

EXPLANATORY MEMORANDUM

Planning and Development Amendment Bill 2022

OVERVIEW

The purpose of this Bill is to amend the *Planning and Development Act 2005* ('the PD Act'). The amendments relate to Part 17 – *Special provisions for COVID-19 pandemic relating to development applications*.

Part 17 was introduced by the *Planning and Development Amendment Act 2020* ('Amendment Act 2020'). This is a temporary system designed to generate economic output to benefit the State economy, by encouraging major development activities through appropriate regulatory flexibility and a coordinated assessment process. These reforms introduced a new flexible and streamlined approval pathway for certain significant development applications (with an estimated cost of \$20 million or more in the metropolitan region and \$5 million or more in regional areas), as well as other referred developments.

The benefits of the Part 17 pathway for proponents included:

- a coordinated development assessment process by the Western Australian Planning Commission ('WAPC' or 'Commission');
- a more flexible and less prescribed assessment process;
- explicit and coordinated management by the Commission of the agency referral process to ensure referrals are responded to in the timeframe allocated;
- a substantially more flexible application of planning rules, including the ability to consider non-planning matters in the public interest; and
- a much stronger degree of certainty for proponents who obtain approval, ensuring other approval regimes administered by other government agencies and authorised persons (for example, in relation to a building permit, liquor licence, noise permit, or road access etc.) will not later frustrate any development approval obtained under this pathway without special authorisation to do so.

To ensure these regulatory benefits are actioned, Part 17 was designed with an 18-month sunset clause, which precluded new applications being lodged after 7 January 2022. The system also featured other in-built restrictions, such as prohibiting the Commission from extending the "substantial commencement" period for development activities, ensuring proponents begin significant construction activities and not simply "bank" their planning approvals.

Noting both the fast-changing circumstances since the Amendment Act 2020 was introduced, as well as a degree of ongoing uncertainty into the future, it has been determined that it is appropriate to extend temporarily the operation of the Part 17 pathway. Matters have since arisen that were not foreseen in 2020, such as challenges relating to construction, labour, supply and transportation constraints.

While prudent economic management has seen the State navigate the worse aspects of the last two years, in light of ongoing uncertainties, both domestically and internationally, it is premature to say the economic impacts of the pandemic are over. There remains, therefore, a need to continue to support and facilitate development in response to the economic effects of the COVID-19 pandemic.

As a consequence, the purpose of these amendments is broadly fourfold:

- Extend the timeframe by which new development applications can be submitted within the Part 17 system, to 5pm on 29 December 2023.
- Enable the Commission to extend the timeframe by which existing development approvals must be substantially commenced.
- To clarify and “tidy-up” existing ambiguities in Part 17.
- Provide any transitional or other arrangement necessary to achieve these aims.

CLAUSE NOTES

Clause 1. Short title

This clause provides that the name of this Bill when enacted is the *Planning and Development Amendment Act 2022*. A standard clause.

Clause 2. Commencement

This clause sets out when different provisions of the Bill become operational. A standard clause.

Clause 3. Act amended.

This clause explains this Part amends the PD Act. A standard clause.

Clause 4. Section 269 amended.

Section 269 provides the definitions section for Part 17. Clause 4 introduces a new term, being “extended recovery period”. The new extended recovery period will operate from the commencement of this Bill and expire at 5pm on 29 December 2023, which is the last business day of 2023.

Rather than attempt to extend the original period, which has since expired, the legislation in effect will permit two separate periods of operation under Part 17:

- the original “recovery period” (from 7 July 2020 to 7 January 2022); and
- a new “extended recovery period” (from the commencement of this Bill till 29 December 2023).

This will create a gap from 8 January 2022 to the commencement of this Bill, when new applications under Part 17 cannot be lodged. However, given a number of applications were lodged just prior to the cut-off date, plus the ongoing effective functioning of the Development Assessment Panel system, this gap is unlikely to have any significant impact. Nonetheless, this approach is clearer, compared with potentially dealing with more complicated questions of retrospective approvals and complex transitional provisions.

Clause 5. Section 271 amended.

Section 271 sets out the period in which a development application can be submitted under Part 17. Clause 5 permits certain development applications to be lodged during the new extended recovery period, in addition to the current recovery period.

Importantly, both the recovery period and extended recovery period only set out when certain development applications must be initially lodged – not finally determined. Provided an application is lodged in time, the Commission can continue to deal with such applications, or amendments to those applications, after the expiry of both periods.

Clause 6. Section 272 amended.

Section 272 provides the Premier and Minister with options to refer certain development applications to the Commission, in order to be determined under Part 17. There were no such referrals during the original recovery period, which expired on 7 January 2022. Notwithstanding that fact, clause 6 has been introduced to replicate the existing referral powers, but with respect to the new extended recovery period.

Clause 6(3) introduces new subsection (8), and cross-references back to section 268A of the PD Act. Section 268A sets out a procedure for laying documents before each House of Parliament when not sitting. This amendment is a “tidy-up”, noting there is some risk of confusion as to how the Premier is to inform each House under section 268A, when section 268A only deals with the actions of the Minister. An administrative amendment.

Clause 7. Section 273 amended.

Section 273 sets out what information is provided to the Commission as part of an application under Part 17. Clause 7 amends section 273(2), by inserting a cross-reference to section 272(3A), to take into account a potential referral during the new extended recovery period. An administrative amendment.

Clause 8. Section 274 amended.

Section 274 sets out the Commission’s role in determining a development application under Part 17. Clause 8 amends section 274(1)(a) and (3), to make references to the new extended recovery period. An administrative amendment.

Clause 9. Section 278 amended.

Section 278 deals with substantial commencement periods. This section requires any development application approved under Part 17 be substantially commenced either within 24 months or some other period specified in the approval.

The term “substantially commenced” is set out in section 269, and cross-references the definition in the *Planning and Development (Local Planning Schemes) Regulations 2015* (‘LPS Regulations’), Schedule 2 clause 1. The meaning in effect entails, “that some substantial part of work in respect of a development approved under a planning scheme or under an interim development order has been performed.”

Substantial commencement periods are a longstanding feature of the planning system. Importantly, substantially commenced does not mean substantially completed. Nonetheless, substantial commencement requirements exist to ensure development approvals are not “banked”

or “warehoused”, are acted upon within a timely fashion, and there is a commitment of resources of such proportion relative to the approved development so as to carry the assurance that work has really commenced.

The original intent, as reflected in sections 278 and 279, was to prevent the Commission from extending a substantial commencement period. This was a departure from the ordinary planning framework that exists outside the Part 17 system, where a planning authority usually does retain the power to grant an extension to the substantial commencement period. Noting the temporary and time-limited nature of Part 17, proponents were to treat their development approvals as “use-it-or-lose-it” opportunities, without the prospect of extension.

While this original intent has not changed, unforeseen issues have since arisen in relation to construction, labour, supply and transportation constraints. It has therefore been deemed appropriate that there should be some ability to extend the substantial commencement period.

Note both the Commission (under section 279) and the Governor (under section 284, in practice on advice, through Cabinet processes) will have the power to grant an extension. Clause 9 directs readers to this dual pathway for extension in a new advice note.

Clause 9 also amends section 278 by inserting new subsections (4) and (5). These provisions clarify that the power to extend a substantial commencement period can be granted even if the original approval has lapsed. This largely reflects the intent of current planning legislation outside the Part 17 system. For example, the LPS Regulations, Schedule 2, clause 77, already permits an application being made “to amend the approval so as to extend the period within which any development approved must be substantially commenced”, and being “made during or after the period within which the development approved must be substantially commenced”.

Clause 10. Section 279 amended.

Section 279 empowers the Commission to amend an existing Part 17 approval. Note subsection (4) currently prohibits the Commission from extending the substantial commencement period. Reflecting other changes to section 278, clause 10 will amend section 279 by deleting subsection (4).

Clause 10 also introduces additional provisions into section 279, which will now explicitly permit the Commission to extend any existing substantial commencement period.

New subsection (6A) allows for only one application for extension to be made, and limits the Commission to granting only one extension. This will ensure Part 17 approvals remain temporary and time-limited in nature, rather than allow approvals to be banked or warehoused, *per* the original intent of the framework.

Clause 11. Section 280 amended.

Section 280 introduces conflict resolution provisions into the Part 17 system. Together with sections 281 and 282, these provisions exist to provide greater regulatory certainty for proponents, by ensuring other approval regimes administered by other Government agencies and authorised persons (for example, in relation to a building permit, liquor licence, noise permit, or road access etc.) will not later frustrate any development approval under Part 17.

Clause 11 includes an amendment to clarify and “tidy-up” potential ambiguities in section 280. Namely, existing section 280(1)(b) possibly suggests only conditions imposed by the

Commission made under section 274 can benefit from the conflict-resolution mechanisms. This in turn may suggest the Commission's amendments under section 279, or conditions imposed by the Governor under section 284, might be excluded from the conflict-resolution provisions. This is not the intent. An administrative amendment.

Clause 12. Section 284 amended.

Section 284 empowers the Governor (in practice on advice, through Cabinet processes) to amend or cancel approval granted by the Commission under section 279. This remains an important safeguard or check on the broad decision-making discretion afforded to the Commission under Part 17. It ensures Government oversight of the Commission's decision-making functions.

Importantly, where the Governor does intervene under section 284, such an order is to be treated as subsidiary legislation and subject to the procedures set out in section 42 of the *Interpretation Act 1984*. That is, the Governor's order must be laid before each House of Parliament and is subject to potential disallowance. Thus, while Part 17 affords the Commission's broad discretion, that power is ultimately subject to the oversight of Government, and Government to Parliament, within established Westminster traditions of Responsible Government.

Clause 12 inserts new section 284(2)(a), more explicitly empowering the Governor to extend the substantial commencement period of an existing approval. Note the Governor is not limited to granting just one extension, as is the case with the Commission under new section 279(6). In an unforeseen but extraordinary situation where more than one extension might be warranted, it is appropriate that the Governor (in practice on advice, through Cabinet processes) alone have such power, subject to oversight and potential disallowance by Parliament.

Clause 13. Part 19 heading amended

Part 19 contains transitional provisions arising out of the Amendment Act 2020 but is being amended to include transitional provisions arising from the Bill. Clause 13 deletes the reference to the Amendment Act 2020 in the current heading. An administrative amendment.

Clause 14. Part 19 Division 1 heading inserted.

Clause 14 makes the current Part 19 heading, referring to the Amendment Act 2020, as a new Division 1 within Part 19.

Clause 15. Part 19 Division 2 inserted.

Clause 15 provides transitional provisions arising out of the Bill, to be set out in a new Division 2 within Part 19. Division 2 contains two new sections: section 295 and section 296.

Section 295: This transitional provision clarifies that the new powers to extend the substantial commencement period, as set out in clauses 9 to 12 of this Bill, include existing applications lodged during the original recovery period and not only future applications to be lodged during the new extended recovery period. An administrative amendment.

Section 296: This transitional provision clarifies that existing fees imposed by the *Planning and Development (Part 17 Fees) Notice 2020* will apply to new applications lodged during the extended recovery period. It also clarifies that the existing fees will apply to an application for an extension of the substantial commencement period, whether relating to applications lodged during either the original recovery period or the extended recovery period. Finally, while the transitional provisions automatically extend the operation of the existing fee notice, it does not

preclude a new or amended fee notice also being prepared in the future. An administrative provision.
