Summary of the

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (PART 3A REPEAL) Act 2011

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Introduction

1. As the name suggests, the principal effect of the Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 (“Part 3A Repeal Act”) is to remove Part 3A from the existing Environmental Planning and Assessment Act 1979 and replace it with provisions designed to confine the types of development for which the Minister responsible for the EP&A Act is the consent authority. The Part 3A Repeal Act also makes minor adjustments to the way in which the PAC and JRPP operate.

2. The amendments were introduced in response to criticisms that the planning system in NSW had become too centralised. The purpose of the Part 3A Repeal Act is to fulfill a commitment of the O’Farrell Liberal Government to return a broad range of decision-making powers to local communities and provide a planning framework for genuinely State significant development that provides certainty for investment and the efficiency.

3. The policy behind the amendments is to correct the imbalance between the decisions that should be made by local communities and the decisions that are genuinely of State significance. The amendments are designed to give local government more say.


5. The Government estimates that these changes will return around 55 per cent of development applications back to councils and will allow regional panels to concentrate on the determination of truly regionally significant development.

Summary of Amendments

6. Part 3A (ss75A – 75ZA) of the EP&A Act is repealed, in its entirety.

7. A new Division is to be inserted (to be called Division 4.1) under Part 4 of the EP&A Act to establish the new assessment pathway for State significant development (ss89C to 89L). The section numbers and headings contained in the new Divisions are as follows:

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1 This Paper has been sourced from the Minister’s Second Reading Speech for the Part 3A Repeal Bill, NSW Parliament Hansard 20 June 2011, p2783 and the amending legislation.
89C Development that is State significant development
89D Minister consent authority for State significant development
89E Consent for State significant development
89F Public participation
89G Regulations—State significant development
89H Evaluation of development application (s 79C)
89I Biobanking—special provisions
89J Approvals etc legislation that does not apply
89K Approvals etc legislation that must be applied consistently
89L This Division prevails

8. A new Part is to be inserted after Part 5 (to be called Part 5.1) of the EP&A Act to establish the new assessment pathway for State significant infrastructure (ss115T to 115ZM).

9. A new Schedule is to be inserted after Schedule 4 (to be called Schedule 4A), which outlines the classes of regional development to which JRPPs will be the consent authority (these have largely come across from the State Environmental Planning Policy (Major Development) 2005, with some changes.)

10. A new Schedule is to be inserted in the EP&A Act after Schedule 6 (to be called Schedule 6A). This schedule establishes transitional arrangements for applications pending consent and already approved under the unamended Part 3A (the Government estimates that over 500 pending Part 3A projects worth over $60 billion are caught in the Part 3A system)

11. The Part 3A Repeal Act changes the membership, role and function of the Planning Assessment Commission and Joint Regional Planning Panels.

12. The existing State Environmental Planning Policy (Major Development) 2005 will be repealed in part and a new SEPP, called State Environmental Planning Policy (State Environmental Planning policy (State and Regional Development) 2011 is to be made.

13. The Part 3A Repeal Act also makes changes to appeal rights.
State Significant Development

14. The Minister for Planning may not grant consent to development that is wholly prohibited by an environmental planning instrument (s89E(2)), but consent for partly prohibited development may be granted (s89E(3)). A development application may be considered for prohibited development in conjunction with a proposed environmental planning instrument (s89E(5)).

15. An environmental impact statement must accompany a State significant development application, even if the development is not otherwise designated development (s78A(8A)).

16. Provisions of the EP&A Act applying to designated development, advertised development and integrated development do not apply to state significant development, except post determination notification (s81(4)).

17. Current provisions relating to the following matters will apply to state significant development under the new regime:
   a) application of approvals under other legislation (s89J & 89K);
   b) biobanking (s89I);
   c) the following sections of Part 4: 79C (heads of consideration), 95 (llapping), 96 (modifications), 97 (applicant appeal rights); and
   d) section 123.

18. Development standards applying to state significant development can be varied where appropriate under State Environmental Planning Policy 1.

19. The Minister may require modifications to a State significant development proposal before approving it.

20. Amended proposals must be re-exhibited (s89F(4)).

State significant infrastructure and critical state significant infrastructure

21. State significant infrastructure (including “critical State significant infrastructure”) is development identified in a SEPP, or by an order of the Minister (s115U). The Minister is the consent authority for state significant infrastructure (s115W). In order to declare development as critical state significant infrastructure the Minister must form the opinion that the development is essential for the State for economic, environmental or social reasons (s115V).

22. State significant infrastructure largely includes classes of development undertaken by, or for, public authorities. These are works that were traditionally determined by the Government under Part 5 of the EP&A Act, before Part 3A was introduced.
23. A 3 month time limit applies to the commencement of any such judicial review proceedings in regard to any State significant infrastructure project.

24. The main distinction between State significant infrastructure and critical infrastructure is that for State significant infrastructure an assessment is undertaken to determine whether the development should proceed. However, for critical infrastructure the proposal will generally already be recognised as a priority to proceed and the assessment process assists in determining the details of how it will proceed.

**Revised Functions of the PAC**

25. The PAC has some additional functions in relation to reviewing proposals and conducting public hearings (s23D(1)(b), EP&A Act).

26. The chairperson is now included as a member of the PAC. Membership can range from 4 to 9 members, including the chairperson. Members are entitled to remuneration and allowances.

27. Members of the PAC may:
   a) not hold office for more than 6 years in total (this is intended to strengthen the independence of the PAC); and
   b) be appointed on either a full-time or part-time basis.

28. Meetings where determinations of development applications are made will generally be open to the public to give opportunities to communities, local councils and proponents to address the Planning Assessment Commission directly.

**Revised Functions to JRPPs**

29. The chairperson is now included as a member of the JRPP.

30. The Minister is required to obtain the concurrence of the Local Government and Shires Associations to the appointment of the chairperson of a JRPP unless the Association (cl 2.2, sch 4):
   a) does not respond to the request within 21 days, or
   b) refuses concurrence on 2 occasions with respect to the same appointment.

31. Among the types of development applications set out in Schedule 4A, the JRPP will be consent authority for applications:
   a) with a capital investment value (CIV) of between $10M and $20M if the DA remains undetermined by the local council after more than 120 days, unless the chair of the JRPP considers the delay was caused by the applicant (cl 10, sch 4A);
b) if the Minister deems the council's performance in dealing with those development proposals to have been unsatisfactory (cl 11, sch 4A).

32. Development within the City of Sydney LGA is excluded from schedule 4A (cl 2(e), sch 4A).

33. The CIV threshold for the general development category of development to be determined by the JRPP has increased from $10M to $20M (with the exception of council and crown applications). Other classes of development applications determined by the JRPP will not materially change.

Proposed SEPP (State and Regional Development) 2011

34. A consultation draft of the proposed SEPP was publically exhibited from 18 August 2011 to 2 September 2011. The proposed SEPP is due to commence “on the commencement of Schedule 1.1 to the Part 3A Repeal Act.”

35. The proposed SEPP amends a number of other SEPPs (in part) including:
   a) State Environmental Planning Policy (Infrastructure) 2007 as set out in cl 6.11 of schedule 6; and
   b) State Environmental Planning Policy (Major Development) 2005 as set out in cl 6.12 of Schedule 6.

36. The proposed SEPP aims to:
   a) identify development to which the State significant development assessment and approval process under Part 4 of the EP&A Act applies,
   b) identify development that is State significant infrastructure and critical State significant infrastructure,
   c) confer functions on joint regional planning panels to determine development applications.

37. Clause 11 of the proposed SEPP provides that development control plans do not apply to State significant development.

38. Types of development to be included in the proposed SEPP include:
   a) coal mining and other large scale mining resource;
   b) primary industry projects such as petroleum and extractive industries;
   c) projects such as timber milling, intensive livestock industries, aquaculture, agricultural and food processing, as well as metal and chemical processing and major industrial manufacturing, storage and distribution facilities;
   d) category 1 remediation of contaminated land;
e) major social infrastructure projects valued over $30M such as large scale hospitals and medical facilities, correctional centres, schools, TAFEs and universities, major sporting facilities, and cultural facilities such as performing arts centres, museums and exhibition and convention centres;

f) certain public infrastructure projects over $30M such as electricity generation, port and wharf facilities, water supply works, sewage and wastewater treatment plants, private road and bridge projects, industrial heavy rail lines, rail freight and intermodal terminals and related rail corridor developments;

g) certain infrastructure such as electricity generation, sewage treatment, water supply works and resource recovery and waste facilities such as landfills depending on their scale and whether they are located in environmentally sensitive areas.

h) development on specified sites, including several sites from the Major Development SEPP (Sydney Opera House, Luna Park, Barangaroo, Sydney Olympic Park, the Bays Precinct, Honeysuckle, Warnervale, The Rocks, Darling Harbour, Taronga Zoo, Fox Studios, Moore Park and Sydney Sports Stadiums, Redfern Waterloo sites and Penrith Lakes).

39. Generally, thresholds for employment generating numbers and capital investment value that applied under the Major Development SEPP have increased. For example from $15 million to $30 million for health facilities and from $20 million to $50 million for large warehouse and distribution centres. Residential, commercial, retail, coastal subdivision and marina projects are no longer state significant development.

40. The Major Development SEPP is to be amended to:

   a) remove provisions related to Part 3A and JRPPs;

   b) remove Schedules 1 and 2 of the SEPP, which identify classes of major projects; and

   c) make other consequential amendments arising from the repeal of Part 3A.

**Appeal Rights**

41. Applicant appeal rights under section 97 of the EP&A Act are switched off for designated development if the development application has been the subject of a public hearing by the PAC (s97(7)).

42. Objector appeal rights under section 98 of the EP&A Act will apply to State significant development, but only if the development application has not been the subject of a public hearing by the PAC (s98(4) and (5)).
43. Except as otherwise approved by the Minister, ss122 to 124A of the EP&A Act and ss252 & 253 of the POEO Act do not apply to critical State significant infrastructure (s115ZK). However judicial review is still available in line with the principles recognised in 2010 by the High Court in the case of *Kirk v Industrial Court of NSW*.

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