

PLANNING LAW REFORMS

Part 3A & Standard LEP

Jessica Wood Senior Solicitor
Sue Higginson Solicitor

Environmental Defender's Office
Northern Rivers
10 Club Lane
Lismore NSW 2480
Tel: 1300 369 791
Fax: 6622 6404

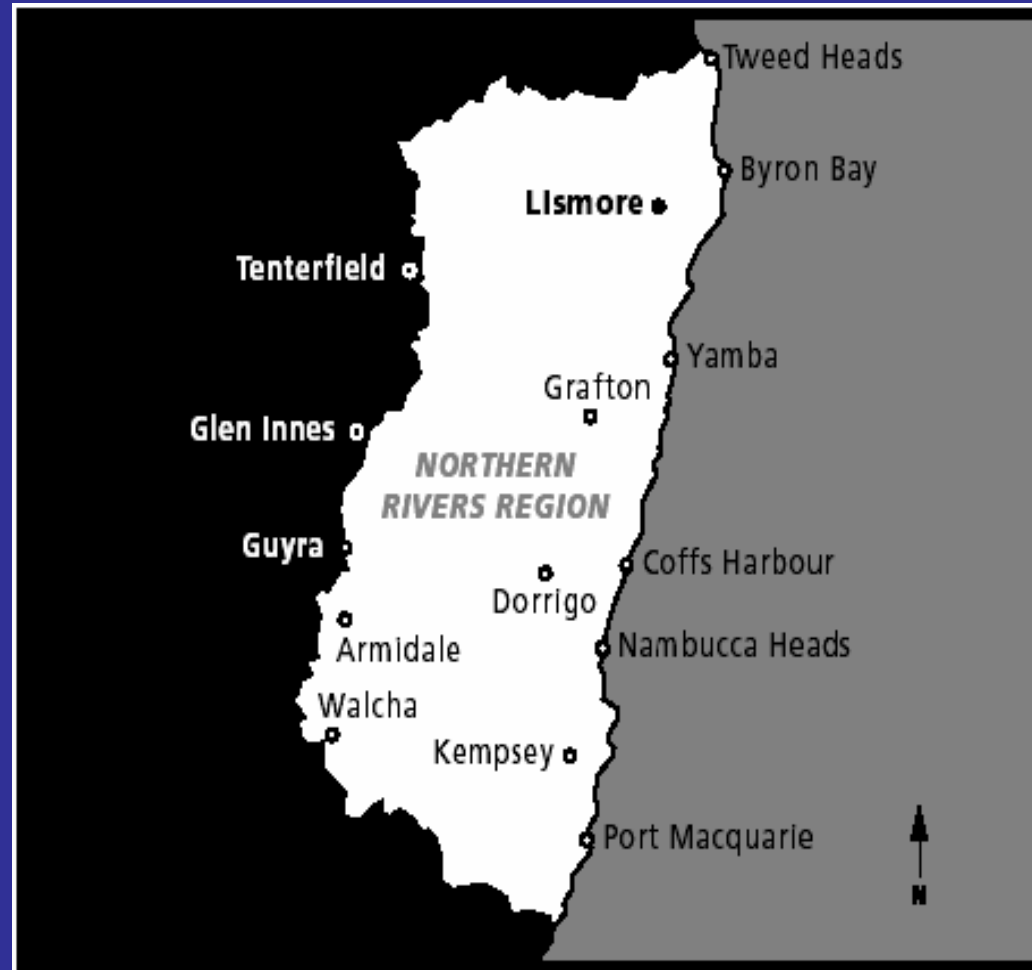
Workshop Agenda

1. Overview of the Planning Reforms
2. What is the Environmental Defender's Office?
3. The EP&A Act and Environmental Planning Instruments and the Standard Local Environmental Plan
4. Part 3A of the EP&A Act – Major Projects
5. Development Appeals
6. Responding to breaches of the law and getting legal advice

Environmental Defender 's Office

- A community legal centre specialising in public interest environmental law
- Mission: To empower the community to protect the environment through law

Environmental Defender's Office Northern Rivers – Service Area



ENVIRONMENTAL DEFENDER'S OFFICE
NORTHERN RIVERS

EDO Environmental Law Advice Line

Free initial legal advice on planning
and environmental law matters

Advice Line: **1300 369 791**

Northern Rivers Address:
10 Club Lane Lismore
PO Box 212 Lismore

website: www.edo.org.au/edonsw

ENVIRONMENTAL PLANNING & DEVELOPMENT ASSESSMENT PROCESSES

Central to our system of environmental law is environmental planning and development assessment processes

The principal law regulating land use in New South Wales is the *Environmental Planning and Assessment Act 1979*.

Environmental Planning and Assessment Act 1979

- A major achievement
- Set up a framework for public participation in the planning process
- Open standing provisions ANY PERSON may bring proceedings to remedy or restrain a breach of the Act
- Included a framework for environmental assessments for developments and activities considered likely to significantly affect the environment

SCHEME of the EP&A Act

- Part 3 – Environmental Planning Instruments
- Part 3A – Major Projects and Critical Infrastructure
- Part 4 – Development Control Process
- Part 5 – Activities that do not require development consent that are likely to significantly affect the environment

PART3

Environmental Planning Instruments

Part 3 Environmental Planning Instruments (EPIs)

- Local Environmental Plans (LEP)
 - prepared by council – must be approved by the Minister
 - opportunity for public comment
 - Standard LEP (mandatory) & in accordance with Ministerial directives
- Regional Environmental Plans (REP)
 - matters significant for environmental planning in the region
 - prepared by the Department
 - opportunity for public comment
- State Environmental Planning Policies (SEPP)
 - matters significant for environmental planning for the State
 - prepared by the Department
 - public comment at discretion of Minister

The Standard LEP

Currently

- 5,500 LEPs
- 3,100 Zones
- 1,700 definitions



Standard LEP

- 152 LEPs
- 34 Zones
- 241 definitions

Why a standard LEP?

According to the Government:

- Cut the 'red tape'!
- Make it easier to do business across the State.
- Implement State strategic planning initiatives.
- Create consistency across all local government areas.

Zones in the Standard LEP

34 ZONES

- 6 Rural – Primary Production Rural Landscape, Forestry, Rural Small Holdings, Village, Transition
 - 5 Residential – General, Low Density, Medium Density, High Density, Large Lot Residential
 - 7 Business – Neighbourhood Centre, Local Centre, Commercial Core, Mixed Use, Business Development, Enterprise Corridor, Business Park
 - 4 Industrial – Light, General, Heavy, Working Waterfront
 - 3 Special Area zones – Special Activities, Infrastructure zone, Tourist
 - 2 Recreation – Public, Private
 - 4 Environmental Protection – National Parks and Nature Reserves, Environmental Conservation, Environmental Management, Environmental living
- 3 Waterway Zones – Natural, Recreational, Working

How will councils decide what zones to use?

- The template does not specify what zones councils are required to use. However, councils are required to implement the following through the standard LEP:
 - Regional strategies
 - Local Settlement Strategies
 - The North Coast Regional Environmental Plan 1988
 - Section 117 Ministerial Directions

S117 Ministerial Directions

- 28 Directives have been issued by the Minister (under s117 *EPA Act*) to Local Councils in relation to the preparation of their LEP
 - Coastal Protection
 - Cultural Heritage
 - Farmland of State and Regional Significance on NSW Far North Coast
 - Commercial and Retail Development along the Pacific Hwy North Coast

SEPPs to be Merged into Standardised LEP

- SEPP 1- Development Standards
- SEPP 9 – Group Homes
- SEPP 21 – Moveable Dwellings
- SEPP 36 – Manufactured Home Estates
- SEPP 64 – Advertising & Signage
- SEPP 60 – Exempt & Complying Development

Public Participation in the making of environmental planning instruments

- Opportunities for participation in the plan-making process:
 - LEP: notification, exhibition, public comment
 - REP: notification, exhibition, public comment
 - SEPP: at the discretion of the Minister
- Any person may challenge a new environmental planning instrument if there has been a breach of the law in the making of the instrument.

PART4

DevelopmentAssessment

Part4 – Development

- Local Government or Minister may be the Consent Authority
 - Development Assessment
 - Exempt
 - Complying
 - Consent required
 - Integrated Development
 - Advertised Development
 - Staged DAs
 - Designated Development

Development Applications

- 'Development' includes: using land, subdividing land, erecting a building, carrying out a work or demolishing a building or work.
- Three categories of development:
 1. Permissible without consent
 2. Permissible with consent
 3. Prohibited

Consent Authority

- Local councils are ordinarily responsible for development assessment and approvals.
- Minister for Planning is responsible for 'major projects', 'critical infrastructure projects' and development on State significant sites.

Advertised development

- Advertised development requires public notification and the preparation of a statement of environmental effects (SEE)
- In order to determine whether 'advertised' refer to regulations, environmental planning instruments and development control plans

Designated Development

- Designated developments are large scale developments that require the preparation of an **environmental impact statement (EIS)**
- Designated developments require public notification and the preparation of an **environmental impact statement (EIS)**

Integrated Development

- Development that requires one or more approvals from another state government agency is known as 'integrated development'.
- Integrated development requires public notification.

Development which has a significant impact on threatened species

- In order to determine whether there is likely to be a significant effect, apply the eight-part test.
- For example:
 - whether viable local population of species at risk of extinction
 - whether significant area of known habitat to be removed or modified
 - whether activity is a threatening process

① *Threatened Species Conservation Act 1995*

Development impacting on threatened species

- If there is likely to be a significant effect on threatened species a **species impact statement** (SIS) must be prepared, with the need for concurrence from DEC.
- Threatened species are listed in Schedules to:
 - *Threatened Species Conservation Act 1995*
 - *Fisheries Management Act 1994*

Development Consent

- When issuing a development consent, the consent authority must consider the following matters:
 - (a) the provisions of EPIs and draft EPIs
 - (b) Development Control Plans
 - (b) impacts of the development on the natural and built environments and social and economic impacts in the locality;
 - (c) the suitability of the site for the development;
 - (d) public submissions made; and
 - (e) the public interest.

① *Environmental Planning and Assessment Act 1979 (Section 79C)*

Consent Conditions

- Consent authority may grant or refuse consent.
- Development consent may be subject to conditions.
- Consent conditions for integrated development must be consistent with the general terms of approval from other government agencies.
- Consent conditions are legally binding.

Part 5

Activities that do not require
development consent but require
environmental impact assessment

Part5 – Environmental Assessment

- Environmental assessments of activities that do not require development consent (safety net)
 - Activity essentially has the same meaning as development under Part 4
- Infrastructure works undertaken by a public authority (ie. roads, transmission lines)

Part 5 Activities

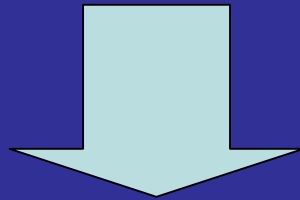
- Require the preparation of a **review of environmental factors** (REF).
- If there is likely to be a significant effect on the environment an **environmental impact statement** (EIS) must be prepared.
- Section 111 duty to consider the environment now removed for routine works undertaken in accordance with approved code.
- If there is likely to be a significant effect on threatened species a **species impact statement** (SIS) must be prepared, with the need for concurrence from DEC.

Part3A

Critical Infrastructure & Major Projects

Environmental Planning and Assessment Act – Part 3A amendment

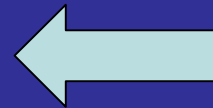
- In August 2005 the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* commenced.



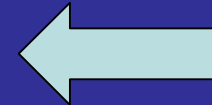
- Part 3A Major Infrastructure and other projects as inserted into the EPA Act

Part3A Developments/Projects

- Major projects



- Critical infrastructure projects



Part3A – MajorProjects

- Minister grants approval
 - Project approval
 - Concept approval
- May be critical infrastructure if declared by Minister
- Minister may constitute Independent hearing and assessment panel

Major Projects

- Are of state or regional significance (under Major Projects SEPP); or
- Would otherwise have a significant effect on the environment.
- Are declared by the Minister to be a major infrastructure project or critical infrastructure project.

The Minister is the consent authority for major projects.

① *Environmental Planning and Assessment Act 1979, Part 3A*

① *State Environmental Planning Policy (Major Projects) 2005*

SEPP(Major Projects)

- The Major Projects SEPP identifies types of development which are:
 - Part 3A classes of developments
 - Part 3A specified sites and State significant sites
 - Major infrastructure projects
 - Critical infrastructure projects

Part 3A Projects – Critical Infrastructure

Sofar the only identified critical infrastructure project is the Kurnell desalination plant in Sydney.

Concept Plans

The Minister may authorise or require the proponent to submit a concept plan for a Part 3A project.

A concept plan must:

- (a) outline the scope of the project and any development options,
- (b) set out any proposal for the staged implementation of the project,
- (c) contain any other matter required by the Director-General. (including tailored EIA requirements)

A detailed description of the project is not required.

Once a concept approval is granted, it has statutory force (“providing up front certainty for long term or complex projects”).

Critical Infrastructure Projects

‘Critical infrastructure projects’ are developments that the Minister determines are “essential for the State for economic, environmental or social reasons”.

(eg, a desalination plant).

Minister has power to approve even if development wholly prohibited under LEP

① *Environmental Planning and Assessment Act 1979, Part 3A*

① *State Environmental Planning Policy (Major Projects) 2005*

Development Assessment for Part 3A Projects

Part3A Projects

- For Part 3A projects, environmental assessment requirements are tailored to the particular project.
- The Director General determines the assessment requirements based on consultations with other relevant public authorities.
- The legislation provides for guidelines to be developed regarding the environmental assessment of major projects, but there have been none published.
- The Director-General may require proponent to prepare an environmental assessment in the approved form.
- The Director-General may require the proponent to prepare a statement of commitments (SOC) for environmental management & mitigation measures.

① *Environmental Planning and Assessment Act 1979, Part 3A*

① *State Environmental Planning Policy (Major Projects) 2005*

Part 3A Assessments

- After the environmental assessment has been accepted by the D-G the environmental assessment must be publicly exhibited for at least 30 days.
- Any person can make written submissions

PublicSubmissions

- D-G will provide copies of submissions to:
 - proponent
 - DEC – where an environment protection licence is required
 - Any other public authority D-G considers appropriate
- D-G may require the proponent to respond to issues raised in submissions
- A revised statement of commitments (SOC)

Independent Hearing and Assessment Panels (IHAPs)

- IHAP may be used to assess any aspect of the project at the discretion of the Minister.
- IHAP can be panel of experts or a panel of department/ public authority reps.
- The IHAP may choose to receive submissions from interested parties and submit a report to the Director-General.
- Terms of reference of the panel must be approved by the Minister.
- Panel is not subject to the Ministers directions regarding findings or recommendations.
- The Panel's role is advisory only.

Environmental Approvals

For **Part 3A projects**, approvals such as:

- threatened species approval
- environmental protection licence
- land clearing approval
- water licence
- cultural heritage permit

are either:

- not required; or
 - must be given in a manner consistent with the planning approval (eg. pollution licence).
- For Part 4 developments or Part 5 activities, the failure to obtain such approvals can stop the proposal.

Part3A

DevelopmentConsent

Minister's Consent Authority

- The D-G is to give the Minister a report on the project for consideration in determining whether to grant approval
 - Report must include:
 - Proponents Environmental Assessment
 - Any advice received by public authorities
 - Report of any IHAP
 - Reference to relevant SEPPs
 - Any EPI that would but for Part 3A govern the carrying out of the project (except for Critical Infrastructure)
 - Any environmental assessment undertaken by the D-G

Part3A Approvals

The Minister may approve Part 3A projects providing the environmental assessment requirements have been dealt with.

In deciding whether to approve a Part 3A project, the Minister must consider:

- the Director General's report and any accompanying reports, advice, recommendations (not necessarily the proponent's actual environmental impact assessment as was held in the recent Tugun Bypass case)
- advice from a relevant Minister (if the proponent is a public authority)
- any findings or recommendations from a Commission of Inquiry (if held).

① *Environmental Planning and Assessment Act 1979, Section 75J and Section 119*

APPEALS

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Part 4 Development Appeals

- A decision to grant or refuse development consent may be appealed to the Land and Environment Court.
- The **merits** of the decision may be challenged by:
 - the **developer** against refusal or consent conditions within 12 months of notification
 - an **objector** to a designated development against grant within 28 days of notification
- The **legality** of the decision may be challenged by **any person** within **3 months** of notification

Part 4 Development Appeals

- **Merits Appeal**
 - Court considers the **merits** of the decision
 - Court hears the appeal as if it is the original consent authority
- **Judicial Review**
 - Court considers the **legality** of the decision
 - For example, where the decision-maker has:
 - failed to follow proper legal procedure
 - failed to take into account relevant considerations
 - acted beyond the legal scope of their powers
 - Court will **not** consider the merits of the decision.

Part 3A Development Appeals

Major Projects :

The merits of the decision may be challenged by:

- the **developer** against refusal or consent conditions within 3 months of notification

Where not critical infrastructure

Where there has been no approval of a concept plan

Project has not been subject of an a Commission of Inquiry or IHAP

- an **objector** to a grant of approval within **28 days** of notification

Where not critical infrastructure

Where there has been no approval of a concept plan

Project has not been subject of an a Commission of Inquiry or IHAP and

But for Part 3A the project would be a Designated Development

Part3A DevelopmentAppeals

- A Concept Plan
 - Proponent can appeal within 3 months of date of notification
 - If project not critical infrastructure
 - Proponent is not a public authority
 - Project has not been the subject of a commission of inquiry or an IHAP
 - But for this section Part 4 would apply
 - No right of appeal for Objector

Part3A JudicialReview

- The **legality** of the decision may be challenged by **any person** within **3 months** of notification

Part 3A Development Appeals

Critical Infrastructure Projects:

Neither the developer, nor an objector, may challenge the legality or merits of the decision unless the challenge is made by or approved by the Minister.

Legal Advice

- It is important to seek legal advice as soon as possible, as delay may prevent you from taking legal action.
- If you are seeking legal advice, it is useful to provide as much information as possible about your case.
- For example:
 - development applications and consent conditions
 - minutes and business papers of council meetings
 - environmental impact assessment documents
 - environmental protection licences
 - evidence of environmental harm

Costs Orders

- **General Rule:**

Loser pays for the winner's legal expenses.

- **Exceptions:**

- In a merits appeal regarding designated development, each party will generally pay their own costs, although the judge retains a broad discretion to order costs.
- In a public interest case, the judge may exercise their discretion to not order costs against the person acting in the public interest.

Costs of Legal Action

- Taking legal action can be a time consuming, expensive and exhausting process.
- The financial costs of legal action may include:
 - fees for legal advice and representation
 - fees for technical reports and expert witnesses
 - incidental expenses, such as photocopying
 - court fees (may be waived in certain cases)
 - other side's costs

Environmental Offences

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Environmental Offences

- The community has a key role in responding to breaches of environmental law
- Two key types of environmental offences:
 - undertaking a prohibited activity without approval
 - breaching the conditions of an environmental approval
- For critical infrastructure projects, the Minister's consent is needed to enforce the law

Environmental Offences

- Examples of common environmental offences include:
 - development without consent
 - breach of development consent conditions
 - pollution without environmental protection licence
 - breach of environmental protection licence conditions
 - removal of native vegetation without approval
 - harming native animals without approval
 - harming cultural heritage without approval
 - using water without approval

Reporting Environmental Incidents

- Report the incident to the relevant authority:
 - Local Council
 - Department of Environment and Conservation:
 - Department of Natural Resources
 - Department of Planning
- Consider reporting the incident to:
 - the person or company in breach
 - an environment group
 - the media
 - a lawyer

Reporting Environmental Incidents

- Provide as much detail as possible:
 - description of incident
 - time, date, location and witnesses
 - state of the environment before the breach
 - photographs, video and physical evidence
- Keep a written record of the report
 - record the name of person receiving your report
 - record the content of your report and their response

Environmental Enforcement

- The responsible agency may respond to the incident by:
 - issuing an order or penalty notice
 - commencing civil or criminal proceedings
- If the agency does not provide an adequate response, you may be able to take legal action to enforce the law.
- If you are considering legal action, seek legal advice regarding prospects of success and potential costs.

Legal Advice

- Legal advice can play an important role in dealing with local environmental issues.
- To obtain legal advice on a public interest environmental law matter, contact:
 - Environmental Defender's Office
 - Northern Rivers 1300 369 791
 - Public Interest Law Clearing House 9299 7833
 - Law Access 1300 888 529
 - NSW Law Society 9926 0333
 - Generalist Community Legal Centre
 - Private Solicitor or Barrister

Online Resources

- EDO Fact Sheets
www.edo.org.au/edonsw
- NSW Legislation
www.legislation.nsw.gov.au
- Commonwealth Legislation
www.comlaw.gov.au
- Australian Legislation and Cases
www.austlii.edu.au
- Legal Information Access Centre
www.liac.sl.nsw.gov.au
- Department of Environment and Conservation
www.dec.nsw.gov.au
- Department of Planning
www.planning.nsw.gov.au
- Department of Natural Resources
www.dlwc.nsw.gov.au
- Department of Local Government
www.dlg.nsw.gov.au
- Department of the Environment and Heritage
www.deh.gov.au