

Planning Law Reforms, Implications for the Community and the Environment, and the Court's Response

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Overview

- **Part 3A EP&A Act**
 - The explosion of Ministerial discretion
 - Non-prescribed and inconsistent EA
 - Loss of community participation in decision making and loss of appeal rights
- **The Court's ESD Wake Up Call**
 - Defining and applying ESD in NSW
 - ESD and Part 3A

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Strategic Planning for development, not Sustainability?



- **Government's reasoning for planning reforms:**
 - Cut Red Tape
 - One stop shop/ Centralisation of power in the Minister
 - Partnership with industry approach

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Development under Part 3A

- **Major projects**
- **Critical infrastructure projects**
 - Major Projects SEPP Replaced "State Significant Development"



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Major Projects and Critical Infrastructure

Minister is the Consent Authority

Specified in the Major Projects SEPP

May be declared by the Minister

Critical infrastructure = major project + essential for economic, environmental or social reasons.



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Applications for Major Projects and Critical Infrastructure

- Development application is negotiated with the proponent
- Limited notification and owners consent requirements
- May be by concept plan

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Tailored Assessment of development under Part 3A

- Director General sets the assessment requirements
- More negotiation with the proponent
- Guidelines may be published by the Department but none have been

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Assessment Process

- **Proponent prepares environmental assessment (incl. Statement of Commitments)**
- **Advertised on Department's website for 30 days**
- **Public submissions may be provided to the proponent but don't have to be provided to the Minister**

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Independent Hearing and Assessment Panels

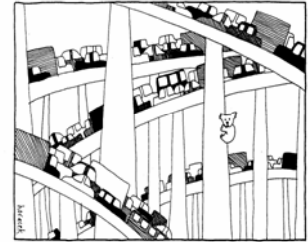
- Can be used to assess any aspect of the project.
 - Made up of 'experts' or 'officers'
 - No criteria for 'experts'
- The IHAP *may* choose to receive submissions from the public.



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Environmental Safeguards Out the Door

- Not required, or
- Must be given in a manner consistent with the planning approval



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Appeals under Part 3A

- Appeals for proponent
 - Limited
- Appeals for third parties
 - Very limited but not tested
- Local and state government agencies cannot invoke stop work orders or environment protection notices for critical infrastructure projects.

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Ecological Sustainable Development - ESD

Development That Meets the Needs of the Present Without Compromising the ability of Future Generations to Meet Their Own Needs



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Principles of ESD

- **Precautionary Principle**
- **Inter & Intragenerational Equity**
- **Conservation of Biological Diversity & Ecological Integrity**
- **Internalisation of Environmental Cost**



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The Life of Brian

The Principles of ESD are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles

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Applying the Precautionary Principle

- **Conditions Precedent**
 1. A threat of serious or irreversible environmental damage
 2. Scientific uncertainty as to the environmental damage
- **Once both conditions are satisfied precautionary measures may be taken to avert anticipated threat of environmental damage**

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Function of the Precautionary Principle

- **The decision maker is required to assume that there is, or will be a serious or irreversible threat to the environment (it is no longer uncertain)**
- **Does not mean a development has to be refused**

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Intergenerational Equity

- Conservation of options
- Conservation of quality
- Conservation of access

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Objects of the EP&A Act

- TO ENCOURAGE ECOLOGICALLY SUSTAINABLE DEVELOPMENT



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Part 3A, ESD and Climate Change



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The Anvil Hill Coal Mine Case



- Should the indirect greenhouse gas emissions associated with the burning of the coal either in Australia or overseas be assessed at the application and consent stage of a proposed coal mine?

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Anvil Hill - Hunter Valley



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Environmental Assessment of Anvil Hill Proposed Coal Mine

- D-G issued to Centennial the EAR
- Centennial lodged its EA with the D-G
- Adjustment of the EA was required
- D-G considered that the EA was adequate for public exhibition

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Greenhouse Gas Emissions

- Scope 1: Direct GHG emissions
- Scope 2: Electricity indirect GHG emissions
- Scope 3: Other indirect GHG emissions



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Gray v The Minister for Planning and Ors [2006] NSWLEC 720

- Applicant Argued:
 - The EA did not comply with the EARs
 - Causation – there is a real and sufficient link between the proposal and the emissions of 3 party users
 - The impacts to be assessed are those causally connected to the proposal
- Respondent Argued:
 - D-G's assessment of the adequacy of the EA not a reviewable decision
 - EA provisions in Part 3A so discretionary no minimum standard of EA
 - Causation – Chain broken

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**Gray v The Minister for Planning and Ors
[2006] NSWLEC 720**

- **Applicant Argued:**
 - **D-G failed to take into account ESD principles**
 - **Particularly intergenerational equity and the Precautionary Principle**
- **Respondent Argued:**
 - **Implied that the D-G did take ESD into account**
 - **No mandatory condition to take ESD into account under Part 3A**

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ESD A MUST

- It is a legal requirement that the D-G consider ESD in accepting the adequacy of an Environmental Assessment under Part 3A.
- The key purpose of EA is to provide information about the impact of a proposal on the environment to the decision maker so that he/she can make an informed decision
- **In the case of Anvil Hill, the D-G was legally bound to require assessment of greenhouse gas emissions from burning coal by 3rd parties because the principles of Intergenerational Equity and the Precautionary Principle required this.**

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Wind Farms and ESD

- The principles of ESD are central to the development of new energy resources
- One of the key concepts of ESD is Intergenerational equity



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**Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd
[2007] NSWLEC 59**

- Reducing greenhouse gas emissions is one of the key ways to effect intergenerational equity
- The public interest of achieving intergenerational equity outweighs the visual and noise impacts of the wind farm.

