

Why major projects legislation is bad for the environment and public participation- the NSW experience

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As our cities continue to struggle to balance economic growth and population increases with the lack of infrastructure, in order to continue our quality of life, planning laws are becoming more contentious. Australia is also facing a number of complex environmental issues in the area of water, climate change and loss of biodiversity, which existing planning laws do not adequately address. The solutions to these problems are complex and multifaceted, and many State planning laws do not adequately balance and address these issues. In response, many State governments have chosen to introduce new laws with the primary aim of fast tracking major projects in an effort to promote economic growth. From the community's perspective, these changes have exacerbated the disjunction between the community and decision making in planning laws. This article outlines the community perspective on changes to the *Environmental Planning and Assessment Act 1979* (EP & A Act) in NSW for major projects of State or regional significance.

Major projects legislation

In 2005, the NSW Government amended EP & A Act to introduce the major projects section or "Part 3A", as it is known. The change was premised on the need to promote economic growth and investment in the development sector through "streamlining" the planning system in NSW for "major projects". Part 3A adopts many of the features of the Queensland *State Development and Organisation Act 1971*. Recently, Victoria adopted some of Part 3A's features in the *Major Transport Projects Facilitation Act 2009*. There is discussion of further planning reforms in Victoria to widen the scope of these reforms to all major projects in a similar vein to Part 3A in NSW.

Operation of Part 3A

Part 3A projects are projects that, in the opinion of the Minister for Planning (Minister), are of "State or regional planning significance".¹ Part 3A projects are often large government infrastructure projects, such as roads, pipelines, desalination plants and dams, but also often include private developments which range in size from minor subdivisions to major urban renewal projects.² Development (or a category of development) can be declared to be subject to the Part 3A assessment process under a *State Environmental Planning Policy (Major Development) 2005* (Major Development SEPP) or a Ministerial Order. The Major Development SEPP states that Part 3A applies to developments that, in the opinion of the Minister, are of a kind described in Schedules 1, 2, 3 or 5 of the SEPP. For example, all residential development worth over \$100 million is defined as a major project. As the Minister has a discretion to gazette projects of "State or regional planning significance", small contentious developments have also come within Part 3A.³ Often the length of time a matter has taken to be determined by a local council or the rejection of a project, is used as a basis for referring the matter for consideration under Part 3A.

¹Section 75B(2), EP & A Act.

²Section 75A, Section 75B(2), EP & A Act.

³ Minor major projects under Pt 3A have included a three lot subdivision in Shoalhaven, a house at Mosman, two bunkroom cabin at Kempsey, 42 units in City of Canada Bay, two lot residential subdivision at Tura, See Jemilah Hallinan "New South Wales and the Sandon Point case" in T.Bonyhady & A.Macintosh (ed), *Mills, Mines and other Controversies- the Environmental Assessment of Major Projects*, Federation Press, 2010, pg. 198.

The main effect of Part 3A is that it removes major projects, and a sub-category known as critical infrastructure projects, from assessment and approval under the Part 4 and Part 5 assessment processes of the EP & A Act, and gives control of these projects to the Minister for Planning. Most importantly, the Minister has a largely unconstrained discretion to approve projects under Part 3A. The Part 3A provisions also allow for major projects to be assessed from a concept plan, meaning “a detailed description of the project is not required”.⁴ The environmental assessment process under Part 3A is also discretionary and determined by the Director-General of Planning for each individual project.⁵

Problems in the application of Part 3A for the community

A fundamental failure of the major project legislation in both Queensland and NSW is public participation in planning decisions. The EP & A Act on its inception in 1979 went a long way towards establishing a good planning system with community involvement and environmental assessment processes. Unprecedented at the time, the EP & A Act was underpinned by principles of genuine public participation, transparency, accountability, consistency of decision-making and comprehensive environmental assessment.

Part 3A has wound back some of these features. In particular, because Pt 3A has removed the need to comply with a Local Environmental Plan, the community feels that they are overridden by the process. It is also common for the Minister to rezone a particular area to facilitate a major project approval in order to remove any prohibitions on development that may still occur.⁶ This was the case with the development at Catherine Hill Bay/Gwandalan area where, despite the fact that it was ranked 98 out of 99 on a list of potential areas for new development in the Lower Hunter Regional Planning process, a rezoning from land that was previously zoned mostly for conservation was allowed to occur through the Part 3A process in order to allow a new subdivision in the area.⁷ The decision of the Minister in that case was eventually overturned on different grounds because the Minister was seen to have pre-judged the application and therefore shown bias by entering into a Deed of Agreement to facilitate the development before an project application was even lodged.⁸

The community only gets a right to comment on a Part 3A project once all the environmental assessments have been completed and exhibited for 30 days. Many feel that by this stage it is too late, and few of their submissions are actually given weight. Despite often hundreds of submissions being made, few projects under Part 3A are ever refused.⁹ To compound community concern, Part 3A has also removed certain appeal rights of objectors by removing merits appeals for all matters involving critical

⁴ Section 75M

⁵ Section 75H

⁶ See cl 8N of the Environmental Planning and Assessment Regulation 2000 that prevents the minister approving certain projects where they are in environmentally sensitive areas or significant coastal locations and also where development is prohibited in an LEP. The minister usually rezones the area to avoid this issue before it is approved.

⁷ http://www.planning.nsw.gov.au/regional/pdf/lowerhunter_regionalstrategy.pdf (14 October 2010). See p27.

⁸ *Gwandalan Summerland Point Action Group Inc v Minister for Planning & 2 Ors* [2009] NSWLEC 140

⁹ The only refusals since Pt 3A commenced are the following projects - Stamford Plaza Double Bay, Somersby Quarry, coastal development in Cronulla, Bickham coal mine, Currawong, Moruya East Village
See major development monitors from 2005-2009 which can be found at <http://www.planning.nsw.gov.au/SettingtheDirection/Corporatepublications/tabid/95/language/en-AU/Default.aspx> (14 October 2010).

infrastructure, a review by a panel of experts or a concept plan.¹⁰ So, for example, prior to the enactment of Part 3A, an objector could have brought a merits review to challenge the approval of an open cut mine. Now it is only in limited circumstances that this right still exists. The only legal option is judicial review proceedings, which are more difficult and costly, as costs follow the event in that part of the Land and Environment Court's jurisdiction unless there are exceptional public interest matters involved.¹¹

Good planning systems enshrine public participation as a key aspect of driving change in planning for our cities. The Grattan Institute recently undertook some research on sustainability and planning issues, comparing the population growth in Australian cities to eight cities overseas.¹² They found that it was vital that communities were involved in decisions about cities. Cities overseas with genuine, sophisticated and deep public engagement were able to make tough choices about managing growth better. It is therefore not surprising that reforms are being considered to Part 3A by the NSW Opposition in order to temper community outrage about planning decisions.

Problems for the environment in the application of Part 3A

Another significant issue with Part 3A is that there are no mandatory environmental considerations imposed on the Minister in making a decision under Part 3A. The Minister merely needs to have the Director-General's report on the project, including a statement relating to compliance with the environmental assessment requirements, in order to approve a project.¹³ Many of the cases brought by community groups have focused on this aspect of Part 3A and sought to ensure that at least the principles of Ecologically Sustainable Development (ESD) must be considered by the Minister. In the decisions of *Gray v Minister for Planning* and *Walker v Minister for Planning*, the Land and Environment Court accepted this proposition.¹⁴ However, the NSW Court of Appeal has tempered this requirement, suggesting the Minister must consider the public interest only, leaving open the question of whether over time ESD will be part of the public interest.¹⁵ This is the question of further legal debate in a current case, *Haughton v Minister for Planning*, about whether the Minister considered ESD and climate change in the approval of two new coal-fired power stations.¹⁶

Other areas of concern

An important aspect of the development of infrastructure is whether the Minister has considered prudent and feasible alternatives to the proposal. Often areas of contention can be addressed through different design. For example, the current western rail project was to move the railway line which would have required the bulldozing of heritage houses in Newtown. Only a concerted community campaign was able to convince the authorities to redesign the proposal to save the houses.¹⁷ If the Minister was

¹⁰ Section 75L

¹¹ *Land and Environment Court Rules*, rule 4.2 See *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* (No 3) [2010] NSWLEC 59

¹² Jane Frances-Kelly, Grattan Institute, "Cities who decides?" October 2010.

¹³ Section 75J

¹⁴ *Walker v Minister for Planning* [2007] NSWLEC 741, *Gray v Minister for Planning* [2006] NSWLEC 720.

¹⁵ *Minister for Planning v Walker* [2008] NSWCA 224

¹⁶ See case of *Ned Haughton v Minister for Planning* which was heard in mid September 2010. Judgment is currently reserved.

¹⁷ See <http://saveleamingtonavenue.org/>

required under the E P & A Act to consider alternatives properly and undertake early public consultation, then this problem could have been avoided.

Part 3A has also downgraded the weight of advice from other government agencies, and in some cases even removed requirements to obtain consents under other environmental legislation. The EP & A Act now only requires consultation as part of the process of determining the appropriate environmental assessments. Legislation that previously imposed checks and balances outside the planning framework has also been removed. For example, environment protection licences which regulate pollution must now be granted consistently with any project approvals.¹⁸ There is also no longer a requirement to obtain the relevant consents that are in place to protect heritage sites of both Indigenous and non-Indigenous heritage value.¹⁹

Possible reform

Part 3A has successfully ensured the approval of millions of dollars worth of development for NSW, as often championed in the Department of Planning's glossy publications outlining how many approvals and jobs have been created by the system.²⁰ However, the experience in NSW has also been considerable public backlash against the Part 3A process. The community feels developers' desire to make a profit have been championed over the rights of the community. It is this public backlash that has resulted in a commitment from the NSW Opposition to abolish some aspects of Part 3A if elected in March 2011, to restore some rights to the community and local planning authorities. It will be interesting to see how any future reforms meet the challenges of balancing economic growth and environmental constraints.

¹⁸ Section 75T

¹⁹ Section 75U

²⁰ See major development monitors from 2005-2009 which can be found at <http://www.planning.nsw.gov.au/SettingtheDirection/Corporatepublications/tabid/95/language/en-AU/Default.aspx> (14 October 2010).