

fact sheet

ABORIGINAL CULTURE AND HERITAGE



New South Wales
Aboriginal Land Council

4

Part 3A developments

This Fact Sheet provides information about the operation of Part 3A planning laws in NSW. It is one of a series of Planning Fact Sheets which have been developed for Local Aboriginal Land Councils (LALCs) and the Aboriginal community by the NSW Aboriginal Land Council (NSWALC).

Please Note: While all care has been taken in the preparation of these Fact Sheets, they are not a substitute for legal advice in individual cases. The information in this Fact Sheet is current as of March 2011.

The planning system in NSW

The *Environmental Planning and Assessment Act 1979*, also known as the EP&A Act, is the main planning law in NSW. This law is administered by the NSW Department of Planning.

For more information on the EP&A Act see NSWALC Planning Fact Sheet 1 – *Introduction to NSW Planning Laws*.

What are Part 3A developments?

Part 3A developments are **major projects** that are either listed under the *State Environmental Planning Policy (Major Developments) 2005*¹ (SEPP Major Development), or which the Planning Minister believes are of state or regional environmental planning significance.

¹ A copy of this policy is available at the NSW legislation website www.legislation.nsw.gov.au - click on 'Browse', then under the heading 'Browse in force', click on 'S' under 'EPs'. Scroll down and click on *State Environmental Planning Policy (Major Developments) 2005*. The types of developments that are major projects are listed in the schedules at the end of the policy (see schedules 1,2,3 and 5)

Note: In March 2011 the NSW Liberal Party and National Party (the Coalition) were elected to Government.

The Coalition has outlined in recent policy statements that it plans to repeal Part 3A and commence an overhaul of the NSW Planning system.

Examples of Part 3A projects can include large infrastructure developments such as roads, railways, pipelines, mining projects, sensitive coastal developments and electricity generators.

The definition of what projects can be defined as Part 3A projects is very wide and can include private developments ranging from minor subdivisions to major urban renewal projects. This is because even if the type of development is not listed in the SEPP Major Development, it can still be declared a major project by the Planning Minister if he or she thinks it is of State or regional planning significance.

If a project has been declared as a Part 3A project, the Planning Minister can make an additional declaration that the project is also a '**critical infrastructure project**' if the Minister is of the opinion that the project is essential for the State for economic, environmental or social reasons.²

Unlike other types of development, Part 3A projects do not need to comply with the normal rules for environmental and heritage assessments.

² *Environmental Planning and Assessment Act 1979* (NSW), s75C

PLANNING

March 2011

Rules for Part 3A developments

Examples of laws which Part 3A projects do not need to comply with include:

- The requirement for an Aboriginal Heritage Impact Permit under the *National Parks and Wildlife Act*. A permit is normally required from the Department of Environment, Climate Change and Water (DECCW) if a development is likely to impact on an Aboriginal object or place.
- Consents issued under *Heritage Act 1977*, including the consents normally required if a development is going to impact on a site registered on the State Heritage Register.
- Provisions in Local Environmental Plans (LEPs).
- Consents under the *Threatened Species Conservation Act 1995*, *Native Vegetation Act 2003* and *Fisheries Management Act 1994*. Interim protection orders and stop work orders to protect threatened species cannot be issued against a critical infrastructure project.

However, some Part 3A projects are required to undertake heritage and environmental assessments similar to those required for other types of development and some may still be required to comply with the *National Parks and Wildlife Act*.

The Director-General of the Department of Planning can require a developer to undertake studies or consult with the community about a project as a condition of its approval. Requirements set out by the Director-General are published on the Department of Planning website as part of the **Major Project Tracking System**.³ They are called 'Director-General's Requirements'.

The Department of Planning has also developed guidelines for consultation with the Aboriginal community, and when a heritage assessment is to

be undertaken, which are available on request from the Department.⁴

These guidelines are currently under review by the Department.

Key steps in the assessment of Part 3A projects

1. Lodging an application

The developer, also known as the proponent, applies to the Department of Planning for their project to be assessed under Part 3A of the *Environmental Planning and Assessment Act*.

In some cases, the Minister for Planning can 'call in' a project for assessment under Part 3A. This means that the Minister for Planning has the power to decide whether a certain project is assessed under Part 3A, even if the developer didn't apply under this section.

To lodge a major project application, a developer usually puts in a detailed application, complete with detailed plans and environmental assessments. However, a developer can also lodge a 'concept plan' for approval, which provides only the outline of the development, sometimes including a number of different available options.

Having a say

Although there is only a limited opportunity to *formally* comment on Part 3A projects, if LALCs are aware that a project has been submitted to the Department of Planning they should write directly to the Department and the Minister for Planning outlining their concerns and request that community consultation and a heritage assessment are made a requirement of the project approval.

LALCs can also request that the heritage assessment be undertaken by an independent body – that is, not by the developer, or any other party with vested interests in the development.

³ Department of Planning's Major Project Tracking System is available at <http://majorprojects.planning.nsw.gov.au/>

⁴ Department of Planning and Department of Environment and Conservation, 'Part 3A EP&A Act Guidelines for Aboriginal Cultural Heritage Impact Assessment and Community Consultation' September 2007 (currently under review).

2. Director General's requirements

The Director-General of Planning will make a decision about the type of environmental assessment required for a development. These are known as Environmental Assessment Requirements (EARs) and are issued to the developer.

The Director-General of Planning must consult with relevant public authorities (such as DECCW and local councils) so that key issues raised by those authorities can be included in the assessment requirements.⁵

3. Environmental and Heritage Assessments

If an environmental or heritage assessment is a requirement of the project approval, the draft reports must be submitted to the Department of Planning. The Department will make a decision about whether the reports meet the requirements set out by the Director-General.

4. Exhibition period

If the Director-General is satisfied with the assessments, the project proposal and the assessments must be made publicly available for at least 30 days.⁶

The Department of Planning advises the developer about whether advertisements about the exhibition of Part 3A projects are to be placed in newspapers, and whether relevant public authorities and local council/s are to be notified. Adjacent landowners may also be notified.

Having a say

This is the only formal opportunity to comment on the project. During the exhibition period, any person can make a written submission to the Director-General of the Department of Planning. Submissions could address concerns in relation to the impact of the project on Aboriginal heritage places and objects, and could urge the Director-General to impose requirements on the developer to take measures to avoid any harm to Aboriginal objects or places, or include buffer zones.

⁵ *Environmental Planning and Assessment Act 1979, s75F(4)*

⁶ *Environmental Planning and Assessment Act 1979, s75H(3)*

5. Consideration of submissions

After the public consultation process is concluded, the Director-General must then give an environmental assessment report to the Planning Minister which includes the proponent's environmental assessment and any proposed changes to it, a copy of any report by the Planning Assessment Commission, and any comments by the Director-General or other public authorities.

The Director-General's Report is the main document on which the Planning Minister relies on when deciding whether or not to approve the project.

The final Director-General's Report can be made public, and if so will be accessible through the Major Project Tracking System (but there is no legislative requirement for this). However, environmental assessment reports by the Director-General to the Planning Minister must be made publicly available.⁷

There is no requirement for the project to be re-exhibited if the project is revised. However, the Director-General may require the developer to submit a 'preferred project report' that outlines any proposed changes to the project to minimise its environmental impact. If significant changes to the project are proposed the Director-General may require the developer to make the preferred project report available to the public.⁸

Having a say

LALCs should write directly to the Director-General of the Department of Planning to outline any concerns, and to request that the developer respond to these concerns.

6. Approval

The Minister for Planning either approves or refuses the proposal. The Minister can approve the project with modifications, or can impose conditions on approval.

The Minister's decision will be displayed on the Department's website under 'determinations'.

⁷ *Environmental Planning and Assessment Act 1979, s75X(2)*

⁸ *Environmental Planning and Assessment Act 1979, s75O(6) and 75O(7)*

Having a say

LALCs should write directly to the Minister for Planning to request that conditions be placed on the project prior to it being approved. These conditions could include that there be ongoing site evaluations by the Aboriginal community during development, and a commitment to undertake a new cultural heritage assessment if the development uncovers any objects or sites of Aboriginal significance.

Other possible conditions that the community could seek to have imposed on the developer include compensation from the developer if Aboriginal heritage is to be impacted by the development.

Appealing Part 3A projects

There are limited appeal rights against Part 3A major projects. Appeals to the Land and Environment Court of NSW are available in some limited circumstances.

Only persons who made a submission during the exhibition stage of the project are able to appeal.

There are other limitations on appeals to Part 3A projects. For example, if the development is a 'critical infrastructure' project, there is no right to appeal. Also, if the development is approved by way of a concept plan, there is no right to merits appeals.

For more advice about how to challenge a **major project**, contact the free advice line of the Environmental Defender's Office on 1800 626 239.

Where to find out more

NSWALC Fact Sheets, including the 'Site Protection' series, are available from www.alc.org.au, or by calling the NSWALC Policy and Research Unit on 02 9689 4444.

- Fact Sheet 1 – *Introduction to NSW Planning Laws*
- Fact Sheet 2 – *Introduction to Local Environmental Plans*

- Fact Sheet 3 – *Planning Laws and Aboriginal Culture and Heritage*
- Fact Sheet 4 – *Part 3A Developments*
- Fact Sheet 5 – *Local Councils and Public Land*
- Fact Sheet 6 – *Land Zoning and Local Environmental Plans*

Other useful contacts

NSW Department of Planning

Web: www.planning.nsw.gov.au

Head Office – Sydney: (02) 9228 6111

Email: information@planning.nsw.gov.au

NSW Heritage Office (part of the Department of Planning) –

Web: www.heritage.nsw.gov.au

Phone: (02) 9873 8500

Email: heritage@planning.nsw.gov.au

NSW Department of Environment, Climate Change and Water (DECCW) -

Web: www.environment.nsw.gov.au

Head Office – Sydney: (02) 9995 5000

Email: info@environment.nsw.gov.au

