
Memorandum

Date: 25 May 2020
To: Robert Stokes MP, Minister for Planning and Public Spaces
From: Samantha Daly, Partner, JWS and Andrew Graham, CEO, EPM Projects
Subject: State Environmental Planning Policy (Infrastructure) Amendment (Energy Storage Technology) 2020
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We refer to the recent *State Environmental Planning Policy (Infrastructure) Amendment (Energy Storage Technology) 2020 (Amending SEPP)* which amended the *State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)*.

The Amending SEPP made a number of changes to Part 3, Division 4 of the ISEPP relating to electricity generating works or solar energy systems, and was significant in the context of facilitating renewable energy projects in NSW. As noted by the NSW government when announcing the changes, the amendments to the ISEPP *'will allow larger-scale solar systems to be installed on homes and commercial buildings without council approval, enable utility providers to construct electricity storage as part of improvement works to transmission and distribution networks, and allow for large-scale battery storage systems to be built in permitted zones across NSW.'*

In particular we note that the Amending SEPP omitted the previously clause 36(3) of the ISEPP (relating to development permitted without consent), and inserted instead:

*(3) **Solar energy systems** Development for the purpose of a solar energy system may be carried out by or on behalf of a public authority without consent on any land if it is ancillary to—*

(a) an existing infrastructure facility, or

(b) an educational establishment within the meaning of State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017.

Johnson Winter & Slattery (**JWS**) and EPM Projects provide legal services and project management services respectively to a number of non-government schools in NSW. A number of the schools that we assist have, or are proposing to, install solar energy systems within their schools in order to reduce electricity costs and to move to a more sustainable energy source for their future operations.

Given the work that we do for schools, we were particularly interested in the recent changes made to clause 36(3) of the ISEPP. However whilst the changes made to clause 36(3) of the ISEPP are a very positive change for government schools, unfortunately the changes do not apply to non-government schools. In our view this is likely to be due to a regulatory oversight rather than being an intentional delineation between government and non-government schools so that only government schools obtain the benefit of cl 36(3).

Specifically, clause 36(3) refers to development for the purpose of a solar energy system that is carried out 'by or on behalf of a public authority'. A public authority is defined in the ISEPP as follows:

public authority-

(a) has the same meaning as it has in the Act, and

(b) in respect of development connected with rail corridors or railway infrastructure facilities, includes the Australian Rail Track Corporation Limited (ACN 081 455 754).

'Public authority' is defined in the *Environmental Planning & Assessment Act 1979 (EP&A Act)* as:

- (a) a public or local authority constituted by or under an Act, or
- (b) a Public Service agency, or
- (c) a statutory body representing the Crown, or
- (d) a Public Service senior executive within the meaning of the *Government Sector Employment Act 2013*, or
- (e) a statutory State owned corporation (and its subsidiaries) within the meaning of the *State Owned Corporations Act 1989*, or
- (f) a chief executive officer of a corporation or subsidiary referred to in paragraph (e), or
- (g) a person prescribed by the regulations for the purposes of this definition.

For the purpose of paragraph (g) of the definition of public authority, clause 277 of the *Environmental Planning & Assessment Regulation 2000 (Regulation)* prescribes specific entities, organisations or persons as 'public authorities'. This includes relevantly in clause 277(6), the proprietor of a registered non-government school but only so as:

- (a) to enable the proprietor to be treated as a public authority in relation to development in connection with the school that is exempt development under clause 18 of *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017*, and
- (b) to allow the proprietor to be a determining authority within the meaning of Part 5 of the Act for development that is permitted without consent under clause 36 of that Policy on land in a prescribed zone (within the meaning of clause 33 of that Policy).

Therefore whilst proprietors of registered non-government schools are a public authority for certain provisions of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP)*, in respect of exempt development and development permitted without consent, they are not a public authority for any other purpose, including in relation to the ISEPP.

The insertion of clause 277(6) into the Regulation occurred when the ESEPP commenced to ensure that government and non-government schools were on equal footing in respect of the availability of alternative planning approval pathways for school developments. Applying the same rationale to the ISEPP, we would therefore consider it appropriate that both government and non-government schools are able to get the benefit afforded by clause 36(3) of the ISEPP.

We suspect that this is likely to be a regulatory oversight, rather than an intentional application of clause 36(3) to only government schools.

Therefore we respectfully suggest that clause 277 of the Regulation is amended to prescribe the proprietors of registered non-government schools as a public authority so as to allow the proprietor to be a determining authority within the meaning of Part 5 of the Act for development that is permitted without consent under clause 36(3) of the ISEPP.

Given the significant interest by non-government schools to install solar energy systems, and given the clear environmental and social benefits in the installation of such systems, we would encourage the Minister to expedite this change so as to ensure equality across government and non-government schools in the ability to access affordable, reliable and sustainable energy supply solutions.

We would be happy to discuss this further with you, or the relevant members of the Department of Planning, Industry and the Environment, if required.

Samantha Daly

Partner

Johnson Winter & Slattery

samantha.daly@jws.com.au

0405 260 945

Andrew Graham

Chief Executive Officer

EPM Projects

agraham@epmprojects.com.au

0419 732 021