



Submissions report

Environmental Planning and Assessment Regulation 2021

December 2021



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Acknowledgment of Country

The Department of Planning, Industry and Environment acknowledges the Traditional Owners and Custodians of the land on which we live and work and pays respect to Elders past, present and future.



Wollumbin (Mount Warning) at dusk from Tweed River. Murwillumbah, NSW

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1. Introduction

The NSW Government has made the *Environmental Planning and Assessment Regulation 2021* (2021 Regulation) to replace the *Environmental Planning and Assessment Regulation 2000* (2000 Regulation).

1.1. Purpose of the Environmental Planning and Assessment Regulation

The 2000 Regulation was made to support the *Environmental Planning and Assessment Act 1979* (EP&A Act), which establishes the land use planning and development assessment framework for NSW.

It includes procedures for the making of environmental planning instruments (EPIs), the assessment of development proposals, the levying of development contributions, and compliance and enforcement powers.

1.2. Environmental Planning and Assessment Regulation 2021

The 2021 Regulation retains many of the provisions of the 2000 Regulation while making amendments to:

- reduce administrative burden and increase procedural efficiency
- establish a simpler, more modern and transparent planning system.

The main purpose of the 2021 Regulation is to provide legislative support for the operation of the EP&A Act. Key changes in the 2021 Regulation are as follows:

- A broad range of changes have been made to reduce administrative burden in the processes and requirements for development applications (DAs) and modification applications. This includes updating application requirements and refining notification requirements.
- Improvements have been made to DA processes to simplify the stop the clock provisions and concurrence and referral procedures, and provide greater certainty around calculation of the assessment and deemed refusal periods.
- Requirements for planning certificates have been simplified and refined to focus the content on land use and development controls essential to conveyancing.
- Improvements have been made to application requirements for complying development certificate (CDC) applications and information disclosure in approvals and notifications, to support increased transparency for this assessment system.
- New requirements for publication of environmental assessments for certain infrastructure proposals have been introduced to improve transparency and confidence in the process.
- Improvements have been made to modernise designated development provisions. Revisions to the development categories and definitions respond to recent changes in industry and technology and broader policy reforms. Removing lower risk development types (e.g. lower risk solar farms and poultry farms) from designated development will support economic productivity.

The 2021 Regulation also incorporates changes that were made to the 2000 Regulation after the exhibition draft was prepared. This includes all amendments made after 30 June 2021. The 2021 Regulation is intended to commence on 1 March 2022 with some provisions deferred until later in 2022.

Provisions in the 2021 Regulation are now referred to as 'sections', whereas reference to provisions in the 2000 Regulation remain as 'clauses'.

2. Consultation

2.1. Exhibition process

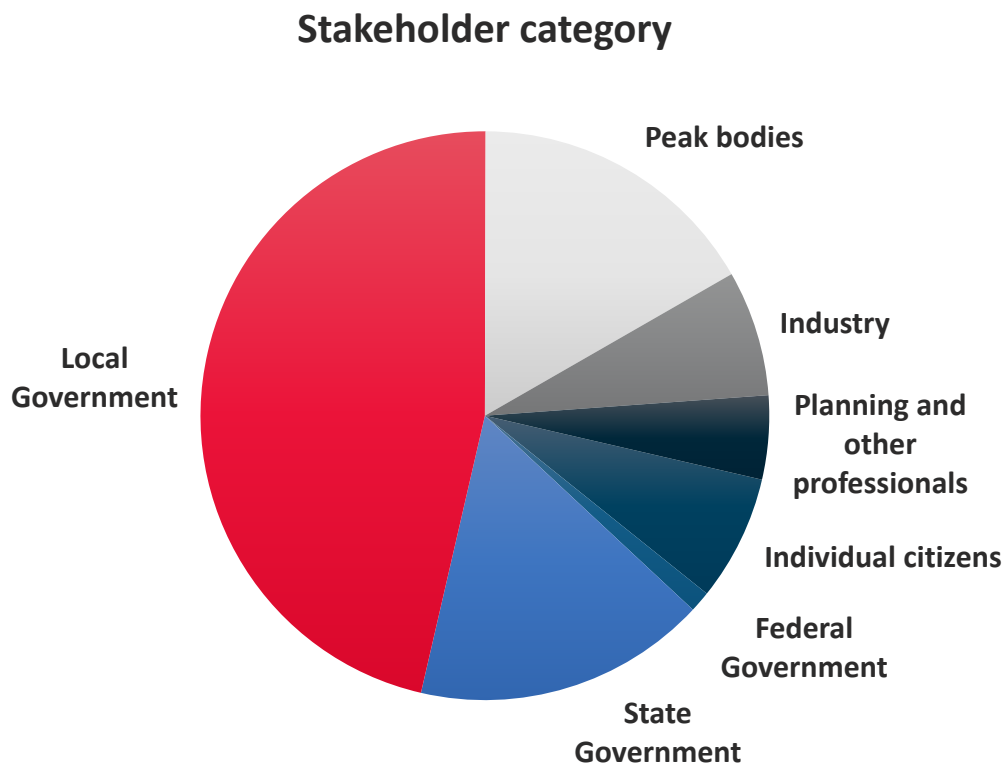
The Department of Planning, Industry and Environment (Department) thanks stakeholders for their feedback on the exhibited 2021 Regulation. This feedback has helped shape and refine the final 2021 Regulation.

The proposed 2021 Regulation was exhibited from 5 August until 22 September 2021. Exhibition was advertised through a notice in the NSW Government Gazette, an email to key stakeholders including councils and peak industry groups and advertisements in the Sydney Morning Herald and the Daily Telegraph newspapers. Exhibited documents included:

- an exhibition draft of the proposed 2021 Regulation, which contained the proposed regulatory provisions
- a Regulatory Impact Statement, which contained a detailed explanation and cost benefit analysis of the proposed changes
- fact sheets summarising key changes:
 - EP&A Regulation 2021 overview
 - Designated development fact sheet
 - Development assessment and complying development fact sheet
 - Infrastructure and environmental impact assessment fact sheet
 - Planning certificates fact sheet.

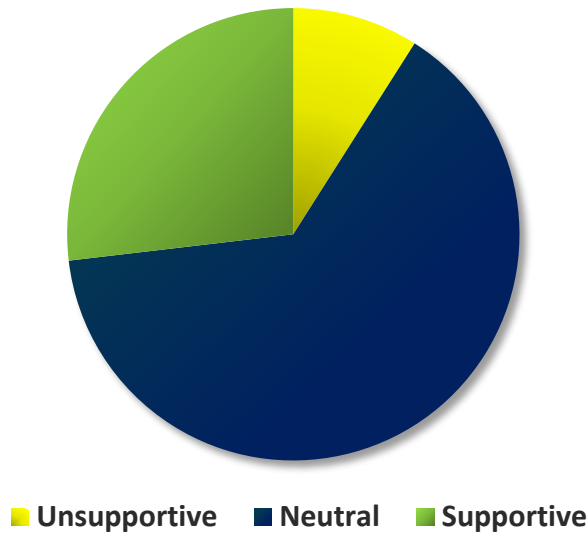
2.2. Overview of submissions

The Department reviewed and considered each submission made to the proposed 2021 Regulation. The chart below illustrates the number of submissions received by stakeholder group.



The chart below shows the overall sentiment of stakeholder responses.

Stakeholder sentiment



Submissions generally supported the proposals or suggested additional improvements to ensure a functional regulation and support efficient planning processes.

The sections below summarise comments received on each part of the proposed 2021 Regulation. The final 2021 Regulation includes amendments that respond to issues identified during the analysis of submissions received on the proposed 2021 Regulation. Key amendments are summarised in the 'Response' sections below.

Other issues that were raised in submissions may be addressed through other planning reforms currently in progress, or could instead be considered in the Department's future work program.

Parts of the Regulation that received no comments and had no policy changes (e.g. paper subdivisions) have not been included below.

3. Planning instruments

3.1. Summary of proposed reform

Other than minor changes to remove outdated requirements for planning authorities to make hard copies of development control plans (DCPs) available for purchase, the final 2021 Regulation does not make any policy changes to the planning instruments provisions that are contained in the 2000 Regulation. Rather, the 2021 Regulation will largely carry over the EPI and DCP provisions of Parts 2 and 3 of the 2000 Regulation. Section 3 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#) provides further detail of this proposal.

3.2. Issues raised in submissions

Minimal comments were received on provisions for planning instruments, and feedback was largely neutral. One area of concern was the change in wording from the 2000 Regulation to the 2021 Regulation in relation to the approval of DCPs for residential apartment developments. These provisions are contained in clause 21A of the 2000 Regulation and have been carried over to section 15 of the 2021 Regulation, with minor changes in wording. One council was concerned that the new wording in section 15 of the 2021 Regulation implies that a council would need to refer DCP provisions applying to residential apartments to a design panel for review, even in council areas that do not have a design panel constituted. This is not the intended effect of this section. Rather, as per the clause in the 2000 Regulation, councils will only be required to refer these provisions to a design panel if there is one that has been constituted for the local government area.

A small number of suggestions and requests for clarification were made, with a focus on improving quality and process efficiency for planning instruments. Comments were made on the requirements for the format of DCPs and their exhibition and publication, and for the processes and format for planning proposals. Guidance was requested for cases where planning proposals propose reservation of land. It was also suggested that the Regulation should state minimum requirements for local strategic planning statements (LSPSs) and local housing strategies (LHSs).

3.3. Response

The 2021 Regulation has not made changes to design-related provisions, as these matters are being considered separately as part of the [Design and Place SEPP](#).

The Department is also currently reviewing procedures for planning proposals to identify future improvements. Suggestions for improving planning proposal processes will be considered as part of that work.

Requirements for LSPSs are detailed in the EP&A Act, and guidance for LSPSs and LHSs is available on the Department's website. Other comments for improving the quality and processes for planning instruments may be considered as part of future potential reforms.

4. Development applications

4.1. Summary of proposed reform

A summary of the proposed reforms to provisions for development applications (DAs) is provided in section 6 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#). Some refinements to these reforms have been made in response to submissions (see 'Response' section below).

4.2. Issues raised in submissions

Detailed and extensive feedback was received on the reform proposals and broader processes for DAs. There was wide support for improving DA processes through the proposed amendments. Comments supported the ongoing move to digital communication and publication requirements,

and the removal of requirements to provide hard copy documents. Submissions advocated for improved and expanded functionality of the NSW Planning Portal to ensure it is fit for purpose to manage the digitisation of planning processes.

Many comments were received in relation to DA submission requirements (Schedule 1 in the 2000 Regulation), and the proposal to move these into a form outside the Regulation. Feedback supported a review of the requirements and highlighted ongoing issues with the quality of DAs and the resulting impact on assessment timeframes. Most feedback supported the proposal for an approved form to replace Schedule 1 of the 2000 Regulation. Stakeholders requested consultation to help develop a form with clear requirements.

Improvements were requested to the process for uploading, lodging and accepting/registering a DA on the NSW Planning Portal. Feedback highlighted the need for clarity on the status of an application and assurance of procedural efficiency during these steps. Concerns were raised over the current process for demonstrating landowner's consent when uploading a DA onto the NSW Planning Portal. Feedback supported a requirement to provide clearer evidence that consent had been obtained.

There was a mixed response to the proposal for narrowing the types of modifications that need to be referred to concurrence authorities and approval bodies. Supportive and neutral comments focused on efficiency gains, while unresponsive feedback raised concerns that issues may be missed by removing the referral requirement. Feedback was generally supportive or neutral on the requirement for authorities to specify a reasonable period for applicants to provide additional information on a DA.

Feedback was mostly unresponsive of removing the two concessional days in the DA process, and considered current prescribed assessment timeframes unrealistic. Feedback was supportive of clarifying the 'stop the clock' procedure, but suggested more reform is needed in this area.

Most feedback supported the proposal for ensuring development consents reflect subsequent modifications, and for standardising the format of modified development consents. There was also support for proposed amendments to streamline notifications for determinations.

A range of other suggestions were made in relation to DAs, assessment and determination. These were primarily seeking to improve clarity, consistency and quality of these processes as well as better building and design outcomes.

4.3. Response

In considering and responding to the feedback received, the Department has sought to balance regulatory certainty with practical flexibility in the final 2021 Regulation.

An objective of the Regulation review was to reduce administrative burden. Refinements to the requirements for referring modifications help meet this objective and the proposal will proceed as exhibited.

The Department is aware of issues relating to technical and regulatory requirements for the use of the NSW Planning Portal. Several changes to the DA provisions have been incorporated into the final Regulation 2021 to address these issues and ensure the provisions work in practice. For example:

- Increased flexibility has been provided to allow for notification outside the NSW Planning Portal where an entity or stakeholders does not have access to the Portal.
- The requirement for a consent authority to explicitly approve or reject amendments to DAs via the Portal has been amended to exempt matters that are currently the subject of the NSW Land and Environment Court. This is to acknowledge that the LEC becomes the consent authority for these matters but does not have access to the Portal. Providing this exemption will facilitate faster amendments that are negotiated between the parties during a trial and submitted directly to the Court during the hearing.

- Changes have been made to clarify that the assessment period commences on the lodgement date, which is when the fees are paid or on the day the applicant submitted the DA on the Portal if no fee is required.

Many suggestions received on DA processes, including assessment periods and linkages to the Portal, require further consideration and consultation beyond the timeframes of the current review. These include:

- An amendment to require councils to register an application within a specific time period. The Department is aware that there is not currently a regulatory requirement for councils to register an application within a specific time period following lodgement on the Portal, and that this has caused some issues. The Department is currently considering options to address this issue, but this will be addressed separately to the remake of the Regulation.
- The need to use terms such as 'lodged', 'made', 'submitted' and 'received' consistently and appropriately throughout the Regulation to ensure it is easy to use. Some minor changes will be made in the final Regulation 2021 to apply these terms more consistently, but further changes may be considered next year. Any changes to the use of these terms need to be carefully considered to ensure there are no unintended implications for assessment periods and to ensure they align with how councils are using the Portal.
- With the recent rollout of the Portal to all councils in NSW, the Department will continue to monitor and review these provisions to ensure the system meets the needs of users. Any changes to timeframes for DA processes will require extensive analysis and consultation, including consideration of changes resulting from transitioning to the Portal. This will be undertaken as part of future reforms.

Further work will also be undertaken in 2022 to review DA requirements in consultation with councils.

5. Complying development

5.1. Summary of proposed reform

A summary of the proposed reforms to provisions for complying development is provided in section 6 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#). Some refinements to these reforms have been made in response to submissions (see 'Response' section below).

5.2. Issues raised in submissions

Over 130 comments were received on the complying development provisions of the 2021 Regulation, with almost all being supportive or neutral. Commonly raised topics are summarised below.

Most stakeholders supported the proposed information provision and disclosure requirements in the proposed 2021 Regulation for CDC applications. All stakeholders were supportive of proposed requirements to include plans and drawings in CDC applications.

Changes were suggested for CDC applications to clear up potential ambiguity, and clarity was sought on some of the terminology used in the provisions, including 'building envelope', 'auditor' and 'roads authority'.

The exhibited 2021 Regulation proposed to remove a requirement to notify neighbours of a modified CDC application if they had been previously notified of the original application. Responses to this proposal were mixed. Supportive and neutral comments acknowledged that neighbour notification provisions for complying development have limited utility and can create unnecessary conflict between neighbours. Unsupportive feedback suggested that removing this requirement could cause issues if neighbours notice that a development is being built that isn't in

accordance with the original approval. Submissions noted this could result in increased complaints to certifiers and councils. Feedback suggested a provision requiring a record of notification be kept by the CDC holder. This would record properties notified and the method of notification before the issue of a CDC. Penalty notices could be issued for breaches.

Most feedback was neutral on the documentation requirements for complying development on contaminated land. Industry experts suggested additional requirements for site audit statements to ensure investigations are undertaken by qualified professionals in accordance with guidelines made or approved by the NSW Environment Protection Authority ('EPA') under section 105 of the *Contaminated Land Management Act 1997*. Numerous submitters also indicated that the proposed new requirements for site audit statements would be onerous, as they would unnecessarily capture minor works.

Other feedback related to complying development generally, including concern that it had become complex and had moved beyond its original intended scope. Additional changes to those proposed in the 2021 Regulation were requested, including:

- further amendments and additions to complying development categories, such as a request for low-rise housing developments that are currently assessed as complying development (e.g. dual occupancies and terraces) to instead sit within the DA framework
- clarity and consistency with the wording and terminology used in particular sections
- development of a standard CDC approval template and compliance checklist to improve transparency
- a request that CDCs should only be issued once development contributions and fees have been paid via the NSW Planning Portal.

5.3. Response

Changes to complying development will generally proceed as proposed in the exhibited 2021 Regulation. Key amendments made in response to feedback include:

- omitting the draft provision allowing a certifier to dispense with providing neighbour notification for an application to modify a CDC.
- requiring site plans submitted with CDC applications to indicate the location of any registered easements on the land.
- clarifying that drawings must indicate the building envelope of the proposed buildings or works
- for complying development on contaminated land - requiring a statement by a qualified person to certify that the land has been appropriately investigated in accordance with the guidelines made or approved by the NSW EPA under section 105 of the *Contaminated Land Management Act 1997*.
- clarifying what is meant by a qualified person for the purpose of contaminated land requirements.
- the new requirement for a site audit statement (included in section 115(4) of the exhibited 2021 Regulation) will be omitted until further analysis and consultation is completed, because it could otherwise unnecessarily capture minor works.

Further changes to terminology, definitions and development categories would require detailed analysis and consultation with stakeholders and so could be considered as part of future updates to the Regulation.

6. Existing uses – the Act, Div 4.11

6.1. Summary of proposed reform

A summary of the proposed reforms to provisions for existing uses is provided in section 5 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#).

6.2. Issues raised in submissions

There was general support for the sections for existing uses, which remain largely unchanged from the 2000 Regulation. Feedback supported the proposal to replace ‘floor space’ with ‘gross floor area’ in section 148 of the exhibited 2021 Regulation, and to adopt the Standard Instrument definition of this term.

Some comments suggested changes to the existing use rights framework, including the following:

- A suggestion that the Regulation could recognise that some existing uses occur outside buildings (for example, a car wash or a plant nursery).
- A request for clarity on whether the existing use regime applied to both development assessment under Part 4 of the EP&A Act and relevant infrastructure and environmental assessment under Part 5 of the EP&A Act.
- A proposal to include a Part 5, Division 5.1 planning pathway where existing infrastructure use would be permitted without consent if it were within a relevant prescribed zone.
- A concern that the 2000 Regulation provisions improperly restrict the redevelopment of commercial properties with existing use rights. It was suggested that section 148 should revert to its pre-2006 form or recognise that provision of tourist attractions are a form of commercial use for the purposes of the existing use rights regime.
- Future legislative amendments to address restrictions in granting development consent that are not addressed in the existing use rights regime.

6.3. Response

No further changes were made to the provisions for existing use rights in the final 2021 Regulation. The provisions are operating as intended, having regard to the policy intent and outcomes of case law in recent years. Suggestions for changes to the existing use framework would need further consideration and consultation beyond the proposed 2021 Regulation timeframes and are not proposed to be progressed at this time.

7. Infrastructure and environmental impact assessment

7.1. Summary of proposed reform

A summary of the proposed reforms to the provisions for infrastructure and environmental impact assessment is provided in section 7 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#). Some refinements to these reforms have been made in response to submissions (see ‘Response’ section below).

7.2. Issues raised in submissions

There was near universal support for using the term Review of Environmental Factors (REF) in the 2021 Regulation. Most feedback also supported the proposal for publication of REFs. While some comments requested all REFs be published (i.e. rather than those that meet the specified criteria included in the 2021 Regulation), other feedback raised concerns with the administrative burden associated with publication. Some feedback suggested alternatives to the criteria proposed in the exhibited 2021 Regulation, such as providing REFs on request or voluntary publication. Specific comments on the criteria included:

- \$5M capital investment value: some comments were supportive but others considered the value was either too low or too high.
- Approval under another Act: clarification was sought on the type of approvals that would be captured. Some submitters requested this criterion be narrowed to only capture certain types of approvals, to avoid capturing routine activities or activities that would be of limited interest to the public.
- Public interest: comments were supportive or sought guidance on what this would capture.

Almost all comments on the provisions to allow the Planning Secretary guidelines were supportive or neutral. There were many requests for consultation during development of these guidelines, as well as content suggestions. Other comments requested additional guidance be provided on the EP&A Act Part 5 planning pathway.

There was strong support for the proposed requirement to consider strategic plans and other relevant factors when considering the impact of an activity. Some comments suggested more factors should be added, while others commented on application of the factors.

Other feedback related to the function of Part 5 generally. These included comments on regulatory provisions (e.g. processes for environmental impact statements and the Secretary's environmental assessment requirements), and broader reform suggestions to this planning pathway.

7.3. Response

Feedback broadly suggests the REF publication criteria appropriately balances planning system objectives of transparency and efficiency. The criterion of approval under another Act will be narrowed and clarified to better focus publication requirements on matters of highest interest and to minimise administrative burden. This criterion will now only require REF publication for activities requiring approvals under:

- sections 144, 201, 205 or 219 of the Fisheries Management Act 1994
- section 57 of the Heritage Act 1977
- section 90 of the National Parks and Wildlife Act 1974
- sections 47, 48, 49 and 122 of the Protection of the Environment Operations Act 1997.

The final 2021 Regulation has also been amended to:

- Enable the Secretary to exempt particular classes of activities from the publication requirements. This will provide flexibility so that activities that are minor, routine or of little public interest are not subject to the requirement to publish a REF.
- Provide that publication can occur as soon as possible after an activity commences (but not later than one month after) if it is not practicable to publish the REF beforehand. This will ensure the delivery of critical infrastructure isn't delayed.
- Clarify that REF publication requirements in the 2021 Regulation do not apply to activities carried out under an approved code. Amendments have also been made to the provisions for approved codes (section 198 of the 2021 Regulation) for clarity and to provide consistency with the 2000 Regulation.
- To provide that the requirement to publish REFs will commence on 1 July 2022. This will provide more time for determining authorities to prepare for implementation.

The Department is currently preparing updated guidance for activities under Part 5, Division 5.1 of the EP&A Act. Feedback from users of this Division is being used to update the guidelines. The updated guidelines will replace the *Is an EIS required? Best practice guideline for Part 5 of the Environmental Planning and Assessment Act 1979*. The Department will continue to work with these users in the development and finalisation of the guidelines.

Further changes were included in this part to include provisions made by the Environmental Planning and Assessment Amendment (Major Projects) Regulation 2021, which was made after the exhibition draft was prepared.

Other feedback on the regulatory provisions for Part 5 may be considered as part of potential future reform processes.

8. Infrastructure contributions and finance

8.1. Summary of proposed reform

The exhibited 2021 Regulation proposed minimal changes to the provisions for development contributions. This is because the Department has been working to improve the infrastructure contributions system through a separate process and the provisions in the 2000 Regulation were only recently updated through a separate amending regulation in February 2021. These updates have been carried over to the 2021 Regulation, along with two minor amendments. A summary of these updates and details of the amendments included in the 2021 Regulation are provided in section 4 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#).

8.2. Issues raised in submissions

Minimal feedback was received on the two minor amendments that were proposed in the exhibited 2021 Regulation. Feedback instead highlighted concerns with unpaid contributions for complying development proposals. Comments suggested the Regulation require payment of contributions before a CDC can be issued and include penalties for non-compliance.

Submissions also commented on publication and reporting requirements, which were part of the amendments made to the development contribution provisions in February 2021. Other feedback included a range of suggestions and requests for guidance to improve processes, support integrity and clarify terminology used in the provisions for infrastructure contributions and planning agreements.

8.3. Response

The development contribution provisions made in February 2021 have been included in the final 2021 Regulation. These are intended to improve the transparency of receipt and expenditure of infrastructure contributions received under local contributions plans and planning agreements.

The final 2021 Regulation does not include changes to requirements for payment of contributions for complying development. It is appropriate to retain the 2000 Regulation requirement for payment before commencement of works because an applicant and instead it is open for a consent authority to use compliance processes where there has been a breach of the CDC conditions.

Given the Department's ongoing work to improve the infrastructure contributions system, the final 2021 Regulation makes only two minor changes to these provisions as noted above. Other changes to these provisions are best addressed as part of the infrastructure contributions work that is currently being undertaken by the Department. Further information on that work can be [found here](#).

9. Registers and other records – the Act, s 4.58

9.1. Summary of proposed reform

The final 2021 Regulation makes minimal changes to provisions for registers and other records. A new requirement has been introduced for certain registers and records to be published on council websites.

9.2. Issues raised in submissions

Minimal feedback was received on the provisions for registers and other records. A small number of comments highlighted the workload associated with meeting requirements for online registers. Comments requested lead time for implementation, and clarity on when the new register requirements will apply.

Feedback expressed a preference for the NSW Planning Portal to be the centralised online register in place of publishing on council websites. Concerns were raised by a small number of stakeholders in concurrently meeting the register and record requirements while also adhering to copyright and record keeping obligations.

9.3. Response

The final 2021 Regulation includes an amendment to provide that the requirement for online publication of certain registers and records applies only to DAs and CDCs made after commencement of the Regulation. This clarifies that in-progress and older applications are not captured by the requirement.

In addition, the Regulation will not commence until March 2022, allowing time to prepare for these new requirements.

The NSW Planning Portal does not currently have the capacity to house all council registers, but the Regulation could potentially be amended in future to allow publication on the Portal, if this lessens the administrative burden for councils and improves access for the public. Further consideration will be given to this matter after the Regulation has commenced.

10. Reviews and appeals

10.1. Summary of proposed reform

Part 12 of the 2021 Regulation makes minimal changes to the provisions for reviews and appeals.

10.2. Issues raised in submissions

Feedback suggested the exhibited 2021 Regulation could better reflect current practices by replacing the requirement to give copies of an application for review to concurrence authorities in draft section 226(3) with a requirement to notify concurrence authorities by using the NSW Planning Portal.

Some submitters raised issues with the requirements for notifying parties of a determination on an application for review ('a review decision') under proposed section 227. This section requires consent authorities to notify parties of a review decision by means of the NSW Planning Portal, however some stakeholders (e.g. the New South Wales Aboriginal Land Council and submitters) do not have access to the Portal.

Concern was raised that providing for a deemed refusal period based on perceived unrealistic assessment timeframes leads to unnecessary litigation. This litigation has resourcing implications for consent authorities. Feedback suggested aligning the deemed refusal period with the types and complexity of assessments, as an alternative to the current one-size-fits-all approach. This approach would also exclude weekends from assessment timeframes.

Feedback also noted this part does not include the period for review of a DA determination, though this is covered by section 8.3(2) of the EP&A Act.

10.3. Response

Section 226(3) of the exhibited draft has been amended to require consent authorities to notify concurrence authorities of applications for review via the NSW Planning Portal.

Section 227 of the exhibited draft has also been amended to require parties other than the applicant to be notified of a review decision via means other than the NSW Planning Portal, to reflect the fact that these parties don't have access to the Portal.

Any changes to timeframes for DA processes would require extensive analysis and consultation, including consideration of the transition to use of the Portal. The Department may consider progressing this work separately to the process for making the 2021 Regulation.

11. Miscellaneous

11.1. Summary of proposed reform

A summary of the proposed reforms to the miscellaneous provisions of the Regulation is provided in section 13 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#).

11.2. Issues raised in submissions

There was general support for the intent of the amendments proposed in the exhibited 2021 Regulation to increase efficiency and effectiveness of the system. Stakeholders also identified further amendments to achieve this outcome.

Feedback on the miscellaneous provisions included:

- Concerns about the impact that the 2021 Regulation changes will have on councils. These impacts related to implementation capacity, additional costs, resourcing and technical infrastructure required. These costs were considered to potentially impact regional councils to a higher degree. Stakeholders recommended support be provided and an adequate transitional period before commencement, to allow sufficient preparation time prior to implementation. Councils commonly indicated that the March 2022 deadline is an inadequate timeframe for transition.
- Concern about consistency in definitions deriving from the Building Code of Australia (BCA)
- Further amendments to section 254 in relation to the bush fire attack levels and the certification process.
- Concern around whether proposed savings provision in section 275 will preserve the ability to assess and determine REFs under the 2000 Regulation provisions where those REFs were prepared prior to the commencement of the proposed 2021 Regulation.
- Suggestions to consolidate the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 with the proposed 2021 Regulation and repeal outdated provisions.

Feedback noted the changes to planning certificate requirements in the exhibited 2021 Regulation and the associated data/data validation required. It was requested that the amendments be delayed until guidance and templates are prepared and there is greater certainty of the content and final structure of the planning certificate template.

11.3. Response

Additional savings and transitional provisions have been included in the final 2021 Regulation, including:

- To provide that anything begun under a provision of the 2000 Regulation before its repeal may be continued and completed under the 2000 Regulation as if that Regulation had not been repealed. This will include DAs, CDC applications and REFs.
- A savings provision to allow applications to be assessed and determined without using the NSW Planning Portal if the application was made before the dates in clause 296(2) of the 2000 Regulation. This is intended to address issues with the functionality of the NSW Planning

Portal. Under the 2000 Regulation, notices and communications cannot be made using the NSW Planning Portal if the original DA was lodged in paper form and not on the Portal. For example, the NSW Planning Portal won't facilitate the consent authority to issue a notice of the determination of the DA where the original application is not on the NSW Planning Portal.

- A savings provision to provide that clause 245K of the 2000 Regulation continues to have effect. There are some projects still in existence that received approval under Part 3A of the EP&A Act. If modification applications are lodged for these projects, clause 245K should still apply so that fees can be calculated and determined for the assessment of those modification applications.
- Savings and transitional provisions inserted into the 2000 Regulation after the exhibition draft of the 2021 Regulation was prepared. These have been carried over to the final 2021 Regulation.

An amendment has also been made to clarify that a building information certificate can be issued for part of a building, consistent with the 2000 Regulation.

The following sections of the Submissions Report provide details of the Department's response to feedback provided on changes to requirements for REFs, registers and record keeping and planning certificates (e.g. concerns raised by councils in relation to resourcing implications and preparation time required for implementing these new requirements).

- REFs – see section 7.3, which notes that the requirement to publish REFs will commence on 1 July 2022 to provide more time for determining authorities to prepare for implementation.
- Registers and record keeping – see section 9.3, which notes that the final 2021 Regulation includes an amendment to provide that the requirement for website publication of certain registers and records applies only to DAs and CDCs made after commencement of the Regulation. This clarifies that in-progress and older applications are not captured by the requirement.
- Planning certificates – see section 13.3, which notes that commencement of the new schedule for planning certificates will be deferred until 1 October 2022, to allow councils sufficient time to update their systems and implement changes.

Suggested amendments to section 254 (development excluded from bush fire prone land) would need to be considered separately in consultation with councils and certifying authorities. Other amendments suggested in submissions may be considered as part of potential future work.

12. Designated development

12.1. Summary of proposed reform

A summary of changes proposed in the 2021 Regulation for designated development is provided in section 12 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#). Some refinements to these reforms have been made in response to submissions (see 'Response' section below).

12.2. Issues raised in submissions

Over 150 comments were received on the designated development provisions of the 2021 Regulation. Commonly raised topics are summarised below.

There was strong support for alignment between the designated development schedule in the proposed 2021 Regulation and the *Protection of the Environment Operations Act 1997* (POEO Act) schedule (activities requiring an EPL). There was also strong support for the amendments focused on improving environmental outcomes – including for wetlands, drinking water catchments and environmental sensitive areas of state significance (ESASS). Further changes were also suggested for ESASS.

There was majority support for the updates to designated development categories including the addition of emerging technologies. For example, there was support for including energy from waste as a designated development category, with some submissions requesting further detail on the types of proposals captured.

While the exhibited 2021 Regulation proposed minor amendments to the 2000 Regulation waste provisions, further changes were also requested. Requests were also made for further amendments and additions to other development categories in the schedule.

The removal of lower risk proposals from the designated development schedule was mostly supported, with the exception of small poultry farms where mixed feedback was received. There was also concern with the exclusion of associated works and the removal of solar (except for on floodplains). Concerns primarily focused on the consequential removal of third party appeal rights and the need to adequately assess potential impacts.

Several comments requested further changes regarding terminology and reordering the schedule alphabetically. Other comments related to other legislation in the planning system and so would need to be considered as part of separate reforms.

12.3. Response

The amendments to designated development will generally proceed as proposed in the exhibited 2021 Regulation.

In response to feedback, the final 2021 Regulation has been updated to fix minor editorial issues, refer to *declared* wilderness in the ESASS definition and refer to *livestock processing industries* – consistent with the Standard Instrument LEP. The schedule has also been ordered alphabetically for ease of user navigation.

Concern over removing some development proposals from designated development is noted. The solar development category will be adjusted to only exclude the relatively low risk *photovoltaic* solar (not *thermal* solar) from designated development, except if on a floodplain.

Removal from designated development means these proposals would generally revert to the standard DA planning approval pathway under Part 4 of the EP&A Act. This pathway has environmental impact assessment requirements that must be met by the applicant when preparing an application – including the preparation of a statement of environmental effects. These proposals would also typically be exhibited by council and members of the public invited to lodge a submission to outline any concerns. Consent authorities can then impose conditions (if granting consent) to mitigate potential impacts. Other legislative protections such as those for heritage, biodiversity and waterways would continue to apply. Therefore, it is considered appropriate to remove low risk proposals from designated development as this supports an adequate level of assessment and an efficient planning system.

Further suggested changes such as amendments to terminology, definitions and development categories would require analysis and consultation with stakeholders. These could be considered as part of future updates to the 2021 Regulation.

13. Planning certificates

13.1. Summary of proposed reform

A summary of changes proposed in the 2021 Regulation is provided in section 11 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#).

13.2. Issues raised in submissions

Thirty-two stakeholders made comments related to planning certificates. Twenty-five were from local government, 3 were peak bodies, and 3 from state government. Out of these stakeholders, 19

expressed general support for the proposed changes to planning certificates, including the proposal to reorder sections, remove certain matters, and develop a standard format for planning certificates.

Eighteen stakeholders raised concerns about implementation, including resourcing, funding, and timing issues that would result from the proposal to commence the Schedule 2 provisions in March 2022. Stakeholders requested further time and for the proposed changes to coincide with the development of a standard format for certificates.

There was broad support for the proposal to include draft DCPs as well as draft EPIs under Schedule 2 section 1 of the 2021 Regulation (Names of relevant planning instruments and development control plans). However, the proposal to exclude draft DCPs or EPIs that have not been made within 3 years of public exhibition received a mixed response. Three stakeholders suggested all draft DCPs and EPIs be included regardless of their status or the time they were last exhibited, another recommended that 3 years be changed to 5 years, and one sought clarification about the point at which something becomes a 'proposed EPI'.

In relation to Schedule 2 section 2 (Zoning and land use under relevant planning instruments) of the 2021 Regulation, stakeholders generally supported the proposal to:

- include additional permitted uses under the relevant LEP
- include all SEPPs that zone land
- update terminology around outstanding biodiversity value.

Stakeholders requested clarification and guidance about the scope of additional permitted uses and SEPPs that zone land, and the term 'conservation'. Stakeholders also raised that including additional permitted uses may be a complicated exercise, particularly with councils with more than one LEP or historical LEPs. Some stakeholders also submitted comments about improving the structure and language in section 2.

There was some concern about the resources needed to implement changes to include all SEPPs that zone land. In relation to the proposed changes to clauses 1 and 2 of the 2000 Regulation, several stakeholders recommended that the Department keep a list of current draft State environmental planning policies that need to be included on planning certificates.

Ten stakeholders were supportive of the changes to clarify the scope of the provision relating to complying development and to expand it to include land use classifications that affect the ability to undertake exempt development. Three councils objected to the changes. They were concerned about:

- the level of interpretation required by councils to implement the changes
- potential for misinterpretation by applicants
- potential increase in the margin of error in providing this information
- duplication.

Stakeholders requested guidance and a suitable transition time to implement the proposed change.

Nine stakeholders supported the proposed change to clause 7 of Schedule 4 under the 2000 Regulation (Council and other public authority policies on hazard risk restrictions) to expand the list of hazard risk restrictions. One stakeholder expressed that the requirement to explicitly include coastal hazards and sea level rise under the new section (section 10 of the of the 2021 Regulation) will drive the necessity for councils to have the latest coastal hazard and sea level rise assessments and provide greater consistency across LGAs. Others requested clarification about the inclusion of bush fire prone land in planning certificates, recommending it only be covered once on a planning certificate (it is covered under both clauses 7 and 11 of the planning certificates schedule in the 2000 Regulation, and sections 10 and 11 of the new planning certificates schedule

in the 2021 Regulation). One stakeholder raised concerns about mandating the identification of contamination in certificates, citing liability, accuracy, and barriers to automating planning certificates in the future. Other stakeholders requested:

- additional information be provided in relation to flooding
- the new section relating to council and other public authority policies on hazard risk restrictions (section 10 of the 2021 Regulation) be amended and restructured
- guidance be provided, particularly about contaminated land and aircraft noise information under the new section 10.

Stakeholders were generally supportive of the proposal to require councils to indicate whether the land is in a special contributions area and to note whether any draft contributions plans apply to the land under Schedule 2 section 3 (Contributions plans) of the 2021 Regulation. One stakeholder objected to the proposal, citing administrative burden, and requested that the Department provide details of all adopted and draft special contributions areas and areas subject to satisfactory arrangement provisions. Another stakeholder recommended that this section also require councils to provide details of intensive urban development areas under LEPs.

Three stakeholders recommended removing section 18 of the 2021 Regulation (clause 13 of the 2000 Regulation), which relates to orders under the *Trees (Disputes Between Neighbours) Act 2006*. One recommended that this information be included in an Outstanding Notices Certificate instead, and another noted that this information is not useful unless there is a procedure in place for the Land and Environment Court to inform a council when an order has been fulfilled.

Stakeholders also recommended removing section 6 of the 2021 Regulation (clause 21 of the 2000 Regulation), which relates to affected building notices. One stakeholder proposed this information be put on an Outstanding Notices Certificate instead. Another stakeholder, on the other hand, recommended that the scope of information under section 6 should be expanded to include information related to the Orders Register under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

Stakeholders objected to the relocation of the note related to the matters prescribed under by section 59(2) of the *Contaminated Land Management Act 1997* from Schedule 4 of the 2000 Regulation to section 265 of the 2021 Regulation. Eight stakeholders recommended that this note be reinstated in the Schedule.

Other comments recommended:

- Rewording and/or moving certain sections to increase clarity (e.g. rewording a section to clarify exactly what information needs to be provided).
- Including additional matters on planning certificates, such as the Biodiversity Values Map, and expanding contaminated land requirements and information concerning the presence of asbestos.
- That a future prescribed format for planning certificates be designed with local policies, planning strategies and council DCPs in mind.
- That a protocol be developed to notify councils of legislative changes affecting planning certificates.
- That the Department undertake further consultation and provide guidance to stakeholders regarding the proposed changes, including the proposal to prescribe the format of a planning certificate.
- That the Department provide guidance about the matters that should be included on a section 10.7(5) planning certificate.
- Changes to the planning certificate provisions in the EP&A Act.

13.3. Response

Commencement of the new schedule for planning certificates (Schedule 2 of the 2021 Regulation) has been deferred until 1 October 2022, to allow councils sufficient time to update their systems and implement changes. Up until this time, councils can continue to issue planning certificates subject to the requirements of the current planning certificates schedule (Schedule 4 of the 2000 Regulation). The Department will also develop an online, centralised list of draft State Environmental Planning Policies (SEPPs) to assist councils in implementing the changes to planning certificates.

During this time, the Department will consider the other matters raised in relation to planning certificates in submissions to the 2021 Regulation. The Department will also develop a standardised template for planning certificates in consultation with stakeholders. This will be accompanied by plain English explanations of the relevant regulatory provisions where necessary, including references to supporting documentation to guide understanding and interpretation of the information contained in certificates.

The EP&A Act does not allow the Regulation to prescribe matters for the purpose of section 10.7(5) of the EP&A Act. The Department will provide optional guidance regarding the matters to be included on a section 10.7(5) certificate to improve the quality and consistency of any additional information included on these certificates. This guidance could recommend matters for inclusion as well as the form that these matters take.

The Department will investigate developing an internal protocol for the timely notification of legislative changes that have an impact on planning certificates. This will include consulting with councils to identify the best mechanism for notifying councils.

14. Fees

14.1. Summary of proposed reform

A summary of changes proposed in the 2021 Regulation is provided in section 8 of the [Regulatory Impact Statement \(PDF 1,200 KB\)](#).

14.2. Issues raised in submissions

Around 60 comments were received on the fee provisions in the exhibited 2021 Regulation. Commonly raised topics are summarised below.

Councils generally supported amending the fees and enabling ongoing indexation and minor adjustments to fees. Many also recommended a more comprehensive review of fees and a shift towards a cost recovery model that recognises the increasing burdens associated with delivering planning services and meeting compliance responsibilities.

Several fees issued under the Regulation were recommended for further review, including fees for concurrence, planning certificates and building information certificates. Councils considered the fees in the 2000 Regulation do not cover administrative costs. Councils also recommended a review of the framework for managing unauthorised development and considered additional fees should be charged to act as a deterrent against unauthorised work.

Councils supported introducing fee changes sooner than 1 July 2023, whereas the development industry supported delayed commencement. Councils also raised some procedural issues with indexation occurring in March.

There were some concerns that the fee changes may impact on the viability of social and affordable housing, particularly for not for profit providers. Whilst it was noted the proposed

increases are relatively modest, cumulative cost impacts were noted and it was recommended that consideration be given to reduce or waive fees for this housing type.

Other issues raised included:

- That annual changes to fees should occur in July as this aligns with when councils update their schedule of fees and application forms, which include fee estimates.
- A need for building information certificate assessment fees to be included in the Regulation.
- More support for rural and regional councils to assess SSD and infrastructure.
- A need for clarification on how certain fees are intended to apply.
- Further transparency on the planning reform fund fee.

Recommendations were also made to move away from using costs of development to calculate fees, and a fee reduction was suggested for development that demonstrates high environmental performance.

14.3. Response

Amendments to fees will generally proceed as proposed in the exhibited 2021 Regulation. The final 2021 Regulation amends fixed fees to include movements in the consumer price index (CPI) and to allow for ongoing minor adjustments in these fees either annually or biannually. This will allow fixed fees to gradually increase over time to better reflect the cost of providing planning services. A change to fees other than just the CPI increase will require a comprehensive review of all inputs, processes and potential impacts to councils and applicants. The Department may look to undertake this work separately after the Regulation has commenced.

The 2021 Regulation maintains provisions that allow for fees to be waived. It is at the discretion of council or the relevant authority to consider whether to waive fees for development such as social and affordable housing or development of high environmental performance.

15. Penalty notice offences

15.1. Summary of proposed reform

The 2021 Regulation makes minimal changes to provisions for penalty notice offences.

15.2. Issues raised in submissions

Minimal comments were received in relation to the penalty notice provisions of the Regulation. The only concern raised in respect to these provisions was a comment on the proportionality of penalties applying to non-compliance with certain CDC provisions. The comment specifically suggested that penalties for non-compliance with section 122, which sets out requirements for the form of a CDC (i.e. what it must contain) were disproportionately high. The stakeholder pointed out that non-compliance with these provisions could occur as a result of an administrative error.

Recommendations were made for new penalty notice offences including:

- A new offence for not keeping a record of neighbours notified in relation to complying development work, because councils commonly receive complaints from neighbours claiming they have not been notified.
- A new provision and associated offence to ensure a CDC copy is kept on site for council officers when attending privately certified sites.

- A new offence provision for contraventions of development sign requirements as these requirements are often disregarded. This causes difficulties for council officers and nearby residents to contact the principal contractor or principal certifier.
- A new penalty notice if development contributions are not paid upon commencement of privately certified complying development works, because councils are experiencing issues following up unpaid development contributions.
- A new offence in relation to asbestos declarations and conditions.

15.3. Response

The penalties relating to requirements for the form of a CDC are broadly consistent with those in the 2000 Regulation and the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*. The maximum penalties under this section have been reduced in the final 2021 Regulation compared to the 2000 Regulation. An alternative compliance option to seeking these maximum penalties through court proceedings is for council (or other authorised persons) to issue a penalty notice under Schedule 5. The penalty notice is of lesser monetary value than the maximum penalty, allowing for a proportionate compliance approach.

The suggested new penalty notices would require further consideration and consultation with relevant stakeholders, and so have not been included in the final 2021 Regulation.

16. Other feedback received

16.1. Issues raised in submissions

There was general support from stakeholders for the proposed changes to the 2000 Regulation, especially from councils.

Councils were concerned about the 2021 Regulation potentially increasing administrative burden and costs and creating pressure on industry. Changes would be required to council practices and systems in relation to templates updates, planning certificates, development assessment, GIS systems and community participation plans. Councils requested guidance and sufficient lead time to implement the changes.

Feedback was received on the removal of the fire safety and certification provisions, which have been moved to a separate *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*. There was some support for these provisions being separated, noting their complexity. Further consultation was requested on these provisions.

Many councils were concerned about the compliance levy and compliance cost notice provisions, noting the lack of information, limited funding, resourcing and budget for those matters. These provisions were considered impracticable and administratively onerous. Submissions recommended a comprehensive review. Introduction of a levy was suggested for all development and complying development applications – with a focus on cost recovery, recoupment of costs, and additional funding for councils.

Recommendations were made for the NSW Planning Portal to capture DA and contribution payments as a central system for DA lodgement. Further consultation was requested on aspects of the Portal such the need to capture required application documentation, the forms used and the information provided.

Some comments suggested the proposed 2021 Regulation could better consider environmental objectives including: the government's objective of net-zero greenhouse gas emissions by 2050, better integration of the aims of the *Biodiversity Conservation Act 2016*, and considerations of circular economy and waste production in development assessment.

It was recommended the 2021 Regulation ensures developments with greater impacts receive greater scrutiny. Amendments were suggested to the State Significant Development planning

approval pathway in the *State Environmental Planning Policy (State and Regional Development) 2011*, to improve scrutiny of higher impact proposals.

Other general comments raised in feedback included:

- comments advocating for greater consideration of better design and amenity
- recommendations for:
 - a new SEPP for waste and resource recovery
 - community participation principles in the EP&A Act to inform the 2021 Regulation.

16.2. Response

Some concerns raised are outside the scope of the reform process for the 2021 Regulation, and other issues are currently being considered (or may be considered) as part of separate reform processes within the Department.

The Department is progressing work on compliance levies, compliance cost notice provisions, development contribution matters and functionality of the NSW Planning Portal as part of separate reform processes. The 2021 Regulation supports improved environmental outcomes through changes such as the amendments to designated development.

The new *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* has been made separately to the proposed 2021 Regulation and will commence on 1 January 2022. This carries over the provisions of the 2000 Regulation with only minor updates. Consultation with stakeholders, including with the Minister for Better Regulation and Innovation who jointly administers these provisions, would be required before any substantial or further changes could be made to certification and fire safety provisions, so amendments to these provisions have not been made as part of the Regulation remake or the making of the Development Certification and Fire Safety Regulation.

The definitions of 'accredited practitioner (fire safety)' and 'class' have been updated to match the definitions found within the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*. The final 2021 Regulation also includes a definition of 'exit' to have the same meaning as in the BCA.

The final 2021 Regulation will not come into effect until 1 March 2022, with certain provisions being deferred for commencement later in 2022. This will allow more time for councils to implement the changes. The Department will be consulting with councils on the new DA form in 2022 to improve the quality of information provided in DAs and to reduce administrative burden.