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Assessment Regulation 2021*

**ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION
2021**

The *Environmental Planning and Assessment Regulation 2021* (**2021 Regulation**) is the culmination of a comprehensive review of the *Environmental Planning and Assessment Regulation 2000* (**the former Regulation**).

The 2021 Regulations aim to better align the significant reforms of the *Environmental Planning and Assessment Act 1979* (**the Act**) in 2018, which was a response to the [Issues Paper in 2017](#) and provide improvements identified by stake-holders for issues in the former Regulation.

The 2021 Regulation keeps many of the 2000 provisions but modernises, simplifies and streamlines the systems and requirements.

The 2021 Regulation commenced on 1 March 2022, with some provisions deferred to commence earlier/later in 2022 (being schedule 8 on 1 July 2022 and Schedule 9 on 1 January 2022). The former Regulation continues to apply to a development application (**DA**) and an application for a complying development certificate (**CDC**) made, but not finally determined, before 1 March 2022.

Provisions of the 2021 Regulation are now referred to as 'sections' and references to the existing provisions of the former regulation remain as 'clauses'.

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DEVELOPMENT APPLICATIONS AND MODIFICATION APPLICATIONS

Amendments in the 2021 Regulation clarify the requirements for DAs and modification applications (**MA**). These are principally contained within Part 3 of the Regulation.

All DAs (and MAs) are required to be in the “approved form”. The DA requirements which were within Schedule 1 of the former Regulation are now contained within a list of documents and drawings which should accompany a DA on the planning portal: [Application requirements \(nsw.gov.au\)](https://www.nsw.gov.au/application-requirements).

A consent authority has the power to reject any DA or MA within 14 days after receiving the application if it does not conform to the stipulated requirements or if it is illegible or unclear on what development consent is sought (see s 114(1)). Withdrawal provisions that relate to a DA also now apply to all MAs.

Under s 37(6) of the 2021 Regulation, any amendments to undetermined DAs must be accompanied by greater details of the proposed changes including the name, number, and date of any plans that have changed. Similar requirements apply to the amendment of MAs (s 113(3)).

When a consent authority approves a modification application, the applicant is required to be provided with a modified development consent that complies with the requirements of the Planning Secretary (s 118(5)).

Sections 67(5) and 68(6) of the 2021 Regulation remove the requirement for the consent of the owners for the surrender or modification of an original DA if the consent of the owner of the land was not required under s 23 to make the application for development consent in the first place.

The 2021 Regulation also requires consent authorities to notify submitters of determinations of internal review applications.

STOP THE CLOCK, CONCURRENCE AND REFERRALS

The 2021 Regulation aims to:

- eliminate unnecessary concessional delays in assessment periods;
- streamline the process by removing unnecessary requirements to notify concurrence authorities and approval bodies where minor modification applications do not need to be referred to such authorities or bodies; and
- clarify complex rules, remove redundant provisions and update definitions for consistency with the Act and other regulations.

Under s 24(3), a DA is lodged and the assessment clock will start on the day the relevant fees are paid, unless the said fee is waived, in which case, the assessment clock will start on the day the DA or MA is lodged. The clock will no longer be stopped on the first two days after the lodgement, nor will it stop for the two days after the date the consent authority provides additional information to a concurrence authority or approval body.

Where consent authorities issue an information request in relation to an undetermined DA or MA, new notification requirements ensure that the consent authority outlines the

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number of days that have lapsed in the assessment period. Such requests must be made in writing and specify a reasonable time for information to be provided (s43(2)). Consent authorities must also inform the applicant when the clock will cease to run whilst the request remains unanswered (s 36(3), s 43(3), s 44(2), s 52(4), s104(2)).

State significant development

Where the Planning Secretary requests a written response from the applicant in relation to the DA, the clock will stop from the day on which the request is made from the Planning Secretary until the earlier of:

- the day on which the applicant provides a response to the Planning Secretary, or
- the day on which the applicant gives or is taken to have given written notice that no response will be provided.

Amendments to DAs

Under s 38(2), the clock will only restart if an application to amend a DA is approved (ie. accepted) by a consent authority, and the consent authority considers the amendment not to be minor, and the consent authority notifies the applicant via the planning portal that the later date applies. This provision appears to be a statutory embodiment of the decision in *Ipoh Pty Limited v Sydney City Council* (2005) 142 LGERA 373.

COMPLYING DEVELOPMENT CERTIFICATES

Under the 2021 Regulation CDC applications must now be provided in the approved form (s 120) and include information such as a detailed site plan, development plans comprising floor plans, building envelope, elevations and sections, and land levels, landscaping, parking and drainage (s 121). The requirements vary according to the type of development proposed under the CDC.

Pursuant to s 129 of the 2021 Regulation, a CDC application regarding contaminated land under s 60 of the *Contaminated Land Management Act 1997* must also be accompanied by site audit statements and statements by qualified persons to certify the land has been appropriately investigated in accordance with guidelines made or approved by NSW EPA.

PLANNING CERTIFICATES

The 2021 Regulation relating to planning certificates are set to commence on 1 October 2022.

In accordance with Schedule 2 of the 2021 Regulation a planning certificate must:

- include information on all environmental planning instruments (**EPI**) or draft EPI that zones the land (Schedule 2(2));
- disclose whether the land is affected by a policy adopted by the Council or other public authority restricting development due to various types of hazard risk (Schedule 2(10));

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- indicate whether the land is located in a special contributions area and whether any draft contributions plans may apply to the land (Schedule 2(3)).

OTHER KEY AMENDMENTS

Floor space

Pursuant to s 163 of the 2021 Regulation, the term 'floor space' is replaced with 'gross floor area' to adopt the Standard Instrument – Principal Local Environmental Plan definition of this term. The benefit of this is to provide consistency in the way the floor space ratio is to be calculated by applicants and consent authorities when considering applications that include an increase in the floor area of a premises that have the benefit of existing use rights.

Adjustments to fees and charges

There are two types of fees and charges applicable:

- Fixed fee, and
- Sliding scale fees, also known as 'ad valorem' fees.

Fixed Fee

- Fixed fees are amended to include movement in the CPI that have occurred since the last CPI increase to fees in Regulations in 2011 and allows for ongoing minor adjustment on annual or biannual basis.
- This allows fixed fees to gradually increase over time, to better reflect the cost of providing planning services.
- The first increase will apply from 1 July 2023.

Sliding Scale

- Sliding scale fees are based on estimates of costs of development and allow for inbuilt and ongoing increase in total amount of maximum DA fees payable by the applicant due to increasing costs of development.

For further information regarding this update, please contact Ryan Bennett.

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