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LAWYERS

LG Alert

Amendments to the PDI Bill

As readers will be aware, The *Planning, Development and Infrastructure Bill 2015* ("the Bill") is currently being debated in the House of Assembly. Since the Bill was introduced and read for a second time on 8 September, 74 amendments have been made to the Bill. Some of the amendments address concerns we raised in our Planning Reform Seminars. Further, some of the amendments considerably alter the role of Local Government in the planning system under the Bill.

This Alert outlines the most significant amendments to the Bill.

Compliance and enforcement provisions
It is proposed that councils will have access to each of the new compliance and enforcement mechanisms in clauses 210, 212, 216 and 217 of the Bill (albeit with some qualification).

Specifically, councils will be permitted, pursuant to clause 210, to enforce adverse publicity orders and have the ability to recover the costs incurred in doing so from the offender. Prior to the proposed amendments, the Bill permitted only the State Planning Commission ("the Commission") to take such action.

Similarly, under the original version of the Bill, councils could not obtain or negotiate civil penalties and could not enter into voluntary enforceable undertakings.

The amendments provide for councils to exercise powers under clauses 212 and 217 **but only with the prior authorisation of the Commission**. Given that councils currently undertake the bulk of compliance and enforcement activity under the *Development Act* and civil penalties are proposed to be made directly available to councils without any need for authorisation in the draft *Local Nuisance and Litter Control Bill*, we see no reason why authorisation from the Commission should be required before those powers are exercised.

Further, there is no statutory guarantee that the Commission will determine applications for authorisation to exercise these powers promptly or that authorisation will not be unreasonably withheld. Without such guarantees in place, this may discourage councils from considering these options in the future – thereby rendering the amendments of little value.

Additionally, in relation to the provisions concerning to the recovery of economic benefit, clause 216 now provides that the Court can order that payment of economic benefit can be made to a council if the Court thinks fit. However, where such a payment is made to a council, the council is required to apply the costs recovered for the purpose of acquiring or developing land as open space and not for any other purpose.

Environment and Food Protection Areas
Amendments are also proposed to clause 7 of the Bill, relating to the environment and food protection areas. The amendments require the Commission to conduct a review of all established environment and food production areas on a 5 yearly basis.

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As part of that review the Commission must assess whether adequate provision exists outside the established areas to accommodate housing and employment growth over the longer term (being at least a fifteen year period) in a manner that avoids undue upward pressure on the cost of housing, transport and other services. The Commission may only recommend the Minister to vary or abolish an area where the Commission is satisfied that provision is not being made to accommodate housing and employment growth or the change is minor or trivial. It appears this amendment stems

from concerns that the establishment of these areas will negatively impact future employment and housing growth.

This amendment seeks to ensure that the Commission takes these issues into account when it reviews environment and food protection areas every 5 years.

Delegation of the Commission's planning consent powers

Amendments to clause to 30 of the Bill require the Commission to delegate its functions and powers as a relevant authority with respect to determining whether or not to grant planning consent. The delegation must be to a Commission assessment panel, a joint planning board assessment panel, a council assessment panel, an assessment panel constituted by the Minister or a person for the time being occupying a particular office or position.

However, despite the Commission being required to delegate its functions and powers in this way the amendments make it clear that the delegations are revocable at will and will not derogate from the power of the Commission.

"In respect of restricted developments the further amendments to clause 103 make it clear that the Commission, or its delegate, may refuse an application that relates to a restricted development without proceeding to make an assessment of that application."

This amendment begs the question – what decisions will the Commission delegate and on what basis? Will delegations be made to all council assessment panels on the same terms or will certain panels receive delegations and others not? Will councils be reimbursed for the costs of their development assessment panel making decisions as delegate of the Commission? These questions and more are not addressed in the amendments.

Planning and Design Code

While we will not know the content of the Planning and Design Code until it is produced, amendments to clause 62 makes it clear that the focus will be on the desired ***form*** of development, such as the desired landscape, townscape or streetscape form of an area – rather than land uses in a locality or area, which is, of course, a key consideration in current Development Plans.

Representations

Amendments to clauses 100 and 103 of the Bill ensure these provisions now specifically provide that a member of Parliament or a member of a council is entitled to make representations in relation to both performance assessed development and restricted development respectively. While the amendments provide that council members can make representations this does not change the fact that section 103 permits the Commission to grant development approval to a restricted form of development without the concurrence of the relevant council.

Restricted developments

In respect of restricted developments the further amendments to clause 103 make it clear that the Commission, or its delegate, may refuse an application that relates to a restricted development without proceeding to make an assessment of that application. A decision to refuse such an application without proceeding to make an assessment is subject to review by the Commission on application by the applicant. On review the Commission may affirm the decision of its delegate or refer the matter back with the direction that the application for planning consent be assessed. Importantly, the amendments make it clear the decision of the delegate to refuse or the decision of the Commission on a review cannot be appealed.

Feedback to the Bill

It is clear from a review of Hansard from the last sitting days of 27 – 29 October that the Opposition is highly critical of the Bill. The Opposition raised serious concerns with many aspects of the Bill, including, the infrastructure schemes, the removal of elected members from CDAPs, the establishment of environment and food protection areas and the overall lack of specific detail in the Bill (much of which has been left to the, as yet, unseen accompanying regulations). Given the attitude of the Opposition to date, it appears likely that more amendments will follow. Parliament sits again from 17-19 November. We will continue to keep you updated as the Bill proceeds.

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