Major projects are a type of development that is assessed and approved under Part 3A of the Environmental Planning and Assessment Act 1979 (EP&A Act). These types of developments are usually large government projects such as roads, pipelines, desalination plants and dams but they can also be private developments that the Minister for Planning considers to be of a State or regional environmental planning significance such as a coal or sand mine.

The EP&A Act sets out what procedures must be followed by governments when they are deciding whether to approve a development. These procedures relate to development assessment, and include things like whether the State Government or the Local Council gets to decide whether to approve the development, whether the development application needs to be advertised to the community, what sort of environmental impact assessment needs to take place, whether the community has a right to comment on the development application and whether the community has a right to appeal a decision to approve the application.

There are different procedures depending on the type of development proposed. Developments will fit into one of three categories, Part 3A, Part 4 or Part 5 of the EP&A Act.

This toolkit will only deal with developments that fit into the Part 3A category.

Major projects are assessed by the NSW Government through the Department of Planning. This toolkit will set out the procedure that the Department of Planning must follow when it is assessing a major project and tell you about the opportunities you, as a member of the public, have to get involved in that decision-making process.

Part 3A has introduced a much more discretionary approach to environmental assessment and approvals, with few formal rights for the community to be involved. That is why we have included a best practice section in this toolkit, so that the system can be used to best effect. We hope this publication will help you to engage in the process and have your say in an effective way so that better planning outcomes can be achieved through Part 3A.

Before you begin

Throughout this toolkit we will be referring to the law a lot. In particular we will refer to:

- The Environmental Planning and Assessment Act 1979
- The Environmental Planning and Assessment Regulation 2000
- State Environmental Planning Policy (Major Development) 2005

All of these laws can be accessed on the NSW legislation website at www.legislation.nsw.gov.au

If you click on ‘Browse’ from the top menu you can then ‘Browse in Force’ an alphabetical list of Acts, Regulations and Environmental Planning Instruments (EPIs). The State Environmental Planning Policy will be under ‘S’ in EPIs.

Part 3A Projects - Major Projects or Critical Infrastructure?

The types of developments that are assessed under Part 3A fall into two categories – major projects and critical infrastructure. This toolkit will focus on major...
projects as opposed to critical infrastructure. However, it is important to understand the distinction and the special rules that apply to critical infrastructure projects.

If a project has been declared as a Part 3A project, the Minister can make an additional declaration that the project is also a critical infrastructure project.

Critical infrastructure projects are those major projects that, in the opinion of the Minister, are essential for the State for economic, environmental or social reasons.\(^1\)

Projects that are critical infrastructure are listed in Schedule 5 of the *State Environmental Planning Policy (Major Development) 2005*. Currently, the listed projects include the Kurnell Desalination Plant, the Royal North Shore Hospital Redevelopment Site, the Liverpool Hospital Redevelopment Site, the Queensland-Hunter Gas Pipeline and Tillegra Dam.

Critical infrastructure projects are assessed and approved in the same way as major projects. However, there are a few important differences.

**Land owner consent not required**

Unlike most other forms of development, an application for a critical infrastructure project can be lodged without the consent of the landowner.\(^2\)

**No appeal against critical infrastructure projects**

There is no right of appeal against an approval for a critical infrastructure project.\(^3\) Once a decision is made it is final.

**Exemption from other environmental laws**

Critical infrastructure projects are largely immune from other environmental laws. There is very little that other public authorities or the public can do to ensure that the project complies with environmental laws as many do not apply. For example, State Environmental Planning Policies do not apply to critical infrastructure unless the SEPP specifically states that it does.\(^4\)

Individuals cannot bring enforcement action in the Land and Environment Court like they can for other types of development unless they have the permission of the Minister for Planning.\(^5\) So if the project is in breach of the development conditions there is no automatic right for a member of the public to bring a legal action to enforce those conditions unless the Planning Minister first agrees that the matter can be brought.

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\(^1\) EP&A Act 1979, s. 75C(1).

\(^2\) EP&A Regulation 2000, cl. 8F(1)(b).

\(^3\) EP&A Act 1979, s 75K, 75L, 75Q and 75T(2).

\(^4\) EP&A Act 1979, s. 75R(2)(b).

Before a development can be assessed under Part 3A, it must first qualify as a development to which Part 3A applies. There are two ways a project can qualify, either automatically, or by order of the Minister for Planning.

**Automatic qualification**

Some projects fall automatically into the definition because they are, in the opinion of the Minister, of a type listed in *State Environmental Planning Policy [Major Development] 2005* (Major Development SEPP).

The Major Development SEPP states that Part 3A applies to developments that, in the opinion of the Minister, are of a kind described in Schedules 1, 2, 3 or 5 of the SEPP.¹

- **Schedule 1** deals with projects of a particular *type* such as development for the purposes of residential, commercial or retail projects with a capital investment value of more than $100 million that the Minister determines are important in achieving State or regional planning objectives.
- **Schedule 2** deals with projects on *specified sites* such as coastal areas, Penrith Lakes and the Sydney Harbour foreshore site.
- **Schedule 3** deals with *State significant sites* such as the Sydney Opera House.
- **Schedule 5** deals with projects that are deemed to be *critical infrastructure*.

**By order**

If the Minister thinks a project should be assessed under Part 3A, he or she can publish an order to that effect in the NSW Government Gazette. All that is required is for the Minister to form the opinion that the project is of State or regional environmental planning significance.² This has meant that many projects have qualified as a Part 3A project – over 700 since 2006.

**Why is this important?**

If the development qualifies for assessment under Part 3A the usual assessment processes under Parts 4 or 5 of the EP&A Act don’t apply and the whole development assessment process is more discretionary. This can have important consequences for the public’s rights to get involved in the process.

**What is involved?**

The proponent³ asks the Minister for Planning to make a declaration that the project is a Part 3A project, either because it fits one of the categories in the Major Development SEPP or because the developer thinks the development is of State or regional planning significance. In some cases the Minister can ‘call in’ a development that hasn’t been put forward as a Part 3A project by making an order in the Gazette.

Once the Minister has declared the project to be a major project the proponent prepares an application setting out the proposal.

**Concept Plans**

The Minister might decide that the application is to be made by way of concept plan. A concept plan sets out the scope of a proposed development in general terms but does not contain specific details. It is usually used for big developments that involve many separate stages of development or many
separate developments within the whole. If a concept plan is lodged it may be difficult for you to know exactly what is being proposed. However, even if the concept plan is approved, further approvals may still be needed dealing with the details before the project can proceed.4

**PUBLIC PARTICIPATION**

There is no provision in the EP&A Act for any public participation prior to the Minister declaring the project as a Part 3A project. The Minister is not required to publicise the requests by proponents to have projects assessed under Part 3A.

You may be able to challenge the Minister’s decision to declare a project a Part 3A project if it can be shown that the project does not fall within any of the categories in the Major Development SEPP.5 Alternatively, you may be able to challenge the Minister’s decision to make an order that a project is a major project. However, it would be difficult to challenge how the Minister formed the opinion that the project is of State or regional environmental planning significance.

If only part of the project properly falls within the definition of major project you could seek an order from the Land and Environment Court that the declaration of the project as a major project is limited to an aspect of the development, or a particular period of carrying out the development or otherwise.6

In a recent case the Land and Environment Court found that the Minister was not empowered to declare the proposal a major project and therefore had no power to decide whether to approve it.7

If you intend to make a legal challenge, see Card 9 for more information.

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2. EP&A Act, s. 75B(2)(a).
3. The proponent is the person proposing the development.
4. Although, it is also possible for the concept plan approval to suffice and for the Minister for Planning to specify that no additional approvals will be required when the details are decided. EP&A Act 1979, s. 75P(1)(c).
5. This would involve initiating class 4 proceedings to challenge the legality of the Minister’s decision and to be successful you would need to show that there was a legal error in the decision; for example, the Minister’s decision was so unreasonable that no reasonable person could have made it. This is very difficult to prove. Always seek legal advice before initiating Court proceedings.
The proponent prepares an application and lodges it with the Director-General for Planning. The application must describe the project and any other matters required by the Director-General.¹

These other matters might include the Director-General’s requirements for consultation and environmental assessment. The project application is usually accompanied or followed by a preliminary assessment describing these matters.

**How will I know if an application has been lodged?**


**Environmental Assessment Requirements – also known as Director-General’s Requirements**

When an application is lodged, the Director-General prepares Environmental Assessment Requirements (EARs) that the proponent must address. These can be changed later if necessary.

When preparing the EARs, the Director-General has to consult relevant public authorities² and have regard to any issues raised by the public authorities.³ Relevant public authorities might include the Department of Environment, Climate Change and Water or the Roads and Traffic Authority.

The EARs may require an environmental assessment to be prepared by or on behalf of the proponent.⁴ If so, the proponent must undertake an environmental assessment that addresses the key issues outlined by the Director-General. The assessment may also include a statement of the commitments the proponent is prepared to make to minimise or manage the environmental impacts of the development.⁵

**Concept Plans**

If a project is being assessed as a concept plan, the procedure is the same as for other projects under Part 3A.⁶

**PUBLIC PARTICIPATION**

There is no formal opportunity for public participation at this stage of the process.

There is no opportunity to challenge the Director-General’s EARs if you think they are inadequate.

**BEST PRACTICE**

Proponents often go beyond what the law requires and create additional opportunities for public input such as through planning focus meetings that explain the proposed project and get input from the public.

If the proponent does not do this, you could contact the proponent directly and ask them to consider holding a public briefing where community concerns can be raised.

The benefit of doing this is that the proponent can hear about any objections to the proposal before they become too married to their project in final form. This would give an opportunity for some collaborative planning and for each interested party to be heard and offer suggestions and concerns before they become ‘objections’ and ‘objectors’ and their input is necessarily seen as negative.
It is important to remember that at this stage the proponent is doing whatever is necessary to get the project approved. The information they provide is not likely to be very detailed and is likely to present the project in the best possible light. Also, it is likely that limited scientific studies have been completed at this stage so there may not be much evidence for the proponent’s claims. However, you may have some leverage if the proponent fears community concerns may have a bearing upon the approval process.

Now is the time to get interested people together, discuss concerns, and make contact with the proponent to see if you can discuss any concerns and possible solutions.

Consider who the relevant public authorities may be. Speak to them, advise them in writing of your concerns and request that they raise your issues in their consultation with the Director-General. This is important because the Director-General is obliged to provide the Minister with a report known as an Environmental Assessment Report which will help the Minister decide whether or not to approve the project. The Environmental Assessment Report must contain any advice provided by public authorities on the project. The Minister in turn is obliged to consider the report by the Director-General and any advice contained in it, when making a decision.

Case Study: Consulting the community early

A developer in Coffs Harbour purchased a property earmarked for medium to high density residential development. It conducted a 5-day design workshop for the site, which was attended by local residents, neighbours and other stakeholders. At the end of the workshops, six development scenarios were put forward for the public to comment on before a final plan was chosen and lodged for approval.
The proponent will usually hire a consultancy firm to undertake the environmental assessment (EA) on its behalf. Because they are paid for by the proponent, EAs often suffer from a perception of bias.

The process can last several months and sometimes years, depending on the project and how stringent the Director-General’s Environmental Assessment Requirements (EARS) are.\(^1\)

The general aim of an EA is to predict the possible impacts—both positive and negative—that a proposed project may have on the natural and built environment.

It is difficult to challenge the adequacy of EAs so it is important to ensure from the outset that the assessment is as comprehensive as possible.

**PUBLIC PARTICIPATION**

The EA itself is not made public until a later stage (when the proposal goes on exhibition). However, proponents are often required to consult the community and local councils and agencies when preparing the EA.\(^2\) So it is very possible that the proponent will call a public meeting, also known as stakeholder consultation, to discuss the proposal at this stage.

These meetings are usually just a presentation by the proponent outlining the project and potential impacts. However it is important to remember that this is the proponent’s opportunity to get the community on board and they are almost certainly going to present the proposal in the best possible light. It is unlikely that full scientific results will be presented at this stage.

If a public meeting is called, it is a good opportunity to incorporate your expertise, knowledge and concerns into the EA. For example, you may be concerned about the impact of the proposal on local air quality or traffic congestion in the area but which the consultant preparing the EA has not mentioned. If you wait until the EA is complete before commenting it can be difficult to have the issue dealt with as it would not have been covered by the consultant. However, if you raise it at an early stage in a public meeting, the proponent is on notice and is in a better position to include the matter in the scope of the report.

**Why is it important?**

The EA will be submitted to the Director-General and it will be one of the documents that helps the Minister decide whether to approve the project so it is important that your concerns are adequately addressed in the EA.

**Participating effectively**

At this stage, it can be difficult to know which questions to ask and you may be confused by ‘technical’ answers so it is good to get some advice early on so that you can make sure you ask the right questions and can interpret the answers. The EDO has a Scientific Advisory Service that can assist you in this regard.

**BEST PRACTICE**

There are three key areas of EA that the community can get involved in:

1. Gathering information – the community has a key role in identifying and providing
relevant information to be included in the assessment.

2. Undertaking the assessment – the community can ensure the assessment is rigorous by asking questions about the methodology and any assumptions or uncertainties upon which it is based.

3. Mitigation measures – the consultant will often suggest ways that the impact of the development can be minimised. The community should question how effective any such measures are likely to be and request evidence to support that view.

Find out as much as you can about the consultant preparing the EA. This may give you an idea as to what sort of reputation they have and whether they have the relevant expertise.

If your concerns relate only to the form of the proposal, discuss options for how the environmental impacts of the development might be minimised. Can technological innovations be incorporated into the design of the project to ensure it is built sustainably? These might include rainwater tanks, solar panels, waste management systems, grey water harvesting, remediation strategies for disturbed land, the implementation of low emissions technologies, soundproofing, sensitive design and BASIX.3

Case Study: Drake-Brockman v Minister for Planning [2007] NSWLEC 490 (the CUB case)

The EDO represented Matthew Drake-Brockman in proceedings in the Land and Environment Court challenging the approval under Part 3A for re-development of the Carlton United Brewery site for 1600 residential apartments, commercial offices and retail premises.

It was argued that the Minister failed to properly consider the principles of Ecological Sustainable Development when approving the development as ESD required the Minister to undertake a detailed consideration of the climate change implications of the development.

The Court found in favour of the Minister but the case raised awareness of best practice urban design and the proponent, Frasers Property Australia devised a new concept plan to include:

1. Powering the precinct with its own gas powered, low carbon usage tri-generation facility,

2. Supplying 100% non-potable water through on-site rainwater capture and waste recycling,

3. Restoration and public access for heritage such as the old brewery yard, car share schemes and integration into the inner city bicycle network.

The developers are aiming to recycle 90% of materials from the demolition, and aim for six star energy and water usage.4

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1 EARs are described on Card 3.
3 BASIX stands for ‘building and sustainability index’ and is a NSW Government initiative to ensure all new residential developments meet a set standard for energy and water efficiencies by implementing a range of design strategies and technologies.
4 Smith J, and Ruddock K (2008) Best Practice in Planning
Once the proponent has lodged the environmental assessment, the Director-General will decide whether it is adequate and ready for public exhibition. If the Director-General is not satisfied with the assessment, he or she can require the proponent to submit a revised environmental assessment addressing the inadequacies identified by the Director-General.1

If the Director-General is satisfied with the environmental assessment, he or she must make the proposal, along with the environmental assessment publicly available for at least 30 days. This is known as the exhibition period.2

How will I know if a project is on exhibition?


Locate the project you wish to know more about.

The Department of Planning alerts people about new projects on exhibition through advertisements in newspapers and notifying relevant State agencies and local councils. Sometimes letters are sent to adjacent landholders.

The EDO has a free weekly e-bulletin that lists all new Part 3A projects on exhibition. To subscribe to the bulletin, call 02 9262 6989 or email education@edo.org.au or visit the website www.edo.org.au/edonsw/site/supportus and become a friend of the EDO.

During the 30 days of the exhibition period any person may make written submissions to the Director-General about the proposal. The Director-General must provide a copy of the written submissions to the proponent.3

This is your opportunity to make a written submission about the project and in particular the environmental assessment.

You can now make submissions online from the Department of Planning’s website. Each project on exhibition will link to a standard online submission form.

Preferred project report

The Director-General may require the proponent to provide a response to the submissions through what is known as a preferred project report which outlines any proposed changes to minimise the social or environmental impact.4 If the Director-General thinks that significant changes are proposed to the nature of the project, the Director-General may require the proponent to make the preferred project report available to the public for further comment.5

Case Study: Gray v Minister for Planning & Ors [2006] NSWLEC 720

This case challenged the legality of the Director-General’s decision to accept a proponent’s environmental assessment which did not address all of the Environmental Assessment Requirements (EARs) in full. The Court found that this amounted to an error and the decision to accept the Environmental Assessment for exhibition was overturned.
Many environmental assessments are hundreds of pages long, sometimes thousands, and they can contain very technical information that may be difficult for lay people to understand. If necessary you should retain your own expert to advise you on aspects of the assessment so that you can write an informed and evidence-based submission.

Ideally, the proponent, along with the consultant that prepared the Environmental Assessment should be available during this period to answer any specific questions you may have. This could take place via an online forum so that the questions and answers could be publicly available.

Given the length and complexity of many environmental assessments, the 30-day exhibition period is often inadequate for members of the community to read, understand and respond to the proposal. It is therefore necessary to be prepared and get as much information about the project as you can before the exhibition period commences. You should also focus your attention on your key concerns. Submissions do not need to address every issue. In fact, short, specific submissions may be more effective.

The Department of Planning may grant you an extension of time to lodge submissions. You can request an extension by calling the contact person listed against the particular project. The Department will be within its rights to decline your request and if it allows you an extension, it will be for you personally (or your organisation) and not for the general public.

If a preferred project report is prepared you should ask for it to be readvertised and an opportunity to make further submissions. The preferred project report might differ markedly from the original project and is not necessarily going to be an improvement. You should make the Minister and the media aware of the need for transparency in the decision-making process and promote the public’s right to be informed of exactly what is proposed.

With a few exceptions, projects that are approved under Part 3A are not subject to the normal zoning restrictions contained in local environmental plans (LEPs). This means that even if the LEP prohibits the type of development proposed, the project can still be approved under Part 3A. In effect, Part 3A trumps the provisions in LEPs.

The EP&A Act says that the Minister can (but does not have to) consider the provisions of a LEP when making a decision. If your LEP prohibits development of a kind proposed by the project in the zone you should bring this to the Minister’s attention.

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1 EP&A Act 1979, s. 75H(2).
2 EP&A Act 1979, s. 75H(3).
3 EP&A Act 1979, s. 75H(4), (5).
4 EP&A Act 1979, s. 75H(6).
5 EP&A Act 1979, s. 75H(7).
6 Where the project relates to land that is located within an environmentally sensitive area of State significance or a sensitive coastal location and that type of development is prohibited under the applicable LEP.
7 EP&A Act 1979, s. 75J(3).
Planning Assessment Commission

The Planning Assessment Commission (PAC) is a body corporate which can provide advice to the Minister for Planning on a proposal or, in some cases, replace the Minister as the decision-maker under Part 3A. The Minister for Planning has delegated to the PAC the role of consent authority (decision-maker) to determine projects under Part 3A if the application:

- Has a reportable political donation; or
- Is within the electoral district of the Minister for Planning; or
- Is one in which the Minister has a pecuniary interest.¹

This delegation does not apply to critical infrastructure projects where the proponent is a public authority other than local councils.

The Minister can vary the current delegation by issuing a new delegation or a specific delegation for a project when required.

The PAC consists of a Chair and between 3 and 8 members. The members are appointed by the Minister for Planning.²

The PAC is not subject to the direction or control of the Minister, except in terms of procedures to be followed under the EP&A Act.

The PAC may call a public hearing to investigate particular aspects of the proposal. It can call witnesses to appear before it and give information.³

However, it is important to note that if the PAC holds a public hearing, members of the public lose the right to appeal to the Court against the PAC’s ultimate decision. In other words, a public hearing extinguishes your right of appeal from a decision of a PAC.⁴

In any event, you may find it is strategically advantageous to have the decision as to whether the project should be approved made by the PAC instead of the Minister. In such cases, you should lobby the Minister to delegate the decision-making power to the PAC.

The PAC must provide a copy of its findings and recommendations to the Minister and the report is to be made publicly available on the Department’s website within a reasonable time after it has been provided to the Minister.³

To find out more about the PAC, visit the website www.pac.nsw.gov.au

Central Sydney Planning Committee

For certain developments within the City of Sydney, the Central Sydney Planning Committee will be the decision-maker. The Central Sydney Planning Committee has the exclusive right to exercise the functions of City of Sydney Council in relation to the determination of applications for major developments (the estimated cost of which exceeds $50 million).

In practice, this means that many developments that would normally automatically qualify as major projects under the Major Development SEPP will not automatically qualify if they are within the City of Sydney.⁵ For example, under the Major Development SEPP, development for the purpose of residential, commercial or retail projects with a capital investment value of more than $100 million automatically qualify as major projects. However, if these developments are proposed for the City of Sydney local government area, they will not automatically qualify and will be determined...
by the Central Sydney Planning Committee unless the Planning Minister orders that the development is a major project.\(^7\)

The Central Sydney Planning Committee has 7 members which are made up of the Lord Mayor of Sydney, two councillors of the City of Sydney elected by the City Council and four people appointed by the Minister for Planning (two of whom are senior State Government employees and two of whom are not State or local government employees).\(^8\)

**PUBLIC PARTICIPATION**

If the PAC calls a public hearing you should attend and make presentations to the commission. You may wish to engage a scientific expert if the subject matter is quite technical. Card 8 contains more information about appearing before a PAC.

The Central Sydney Planning Committee must follow the provisions of the EP&A Act when it comes to consulting the community about proposals it is assessing.\(^9\) It does not follow the Part 3A process, rather it follows the process set out in Part 4 of the Act (and where appropriate, Part 5). Under Part 4, certain kinds of developments are exhibited to the public and the public has an opportunity to comment by way of written submission. Meetings of the Central Sydney Planning Committee are open to the public. The council has guidelines for speakers at Council Committees which can be accessed online.\(^10\) You should note that you need to register to speak by calling Council’s Secretariat on 02 9265 9310 before 12.00 noon on the day of the meeting. Speakers are kept to a 3 minute time limit.

**BEST PRACTICE**

Find out as much as you can about the PAC members. This will help you understand their expertise and what sort of information they are likely to find persuasive. Remember, the members rely on submissions from the community to understand all the issues and it is your role to bring important information to their attention. Never assume the members know about an environmental issue. We suggest addressing your submissions to each PAC member. Tailor your letters. You should suggest to each PAC member that approval be conditional upon any of the following:

- the provisions of the relevant Local Environmental Plan;
- the proponent undertaking to make a more energy efficient commitment;
- the proponent to comply with any obligations contained in a statement of commitments made by the proponent; or
- the proponent to enter into a Planning Agreement with the Minister.

Attend meetings of the Central Sydney Planning Committee or access minutes from meetings online to keep up to date on what the Committee is doing and what developments it is assessing.

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\(^3\) EP&A Regulation 2000, cl.268Q(1).
\(^4\) EP&A Act 1979, s. 23F(2).
\(^5\) EP&A Regulation 2000, cl.268V.
\(^6\) State Environmental Planning Policy (Major Development) 2005, Schedule 1.
\(^7\) See Card 2 for more information about how developments are declared to be major projects.
\(^9\) City of Sydney Act 1988, s. 40 (1).
The Director-General prepares an Environmental Assessment Report based on the proponent’s environmental assessment. The report is given to the Minister for Planning and is the primary document that the Minister relies on when deciding whether to approve the project.

The Director-General’s report must include the following information:

1. A copy of the proponent’s environmental assessment and any preferred project report
2. Any advice provided by public authorities on the project
3. A copy of any report of the PAC in respect of the project
4. A copy of or reference to the provisions of any State Environmental Planning Policy that substantially governs the carrying out of the project
5. A copy of or reference to the provisions of any environmental planning instrument such as a local environmental plan that would substantially govern the carrying out of the project
6. Any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate, and
7. A statement relating to compliance with the environmental assessment requirements with respect to the project.

The Minister can approve or reject the project. The Minister must consider the following matters when making a decision:

1. The Director-General’s report on the project and the reports, advice and recommendations contained in the report
2. If the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the proponent
3. Any findings or recommendations of the Planning Assessment Commission following a review in respect of the project.

**PUBLIC PARTICIPATION**

There is no formal opportunity for the public to participate in this stage of the assessment process. Usually the Director-General’s Report to the Minister will only be made publicly available at the time that the Minister’s decision is published on the Department of Planning’s website [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

**BEST PRACTICE**

Sometimes the Director-General’s Report will be made available to the public before the Minister makes a decision. If this is the case, you will have all the information that will be before the Minister when he or she makes a decision. It will therefore be possible to point out any features of the Report that the Minister should pay particular attention to. It may therefore be worthwhile lobbying the Director-General to make the Report publicly available.

As there is no formal opportunity for public participation, there is no guarantee that your attempts to participate at this stage will be taken into account. However, it is worth keeping the pressure on the Minister so there can be no doubt about the level of public scrutiny and public concern about the project.
Even if the Minister approves the project he or she can attach conditions on how the project can be carried out. From the outset you should consider what conditions would be appropriate to minimise the negative impacts of the project. You should then suggest these conditions to the Minister both during the exhibition period (when you have an opportunity to write a submission) and again at the time that the Minister is deciding whether to approve the project.

If you intend to appeal the decision of the Minister if he or she approves the development, you should seek legal advice as soon as possible. If the Director-General’s Report is made available before the decision is made, you should seek early legal advice to see if the correct procedure has been followed in arriving at the decision, or if there are any other grounds for appeal.

Planning Agreements

A planning agreement is a voluntary agreement between a planning authority and a developer. Under these agreements, the developer agrees to provide a public benefit to be used for a public purpose. This might include:

- The provision of (or the recoupment of the cost of providing) public amenities or public services
- The provision of (or the recoupment of the cost of providing) transport or other infrastructure relating to land
- The funding of recurrent expenditure relating to the provision of public amenities or public services, affordable housing or transport or other infrastructure
- The monitoring of the planning impacts of development
- The conservation or enhancement of the natural environment.

It might be worth encouraging the Planning Minister to enter such an agreement with the proponent if it will offset some of the disadvantages of having the project go ahead. You should suggest what the agreement should cover.

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1 EP&A Act 1979, s. 75I.
2 This requirement does not apply when the project is a critical infrastructure project.
3 EP&A Act 1979, s. 75J(2).
4 EP&A Act 1979, s. 75J(4).
5 EP&A Act 1979, s. 93F.
During the 30-day exhibition period any person can comment on the proposed project. Comment is usually by way of written submission. In some cases a public hearing may be held.

**Submission writing**

As this is the primary method through which the community can participate in environmental decision-making it is important to write submissions that will clearly and effectively communicate your points. This section provides tips on how you can prepare a submission that is as persuasive as possible.

**Obtaining information**

The first step is to gather information about the proposal and the locality. An important piece of information will be the proposal itself, along with the Director-General’s Environmental Assessment Requirements and the Environmental Assessment prepared by the proponent. You may also need to gather independent scientific information that tells you what impact the proposal will have on the environment, the economy and social cohesion. You should also find out who the decision-maker is going to be – the Planning Minister or a PAC.

**Identifying of key issues**

Work out what your key concerns are and focus on these. If you try to include everything you can possibly think of in the submission the good points will get lost in the weaker points and your submission will be less effective.

**Supporting with facts**

Include factual information to back up your arguments. Your arguments will be better received if they are supported by evidence and you will have a far greater chance of influencing the decision-maker than if you lodge a submission containing only unsubstantiated claims.

Also, attach relevant supporting documents, physical evidence and observations and opinions from scientists to support what you’re saying.

**Using a clear structure and layout**

Use headings and bullet points to highlight key concerns. Use summaries to highlight key recommendations/concerns.

Remember the decision-maker may receive many submissions so you want yours to be easy to read and well expressed. Write clearly and concisely. A rambling stream of consciousness will not effectively communicate your ideas.

**Writing objectively**

Use clear, calm language and maintain a professional style. Overly emotional arguments are not as convincing and often have an adverse effect upon the reader.

**Remember!**

Have your submission in on time. If you can’t meet the deadline ask for an extension, or if an extension is not granted, do the best you can in the time frame.

Follow up on your submission – follow up phone calls to the decision maker can ensure that your issues are on the forefront of their minds at all times.

Include your name and contact details on your submission.

It may be worth considering mounting a wider campaign against the proposal, including through the local media.
Appearing before a PAC at a Public Hearing

The public hearings are quite formal in nature.

A schedule of presentations is made publicly available before the hearing. The schedule includes a list of who will be making submissions to the panel and the times they have been allocated to present. Those making submissions will be kept to their allocated times. The chairperson gives a warning shortly before the presenter’s time is up, and may cut the presenter off if they continue to speak beyond their allocated time.

The PAC does not cross examine those making submissions during the public hearing. However, if a member of the PAC has a question relating to a presentation they may voice it at the end of (not during) the presentation.

The public hearings are not recorded with audio or visual recording devices, although members of the PAC will take notes during the hearing if necessary. For the most part, the PAC relies on the written submissions made by the proponent, government authorities, community groups and members of the public.

Time Limitations

The PAC has binding time frames in place to achieve greater efficiency during public hearings. This creates issues when important, sometimes critical, submissions are being presented to the PAC for it to consider, but the presenter’s allocated time is up.

The proponent is also constrained in terms of the amount of time it is allowed to respond to submissions made during the PAC.

Advice to organisations, groups and individuals interested in making submissions during a public hearing

While the PAC gives members of the public the opportunity to challenge concept plans and development applications by bringing potential issues to light, it is important for individuals making submissions during public hearings to keep in mind the terms of reference for the Commission, as the PAC is bound by the terms of reference which limits the matters that it can consider. In this respect, there is nothing to be gained from attacking the PAC members or questioning their authority.

Other things to keep in mind:

- Dress neatly, as if you were going to court
- Be punctual, make sure you are there on time
- Speak clearly and loudly
- Practice beforehand and time yourself so you can be sure that you will fit in all of your key points
- Come prepared with a list of points you want to cover during your presentation
- Try to keep track of time while you are presenting

BEST PRACTICE

Perhaps in the future, as was suggested by Neil Shepherd (a part-time Commissioner who has been appointed to the PAC), material which is unable to be discussed during the PAC because of time limitations could be submitted in writing afterwards for consideration by the Panel.
Appealing a decision involves going to the Land and Environment Court of NSW. Usually decisions will be notified on the Department of Planning’s website. Appeals are usually against the decision to approve the project. There are two different ways of challenging a decision to approve a major project – merits appeals and judicial review.

**Merits appeals**
Merits appeals challenge the merits of a decision, that is, they seek to overturn a decision because it was a bad decision. The Court hears the appeal as the original decision maker and each side presents evidence to support their argument. The Court will look again at the information that was before the Minister (or the PAC) and also any additional information that the parties put before it.

The Court then decides whether to uphold, vary or overturn the original decision. It is difficult to commence proceedings in the Court to challenge the merits of a decision because there are a number of limitations on merits appeals.

**Judicial review**
In judicial review proceedings the Court cannot comment on the merits of the decision but looks instead at the process that was followed in arriving at the decision. Essentially the Court considers whether the decision was legally made.

There are only a limited number of grounds that give rise to judicial review. They include:

(a) Ultra vires (which is where the decision-maker did not have the power to make the decision in the first place)

(b) Denial of natural justice

(c) Failure to observe the procedures required by the law when making the decision

(d) Improper exercise of the power to make the decision (this might be demonstrated by the decision-maker failing to take into account a relevant consideration or taking into account an irrelevant consideration)

(e) The decision was affected by fraud

(f) There was no evidence or other material to justify making the decision

(g) The decision was contrary to the law

Unlike with merits appeals, the Court cannot substitute its decision for that of the original decision-maker. The most it can do is declare the decision to be either valid or invalid. Where the Court declares a decision to be invalid the decision-maker may be able to make exactly the same decision again, only this time following the correct legal process and procedure.

**Who can bring legal challenges?**
There are limits on who can commence legal challenges in the Land and Environment Court. Because members of the public are not a party to the decision, that is, they are not the proponent or the decision-maker, they are known as third parties.

Third parties can only bring merits appeals against major project approvals if they objected to the development during the exhibition stage and providing the project was not reviewed by a PAC and the project was not approved by way of concept plan.
Also the project must have been designated development under Part 4.²

Designated development is a type of development that is assessed under Part 4 (as opposed to Part 3A) of the EP&A Act. Since Part 3A came into effect many developments that would have been assessed as designated developments under Part 4 are now declared to be major projects and are assessed under Part 3A. Given that, third parties retain some of their rights to bring merits appeals against major projects that would otherwise have been assessed as designated development. To find out if a development would have been designated development see Schedule 3 of the EP&A Regulation 2000. Examples include electricity generating stations, marinas, railway freight terminals, sewerage systems and shipping facilities.

Third parties also have an unqualified right to commence judicial review proceedings.

Time limits

Very strict time limits apply to legal challenges and you must commence your challenge within the time period or the Court will very likely refuse to hear your matter.

Merits appeals must be commenced within 28 days of the decision being publicly notified.³

Judicial review proceedings must be commenced within 3 months of the decision being publicly notified.⁴

Developer appeals

If the project is rejected by the Minister the developer might appeal the decision. The developer can bring a merits appeal in the same kinds of situations as objectors so long as the proponent is not a public authority.⁵ They can also bring judicial review proceedings. In both cases the developer has 3 months to commence proceedings.

If you are concerned that the Minister will not adequately defend a developer appeal you can apply to join the proceedings.⁶ If you join, you will be allowed to present evidence to support the Minister’s decision that the Minister may not have been planning to present. The Court will not let you join unless there is a good reason for allowing it.

Third party enforcement

The EP&A Act allows any person to commence proceedings in the Land and Environment Court to enforce the EP&A Act or to prevent someone from breaching the EP&A Act.⁷

If a major project approval is granted and the proponent either breaches the conditions attached to the approval or in any way goes outside the scope of the approval or breaks other environmental laws when carrying out the approval, any person can bring enforcement proceedings in the Land and Environment Court to stop the breach from continuing. Remember, for critical infrastructure projects the approval of the Minister is required before such actions can be commenced.⁸

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1 In some cases, appeals can be brought against preliminary decisions such as the decision of the Director-General to accept the Environmental Assessment.
2 Administrative Decisions (Judicial Review) Act 1977, s. 5. Please note, this Act does not apply in the Land and Environment Court but the grounds of judicial review are still the same.
3 EP&A Act 1979, s. 7SL.
5 EP&A Act 1979, s. 7SL(3).
6 EP&A Act 1979, s. 7SL(4).
7 EP&A Act 1979, s. 7SL.
8 Uniform Civil Procedure Rules 2005, Rule 6.27.
9 EP&A Act 1979, s. 123.
10 EP&A Act 1979, s. 7ST(2).
Sometimes, other approvals are required in addition to that of the Planning Minister before a development can go ahead. For example, if a development is going to use a lot of water (as mines do) it might need a water use approval under the Water Management Act 2000.

These extra approvals are necessary because they ensure that other government departments such as the Department of Environment, Climate Change and Water have a say about how the development is to proceed. They ensure that the objects of other environmental laws are met. In effect, these additional approvals add an extra layer of scrutiny to the assessment and approval process that ensures the environmental impacts of the development are accounted for and, equally importantly, the various impacts that the environment may have on the development are considered.

Projects approved under Part 3A do not require these additional approvals in the same way. On the one hand, the provisions of a number of environmental laws do not apply to projects approved under Part 3A.

For example, an order issued under the Heritage Act 1977 to restrict harm to heritage buildings, does not apply to prevent or interfere with the carrying out of a project approved under Part 3A. On the other hand, other environmental laws still apply but must be applied consistently with the approval of the project. In other words, if an authorisation from another government department is necessary before the project can be carried out, that government department must give that authorisation. For example, an environment protection licence (also known as a pollution licence) under the Protection of the Environment Operation Act 1997.

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1 For a full list of the legislation that does not apply to Part 3A project, see EP&A Act 1979, s. 75U.
2 EP&A Act 1979, s. 75U(2).
3 EP&A Act 1979, s. 75V.
4 EP&A Act 1979, s. 75V(1)(e).
CONTACTS AND OTHER USEFUL INFORMATION

Seeking legal advice
You should always get legal advice before taking legal action. The Environmental Defender’s Office operates an environmental law advice line where you can get free initial legal advice.

The advice line operates Mondays - Thursdays between 2.30 and 5.30pm.

Call us on 02 9262 6989.

If English is not your first language and you would prefer to speak to us through an interpreter please call TIS National on 131 450 and ask to speak to the Environmental Defender’s Office on 02 9262 6989. You will not be charged for this service.

Getting more information on the project
The Department of Planning website has lots of information about Major Projects and the approval process. www.planning.nsw.gov.au

With regards to particular development, the Department’s website contains a Major Project register which allows you to search for Major Projects at various stages of assessment www.majorprojects.planning.nsw.gov.au

It also has a page displaying projects that are on exhibition www.majorprojects.planning.nsw.gov.au/page/on-exhibition/

This page is important because it is where you get all the detailed information about the proposed project and once a project appears on the ‘exhibition’ stage, the public consultation period has begun and you only have a limited time to get your submissions in.

Planning Assessment Commission
Contact the Panel Secretariat on 02 9383 2100 or email pac@pac.nsw.gov.au
Website: www.pac.nsw.gov.au

Other useful information
The EDO website has a number of fact sheets that you may find useful when commenting on a major project. www.edo.org.au/edonsw/site/factsheets.php

In particular, we have fact sheets on Part 3 A (under NSW Planning Laws) and science fact sheets on collecting evidence, water quality assessment and air quality- dust monitoring. www.edo.org.au/edonsw/site/science_advises.php