HERBERT SMITH FREEHILLS

PROPOSED CHANGES TO NSW PLANNING LAWS

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Legal Briefings – By **Peter Briggs** and **Daniel Webster**

The NSW Government has released a draft bill proposing significant amendments to the *Environmental Planning and Assessment Act 1979* (**Act**).

The draft bill (**Bill**) takes a more gentle approach at a larger scale review of the Act, following the failed Planning Bill of 2013, but still contains noteworthy changes to the administration and operation of the State planning regime.

WHY DOES THIS MATTER?

To proponents of ongoing mining projects approved under Part 3A, the most significant proposal is, without doubt, the repeal of the transitional provisions for Part 3A and the consequent removal of access to the modification power under section 75W.

Transitional Part 3A projects will be converted to either State significant development (**SSD**) or State significant infrastructure (**SSI**). Mining, petroleum and extractive projects will be exclusively converted to SSD.

While it is understood that those projects that are converted to SSI (e.g. energy and water projects) will have access to the SSI modification power under section 115ZI of the Act (which is in terms similar to that of section 75W), proponents of transitional Part 3A projects that are converted to SSD will be limited to the more restrictive modification power under section 96 of the Act.

Bearing this in mind, proponents of mining projects should earnestly consider whether any future modifications to transitional Part 3A projects should be brought forward to utilise section 75W while it is still in effect, or while the proposed transitional provisions operate.

These proposed transitional provisions are, currently, designed to allow the continued operation of section 75W for the purpose of modifying transitional Part 3A projects, but only where:

- modification applications are received within two months of the passage of the Bill; and
- modification applications for which Secretary's Environmental Assessment Requirements (**SEARs**) have been issued have an environmental impact statement lodged within 12 months of the date of the issue of the SEARs.

OTHER RELEVANT AMENDMENTS

- The DPE has committed to ensuring that conditions which are duplicated in a development approval and other licence (i.e. mining lease or environment protection licence) will be progressively removed from development consents. This is an excellent outcome which reduces the current risk of 'double jeopardy' for any breaches.
- An express power is proposed to be included to impose conditions which require a financial security for the carrying out of rehabilitation or decommissioning works (particularly where projects are carried out on land not owned by the proponent).
- An express power to impose conditions which require offsets to address any environmental impact (and not just biodiversity impacts) may be included within the Act.
- No more 'retrospective regularisation' of work undertaken without development approval by way of a modification;
- Increased community participation and consultation requirements, and the requirement of consent authorities to give reasons for determinations of development applications;
- The inclusion of enforceable undertakings as an additional remedy under the Act;
- Significant changes to the Planning Assessment Commission (to be renamed the Independent Planning Commission (**IPC**)). The IPC will be a determining authority and recognised as a NSW Government agency. There will also be changes to the public hearing process, which is to be separated into two stages (with two public hearings).

EXHIBITION AND SUBMISSION PERIOD

The Bill is on exhibition until 31 March 2017 and submissions from stakeholders, interested community groups and individuals are invited by the Department of Planning and Environment.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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