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## **The NSW planning system: the current state of play Environmental Defender's Office July 2007**

Recent reforms in NSW over the past couple of years have substantially changed the face of planning. There has been a fundamental shift – in both form and substance, as well as the mode of engagement – away from public involvement, as well as from sound decision-making frameworks. The effectiveness of environmental assessment has also been impacted.

Community involvement was a hallmark of the planning system and is one of the objects of the planning legislation: see section 5(c) of the *Environmental Planning and Assessment Act 1979* which is “to provide increased opportunity for public involvement and participation in environmental planning and assessment”.

The involvement of the community is no mere rhetorical shell. It ensures that good decisions are made, based on the best possible information. It also gives legitimacy to planning decisions and “buy-in” of the community: people may not like a decision but they are more likely to accept it if they have been given a proper opportunity to be heard.

The new Part 3A reforms in 2005 introduced a new way of doing planning and development in NSW. The reforms were based on laws introduced by Premier Joh Bjelke-Petersen in Queensland in the early 1970s: the *State Development and Public Works Organisation Act 1971*. These rode roughshod over community consultation rights.

Part 3A turns away from a community-based approach to one where a great deal of unfettered discretion is given to the Minister to make decisions on major projects. This discretionary model cuts away at public participation, leaving decisions about the level of involvement of the community with the Department and the Minister.

Moreover, there is no real environmental framework within which decisions can be made. Two examples highlight this. First, the Minister has still not published guidelines for environmental assessment requirements nearly two years after Part 3A commenced. Second, the notion of a concept plan – and approval of such - is inconsistent with good environmental decision-making. Proper assessment of environmental impacts cannot occur in the abstract – detailed information



is required about the specifics of a project: its location, size, operating output and the activities to be conducted.

Furthermore, basic opportunities for public participation are more limited under Part 3A, with no merit appeals where an Independent Hearing & Assessment Panel is constituted, nor for concept plans or critical infrastructure projects. Legal challenges cannot be made, or stop work orders sought, for critical infrastructure projects without the permission of the Minister.

The power to make decisions over planning for major projects has also been centralised in the Planning Minister's hands. The need to get approvals from other agencies has been taken away. For example, DECC can no longer refuse a licence to prevent pollution, where an approval has been given.

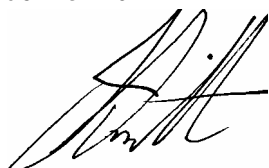
The changes extend well beyond Part 3A, however. The autonomy of Councils' was further eroded in 2006 by the power of the Minister for Planning to appoint an administrator if the performance of a Council is, in the Minister's opinion, unsatisfactory 'in any respect'.

Further the government has done little to integrate natural resource management – upon which the health of our catchments and native vegetation relies – into the planning system. Rather it seeks to centralise decisions in one department and as a consequence marginalise key environmental issues.

Most worryingly, the community has been shut out of debating these planning reforms. A series of Taskforces constituted in 2003 to review planning in NSW contained no community or conservation representatives (but did contain developer representatives). Part 3A itself was explained to conservation and community groups after its introduction into Parliament. Further amendments followed this trend.

This attitude prevails. The Department of Planning is running a 'New ideas for Planning' forum on 14 August 2007. The forum is promoted as being "essential attendance for anyone interested in where planning should head in NSW" and states that "we are looking for new ideas to improve the planning system". The cost to participate: \$250. This is clearly intended to dissuade community and non-profit representatives from attending.<sup>1</sup>

Jeff Smith



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27 July 2007

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<sup>1</sup> Note: The EDO has been granted free entry after requesting dispensation from the fee. The EDO was told it had to satisfy an internal panel that it was "genuine" and "relevant". A short letter was accepted.



The following sets out the detail on the major changes over the past couple of years.

### **Declaration of developments as major projects**

- There is no criterion or definition in Part 3A of “regional or state significance”, which is a trigger for Part 3A projects. A development is subjectively defined as a major project if, in the Minister’s opinion, it is of ‘regional and state significance’ (s 75B(2)(a)).
- Similarly, critical infrastructure projects are those “essential for economic, environmental or social reasons” in the opinion of the Minister (s 75C(1)).

### **Environmental assessment**

- The Minister has failed to gazette guidelines (under s 75F(1)) with respect to environmental assessment requirements for the purpose of the Minister approving projects (including levels of assessment and the public authorities and others to be consulted). These guidelines were supposed to be gazetted soon after Part 3A came into operation.
- The Director-General has largely unfettered discretion in setting environmental assessment requirements. There is no requirement for input from the public as to what the assessment should encompass. There is also no mandatory requirement to have regard to threatened species and critical habitat in determining the scope of environmental assessment requirements. (s 75F(2)).
- In preparing the environmental assessment requirements, the Director-General is to consult relevant public authorities and have regard to the issues they raise (s 75F(4)). However, failure to consult with these authorities may not invalidate an approval (s 75X(5)).
- The environmental assessment is publicly exhibited once the Director-General deems the proponent’s assessment to be adequate. There is no opportunity for the public to make submissions on the adequacy of the proponent’s assessment before it is accepted by the Director-General (see s 75H(3)).
- There is no requirement for the Director-General to include public submissions in the Environmental Assessment Report that is given to the Minister (see s 75I(2)).

### **Licences/Approvals from other agencies**

- Several important licensing and approval requirements from other agencies are not required for Part 3A projects. These include permits under *Heritage Act 1977*, *National Parks and Wildlife Act 1974* and the *Water Management Act 2000* (s 75U).
- Those authorisations that still apply cannot be refused and must be substantially consistent with the Part 3A approval. These include an environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997*, a mining lease under the *Mining Act 1992*, and native vegetation clearing consent under the *Native Vegetation Act, 2003*.

### **Determination and Approval by Minister for Planning**

- In making his decision whether to approve the project the Minister is only required to consider the Director-General’s Report and a statement relating to compliance with the environmental assessment requirements (s 75J(1)). If the proponent is a public authority, any advice provided



by the Minister having portfolio responsibility for the proponent must also be considered (s 75J(2)). There is no list of criteria that the Minister must consider such as those in s 79C of Part 4.

- There is no requirement for the Minister to have regard to public submissions when determining whether to approve a major project.
- There is no express requirement for the Minister to consider Ecologically Sustainable Development.
- Recent amendments to Part 3A allow the Minister to subvert local planning laws by permitting the Minister to ignore prohibitions in Local Environment Plans and to consent to projects that would otherwise be prohibited (s 75R(3A)).

### **Concept Plans**

- Concept plans provide little detail about the impact and extent of developments, with the legislation expressly providing that “a detailed description of the project is not required” (see s 75M(2)).
- A single application may be made for approval of a concept plan for a project and for the final approval to carry out any part or aspect of the project. This facilitates the approval of major projects on the basis of the concept plan, with little detail of the particulars of the project (section 75M(3A)).
- There is no merits appeal for objectors in relation to the approval of a concept plan (s 75L).

### **Independent Hearing & Assessment Panels (IHAPs)**

- There is little if any criteria for the appointment of experts to an IHAP (see s 75G).
- There is no obligation on the panel to receive and hear submissions from the public – they may hear or receive submissions from interested persons (s 75G(4)).

### **Appeal Rights and Enforcement Action**

#### *Preventative action*

- For critical infrastructure projects, there is no provision for stop work orders, interim protection orders and notices regarding cultural heritage, threatened species and pollution once an approval has been given (s 75U(3)).

#### *Merits*

- A right to a merits appeal for objectors under Part 3A is significantly more restricted than previously existed (eg designated developments under Part 4). There is no such right where a critical infrastructure project or concept plan has been approved or where an IHAP has been commissioned (s 75L).

#### *Judicial Review*

- Judicial review is the right to challenge a decision because it has been wrongly made at law. The Part 3A reforms make it clear that there are no appeal rights whatsoever in relation to critical infrastructure projects, except with the approval of the Minister (s 75T).



### *Enforcement of the law*

- For critical infrastructure projects, both the public and government agencies need the permission of the Planning Minister to enforce the conditions of approval (such as breaches of pollution licences) (section 75T(2)(b)).

### **Dismissal of Councils**

- The Minister now has considerable power to dismiss a council and to appoint an administrator to take its place as they see fit. The decision depends on the opinion of the Minister as to whether the council has failed to comply with its obligations under the planning laws or if its performance is unsatisfactory 'in any respect' (s 118).

### **Ongoing Public Participation and Consultation**

- Before establishing Part 3A, the Minister commissioned a number of taskforces to review the planning system. All these taskforces were comprised of members of the development and business industries. There was no inclusion of environmental and community groups, nor any form of consultation.
- The Department of Planning has recently begun a process of charging people to attend consultation forums. The upcoming 'New ideas for Planning' forum includes a \$250 fee for attending.

