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CHANGES IN *ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (PART 3A REPEAL) BILL 2011*

The Bill repeals part 3A of the *Environmental Planning and Assessment Act 1979 (*EP & A Act). It will commence by proclamation (that is in six weeks upon passing through Parliament).

Importantly, it still retains a category of State significant development and State significant infrastructure. It also contains transitional provisions for dealing with part 3A applications still in the system.

What has fundamentally changed?

There is a new definition of "State significant development". This is declared through a State Environmental Planning Policy (SEPP) and can include a class of development or a development (presumably continuing the role of the *State Environmental Planning Policy (Major Development) 2005)* (Major Development SEPP). The Minister can call in a specified development to be assessed as State significant development but only if the Minister has obtained advice from the Planning Assessment Commission (PAC) about the State or regional planning significance of the development.[1]

Earlier amendments to the Major Development SEPP removed coastal development, and commercial, residential and tourist development over $100 million, but otherwise retained other categories in the SEPP. This currently means "State significant development" will continue to include most large mines, ports, quarries, aquaculture, intensive livestock industries, timber processing, petroleum gas, processing plants, chemical industries, manufacturing industries, distribution facilities, marinas, sporting facilities, film, tv and tourism and entertainment facilities, hospitals, education facilities, medical research facilities, correctional facilities, rail facilities, electricity generation, water supply, sewage, pipelines and waste facilities.[2]

Much of the detail of how the environmental impact assessment requirements will work, requirements for submissions, as well as what will be publicly available in respect of these applications is to be set out in the Regulations which are not yet available.[3]

There is also a new category of "State significant infrastructure". The term is defined by what is declared in a SEPP.[4] However, it has to be infrastructure, or otherwise would have required an

[1] Section 89C
[2] See Major Development SEPP –Schedule 1 for exact triggers
[3] See section 89G

EIS under part 5 of the EP & A Act. The Minister can also declare something to be State significant infrastructure.[5] Infrastructure is defined to include railways, roads, electricity transmission or distribution, pipelines, ports, wharf or boating facilities, telecommunications, sewerage systems, stormwater management systems, water supply works, waterway or foreshore management activities, flood mitigation works, public parks or reserves management, soil conservation works or other purposes prescribed in the Regulations.[6]

State significant infrastructure can also be declared to be 'critical State significant infrastructure' if it is of a category that in the opinion of the Minister it is essential for the State for economic, environmental or social reasons.[7] This is similar to the old "critical infrastructure" provisions. Breaches of the EP & A Act by critical State significant infrastructure cannot be enforced by third parties.[8]

Essentially, the State significant infrastructure process is closer to the old part 3A process than state significant development.

PAC members can be appointed for no more than 6 years and are still appointed by the Minister.[9] Joint Regional Planning Panels now consider the classes of development set out in Schedule 4A. This includes development over $20 million in value, Council related development over $5 million, crown development over $5 million, private infrastructure and community facilities over $5million, eco-tourist facilities over $5 million, coastal subdivisions, particular designated development like marinas, waste facilities and quarries, as well as development subject to delays in determination that is worth between $10 -20 million, or where the Minister has determined the development assessment to be unsatisfactory.[10] JRPP Chairpersons will be appointed with the concurrence of the Local Government and Shires Association.[11]

What remains of Part 3A in the State significant development and State infrastructure area?

The Minister is still the consent authority for State significant development and State significant infrastructure.

There are still significant powers of the Minister to approve a development that is in conflict with the provisions of an environmental planning instrument (EPI), by considering amendments to the EPI. The Director-General can effectively deal with spot rezonings as part of this process.[12] Consent can also be granted if it is partially prohibited by an EPI. In many cases it will be difficult to find a complete prohibition development in an EPI. Any spot rezonings to facilitate wholly prohibited development will have to go before the PAC.[13]

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[4] Section 115U(2)
[5] Section 115U(4)
[6] Section115T
[7] Section 115V
[8] Section 115ZK Including under POEO Act.
[9] Schedule 3, clause 5
[10] See Schedule 4A
[11] Schedule 4, clause 2
[12] Section 89E(5)
[13] Section 89E(6)

The Minister's powers to approve State significant infrastructure are essentially the same as part 3A and therefore his discretion is very broad and fairly unconstrained by environmental criteria.[14] He also has a power to consider staged infrastructure applications that set out concept proposals for infrastructure (similar to the previous Concept Plans), with only detailed proposals for the first stage.[15]

The public participation processes have not improved (subject to seeing the Regulations). Applications and accompanying documents must go on public exhibition for not less than 30 days.[16] There is a right to copy and inspect these documents during that time. Objections must be in writing and set out the grounds of the objection.[17] The public availability of documents is the same as under part 3A.[18]

The Bill makes it clear that state significant development does not require the same concurrences for bush fire or consultation requirements as other part 4 development.[19] In fact, the same concurrence removals that were set out in s.75U continue through s.89J and s.115ZG. Similarly the approvals that must be applied consistently with a part 3A approval remain.[20] This significantly limits the role of other Government agencies in regulating State significant development.

Merits appeals continue to be limited with objector rights limited to those matters that would have been otherwise designated development that do not go to a public hearing as part of PAC review.[21] Proceedings similarly must still be challenged within three months of public notice of the approval.[22]

What has improved?

The Minister has less discretion to make a development State significant development. The Minister has a power to stage development and send parts back to the Council for determination.[23]

State significant development requires an Environmental Impact Statement to be prepared in accordance with the form in the Regulations.[24] Similarly, State significant infrastructure also requires an EIS.[25] The requirements for an EIS for State significant infrastructure are determined by the Director-General of Planning (D-G) in consultation with other Government authorities.[26] In particular, the D-G must have regard to the need for the requirements to assess any key issues identified by other authorities. The D-G can also require a revised EIS. The minimum exhibition time is again 30 days.[27]

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[14] Section 115ZB
[15] Section 115ZD
[16] Section 89F
[17] Section 89F(3)
[18] Section 115ZL
[19] Section 79B(2A) and 79BA (IB)
[20] Section 89K similar to s.75V, section 115ZH.
[21] Section 98(5)
[22] Section 115ZJ
[23] Section 89D
[24] Section 78(8A). But no Regulation as yet so hard to know how good the process will be.
[25] Section 115X
[26] Section 115Y
[27] Section 115Z

In relation to State significant infrastructure, the D-G is to provide copies of submissions to the proponent and OEH if an environment protection licence is required, and other authorities he considers appropriate.[28] The D-G can require a response and a preferred project report and, if there are significant changes proposed, make it available to the public.[29] The D-G is to give a report to the Minister that includes the EIS, preferred infrastructure report, any advice by public authorities, copy of PAC advice and any environmental assessment by D-G.[30]

Most importantly, there are clearer constraints on the Minister's power to approve or refuse State significant developments. [31] The Minister has a clear discretion to modify and place conditions on developments. Consent cannot be granted if the development is "wholly prohibited" in an EPI but it may be granted if it is partially prohibited. Section 79C also applies to the determination of a development application for State significant development.[32] This will ensure the Minister is required to consider EPIs, Development Control Plans, Coastal Zone management plans, public submissions, the public interest and ecologically sustainable development, as well as the likely impacts of the development including environmental impacts on both the natural and built environment, and social and economic impacts in the locality as well as the suitability of the site for the development. This will mean a considerable body of law on interpreting s.79C will apply to State significant development consents, including, for example, consideration of cumulative impacts. The Minister (or other relevant consent authority) must consider the findings and recommendations of the PAC in determining a development application.[33]

The Minister now has a specific power to require a proponent to acquire biobanking credits that are to be retired as part of the proposal, and to comply with the conditions of a biobanking statement. In particular, he has the power to make them retire biodiversity credits that will restore or improve the biodiversity values of the development.[34]

Some enforcement powers of other Government agencies seem to have been restored. For example, there is no restriction on the ability of OEH to issue stop work orders under the *National Parks and Wildlife Act 1974* and *Threatened Species Conservation Act 1995*, as well as environment protection notices under the *Protection of the Environment and Operations Act 1997* in relation to a State significant development. These restrictions still exist for State significant infrastructure.[35]

The modification power only applies to State significant infrastructure and is fairly broad with no mandatory requirement for environmental assessments.[36]

Transitional provisions

The transitional provisions are designed to include current part 3A applications that have environmental assessments notified but not those applications which are no longer within part 3A (commercial/residential/tourist developments). Part 3A continues for these applications. Certain projects can be declared State significant infrastructure. Concept Plans in the system

[28] Section 115Z(5)
[29] Section 115Z(6)
[30] Section 115ZA
[31] See section 89E
[32] Section 89H
[33] Section 80(6) & (7)
[34] Section 89I and s.115ZC
[35] Section 115ZG (3)
[36] Section 115ZI

continue to apply slightly differently for those no longer in the part 3A system. There is also a specific provision stating that compensation does not apply as a result of the changes.[37]

[37] Schedule 1, clause 9