Our Ref: PRC:212686-1

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LAWYERS

24 July 2017

NSW Planning & Environment

Proposed Amendment to Environmental Planning and Assessment Act 1979

We write on behalf of the Walsh Bay Precinct Association in relation to the public consultation draft of the *Environmental Planning and Assessment Amendment (Staged Development Applications) Bill 2017*. We urge the Minister not to proceed with this bill, which represents a backward step in the assessment of complex projects.

The requirement for a staged development application to comprise two or more stages is not a mere legal nicety leading to unnecessary complexity. Rather, it is inherent to the scheme of staged development applications in Part 4, Division 2A. As Basten J commented in *Bay Simmer Investments v the State of NSW* [2017] NSWCA 135 at [25]-[26], Division 2A according to its terms only applies to developments involving multiple, discrete, stages. In this context, the facility of obtaining concept approval gives the developer certainty that the whole of a sequential development will be permitted if it is in conformity with the concept-level approval given to the whole. By contrast, there is no real justification for splitting up the assessment process if the subject matter of the "concept" and "detailed" stage is identical.

If Parliament replaces the staged approval process with a concept approval process, it will not be providing "clarification", but rather making a fundamental change to the scheme of Part 4 Division 2A. The decision of the Court of Appeal in *Bay Simmer* has clarified how Part 4 Division 2A was intended to operate. The fact that some approval authorities may not have been acting in accordance with this understanding is no justification for changing the Act to transform this mistaken practice into law. We understand that the government is concerned about the impact on existing consents. However, a much more limited law protecting existing consents (not challenged within 3 months of grant) could be passed without making such a fundamental change to the planning scheme.

Concept plan approvals without staging are inimical to public participation because they deprive the general public of the opportunity to have input into a detailed approval process before the consent authority gives in-principle approval. If the government goes ahead with this proposed change, it will be reverting to a model of concept plan approvals which originated in the former Part 3A of the *Environmental Planning And Assessment Act 1979*. Part 3A was rightly seen by the community as creating a two-track approvals system which gave special privileges to large developers and sidelined community involvement in the planning system, and for this reason it was a key election promise of the present government to repeal Part 3A.

The process followed in relation to the proposed Walsh Bay Arts Precinct is a glaring example of how a bifurcated "concept" approval process tends to disenfranchise the community.

When the initial "Stage 1" application for the Walsh Bay Arts Precinct was lodged in July 2014, very few of the owners and occupiers lodged objections, because the lack of detail in the application resulted in little awareness of the impacts. After the Stage 2 application

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was exhibited there was a high degree of concern among members of the Precinct Association about the potential impacts of the proposal, particularly construction noise, construction and operational traffic, noise generated by events in the public square and noise generated by the proposed event space at the end of Pier 1/2. Acting on these concerns, we lodged an objection to the Stage 2 proposal. However, we did so with an awareness that the only elements of the proposal up for discussion at this stage were those relating to detailed design and operation. Because the legislation provides that the detailed approval cannot be inconsistent with the initial approval, it was too late to submit, for example, that the public square should be deleted or relocated because of impacts about which we had no or inadequate information in Stage 1.

Of even greater concern is the proposal to make it optional for the consent authority to consider "the likely impact of the carrying out of development that may be the subject of subsequent development applications" when considering the likely impact of a concept proposal under s 79C.

The expression "carrying out development" refers to much more than just construction. The carrying out of a development is the whole subject matter of a development application, whether it is a concept application or an ordinary application. It includes the construction, but also the existence and use of the completed development. It is the action of carrying out development which triggers the need for consent under s.76A, and a development application is defined in s.4 as an application to carry out development. We note that under the proposed amended s.83B, a concept development application is still described as a kind of development application. Therefore, if the impacts of "carrying out the development" are excluded, this excludes, ipso facto, all of the impacts which the concept proposal could possibly have. On one view, this would make the assessment of any or all of the impacts of the concept proposal completely optional at the concept approval stage. This would make a mockery of the concept approval process, since the proponent would then would be able to obtain an "in principle" approval providing supposedly bankable certainty of future approvals, based on an assessment process which left out of consideration a raft of potentially significant impacts.

Nor would this situation be much improved if the amendment were expressly limited to construction impacts. As Basten JA said in the Court of Appeal at [62] "(i)t would be curiously artificial to assess any development application on the basis that the completed development had simply materialised, without regard to how it had materialised". His Honour then gave examples of cases where the impacts of construction may be more serious than the impacts of operation. The Walsh Bay Arts Precinct is an example of this, because the construction traffic and noise impacts have the potential to seriously impact upon residential amenity for a long period, and to drive some business owners out of business. This demonstrates why construction impacts should not be treated any differently from the other impacts of a concept proposal. If there is to be a two stage approval process, then construction impacts should be assessed, along with the other impacts of the proposal, at the concept stage in order to determine whether the construction impacts are so severe as to warrant the refusal of concept approval, or the imposition of overarching conditions to protect neighbouring owners and occupiers from these impacts. This need not result in duplication if the level of detail of consideration at each stage is calibrated to the level of detail in the proposal.

Therefore, Parliament should not proceed with this legislative proposal. Instead, it should

(a) embrace the clarification of the law provided of the Court of Appeal in *Bay Simmer;*
(b) if necessary validate existing concept plan consents to the extent that they would have been invalid because of a failure to provide for two or more subsequent stages; and

(c) process future staged development applications in accordance with the requirements of this decision. This must mean in relation to the pending Stage 2 Walsh Bay Development Application, withdrawing the present application and lodging a single (non-staged) state significant development application, allowing for all of the impacts of the proposal to be properly assessed in a single process, with proper public participation, under s.79C.

Yours faithfully
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