Property Council of Australia
ABN 13 00847 4422

Level 1, 11 Barrack Street
Sydney NSW 2000

T. +61 2 9033 1900
E. nsw@propertycouncil.com.au

propertycouncil.com.au
@propertycouncil

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1 October 2021

Department of Planning, Industry & Environment

Submitted online via the Planning Portal and email

Attn: Ms Kirsty Chan, Director, Planning Regulatory Reform

Dear Ms Chan,

Re: Environmental Planning and Assessment Regulation 2021 Amendment

The Property Council welcomes the opportunity to provide feedback on Draft Environmental Planning and Assessment Regulation 2021 Amendment (**the Draft Regulation**) publicly exhibited by the Department of Planning, Industry and Environment (**the Department**).

We provide 'in-principle' support for the objectives and aims of the Draft Regulation. We note the Draft Regulation will retain many of the existing provisions while making the following key changes:

- Updating development and modification application requirements
- Simplifying stop the clock, concurrence and referral provisions
- Revising Planning Certificates to focus on e-conveyancing requirements
- Updating Designated Development categories
- Revising provisions relating to infrastructure and environmental impact assessment
- Amendments to fees and charges, electronic communication, development contributions, existing use rights and some miscellaneous changes

Our comments are provided in the attached table for your consideration.

Should you have any questions or seek further clarification on any item raised in our submission, please do not hesitate to contact NSW Policy Manager, Annie Manson on 0422 131 741 or amanson@propertycouncil.com.au.

Yours sincerely,

Luke Achterstraat
NSW Executive Director
Property Council of Australia

Draft Environmental Planning & Assessment Regulation Amendment 2021	
Proposed changes	**Commentary**
Existing Use Rights	
Replace the term 'floor space' with 'gross floor area' for the purpose of considering whether an existing use can be changed and adopt the Standard Instrument – Principal Local Environmental Plan (Standard Instrument LEP) definition of this term.	**This is supported by the Property Council.** This clearly establishes and clarifies the way floor area is calculated by applicants and consent authorities when considering applications to increase floor area of premises that have the benefit of existing use rights
Development applications (other than complying development)	
Updating application of requirements, including to simplify the provisions and remove/update outdated requirements	With regard to these requirements, the Property Council believes email is sufficient for notification of development application processes. Lodgement processes need to be clarified to specifically note that development applications **can** be lodged by the landowner's nominated planner or other nominated representative. The proponent must also be given the option to include, should they choose, not just one but several contact emails for this purpose. Additionally, the Property Council notes that the provisions relating to the lodgement of documents via the NSW Planning Portal have, perhaps inadvertently, resulted in unacceptable delays. This arises where documents submitted by an applicant onto the Portal are left in 'limbo' for unspecified and sometimes extended periods of time, until they are accepted by a council and lodged onto the Portal. Member experience indicates that this delay between upload and acceptance of documents can span anywhere up to 14 days, during which time applicants have no ability to require the council to take any steps to progress their consideration of the material and uploading of the documents onto the Portal. **The Property Council therefore recommends that as part of the Draft Regulation, provisions giving effect to 'deemed' acceptance of documents be included so as to avoid applicants being unduly impacted by procedural delays arising from the use of the NSW Planning Portal.**
Prescribe additional requirements for modification applications and proposed amendments to development applications that are still under assessment, to	The Property Council notes the proposed Regulation requires the consent authority to explicitly approve or reject amendments to DA's via the planning

improve the quality of information submitted with these applications and reduce administrative burden (not SSD and SSI)	portal. This is contrary to Land and Environment Court decisions, which allow the agreement of the consent authority to be inferred where they continue to act consistently with the amendment. **The Property Council recommends that provisions be included to allow for 'deemed' acceptance of documents seeking to amend a development application, where those amendments are sought in the context of legal proceedings and the Court has made a direction (as consent authority) that the documents are to be accepted.** This is required to overcome another source of delay where it can take, anecdotally, between 24-48 hours for documents submitted via the Planning Portal to be notified to the council for a decision to be made to approve or reject the application. This has resulted in proceedings, which might otherwise be swiftly resolved being drawn out, causing unacceptable administrative burdens on the Courts as well as to parties involved in litigation. **The Property Council also recommends that provisions be included to address the matters raised by the Court of Appeal in *Ku-ring-gai Council v Buyozo Pty Ltd [2021] NSWCA 177*. That is, confirmation that modifications may be sought even where no change to the development is proposed.** This is necessary, as applicants often seek to amend conditions of a consent which do not alter the nature or physical aspects of the approved development.
Remove the requirement for landowner's consent for the surrender or modification of a development consent, where the original development application could have been made without the consent of the landowner	**This is supported by the Property Council.** Larger, long-term staged developments can experience issues and difficulties where ownership becomes fragmented over time and new owners are often not motivated to provide consent or understand the nature of the development and their critical role in providing consent. A suitable clause which could be adapted to address this issue is Schedule 4, Part 1B, Cl.8F of the Environmental Planning and Assessment Regulation (Savings, Transitional and Other Provisions) Regulation 2017
Clarify that the consent authority is able to reject a modification application in certain circumstances	The Draft regulation is not clear as to the circumstances in which a consent authority may reject a modification application as cl. 36 refers to modifications to

	development applications. Property Council recommends that these circumstances are clearly set out in the legislation. The reference to integrated development in cl.36(1)(d) and (e) could be amended for state-level applications nominated as integrated development, noting that whilst other approvals may be required, the DA can choose to be nominated as 'integrated' or not. **The Property Council recommends further consultation be provided on this matter so that clarity is achieved.**
Clarify that withdrawal provisions afforded to DA's also apply to all modification applications.	**This is supported by the Property Council.**
Require a consent authority who approves a modification to provide the applicant with a modified development consent that complies with any requirements specified by the Planning Secretary.	**This is supported by the Property Council.** This will provide a consistent approach to modifying a development consent and ensure development consents are iteratively updated to reflect subsequent modifications.
Require consent authorities to notify submitters of determinations on internal review applications.	**This is supported by the Property Council.**
Calculation of assessment and deemed refusal periods, stop the clock provisions and concurrence and referrals provisions	
Amend the drafting of stop the clock provisions to clarify rules and remove redundant provisions	**This is supported by the Property Council.** The Cl. 107 of the current EP&A Regulation is unnecessary, and those two (2) days should be included in the assessment period. Clause 34(3)(b) states that a consent authority's request for additional information from an applicant must 'specify a reasonable period within which the additional information must be given to a consent authority.' However, this allows for considerable council discretion and could vary considerably. Many of our members have experienced situations where the timeframe provided by council has been unreasonable and any request for extension has been rejected, generally in instances where Council clearly did not support the DA. The Department could consider mandating a minimum period of time in consultation with relevant stakeholders, such as 'not less than 21 days'.

	The Department could also consider a longer 'headline' timeframe to provide greater certainty, rather than the current mechanism of a short headline with multiple events pausing/restarting/excluded from the timeframe.
Eliminate unnecessary concessional delays in assessment period (e.g. by removing the two concessional days occurring while the concurrence authority or approval body's request for additional information remains unanswered (provided under cl 110(1)(a) and (b) to reflect the use of emails and instant uploads of reports and to simplify the calculation of assessment periods.	**This is supported by the Property Council.** The Property Council suggests the Draft Regulation introduce 'deemed acceptance' of an application submitted on the Planning Portal, once fourteen days have passed since the day the application was submitted. Currently the consent authority is provided with 14 days to accept lodgement however it is common for this process to take much longer.
Remove unnecessary requirements to notify concurrence authorities and approval bodies, including by providing that modification applications under section 4.55(1) and (1A) of the EP&A Act do not need to be referred, except where they propose changes to conditions imposed by the concurrence authority or the general terms of approval of the relevant approval body.	**This is supported by the Property Council.**
Provide greater certainty around the day that the clock stops when an information request has been issued.	**This is supported by the Property Council.**
Reduce unnecessary delays and provide greater certainty around the period for providing additional information, by requiring authorities to specify a reasonable period in which the information must be provided.	**This is supported by the Property Council.**
Clarify when the clock restarts in circumstances when an application is amended.	**This is supported by the Property Council.** The Property Council requests that the clarification is consistent with the current case law from the Land and Environment Court.
Provide that the assessment clock starts when payment is received (unless payment is waived) and allow someone else to make a payment on behalf of the applicant.	**This is supported by the Property Council.**
Facilitate a shared understanding of elapsed time in the deemed refusal period, by providing that an information request issued by the consent authority must - Specify the number of days that have elapsed in the assessment period, and - Inform the applicant that the assessment period ceases to run between the date the request is issued and the date the applicant provides the information or notifies (or is taken to have notified) the consent authority that the information will not be provided	**This is supported by the Property Council.** To ensure certainty and clarity around timing, the Department could provide a 'timer' on the Planning Portal which shows a calculation on the assessment period. With regards to cl.86(2), which reads:

	(2) The assessment period for a development application ceases to run during the period between the date on which a consent authority requests additional information from an application under clause 34 and the earlier of: (a) The date on which the information is given to the consent authority, or (b) The date on which the applicant gives, or is taken to have given, written notice to the consent authority that the information will not be given. This clause does not reflect circumstances where a response is provided, but not all information requested is deemed by the applicant to be required to assess the application (for example, additional contamination reporting where the submitted documentation is sufficient to address the relevant matters for consideration). An additional clause to include this scenario could read: (c) The date on which the response given is sufficient to enable the clock to restart. Should the consent authority determine that after considering the response that the additional information or response is not sufficient, then another request for information could be made.
Reduce administrative burden associated with post-determination notifications	
Distinguish between a notice of determination issued to an applicant and a notice issued to any other party. This will ensure that, even where a submitter has not provided an email contact, the consent authority would only need to post that person a letter (rather than the full list of information that currently needs to be sent to all parties).	**This is supported by the Property Council.**
Clarify that the requirement for a consent authority to send a copy of its notice of determination to the approval can be satisfied by uploading the notice to the NSW Planning Portal	The current wording of the Draft Regulation requires notices to be provided to the 'applicant'. Some councils have raised issue with material being provided to an agent of the applicant. This could be amended through inclusion of words to the effect of 'or a nominated agent of the applicant'

	The Property Council suggests that this be amended to include 'uploading the notice of determination to the approval to the planning portal <u>and another means in the event there are issues with the portal'</u>. Email would be the most appropriate additional avenue to issue the notice of determination.
Complying Development Certificates	
Improve information provisions and disclosure for CDC applications by requiring the following be included on CDC applications: - **Details on site configuration and building envelope** - **Detailed engineering plans for telecommunications or electricity works** - **A site plan that is drawn to scale** - **The maximum site coverage of the land.**	**This is supported by the Property Council.** The majority of these changes will give greater transparency in the CDC process and certainty for the principal certifying authority issuing the CDC.
Requiring all titles of reports, studies, plans and documentation relied upon to determine the CDC application to be listed on the CDC with sufficient guidance on how and where the documents can be accessed	**This is supported by the Property Council.**
Requiring pre-approval notices to identify the relevant SEPP or the relevant code in the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 under which the CDC has been proposed	**The Property Council recommends that a Draft Regulation should clarify what constitutes a 'pre-approval notice'.**
Requiring disclosure of site plans in a pre-approval notice.	**This is supported by the Property Council.**
Require a CDC application on land that is declared as contaminated under Section 60 of the Contaminated Land Management Act 1997 to be accompanied by a site audit statement from an accredited auditor	**This is supported by the Property Council.**
Require that any CDC approved on land that is declared as contaminated under section 60 of the CLM Act must contain a condition that any site audit statement recommendations relating to the use of the land for the purpose of the CDC must be complied with.	**This is supported by the Property Council.**
Remove duplication requirements for neighbour notification prior to the issue of a modified CDC (where neighbours were notified of the original application)	**The Property Council recommends a threshold should be established where notification is not required, similar to the modification of a Development Application** (for example, where there is a minor modification to a CDC, no notification be required where notification was made with the original CDC).

Note on other new application requirements for CDC applications: New clause 102(1) provides that an application for a complying development certificate must be in the approved form and include all the information and documents specified in the approved form (or required by the Act or Regulation). The form will be updated so that CDC applications are also provided to require:	**This is supported by the Property Council.**
Previous DA reference numbers for change of use CDC applications	**This is supported by the Property Council.** However consideration should be given as to how this requirement will impact historical buildings such as CBD office buildings that may not have a development application consent (due to poor record keeping, age of building etc).
Additional information on prior approvals (approvals granted under the Local Government Act 1993, Road Act 1993 or approval for removal of a tree issued within the last 20 years, when such information is readily available or accessible)	There may be a large number of approvals associated with a site that are not relevant to the scope of the CDC. **The Property Council recommend that only 'relevant' prior approvals should be required.**
Environmental assessment under Part 5 of the Act	
Amendments to improve the transparency and operation of environmental impact activities under Part 5 of the Act	
Retitle the relevant clause (currently clause 228 'What factors must be taken into account concerning the impact of activity on the environment?') to clearly reference a 'review of environmental factors' (known as a 'REF'). This will distinguish the process from the Environmental Impact Statements (EIS) process and give statutory recognition to a widely used phrase	**This is supported by the Property Council.**
Allow the Secretary to prescribe guidelines for the form of environmental assessment for activities that do not require an EIS.	**This is <u>not</u> supported by the Property Council,** as there is no need to publish guidelines in relation to an assessment of environmental factors when these factors are clearly established in CL 156(2). Adding more guidelines will just add another layer of complexity to the process, noting the Secretary has the discretion to vary or revoke the guidelines at any point.
Require agencies to publish environmental impact assessment reports (documenting their REFs) for activities that meet a specified threshold.	**The is supported by the Property Council.** The $5 million threshold in CL 156(4)(a) is not necessary. It is reasonable to include thresholds for (b) and (c), but not (a).

	Often the Contruction Investment Value (CIV) of a proposed activity for the purposes of Part 5 is not established, unless there is a need to, for the purposes of determining whether any SSD thresholds (or the like) are met.
Insert two additional requirements for agencies to consider: - Any environmental factors that may be relevant to the likely impact of an activity on the environment and not just those factors listed in clause 228 - Any strategic plans made under Part 3 of the Act, including local strategic planning statements, regional and district plans.	**This is supported by the Property Council.**
Remove redundant clauses, including provisions relating to fisheries management and the Australian Rail Track Corporation Ltd	**This is supported by the Property Council.**
Update the requirements for publication of EIS decision reports.	**This is supported by the Property Council.**
Designated development	
Energy recovery from waste facilities, oil or petroleum waste storage facilities and contaminated groundwater treatment activities will only be designated development where they also require an EPL.	**This is supported by the Property Council.**
Add new categories to capture emerging technologies • **Large scale battery storage facilities: lithium-ion and lead-acid batteries are classified as dangerous goods and therefore require an assessment on risk. An EPL would be required where a facilities has the capacity to use more than 1,000 tonnes of batteries over a year** • **Geosequestration: requires an assessment of impacts on groundwater, and may also trigger an EPL or dangerous goods licence for certain activities relating to chemical production, storage, waste disposal and transport – particularly in relation to carbon dioxide** • **Large Scale desalination systems or works: may have water quality impacts and also a proponent may apply for an EPL to authorise discharge of desalination brine into waterways or to transport and dispose of this waste at other premises.**	**This is supported by the Property Council.**
Remove low risk photovoltaic solar energy generation and smaller scale poultry farms, breweries and distilleries	**This is supported by the Property Council.**

Align designated development categories with the POEO Act where appropriate, to - **Match thresholds and clause coverage** - **Adopt definitions and terminology** - **Align petroleum works and related legislation**	**This is supported by the Property Council,** to provide greater consistency between types of designated development that are often affected by the POEO Act.
Vary the concrete works and intensive livestock agriculture categories based on industry specific changes	**This is supported by the Property Council**, to reflect contemporary circumstances around these uses.
Alter location -based triggers to: - **Replace the environmentally sensitive areas definition with an updated 'environmentally sensitive areas of State significance definition** - **Increase wetland buffers** - **Revise the drinking water catchment definition** - **Clarify that associated works (e.g. an access road) are not triggers**	**This is supported by the Property Council**, particularly the change in definition for drinking water catchment, which currently is too encompassing.
Alter exclusions to designated development to clarify provisions around DA's for alterations and additions and removing certain LEP and REP exemptions	**This is supported by the Property Council.** Certain lower-risk types of development should be exempt from designated development, for example remediation which does not involve removal of material from the site (capping) The current provisions create the possibility that an entire development is designated development (e.g. asbestos removal and building erected on land).
Include housekeeping and miscellaneous updates to revise definitions, improve phrasing and clause structure, remove outdated clauses, update cross-references to agencies, legislation and external documents, and refine wording to clarify policy intent.	**This is supported by the Property Council.**
Planning Certificates	
Amendments to reduce the complexity of planning certificates and improve clarity and consistency, reduce administrative burden and remove unnecessary regulatory requirements and ensure interested parties can readily access information on land that is relevant, accurate and easy to interpret.	
Refine and reorder the list of matters in Schedule 4 (see Schedule 3 under the proposed 2021 Regulation), to focus the content of section 10.7(2) certificates on land use and development controls essential to conveyancing. Relegate all other matters to 10.7(5) certificates through non-statutory guidelines	**This is supported by the Property Council.**

Retain the requirement to list all relevant planning instruments and development control plans (and also require councils to include draft DCPs) but require councils to provide further explanation of the information provided.	**This is supported by the Property Council.** 'Item of environmental heritage' should be changed to be consistent with the wording used in the Standard LEP, and to clarify scope (local, state, national heritage).
Require councils to include information on all SEPPs that zone land	**This is supported by the Property Council.**
Specify that draft environmental planning instruments and draft DCPs that have not been made within three years from the date they were last on public exhibition do not need to be included on planning certificates	**This is <u>not</u> supported by the Property Council.** Despite the fact they may not be certain or imminent, any draft EPI should be included in the certificate as it is a relevant matter for consideration under the Act in the assessment of a DA. EPI's deferred indefinitely as advised by the Secretary do not need to be included on planning certificates.
Rename and reword the complying development clause to clarify the purpose of clause and the information it requires councils to provide	**This is generally supported by the Property Council,** however in many instances, certificates note that complying development cannot be carried out with no reason given (stating insufficient information), when in fact, the reason can be easily determined through Council's own LEP and associated mapping. For example, areas where the site may be located in a "buffer" area but this is not clearly identified on the certificate.
Add a new clause which requires councils to include key land use classifications that affect the ability to undertake exempt development under the Codes SEPP	**This is supported by the Property Council**, consistent with complying development provisions. This could be expanded to include listing types of exempt development that is permitted.
Update the provisions related to hazard risk restrictions to explicitly include contamination, aircraft noise, salinity and coastal hazard and sea level rise in the list of risks. Including contamination in particular will require councils to include a statement as to whether a policy adopted by the council or another public authority restricts the development of land due to the likelihood of contamination. Currently this information is included in some planning certificates but not others, at the discretion of the relevant council.	**This is supported by the Property Council**. This information should be included in all planning certificates for clarity. Where flood planning areas/ affectation are identified, the flooding provisions should include the relevant Flood Plain Risk Management Plan. This is particularly important given the recent change to the flood clause in the Standard LEP.
Require councils to indicate whether the land is in a special contributions aera and to note whether any draft contributions plans apply to the land	**This is supported by the Property Council.**
Require councils to identify on planning certificates whether any additional permitted uses apply to the land under the relevant LEP	**This is supported by the Property Council.**
Fees and charges	

Amend the fee provisions to include movements in the consumer price index that have occurred since the last CPI increase to fees in the Regulation in 2011, and to allow for ongoing minor adjustments in fixed fees annually or biannually. This will allow fixed fees to gradually increase over time to better reflect the cost of providing planner services. Under the proposed 2021 regulation, the first increase to those fees will not be applied until 1 July 2023, which is the first full financial year after the intended commencement of the proposed 2021 Regulation.	**This is supported by the Property Council.** The Property Council suggest the fees for modifications under s.4.55(2) are reviewed and adjusted.
Electronic Communication Methods	
Remove requirements for hard copies of documents to be made available for free or for a fee and instead require that this information to be made available online or electronically.	**Supported**
Clarify that clauses that require a document to be delivered or posted can be met through electronic methods.	**Supported**
Allow publication requirements to be met through electronic communication methods.	**Supported.** The Property Council also recommends draft Development Control Plans be registered on the planning portal prior to exhibition, and prior to commencement so their implementation can be tracked in a central database.
Miscellaneous (including definitions)	
Amend the Regulation so that a large boarding house, seniors housing, a group home or a hostel does not have to obtain a BASIX Certificate.	**Supported.** These types of developments are class 3 buildings and are already subject to energy efficiency requirements under the Building Code of Australia, and water efficiency requirements under the National Construction Code and Australian Standards.