

## EXPLANATORY NOTES

### **AMENDMENT TO THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (EPA Act) BY A NEW REGULATION UNDER THE NATION BUILDING AND JOBS PLAN (STATE INFRASTRUCTURE DELIVERY) ACT 2009**

*The purpose of this document is to advise consent authorities, other planning system users, Infrastructure Project proponents and the public of amendments made to Schedule 6 of the EPA Act by a new regulation under the Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009. The Nation Building and Jobs Plan (State Infrastructure Delivery) Amendment (Planning Legislation) Regulation 2011 commenced on 3 March 2011 and inserted a new Part 25 (clauses 137 – 141) into Schedule 6 of the EPA Act.*

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#### **Introduction**

The *Nation Building and Jobs Plan (State Infrastructure Delivery) Act 2009* (the Act) came into effect in February 2009. The Act was introduced to ensure the rapid and coordinated delivery of education, housing and other community projects (Infrastructure Projects) within NSW that were funded (wholly or in part) by the Commonwealth Government's Nation Building and Jobs Plan program (Nation Building Program).

The Act established an Infrastructure Coordinator General (ICG) with powers to streamline the planning approval process by exempting Infrastructure Projects from development control legislation (including the EPA Act). As a policy, projects were considered under the NBJP Act where there was a demonstrated risk that a Project would not meet the delivery deadlines imposed by the Australian Government..

Not all projects associated with the Nation Building Program were approved using this Act. Many projects relied on existing Environmental Planning Instruments such as *State Environmental Planning Policy (Infrastructure) 2007* (ISEPP) and the *State Environmental Planning Policy (Affordable Rental Housing)* (ARHSEPP).

The Infrastructure Projects to which the Act applied included the:

- Building the Education Revolution (BER) program for primary schools, science and language centres in high schools and facilities at TAFE colleges;
- National School Pride program for school maintenance projects;
- Social Housing Initiative (SHI) funding for building 6000 new affordable housing units in the State; and
- Community Infrastructure program for local government projects.

The Act allowed for the ICG to exempt specific Infrastructure Projects from development control legislation with or without issuing an Authorisation.

The first Authorisation was issued in June 2009 and the ICG has now issued Authorisations for some 774 projects under the Act. Two hundred and ninety two (292) amendments to these authorisations were also issued. The majority of these have been for schools projects such as new halls and classrooms.

Seventy three (73) Authorisations were issued for medium density social housing projects. Two council community infrastructure projects were authorised.

Applications for these projects were submitted to the ICG in much the same manner as a development application under Part 4 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

A full merit assessment was undertaken by qualified planning staff and a report prepared for consideration by the ICG. In most cases, approval by the ICG was granted by the issuing of an order under section 23 of the Act, exempting the project from certain development control legislation, including parts of the EPA Act, and an 'Authorisation' under section 24 of the Act that outlined the conditions of approval.

In some cases for minor projects, an Order under section 23 of the NBJP Act was issued and no Authorisation was required (see discussion on 'exempt' development, below).

Most Infrastructure Projects that required Authorisation under the Act have now commenced and many are complete. At present, these developments have no status under the EPA Act. As projects are completed, a mechanism is required to give the developments legal status under the EPA Act and to allow the Infrastructure Projects to be modified in the future.

A Regulation under section 29 of the NBJP Act, called the *Nation Building and Jobs Plan (State Infrastructure Delivery) Amendment (Planning Legislation) Regulation 2011* (the Regulation) came into force on **3<sup>rd</sup> March 2011** to enable the transition of NBJP Act Authorisations to the EPA Act.

The Regulation inserted a new Part 25 (clauses 137 – 141) into Schedule 6 (*Savings and Transitional and other Provisions*) of the EPA Act. These provisions can be found on the NSW legislation website.

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+203+1979+cd+0+N>

### **Object of the Amendments**

Part 25, Schedule 6 of the EPA Act provides for the process to:

- deem all Authorisations issued for Infrastructure Projects under the NBJP Act to be development consents, subject to the conditions specified in those Authorisations;
- deem all Infrastructure Projects under the NBJP Act for which an Authorisation was not required, to be exempt development, and
- apply the provisions of the EPA Act to those Infrastructure Projects from the date of transition, in particular provisions for the modification of development consents and relating to the erection and use of buildings.

### **Transition from authorisation to a development consent**

(clause 138(1), Schedule 6, EPA Act)

An authorisation under the NBJP Act will become a development consent under the EPA Act, for the development comprising the Infrastructure Project, when the ICG has certified in writing that Part 25, Schedule 6 of the EPA Act applies to the project.

This certification will generally be given after the proponent has sent the Taskforce Office the construction and occupation/completion certification for the project and the Taskforce has completed an audit of the submitted documentation, to examine compliance with the conditions of the Authorisation.

The proponent and the relevant Council will be advised in writing that the certification has been issued (see clause 140(1), Schedule 6).

### **Conditions and provisions of nation building consents**

(clause 138(2) – (5), Schedule 6)

The conditions of the Authorisation will become the conditions of the development consent and any reference to the ICG in the conditions is to be read as a reference to the relevant council.

The development consent will be effective and operate from the date that the Authorisation was issued. As all Authorisations that will be certified will have physically commenced there is no need for any provision for a nation building consent to 'lapse'.

The consent authority is deemed to be the council in the area that the project is situated. The Authorisation will therefore become a council consent.

### **Projects that will become exempt development under the EPA Act**

(clause 139, Schedule 6)

Section 23(1)(a) of the NBJP Act allows the ICG to make an Infrastructure Project or class of project 'exempt' from development control legislation without issuing an Authorisation.

In relation to SHI funded **affordable housing**, Orders were issued to allow the conversion of Housing NSW bedsit units to one bedroom units, on certain sites, subject to the terms and conditions of the Order.

In relation to BER funded **government schools**, Orders were issued to:

- allow the construction of a small school building known as the 'BDR' on certain school sites without planning approval, provided the terms of the Order were met; and
- to allow electricity substations on school sites without planning approval or notification under the ISEPP or the *Electricity Supply Act 1995* (Electricity Act) provided the terms of the Order were met.

The Regulation allows that upon certification by the ICG, the above classes of infrastructure projects will become 'exempt' development under the EPA Act.

There were also Orders issued by the ICG under section 23(1)(a) to:

- allow the demolition of existing dwellings on social housing redevelopment sites to occur without planning approval, subject to the terms of the Order;
- exempt certain social housing redevelopment sites from the notification requirements under *State Environmental Planning Policy no. 55 – Remediation of Land* (SEPP 55), subject to the provisions in the Order being met; and
- exempt certain substation development on affordable housing sites from the requirement to notify the council and adjoining neighbours under the ISEPP, subject to the provisions in the Order being met.

For the above projects, no certification will be given under Schedule 6 of the EPA Act as there is no physical outcome that needs to be recognised in the EPA Act associated with these Orders.

#### **Notification of certification to the council**

(clause 140, Schedule 6)

Clause 140 of Schedule 6 requires the ICG to notify the council when certification has been issued.

As a matter of policy, for projects **where an Authorisation was issued**, the council will be sent a copy of the:

- certification by the ICG under clause 139(c) of Part 25, Schedule 6 of the EPA Act; and
- Authorisation (including the most recent amendment, if any). This will become a development consent, as if issued by the council;

For background information purposes only, Council will also be forwarded the:

- original assessment report prepared by the Taskforce Office, and the report for any amendments; and
- Order issued under section 23(1)(a) of the NBJP Act, that exempted the infrastructure project from specified development control legislation. This will not apply to any further development.

It is noted that the council was forwarded a copy of the Order and Authorisations (including amendments, if any) for all projects at the time an Authorisation was issued in its area. A fresh copy of these documents will be forwarded with the certification to ensure that councils have complete records.

A copy of the certification will also be sent to the proponent.

For projects where no authorisation was issued, but there was **only an Order under section 23 of the NBJP Act issued**, these will become deemed exempt development.

The Council will be sent a copy of the relevant s23(1)(a) Order for their records and a list of sites to which the Order applied. This will be sent progressively as the substations, BDR buildings and bedsit units are completed. The proponents (being either Housing NSW or the Department of Education and Training) will also be notified.

**Register of certification to be kept by the ICG**

(clause 140(2), Schedule 6)

The ICG will keep a register of certificates. This register, together with the files relating to each infrastructure project will be held in the Taskforce Office, in the Department of Premier and Cabinet.

**Council to keep a register of notices of certification**

(clause 140(3) – (5), Schedule 6)

Each Council is to keep a register of notices sent to it by the Taskforce Office. This may be part of the register of development consents that is required to be kept under section 100 of the EPA Act.

**Section 149 Certificates**

(clause 140(6), Schedule 6)

On the issue of an Order under section 23(1)(a) of the NBJP Act to exempt a project from certain development control legislation, and the concurrent issue of an Authorisation for the Infrastructure Project, Councils were required (by section 26 of the NBJP Act) to place a notation on the section 149 Planning Certificate giving details of the Order and Authorisation under the NBJP Act. Following receipt of notification of certification, Councils will no longer be required to include this notation on any s149 certificate issued after that date.

**Use of facilities erected with a nation building consent**

(clause 141(1), Schedule 6)

Section 81A of the EPA Act will continue to apply to nation building consents. Section 81A(1) states that a development consent that enables the erection of a building is sufficient to authorise the use of the building when erected for the purpose for which it was erected, subject to an occupation certificate having been issued. This means that if approval is given for a school building structure, approval is also given to the building's use as a school building.

**Future modifications of nation building consents**

(clause 141, Schedule 6)

Clause 141, Schedule 6 exempts the nation building consent from certain sections of the EPA Act that are not relevant given that a planning approval has already been issued. However, it allows certain provisions to apply when an application to modify a project is lodged under section 96 of the EPA Act. For example, section 79C(1) does not apply to the nation building consent, as it has already been determined, however, the requirements for consideration under section 96, including for example consideration of s79C, still apply for any modification application.

It should be noted, that the community or commercial use of school facilities was not approved in NBJP applications. Future commercial or community use of school buildings such as a new school hall will require a development application to be submitted to the council and an assessment will proceed on merit.

Once a project is transitioned to the EPA Act, any changes may be made via section 96 of the EPA Act, or where the changes do not meet the tests for section 96, via a new development application, lodged with the Council.

In order to allow changes that come under the ambit of section 96 to be considered by Councils, new clause 141(2), Schedule 6 stipulates that the Council must not consider any provisions of an environmental planning instrument or development control plan that would 'prohibit' the modification.

For example, a medium density affordable housing development was approved in a mixed use zone, where normally a component of commercial space would be required. If Housing NSW or the Community Housing provider that is managing that site wished to lodge a s96 application for a car port over a car space in the development, the council would not be able to refuse the modification application on the basis that the project was not permissible in the zone.

This provision will allow for the modification of development that was authorised under the NBJP Act, but which would otherwise have been prohibited under an environmental planning instrument, such as a local environmental plan (LEP). There are a limited number of these projects, and the relevant Councils will be advised of these in more detail.

Clause 141(2), Schedule 6 also provides that in considering any future section 96 applications, a Council must not refuse consent on the basis of any non-discretionary development standard in a regulation or environmental planning instrument if the non-compliance has already been allowed by the nation building consent. There are a limited number of these projects for which this provision may be required.

Without these provisions in the new Part 25, Schedule 6 for the limited number of authorised projects that were prohibited by zoning or did not comply with certain non-discretionary development standards, the Council would be unable to approve modifications. This would be an unacceptable outcome as it would mean that changes within the ambit of section 96 of the EPA Act would not be possible in the future.

On those sites where there is a zoning issue, if future development warrants a development application (ie it is of a scale that cannot be dealt with as a modification under section 96), the development will be subject to the zoning rules that apply at that time.

Clause 141, Schedule 6 does not allow consents issued for the purpose of seniors or affordable housing to be modified under section 96 to change the use to another residential use. That change of use will require a development application.

#### **Future modifications or new development applications for schools** (clause 141(3), Schedule 6)

In some limited cases, with the support of the local Council, new schools were authorised under the NBJP Act where due to a zoning anomaly, a school use was prohibited.

New development at these schools will be possible by virtue of the existing provisions in the ISEPP. These provisions make permissible with consent educational establishments on land where there is an existing educational establishment or expansion of existing educational establishments on land adjacent to an existing educational establishment. This would include a site approved for a school under the NBJP Act. No specific provision is therefore required in Part 25, Schedule 6 to address this.

Section 96 modifications are also facilitated by clause 141(3), Schedule 6 which provides that where the consent relates to an educational establishment then any other development for the purpose of an educational establishment is taken to be 'substantially the same development', for the purposes of section 96 of the EPA Act.

### **Infrastructure projects where construction has been staged**

Section 81A of the EPA Act applies in its entirety to nation building consents. There are therefore implications for the on-going application of each subsection.

Section 81A(2) of the EPA Act states that the erection of a building requires the issue of a construction certificate and the appointment of a PCA and associated requirements. Reference is also made for the Crown to obtain certification under s109R prior to construction commencing. Section 81A(3) contains similar provisions in relation to subdivision. Section 81 A (2) and (3) apply to nation building consents. All non-government projects authorised under the NBJP Act were subject to the requirements to obtain Part 4A certificates under the EPA Act. This part of the development control legislation was not 'turned off'.

Clause 141(1), Schedule 6 preserves the application of section 81A to nation building consents. For projects where the ICG approved development was to be constructed in stages, further stages may be undertaken under the EPA Act, after certification for the first (Nation Building funded stage) has been given.

For example, an authorisation was issued for two stages of a school hall project. Stage 1 was largely funded under the Nation Building program, and certification under Part 25, Schedule 6 will be given when this stage is finished.

However, additional works, integral to the funded component were authorised. As a result of section 81A, the school is required to obtain a construction certificate for the second stage. This may occur after the first stage of the project has been certified. The administration of the second stage will be undertaken wholly under the EPA Act by the appointed principal certifying authority.

### **Implications for development that would have been Integrated Development**

Many NBJP school projects were assessed by the Taskforce as they 'missed out' on being Complying Development under the EPA Act because they were located on bush fire prone land. In more limited cases, some school projects would have been integrated development with respect to the *Heritage Act 1977* (Heritage Act) (as a State heritage item was located on the site).

The Orders issued under section 23 of the NBJP Act 'turned off' the operation of the other Acts, such as the *Rural Fires Act 1977* and the Heritage Act. Other Acts not covered by integrated development such as the *Native Vegetation Act 2003* were also 'turned off' for the determination of NBJP applications.

The Taskforce Office made referrals to the relevant agency and incorporated relevant requirements into authorisations.

If a **new development application** is lodged on the site of a nation building consent, the normal requirements of the EPA Act will apply.

If a **section 96** application is lodged with respect to a nation building consent, section 96(2)(b) of the EPA Act requires the consent authority to consult with an approval

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body for integrated development but only in cases where a condition has been imposed in accordance with the general terms of approval granted by the approval body. For nation building consents this will not strictly apply as there were no conditions imposed as a result of the integrated development provisions of the EPA Act. The equivalent of the general terms of approval and also the actual approval under those other Act/s were incorporated into the conditions of Authorisation. No further permits or approvals under other Acts were required.

In relation to the notification of approval bodies, clause 120 of the EPA Regulation requires the consent authority to notify an approval body for integrated development of the modification application. For nation building consents there will be no such approval body to notify given that there were no general terms of approval issued for those consents.

Notwithstanding the strict legal position, councils are encouraged to adopt a practice of notifying approval bodies in any event, especially in circumstances where the modification will trigger a requirement to obtain an approval from another Act.

**For further information on these amendments or the transition from authorisation under the NBJP Act to development consent under the EPA Act, please contact the Taskforce Office on:**

**Telephone: 1800 752 100**

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