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INDEPENDENT COMMISSION  
AGAINST CORRUPTION



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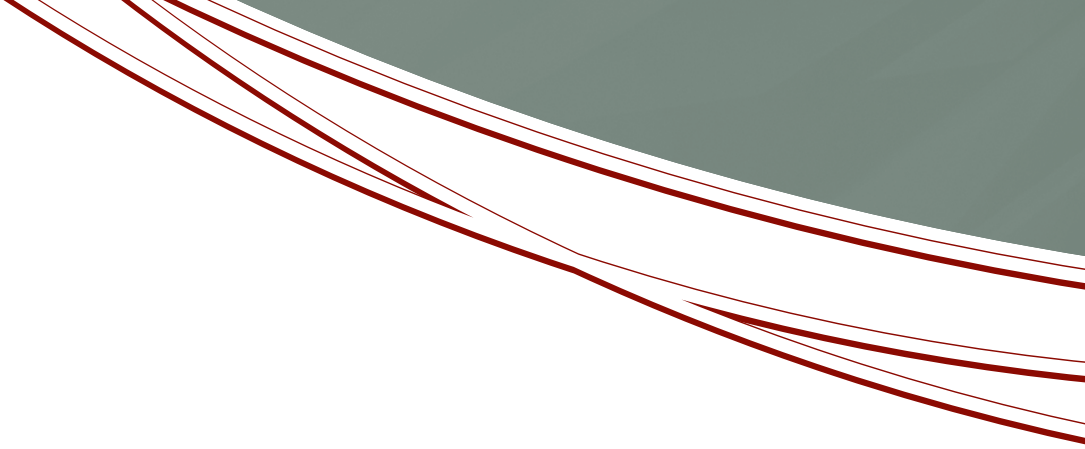
THE EXERCISE OF  
DISCRETION UNDER PART  
3A OF THE *ENVIRONMENTAL  
PLANNING AND ASSESSMENT  
ACT 1979* AND THE  
STATE ENVIRONMENTAL  
PLANNING POLICY (MAJOR  
DEVELOPMENT) 2005

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ICAC REPORT  
**DECEMBER 2010**

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# Chapter 1: Introduction and overview

Part 3A of the *Environmental Planning and Assessment Act 1979* (“the EP&A Act”) commenced in 2005. Part 3A consolidated the different assessment and approval regimes for “major” projects in NSW determined by the NSW Minister for Planning (“the Minister”). These were previously contained in Part 4 and Part 5 of the EP&A Act.

The State Environmental Planning Policy (Major Development) 2005 (referred to in this report as “the MD SEPP”) identifies several classes of Part 3A projects. These include significant private developments, such as residential flats and commercial developments, and public sector infrastructure projects, such as desalination plants and pipelines.

The MD SEPP also provides a process for listing additional state significant sites. This operates as a form of site-specific rezoning.

A joint task force comprised of representatives of the Independent Commission Against Corruption (“the Commission”) and the NSW Department of Planning (“the Department”) was established in 2010 to examine whether there were corruption risks attached to Part 3A and the MD SEPP, and to develop measures to address any of the identified risks. The task force met on six occasions. The Commission acknowledges the valuable assistance provided by the Department in participating in the task force.

This report has been prepared in its entirety by the Commission. It looks at the main areas of discretion involved in Part 3A and the MD SEPP, the safeguards with regard to corruption that are already in place, and what more could be done. Consequently, the recommendations in this report are those of the Commission, and the Department bears no responsibility for them.

## Basis of the Commission’s interest

One of the Commission’s principal functions is to examine the laws governing, and the practices and procedures of, public authorities and public officials in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures that may be conducive to corrupt conduct.<sup>1</sup>

The *Independent Commission Against Corruption Act 1988* (“the ICAC Act”) allows the Commission to cooperate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct. The ICAC Act also contemplates the Commission’s involvement in the establishment of task forces within NSW and in coordinating any such task forces.<sup>2</sup>

In 2005, the Commission concluded that development approval processes in NSW face a number of specific corruption prevention challenges. This conclusion was based on the high volume of complaints on planning matters received by the Commission (approximately one-third of all complaints), and a number of investigations involving planning approvals. As a result, in September 2007, the Commission published *Corruption risks in development approval processes*. This position paper includes a series of recommendations for addressing corruption risks in the planning system. Its focus is largely on Part 4 of the EP&A Act, which deals with developments that are, in the main, assessed and determined by local councils.

The Commission has recently turned its attention to development approvals given at state level, particularly those given under Part 3A of the EP&A Act, and the process for listing state significant sites.

<sup>1</sup> Section 13, *Independent Commission Against Corruption Act 1988* (“the ICAC Act”).

<sup>2</sup> Section 15, ICAC Act.



## Policy matters

The Commission recognises that decisions about what type of development is to be permitted or encouraged in a given area are a matter of government policy. For example, whether an area is to be “up-zoned” to allow higher density housing is a matter of policy. Such decisions are the prerogative of government. There may well be disagreement about whether a decision of this nature should be taken at state government level or at local government level, but that too is a matter of policy. The Commission also recognises that a ministerial “call in” power of one kind or another has been present in planning legislation for many years.

As a general rule, the Commission does not intrude in matters of government policy. Policy matters are under the control of the legislature, and not subject to review by other bodies, such as the courts. The appropriate arbiter of such matters is the voting public, via the ballot box.

There is a proviso to the above proposition, in cases where the Commission believes that a government policy is conducive to corruption.<sup>3</sup> In these instances, the Commission has both the right and the obligation to examine whether planning decisions are made impartially and are not compromised by corrupt influences or conflicts of interest. This is so regardless of the identity of the decision-maker. Any system that is, or is widely perceived to be, conducive to corrupt conduct is invariably damaging to public confidence in the integrity of government, and not just in relation to planning issues but in a broader sense.

In any event, while decisions made under Part 3A are one means of implementing government planning policy, the decisions themselves are predominantly administrative in nature.

Planning policies are typically expressed and implemented through the creation of planning instruments. This is a legislative power that has been delegated to the executive arm of government. Planning instruments are a type of subordinate legislation,<sup>4</sup> and normally apply to a sizable group of individuals rather than to one individual in particular.

The exercise of discretion under Part 3A of the EP&A Act is largely directed towards the approval or disapproval of individual development proposals. For example, the decision to approve a major commercial or residential development subject to particular conditions is made in favour of a particular applicant, and is more appropriately characterised as the exercise of administrative discretion. Administrative decisions are routinely subject to oversight and/or review.

While the MD SEPP provides for the Minister to declare a site to be a state significant site and to establish the planning regime for that site (that is to rezone it), the exercise of this power similarly relates to specific sites and affects particular applicants. Oversight and review mechanisms are appropriate in these circumstances.

## Discretion and safeguards on the use of discretion

There are no established examples of the corrupt use or manipulation of discretion under Part 3A or the MD SEPP, and this report does not intend to suggest otherwise. There is, nonetheless, considerable discretion built into Part 3A and the MD SEPP, and similar kinds of discretion have been the subject of several Commission investigations and investigations in other jurisdictions in Australia and beyond.

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<sup>4</sup> L. Stein, *Principles of Planning Law*, Oxford University Press, 2008, p.9. Unlike other subordinate legislation, planning instruments are not tabled in Parliament for possible disallowance. See *Legislation Review Act 1987*.

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<sup>3</sup> Section 13, ICAC Act.

The actual cases of corrupt conduct revealed during those investigations<sup>5</sup> demonstrate that the degree of subjectivity and flexibility in the planning system (including the potential for established controls to be overridden), combined with the high value of increases in development yield, makes the area an enduring target for those prepared to use corrupt means to achieve a favourable result.

Results from previous investigations also demonstrate that a much higher corruption risk exists for private sector projects than for public infrastructure projects. If corrupt conduct were to be involved in a public sector project, it is more likely to occur in different phases of the project; for example, in the tendering and/or the project's delivery phases. As a result, the recommendations contained in this report are only directed towards private sector projects.

An approval given under Part 3A can allow for some categories of development (particularly residential and commercial) of a very different nature and at much greater intensity than is allowed for by the existing planning instruments, under which members of the public (and other potential purchasers of the land) have made decisions. Consequently, Part 3A has the potential to deliver sizable windfall gains to particular applicants. The attendant corruption risk is obvious.

It requires no great leap of faith to suggest that anyone who has discretion to grant development approval, to rezone or to depart from stated requirements – whether they are elected officials or professional officers, and regardless of their level and political persuasion – is at risk of corrupt approaches. The greater the departure from the previous norm, the greater the corruption risk.

The Commission's concern does not represent a lack of trust in any individual or in the holder from time to time of any position. There is no reason to suppose that a minister or state-level planning official is any more susceptible to corrupt approaches than a local-level councillor or professional planning officer. Conversely, there is no reason to suppose a minister or state-level planning official is inherently immune from such approaches.

The key issue is the adequacy of safeguards when discretions are exercised by elected or unelected officials at *any* level of government. Such safeguards are a normal part of the fabric of Australian law and public administration, and should not be seen as a negative commentary on the integrity of anyone.

## Terms of reference of joint task force

The joint task force adopted the following terms of reference:

1. Examine the Part 3A process from project declaration to determination, and identify key decision points in the process that present a potential corruption risk, having regard to:
  - responsibility for decisions
  - extent of discretion and how it is exercised
  - transparency around the assessment process and decision-making
  - scope and frequency of review.
2. With regard to any potential corruption risks identified, the working group will:
  - identify and assess the effectiveness of current procedures and practices to manage and mitigate the risk
  - recommend any improvements to procedures, practices, the MD SEPP, the EP&A Act and the Environmental Planning and Assessment Regulation 2000 ("the EP&A Regulation") to more effectively manage and mitigate the risk.

## List of recommendations

### Recommendation 1

That the process currently underway to bring local environmental plans up to date be expedited by the NSW Department of Planning.

### Recommendation 2

That the tenure of members of the Planning and Assessment Commission (PAC), including opportunities for reappointment, be limited to two terms, and that PAC members be prohibited from re-appointment to the PAC after this period has expired.

### Recommendation 3

That the ability of the NSW Minister for Planning to appoint and dismiss members of the Planning and Assessment Commission be subject to Parliamentary scrutiny or other independent scrutiny.

<sup>5</sup> The most recent example is the Independent Commission Against Corruption's *Report on an investigation into corruption allegations affecting Wollongong City Council – Part 3*, October 2008.

## Recommendation 4

That the NSW Government undertakes a fundamental review of the Planning and Assessment Commission's (PAC) governance arrangements. The review should include, but not be limited to, the possibility of giving the PAC quasi judicial status and appointing its members on a full-time basis.

## Recommendation 5

That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to provide that the Planning and Assessment Commission (PAC) will be the determining body for the three classes of applications contained in the general delegation to the PAC that was issued by the then NSW Minister for Planning in December 2008.

## Recommendation 6

That the NSW Minister for Planning takes the necessary steps to transfer all of the procedural requirements for listing state significant sites, including those currently contained in clause 8 of the State Environmental Planning Policy (Major Development), to the Environmental Planning and Assessment Regulation.

## Recommendation 7

That the NSW Department of Planning develops guidelines for gazettal that contain a set of criteria for initially assessing a proposed state significant site. The set of criteria should incorporate the Department of Planning's current internal guidelines for initially assessing a proposed state significant site.

The Environmental Planning and Assessment Regulation should also be amended to require compliance with the gazetted guidelines.

## Recommendation 8

That the NSW Department of Planning develops guidelines for gazettal, setting out the circumstances in which studies of proposed additional state significant sites are required. As a minimum, the guidelines should incorporate the Department of Planning's current practice of requiring studies if a proposed site involves a significant change in land use and if a prior relevant study has not been completed.

The Environmental Planning and Assessment Regulation should also be amended to require compliance with the gazetted guidelines.

## Recommendation 9

That the Department of Planning formalises its current arrangements for external peer review of state significant site studies, when such studies are undertaken by or on behalf of such proponents.

## Recommendation 10

That the NSW Minister for Planning takes the necessary steps to amend the Environmental Planning and Assessment Regulation to mandate the circumstances in which inquiries are required as part of the process for listing state significant sites. As a minimum, this should include proposals involving significant changes in land use.

## Recommendation 11

That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to mandate the public exhibition of proposed state significant sites that propose significant changes in land use.

## Recommendation 12

That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to limit the application of Part 3A to projects that are permissible under existing planning instruments.

## Recommendation 13

That the *Environmental Planning and Assessment Act 1979* be amended to give to Joint Regional Planning Panels the NSW Minister for Planning's authority to determine rezoning proposals for prohibited aspects of Part 3A projects.

## Recommendation 14

That the NSW Department of Planning's "gateway review guidelines" be amended to include meaningful and objective reference points for considering the reasonableness of what is being proposed, when Part 3A proposals exceed current development controls contained in local environmental plans. Reference points would include relevant draft planning instruments, relevant existing development controls, the design principles relating to bulk and scale in the State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development, and relevant master plans.

## Recommendation 15

That the NSW Department of Planning’s “gateway review guidelines” be published and given statutory status. These guidelines should set out the circumstances in which the Department of Planning will refuse to accept applications for residential, commercial and retail development that technically fall within schedule 1 of the State Environmental Planning Policy (Major Development).

## Recommendation 16

That the Planning and Assessment Commission performs a gateway role (that is, by way of independent scrutiny) in reviewing proposals to call in private sector projects via specific Ministerial Order. This role should be contained in the *Environmental Planning and Assessment Act 1979*.

## Recommendation 17

That the NSW Department of Planning’s intention to publish on its website all submissions to the NSW Minister for Planning in relation to Part 3A project declarations be put into effect as soon as practicable.

## Recommendation 18

That the *Environmental Planning and Assessment Act 1979* be amended to require the NSW Minister for Planning to refer private sector Part 3A applications, which exceed development standards by more than 25%, to the Planning and Assessment Commission for determination.

## Recommendation 19

That section 75P of the *Environmental Planning and Assessment Act 1979* be amended to make it clear that all Part 3A projects require project approval and, if applicable, concept plan approval.

## Recommendation 20

That the NSW Government expands the availability of third party merit appeals under Part 3A of the *Environmental Planning and Assessment Act 1979* to private sector projects, where the project constitutes a major departure from existing development standards. Controls on the abuse of merit appeals (that is, appeals made for frivolous, obstructive, commercial or coercive reasons) should also be introduced.



## Chapter 2: Key issues

Three key issues have emerged from the work of the task force and the Commission's own activities.

### Broad discretion and lack of legislative enforcement of strategic plans

The Part 3A system is characterised by a lack of published, objective criteria. There are also various elements of Part 3A that are discretionary, particularly as regards residential and commercial development, which are prohibited or exceed existing development standards. Notwithstanding safeguards in process, the existence of a wide discretion to approve projects that are contrary to local plans and do not necessarily conform to state strategic plans creates a corruption risk and a community perception of a lack of appropriate boundaries.

Excessive discretion in the planning system makes it difficult for observers to know what decision might or might not reasonably be expected in particular circumstances. This can provide a convenient cloak for corrupt behaviour, which makes detection more difficult.

### Complexity

The planning system, in general, and the legislation governing Part 3A, in particular, are exceedingly complex, even for planning professionals.<sup>6</sup> In a paper prepared in August 2010, the NSW Division of the Planning Institute of Australia argues that the complexity of the legislation increases the risk of errors of interpretation and process. The paper expresses concern about the effect this has on decision-making in

terms of risk aversion, delays and added costs.<sup>7</sup>

This is also a cause for concern in relation to corruption prevention. In *Corruption risks in development approval* processes, the Commission refers to conclusions of its own research, stating that:

*The less transparent the system, the more likelihood there is of delay, and delay is ... a recognised trigger for corruption – individuals needing to access a service in which delays are common may be tempted to bribe the official involved in order to move up the queue or to short-cut the process. The Hong Kong Independent Commission Against Corruption identified a three-year time frame to issue restaurant licences as a cause of corruption and it examined, co-ordinated and simplified the process for granting restaurant licences in order to shorten the time involved, so people would be less tempted to bribe officials or break the rules in some way.<sup>8</sup>*

A high degree of complexity also increases the likelihood that applicants will feel it necessary to engage lobbyists, and contributes to perceptions of undue influence by lobbyists

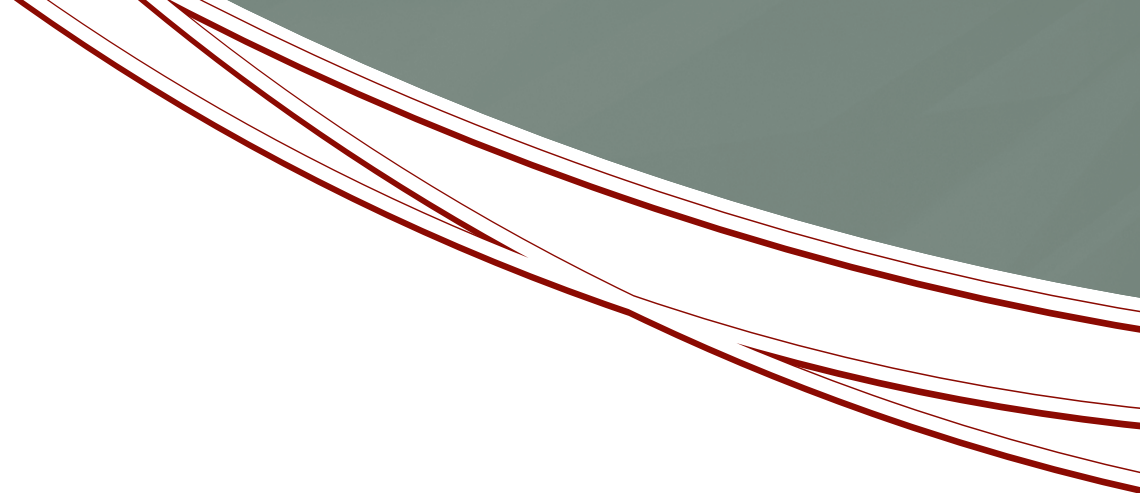
### Statutory lag

Allied to the issue of delay is the phenomenon of “statutory lag” (in instances when the relevant local environmental plan (LEP) is outdated, an amended LEP is in the process of being developed, and the new LEP will allow for the currently prohibited use). The Department has advised that sometimes developments seeking prohibited uses are considered under Part 3A because of statutory lag. Part 3A allows these developments to be considered earlier than they would be if the applicant had to wait for the new LEP to be finalised.

<sup>6</sup> Although, the introduction of Part 3A is an attempt to provide a streamlined assessment process.

<sup>7</sup> NSW Division of the Planning Institute of Australia, *A New Planning Act for New South Wales*, August 2010, pp. 2–3.

<sup>8</sup> Independent Commission Against Corruption, *Corruption risks in development approval processes – position paper*, September 2007, p.24.



As noted earlier, the Commission understands that there can be policy disagreements between local and state governments (both of which are democratically elected), and that it is usual for the state to have some mechanism to override policy settings preferred at the local level.

The use of Part 3A as a short cut to rezoning as a result of difficulties in keeping LEPs up to date is problematic, and does not sit comfortably within this legislative and policy scheme. Rezoning can greatly increase the value of land and has been central to many instances of proven corruption. This precise issue – variations justified on the basis that the controls were no longer current, but updated controls were not put in place in a timely manner – arose during the Commission’s 2008 investigation into Wollongong City Council (Operation Atlas), and was identified as a factor that was conducive to the corrupt behaviour that occurred.

The use of Part 3A to address statutory lag may also be counter-productive, in that it is resource-intensive and draws on the same expertise required to assess and finalise the updating of LEPs. A vicious cycle of statutory lag followed by ad hoc intervention is undesirable in corruption prevention terms.

The Department has in train a major program that aims to bring planning controls up to date. In the Commission’s view, this program warrants a high priority.

## **Recommendation 1**

That the process currently underway to bring local environmental plans up to date be expedited by the NSW Department of Planning.

# Chapter 3: Overview of Part 3A and the State Environmental Planning Policy (Major Development) 2005

Part 3A of the EP&A Act defines the way a project is to be assessed. The MD SEPP defines which projects are subject to Part 3A, and provides a process for listing new sites as state significant sites.

The listing of a state significant site is frequently considered alongside consideration of a specific proposal under Part 3A. This results in concurrent rather than sequential processes.

## MD SEPP

Key functions of the MD SEPP are to make the Minister the consent authority for the development to which the MD SEPP applies and to change planning controls over specified land. The development to which the MD SEPP applies is contained in the SEPP itself and in a number of schedules, as follows:

### Schedule 1 – Classes of development

Schedule 1 brings a range of developments into Part 3A by reference to factors such as purpose, location, capital investment value, employment numbers and intensity. For the most part, the kinds of development listed under schedule 1 are industrial, agricultural or extractive in nature.

Group 5 in schedule 1 relates to commercial, retail and residential projects. Since July 2009, commercial, retail or residential projects that are valued over \$100 million come to the NSW Government for assessment and determination. Prior to this date, commercial, retail or residential projects could be called in under this schedule

if they were valued at more than \$50 million *and* were deemed to be of regional or state significance.

### Schedule 2 – Specified sites

Schedule 2 identifies proposals on specified sites; for example, certain coastal areas and certain developments in specified sites, such as the Chatswood Railway Interchange, Kurnell, and the Honeysuckle area in Newcastle. Schedule 2 also identifies certain developments with a capital investment value greater than \$5 million in sites at Fox Studios, Moore Park Showground and Sydney Cricket Ground. Developments that have a capital investment value of more than \$5 million on specified sites such as Taronga Zoo are also included. All specified development on schedule 2 sites falls within Part 3A.

### Schedule 3 – State significant sites

Schedule 3 lists a number and range of state significant sites, such as the Opera House, the Barangaroo site, and the Doonside residential precinct.

### Schedule 5 – Critical infrastructure projects

(note: Schedule 4 is repealed).

Schedule 5 lists Part 3A projects declared to be critical infrastructure. These are the Kurnell Desalination Plant, Royal North Shore Hospital Redevelopment Site, the Liverpool Hospital Redevelopment site and the Queensland-Hunter Gas Pipeline.

There is a set of broad criteria for declaring projects to be critical infrastructure. Any development that is a Part

3A project may be declared by the Minister to be a critical infrastructure project if it is, in the opinion of the Minister, essential to the state for economic, environmental or social reasons. This means that the projects listed in schedule 5 are already subject to Part 3A, and are not discussed at any great length in this report.

It should also be noted that critical infrastructure projects are usually public sector projects and their declaration does not, in the Commission's opinion, represent a pressing corruption risk.

## Schedule 6 – Part 4 development for which the Minister is the consent authority

Schedule 6 directly makes the Minister the consent authority for specified development, without bringing it within Part 3A. Those listed include Sydney Harbour sites and parts of Redfern–Waterloo Authority sites.

The addition of projects to schedule 6 – so that the Minister becomes the consent authority but that Part 4 continues to apply rather than Part 3A – has not been considered for the purposes of this report.

## Schedules 8 and 9 – Exempt and complying development

The remaining schedules, 8 and 9, make specified development exempt from approval requirements, and nominate other development as complying development. They are not considered further in this report.

## State significant sites

Clause 8 of the MD SEPP sets out a process for amending schedule 3 by listing additional state significant sites (although compliance with this clause is not a precondition for listing).

The process for listing a site can be initiated in two ways:

- a proponent can request that the Minister agree to consider the site for listing
- the Minister can direct that a site be considered for listing.<sup>9</sup>

Prior to making a decision to list a site as a state significant site, the Minister *may* initiate an investigation into the proposal by requiring the Director General of the NSW Department of Planning to undertake a study or to make arrangements for a study to be undertaken. In such cases,

a Planning Focus Meeting is convened with key agencies to identify issues to be addressed through a state significant site study.

If a study is required, the Director General then issues state significant site study requirements. A study would assess:

- the state or regional planning significance of the site
- the suitability of the site for any proposed land use, taking into consideration environmental, social and economic factors, the principles of ecologically sustainable development, and any state or regional planning strategy
- the implications of any proposed land use for local and regional land use, infrastructure, service delivery and natural resource planning
- any other matters required by the Director General.

Studies can be coordinated and completed by the Department or they may be prepared by the proponent. Studies completed by proponents are submitted to the Department for review. The Department notifies the proponent about whether or not the study requirements have been met.

The Department then publicly exhibits the study. Section 38 of the EP&A Act requires, inter alia, that before recommending the making of a State Environmental Planning Policy ("SEPP") by the Governor, the Minister is to take such steps, if any, as the Minister considers appropriate or necessary to seek and consider submissions from members of the public. The Department also consults relevant agencies.

If requested by the Department, the proponent submits a response to submissions. The proponent may also amend the study, if required to do so by the Department.

The Minister *may* further direct that an inquiry be held as part of the investigation into a potential state significant site.

The Department then makes a recommendation to the Minister on the proposed draft amendment to the MD SEPP. The Minister subsequently makes a recommendation to the Governor to amend the MD SEPP or refuses the request. If endorsed by the Governor, the MD SEPP is amended to include the site in schedule 3 as a state significant site.

Applications for development on state significant sites are not necessarily determined by the Minister under Part 3A. When a new state significant site is listed, the Minister establishes the planning regime for that site, and may amend schedule 3 to include:

<sup>9</sup> NSW Department of Planning, *Fact sheet – What is a State significant site*, October 2009.



- new land use zones and permitted uses
- development standards, such as height and density
- any major projects or development to be determined by the Minister and/or local development to be determined by council.

In most cases, however, some or all development on state significant sites has been identified as falling within Part 3A of the Act.

Whether or not development on a state significant site is subject to Part 3A, the declaration of a state significant site is a key area of ministerial discretion, and accordingly an important issue for consideration in this report.

## Part 3A project processes

The process for lodging, assessing and determining Part 3A project applications is initiated when a proponent lodges an application form, accompanied by a preliminary environmental assessment that explains the proposal. The proponent typically requests that the Minister forms the opinion that the proposal is a project to which Part 3A applies.

If a project is declared to be subject to Part 3A, a Planning Focus Meeting may be convened with key agencies to identify issues that may need to be addressed through the environmental assessment. The Department then prepares a list of requirements that identify the key issues that a proponent must address in their environmental assessment of the project, referred to as the Director General's Requirements (DGRs).

The proponent then prepares and submits an environmental assessment that addresses the DGRs. The Department then decides whether it is adequate for public exhibition. Once the Department is satisfied, the assessment goes on public exhibition.

The public is notified of the exhibition and the relevant documents are made publicly available. During the exhibition period, any person can make a written submission to the Director General. At this stage, the Department also consults with relevant government agencies to get their views about the development.

The Director General provides the proponent with copies of all submissions received during the exhibition period, and may request a response to the issues raised in the submissions. Where the Department's response proposes significant changes to the project, the proponent will prepare a Preferred Project Report, assessing changes in more detail. This report is made available on the Department's website, and in some cases may be formally exhibited.

The Department assesses the proposal in detail (including the key issues and merits of the project), and prepares the Director General's report to the Minister. If the Director General's report recommends approval of the project, conditions are usually recommended.

The Minister then decides to approve or refuse the proposal, and may endorse the Director General's recommended conditions (if any).<sup>10</sup> At any stage of the assessment, the Minister may also request the PAC to review and advise on any aspect of an application.

Once the Minister has made a determination, the Department notifies the proponent, relevant state authorities, the local council(s), and the individuals or groups that have made a written submission on the project. The Director General's report and the Minister's determination are placed on the Department's website, and the determination is advertised in local and/or regional newspapers. In limited cases, a proponent or an objector can appeal to the Land and Environment Court against the Minister's decision.

The proponent must comply with the Minister's approval, including any conditions, throughout construction and operation of the project. The Department has responsibility for enforcement action in the case of non-compliance with conditions of approval, including rectification work, imposing fines or bringing legal proceedings in the Land and Environment Court.

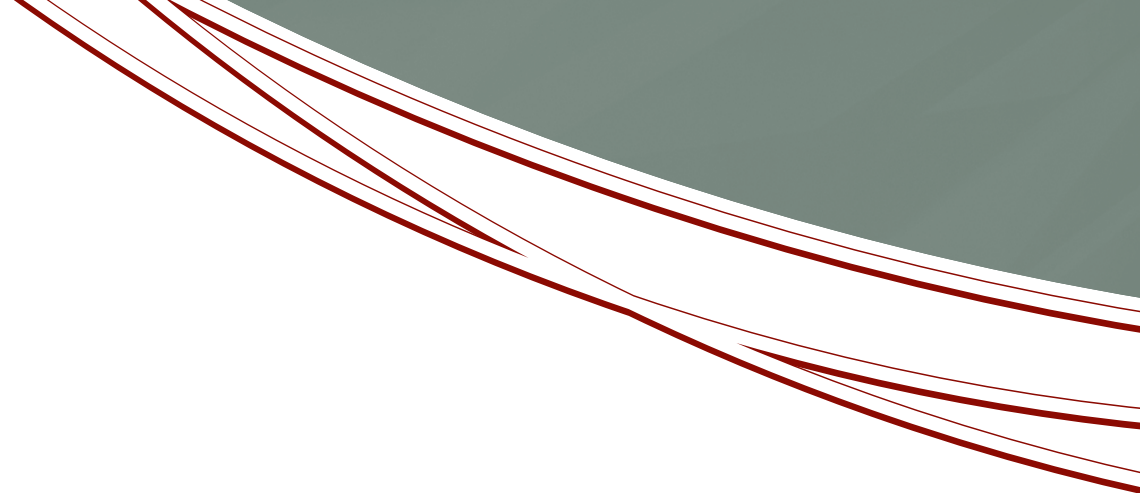
The proponent may also apply to modify an approved project under section 75W of the EP&A Act. The modification application is assessed and determined in a similar way to other Part 3A applications, except that the Department may decide not to formally exhibit the modification application and seek public submissions.

## Who determines a Part 3A proposal?

The Minister is the determining authority for Part 3A proposals. However, the Minister has the ability to delegate power to determine any application, other than an application for project approval or concept plan approval for a critical infrastructure project, which cannot be delegated to the Planning Assessment Commission (PAC).<sup>11</sup> In such cases, the Minister's delegation to the Department and the Minister's delegation to the PAC confirm who will determine a project. The Minister may also refer Part 3A projects to the PAC for determination on a case-by-case basis.

<sup>10</sup> The Minister has delegated power to determine some project applications.

<sup>11</sup> NSW Department of Planning, *Role of the PAC in Part 3A projects*, October 2009.



The Minister has also delegated to the Assistant Planning Minister the determination of all projects where the Minister for Lands or the Minister for Planning (or their portfolio agencies) have an interest in the subject land or would receive financial benefit from an approval (unless the determination has been delegated to the Department or the PAC).

The few instances of Part 3A project refusal can partly be attributed to the removal of proposals from the system prior to formal lodgement. As outlined in chapter 7, the Department discourages the submission of applications that it regards as unreasonable, and to the extent that it succeeds in doing so, the number of formal refusals is reduced.

## Chapter 4: General safeguards

The following chapters set out the specific safeguards relevant to particular phases of the Part 3A process and the process of adding a site to the MD SEPP. These safeguards include unpublished de facto criteria, internal review processes, referral to the PAC, consultation with other agencies (including local councils), and public scrutiny.

Some general safeguards relevant to all or several of these separate phases are discussed in this chapter.

### Political donations

The potential for political donations to undermine the integrity of ministerial decision-making on planning matters has been addressed in recent years. This issue was raised by the Commission in one of its earliest inquiries, the North Coast Land Development Inquiry, when it observed:<sup>12</sup>

*Offers are made from time to time. The law and public opinion, fear of being caught, dislike of gaol, and the honesty of public officials, all help to keep down the acceptance rate. But if there is a form of payment that can be made, and accepted, without fear from the law, or from public opinion, then there is an obvious threat to fair and honest government.*

*There is a risk that if nothing is done now to address the problem, donations to political parties will fill that role.*

*If money is offered to a Minister or a Member of Parliament for himself or herself, it will be seen as a bribe, and none but the dishonest would accept it. On the evidence heard in this Inquiry, it seems that if money is offered, or paid, to a political party or an election campaign fund, it is likely to be seen as a necessity, and few, if any, would refuse it.*

The Commission's position paper, *Corruption risks in development approval processes*, recommended that the NSW Premier consider amending the *Election Funding Act 1981* to require persons submitting development applications or rezoning proposals to the Minister to declare any political donations that they have made to the Minister or to his or her party.

In October 2008, amendments to the EP&A Act instituted a system for the disclosure of political donations by Part 3A applicants. These provisions are also mirrored at local government level.

Section 147(3) of the EP&A Act requires a person who makes a relevant planning application or a relevant public submission in relation to the application to disclose political donations of \$1,000 or more and gifts made by any person with a financial interest in the application (within a period commencing two years before the application is made and ending when the application is determined). A relevant planning application includes project applications as well as:

- formal requests to the Minister or the Director General for development on a particular site to be made a state significant site or declared a project to which Part 3A applies
- applications for approval of a concept plan or project under Part 3A (or the modification of a concept plan or of the approval for a project).

It is departmental policy to include all disclosures of political donations from proponents or submitters, which were received during the assessment of a project, in an assessment package. The Department is also required to make all disclosures to the Minister or Director General publicly available.

<sup>12</sup> Independent Commission Against Corruption, *Report on investigation into North Coast land development*, July 1990, p.653.

*Corruption risks in development approval processes* also recommends that the Minister for Planning include (in the list of designated development) development in respect of which a declaration as to the making of a donation has been made. This was recommended as a means to give third parties the right to appeal a Minister's decision (as third parties have a right to appeal against a decision with respect to designated development), if a political donation had been made by the applicant. Instead, the government chose to address the issue by removing the Minister from the decision-making role in such cases. As noted below, the PAC now determines applications in relation to which a statement has been made disclosing a political donation of \$1,000 or more.

The Commission's 2007 paper also canvasses the idea of banning donations from property developers, which had been suggested in many responses to the discussion paper that preceded the position paper. At the time, the Legislative Council Select Committee on Electoral and Political Party Funding had been conducting an inquiry into electoral and political party funding in NSW. As this inquiry was dealing with the broader question of appropriate limits on donations, the Commission stopped short of making a specific recommendation in its paper.

In December 2009, the *Election Funding and Disclosures Act 1981* was amended to prohibit political donations from property developers. This closed off a very significant source of corruption risk at state level. The Select Committee had recommended the banning of all but small donations by individuals in recognition of the fact that the potential for donations to undermine the integrity of decision-making is not confined to the property development sphere. The NSW Parliament has recently passed laws capping political donations and campaign expenditure.

## Ministerial Code of Conduct

The NSW Government Ministerial Handbook (November 2009) contains a Ministerial Code of Conduct. Apart from their ethical obligations, ministers (as holders of public office) are reminded that they are subject to civil and criminal law.

Part 1 of the Ministerial Code sets out general obligations, which include:

*1.1 Ministers will exercise their office honestly and in the public interest.*

*1.2 Ministers should avoid situations in which they*

*have or might reasonably be thought to have a private interest which conflicts with their public duty.*

Part 3 of the Ministerial Code deals more specifically with the subject of conflict of interest. In particular, it states:

*3.2 A Minister shall not:-*

*(a) use his or her position for the private gain of the Minister or for the improper gain of any other person; or*

*(b) have any material or undisclosed interest in any decision or action taken in virtue of office.*

*So as to ensure that such does not appear to have occurred, a Minister shall avoid situations in which it might reasonably be thought that the ministerial position is being so used, or that a possible conflict of interest has arisen.*

## Department of Planning's Code of Conduct

The Department introduced a comprehensive Code of Conduct in 2007–08, which provides an ethical framework for the decisions, actions and behaviour of the Department's staff. Reference to the Code has been included in all offer letters, and staff must sign to acknowledge their understanding and acceptance of the Code.

## Lobbying

### NSW Government Lobbyist Code of Conduct

The NSW Government Lobbyist Code of Conduct was introduced in 2009. Since 1 February 2009, lobbyists (as defined in the Code) who act on behalf of third party clients have been required to register with the Department of Premier and Cabinet before they can lobby a government representative (as defined in the Code).

A lobbyist is defined in the Code as a person engaged to represent the interests of third parties to a government representative. This limits the number of lobbyists who require registration to professional lobbyists employed by third parties to lobby on their behalf. It contains a number of exclusions, including in-house lobbyists and lobbyists from peak bodies. It also does not deal with the lobbying of ministers by other Members of Parliament (MPs) or by officials of any political party to which they belong.

A government representative is defined in the Code to include ministers and parliamentary secretaries but does not otherwise include MPs. This means that a lobbyist can approach a backbencher known to have influence (or believed to have influence) over a government



representative (such as the Minister for Planning), without the need for registration or disclosure of the contact.

All persons employed, contracted or engaged in an agency that is a Division of the Government Service<sup>13</sup> (such as the Department of Planning) must comply with the NSW Government Lobbyist Code of Conduct.

The Commission recently conducted an investigation into the lobbying of public officials and public authorities in NSW and the related regulatory regime. The report on this investigation was made public in November 2010. Consequently, these issues are not pursued in this report.

## Parliamentary Code of Conduct

The Code of Conduct for Members of both Houses of the NSW Parliament prohibits them from promoting matters, voting on bills or resolutions or asking questions in return for payment or other direct financial benefit. This activity is often termed “paid advocacy”.

The Code is ambiguous, in that the relevant clause (Clause 2) is headed “bribery”, and the prohibition is coupled with others that relate specifically to voting and asking questions in Parliament or to Parliamentary committees.

It is not clear whether and how these requirements might cover approaches to the Minister in relation to the exercise of Part 3A discretions by a member in return for reward. They do not appear to prohibit a member from promoting a matter in return for reward, as long as it happens outside the Parliament and its committees.

The Code of Conduct for Members is under review by both Houses of the NSW Parliament. The Commission has made several recommendations to the relevant Parliamentary Committees.<sup>14</sup>

## Guidelines for managing lobbyists and corruption allegations made during lobbying

In 2006, the Department of Premier and Cabinet issued memorandum M2006-01, which contains guidelines for ministers, ministerial staff and public officials. These guidelines apply to statutory decisions where the decision-maker is required to adhere to the principles of administrative law. They apply to lobbying by any person,

including special interest groups, professional advocates, MPs and any other person. The principles to be observed are:

*Ministers, ministerial staff and public officials should ensure that lobbying in relation to a statutory decision:*

*(a) is undertaken in accordance with appropriate practices; and*

*(b) does not undermine the integrity of decision-making processes.*

The guidelines do not elaborate on what constitutes “appropriate practices”, and what might undermine the integrity of decision-making processes, apart from the following advice:

*In some cases, it might even be wise for Ministers, ministerial staff and public officials to consider taking such reasonable steps as are available to them to try to ensure that lobbying does not occur at all while the proposed statutory decision is being made.*

## Department of Planning’s Meeting and Telephone Communications Code of Practice

In December 2009, the Department supplemented the NSW Government Lobbyist Code of Conduct with a Meeting and Telephone Communications Code of Practice. The Code of Practice relates to interactions between Department staff and persons making representations on planning proposals and/or development matters, and requires staff to disclose all contact with registered lobbyists in an attachment to relevant reports, which are available online. Any such disclosure accompanies the relevant assessment package.

The Code of Practice stipulates that all contact with developers or registered lobbyists on any specific planning proposal and/or development matter *must* be on a formal basis and be conducted in accordance with the Code of Practice. Departmental officials are warned that, “Under no circumstance should any informal discussion be entered into or undertaking given to any lobbyist on any specific planning proposal and/or development matter without the presence of at least two Departmental representatives”.

<sup>13</sup> Section 4A, *Public Sector Employment and Management Act 2002*.

<sup>14</sup> The Commission made recommendations to the Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee.

## Chapter 5: The Planning and Assessment Commission

The Planning and Assessment Commission (PAC) is a statutory body that commenced operation on 3 November 2008. In response to the ICAC's publication, *Corruption Risks in NSW Development Approval Processes*, the NSW Government described the PAC as "a new decision-making body which will provide an independent, alternative determination authority for applications of state significance". In some circumstances, the referral of Part 3A applications to the PAC for determination is used as a safeguard. The PAC has the potential to be more widely used.

### PAC membership and roles

PAC members are appointed by the Minister and can be removed by the Minister. They are not subject to the direction or control of the Minister, except in relation to the PAC's administrative procedures. The tenure of PAC members is limited to three years, with the possibility of reappointment.

### Ministerial delegations to PAC

In June 2008, the NSW Government advised the ICAC that, "the Minister will delegate the majority of ministerial-level determinations to the PAC, excluding applications for critical infrastructure and other key projects of State significance". It was observed that this proposal, "is consistent with the ICAC's recommendation, which calls for greater transparency in relation to developments for which the Minister is the consent authority".

Then Minister for Planning Frank Sartor also publicly stated that he expected that 80% of Part 3A projects would be referred to the PAC for determination.<sup>15</sup>

In December 2008, Kristina Keneally, then Minister for Planning, issued a general delegation to the PAC (which is still in place) that provides for the determination of the following classes of application:

- in relation to which a statement has been made disclosing a reportable political donation (see chapter 4) or
- in relation to the carrying out of development within the boundaries of the state electoral district represented by the Minister (where the Minister is a member of the Legislative Assembly) or
- in relation to the carrying out of development in which the Minister has a pecuniary interest.

Infrastructure projects where the proponent is a public authority (other than a local council) are exempt from the delegation. The instrument of delegation also does not apply to concept plan applications or project applications for those that have been declared to be critical infrastructure projects.

The Minister is able to remove the delegation with respect to a particular application or class of development.

The current delegation has not achieved the previously stated aim of 80% of Part 3A projects being referred to the PAC. In 2009–10, the PAC determined 16 projects. This does, however, represent an increase from the previous year, in which the PAC determined two projects.

A comparison with approvals issued by the Minister and Department is provided below:

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<sup>15</sup> Hansard, NSW Parliament, 15 May 2008.

**Table 1: Part 3A approvals 2009–10**

Minister	
Concept	17
Project	49
Part 3A modification	8
<b>Total</b>	<b>74</b>
Department (under delegation)	
Concept	2
Project	40
Part 3A modification	110
<b>Total</b>	<b>152</b>
PAC	
Concept	2
Project	14
Part 3A modification	0
<b>Total</b>	<b>16</b>

Source: NSW Department of Planning

## Enhancement of the role of the PAC and provisos

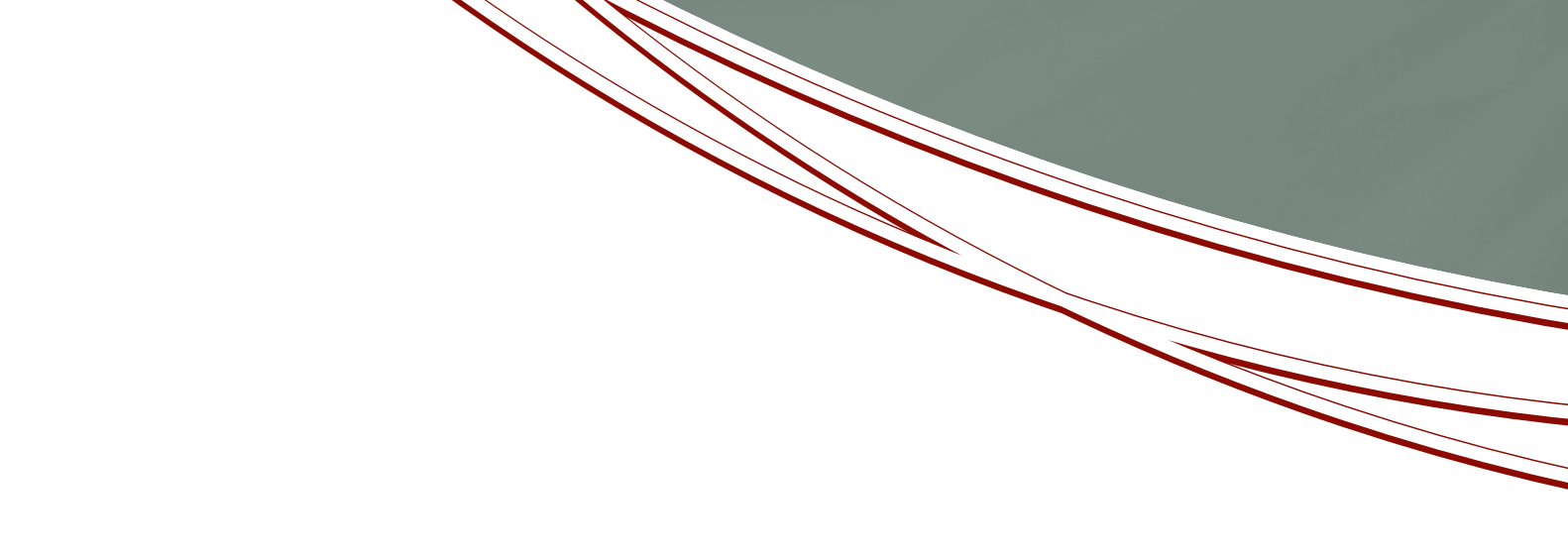
An enhanced role for the PAC is recommended in several places in this report. Referral to the PAC is seen as a safeguard because of its independence. In addition, the opportunity for a person to approach PAC members corruptly is comparatively limited as it is generally not known far in advance which PAC members will be allocated to a given matter. Over a long period of time, however, the opportunity to “groom” PAC members will increase and the pool of PAC panel members will become well known.

For these reasons, it is appropriate for there to be a limit on the tenure of PAC members. A limit of two terms would be appropriate. In its investigation into Wollongong City Council in 2008, the Commission made a similar recommendation in relation to limiting the tenure of Joint Regional Planning Panel members.<sup>16</sup> To allow for a degree of continuity, the terms of members can be staggered so that their terms do not all expire at the same time.

Furthermore, should the PAC assume the additional responsibilities recommended in this report, then a more fundamental review of its governance arrangements would be warranted. For example, some work needs to be done to ensure that the appointment and removal of PAC members is open to proper scrutiny, in order to reduce their actual or perceived vulnerability to undue influence. Parliamentary scrutiny is one possibility, but there may be others.

The independence of the PAC will also be strengthened if it has quasi judicial status and its own administration. This will also help ensure that it is properly equipped to handle any enhanced role. It may also be appropriate to

<sup>16</sup> *Report on an investigation into corruption allegations affecting Wollongong City Council – Part 3*, op cit, p.125.



reconstitute the PAC, so that members are appointed on a full-time basis. These options have not been canvassed with the PAC or other potentially interested parties at this stage. Consequently, rather than make specific recommendations, the Commission has made the general recommendation that a fundamental review of the PAC's governance arrangements be undertaken by the NSW Government.

It should also be noted that the delegation of power to determine applications is reliant on the Minister's discretion and can be removed at any time. The discretion of the Minister to remove a particular development or class of development from the jurisdiction of the PAC is undesirable, as such an act could give rise to a perception of corrupt conduct. The role of the PAC as the determining body for certain classes of applications that are perceived to have a significant potential to raise corruption issues should be contained in the EP&A Act, rather than in instruments of delegation. Such instruments are easier to amend and much more difficult to access. This would promote transparency and certainty, which can reduce actual or perceived corruption risk.

## Recommendation 2

That the tenure of members of the Planning and Assessment Commission (PAC), including opportunities for reappointment, be limited to two terms, and that PAC members be prohibited from re-appointment to the PAC after this period has expired.

## Recommendation 3

That the ability of the NSW Minister for Planning to appoint and dismiss members of the Planning and Assessment Commission be subject to Parliamentary scrutiny or other independent scrutiny.

## Recommendation 4

That the NSW Government undertakes a fundamental review of the Planning and Assessment Commission's (PAC) governance arrangements. The review should include, but not be limited to, the possibility of giving the PAC quasi judicial status and appointing its members on a full-time basis.

## Recommendation 5

That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to provide that the Planning and Assessment Commission (PAC) will be the determining body for the three classes of applications contained in the general delegation to the PAC that was issued by the then NSW Minister for Planning in December 2008.



## Chapter 6: Amending the classes of development and specified sites in the State Environmental Planning Policy (Major Development) 2005

This chapter deals with the addition of classes of development and sites to schedules 1, 2 and 3 of the MD SEPP. As mentioned in chapter 3, Schedule 1 of the MD SEPP deals with the types of development that can be considered major projects. Schedules 2 and 3 of the MD SEPP list the types of development that can be considered major projects because of where they are located.

### Schedules 1 and 2 – Classes of development and specified sites

The MD SEPP does not set out any particular procedures for amending schedules 1 and 2.

#### Areas of discretion

Part 3 of the EP&A Act includes procedures for making environmental planning instruments, such as SEPPs. The EP&A Act provides that environmental planning instruments may be made for the purposes of achieving any of the objectives of the EP&A Act.<sup>17</sup> In the case of possible effects on threatened species and water catchments, sections 34A and 34B of the EP&A Act require consultation with relevant state agencies. Otherwise, section 38 of the EP&A Act gives the Minister the discretion to decide what steps, if any, will be taken to:

- publicise an explanation of the intended effect of the proposed instrument
- seek and consider submissions from the public on the matter.

#### Safeguards

There are no particular safeguards in relation to the addition of categories and sites to schedules 1 and 2 of the MD SEPP. The general safeguards set out in chapter 4 apply, and there are also internal review processes within the Department.

### Schedule 3 – State significant sites

Clause 8 of the MD SEPP sets out the process for including additional state significant sites in the MD SEPP. The following section of this report contains a number of recommendations relating to the procedural requirements for listing additional sites. The Commission is of the view that these recommendations should have statutory backing. After consultation with the Department, the Commission supports the option of transferring all of the procedural requirements for listing state significant sites, including those currently contained in clause 8, to the EP&A Regulation. The EP&A Regulation should also include a new clause that requires compliance with specified gazetted guidelines.

<sup>17</sup> Section 24, *Environmental Planning and Assessment Act 1979* ("the EP&A Act").

As SEPPs are policy documents, they should not include detailed procedural requirements. Transferring the procedural requirements for listing additional state significant sites to the EP&A Regulation will have the added benefit of improving transparency, as regulations are subject to Parliamentary scrutiny.

## Areas of discretion

The ability of the Minister to list a site as an additional state significant site, and to create a new planning regime for the site, is an area of considerable discretion. Clause 8(6) of the MD SEPP provides that compliance with clause 8 is not mandatory. Section 38 of the EP&A Act also confers a discretion on the Minister in relation to publicly exhibiting proposed SEPPs.

Prior to making a decision to list a site as a state significant site, the Minister *may* initiate an investigation into the proposal by requiring the Director General to undertake a study or to make arrangements for a study to be undertaken. Conducting any such study is not mandatory.

If there is a prior study, the assessment requirements constitute a set of criteria for deciding whether or not a site should become a state significant site. If there is no study, given that there are no detailed set of criteria on the face of the MD SEPP, the discretion to list a site is, on the face of it, unconstrained.

Where a decision has been made to initiate a study, the Department may undertake the study itself. It may also arrange for an external peer review of a study prepared by or on behalf of the proponent. Currently, there is a need for the Department to formalise its current arrangements for external peer review, where a study is undertaken by or for a proponent.

The Minister *may* further direct that an inquiry be held, as part of the investigation into a potential state significant site. Given that the permitted uses and development standards to be applied to a state significant site can represent a major change, some independent scrutiny of what is being proposed would provide an important safeguard. The conduct of inquiries is the main mechanism through which this can occur. Presently, this is subject to the discretion of the Minister. The Commission is of the view that this is undesirable, as any Minister for Planning involved in corrupt conduct could simply by-pass this safeguard. As an alternative, the circumstances in which inquiries are required should have statutory backing. As a minimum, this should include proposals involving significant changes in land use.

Similarly, the fact that the public exhibition process can be by-passed because compliance with clause 8 is not mandatory means that the key mechanism for public consultation is a discretionary matter.

## Safeguards

### Guidelines for listing of state significant sites

The Department has developed internal guidelines for considering whether or not a site should be initially assessed for listing as a state significant site. These guidelines apply whether or not a prior strategy (for example, a subregional strategy) has been completed, and ensure that some consistent criteria are, in fact, in place. The guidelines state:

*When considering whether a site can be of State or regional planning significance, the Minister will consider whether the site meets one or more of the following criteria:*

- *be of regional or State importance because it is in an identified strategic location (in a State or regional strategy), its importance to a particular industry sector, or its employment, infrastructure, service delivery or redevelopment significance in achieving government policy objectives; or*
- *be of regional or State environmental conservation or natural resource importance in achieving State or regional objectives. For example, protecting sensitive wetlands or coastal areas; or*
- *be of regional or State importance in terms of amenity, cultural, heritage, or historical significance in achieving State or regional objectives. For example sensitive redevelopment of important heritage precincts; or*
- *need alternative planning or consent arrangements where:*
  - *added transparency is required because of potential conflicting interests*
  - *more than one local council is likely to be affected.*

The formalisation and gazettal of these Departmental guidelines would provide publicly accessible criteria for the exercise of this important discretion. It would also give the set of criteria statutory backing, and avoid any argument about the application of internal guidelines being ultra vires because of an impermissible application of policy. They should first be reviewed to make them sufficiently objective to serve as robust criteria. The EP&A Regulation should also be amended to require compliance with the guidelines.

### Consultation with other agencies

The Department routinely conducts a Planning Focus Meeting with other departments to identify issues to be addressed through a state significant site study, if such a study is undertaken. Under section 34A of the EP&A Act, the Minister must consult with the Director General of the Department of Environment, Climate Change and Water if critical habitat or threatened species, populations or ecological communities (or their habitats) will or may be adversely affected by proposed LEPs and SEPPs.

### Studies of proposed state significant sites

The Department informed the Commission that, in practice, it undertakes or makes arrangements for a study if a proposed additional state significant site involves a significant change in land use. The Department also reported that the only exception to this occurs when a study has just been completed,<sup>18</sup> but there is no guarantee that this is the case.

Under Part 3 of the EP&A Act, local councils may not necessarily complete a study prior to the rezoning of land, but a decision not to do so is subject to the agreement of the Department. There is no equivalent safeguard in the case of Part 3A. As a result, the Commission is of the view that gazetted guidelines should be developed that set out the circumstances in which studies of proposed additional state significant sites are required.

The EP&A Regulation should require compliance with the gazetted guidelines. As a minimum, the guidelines should incorporate the Department's current practice of requiring studies if a proposed site involves a significant change in land use and if a prior relevant study has not been completed. Again, gazettal of the guidelines and amendment of the EP&A Regulation to require compliance would avoid any concerns about the application of internal guidelines being *ultra vires*.

### Recommendation 6

That the NSW Minister for Planning takes the necessary steps to transfer all of the procedural requirements for listing state significant sites, including those currently contained in clause 8 of the State Environmental Planning Policy (Major Development), to the Environmental Planning and Assessment Regulation.

### Recommendation 7

That the NSW Department of Planning develops guidelines for gazettal that contain a set of criteria for initially assessing a proposed state significant site. The set of criteria should incorporate the Department of Planning's current internal guidelines for initially assessing a proposed state significant site.

The Environmental Planning and Assessment Regulation should also be amended to require compliance with the gazetted guidelines.

### Recommendation 8

That the NSW Department of Planning develops guidelines for gazettal, setting out the circumstances in which studies of proposed additional state significant sites are required. As a minimum, the guidelines should incorporate the Department of Planning's current practice of requiring studies if a proposed site involves a significant change in land use and if a prior relevant study has not been completed.

The Environmental Planning and Assessment Regulation should also be amended to require compliance with the gazetted guidelines.

### Recommendation 9

That the Department of Planning formalises its current arrangements for external peer review of state significant site studies, when such studies are undertaken by or on behalf of proponents.

### Recommendation 10

That the NSW Minister for Planning takes the necessary steps to amend the Environmental Planning and Assessment Regulation to mandate the circumstances in which inquiries are required as part of the process for listing state significant sites. As a minimum, this should include proposals involving significant changes in land use.

### Recommendation 11

That the NSW Government amend the *Environmental Planning and Assessment Act 1979* to mandate the public exhibition of proposed state significant sites that propose significant changes in land use.

<sup>18</sup> Joint task force meeting, 6 August 2010.

## Chapter 7: Declaring that Part 3A applies

Part 3A of the *Environmental Planning and Assessment Act 1979* applies to the carrying out of development that is declared to be a project to which Part 3A applies. Only certain kinds of development can be declared to be a project to which Part 3A applies. These are:

- major infrastructure or other development that, in the opinion of the Minister, is of state or regional environmental planning significance
- major infrastructure or other development that is an activity for which the proponent is also the determining authority (within the meaning of Part 5 of the EP&A Act), and that, in the opinion of the proponent, would (but for Part 3A) require an environmental impact statement to be obtained under Part 5.<sup>19</sup>

A Part 3A declaration can be made by a SEPP, or by an Order of the Minister published in the *Government Gazette*.<sup>20</sup>

As noted in previous chapters, the MD SEPP defines projects that are subject to Part 3A. Projects identified in the MD SEPP are referred to by the Department as “non-discretionary” projects that automatically come to the NSW Government for assessment and determination, as opposed to a local council.<sup>21</sup> Such proposals are described in this report as “category 1” projects.

Projects of a type specified in section 75B(2)(b) of the EP&A Act were declared to be projects to which Part 3A applies by a General Order that was gazetted on 29 July 2005. Consequently, these projects do not require a separate declaration.

A Ministerial Order can also be made providing that a project not identified in the MD SEPP or covered by the General Order is of state or regional environmental planning significance and falls within Part 3A. In such cases, the Ministerial Order is gazetted. These projects are described in this report as “category 2” projects.

The Minister has delegated some powers to the Director General of the Department in order to declare projects to be subject to Part 3A of the EP&A Act. Unless a Part 3A declaration is in place, applications are not accepted by the Department for assessment.

### Category 1 – Declarations under the MD SEPP

Development that, in the opinion of the Minister, is of a kind:

- (a) that is described in schedule 1 or 2 (of the MD SEPP), or
- (b) that is described in schedule 3 as a project to which Part 3A of the Act applies, or
- (c) to the extent that it is not otherwise described in schedules 1–3, that is described in schedule 5

is declared by the MD SEPP<sup>22</sup> to be a project to which Part 3A of the Act applies.

If the Department is of the view that a project meets the set of criteria in the MD SEPP, it prepares a clause 6 opinion submission for consideration by the Minister. In the case of a prohibited development, if the Department is satisfied that departure from the zoning is reasonable, it will include a recommendation that a concept plan be authorised or required in its clause 6 opinion submission to the Minister.

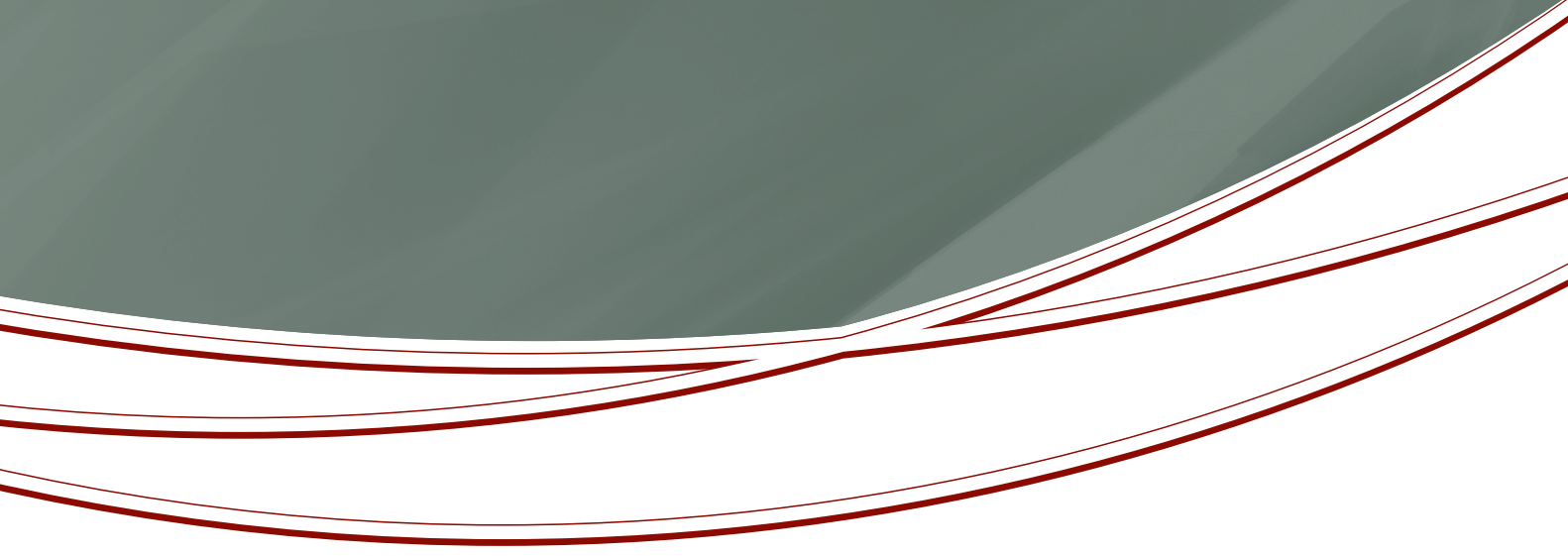
<sup>19</sup> Section 75B(2), EP&A Act.

<sup>20</sup> Section 75B(1), EP&A Act.

<sup>21</sup> NSW Department of Planning, *Major Development Monitor 2008–09*, p.3.

<sup>22</sup> Clause 6, State Environmental Planning Policy (Major Development) 2005 (“the MD SEPP”).





If the Department is of the view that a project does not meet the set of criteria in the MD SEPP, it directly advises the applicant accordingly. A negative clause 6 opinion submission is not provided to the Minister.

## Areas of discretion

It appears that the amendments to the MD SEPP made in July 2009 (see chapter 3) have eliminated the discretion available under clause 13 of schedule 1. The MD SEPP now provides what appears to be a set of non-discretionary criteria for determining whether projects fall within the MD SEPP and whether or not they are Part 3A projects.

The current wording of schedule 1 has created a tendency to attract highly speculative proposals under the MD SEPP. The Minister is not bound by the provisions of LEPs. When this is combined with the fact that the MD SEPP requires proponents to meet capital investment thresholds, it provides an incentive for some applicants to propose unreasonable departures from existing LEP development standards and unreasonable prohibited uses in order to have their projects dealt with under Part 3A.

To deal with this issue, the Department considers the reasonableness of what is being proposed as part of its decision on whether to declare a proposal a major project. This includes projects that are permissible but propose variations to the key development controls, which would apply under Part 4. It also includes projects that are not permissible, which may also propose variations to key development controls.

In this regard, the Department is proposing to codify its existing practices and internal procedures by issuing guidelines on its approach to requests for proposals to be declared major projects under clause 13 of schedule 1. At the time of publishing this report, the guidelines, which

are referred to as the “gateway review guidelines” in this report<sup>23</sup>, were still in draft form.

The Commission believes it is important to introduce an objective set of criteria for assessing the reasonableness of requests for Part 3A project declarations. The objective set of criteria should include, in the case of prohibited development, compliance with key strategic planning documents. This approach has already been adopted in the gateway review guidelines.

An alternative would be to limit the application of Part 3A to projects that are permissible under existing planning controls. Where a Part 3A project is prohibited, it would be appropriate for a body, such as the relevant JRPP, to be given the Minister’s authority to consider and determine a proposed rezoning of the prohibited aspects of the project, prior to any determination of the project under Part 3A. This approach forms the basis of Recommendations 12 and 13.

For proposals that are permissible but propose variations to key development controls in existing instruments, meaningful and objective reference points should be provided for considering the reasonableness of what is being proposed. This would include any controls in a relevant draft LEP or SEPP, a consideration of the relevance of existing controls, and the design principles relating to bulk and scale in the SEPP No. 65 – Design Quality of Residential Flat Developments. The Commission has already made a recommendation concerning this issue to the Department, and takes this opportunity to repeat the recommendation publicly by way of Recommendation 14.

Furthermore, it is undesirable that the existence of the discretionary practice of rejecting unreasonable proposals does not have statutory backing. The MD SEPP, or alternatively the EP&A Regulation, should be explicitly

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<sup>23</sup> The use of the term “gateway” in this report refers to a requirement that serves as an entry point into the Part 3A system.

amended to incorporate the gateway guidelines. This will remove any doubt as to the basis of the Department's current practice, which may be ultra vires. It will also improve the transparency of the Part 3A process.

## Safeguards

### Gateway review guidelines

It appears that the gateway review guidelines prepared by the Department relate to a discretion that is not evident in the MD SEPP. It is appropriate that, where discretion is being exercised, its existence is subject to objective criteria and not arguably ultra vires (as discussed above).

Provided this is done, its use is a "gateway" process that can be seen as a safeguard in the Part 3A system, as it limits the scope for approval of unreasonable proposals. Such approvals have the potential to create large windfall gains, and present a heightened corruption risk. Removing them from the Part 3A system should also relieve the Department of the need to devote resources to the formal assessment of speculative proposals that have no reasonable prospect of success. This, in turn, will assist the Department to deal with the problem of statutory lag, as discussed in chapter 2.

### Internal review process for critical infrastructure declarations

In the case of the declaration of a Part 3A project as a critical infrastructure project, the Department prepares a draft declaration for the Minister's consideration. The draft declaration is endorsed by a number of Departmental officials, in a manner similar to standard Part 3A project declarations. These types of projects are also considered by a Major Projects Panel, established this year by the Department, comprising the relevant Director, Executive Director, and Deputy Director-General.

### Public scrutiny

Clause 8G(4)(a) of the EP&A Regulation requires the declaration of development as a project to which Part 3A of the Act applies or its declaration as a critical infrastructure project to be made available on the Department's website, and in other locations determined by the Director General.

## Recommendation 12

That the NSW Government amends the *Environmental Planning and Assessment Act 1979* to limit the application of Part 3A to projects that are permissible under existing planning instruments.

## Recommendation 13

That the *Environmental Planning and Assessment Act 1979* be amended to give to Joint Regional Planning Panels the NSW Minister for Planning's authority to determine rezoning proposals for prohibited aspects of Part 3A projects.

## Recommendation 14

That the NSW Department of Planning's "gateway review guidelines" be amended to include meaningful and objective reference points for considering the reasonableness of what is being proposed, when Part 3A proposals exceed current development controls contained in local environmental plans. Reference points would include relevant draft planning instruments, relevant existing development controls, the design principles relating to bulk and scale in the State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development, and relevant master plans.

## Recommendation 15

That the NSW Department of Planning's "gateway review guidelines" be published and given statutory status. These guidelines should set out the circumstances in which the Department of Planning will refuse to accept applications for residential, commercial and retail development that technically fall within schedule 1 of the State Environmental Planning Policy (Major Development).

## Category 2 – Ministerial Orders

Regardless of whether it is included in the MD SEPP, the Minister has the discretion to declare a project to be a Part 3A project by Ministerial Order.<sup>24</sup> These projects are known as "discretionary" Part 3A projects within the Department.

### Areas of discretion

A great deal of discretion is available to the Minister with regard to Ministerial Orders. The only criterion required for a Ministerial Order is that the Minister has to be satisfied that the development is of state or regional environmental planning significance.<sup>25</sup>

The Department informed the Commission that, in practice, the use of specific Ministerial Orders tends to be limited to cases where there is uncertainty as to whether a particular government infrastructure project

<sup>24</sup> Section 75B(1)(b), EP&A Act.

<sup>25</sup> Section 75B(2)(a), EP&A Act.

meets the terms of the General Order or where parts of a government infrastructure project may arguably be subject to other provisions of the EP&A Act. Consequently, an agency may request a Ministerial Order to eliminate the risk of procedural review or to avoid having multiple decision-makers for different aspects of the same infrastructure project.

Despite this, the loose criteria for calling in projects via Ministerial Order create a broad discretion that is potentially open to perceptions of undue influence. Even if, in practice, this discretion is exercised on limited occasions, it can be used without reference to any pre-existing strategic planning policy or strategy, and remains an area that could be open to abuse. In particular, there is the potential for projects to be called in via Ministerial Orders because of the identity of a particular proponent, as opposed to pre-determined classes of development or locations, as provided for in the MD SEPP.

The risk is heightened by the Minister not being bound by the provisions of LEPs (and SEPPs generally, in the case of critical infrastructure projects). This allows the Minister to approve development prohibited by these instruments, even though approval of a concept plan may also be needed.

## Safeguards

### Set of de facto criteria

In practice, the circumstances in which specific Ministerial Orders are used suggests that there are de facto criteria in place (namely, that the proposal is a government infrastructure proposal), and there is either a lack of clarity about the applicable decision-maker or multiple decision-makers.

The Commission's view is that it would be reasonable to limit the Minister's capacity to make specific Ministerial Orders by formally stipulating that the above set of de facto criteria is the relevant set of criteria. This approach, however, is not the subject of a recommendation in this report, as the Commission is of the view that this issue is best dealt with through utilising the PAC to perform a gateway review role (considered below). It should also be noted that the implementation of Recommendations 12 and 13 will substantially limit the discretion available to the Minister.

### Internal review process

All discretionary projects (projects that do not meet the criteria in the MD SEPP and are not covered by the General Order) are referred to the Major Projects Panel. Before making a recommendation as to whether the project can appropriately be dealt with under Part 3A, the Major Projects Panel considers the state and regional

significance of the proposed project, permissibility issues, and whether authorisation of a concept plan is warranted.

The Department's submission to the Minister is endorsed by the relevant Director, and signed by an Executive Director, the Deputy Director General and the Director General.

### Public scrutiny

In practice, the Department provides the Minister with a briefing note to justify him/her forming the view that a proposal is of state or regional environmental planning significance and making the decision to call it in. Although they are available under the *Government Information (Public Access) Act 2009*, in the past, these briefing notes have not been published on the Department's website. The actual declaration of development as a project to which Part 3A applies is required to be made publicly available on the Department's website.<sup>26</sup>

The Department has recently decided to publish the briefing notes provided to the Minister on its website. The open publication of the justification to call in a project not included in the MD SEPP or covered by the General Order would be a worthwhile, additional safeguard.

### Referral to the PAC

Currently, there is no practice of referral of proposed Ministerial Orders to the PAC, and this may be reasonable if the availability of the power were formally restricted to the de facto criteria already in place. However, as it is largely unfettered, the use of this power to call in private projects should be subject to independent scrutiny.

Presently, the main mechanism for introducing independent scrutiny into the Part 3A system is through referrals to the PAC. Its role should be extended to proposals to call in private sector projects by specific Ministerial Order.

The involvement of the PAC in a gateway review role at the beginning of the Part 3A process would have the benefit of ensuring independent scrutiny of whether these types of projects should be dealt with under Part 3A, prior to the Department investing considerable resources in their assessment.

It is also desirable that any expanded role for the PAC is contained in the EP&A Act to help promote clarity and certainty. This will also help ensure a consistent role for the PAC that is not subject to the possibility of removal by a change to an instrument of delegation. This issue was the subject of Recommendation 5. The Minister's discretion to delegate their consent role for additional applications or classes of application to the PAC can and should remain in place.

26 Clause 8G(4)(a), EP&A Regulation.



## Recommendation 16

That the Planning and Assessment Commission performs a gateway role (that is, by way of independent scrutiny) in reviewing proposals to call in private sector projects via specific Ministerial Order. This role should be contained in the *Environmental Planning and Assessment Act 1979*.

## Recommendation 17

That the NSW Department of Planning's intention to publish on its website all submissions to the NSW Minister for Planning in relation to Part 3A project declarations be put into effect as soon as practicable.

## Chapter 8: Assessing and determining Part 3A applications

An application under Part 3A may seek approval for the carrying out of any part or aspect of a project (referred to in this report as “project approval”) or approval of a “concept plan” for the project. A single application can be made for approval of a concept plan for a project and for approval to carry out any part or aspect of the project.<sup>27</sup>

### Project approval

A proponent may apply for project approval for any project that has been declared to be a Part 3A project.

If the project is prohibited by current planning instruments, it requires a prior or concurrent concept plan approval or a prior or concurrent listing as a state significant site in schedule 3 of the MD SEPP. Section 75N of the EP&A Act applies certain provisions of the Act<sup>28</sup> to concept plans, in the same way that they apply to project applications.

### Project approval processes

#### Preparation of environmental assessments

Proponents are responsible for the preparation of an environmental assessment of their proposal. The issues to be addressed are stipulated in the Director General’s Requirements (DGRs) produced for each proposal by the Director General of the Department.

In formulating DGRs, the Department is required to consult with relevant agencies under the EP&A Act. Part 3A projects are exempt from obtaining a number of environmental approvals. These include water use approvals under the *Water Management Act 2000*,

excavation permits under the *Heritage Act 1977*, and permits under the *Fisheries Management Act 1994*.<sup>29</sup>

The environmental issues raised through these approval processes can, however, be addressed in the DGRs and the subsequent environmental assessment for each project. These issues are discussed in Planning Focus Meetings with the relevant agencies.

There may be relevant guidelines with respect to the environmental assessment of proposals published under section 75F or 75H of the Act. These guidelines are to be made available on the Department’s website, and in other locations determined by the Director General.<sup>30</sup>

The EP&A Act also provides that a number of authorisations cannot be refused if they are necessary for the carrying out of an approved project, and are to be substantially consistent with the approval granted. These include mining leases under the *Mining Act 1992*, a production lease under the *Petroleum (Onshore) Act 1991*, and a licence under the *Pipelines Act 1967*.<sup>31</sup>

The DGRs also outline any consultation requirements for the proponent to observe during the preparation of the environmental assessment. DGRs issued by the Director General can oblige a proponent to consult with the community during the preparation of its environmental assessment.

#### Set of criteria

The set of criteria against which a Part 3A project is to be assessed is reflected in the issues identified in the DGRs. In the case of a state significant site, the planning controls set out in schedule 3 of the MD SEPP are relevant criteria, and must be considered in the Director General’s assessment report.

27 Section 75M(3A), EP&A Act.

28 Section 75F (environmental assessment requirements), section 75H (environmental assessment and public consultation), and section 75I (Director General’s environmental assessment report).

29 For further exemptions, see section 75U, EP&A Act.

30 Clause 8G, Environmental Planning and Assessment Regulation 2000 (“the EP&A Regulation”).

31 Other environmental approvals that cannot be refused are listed in section 75V(1), EP&A Act.



There are some generic components to DGRs. In practice, the Department includes standard sets of criteria for similar developments. The DGRs also often require a proponent to include, as part of their environmental assessment, a statement of commitments covering environmental management and mitigation measures on the site, and development contributions.

The Minister, when deciding whether or not to approve the carrying out of a project and deciding on any conditions that will apply to the carrying out of a project, is to consider:

- the Director General's report on the project, and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report<sup>32</sup>
- any advice provided by the portfolio Minister (if the proponent is a public authority)
- any findings or recommendations of the PAC with regard to any aspect of the project, following a referral for review from the Minister.

Development standards in LEPs do not bind the Minister. Prohibitions in LEPs generally do not apply if a concept plan is in place (discussed later in this chapter).<sup>33</sup> In the case of critical infrastructure, the Minister is also not bound by the provisions of any SEPPs unless a SEPP expressly states that it applies to a particular project.

### Public exhibition and comment

The Department checks that environmental assessments are adequate (that they contain a reasonable amount of information). As part of its review of the environmental assessment, the Department also assesses the adequacy of any consultation that was required during the preparation of the proponent's environment assessment.

Proponents may be required by the Director General to respond to the issues raised during the exhibition period. Proponents may also amend a project to minimise its environmental impact in response to the submissions generated during this period. If that occurs, the proponent prepares a preferred project report.

### Director General's assessment report

A Director General's assessment report must be prepared for all applications. The report, together with any recommended conditions of approval, is the main outcome of the Department's assessment of a project.

<sup>32</sup> Section 75I(2), EP&A Act and clause 8B, EP&A Regulation stipulate what is to be included in the report.

<sup>33</sup> Section 75O of the EP&A Act, and clause 8N, EP&A Regulation.

The EP&A Act and the EP&A Regulation specify the following minimum requirements for the report:<sup>34</sup>

- any environmental assessment undertaken by the Director General or other matter the Director General considers appropriate
- an assessment of the environmental impact of the project
- the suitability of the site for the project
- any aspect of the public interest that the Director General considers relevant to the project
- a statement relating to compliance with the environmental assessment requirements under Division 2 of Part 3A of the EP&A Act, with respect to the project
- a copy of or reference to the provisions of any state environmental planning policy that substantially governs the carrying out of the project
- except in the case of a critical infrastructure project, a copy of or reference to the provisions of any environmental planning instrument that would (but for Part 3A) substantially govern the carrying out of the project *and that have been taken into consideration in the environmental assessment of the project* [emphasis added]
- a copy of the proponent's environmental assessment and any preferred project report
- any advice provided by public authorities on the project
- copies of submissions received by the Director General in connection with public consultation under section 75H of the EP&A Act or a summary of the issues raised in those submissions
- a copy of any report of the PAC in respect of the project.

The Minister also has the discretion to refer the Department's assessment to the PAC for advice. In this case, the PAC reports directly to the Minister with its recommendation.

## Areas of discretion

The existing development standards under LEPs (such as height/floor space ratio) are in effect set aside when a proposal becomes a Part 3A project. To some extent, DGRs operate as a set of criteria for the assessment of applications, but the discretion available to the Director General in specifying DGRs and the Minister in

<sup>34</sup> Section 75I(2), EP&A Act, and clause 8B, EP&A Regulation.

determining project applications is very broad. For example, the extent to which existing LEPs are considered is a matter of discretion.

The Director General's report may take into account the "provisions of any environmental planning instrument that would, but for Part 3A, substantially govern the project",<sup>35</sup> but this is a matter of discretion; if these instruments are not taken into account, they need not be mentioned in the Director General's report to the Minister.

This raises the question: if development standards contained in existing LEPs are not considered, what is? The Planning Institute of Australia (NSW Division) has recently expressed the view that, "there is a widespread perception that proper strategic planning has been overtaken by ad hoc project planning ... A mature and effective planning system should have at its foundation robust and well researched strategic plans as the basis for decision-making".<sup>36</sup> The Department, however, argues that it has undertaken, and continues to undertake, extensive strategic planning work.

The extent of consultation required, if any, during the preparation of the proponent's environmental assessment is a matter for the discretion of the Director General. Another point of discretion is the ability of the Department to determine whether or not an environmental assessment is adequate for exhibition.

## Safeguards

### Gateway review guidelines

From a corruption prevention perspective, the absence of clear criteria to be applied in lieu of development standards in existing LEPs creates a high level of discretion in an area where decisions can be very valuable. Any misuse of this discretion would be difficult to identify and even more difficult to prove. The draft gateway review guidelines (discussed in the previous chapter) should assist in requiring justifications for departures from existing development standards, and in requiring an objective measure of the reasonableness of a proposal, if Recommendation 14 is adopted.

### Internal review and consultation with other agencies

Departmental procedures require assessment officers to discuss with their director any decision to recommend approval or refusal of a project. Departmental directors also review all assessment reports and recommended conditions of approval.

The Department also seeks feedback from key agencies on recommended conditions of approval. The Department sees the role played by other agencies as a safeguard, as these agencies would complain if their views were ignored. In addition, the Department has developed an agreed protocol with the Local Government and Shires Associations on when a council's comment on draft conditions would be sought. These consultation arrangements are not statutory requirements, and they are limited to conditions of consent.

### Referral to the PAC

If the Minister is the proponent of a project or proposed project, the EP&A Act mandates that matters must be referred to the PAC for *review*.<sup>37</sup> The PAC may also review any aspect of a project application or a concept plan application, if requested to do so by the Minister.<sup>38</sup>

As part of this role, the Minister may request the PAC to conduct a public hearing. Part of this process is to call for submissions from interested parties. Other than this, PAC hearings are conducted in private. This is in contrast to JRPPs and local council meetings.

After its review, the PAC is required to provide a copy of its findings and recommendations to the Minister. The Minister is then required to consider the findings or recommendations of the PAC when determining a project or concept plan.

The role of the PAC as a consent authority is limited (see chapter 5). The PAC is now the decision-maker for the cases in which the Minister's ability to act impartially can reasonably be perceived as compromised; for example where an application is made by a political donor.

The Commission believes that expanding the decision-making role of the PAC would provide an important safeguard against potential corrupt conduct. As noted above, the extent of departure from existing zonings and existing development standards contained in LEPs is unrestricted when Part 3A decisions are made. Recommendation 12 and 13 deals with this issue in relation to prohibited developments. A greater degree of confidence in the operation of Part 3A would also be engendered if the role of the PAC were extended to the determination of Part 3A applications that significantly exceed the development standards in the applicable planning controls. In this regard, the Commission's views form the basis of Recommendation 18.

This approach would be consistent with the concept of providing additional safeguards for applications dealt with at local level that are reliant on significant SEPP 1

<sup>35</sup> Section 75I(2)(e), EP&A Act.

<sup>36</sup> NSW Division of the Planning Institute of Australia, *A New Planning Act for NSW*, August 2010, p.3.

<sup>37</sup> Section 75(X)1, EP&A Act.

<sup>38</sup> Section 23D(b)(ii), EP&A Act.

(Development Standards) objections, which was adopted in the *Environmental Planning and Assessment Amendment Bill 2008*. This Bill provides for a review of determinations by JRPPs for certain applications that exceed existing development standards by more than 25%. The provision has not yet been proclaimed.

In 2008, the Commission indicated its support for the Bill in its third report on corrupt planning decisions at Wollongong City Council, and reiterates this view in this report. The Commission regards the adoption of an additional safeguard for Part 4 developments relying on significant SEPP 1 objections as a sound move, which is equally appropriate to the exercise of ministerial discretion under Part 3A.

### Public scrutiny

Public scrutiny in relation to Part 3A project applications has the potential to ensure relevant issues are considered, and consequently works against any attempt to exercise improper influence. Effective public scrutiny requires information. Section 75X(2) of the EP&A Act and clause 8G of the EP&A Regulation provide that many of the documents relevant to Part 3A decisions are to be made publicly available on the Department's website, and in other locations determined by the Director General:

- Applications to carry out projects are to be made publicly available on the Department's website, and in other locations determined by the Director General.
- Environmental assessment requirements for a project determined by the Director General or the Minister are to be made publicly available on the Department's website, and in other locations determined by the Director General.
- Environmental assessments deemed adequate by the Department are placed on public exhibition for at least 30 days. These documents are to be made available on the Department's website, and in other locations determined by the Director General. During the public exhibition period, any person may make a written submission to the Director General concerning the project.
- Environmental assessment reports of the Director General to the Minister are required to be made public.
- Responses to submissions, preferred project reports and other material provided to the Director General by the proponent after the end of the public consultation period must be made available on the Department's website, and in other locations determined by the Director General. The same applies to reviews by the PAC.

Since 1 July 2010, all submissions on project applications have also been available on the Department's website.

In addition, the Department publishes the annual *Major Development Monitor*, which reports on the assessment and determination of projects under Part 3A, among other things.

As a result, a wide range of documents relating to Part 3A assessments and determinations are publicly available.

## Recommendation 18

That the *Environmental Planning and Assessment Act 1979* be amended to require the NSW Minister for Planning to refer private sector Part 3A applications, which exceed development standards by more than 25%, to the Planning and Assessment Commission for determination.

## Concept plans

### Prohibited development

A development that is prohibited under an existing LEP that has been declared to be a Part 3A project can be approved, provided a concept plan has been approved, authorised or required by the Minister<sup>39</sup> or there is a prior or concurrent listing as a state significant site in schedule 3 of the MD SEPP.

Once a project has an approved concept plan in place, the Minister can, by order published on the NSW legislation website, amend any environmental planning instrument that purports to prohibit or restrict the development.<sup>40</sup>

## Content and assessment of concept plans

### Content of concept plans

Concept plans are only required to:

- outline the scope of the project and any development options
- set out any proposal for the staged implementation of the project
- contain any other matter required by the Director General.

They may relate to only part of a project, and a detailed description of the project is not required.

<sup>39</sup> Unless the proposal is located in environmentally sensitive areas of state significance or sensitive coastal locations (see Clause 8N of the EP&A Regulation 2000).

<sup>40</sup> Section 75R(3A), EP&A Act.

## Set of criteria

Once there is an authorisation or requirement that a concept plan be submitted, prohibitions contained in LEPs cease to have force.<sup>41</sup>

As in the case of a project application, the set of criteria against which a concept plan is to be assessed are reflected in the issues identified in the DGRs produced by the Director General for each proposal.

The Minister, when deciding whether or not to give approval for a concept plan, is to consider:

- the Director General's report on the project and the reports and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report
- if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent
- any findings or recommendations of the PAC following a review in respect of the project.

In deciding whether or not to give approval for the concept plan for a project, the Minister is not bound to take into account the provisions of an LEP.<sup>42</sup>

In the case of a state significant site, the planning controls set out in schedule 3 of the MD SEPP are relevant criteria, and must be considered in the Director General's assessment report.

The Minister also has the discretion to refer the Department's assessment to the PAC for advice. In this case, the PAC will report directly to the Minister with its recommendation.

## Areas of discretion

### Authorising and requiring concept plans

There is very wide discretion available to the Minister to require or authorise the submission of concept plan applications, which have the effect of removing prohibitions.

### Assessing concept plans

Once the decision has been made that a concept plan may or must be submitted, and a concept plan is submitted for assessment, there appears to be a broad discretion to approve it. There is limited reference to the relevance

of state policies to the decision on the face of the Department's published material. While there is an internal Departmental Assessment Officers Guide in existence for the assessment of concept plans and project approval applications, there is little emphasis on consideration of strategic planning documents, such as the Metro Strategy.

There is also no requirement that an examination of permissible uses in existing LEPs and the justification for proposed departures be conducted (although existing LEPs may be taken into account and reported on in the Director General's report). This issue is dealt with in Recommendations 12 and 13, which cover projects that are prohibited under existing environmental planning instruments.

### Further assessment requirements

Once a concept plan has been approved, the Minister may determine the further assessment requirements for approval in order to carry out the project. The Minister is able under section 75P(1)(c) of the EP&A Act to determine that no further environmental assessment is required for the project or for any particular stage of the project. As a result, the Minister has broad discretion to determine what, if any, further environmental assessments are required. This could be interpreted as suggesting that a project can be approved based only on a concept plan that does not outline the project in detail.

The Department's advice is that section 75P(1)(c) should be read in conjunction with section 75D(1), which states that a person is not to carry out development that is a project to which Part 3A applies unless the Minister has approved the carrying out of the project under Part 3A (that is, without project approval). Consequently, it was suggested that the Department deals with applications on the basis that an applicant cannot commence building works based only on concept plan approval.<sup>43</sup> The Commission was also informed that sometimes concept plans contain a lot of detail (the same amount of detail that would be in a project application), and that these types of concept plans *can* be approved without further environmental assessments being required.

In this regard, the Commission is concerned that section 75P(1)(3) may be ambiguous, and believes that it should be clarified. It should be made clear on the face of the legislation that a concept plan alone is not sufficient to authorise work to begin on a project. This issue is dealt with in Recommendation 19.

<sup>41</sup> Clause 80, EP&A Regulation.

<sup>42</sup> Section 75O(3), EP&A Act (but not if the project or part of the project is located within an environmentally sensitive area of state significance or a sensitive coastal location; see clause 8N of the EP&A Regulation).

<sup>43</sup> Joint task force meeting, 22 July 2010.



## Safeguards

### Internal review

The Major Projects Panel considers proposals to carry out prohibited development.

### Public scrutiny

Applications for the Minister's approval of concept plans (and approvals of concept plans) are to be made available on the Department's website, and in other locations determined by the Director General.<sup>44</sup>

## Recommendation 19

That section 75P of the *Environmental Planning and Assessment Act 1979* be amended to make it clear that all Part 3A projects require project approval and, if applicable, concept plan approval.

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<sup>44</sup> Section 75X(2), EP&A Act and clause 8G, EP&A Regulation.



# Chapter 9: Third party appeal and review rights

## Appeal and review rights

In NSW, appeals and judicial review are conducted through the Land and Environment Court (LEC). There are separate processes for merit appeals and judicial review.

Appeal rights for applicants refused an approval are well established and are not the subject of this chapter. This chapter is concerned only with third party rights of appeal and judicial review.

Third party appeal rights and judicial review of administrative decisions have the potential to deter corrupt approaches because there can be no guarantee that any favouritism sought will succeed. As a matter of practice, however, applications for judicial review on the basis of grounds such as manifest unreasonableness, failure to take into account relevant factors and taking into account irrelevant factors are difficult to prove.

The scope for third party merit appeals is limited, in general, under the EP&A Act. The exercise of discretion under Part 3A (with few exceptions) is not subject to merit appeal.

## Part 3A declarations

Part 3A declarations (except for critical infrastructure proposals, as outlined below) can be subject to judicial review; for example on the basis that the Minister's opinion was manifestly unreasonable, having regard to the material before the Minister when the opinion was formed.

## Project approvals

In limited cases, third parties that lodge an objection to a project under Part 3A can appeal against the merits of an approval. In these circumstances, appeals are only available

if a project would have constituted designated development under Part 4 of the EP&A Act. Consequently, this excludes residential flat developments and most commercial developments. Furthermore, merit appeals are not available:

- for critical infrastructure projects
- if a concept plan for the project has been approved
- in cases where the project was reviewed by the PAC.

Third parties can, however, bring judicial review proceedings that challenge the validity of an approval. For reasons already expressed, judicial review is largely an empty remedy.

## Concept plans

Third party objectors cannot challenge the merits of a decision to approve a concept plan but concept plans are subject to judicial review (with the exception of critical infrastructure projects, as outlined below).

## Critical infrastructure projects

Judicial review proceedings regarding critical infrastructure projects can only be brought with the approval of the Minister.

Merit appeals are not available for critical infrastructure projects. While appeal and review rights for critical infrastructure projects are severely limited, most of these projects concern state infrastructure developments (as opposed to private development). From a corruption perspective, they represent a lower level of risk.

## Extending appeal rights

The generally limited availability of appeal rights under Part 3A means that an important check on executive government is absent from the ministerial discretion process. Leslie Stein (2008) has noted that the concept of redress has supported the introduction of planning appeals, and that:

*Redress also dovetails with the requirement for the administrative accountability of decision-makers, and institutional arrangements for this purpose are part of the fabric of the legal system. Viewed in this light, an appeal process is merely a check on the exercise of planning power and does not arise from any innate fear or distrust of councils.*<sup>45</sup>

The same is true of appeals against decisions of a Minister or their delegate. These appeals should be seen as a check that is a normal part of the fabric of Australian law and public administration, not for suggesting an innate fear or distrust of the Minister.

The Commission has previously recommended that the right of third parties to a merit appeal should be extended. The Commission noted the wide discretion in the planning system in its *Report on investigation into Randwick City Council* (February 1995). It also observed that in encouraging fairness and proper decision-making, there is only so much that can be achieved through exhortation by bodies such as the Commission. Instead, the Commission argued that what was needed was more effective and independent accountability mechanisms that would provide individuals with an opportunity to have a particular decision appealed – the extension of merit appeal to the LEC providing an avenue for such an appeal.

Accordingly, the Commission recommended:

*Where residential property is directly affected by residential development and building work for which approval (under planning or building control) has to be obtained, and where there is a discretion to be exercised by the approval authority, the owner or inhabitant of the affected property should have a right of appeal to the L&E Court on the merits. Generally costs should be awarded against an unsuccessful third party applicant.*

More recently, the Commission also had cause to recommend an extension to third party merit appeals in the context of Part 3A in the publication *Corruption risks in NSW development approval processes*.

## National approach to third party appeals

A Development Assessment Forum (DAF) has been established at national level to guide the various Australian jurisdictions in developing efficient, effective and nationally harmonised development assessment systems. Membership of the DAF includes the three spheres of government – the commonwealth, state/territory and local government – as well as the development industry and related professional associations.

The recommendations of the DAF have sought to limit the availability of third party merit appeals. In March 2005, the DAF published its *Leading Practice Model for Development Assessment*, which defines the 10 leading practices that a development assessment system should exhibit. Leading practice 10 deals with third party appeals and provides:

*Opportunities for third party appeals should not be provided where applicants are wholly assessed against objective rules and tests.*

*Opportunities for third party appeals may be provided in other limited cases.*

*Where provided, a review of a decision should only be granted against the same policies and objective rules and tests as the first assessment.*<sup>46</sup>

The issue of corruption prevention is central to this paper, and the Commission does not resile from its support for merit appeals, where that is an appropriate response to a real corruption risk. Nonetheless, the Commission takes account of the recommendations of the DAF and the necessity to avoid unnecessary delays in the processing of development applications. A degree of consistency with the national approach to third party appeals could be achieved by limiting third party merit appeals to certain “high corruption risk” situations. These could include limiting third party merit appeals to private sector projects (retaining the status quo for public infrastructure), which represent a major departure from existing development standards. Projects constituting significant prohibited development have already been dealt with in Recommendations 12 and 13. Consequently, the Commission has limited the scope of the following recommendation to projects representing a major departure from development standards.

Additional controls on the abuse of merit appeals (that is, made for frivolous, obstructive, commercial or coercive reasons) could include:

<sup>45</sup> *Principles of Planning Law*, op cit, p.252.

<sup>46</sup> Development Assessment Forum, *A Leading Practice Model for Development Assessment in Australia*, March 2005.

- short time limits for lodging an appeal
- restricting appeals to original objectors
- restricting appeals to those objectors with leave.

## Recommendation 20

That the NSW Government expands the availability of third party merit appeals under Part 3A of the *Environmental Planning and Assessment Act 1979* to private sector projects, where the project constitutes a major departure from existing development standards. Controls on the abuse of merit appeals (that is, appeals made for frivolous, obstructive, commercial or coercive reasons) should also be introduced.



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