).

Ministerial directions

The Minister for Planning can direct a council under s 9.1 of the *Environmental Planning and Assessment Act* to prepare a draft LEP to include provisions that give effect to state planning aims, principles and policies. Councils are required to consider and give effect to the minister's directions when preparing a draft LEP. There is a standard set of s 9.1 directions that are published on the Department of Planning, Industry and Environment website (www.planning.nsw.gov.au).

State of the environment reports

The *Local Government Act* requires councils to prepare annual *state of the environment reports*, which must address various environmental issues. These often come in a "state–pressure–response" format, citing the state of the environment, the pressures on the environment, and management responses to the pressures.

Plans of management

The *Local Government Act* requires a *plan of management* for most public reserves controlled by councils. The plan sets out a framework for activities on the land, and governs the leasing and licensing of the land (see Uses of public land at [23.80]).

Strategic plans

There are a number of strategic plans that councils are required to implement when preparing draft LEPs. They include the Greater Sydney Region Plan, which itself contains a number of district strategic plans and covers the "three metropolises of Greater Sydney", Greater Newcastle Metropolitan Plan and the Hunter Regional Plan, and the Central Coast Regional Plan, as well as regional strategies for other parts of NSW. The strategic plans can all be viewed via the Department of Planning, Industry and Environment's website at planning.nsw.gov.au.

Councils are also required to create their own strategic planning statements to implement state and regional planning priorities in their local areas.

Existing uses

If land is being used for a particular lawful purpose and that use becomes prohibited under an EPI, the use can usually continue, subject to some restrictions.

Existing use rights attach to the land and not the owner, and so may pass from one owner to another.

If a use is abandoned for a continuous period of 12 months, it lapses (although this presumption can be overridden in some circumstances), and the land can then only be used in the ways permitted by the new EPI.

Development consent under Part 4 of the Act

[23.100] Development consent is an approval allowing development to be carried out on land.

[23.110] Consent authorities

The body responsible for giving development consent is often the local council. However, the Minister for Planning, the Independent Planning Commission or a Sydney District or Regional Planning Panel will sometimes be the consent authority (see [23.150]).

What is development?

Development is defined as:

- the use of land;
- the carrying out of work;
- the erection or demolition of buildings;
- the subdivision of land;
- anything else regulated by an EPI.

[23.120] Is development consent needed?

To find out whether a development requires consent, it is necessary to check all the relevant EPIs, particularly LEPs.

As already mentioned, LEPs generally divide land into different zones and indicate what types of development are allowed in each. They usually divide development into three broad categories:

- development permitted without consent (ie, it does not require planning approval under Pt 4 of the *Act*);
- development permitted with consent (ie, development that does require planning approval under Pt 4 of the *Act*);
- prohibited development (ie, development that is not permitted under any circumstances, but see box below).

The minister's power to approve prohibited development

An EPI can provide that specified types of development are prohibited in particular zones.

Local councils, as consent authorities, cannot approve prohibited development. However, the Minister for Planning can approve a state significant development proposal that is not *wholly* prohibited by a LEP.

Critical infrastructure applications can also be approved even if they are prohibited under a LEP (see [23.150] and [23.190]).

[23.130] Development permitted without consent

Not all development requires consent. An EPI can provide that some types of development do not require consent (although other types of approval may be required, such as a construction certificate and an occupation certificate for a residential building). There is also a category of development called *exempt development*.

Exempt development

Exempt development is minor development that has minimal environmental impact. Examples

include non-structural alterations to buildings, and structures like clothes lines, pergolas, boundary fences and flag poles.

The SEPP (Exempt and Complying Development Codes) defines exempt development by reference to a code, and applies statewide.

There are some exceptions; for example, development will not be "exempt" if it is located in an environmentally sensitive area, including the foreshore and scenic protection areas.

Complying development

Complying development is routine development that is certified in accordance with specified, predetermined development standards, and is approved with the issue of a *complying development certificate*. It can be certified by either a council or an *accredited certifier*.

As with exempt development, there is a SEPP that defines complying development. The SEPP (Exempt and Complying Development Codes) defines complying development by reference to various complying development codes and overrides any equivalent provisions in LEPs.

Complying development was introduced to facilitate faster assessment, so councils and accredited certifiers cannot refuse to issue a complying development certificate if the proposed development complies with the relevant development standards, and they have only seven days from the day they receive an application for complying development to make their decision.

There is no requirement for the public to be notified of an application for complying development, unless a development control plan (see [23.90]) requires it.

There is no right of merits appeal from a council or accredited certifier's decision, or failure to make a decision, about an application for complying development.

The requirements concerning complying development are set out in Div 4.5 of Pt 4 of the *Environmental Planning and Assessment Act* and Pt 7 of the *Environmental Planning and Assessment Regulation*.

Accredited certifiers

The *Building Professionals Act 2005* (NSW) establishes the scheme that regulates accredited certifiers. They are accredited by the Building Professionals Board.

Anyone dissatisfied with the work of a private certifier can complain to the board, which can investigate and take appropriate disciplinary action against the private certifier, which can include a requirement to pay compensation of up to $20,000.

[23.140] Development permitted with consent

An EPI can provide that specified types of development need consent. However, within the broad category of "development permitted with consent", there are several overlapping classifications. These classifications determine things like:

- who the consent authority is;
- whether environmental impact assessment is necessary;
- whether the public has rights of participation and appeal;
- time frames for decisions.

Other decision-making bodies

Amendments to the *Environmental Planning and Assessment Act* since 2008 have introduced a number of new decision-making bodies into the development assessment process:

- The Independent Planning Commission (IPC), which is appointed by the minister, determines many state significant proposals, advises the minister, and may be appointed by the minister to take over a council's planning functions.
- Sydney District or Regional Planning Panels (RPPs), which are made up of a mixture of ministerial and local council appointees, and have a similar role, but determine specified "regionally significant" proposals as set out in the SEPP (State and Regional Development 2011).
- Local Planning Panels (LPPs), which are appointed by local councils, and can be set up to assess relevant aspects of a development proposal. These are mandatory in the Greater Sydney region and Wollongong.

Classifications or categories of development

The *Environmental Planning and Assessment Act* has become more complicated over time. There are now over 10 categories of development. As well as the categories of exempt and complying development main classifications to be aware of are:

- local development, regionally significant and state significant development;
- designated development;
- development requiring concurrence;
- integrated development.

These classifications are discussed below. In addition, there is a class of development called state significant infrastructure which falls under Pt 5, Div 5.2 of the *Act*.

Concept development applications

The Act allows for a *concept development application* for a particular site (Pt 4, Div 4.4). The purpose of a concept DA is to outline the concept proposals for development of a site. A concept DA does not need to include a detailed description of the project. However, unless the concept DA provides the required details for the first "stage" of a development, development cannot be carried out on the site until the applicant obtains further, specific development consent. The consent authority must ensure that further development decisions are consistent with any concept DA that is in force.

[23.150] Local, regionally significant and state significant development

Development permitted with consent may be:

- local development; or
- regionally significant development; or
- state significant development.

The procedures for all these types of development are found under Pt 4 of the *Environmental Planning and Assessment Act*.

Local development

Most development falls into the local development category – for example, subdivisions and many commercial developments.

The local planning panels for local councils are usually the consent authority for local development. Some local councils in regional areas continue to act as the consent authority for local development. An exception to this is *complying development*, which can be approved by an accredited private certifier.

Regionally significant development

Regionally significant development generally follows the same procedures as local development. The key difference is the decision-maker, which is a Sydney district or regional planning panel. However, the local council carries out most of the administrative procedures for this type of development, including receipt of a development application, community consultation and initial assessment.

The SEPP (State and Regional Development) 2011 sets out the types of development that are regionally significant and includes all Council development and specified types of private development over $5 million, general development over $30 million (if it is not state significant), and certain types of coastal subdivision and designated development.

State significant development

For the most part, state significant development is defined by the terms of a SEPP (at the time of writing the SEPP (State and Regional Development) 2011). The Minister can also declare development to be state significant on the advice of the Independent Planning Commission (IPC). This is done by publishing an order in the NSW Government Gazette. The types of development that fall within this category are usually:

- commercial developments;
- large-scale tourist developments;
- specified projects on state significant sites; or
- activities that have significant environmental and social impacts, such as hospitals, large-scale mining and extractive industries, and industrial projects.

The Minister for Planning is the consent authority for State significant development. However, the Minister delegates the power to decide applications to the IPC or the Department of Planning, Industry and Environment in many cases.

The IPC is designated as the consent authority for State significant development where:

- the local council has formally submitted an objection to the proposal;
- there are more than 25 community objections to the proposal; or
- the developer has made a reportable political donation.

The specific procedures for State significant development are found in Div 4.7 of Pt 4 of the *Act*.

State significant sites

The State and Regional development SEPP also identifies state significant sites, such as the Sydney Opera House. The rules for State significant development apply to any development on these sites.

Effect of EPIs

If a development or activity is declared by the Minister or identified in the State and Regional Development SEPP as state significant development, EPIs will generally still apply to the development. However, the Minister or the Minister's delegate can approve the development even if part (but not all) of it is otherwise prohibited by an EPI.

Environmental impact assessment

The same environmental assessment requirements apply to state significant development as for local, "designated" development (see [23.160]). Applicants must apply to the Department of Planning, Industry and Environment for a list of requirements that sets out what matters must be addressed by an environmental impact statement (EIS). The department consults with the relevant council and other state agencies before finalising these requirements. The EIS will be placed on public exhibition together with the application and any other accompanying documents.

State significant developments are evaluated against the matters set out in s 4.15 of the *Act* (see The consent authority's evaluation at [23.190]).

Requirement for other approvals

Under the provisions of Div 4.8 of Pt 4 of the *Act*, applicants for integrated development must obtain additional approvals under other legislation (see [23.180]). Many of those approvals are not required for state significant development.

Once state significant development is approved by the minister/IPC, there is little any other authority can do to prevent it from being carried out. If an approved development does require another approval such as an aquaculture permit, mining lease or environment protection licence under other legislation, the relevant authority cannot refuse to give its approval.

Public exhibition requirements

State significant development applications and any accompanying documents must be made publicly available for at least 28 days. They can be found on the website of the Department of Planning, Industry and Environment at www.planning.nsw.gov.au.

During the submission period, any person may make a written submission to the Department of Planning, Industry and Environment in relation to the application.

Independent Planning Commission

As noted above, the IPC is (as delegate for the minister) the decision-maker for much state significant development. The IPC is appointed by the minister and may have different members looking at different development applications. The IPC will generally receive an assessment report and recommendations from the department. As a matter of practice, the IPC will often hold a public meeting before determining an application. In some prescribed circumstances, the IPC is required to also hold a more formal hearing.

[23.160] Designated development

Development permitted with consent may also be *designated* development.

Designated developments are generally developments with high environmental impact, and for that reason, they are accompanied by environmental impact assessment obligations and public participation rights, just like state significant development at [23.150].

Schedule 3 of the *Environmental Planning and Assessment Regulation* lists types of development that are designated.

Examples of designated development are cattle feedlots, chemical industries, quarries, mines, waste management facilities and marinas. Often, large scale "designated" development will be declared state significant development and therefore follow the state significant assessment process.

Not all development that might be expected to be on the list is there; for example, large subdivisions, shopping centres, sports stadiums and tourist resorts are not included. Some, but not all, of these types of development will fall within the category of State significant development.

Specified types of designated development applications are determined by RPPs, including certain extractive industries, marinas and waste management facilities.

Environmental impact assessment

An application for designated development must be accompanied by an environmental impact statement compiled in accordance with Sch 2 of the *Regulation*.

Advertising and notice requirements

An application for designated development must be advertised in a newspaper circulated in the locality on at least two occasions, and written notice of the application must be given to:

- owners or occupiers of adjoining land;
- people whose use and enjoyment of their land may be detrimentally affected if it proceeds;
- any public authorities that may have an interest in the application.

A notice must also be placed at the site of the proposed development.

Public exhibition requirements

Applications for designated development must be placed on public exhibition for at least 28 days. See Public notification and submissions at [23.190] for more about this.

Other development including advertised development

Notification requirements

Councils only need to notify people of development that is not designated, if an applicable development control plan and/or its community participation plan contains provisions requiring notification and/or advertising.

A community participation plan (CPP) will set out the level of community participation, including notification and/or advertising that applies to the types of development that it deals with. Minimum ("mandatory") community participation requirements are set out in Sch 1 of the *Act*.

Generally, community participation will involve public exhibition for 14 days for non-designated development, but there may be different periods stated in the CPP. The CPP will also set out the circumstances where no public exhibition or notification will occur. The CPP should be written in plain English, and it is important to read this Plan to understand whether you are likely to find out about proposed development and have any right to make a submission.

The Regulation states that certain development needs to be advertised for 28 days including:

- particular types of *integrated* development called nominated integrated development (see [23.180]); and
- development that is likely to significantly affect threatened species, ecological communities, or their habitats, is carried out in a declared area of outstanding biodiversity value, or otherwise exceeds the biodiversity offsets scheme threshold (called threatened species development).

The courts have previously held that if a council has a policy of notifying neighbours about such development and continuously applies the policy, neighbours have a legitimate and legally enforceable expectation that they will be notified.

Environmental impact assessment

There is no requirement for an environmental impact statement in relation to development that is not designated, although a statement of environmental effects must accompany the application. A *statement of environmental effects*, which may be prepared by the applicant or by a consultant acting on their behalf must indicate:

- the environmental impacts of the development;
- how the impacts have been identified; and
- the steps that will be taken to protect the environment or to lessen harm to it.

Environmental factors must be taken into account by the consent authority, where relevant, under s 4.15 of the *Act* (see The consent authority's evaluation at [23.190]).

[23.170] Development requiring concurrence

Another classification in the "development permitted with consent" category is development that requires the concurrence, or agreement, of another authority before consent can be granted. For example, development likely to significantly affect a threatened species under the *Biodiversity*

Conservation Act 2016 (NSW) requires concurrence from the Chief Executive Officer of the OEH, if it is not accompanied by a *Biodiversity Development Assessment Report (BDAR)*.

If the concurrence authority refuses concurrence, the relevant consent authority must refuse development consent.

If a concurrence authority grants concurrence with conditions, any development consent granted must contain those conditions.

Exception for minister as consent authority

There is an exception if the consent authority is a minister. In this case, if a concurrence requirement applies, the minister does not have to obtain the agreement of the concurrence authority, but merely *consult* the Minister for the Environment.

[23.180] Integrated development

Development in the final category, *integrated development*, needs not only development consent but also one or more governmental approvals set out in s 4.46 of the *Environmental Planning and Assessment Act*, such as an environment protection licence from the EPA under pollution legislation, or a heritage approval under the *Heritage Act 1977* (NSW). In many cases, designated development will also be integrated development.

The integrated development procedure set out in Div 4.8 of Pt 4 of the *Act* and Div 3 of Pt 6 of the *Regulation* attempts to integrate the procedures that apply to the grant of development consents and these other approvals.

The result is quite complex. When a consent authority receives an application for integrated development, it must refer the application to any relevant approval bodies, such as the EPA or Roads and Maritime Services or the Department of Primary Industries. Each approval body must provide "general terms of approval" to the consent authority, and any development consent it grants must be consistent with those terms.

If the body refuses approval

If an approval body *refuses* to grant approval, the consent authority must refuse to grant development consent.

If the body does not respond

If an approval body *fails to inform* the consent authority whether it will grant approval, the consent authority may go ahead and decide whether or not to grant development consent.

If consent is granted under these circumstances, and the applicant seeks approval from the approval body within three years of the consent date, the approval body must grant the approval, and the approval must be consistent with the development consent.

[23.190] The development consent process

The main steps in the grant of development consent are set out below. It is not possible to go into all the detail of the procedure here; the Act and the Regulation should be consulted as well.

Complying development

What follows does not include the procedure relevant to complying development (see Complying development at [23.130]).

Lodgement of the development application

The applicant must determine who the consent authority is, and submit a development application (DA) to that authority, accompanied by the relevant fee.

The Regulation sets out the prescribed content of forms and fees for the different types of applications.

The consent authority's response

The consent authority must notify the applicant that it has received the DA and can request additional information. The consent authority can set a reasonable period by which the additional information must be provided.

Amending the application

The DA can be amended by the applicant at any time before the decision is made.

Is an environmental impact statement needed?

If the DA is for designated development, it must be accompanied by an environmental impact statement (see [23.160]).

Does the DA affect threatened species?

If the DA is development which is likely to significantly affect threatened species under the *Biodiversity Conservation Act* (see [23.290]), it must also be accompanied by a *biodiversity development*

assessment report prepared in accordance with Pt 7 of the *Biodiversity Conservation Act*. The *Biodiversity Conservation Act* uses a Biodiversity Offsets Scheme (previously known as "biobanking"). This permits a developer to "offset" its impacts on threatened species by taking or paying for someone else to take conservation actions on another property. A developer can simply pay money into a Biodiversity Conservation Fund if they are unable to find appropriate sites to offset their impacts on particular threatened species or ecological communities or their habitats. The consent authority must have regard to the BDAR and impose conditions which require the developer to offset the residual impacts of the development, using this scheme.

For all development except State significant development or activities assessed under Pt 5 of the *Environmental Planning and Assessment Act*, the consent authority must refuse a development if it will have "serious and irreversible impacts" on threatened species.

Public notification and submissions

Who can make a submission?

Anyone can make a submission to a consent authority about a DA. There are special processes in relation to some categories of development that give the public additional rights.

State significant development

Public exhibition requirements for state significant development are described at [23.150]. Anyone can make a submission to the Department of Planning, Industry and Environment in relation to an application for a state significant development during the 28-day submission period. Submissions that object to the development must set out the grounds for objection.

Designated development

If the application is for designated development, it must be advertised and put on exhibition for 28 days (see [23.160]). Anyone can make a submission about it to the council during this period.

Submissions that object to the development must set out the grounds for objection.

Other development

If the DA is for development that is neither designated nor advertised, public notification may or may not be required (see Other development at [23.160]). However, in many cases, there will be a community participation period of at least 14 days.

For regionally significant development, submissions should still be sent to the local council for the area of the proposed development site.

Consultation with other authorities

Development requiring concurrence

If the DA requires the concurrence of another authority (see [23.170]), the consent authority must send a copy to the concurrence authority within 14 days of receiving it.

If there is a public exhibition period, the consent authority must also, at the close of the exhibition period, immediately send the concurrence authority copies of all public submissions received.

The concurrence authority may request further information about the development.

The concurrence authority must give the consent authority its decision:

- within 40 days of the day it received the DA; or
- if the DA was publicly advertised, within 21 days of receiving the public submissions.

Integrated development

Similar procedures apply to integrated development. If the DA requires an approval listed in s 4.46 of the *Act*, the consent authority must send a copy of it to the approval authority within 14 days of receiving it.

If there is a public exhibition period, the consent authority must also, at the close of the exhibition period, immediately send the approval authority copies of all submissions received.

The approval authority may request further information about the development.

The approval authority must give the consent authority its decision and any "general terms of approval":

- within 40 days of the day it received the application; or
- if the application was publicly advertised, within 21 days of receiving the public submissions.

The consent authority's evaluation

What the consent authority must consider

The consent authority must take a number of matters into account when deciding whether or not to grant development consent to an application made under Pt 4 of the *Environmental Planning and Assessment Act*.

The relevant matters are set out in s 4.15 of the *Act*. They are:

- the provisions of:
  - any EPI;
  - any draft EPI that is or has been placed on public exhibition and details of which have been notified to the consent authority;
  - any development control plan;
  - any planning agreement or draft planning agreement with the developer; and
  - the regulations (where they prescribe matters to be taken into account);

  that apply to the land to which the application relates;
- the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with the Act or the Regulation;
- the public interest.

The Land and Environment Court has determined that the public interest would include the principles of ecologically sustainable development, where relevant *BGP Properties Pty Ltd v Lake Macquarie City Council* [2004] NSWLEC 399 and, in relation to state significant development, *Upper Mooki Landcare Inc v Shenhua Watermark Coal Pty Ltd and Minister for Planning* [2016] NSWLEC 6.

If any factor is not considered

Failure to consider any of these matters may be grounds for a procedural appeal against the decision (ie, judicial review), and the decision may consequently be declared invalid.

How the factors are weighed

The matters in s 4.15 must all be considered where relevant.

However, there is nothing in the legislation to indicate what weight should be given to each factor. For example, a decision-maker may decide that conservation should be given less weight than other considerations.

There is also no rule to say that if the development would have a negative impact in relation to any particular factor, consent must be denied.

The rule is simply that all the factors must be considered by the decision-maker where they are relevant.

The consent authority's decision

The consent authority's options

The consent authority can either grant or refuse development consent. If it grants consent, it can do so unconditionally or with conditions.

A consent authority is under no obligation to follow the recommendations of its own planning officers; nor is it bound by its own policies or codes, which have persuasive force rather than the force of law.

However, those policies and codes should be taken into consideration by the consent authority as relevant matters for determining whether to consent to or refuse a DA.

Section 4.15 guidelines

The Department of Planning, Industry and Environment provides a Register of Development Assessment Guidelines on its website which can provide guidance for both the preparation and assessment of various types of development.

When a consent authority must refuse

A consent authority must refuse consent if the proposed development would lead to a breach of an EPI or the Act, except that under clause 4.6 of the Standard LEP a development standard in an EPI may be overridden if the consent authority believes compliance is unreasonable or unnecessary. SEPP 1 includes similar exceptions.

When a consent authority cannot refuse

Neither councils nor Regional Planning Panels can refuse applications from public authorities, unless they have the written approval of the minister. They can simply negotiate on conditions of approval.

Consent with conditions

A consent authority may attach conditions to an approval. Where it does, these must relate to the matters listed for consideration in s 4.15 or the matters set out in s 4.17. For example, conditions may:

- limit the life of a consent;
- require the demolition of a building or work;
- require the carrying out of works;
- require the dedication of land free of cost or the payment of a monetary contribution to the consent authority, or both.

Granting deferred commencement

The consent authority can also grant *deferred commencement* consent.

In this case, it agrees to grant the development consent, but the consent does not operate until the developer satisfies the consent authority that specified conditions have been met.

Consent for staged development

Development consents can also be given for *staged development*.

In this case, consent may be given for part of a development, with a further part or parts to be considered under another application; or, if the application for staged development provides the necessary detail to allow consent to be given for future stages, consent may be granted for those stages without the need for further consent.

Time limits

The consent authority has 40 days from the day it received the application to make a decision about it, or 60 days if the application is for:

- designated development;
- integrated development;
- development requiring concurrence.

The consent authority has 90 days to make a decision about a state significant development.

There are some exceptions to these limits, which are set out in cl 113 of the *Environmental Planning and Assessment Regulation*.

The first two days after receipt of the application do not count for these time periods.

If a decision is not made within the time limit

If the consent authority does not make a decision within the time specified, the application is considered to have been refused (this is called a *deemed refusal*), and the applicant can appeal to the Land and Environment Court.

However, even if an appeal is made, there is nothing to stop a consent authority making its decision after the periods have elapsed.

Notification requirements

After it has made its decision, the consent authority must notify the applicant of its decision in writing.

Where the consent is for designated development and some types of state significant development, the consent authority must also:

- provide written notification of its decision to anyone who made a written submission about the application; and
- tell them that they have the right to appeal against the decision. This is a right of appeal on the merits (see [23.210]).

People who have made submissions about development applications for other types of development during the community participation period also have the right to be notified of the consent authority's decision, but have no right of merits appeal against the decision.

When development consent lapses

A consent operates from:

- the date noted on the conditions of consent; or
- if there was an appeal, the date of the appeal decision.

Development consents are usually granted for an indefinite period, and unless the consent has lapsed, any future purchaser of the land can act on the conditions of consent. Generally, a consent lapses if a development is not commenced within five years.

Some EPIs may prohibit development that is not commenced within one year.

Getting an extension

If a commencement time limit of less than five years is set, the developer can apply to the consent authority for an extension of one year, but this must be done before the consent expires.

Orders that work be completed

The consent authority can also order that work be completed within a reasonable time, even if it was begun within the required period.

Modification of consent

A developer can apply for a consent to be modified. A consent authority can agree to this if it is satisfied that the modified development is substantially the same as that originally proposed.

If the consent was for state significant, designated or otherwise advertised development

If the original development was a state significant or designated development, or the development was otherwise advertised and the consent authority was not a council, the consent authority must publish notice of the application for modification in a local newspaper, and it must be put on public exhibition for at least 14 days.

Other modification applications need to be notified or advertised in the same way as the original development but only up to 14 days.

Making a submission

Anyone can make a submission to the consent authority about the application to modify a consent during the community participation (ie, notification and exhibition) period.

State significant infrastructure

Modifications of state significant infrastructure are not limited to those where the modified development is substantially the same as, or consistent with, the original approval. Any environmental assessment or public exhibition requirements are subject to the Director-General's discretion, although applications must be published on the Department of Planning, Industry and Environment's website.

[23.200] Reviews

A developer which has its application for consent refused may seek merits review of that decision by the council within six months of receiving notification of the decision, or otherwise before any appeal is determined by the Land and Environment Court.

This right does not apply to complying, designated or integrated development.

The review application has to be publicly notified for a period of at least 14 days, or in accordance with a DCP, and anyone can make a submission within the specified time.

A developer can also request a review of a decision to reject an application without determining it.

[23.210] Appeals

There are generally two types of appeals available in relation to development consents: merits appeals and procedural appeals.

Merits appeals

Merits appeals are appeals on the facts – for example, on issues such as whether the development provides enough environmental protection. They are only available in limited circumstances in relation to development consents (see below).

Merits appeals involve a rehearing of the application and are brought in Class 1 of the Land and Environment Court's jurisdiction.

The preliminary conference

The first step in Class 1 proceedings is a preliminary conference presided over by a commissioner (a technical expert who is not a judge). The purpose of the conference is to try to get the parties to reach an agreement without going to a hearing.

If agreement is not reached, anything said at the conference is not admissible at the hearing.

The hearing

The Chief Judge of the Land and Environment Court decides whether the proceedings should be heard and determined by a judge or a commissioner. In practice, most merit appeals are dealt with by a commissioner. However, objector appeals are often heard by a judge with the assistance of a commissioner.

Proceedings for merits appeals are relatively informal. Legal representation is allowed but is not essential. The rules of evidence (eg, the rule against hearsay), which often restrict the sort of information a court can hear, do not apply.

What the court can do

The court hears all the evidence, including new evidence, then decides whether consent should be given. Among other things, it can:

- make a decision even where the concurrence of a concurrence authority has not been obtained;
- override conditions imposed by a concurrence body.

Costs

In merits appeals, each party generally pays its own costs, but the court can still make an order that one party pays the other party's legal costs if that is fair and reasonable in the circumstances.

Appeals from decisions in merits appeals

If a judge or commissioner of the Land and Environment Court has decided to approve or reject a development application, there is no further merits appeal available to the developer, the consent authority or objectors. However, a party to proceedings may appeal a decision of a commissioner on the basis that a legal error was made in determining the appeal. Such appeals are heard by a judge of the Land and Environment Court.

If a judge made the decision and it appears that a legal error was made in determining the appeal, a party to the proceedings may appeal to the Court of Appeal.

Appeal on the merits – developers and objectors

Merits hearings in relation to development consents are available to developers and objectors in the circumstances discussed below.

Appeals brought by developers

If a DA is rejected, or there are conditions of consent that are unacceptable to the developer, the developer can bring a merits appeal within six months of receiving notification of the decision.

A merits appeal is also available to the developer if there is a deemed refusal (see If a decision is not made within the time limit at [23.190]).

There is no merit appeal right for state significant development if the Independent Planning Commission has held a public hearing, or against decisions to refuse a complying development certificate.

Rights of third parties

The public does not have a general right to appear and be heard at a developer appeal. The developer brings its case against the consent authority. However, if the consent authority defends the appeal but does not raise evidence about a matter relevant to the proceedings, a third party can seek leave to join the proceedings to raise the evidence (*Land and Environment Court Act 1979* (NSW), s 39A).

The consent authority can also call evidence from people who objected to the development, and sometimes asks those people to give oral evidence in court or at a site view.

Rights of objectors

If the developer is appealing against a consent authority's decision in relation to an application for designated development or some types of state significant development, any member of the public who objected to the original application has special rights at the hearing. The objector can have their own legal representative present, and can lead evidence, rather than relying on the consent authority to ask them to present evidence. The objector can also make their own submissions to the court.

Appeals brought by objectors

Any person who made a written submission to the consent authority during the exhibition period of an application for designated development is known as an *objector*. Objectors have a right of merits appeal against a development consent if the consent is for designated development or a state significant development which also meets the criteria for designated development. The appeal must be commenced within 28 days of receiving notice of the decision of the council or the minister.

There is no provision for an extension of time to appeal.

There is no right of merits appeal against a consent if the application was the subject of a review or public hearing by the Independent Planning Commission.

Procedural appeals

Procedural appeals (also called judicial reviews) are concerned only with the decision-making procedure. The court cannot decide on the merits of a decision. This means it is not able to consider whether the decision is desirable or acceptable, but only whether the proper decision-making process was followed.

Procedural appeals are brought in Class 4 of the Land and Environment Court's jurisdiction and are heard by a judge.

Appeals in relation to an error of law

If there has been a flaw in the decision-making process (an *error of law*), anyone can bring proceedings to challenge the validity of the consent.

Appeals in relation to a breach of the Act

If the development consent decision-making process set out in the *Environmental Planning and Assessment Act* has not been followed, there will have been a breach of the Act.

Section 9.45 gives anyone the right to bring proceedings to enforce the provisions of the Act, or restrain a breach of it.

Time limits

Procedural appeals must be brought within three months of the consent authority publishing a notice in a newspaper of its decision to grant consent.

If the consent authority does not publish a notice of decision, there is also a limit of three months from the date of the decision, although the court does have a discretion to extend this time limit.

Costs

In procedural appeals, the loser must generally pay the winner's legal costs.

Possible grounds for appeal

A development consent could be challenged for not complying with the requirements of the *Environmental Planning and Assessment Act* and *Regulations* on a number of grounds, including that:

- the application was not properly advertised;
- relevant people were not properly notified;
- there was no environmental impact statement;
- the development is in a zone where developments of that type are prohibited;
- the development is contrary to a SEPP;
- irrelevant considerations were taken into account, or relevant considerations were not taken into account (such as a factor listed in s 4.15 of the *Act*). However, the courts impose a high standard of proof on anyone seeking to overturn decisions on this basis.

[23.220] Enforcing development consents

Enforcement under criminal law

It is a criminal offence to develop without consent, or to breach a development consent or its conditions. The Act has three tiers of penalties (see Pt 9, Div 9.6). For the most serious, intentional breaches, the penalties can be as high as $5 million for corporations or $1 million for individuals. The usual prosecutor is the regulatory authority, such as the local council.

Only in extreme cases, however, are the Act and development consents enforced by resort to the criminal law. It is difficult to prove criminal charges; civil action is far more common.

Civil action

Councils can issue an order under Div 9.3 of Pt 9 of the *Act* requiring a person to comply with a development consent.

Civil enforcement action can also be taken under s 9.45 of the *Act* to:

- stop a breach of a development consent;
- stop development that does not have development consent.

Section 9.45 of the *Act* gives anyone the right to bring proceedings to enforce the provisions of the Act or restrain a breach of it (see Appeals in relation to a breach of the Act at [23.210]).

Breaching development consent or approval, and developing without consent or approval where it is required, are both breaches of the Act.

Who can take action?

Civil enforcement action can be taken by the consent authority (either the local council or the minister), but if the council or the minister refuses to act, an individual can take action in Class 4 of the Land and Environment Court's jurisdiction.

Enforcement orders

Councils have the power to make enforcement orders in some circumstances as an alternative to criminal and civil court proceedings. The Minister or the Director-General can likewise issue orders in relation to state significant infrastructure.

What can council orders cover?

The orders can cover a range of matters, such as orders to demolish a building, repair or make structural alterations, take actions for fire safety, remove an advertising structure or change the use of a premises.

It is an offence not to comply with an order.

Failure to comply

If someone fails to carry out work under an order, the council can enter the property and carry out the work.

Appeal

A person on whom an order is served may appeal to the Land and Environment Court within 28 days after the order has been served.

The court may revoke, modify or replace the order or otherwise determine the appeal as it thinks fit.

[23.230] Building and subdivision certificates

The *Environmental Planning and Assessment Act* was subject to an overhaul which generally commenced on 1 March 2018. As part of that overhaul, the provisions dealing with building and subdivision certification have had a number of significant changes. However, at the time of writing, the commencement of these changes has been postponed until 1 December 2019. This means the "old" provisions of the Act (Pt 4A) still apply.

Part 4A creates (and the new Pt 6 continues) four certificates that are integrally connected with building and subdivision:

- *compliance certificates* certify that building or subdivision work has been completed as specified, or that a building or proposed building has a specified classification under the Building Code of Australia;
- *construction certificates* certify that work completed in accordance with specified plans and specifications will comply with the

requirements of relevant Regulations and the Building Code of Australia;
- *occupation certificates* authorise the occupation and use of new buildings, or changes of use for existing buildings;
- *subdivision certificates* authorise the registration of a plan of subdivision under Div 3 of Pt 23 of the *Conveyancing Act 1919* (NSW).

The new Pt 6 of the *Act* will add another type of certificate: a *subdivision works certificate* will effectively be a construction certificate for subdivision.

It is usually necessary to obtain one or more of these certificates before a development can be finalised. For example:
- a construction certificate is necessary before a building can be erected or land subdivided in accordance with a development consent;
- an occupation certificate is necessary before a new building can be used or occupied, and before there can be a change in use for an existing building;
- a plan of subdivision cannot be registered in accordance with the requirements of the *Conveyancing Act* until a subdivision certificate has been issued.

Environmental assessment under Part 5 of the Act

[23.240] Not all land use regulation falls within Pt 4 of the *Environmental Planning and Assessment Act*. Where development consent is not required under an EPI, the activity may still require assessment and approval under Pt 5.

[23.250] The purpose of Pt 5

Part 5 of the *Act* is intended as an environmental safety net; its purpose is to ensure that even where development consent is not necessary, an adequate level of environmental assessment is undertaken in relation to new development.

Part 5 is particularly important in the context of activities undertaken by government agencies and statutory authorities, which may not require development consent.

[23.260] What Pt 5 does

Essentially, Pt 5 requires government departments, public authorities and local councils (*determining authorities*) to make environmental assessments when they consider either carrying out, or granting approval for, an *activity* (Pt 5 defines "activity" in similar terms to the definition of "development" in Pt 4).

What the authority must consider

The determining authority must "examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity".

The authority must then decide whether the activity is likely to significantly affect the environment. Clause 228 of the *Regulation* spells out the factors to be considered.

A preliminary report may be prepared for activities that have complex environmental impacts to determine whether an environmental impact statement is required. This is known as a *review of environmental factors*.

If there may be a significant impact

If the determining authority decides that the activity is likely to significantly affect the environment, it must require an environmental impact statement to be prepared, and consider it before deciding whether to undertake the activity or grant approval for it.

If the determining authority (excepting councils and county councils) is the proponent, the activity may be state significant infrastructure (see below) and will have to follow that particular process.

State significant infrastructure

Division 5.2 of Pt 5 deals with state significant infrastructure, which may consist of:
- infrastructure;
- development proposed by a public authority (other than councils or county councils) that is likely to have a significant impact on the environment; or
- specified development on specified land.

The SEPP (State and Regional Development) 2011 sets out in more detail what classes of development will follow the state significant infrastructure assessment process. The Minister for Planning can also issue an order that a specific development will follow this procedure.

The minister can also declare such development to be "critical". This is development which, in the opinion of the minister, is essential for the state for economic, environmental or social reasons.

The Minister for Planning is the consent authority for state significant infrastructure.

Environmental assessment

The Director-General will inform the proponent what the environmental assessment requirements for the project are, after consulting with relevant agencies about key issues. The proponent will have to prepare an Environmental Impact Statement to address these requirements.

Public participation

The EIS must be exhibited to the public for at least 28 days. Any person can make submissions to the Department of Planning, Industry and Environment during that time. A copy of the submissions, or a report that sets out the issues raised by the public, is then sent to the proponent so that it can respond to the issues or make any appropriate changes.

As a result of those changes, a document called a preferred infrastructure report may be prepared by the proponent. The Director-General of the Department of Planning, Industry and Environment can decide whether or not the changes are so significant that this report should also be made available to the public.

Approval of state significant infrastructure

Once the environmental assessment process has been completed, the Director-General is required to prepare a report to the minister, which the minister will use to decide whether to approve the development.

The minister is not required to specifically consider the list of matters set out in s 4.15 (see What the consent authority must consider at [23.190]). Nor must the minister apply the terms of SEPPs or LEPs in making a decision to approve the development.

As with state significant development (see [23.150]), once state significant infrastructure has been approved by the minister, it will not require many of the other, usual environmental approvals. Those that are still required must be consistent with the minister's approval.

The approval may be modified without the minister's approval as long as the modified proposal is consistent with the approved proposal. Other modifications require the minister's consent.

[23.270] Environmental impact statements

Who prepares the statement?

The environmental impact statement is usually prepared by the proponent (the person or body proposing the activity).

In some cases, the determining authority is the proponent. For example, the Department of Primary Industries: Forestry Corporation of NSW is both proponent and determining authority in relation to the roads, tracks and trails it constructs in state forests to facilitate logging.

What must the statement include?

An environmental impact statement must include:

- an analysis of any feasible alternative;
- a detailed description of the likely impacts on the environment;
- the justification for the development, having regard to the principles of ecologically sustainable development.

It must be prepared in accordance with any guidelines in force under cl 230 of the *Regulation* or, if no guidelines are in force, the requirements of Sch 2 of the *Regulation*.

Advertisement and exhibition requirements

The statement must be advertised in both a statewide and a local newspaper on at least two occasions.

It must be put on public exhibition for at least 28 days, and public submissions must be called for. Anyone can make a submission during this time.

The determining authority must take all public submissions into account when deciding whether to undertake the activity or grant approval for it.

Threatened species and habitat

An activity that is likely to significantly affect a threatened species, or ecological community, or its habitat, or is to be carried out on land that is a declared area of outstanding biodiversity value (see [23.290]) requires a species impact statement and

the concurrence of the Chief Executive Officer of the OEH.

Some activities can instead rely on a biodiversity development assessment report and conditions requiring the proponent to purchase offsets ("retire credits") under the biodiversity offsets scheme.

[23.280] Appeals

There is no right of merits appeal in relation to Pt 5 of the *Act*. That is, it is not possible to appeal on the facts. However, it is possible to appeal on procedural grounds, arguing that incorrect process has been followed (eg, that public notification requirements were not met with regard to an environmental impact statement). One situation where new expert evidence can be relied on, however, is the "jurisdictional" question whether the activity "is likely to significantly affect the environment" and therefore requires an EIS or SIS.

Procedural appeals are heard by a judge in Class 4 of the Land and Environment Court's jurisdiction.

Court proceedings challenging the validity of critical state significant infrastructure approvals, or proceedings seeking to enforce those approvals, can generally only be begun with the minister's approval.

Time limits

Challenges to state significant infrastructure must be begun within three months after public notice of the decision has been given. There is no statutory time limit on bringing an appeal to restrain a breach of the Act, but as with all legal appeals, it is best to move quickly; an undue delay could see the case rejected on discretionary grounds.

What the court will consider

Note that in deciding whether an environmental impact statement is adequate, the court will ask whether it "substantially complies". The fact that it does not cover every possible topic and explore every avenue does not make it invalid.

Development not caught by Pt 5

Some development proposals may still escape Pt 5. For example, no approval may be required – although this is unlikely if the development involves a substantial environmental impact.

Other proposals may not be covered by Pt 5 because they do not fall within the meaning of "activity" as defined in the Act. For example, it has been held that the spraying of a noxious weed with the chemical 2,4-D, by a county council to which the task of eradicating noxious plants had been delegated, was not an "activity" within the limited meaning given to that term in the Act.

Finally, legislation sometimes exempts particular types of activities or development from Pt 5. For example, renewals of pollution approvals are exempt from Pt 5, as is exempt development under Pt 4.

Biodiversity conservation

[23.290] The *Biodiversity Conservation Act* applies to all plants and animals native to NSW. It allows threatened species to be listed and protected. *Threatened species* include:

- endangered species and ecological communities;
- vulnerable species and ecological communities;
- critically endangered species and ecological communities.

Fish and marine vegetation are the subject of similar provisions in the *Fisheries Management Act 1994* (NSW).

In addition, Pt 5A of the *Local Land Services Act 2013* (NSW) includes certain controls on the clearing of native vegetation.

[23.300] What the Act does

Listings

As well as listing the various types of threatened species, the Act has procedures for provisional listing of threatened species on an emergency basis and for the listing of *Key threatening processes*.

Nominations for listing are considered by a scientific committee, and anyone can nominate a species, population, community or threatening process for consideration.

The Act also establishes a procedure for the Minister to declare *areas of outstanding biodiversity value*.

What is the response to listing?

The Act establishes a Biodiversity Conservation program which includes:

- strategies to achieve the objectives of the Program in relation to each threatened species;
- a framework to guide the setting of priorities for implementing the strategies;
- a process for monitoring and reporting on the overall outcomes and effectiveness of the Program.

Strategies to minimise the impacts of key threatening processes may be included in the Program.

When licences are required

It is necessary to obtain a licence from the Director-General of the OEH for certain types of activities that affect biodiversity.

Licences are required for activities that:

- "harm" (animals) or "pick" (plants) that are a threatened species or part of a threatened ecological community;
- damage its habitat; or
- damage a declared area of outstanding biodiversity value.

In practice, a person will only need to obtain a licence if they do not have development consent or approval under the *Environmental Planning and Assessment Act*. There are also a range of other exceptions to the need to obtain a licence, which are set out in Div 2 of Pt 2 of the *Act*.

Other conservation measures

The *Biodiversity Conservation Act* also provides for other measures that may be taken to conserve threatened species. These take the form of:

- various types of conservation agreements with landholders under a Biodiversity Conservation Investment Scheme;
- a Biodiversity Offsets Scheme and Biodiversity Certification which are the main responses to impacts on biodiversity from development and other activities under the *Environmental and Planning Assessment Act*; and
- various compliance tools, including stop work orders, remediation orders and biodiversity offset enforcement orders.

Biodiversity Offsets Scheme

The *Biodiversity Conservation Act* has established a biodiversity banking and offsets scheme. Under this scheme:

- landowners can make biodiversity stewardship agreements with the Minister for the Environment to protect the biodiversity values on their land in return for "credits". The stewardship agreement contains ongoing management obligations;
- developers whose proposal is likely to have a significant effect on threatened species must obtain a biodiversity development assessment report, which sets out the number and type of "credits" that are necessary to mitigate residual impacts on threatened species. A similar assessment process applies to biodiversity certification (using a biodiversity certification assessment report);
- the reports are based on a biodiversity assessment method established by the Minister;
- the consent authority must impose conditions of consent requiring the purchase ("retirement") of credits to offset the damage caused to similar biodiversity values by the development;
- the developer must purchase the credits in accordance with the scheme, or make an equivalent payment into a Biodiversity Conservation Fund, which will be used to secure equivalent offsets.

Biodiversity certification

The Minister may confer biodiversity certification on specified land. The effect of doing so is that the environmental assessment processes under the *Environmental Planning and Assessment Act* will not include any assessment of the impact of a relevant project on the land on biodiversity values, and the project will be taken not to significantly affect any threatened species.

Biodiversity certification may be granted only if there is a biodiversity conservation strategy in place, which sets out what conservation measures will be implemented to offset the impacts on biodiversity values of the clearing of native vegetation and the loss of habitat. Such measures might include, for example, planning

controls, conservation agreements, biodiversity certification agreements which are made between the minister and another person, and/or use of the biodiversity offsets mechanism described above.

Biodiversity certification applications can be made by planning authorities (such as local councils) or by/with the agreement of all owners of the area(s) of land. Applications must be publicly notified, and the public will have at least 30 days to provide written submissions about such a proposal.

In deciding whether to grant biodiversity certification, an assessment must be made in accordance with a biodiversity assessment methodology, to determine whether the approved conservation measures being proposed will adequately address the likely impacts on biodiversity values. The previous test was whether the overall effect would be to improve or maintain biodiversity values. The methodology is available on the OEH website at www.environment.nsw.gov.au/biocertification.

In conferring certification, the minister may set out requirements for the implementation of conservation measures. These measures can be enforced by the minister if they are not being complied with.

[23.310] Development and activity approvals

What the authority must consider

In deciding whether the development or activity is likely to significantly affect a threatened species or an area of outstanding biodiversity value (in which case a species impact statement or biodiversity development assessment report will be required – see Threatened species and habitat at [23.270]), the consent authority or determining authority must consider the matters set out in ss 7.3 and 7.4 of the *Biodiversity Conservation Act*. Section 7.3 of the *Act* is similar to what was previously known as the *seven part test*.

The consent authority must refuse consent if the proposal will have "serious and irreversible impacts on biodiversity values", unless the proposal is state significant development or infrastructure or another Pt 5 activity. In those cases, the decision-maker must take those impacts into consideration and decide if there are any additional and appropriate measures to minimise the impacts.

Requirement for concurrence

Neither the consent authority nor the determining authority can approve the application or activity without the concurrence of the Environment Agency Head. Concurrence is not necessary if the proposal is dealt with under the biodiversity offsets scheme.

If the authority is a minister

If the consent authority or the determining authority is a minister, the minister need only consult with the Minister for the Environment, and does not need to obtain concurrence from the Environment Agency Head. Again, the requirement does not apply if the proposal is dealt with under the biodiversity offsets scheme.

Federal legislation

[23.320] A development or activity may require approval from the federal Minister for the Environment, in addition to an approval under NSW law. In this case, the environmental impacts of the development or activity will need to be assessed in accordance with the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Act applies to:

- "matters of national environmental significance";
- actions to be carried out by the Commonwealth, or on Commonwealth land.

Under the Act, it is necessary to obtain an approval from the federal minister to carry out a *controlled action*.

[23.330] What is a controlled action?

"Actions" are defined to include such things as a project, a development, an undertaking, an activity, or an alteration to one of these things. A decision by government to give approval for an action, or make a grant of funding, is not an action.

"Controlled actions" include:

- actions likely to have a "significant impact" on a "matter of national environmental significance" (see below);
- actions likely to have a significant impact on the environment of Commonwealth land, even if the action occurs outside Commonwealth land; and
- actions by the Commonwealth government or a Commonwealth agency likely to have a significant impact on the environment.

What is a significant impact?

Guidelines on what is a significant impact can be found on the Department of the Environment website at www.environment.gov.au/epbc/publications.

Matters of national environmental significance

The following are currently defined as "matters of national environmental significance":

- world heritage properties;
- national heritage places;
- wetlands of international importance under the Ramsar Convention;
- nationally listed threatened species and ecological communities;
- nationally listed migratory species;
- activities relating to nuclear energy, including uranium mining;
- the Commonwealth marine environment;
- the Great Barrier Reef Marine Park;
- water resources, in relation to coal seam gas and large coal mining developments.

Additional matters of national environmental significance may be added without the agreement of the states, after consultation, and the list must be reviewed every five years to determine whether further matters should be added (but not deleted).

[23.340] When is approval required?

An action determined by the federal Minister for the Environment to be a "controlled action" (see [23.330]) requires the minister's approval before it can be carried out. The minister decides whether approval is required for a particular action when it is referred to the minister, or the minister calls it in for assessment.

If the minister decides that an action does not need approval under the *Environment Protection and Biodiversity Conservation Act*, only state or territory approvals may be required.

Penalties

There are significant penalties for undertaking a controlled action without approval. The maximum penalty for an individual is $550,000; for a body corporate, it is $5.5 million. Certain offences are also punishable with up to seven years' gaol.

Exceptions

Some matters are exempt from the approval requirements, even if they have a significant impact on a matter of national environmental significance. The exceptions are:

- logging of forests in areas covered by a *regional forest agreement*;
- actions in the Great Barrier Reef Marine Park that have been approved under the *Great Barrier Reef Marine Park Act 1975* (Cth);
- actions exempted by a ministerial declaration;
- actions that have been approved in accordance with an approval under a bilateral agreement (At the time of writing, the Australian government is considering a draft approval bilateral agreement as part of its commitment to a "One Stop Shop" for environmental approvals.);
- actions that will occur in accordance with an endorsed strategic policy, plan or program.

[23.350] The assessment and approval process

The process of assessment and approval of an action is initiated by a referral to the federal Minister for the Environment from one of a number of sources:

- The person or organisation proposing to take the action has a duty to refer it to the minister for a decision as to whether it is a controlled action requiring assessment and approval.
- A state or territory government, agency or local council with responsibilities relating to the proposal can refer it to the minister.
- The minister may request the person or organisation to refer the proposal. If no referral is made within the set time, the minister can deem the action to be referred.
- A Commonwealth agency or minister with responsibilities relating to the proposed action can refer it to the minister.

Unacceptable actions

The minister can decide within 20 days of receiving a referral that an action would clearly have unacceptable impacts on a matter of national environmental significance. This means that the minister does not need to further consider the matter and the proponent cannot go ahead with the action.

The assessment process

After referral, the minister decides what level of assessment is required for the action. There are four possible levels of assessment:

- *assessment on preliminary documentation* – the proponent seeks comments from the public on preliminary information that the minister believes on reasonable grounds will give the information necessary to make an informed decision;
- *public environment report* – the proponent prepares a report following guidelines provided by the minister. Comments are invited which are given to the minister, and the Secretary of the Department of the Environment reports to the minister;
- *environmental impact statement* – this follows a process similar to the public environment report process, but usually examines the activity in more detail;
- *public inquiry* – this is undertaken by a commissioner appointed by the minister, who provides a report to the minister which is made public. The minister sets the terms of reference for the inquiry.

Public comment requirements

A draft of the environmental impact statement or the completed public environment report must ordinarily be released for public comment, and advertised. At least 20 business days must be allowed for written comments to be made, and these comments must be passed on by the proponent to the Department of the Environment.

Following the receipt of public submissions, any draft environmental impact statement must be revised, taking into account the comments received.

The minister's decision

Within 30 days of receiving the results of an environmental assessment (or 40 days of receiving the report of a public inquiry), the minister must decide whether to grant an approval, and what conditions, if any, to attach to it.

Restrictions on the minister's decision

In granting an approval or imposing conditions on an approval relating to world heritage sites, national heritage places, Ramsar wetlands, threatened species or ecological communities or migratory species, the minister cannot act inconsistently with Australia's obligations under the relevant international conventions, and must not grant an approval that is inconsistent with a recovery plan or a threat abatement plan. There are direct prohibitions on approving nuclear power plants or enriching or reprocessing facilities.

Delegation of federal planning powers

Under the *Environment Protection and Biodiversity Conservation Act*, the Commonwealth can also enter into bilateral agreements with states and territories by which the Commonwealth can:

- delegate its assessment processes and approval powers to the state or territory government; or
- accredit a state assessment process on a one-off basis.

Bilateral agreements

The Commonwealth has entered into a number of bilateral assessment agreements, including an agreement with NSW. This covers environmental assessment procedures under the *Environmental Planning and Assessment Act*. An updated agreement is waiting for sign off at the time of writing. If an action has been assessed using one of these procedures, the Commonwealth will not need to carry out its

own environmental assessment, as long as the NSW assessment covered the relevant Commonwealth matters.

Public inquiries and appeals

The *Environment Protection and Biodiversity Conservation Act* does not allow members of the public to demand an inquiry, and very few have been held.

Unlike the NSW *Environmental Planning and Assessment Act*, the *Environment Protection and Biodiversity Conservation Act* does not provide "open standing" rights to allow any person to appeal against decisions under the Act.

Interested persons and organisations

The *Environment Protection and Biodiversity Conservation Act* allows some interested persons and organisations to bring proceedings to enforce its provisions. A person or organisation is "interested" if:

- the person or organisation's interests have been affected by the action or the decision; or
- the person or organisation has been engaged in activities for protecting, conserving or researching the environment at any time in the previous two years and, in the case of an organisation, the organisation's objects or purposes include protecting, conserving or researching the environment.

Bringing legal proceedings

In bringing legal proceedings under the Act, interested persons or organisations can seek injunctions and orders to repair or mitigate damage to the environment.

Proceedings brought under the Act are commenced in the Federal Court.

Merits appeals may be brought in the Administrative Appeals Tribunal in relation to the grant of permits and the making of declarations by the minister's delegate for the international movement of wildlife under Pt 13A of the *Act*.

HERITAGE PROTECTION

[23.360] This section deals with laws operating in NSW that confer a special protected status on heritage items. "Heritage" covers items with natural and cultural values, and it includes Indigenous heritage. What fits into each heritage category can be contentious.

Schemes that protect natural heritage often merge with environmental considerations in general. This section deals more fully with the protection of items of cultural heritage, which are, broadly, built structures and precincts, and moveable objects and relics.

Heritage laws

[23.370] While heritage laws operating in NSW cover a broad range of items in both public and private ownership, they are mainly invoked to protect items of cultural heritage in private ownership.

[23.380] Legislation

The main heritage legislation in NSW is the national *Environment Protection and Biodiversity Conservation Act* and the State *Heritage Act*.

The *Environmental Planning and Assessment Act*, supplemented by the *Local Government Act*, is also very important for heritage in local areas.

Provisions in the *National Parks and Wildlife Act 1974* (NSW) are important for the protection of natural heritage in private ownership, historic places and Aboriginal heritage.

What is cultural heritage?

Defining cultural heritage can be difficult.

The first reaction of many people is to think in terms of old buildings. Most statutory definitions in Australia, however, are much broader. For example, the main Commonwealth legislation, the *Environment Protection and Biodiversity Conservation Act* defines the "heritage value of a place" as including that its natural or cultural environment has aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians (s 528).

The idea of valuing items of aesthetic and historic significance is a familiar one, but the concept of the social value of heritage items continues to be an interesting issue in heritage studies.

The major pieces of legislation in Australia largely operate by giving government ministers and public servants powers to protect heritage.

The legislation's definitions of heritage are very broad. These definitions, and the structures for public participation that the legislation provides, make it of vital interest not only to people who wish to protect a much-loved historic building but to those who want to protect people's neighbourhoods, the homes of low income groups, or the wider environment.

[23.390] Public ownership of heritage

The emphasis on private ownership should not be taken as downplaying the importance of items in public ownership, particularly as the state and federal governments are still the largest owners and users of cultural and natural heritage items. Cultural heritage items, like historic schools, railway stations and bridges tend, however, to be held by government under laws relating to property rights, which will not be discussed here.

State-owned protected areas and reserves contain a significant part of our natural heritage with items of cultural value, and the most important of the relevant laws are discussed briefly.

Heritage legislation places special obligations on public sector owners of heritage, but moves towards smaller government and the privatisation of government businesses, mean that government ownership is no longer the safeguard of cultural heritage properties it once was.

International issues

Heritage is a matter of international concern that affects Australia. Australia is a party to many international conventions that relate to conservation, primarily of the natural environment, but also of the cultural heritage.

The World Heritage Convention

The World Heritage Convention is concerned with the conservation of places that are significant as natural or cultural heritage, or both. (Kakadu in the Northern Territory, eg, is listed for both its natural and cultural values.) The convention is administered by UNESCO, an agency of the United Nations based in Paris.

While the convention may not be a law in a domestic sense, the work of UNESCO and its World Heritage Committee generates international guidelines and expectations, which are reflected in heritage conservation practice in Australia.

International agencies

UNESCO relies on preliminary assessment work by two international, non-government agencies that assist its World Heritage Committee:

- ICOMOS (International Committee on Monuments and Sites) for cultural heritage; and
- IUCN (International Union for the Conservation of Nature) for natural heritage.

Both organisations have active branches in Australia.

The World Heritage List

The World Heritage List is a list of properties considered to be of "outstanding universal value" under the World Heritage Convention. Sites are listed under the convention according to criteria relating to cultural sites, natural sites and cultural landscapes.

There are 19 world heritage sites in Australia; six in NSW, including the Greater Blue Mountains Area and, more recently, the Sydney Opera House. Some sites, like the Australian Convict Sites are serial sites, telling a national and international story across a number of different sites, in different states.

Heritage in NSW

[23.400] Heritage laws in NSW list heritage items by reference to their national, Commonwealth, state and local significance.

Dividing our heritage

A competing view, that heritage significance cannot be neatly divided along the lines of Australia's political and administrative divisions, lay behind the idea of Australia's "national estate" embodied in the Register of the National Estate. This was established under the repealed *Australian Heritage Commission Act 1975* (Cth).

[23.410] Heritage lists

Heritage laws in NSW protect items entered on a *heritage list*, with five statutory lists operating in NSW, including the federal lists.

The National Trust's list and other lists are important, but they do not give legal protection.

Why list?

Listing is the preferred way of providing protection because it is widely seen as proactive. A listing agency may systematically list items of heritage significance, which are then protected.

Until 1998, the *Heritage Act* relied on *conservation orders*, generally made when an item or precinct was in danger, and often after considerable time and money had been spent on development plans. Supporters of listing say that the process gives people advance notice of what is, and is not, available for development.

[23.420] Federal legislation

The federal government is an active participant in heritage issues. Constitutional cases since the 1980s have upheld the federal parliament's power to legislate in matters affecting heritage and the environment.

The *Environment Protection and Biodiversity Conservation Act*, based on these cases, is the Commonwealth's main environment protection legislation, and also contains its heritage protection laws, protecting places of world, national and Commonwealth significance.

Federal power in heritage matters

The power of the federal government to legislate to protect heritage sites of international significance in Australia was recognised in the famous *Tasmanian Dams* case (*Commonwealth v Tasmania* (1983) 46 ALR 625).

In that case, the High Court recognised the validity of the *World Properties Conservation Act 1983*, which enabled the federal government to give effect to Australia's obligations under the World Heritage Convention.

The Act was replaced with provisions in the *Environment Protection and Biodiversity Conservation Act*.

What does the Act protect?

The *Environment Protection and Biodiversity Conservation Act* protects four main categories of places:

- world heritage places;
- national heritage places;
- Commonwealth heritage places;
- places on the List of Overseas Places of Historic Significance to Australia.

Sites of world significance

World heritage places are:

- properties on the World Heritage List; and
- properties that the federal minister (usually the Minister with responsibility for the environment) declares to be world heritage properties.

Properties declared to be world heritage properties

These are properties that have been submitted to the World Heritage Committee of UNESCO for consideration, or are seen as likely to have world heritage values (s 14).

How the sites are protected

The legislation deals with the protection and management of these sites.

Approval requirements

No person may take any action likely to impact significantly on the world heritage values of a property without approval (s 12).

Management principles and management plans

The minister makes management plans for sites in Commonwealth areas (s 316) and works with the states and territories for other sites (s 320). The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) set out Australian World Heritage Management principles.

Management in conjunction with states and territories

Most world heritage sites in Australia are managed through agreements between the Commonwealth and the relevant state or territory, usually based on their existing laws, or joint legislation.

[23.430] Sites of national significance

Heritage sites of national, rather than international, significance are listed as follows

- two lists set up by the Ch 5 of the *Environment Protection and Biodiversity Conservation Act*:

- sites of *outstanding* national significance on the National Heritage List;
- *significant* sites owned by the Commonwealth government on the Commonwealth Heritage List.

The legislative scheme for these lists follows that for world heritage sites.

The Register of the National Estate

Many readers will be familiar with the Register of the National Estate maintained under the repealed *Australian Heritage Commission Act 1975* (Cth).

Maintaining the register was the responsibility of the Australian Heritage Council (*Australian Heritage Council Act 2003* (Cth)) until February 2012 when references to the Register were deleted from that Act and the *Environment Protection and Biodiversity Conservation Act*.

What protection is provided?

Items listed on the Register of the National Estate have no legislative protection.

The National Heritage List

The minister may list places on the National Heritage List for their national heritage value (*Environment Protection and Biodiversity Conservation Act*, Ch 5, Pt 15, Div 1A). Places may also be nominated for listing by the Australian Heritage Council or the public.

A place has a national heritage value if it meets one of the criteria set out in the regulations. The minister asks the council for an assessment of the place and calls for public comment.

What protection is provided?

The Act provides for the place's protection and management, to the extent that the Commonwealth's constitutional powers allow.

Corporations and the Commonwealth and its agencies must not take action likely to affect significantly the place's national heritage values.

A person may not take such an action:

- for the purposes of trade or commerce;
- where the value is an Indigenous heritage value; or
- in an area that Australia has responsibility for under the Biodiversity Convention (*Environment Protection and Biodiversity Conservation Act*, s 15B).

There are civil and criminal penalties (*Environment Protection and Biodiversity Conservation Act*, ss 15B, 15C). The legislation also sets out exceptions (*Environment Protection and Biodiversity Conservation Act*, ss 15B(8), 15C(16)).

Plans are prepared to protect and manage heritage values.

The Commonwealth Heritage List

Where a place has national heritage values, the minister may list it on the Commonwealth Heritage List, if:

- the place is in a Commonwealth area; or
- it is owned or leased outside the Australian jurisdiction by the Commonwealth or one of its agencies (*Environment Protection and Biodiversity Conservation Act*, s 341C).

A place has a Commonwealth heritage value if it meets one of the criteria set out in the regulations (*Environment Protection and Biodiversity Conservation Act*, s 341D). Places may also be nominated for listing by the Australian Heritage Council or the public.

The minister asks the council for an assessment of the place and calls for public comment.

What protection is provided?

A person must not, without approval, take an action on Commonwealth land likely to have a significant impact on the environment within Australia (s 26) or on the environment in a Commonwealth Heritage place outside the Australian jurisdiction (s 27B). In this context, "environment" includes heritage values (s 528).

Commonwealth agencies make plans to protect and manage the heritage values of any Commonwealth Heritage places they own or control (s 341S).

The Commonwealth and its agencies must not contravene these plans.

List of Overseas Places of Historic Significance to Australia

This list was created in 2006. The minister adds items of *outstanding* significance to the list after consulting with the Minister for Foreign Affairs (*Environment Protection and Biodiversity Conservation Act*, ss 390K–390N).

[23.440] Conservation agreements with the Commonwealth

Under the *Environment Protection and Biodiversity Conservation Act*, the minister may enter into a conservation agreement with persons with a legal

interest in the place to promote the protection and conservation of biodiversity, world heritage and national and Commonwealth heritage values.

Agreements are legally binding on the parties, including successors in title to that interest (Ch 5, Pt 14). The Commonwealth may provide financial, technical and other assistance to the person assuming obligations under the agreement (s 306).

[23.450] NSW legislation

In NSW, places of state and local significance are protected by the *Heritage Act*, administered by the NSW Heritage Council and sections of the NSW public service.

The council's powers are largely advisory and recommendatory.

What does the Act protect?

The *Heritage Act* is concerned with environmental heritage, defined as those places, buildings, works, relics, moveable objects and precincts that are of state or local heritage significance (*Heritage Act*, s 4A).

The Act defines this significance to include historic, scientific, cultural, social, archaeological, architectural, natural and aesthetic significance.

Protection under the Act

The Act enables the Heritage Council to supervise any changes to an item that is:

- subject to an interim heritage order; or
- placed on the state Heritage Register.

It may also supervise changes approved under other legislation, such as the *Local Government Act* or the *Environmental Planning and Assessment Act*.

What activities are covered?

Activities covered include demolition, alteration, excavation, site development, the display of notices or advertisements, and damage or destruction of vegetation. These changes are prohibited, unless an approval is first obtained, or there is a specific exemption in operation (s 57).

Who gives approval?

The approval body is:

- the Heritage Council; or
- the relevant local council if that council has imposed an interim heritage order on the property affected.

When is approval likely to be given?

Approvals are typically given for such activities as routine maintenance and repair, alterations to the interior of buildings, some changes of use and subdivision.

Demolition proposals

Applications that would involve demolition must be refused, unless:

- the item is dangerous; or
- the proposal is to relocate the building (*Heritage Act*, s 63).

When consultation is required

If the approval body believes that approval of an application would *materially affect the significance* of an item of environmental heritage, it must exhibit the plans and carry out community consultation before reaching a decision (s 61).

Appeals

Appeals from a decision of the Heritage Council are heard by the minister (s 70) and from a decision of a local council by the Land and Environment Court (s 70A).

Registers kept by the Heritage Council

The Heritage Council keeps the state Heritage Register. It also maintains a register of all properties subject to interim conservation orders, and of any orders, notices and any heritage agreements made under the Act.

Both registers are available for public inspection (s 22).

How to find out if a place is listed

Interested people, such as intending purchasers, can find out if land is affected by an interim heritage order or listing on the state Heritage Register by applying for a certificate from the Heritage Council (s 167) or consulting its website.

[23.460] Entry on the state Heritage Register

The minister may direct that an item be listed on, or removed from, the state Heritage Register after receiving a recommendation from the Heritage Council.

Notice, objections and public inquiries

The Heritage Council gives affected owners and occupiers written notice of an intention to consider listing and also advertises its intention in a newspaper circulating in the area. The notice invites submissions.

What the minister may decide

The minister may decide:

- to list the item; or
- to refer the question to the Independent Planning Commission.

Removing an item from the register

The procedure is similar for decisions to remove an item from the register.

What protection does listing give?

Items of state or local significance are protected by the *Heritage Act* when they are listed on the state Heritage Register.

The minister may enter into agreements with relevant persons to further this protection.

Interim protection

While items are being assessed for listing on the state Heritage Register, they may be protected by an interim heritage order.

[23.470] Making an interim heritage order

An interim heritage order is a temporary protective measure that allows time for a place, building, work, relic, moveable object or precinct to be assessed.

The order is made by the minister, who may seek advice from the Heritage Council. The minister will make an order if it is considered likely that the heritage item will be found to be of state or local heritage significance (s 24).

The minister may also authorise local councils to make interim heritage orders for items of local heritage significance in their areas (s 25).

Affected people need not be given notice until after an interim heritage order has been made (s 26). This helps ensure that an item will not be harmed before the order takes effect.

[23.480] Standards for maintenance and repair

The Heritage Council may endorse a conservation management plan for the heritage place that will govern its care. In addition, the Regulations under the *Heritage Act* set out minimum standards for the maintenance and repair of heritage items. Buildings, works or relics listed on the register, or in a precinct that is listed, must be maintained and repaired to these standards (s 118), and failure to do so is an offence by the owner (s 119).

Heritage Council orders

Where the Heritage Council is satisfied that a heritage item is not being maintained to at least the minimum standards required by the conservation management plan or the regulations, it may order the owner to take, or refrain from taking, some specified action (s 120).

The owner is entitled:

- to be given notice of the order;
- to be given the opportunity to make representations (ss 120A, 120B);
- to appeal to the Land and Environment Court against the order (s 120L).

If the owner fails to comply

If an owner fails to comply with an order, the Heritage Council may carry out the necessary work on the property at the owner's expense (s 120K).

If a person threatens action against a heritage order

If somebody threatens to go ahead with a project in defiance of orders made under the Act, or any other provisions, anyone can bring proceedings in the Land and Environment Court for an order to stop them (s 153).

If damage has already been done, an order can still be sought to remedy the situation by, for example, restoring a damaged building (s 154).

[23.490] If a person breaches the Act

A person who breaches the Act or the Regulations commits an offence (s 156), punishable in the Local Court, or the Land and Environment Court (s 158). Penalties are lower in the Local Court.

In some circumstances, prosecutions may be brought by private individuals.

Orders that can be issued by the minister

The minister has other significant powers against an owner of heritage property who has been

convicted of an offence involving demolition or damage. The minister can issue an order forbidding:

- any development or use of the land for a period of up to 10 years;
- any development that would exceed the previous building envelope (ss 160–162).

The effect of this second order is that a developer who demolishes a heritage item may not build anything bigger on the site, which usually removes the financial incentive for the demolition.

Penalties

The maximum penalty for offences under the *Heritage Act* is 10,000 penalty units (currently $1,100,000) and six months' imprisonment (s 157).

[23.500] Heritage agreements

The *Heritage Act* provides for *heritage agreements* between the owner of an item listed on the state Heritage Register and the minister, who receives advice from the Heritage Council (s 39).

Heritage agreements can be registered, after which they run with the land; that is, the agreement binds future owners of the land as well as the owner who entered into the original agreement (s 43).

A heritage agreement can cover (s 40):

- conservation of the item;
- financial and other advice required for conservation;
- review of the valuation of the item, or the land;
- restrictions on the use of the item, or the land;
- carrying out of work, and the standard of the work;
- restrictions on work that may be carried out;
- exemptions for specified activities;
- repayment of any assistance money;
- public access.

If an agreement is breached

The minister may apply to the Land and Environment Court for an injunction to restrain a breach of an agreement (s 44).

Appeal

A decision of the minister under the *Heritage Act* is considered to be a political decision and is therefore not subject to appeal in the courts. The way the minister arrived at the decision is, however, reviewable by the Supreme Court under a system of review called administrative law (see Chapter 9, Complaints).

What happened to the Regent Theatre?

An example of administrative review in the heritage context is the celebrated case of the now demolished Regent Theatre in Sydney's George Street cinema district. The minister revoked a permanent conservation order over the theatre, but the Land and Environment Court declared that invalid. The court decided that the minister had failed to consider relevant information, including the Commissioner of Inquiry's report.

A later decision by the minister to revoke the same permanent conservation order was found to have no procedural flaws (*Nettheim v Minister* (unreported LEC, 16 August and 21 September 1988; Court of Appeal, 21 October 21 1988)).

[23.510] Emergency orders

Stop work orders can be made under s 136 of the *Heritage Act* to protect vulnerable items of the environmental heritage.

An order under s 136 is a short-term emergency order that takes effect as soon as it is nailed or fixed to the building, work, relic or place that is in danger.

The order is made by the minister, or by the chairperson of the Heritage Council, over a building or work that is about to be demolished, or a relic or place that is about to be harmed. Once an order has been made, any activity or work must stop for 40 days.

What happened to Rose's Emporium?

Rose's Emporium had occupied a prominent corner site in the shopping centre of Parramatta Road, Petersham, until it was demolished in the early hours of a Sunday morning in August 1986. The building had been subject to an emergency order. The two defendants argued that they did not know that the order had been gazetted. The Court of Appeal, however, required evidence that this belief was reasonable. In fact, the defendants had

deliberately avoided making any further inquiries about the gazettal, even though their suspicions had been aroused. Two people were found guilty of demolishing the building contrary to the order and each fined $4,000.

The building, of course, was lost forever (*Caralis v Smyth* (1988) 65 LGRA 303).

[23.520] Financial assistance to owners

The minister, advised by the Heritage Council, may make grants or loans to promote and assist the conservation of items of the environmental heritage (s 106).

Where there is a heritage agreement

The minister may arrange for the provision of financial, technical and other assistance to the owner of an item or land subject to a heritage agreement (s 45).

Rate and tax relief

The owner of a property that is subject to the protective provisions of the Act may seek a reduction in property rates and state taxes under the Act (ss 123–128).

[23.530] Under the Environmental Planning and Assessment Act

It is becoming apparent that the most commonly used legislative instruments for preserving most items of heritage significance in private hands are environmental planning instruments under the *Environmental Planning and Assessment Act*.

The *Heritage Act* now makes statutory provision for the connections between the two Acts that has been developing since 1985, when the minister issued a direction under s 117 of the *Environmental Planning and Assessment Act* to local councils that, unless a special case is made out, all draft local environment plans should include heritage provisions for:

- land on which a building, work or relic is situated, or which comprises a building, work, relic or place, of historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance;
- areas of ecological significance.

Heritage provisions of an EPI

The heritage provisions of an environmental planning instrument typically call for development consent for certain activities, including demolition and the alteration of listed heritage items.

The instrument may set out procedures for public consultation.

It may also require the council or other consent authority to take into account heritage factors when considering an application to carry out development on land in the vicinity of a heritage item.

Standardised heritage provisions are being implemented in current moves for the reform of NSW planning laws.

Integrated development

Some *integrated* development applications require heritage approvals under the *Heritage Act* as well as approval from other consent authorities (see [23.180]).

Local heritage studies

Many councils have commissioned heritage studies of their areas as part of the preparation of a new draft local environment plan and have incorporated heritage protection provisions in the final document including, in many cases, a list of heritage items in the council area.

Heritage Council policy

The Heritage Council has decided that it will not recommend the listing of an item of environmental heritage if it is otherwise adequately protected; for example, by a planning instrument.

The Heritage Council provides funding for heritage studies and may subsidise the employment of heritage planners to assist councils in their responsibilities for heritage.

What happens when heritage protection is left to the planning system?

While this system alerts councils to heritage issues, it does so only as one of many factors that councils must consider. Even if the council is constrained by its environmental planning instrument to give more weight to heritage than to other issues, its decisions can be appealed to the Land and Environment Court.

Thus, there is an argument that the preservation of a heritage item, seemingly paramount under the *Heritage Act*, is downgraded under the *Environmental Planning and Assessment Act* system, which uses lists of heritage items, often attached as a schedule to the planning instrument.

The fact that a building or place is not listed does not mean that it has no heritage significance. Appreciation of heritage significance changes over time, and it should be remembered that one of the criteria for heritage is an item's social significance.

Communities are only now beginning to recognise that preserving individual items in a landscape does not necessarily preserve what they value in their area. It may not be possible to put their "sense of place" on a list, and it may require much more subtle responses than identifying a few major physical features.

Under the Local Government Act

A local council may be able to take heritage issues into account even when the subject matter of the decision has not been included in an instrument under the *Environmental Planning and Assessment Act*. Section 89 of the *Local Government Act* requires councils to seek to give effect to an applicant's interests to the extent that they are compatible with the public interest. The matters that the council must consider in relation to the public interest include "any items of cultural and heritage significance which might be affected" (s 89(3)(c)).

[23.540] The National Parks and Wildlife Act

The *National Parks and Wildlife Act 1974* (NSW) is extremely important in heritage preservation, not only for items of natural heritage but also for cultural and Aboriginal heritage.

The main protection the Act provides is preservation of heritage through public ownership.

Specially protected areas

Under the Act, land can be set aside for conservation purposes under many categories (s 30A), including:

- national parks (s 33);
- historic sites (including the site of events) (s 33);
- state conservation areas (s 47B);
- nature reserves (s 49) and karst conservation reserves (s 58K);
- regional parks (s 47O);
- wild rivers (s 61).

Classifications applying to private land

A number of other classifications may be applied to privately owned land as well as Crown land:

- Aboriginal places (places of "special significance with respect to Aboriginal culture") (s 84);
- Aboriginal areas (s 62(4));
- wildlife refuges (s 68).

Interim protection orders

The Chief Executive may issue interim protection orders under the Act to protect land of natural, scientific or cultural significance, or where action is threatened in relation to fauna or native plants (ss 91A, 91B).

Interim protection orders last for a maximum of two years (s 91D).

Interim protection orders were introduced in 1987. The first, made in 1988 to protect a colony of koalas near Campbelltown, was replaced by a conservation agreement with the owner of the property. Other orders relate to the protection of rare plants near Faulconbridge, a rare bird habitat and Antarctic beech community near Dorrigo, and a koala colony near Grafton.

Permanent protection

There is no provision for permanent orders. Permanent protection depends on:

- a conservation agreement under the Act;
- an environmental planning instrument; or
- invoking the *Heritage Act*.

[23.550] The Wilderness Act

Under the *Wilderness Act 1987* (NSW), wilderness areas can be created on public land, or, with the agreement of the owner, on private land, to provide opportunities for solitude and self-reliant recreation.

[23.560] The Forestry Act

Flora reserves may be set aside in state forests under the *Forestry Act 2012* (NSW) to preserve native flora (s 16).

Competing values

The extent to which these different areas are managed for heritage conservation purposes varies. In national parks, for example, there is a constant tension between conservation and the need to provide opportunities for recreation.

In other areas, there may be a tension between different heritage purposes. Natural areas may be reserved for what are really cultural reasons, such as the inspirational value of tall mountains and spectacular views. Yet it may be important to preserve areas that are not considered beautiful. The preservation of "smelly" swamps and "boring" scrub is extraordinarily important, for example, for maintaining biodiversity.

POLLUTION

[23.570] The *Protection of the Environment Operations Act 1997* (NSW) came into force on 1 July 1999. It consolidated older Acts dealing with air, water and other pollution, noise, regulation of waste and other environmental offences.

Pollution regulation

[23.580] Protection of the environment policies

The *Protection of the Environment Operations Act* provides for the making of protection of the environment policies, designed to guide public authorities in carrying out activities and making decisions that affect the environment.

What the policies may do

Protection of the environment policies may:

- set environmental standards or goals;
- set guidelines and programs for achieving those standards or goals;
- establish ways of measuring whether the standards or goals have been achieved.

The policies may be made to cover a particular geographical area, activity or pollutant. They are rarely made, in practice.

Can the policies be enforced?

The policies are largely advisory, and they do not create criminal offences or allow civil penalties. The Act simply requires that they be taken into account by the EPA, councils and other regulatory authorities when licensing pollution-generating activities.

One of the criticisms of the policies is that because they are not legally enforceable they will have limited effectiveness.

[23.590] Pollution licences

Schedule of activities requiring a licence

The *Protection of the Environment Operations Act* provides a single Schedule of activities that require a licence from the EPA.

The EPA has sole responsibility for licensing:

- scheduled activities under the Act; and
- non-scheduled activities in a local authority area (for water pollution).

Licences to control water pollution

The Act makes it an offence to pollute waters. However, it provides a defence if the polluting activity complies with either a licence or a regulation that controls the way in which the activity may be carried out.

Licences issued in perpetuity

Licences remain in force until they are suspended, revoked or surrendered.

The EPA has the power to amend, revoke or suspend licences at any time due to unsatisfactory performance, and licences are to be reviewed every five years.

Rights of appeal

An applicant or licence holder has 21 days to appeal to the Land and Environment Court against a decision to refuse, revoke or suspend a licence, or against the conditions imposed on a licence.

[23.600] Licences and planning approvals

Where development consent is required for a proposal that also requires a pollution licence (known as an environment protection licence), the development is *integrated development* (see [23.180]) or it may be a state significant development or infrastructure (see [23.150] and [23.260]).

[23.610] Environment protection notices

Under the Act, three types of notice can be issued to polluters. These are:

- *clean-up notices*, requiring specified action to deal with a spill or unlawful disposal of waste;
- *prevention notices*, requiring specified measures to achieve improved environmental outcomes

from an activity (generally these are operational measures – eg, the repair of equipment);
- *prohibition notices*, requiring, in exceptional circumstances, the cessation of an activity.

Again, there are rights of appeal to the Land and Environment Court against such notices.

[23.620] Regulatory powers under the Act

Who has responsibility?

The Act divides responsibility for overseeing its regulatory functions mainly between the EPA and councils.

Essentially, the EPA is responsible for regulating activities listed in the schedule to the Act and activities carried out by the government or public authorities (including local councils).

Local councils are responsible for most other activities.

Roads and Maritime Services is responsible for the non-scheduled activities of certain vessels in NSW waters, and the Marine Parks Authority is responsible for some non-scheduled activities within marine parks.

Issuing environment protection notices

The EPA is the "appropriate regulatory authority" for issuing notices, such as clean-up and prevention notices, for all premises with a pollution licence, and those operated by councils and government agencies.

Councils are the "appropriate regulatory authority" for issuing notices relating to pollution from other premises.

As explained above, Roads and Maritime Services or the Marine Parks Authority may be the "appropriate regulatory authority" in their areas of responsibility.

Issuing notices in emergencies

The EPA can issue clean-up notices in emergencies even if a council is the appropriate authority.

Other powers under the Act

The EPA (and a council, if it is the appropriate authority) can require information to be provided, enter premises (not homes), ask questions and bring court proceedings.

Offences and enforcement

[23.630] Offences

Offences under the *Protection of the Environment Operations Act* are classified as tier 1, tier 2 and tier 3.

Tier 1 offences

The most serious offences (tier 1) are offences where a person wilfully or negligently, in a manner that harms or is likely to harm the environment:
- disposes of waste;
- causes anything to leak, spill or otherwise escape;
- causes a controlled substance (as defined in the *Ozone Protection Act 1989* (NSW)) to be emitted in contravention of the regulations under that Act.

Tier 1 offences are punishable with fines of up to $5 million for corporations, and $1 million and gaol terms of up to seven years for individuals.

Tier 2 offences

Tier 2 offences are all offences that are not tier 1 or 3. They include breaches relating to air pollution, polluting waters without a licence, noise pollution, offences in relation to transport and disposal of waste and the failure to notify non-trivial pollution events to the appropriate regulatory authority.

Tier 2 offences can result in fines of up to $1 million and $120,000 per day for corporations and $250,000 and $60,000 per day for individuals.

Tier 3 offences

Tier 3 offences listed in the *Protection of the Environment (General) Regulation 2009* (NSW) can be dealt with by on-the-spot fines (known as "penalty notices"). They are likely to include less serious offences. At the time of writing, fines varied between $400 and $15,000 for a corporation or between $80 and $7,500 for an individual, depending on the type of offence.

[23.640] Enforcement

Under the *Protection of the Environment Operations Act*, a number of sentencing options are available to a court in dealing with polluters. These include:
- imposing a fine or, for certain offences, a prison sentence;

- ordering the offender to take steps to prevent or control harm to the environment arising from their offence, or to prevent a recurrence;
- requiring an offender to publish the facts of the offence and of the orders made, and/or notify people aggrieved or affected by the offence of those facts and orders;
- requiring an offender to perform an environmental service; for example, a project to restore or enhance the environment in a public place or for the public benefit;
- allowing a court to impose, in addition to a fine, a penalty equal to the estimated value of any financial benefit the offender has gained as a result of committing the offence.

Civil enforcement

As well as criminal proceedings by the EPA or local councils, any person can bring proceedings in the Land and Environment Court to remedy or restrain a breach of the Act, including breaches of pollution licences.

In addition, any person can bring proceedings in the court to remedy or restrain a breach of any other Act or regulations, if that breach is resulting in harm to the environment.

TAKING ACTION

[23.650] Our legal and political systems enable the community to participate in and influence decisions made by governments and local authorities. Unfortunately, people are often not taught the basic skills needed to take action, and they can find it difficult to know how to have a say in decisions affecting their communities.

This section looks at some of the things you can do to protect your local environment. You don't have to be a lawyer to take action, although the law is one of the powerful tools available.

For explanations of legal terms, authorities and legislation referred to in this section, see earlier sections of this chapter.

Strategies for action

[23.660] Getting information

Knowledge is power. You need to know the facts and issues involved when taking action on the environment, whether the campaign concerns a development proposal or ongoing pollution.

Getting information requires some work. What information do you need? The following paragraphs will give you an idea of what you might need and where you might be able to get it.

Freedom of information laws

The *Government Information (Public Access) Act 2009* (NSW) gives people a legally enforceable right of access to information held by many state government departments and agencies and other authorities, including local councils (see Chapter 25, Freedom of Information). There is a presumption that information should be released unless there is an overriding public interest against it.

Approaching the agency

You should contact the relevant body and ask to speak with their Right to Information officer.

Know what you want

Try to establish the types of documents held so that you can accurately describe what you want. It is important to limit the size of your application – for example, by specifying documents from a particular time period – to avoid unnecessary expense.

Costs

The application fee is $30, and there are usually search and processing fees ($30 per hour) and charges for photocopying.

These fees may be reduced by up to 50% for pensioners, full time students, non-profit organisations or where you can show that the information is of special benefit to the public generally. There is also a general discretion to waive or reduce fees.

What documents can't be obtained?

Some documents cannot be accessed through the Act. These include:

- cabinet documents;
- information regarding the location of certain threatened species, ecological communities or Aboriginal objects in certain circumstances;
- some material relating to legal advice.

Access may also be refused to other documents such as:

- departmental internal working documents;
- business and personal records.

However, this will be weighed against the public interest in releasing them in the circumstances of the case.

Review and appeal

If you are denied access to documents for any reason, you can ask for a review of the decision. The review costs a further $40.

Appeal

If you are still unhappy, you can appeal to:

- the Office of the Information Commissioner;
- the NSW Civil and Administrative Tribunal (NCAT).

Information held by federal agencies

Similar provisions apply under the *Freedom of Information Act 1982* (Cth) for access to information held by federal bodies.

Information from private agencies

Information from private agencies can only be obtained by subpoena once legal proceedings are under way (see Chapter 1, About the Legal System).

Keeping records

It is important to start a campaign file and keep a record of all your communications.

Keep copies of any letters and submissions you send, and record details of all phone conversations relating to the matter, noting the date, the time, who you spoke to and details of the conversation.

These records may be very useful later in the campaign if, for example, you need to establish that you have been treated unfairly by a department or have been given misleading information.

What information do you need?

Depending on the campaign, you may need some or all of the following.

The relevant legislation

For example, the *Environmental Planning and Assessment Act*.

Information on the development application and development consent

Development applications and a register of all development consents and complying development certificates must be available for public inspection at local councils (*Environmental Planning and Assessment Act*, s 4.58). This should include any environmental impact statement.

Any reports or minutes of meetings held by the local council and its committees

Council meetings are generally open to the public. The business papers often include important reports prepared by council officers, which can give the history of the matter and the particular officer's appraisal of the issue.

Reports or letters of any agencies consulted by the council or the developer

These agencies may include the EPA, Sydney Water, the Office of Water and the Department of Primary Industries.

If you cannot obtain a copy of a document from the council, request one from the agency itself. First make telephone inquiries to the agency to work out which reports are the most important for your purposes.

Written advice from someone with expertise on the environmental harm you are concerned about

If the action involves an existing development or offence, you may also be able to get evidence such as photographs and statements of witnesses, recording unlawful conduct or showing environmental harm.

Any related submissions of conservation organisations and other groups

Contact these groups directly to find out what action they are taking and what information they have.

A map of the area

This should indicate any environmental features that may be of concern.

The local environmental plan applicable to the site and any relevant zoning details

Your local council has this information. It can tell you if a development is permissible and whether development consent is required. You should also check any regional or state environmental plans with the council.

EPIs (environmental planning instruments) are available online at www.legislation.nsw.gov.au, and LEPs (local environmental plans) are also available from council chambers, council libraries and most council websites.

Company searches

These show the directors of a company, the registered address, accounts, shareholders and other details. They are available from the Australian Securities and Investments Commission.

Property title searches

These show the ownership of land, boundaries, mortgages and so on. This information is available from the NSW Land Registry Services. Title searches can be done online at www.nswlrs.com.au. Phone your local council first to get identification details for the site.

Any environment protection licences and approvals issued for the development

Environment protection licences can be searched for and viewed at https://apps.epa.nsw.gov.au/prpoeoapp/. Development consents granted by council can be viewed at council chambers, and often on the council's website. A register of approved state significant development and major projects can be viewed at https://www.planningportal.nsw.gov.au/major-projects. The Independent Planning Commission has a register of projects on its website at https://www.ipcn.nsw.gov.au/, and similarly, the Regional Planning Panels have a development register on their website at https://www.planningpanels.nsw.gov.au/.

[23.670] Getting public support

The aim of this step is to let people know about the issue and what needs to be done about it. See How to get people involved at [23.680] for some ideas.

[23.680] Getting the message across

Identifying key decision-makers

You should find out who the key decision-makers are and who you need to persuade or lobby on the issue. Use the phone book, call Parliament House, or look up the NSW Government Directory available online at www.service.nsw.gov.au/nswgovdirectory, or the Local Government Directory available on the Office of Local Government's website at www.olg.nsw.gov.au as a starting point to find out:

- who your member of parliament is;
- who the ministers involved in the decision are;
- who the shadow minister is;
- whether there are any relevant caucus or backbench committees;
- if there are any parliamentary committees;
- whether there are any independents, and their attitudes;
- who your local councillors are, and their attitudes.

Write a submission

Now you need to write a submission outlining the issues you are concerned about. This should be based on the information you have gathered and, if possible, should provide alternatives and solutions to the problem. Ask for a response.

If the matter relates to a proposed development, the consent authority will usually call for submissions as a part of the approval process, and you will need to lodge your submission with the council or the Department of Planning, Industry and Environment by a given date.

How to get people involved

Here are a few suggestions for what you can do.

Produce a fact sheet

Produce a simple and accurate fact sheet using the information you have gathered for your campaign. Get in touch with local, state and national conservation groups. They may already have produced information which could be useful to you.

Join forces with another group

You may get more public support by joining forces with an existing group rather than setting up your own.

Incorporate

On the other hand, it may help to incorporate as a separate group to provide a focus for a particular issue or location. Incorporation is a formal legal procedure, which would give your group a separate legal identity and allow it to take court proceedings in its own name (see Chapter 8, Community Organisations).

Letterbox your street

Letterbox your street with the fact sheet, and consider organising a public meeting to discuss the issue if there appears to be good local support for the campaign.

Use the media

Keep the media informed by sending out media releases, which should be short (under one page) summaries of current issues or events. Put them out before an event, if possible, and include contact numbers for further information. Check newspapers, TV and radio to identify relevant journalists and program producers, and make personal contact with them. A media release addressed to a particular journalist or producer is more likely to be read.

Radio and television

For radio and television interviews, it is important to decide beforehand what you are going to say and condense it into about three sentences. You will rarely get the chance to make more than two or three points. In a short "grab" for television and radio news, you can make only one point.

Formats for submissions

Submissions can be more or less detailed depending on the issue and the amount of information you have gathered.

If your submission is long, it is important to organise your material carefully so that it is easy to follow. You could consider the following format:

- a table of contents, including headings and subheadings;
- a summary and recommendations;
- a detailed report;
- a conclusion.

Check your material

Make sure that someone checks your draft submission for missing information or arguments.

Check the accuracy of your facts, and be careful about any defamatory statements about people or organisations. You should get legal advice if you think there could be a problem.

Avoid misleading, ambiguous, exaggerated or emotive statements, and check that your recommendations and objections are clear.

Talk to decision-makers

Try to get appointments with the relevant decision-makers, to put your views in person. It may help to go with other interested people in a small delegation. Be prepared about what you want to say. Dress appropriately, and give the person a copy of your written submission.

Defamation and safe speech

Don't say or write anything defamatory that may trigger a legal action against you or your group. Ensure that your letters, media releases, flyers, television or radio interviews do not contain any defamatory statements.

If you are not sure, ask a lawyer to check your publication first (see Chapter 31, Media Law, for information on defamation laws).

Get your public meeting approved

A public meeting of five or more people may constitute an unlawful assembly under s 545C(3) of the *Crimes Act 1900* (NSW). It need only be three or more people under the common law.

One way to avoid a charge of unlawful assembly is to notify the Police Commissioner of your intention to hold a public assembly under the *Summary Offences Act 1988* (NSW).

Permission should be sought from the Traffic Services Sergeant of the police branch in the region.

The notification must be in writing and must be on a specified form headed "Schedule 1 – Notice of Intention to Hold a Public Assembly". The form is available in Sch 1 of the *Summary Offences Regulation 2005* (NSW) at www.legislation.nsw.gov.au. You must give it to a member of the police force at least seven days before the date proposed for the public assembly (*Summary Offences Act 1988*, s 23).

Non-violent protest

Many people may wish to engage in a form of non-violent protest if they become frustrated with letter writing, lobbying and the legal process.

Planning

Plan your action first.

Planning should include training activists in non-violent behaviour and organising legal support in case people are arrested.

Find out about the range of laws, such as summary offences law, commonly used against demonstrators (see Get your public meeting approved at [23.680]).

Send letters!

You should also send letters to key people.

Your letter should give the full title and office of the person you are writing to; for example, The Hon Rob Stokes MP, Minister for Planning. (The NSW Parliament's website (www.parliament.nsw.gov.au)

has up-to-date details of the names and addresses of all members of parliament.)

Your letter should clearly state:

- what you are writing about (it's a good idea to put a heading at the top of your letter – eg, "Proposal for a new sand mine at Blue Pool, Newcastle");
- where the problem is (sometimes quite well known local environments are not known to government decision-makers. Include an accurate description of the site, such as a street address);
- who the proponent is (ie, who is proposing the development. Your letter should be clear about who is the decision-maker and who is the developer. This can be confusing if the developer is also the government body making the decision);
- why you are writing. Your letter should make it clear just what it is that you want the recipient to do.

Be courteous, and remember that emotive language is unlikely to be productive. Careful reasoning and the calm presentation of evidence are more likely to convince your reader.

Make sure your letter asks a substantial question. That will greatly increase your chances of getting a reply.

[23.690] Getting early legal advice

Community legal centres

Preliminary legal advice can generally be obtained free of charge from community legal centres. See the Contact points of Chapter 4, Assistance With Legal Problems for a comprehensive list of these.

EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law and policy. It has full-time lawyers who will give initial legal advice on environmental matters over the telephone, and will provide advice and representation to individuals and community groups in matters involving a public interest environmental issue.

Obtain advice quickly

Obtain the advice of a lawyer or expert as soon as an issue arises. Delay in seeking legal advice, particularly once a decision has been made, can prejudice court cases – there are strict deadlines for starting these actions.

The developer's financial investment may be put at risk if you delay. If the development has already commenced, the court may be reluctant to issue a restraining order stopping the project.

Finding a specialist lawyer

To find a specialist environmental lawyer, contact:

- groups who have been involved in legal cases relating to the environment, who may have recommendations;
- EDO NSW;
- LawAccess NSW;
- the Environment and Planning Law Association, for the names of private specialist lawyers in NSW;
- the Law Society of NSW – ask for the Pro Bono Scheme Coordinator. This scheme may provide assistance for groups that do not qualify for legal aid but are unable to fund legal representation. More generally, the NSW Law Society also runs a Solicitor Referral Service;
- the Public Interest Advocacy Centre, which also provides a public interest pro bono scheme and can give advice and assistance.

See [23.730] for how to get in touch.

Going to court

[23.700] Challenging a development consent

Time limits

Challenges to the granting of a development consent including for state significant development and infrastructure, or a complying development certificate under the *Environmental Planning and Assessment Act* must be commenced in the Land and Environment Court within three months of the date on which the consent or certificate is advertised in the public notice section of a local newspaper.

You can find out from the council (in the case of local development) or the other relevant consent authority (Minister for Planning, Independent Planning Commission or Regional Planning Panel) the date of the notice of determination.

If no notice is given (if it is not compulsory to advertise them), you must still commence the action within three months of the decision.

Objectors in designated development proceedings have only 28 days from the notification of the council's decision on the development to appeal to the Land and Environment Court (see [23.160] for what this is).

[23.710] Getting illegal work stopped

If work is proceeding on a site without development consent or in breach of development consent conditions, and the local council does not act to enforce the conditions of consent, it may be necessary to obtain an urgent injunction (restraining order) from the Land and Environment Court.

Once substantial work has been done on a development or it is already completed, it becomes much more difficult to obtain these orders.

The time and money already spent by a developer on a particular activity or development and any delay by the objector is taken into account by the court in deciding whether or not to grant an injunction.

[23.720] The Land and Environment Court

The Land and Environment Court is, in some respects, less formal than other courts.

Legal and other representation

In development appeals on the merits (including designated development appeals by objectors), you do not need to be represented by a lawyer. If you choose to be represented, it may be by an expert who does not have legal qualifications (eg, a planner). However, such an "agent" can only appear on your behalf if the court agrees that it is in your best interests.

Development appeals are brought in the Class 1 division of the Land and Environment Court.

While the rules of evidence do not always apply in these appeals, in practice, there is no substitute for legal knowledge and experience when appealing a decision in court.

Merits appeals may be heard by a commissioner or a judge. Commissioners are not usually judges, but will have expertise in a particular area, such as planning or engineering.

Challenges to the legality of planning decisions and civil actions to enforce planning or pollution laws are brought in the Class 4 division of the court. These proceedings are heard by a judge, and the rules of evidence apply. It is advisable to be represented by a lawyer in these proceedings.

Costs

Paying for legal and expert advice

Get quotes from lawyers and experts about fees and costs before engaging them.

Legal aid

Legal aid is no longer available for any environmental cases in NSW.

If you are awarded costs

If you win and obtain an order for costs against the losing party, you may still have to cover the difference between the amount allowed by the court and any higher amount that you have agreed to pay your lawyer.

Who pays if you lose?

Merits appeals

In the Land and Environment Court, each party usually pays their own costs in merits appeals (Class 1 appeals). However, the decision whether to award costs is still a matter within the discretion of the court. In these appeals, the court reconsiders the original decision.

If unnecessary expense is caused

In merits appeals, the court may make an exception to the usual costs orders where unnecessary evidence has been given.

For example, an objector to a designated development may indicate that particular issues are going to be raised, leading the developer to obtain expert evidence to address those issues.

If the objector then does not proceed with these issues, the developer may seek a special costs order making the objector liable for the costs unnecessarily incurred in obtaining the evidence.

Procedural appeals

In challenges in which the legality, rather than the desirability, of a decision is challenged, or where action is taken to enforce environmental

or planning laws (Class 4 applications), the loser usually pays the winner's costs. The loser-pays rule is a considerable disincentive.

Many people could raise the money to pay for their own lawyers and witnesses. However, the possibility that, if they lose, they may have to pay the unknown costs of the other side, is too great a risk.

Public interest costs orders

In 2007, the *Land and Environment Court Rules 2007* (NSW) gave the court a specific power to decide not to make an order for costs against a losing party if it is satisfied that the proceedings have been taken in the public interest. However, in deciding whether or not to apply this rule, the court has decided that there must be something more than merely a public interest nature to the proceedings. This has limited the utility of the rule as an incentive to take actions in the public interest.

Maximum costs orders

There is also a specific power for the court to make an order that the maximum costs that can be recovered by one party against another is a set amount. A person would usually seek such an order at the beginning of the proceedings on the basis that the order is reasonably necessary for the proceedings to continue. In the case of *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150, the Land and Environment Court made such an order, partly on the basis that the proceedings were commenced in the public interest. This decision was upheld by the NSW Court of Appeal. However, there is no guarantee that a person can obtain a maximum (also known as a protective) costs order, as the court also considers other factors when deciding whether to make such an order.

Winning the campaign

Environmental issues are seldom won in a single battle. Sometimes campaigns fail in the short term but have long-term success.

In other cases, a successful legal challenge might stop a development in the short term to ensure that legal processes are followed, only to have the decision-maker correct the legal defect and make exactly the same decision.

Often developments that appear to have been stopped resurface in a slightly modified form.

Even if benefits are not seen in the short term, however, campaigning has an important development role, both for the campaigners and the decision-makers.

Campaigners learn more about the decision-making process, the workings of governments and bureaucracy.

Communities become more aware, and may become more involved on the next occasion.

Decision-makers can learn the value of consulting earlier, and may take a more enlightened approach in assessing development applications.

Contact points

[23.730] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes may be made to the websites for many NSW government departments from time to time. See www.service.nsw.gov.au for further details.

Legislation

Australasian Legal Information Institute (AustLII)
www.austlii.edu.au

Legislation NSW (a NSW Government service)
www.legislation.nsw.gov.au
Courts, Tribunals and legal services

Community Justice Centres
www.cjc.nsw.gov.au
ph: 1800 990 777
For contact details for other Community Justice Centres, see Contact points of Chapter 18, Dispute Resolution.

EDO NSW
www.edonsw.org.au
ph: 1800 626 239 or 9262 6989

Land and Environment Court, NSW
www.lec.justice.nsw.gov.au
ph: 9113 8200

Law and Justice Foundation of NSW
www.lawfoundation.net.au
ph: 8227 3200

NSW Civil and Administrative Tribunal (NCAT)
www.ncat.nsw.gov.au
ph: 1300 006 228 or 1300 00 NCAT

Public Interest Advocacy Centre
www.piac.asn.au
ph: 8898 6500
Conservation and industry groups

Australian Centre for Climate and Environmental Law
www.sydney.edu.au/law/accel
ph: 9351 0324

Australian Conservation Foundation (ACF)
www.acfonline.org.au
ph: 1800 223 669 or (03) 9345 1111

Australian Institute of Architects (NSW Chapter)
www.architecture.com.au
ph: 9246 4055

Environment & Planning Law Association (NSW)
www.epla.org.au
ph: 8227 9600

Friends of the Earth
www.foe.org.au
ph: (03) 9419 8700

Greenpeace Australia Pacific
www.greenpeace.org.au
ph: 1800 815 151

Local Government NSW
www.lgnsw.org.au
ph: 9242 4000

National Parks Association of NSW (NPA)
www.npansw.org.au
ph: 9299 0000

National Trust of Australia (NSW)
www.nationaltrust.com.au
ph: 9258 0123

Nature Conservation Council of NSW
www.nature.org.au/
ph: 9516 1488

Total Environment Centre
www.tec.org.au
ph: 9211 5022

Wilderness Society
www.wilderness.org.au
ph: 8199 5300 (Sydney) or 9045 0601 (Newcastle)
Government departments and agencies

Australian Heritage Council
www.environment.gov.au/heritage/organisations/australian-heritage-council
ph: 1800 803 772 or 6274 1111

Australian Securities and Investments Commission (ASIC)
www.asic.gov.au
ph: 1300 300 630

Environment, Department of the (Cth)
www.environment.gov.au
ph: 1800 803 772 or 6274 1111

Environment, NSW
As a starting place for information about heritage and national parks, www.environment.nsw.gov.au
Pollution reporting, environment information and publication requests
ph: 131 555 or 9995 5000

Beachwatch and Harbourwatch daily bulletins
ph: 9995 5344

EPA (Environment Protection Authority)
www.epa.nsw.gov.au
ph: 131 555 or 9995 5555

Local Government, NSW Office of
www.olg.nsw.gov.au
ph: 4428 4100
Sydney office
ph: 9289 4000

National Parks and Wildlife Service
www.nationalparks.nsw.gov.au
ph: 1300 072 757 or 9995 6500

NSW Department of Industry – Water
www.industry.nsw.gov.au/water
ph: 9338 6600

Planning, Industry and Environment, Department of
www.planning.nsw.gov.au
Information centre
ph: 1300 305 695

Heritage
www.environment.nsw.gov.au/topics/heritage
ph: 9995 5000

Primary Industry, Department of
www.dpi.nsw.gov.au
ph: 6391 3100

RMS (Roads and Maritime Services – incorporating the RTA and NSW Maritime)
www.rms.nsw.gov.au/maritime (for maritime matters)
general enquiries: 13 12 36

Other useful resources

[23.740] P Williams et al, *The Environmental Law Handbook: Planning and Land Use in NSW* (6th ed, Thomson Reuters, 2016).

R Lyster et al, *Environmental and Planning Law in NSW* (4th ed, The Federation Press, 2016).