

General comments

In general, we consider that while the Bill clearly seeks to overcome the decision in *Bay Simmer Investments Pty Ltd v State of New South Wales* [2017] NSWCA 135, it represents a 'light touch' and would benefit greatly from:

1. A clearer transition to the new concept of 'concept development application'.
2. Simplification of potentially confusing proposed and existing drafting.
3. The introduction of a specific clause to ensure that subsequent stages of a concept development are permissible despite any prohibitions which arise after the approval of the concept.

Specific comments

Our specific comments, which relate to the above, are set out below.

Proposed section in Bill	Comment
Division title	We consider that "special provisions" is a more accurate term compared to "special procedures".
83B(1)	<p>Proposed section 83B(1) refers to "concept proposals". We consider that reference to "proposals" in the plural is potentially confusing. For example, "proposals" could be taken to mean that "proposals" for multiple subsequent stages are necessary. While less likely, "proposals" could be taken to mean that a number of proposals should be submitted to the consent authority.</p> <p>In our view, greater clarity is achieved by the use of the term "proposed concept". Please see our amended drafting in section 83B(1) and throughout.</p>
83B(2)	<p>Proposed section 83B(2) continues to refer to "staged development". We consider that the Bill should move away from the concept of "staged development" and instead use the term "concept development application" throughout.</p> <p>Please see our amended drafting throughout.</p>
83B(2)	<p>Proposed section 83B(2) continues to use the term "detailed proposals" in the plural. We consider that this is not entirely clear, and could lead to uncertainty. Similarly to our comments above on section 83B(1), the term "proposals" could indicate (for example) that a number of proposals for stage one should be submitted.</p> <p>We suggest that clause 83B(2) be rationalised to remove extraneous wording, and to state simply that a concept development application can seek approval to carry out a first stage of the proposed concept.</p> <p>Please see our amended drafting.</p>

83B(3)	<p>The Department should take the opportunity to ensure that a development application can be treated as a concept development application so long as the applicant requests it to be treated as such at any time before the determination of the development application.</p> <p>This brings the section in line with the law regarding when owner's consent can be lodged, and prevents concept development applications being refused for the overly technical reason that a box on a form was not ticked.</p> <p>Please see our amended drafting.</p>
83B(4)	<p>The Bill should use this opportunity to rationalise the convoluted language of this section as it currently exists. In our proposed drafting, we have rationalised proposed section 83B(4) so that it states simply that a concept development consent only authorises the carrying out of development:</p> <p>(a) if it sought consent to carry out a first stage; or</p> <p>(b) there is further development consent for a subsequent stage or stages.</p> <p>Please see our amended drafting.</p>
83B(4)(a)	<p>In relation to section 83B(4)(a) in particular, we consider that the Bill should do more to ensure that a concept development consent can clearly be followed by a single development consent for the carrying out of development. Our amended drafting removes reference to the term "that part of the site" and replaces it with the phrase "the site (or any part of it)".</p> <p>Please see our amended drafting.</p>
83B(4)	<p>Further, the wording at the end of proposed section 83B(4), which exists in the current section 83B(4), does not appear to us to have any real practical purpose. This wording was possibly necessary when Division 2A was first introduced, to make it clear on the face of staged development consents that they did not permit actual development. We question whether that is now needed, given the passing of time and the new concept of "concept development application".</p> <p>Please see our amended drafting, in which we have deleted this part of the section.</p>
83B(5)	<p>The proposed wording only states that the consent authority "need only" consider the impacts of the concept development application and "does not need" to consider the impacts of subsequent development.</p> <p>We consider that this may allow consent authorities to take the environmental impacts of subsequent development applications into account where they <i>want</i> to, despite them not <i>needing</i> to.</p> <p>In our proposed amendments, we have sought to modify the operation of section 79C more directly by specifically stating that the likely impact of the construction phase of any development the subject of subsequent development applications is not a matter of relevance to the development the subject of the concept development application.</p> <p>Please see our amended drafting.</p>

83D

At present, the *Environmental Planning and Assessment Act 1979* does not provide for subsequent stages of a 'staged development' to remain permissible if new prohibitions arise after the grant of the staged development consent. This is a risk for developers.

In our proposed drafting, we have inserted a proposed section 83D(4) so that nothing in an environmental planning instrument operates so as to prohibit the carrying of the development the subject of the concept development consent. This ensures the 'bankability' of the concept development consent.
