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24 November 2017

Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

Attention: Director, Legislative Updates

Dear Sir / Madam

Review of the Environmental Planning and Assessment Regulation 2000

We act for Jacfin Pty Ltd (***Jacfin***) and make this submission on behalf of Jacfin to the review of the *Environmental Planning and Assessment Regulation 2000* (the ***Regulation***) and the associated issues paper which is currently on exhibition.

1 Jacfin

Jacfin is the owner of significant land within the Western Sydney Employment Area (***WSEA***), including sites at Horsley Park (Lot A in DP 392643) and Ropes Creek (Lot 121 in DP 1175762 and Part Lot 15 in DP 1157491).

Jacfin is in the process of developing its land for employment purposes, consistent with the zoning of the land under *State Environmental Planning Policy (Western Sydney Employment Area) 2009*.

In 2011, Concept Plan Approval MP 10_0127 and Stage 1 Project Approval MP 10_0128 was granted under Part 3A of the Act for the development of an industrial estate of warehouses on the Ropes Creek land. In 2013, Concept Plan Approval MP 10_0129 and Stage 1 Project Approval MP 10_0130 was granted for the development of an industrial estate of warehouses on the Horsley Park land.

2 Part 3A transitional arrangements

The recent reforms to the *Environmental Planning and Assessment Act 1979* (the ***Act***) will result in the removal of the transitional Part 3A arrangements from the Act to a new regulation, the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (***New Regulation***).

During the second reading speech for the Environmental Planning and Assessment Amendment Bill 2017 (***Bill***), the Government noted that:

> … [t]he Government, in a move welcomed by many, will finally draw to a close former part 3A. We repealed part 3A in 2011, yet despite this transitional arrangements continue, resulting in some developments still accessing the former part 3A modification pathway some six years after its repeal. This will occur through a regulation amending the transitional provisions of the Act once this package of amendments has been enacted. In future, former part 3A projects that need to be modified will be assessed as either State significant development or State significant infrastructure.

On the Department's website summarising the recent reforms, it states:

> … [t]he Government is closing off the transitional arrangements for former Part 3A projects. All future modifications to these projects will be assessed under the State significant development or State significant infrastructure pathways. Consent holders will be given a short transition window to lodge any final modification applications under the old pathway (two months from the passage of the Bill, or one year if environmental assessment requirements have been issued).

It appears from the Bill that the relocation of the current transitional Part 3A arrangements from the Act to the New Regulation will not involve any amendments to the current transitional Part 3A arrangements.

Nonetheless, given the comments in the second reading debate about the Bill and the Department's public statements, we also assume the current transitional Part 3A arrangements about modifications will eventually be amended in the New Regulation.

The intention to subject future modifications of projects approved under the repealed Part 3A as either State significant development (***SSD***) or State significant infrastructure (***SSI***) is provided without any detail as to how this will be achieved.

Jacfin submits that:

- any proposed changes to the New Regulation to amend the current transitional provisions for Part 3A projects should be made available to the public, and that the public should be afforded an opportunity to assess and comment on those provisions given the significant implications of those reforms; and
- the failure to exhibit the proposed amendments to the New Regulation amounts to an improper denial of the public's ability to fully consider the proposed reforms. It is not enough, as the Minister stated in the second reading speech for the Bill, to say that "The Government has been clearly flagging this fact for nearly 18 months", when the detail of those changes has never been released to the public.

3 Implications of transitioning approvals to Part 4

Assuming that the intention is for all existing Part 3A projects, whether subject to concept plan or project approval, to be transitioned to SSD and subject to Part 4 of the Act going forward (if they cannot be characterised as SSI), Jacfin submits that this proposal is inappropriate for the reasons that follow.

Part 3A was initially introduced to provide greater flexibility in the assessment and approval of complex major projects. A key aspect of Part 3A was the ability to obtain consent for a concept, which would be capable of further refinement as the project progressed. The level of detail provided in concept plan applications and in the conditions attaching to concept plan approvals granted under Part 3A of the Act was often less than that provided in applications and consents under Part 4, reflecting the concept level of the proposals being approved and facilitating flexibility in the carrying out of major projects.

The courts have repeatedly recognised the greater flexibility inherent in Part 3A of the Act in contrast to Part 4 (per Jagot J in *Tugun Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396 and Pain J in *Hurstville City Council v Minister for Planning and Infrastructure* [2012] NSWLEC 134). Without reviewing the proposed amendments to the New Regulation about modifications, there is uncertainty as to how existing concept plans will be preserved to ensure their intended flexibility is retained.

The Second Reading speech for the Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005, which introduced Part 3A, stated that one of the primary purposes of Part 3A was to move away from a situation where 'the same set of rules applies to a house extension as to, for example, a $300 million commercial, residential and retail complex'. The Government now proposes to retrofit existing approvals granted under the flexible Part 3A framework back into Part 4 of the Act and apply the same set of rules that apply to development consents granted under Part 4 to these approvals.

Jacfin submits that it is incongruous with the nature of Part 3A approvals to subject them to the same rules that apply under Part 4 of the Act.

There are two particular differences between the rules applicable to approvals under Part 3A of the Act, to be relocated Schedule 6A of the Act to the New Regulation, and the provisions under Part 4 of the Act that render it inappropriate for Part 3A projects to be treated as SSD and subject to Part 4 going forward in Jacfin's submission, namely:

(a) the different test that applies for the modification of an approval; and

(b) the different position affecting the ability to extend the lapsing date of an approval.

4 Modifications

The existing power to modify an approval under section 75W of Part 3A of the Act, as continued in force by Schedule 6A, is significantly broader than the modification power under section 96 of the Act. Whilst a development consent can only be modified under Part 4 of the Act if the development as modified would be 'substantially the same' as the development as originally approved, no such limitation applies to the modification of approvals, including concept plans, under Part 3A of the Act.

The broader modification power under Part 3A is an integral part of the flexibility of the Part 3A regime. The greater scope to modify approvals under Part 3A is particularly important for complex major projects with long lead times and project lives, being the very types of projects intended to be facilitated under Part 3A.

Should all approvals under Part 3A be treated as SSD, as appears to be proposed, future modifications of these approvals will be subject to the 'substantially the same' test under Part 4 of the Act. It is submitted that the application of this narrower test for modifications is incongruous with the nature of Part 3A approvals and will substantially and inappropriately constrain the intended flexibility of the Part 3A regime.

Further, it is unclear how the 'substantially the same' test can or will be applied to modifications of concept plan approvals, noting that concept plans do not strictly approve development, but rather approve an overall concept of development. Jacfin submits that the 'substantially the same test' is inappropriate to be applied to the modification of concept plans.

In some circumstances, the application of the 'substantially the same' test will be entirely unworkable due to the high level nature of some of the concepts approved under Part 3A and the highly flexible nature of the approvals granted for those concepts. It is important to appreciate that the conditions on which concept plans were granted under Part 3A were framed by the consent authority in the context of a highly flexible regime, where the need to sometimes make substantial changes to

developments down the track was contemplated and in fact supported. The types of concepts approved under Part 3A and the conditions imposed on those approvals do not lend themselves to the application of the provisions under Part 4 of the Act.

Jacfin submits that the amended transitional provisions to be included in the New Regulation should preserve the flexibility to modify Part 3A approvals in accordance with the current test applicable under section 75W.

Consistent with the materials issued in conjunction with the Consultation Draft Bill earlier this year, we note the Department's website indicates a two month window will be provided for proponents to make final modification applications to be assessed under the Part 3A regime before the Part 4 tests will apply. If the eventual amendments to the New Regulation do not preserve the same level of flexibility to modify Part 3A approvals as currently exists, it is submitted that a much greater period of time than two months should be allowed for the lodgement of modifications under the current transitional provisions.

Jacfin submits that the foreshadowed two month time period is too short given the extensive work involved in preparing a significant modification application for a complex major project, including the need to properly consult with adjoining landowners, local council and other key stakeholders prior to lodgement. Jacfin submits that the time period for the lodgement of modifications under the former section 75W where relevant amendments are proposed to the New Regulation should be extended to 6 months.

5 Extension of lapsing dates

Section 75Y(2) of Part 3A empowers the Minister to modify a Part 3A approval to extend the lapsing period of the approval. No such power exists under Part 4 of the Act, with the courts having expressly recognised that the lapsing period applicable under section 95 of the Act cannot be extended. There was also an ability under clause 11A of Schedule 6A of the Act to extend the lapsing date of a Part 3A approval by up to 12 months merely by making a request to the Minister to extend the lapsing date of the approval, provided the Minister does not refuse the request within that period.

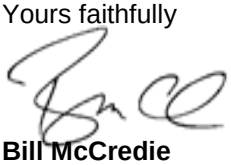
The ability to extend the lapsing date of a Part 3A approval is another necessary aspect of the inherent flexibility of the Part 3A regime. Given the complexity of many Part 3A projects and the often long lead times involved in those projects, with the timing for project initiation sometimes subject to broader commercial and/or political factors outside the control of proponents, it is often necessary for the lapsing periods for Part 3A projects to be extended beyond 5 years.

An inability to extend the lapsing period of Part 3A approvals going forward, thereby resulting in the lapsing of approvals, would represent a significant waste of the time and cost involved in obtaining those approvals and a lost opportunity for the NSW economy to realise the benefits of important major projects that will contribute jobs and economic growth.

Removal of the ability to extend the lapsing date of Part 3A approvals under any new transitional provisions may also have the unintended consequence of numerous modification applications being lodged by proponents, if a two month window after any future amendment of the New Regulation is provided, seeking to extend the lapsing date of their approvals as a 'precaution' before this ability is lost.

Jacfin submits that the ability to extend the lapsing period of a Part 3A approval should be continued in any amended transitional provisions. In circumstances where the modification of a particular approval to extend the lapsing period is wholly within the discretion of the Minister and can be refused where not appropriate on a case by case basis, it is submitted that there is no need to remove the ability to modify Part 3A approvals in this manner.

Yours faithfully



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