NSW GOVERNMENT

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (STATE SIGNIFICIANT DEVELOPMENT) BILL 2024

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

The *Environmental Planning and Assessment Amendment (State Significant Development) Bill 2024* (**the Bill**) will amend the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) in response to the decision of the NSW Court of Appeal (**Court**) in *Bingman Catchment Landcare Group Incorporated v Bowdens Silver Pty Ltd* [2024] NSWCA 205 (**Bowdens**) published on 22 July 2024.

In Bowdens, the Court held that a consent granted by the Independent Planning Commission (**IPC**) for the Bowdens Silver Project, being an open cut silver, lead and zinc mine, was void and of no effect. In particular, the Court held that the IPC should have considered the likely impacts of offsite enabling infrastructure (**OEI**), a transmission line, as part of its overall assessment of the Bowdens Silver Project because it formed part of the "single proposed development" that is State significant development (**SSD**) within the meaning of section 4.38(4) of the EP&A Act.

The Court's decision in Bowdens has impacted long-standing planning practice by finding that OEI may need to be assessed as part of a "single proposed development" that is SSD within the meaning of section 4.38(4) of the EP&A Act, where that OEI is "integral" or "has a real or sufficient link" to the proposed SSD.

Before the Court's decision in Bowdens it was generally accepted that OEI could be assessed and approved via an alternative planning pathway, in accordance with the EP&A Act. This practice allowed assessment and determination of SSD applications to occur more quickly and avoided delays with respect to the physical carrying out of SSD once the relevant consents had been obtained. However, the Court's decision in Bowdens has cast doubt on the continuation of that practice.

Consequently, it is now the case that OEI may need to be assessed as part of the "single proposed development" where it is considered that the OEI is "integral" or "has a real and sufficient link" to the proposed SSD. In practice this means that it may no longer be possible for OEI to be assessed under an alternative planning pathway, including, for example, via a separate development application under Part 4 of the EP&A Act, as development without consent under Part 5, Division 5.1 of the EP&A Act or as exempt development or complying development.

The time, effort and expense required to consider how "integral" offsite enabling infrastructure is to a proposed SSD on a case-by-case basis will cause significant uncertainty and delays in the assessment and determination of SSD applications. This is particularly so, given that the Court did not offer any guidance on how to determine whether OEI is "integral" to a proposed SSD.

The precedent established in Bowdens affects both current SSD applications awaiting determination and those applications which have already been determined. Many of those applications seek approval to carry out development involving renewable energy facilities and large-scale housing projects. The risk of delay or legal challenge to the delivery or operation of SSD projects is, therefore, substantial and one which cannot be overlooked by the Parliament.

Objectives: What is the policy's objective couched in terms of the public interest?

The object of the Bill is to amend the EP&A Act in relation to SSD and to validate certain development consents. As a direct result, the Bill will support the transparent, efficient and orderly assessment and determination of essential SSD in NSW.

The Court's decision in Bowdens has a real and material impact on the assessment and determination of applications for SSD. The Department or Planning, Housing and Infrastructure (**Department**) estimates that up to 60 SSD applications, amounting to approximately $50 billion worth of direct investment, which are currently under assessment could be affected by the decision.

The delivery and operation of SSD is essential to the productivity of the State's economy and the well-being of its communities. As a result of SSDs, power is provided to homes and workplaces, and access to high-quality health care infrastructure is improved. Further, SSDs provide a significant amount of employment opportunities, directly through construction and operation of projects; and indirectly through supporting businesses, such as suppliers, cafes and tradespeople.

Resolution of the issues arising from the Court's decision in Bowdens will provide clarity and certainty to proponents of SSD and those persons involved in the assessment and determination of SSD applications.

Options: What alternative policies and mechanisms were considered in advance of the Bill?

An amendment to the EP&A Act is the only suitable option available to address the issues arising from the NSW Court of Appeal's decision in Bowdens. The Court's decision altered long-held understanding of the operation of section 4.38(4) of the EP&A Act and will cause significant uncertainty and delays in the assessment and determination of SSD applications.

This Bill is necessary to remove legal uncertainty and facilitate efficient assessment and determination of SSD applications. Without this urgent and necessary change, an estimated $50 billion worth of direct investment across 60 SSD applications currently under assessment may be at risk of delay. It also risks more than 20 recent SSD projects, which have already been determined.

Non-regulatory options could not provide the legal certainty required, nor address the issues raised by the Court's decision in Bowdens.

Analysis: What were the pros/cons and benefits/costs of each option considered?

If the legislative amendments are not made, the assessment, determination and delivery of essential SSD may be at risk. In the absence of legislative reform, the time, effort and expense required to consider how "integral" offsite enabling infrastructure is to a proposed SSD on a case-by-case basis will cause significant uncertainty and delays in the assessment and determination of SSD applications. This is particularly so, given that the Court did not offer any guidance on how to determine whether OEI is "integral" to a proposed SSD.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The amendments proposed in the Bill will commence on the date of assent to the Bill. Supporting regulations, if any, will be prepared and implemented where appropriate, following the commencement of the provisions of the Bill.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

Given the urgency of the proposed reforms, the views of affected stakeholders were not sought or considered in the preparation of the Bill. Affected stakeholders will be informed about the proposed changes, once implemented. Relevant NSW Government agencies were contacted during the preparation of the Bill and informed about the proposed reforms. Those agencies were given an opportunity to provide initial high-level feedback on the proposed reforms.