

COVID-19: (AUSTRALIA) SWEEPING NSW PLANNING POWERS INTRODUCED IN RESPONSE TO THE COVID-19 PANDEMIC

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Australia Real Estate Alert

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**This information is accurate as of Sunday 5 April 2020 and is subject to change as this situation evolves.*

OVERVIEW

The NSW Government has made key changes to the NSW Planning System to enable the flexibility required to respond to, and aid the economic recovery from, the current COVID-19 pandemic.

Amendments made to the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) on 25 March 2020 give the Minister for Planning and Public Spaces wide ranging new powers to make orders enabling the carrying out of development which is "necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic" (COVID-19 Ministerial Orders). Details of this new power and existing COVID-19 Ministerial Orders already made are contained below.

In addition, the NSW Government has also announced a Planning System Acceleration Program which will bring forward planning reforms to "cut red tape and fast-track assessment processes to boost the construction pipeline and fast-track new projects" to aid recovery from the economic downturn arising from the COVID-19 pandemic. While only limited details of the Planning System Acceleration Program have been provided at present, it is proposed that it will include measures to:

- fast-track the assessment of State Significant Developments, development applications and rezonings, with more decisions to be made by the Minister if necessary
- support councils and planning panels to fast-track locally and regionally significant development applications
- expand the type of works that can be carried out as a complying development
- introduce a 'one stop shop' for industry to progress projects that may be 'stuck in the system'
- appoint additional Acting Commissioners to help clear the current backlog of merits appeals in the New South Wales Land & Environment Court, and
- include the investment of A\$70 million to co-fund the community infrastructure required to support the construction of new homes in North-West Sydney.

NEW POWER TO MAKE COVID-19 MINISTERIAL ORDERS

The *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) amended the EP&A Act to give the Minister for Planning and Public Spaces wide ranging new powers to make COVID-19 Ministerial Orders authorising development which is "necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic".

Each COVID-19 Ministerial Order:

- operates as a development consent under the EP&A Act and has effect despite any restrictions in an environmental planning instrument
- may also turn off requirements in any other legislation for the purpose of enabling development to be carried out
- operates for a limited "prescribed period" of 6 months ending on 25 September 2020 (which may be extended to 12 months by regulation).

Before making a COVID-19 Ministerial Order the Minister must first:

- consult with the Minister for Health and Medical Research
- be "reasonably satisfied" that the making of the order is "necessary to protect the health, safety and welfare of members of the public during the COVID-19 pandemic".

Accordingly, a COVID-19 Ministerial Order may only be made where there is a direct link between the development authorised and the protection of public health and safety (including worker health and safety) during the COVID-19 pandemic.

A number of COVID-19 Ministerial Orders have already been made under the new powers and it is likely that more will be made in coming days and weeks. An overview of the existing COVID-19 Ministerial Orders is outlined below.

If your company needs to make urgent changes to its NSW facilities or operations which:

- would otherwise require planning approval under the EP&A Act
- is not authorised by an existing COVID-19 Ministerial Order,

to "protect the health, safety and welfare of members of the public during the COVID-19 pandemic", we recommend that you approach the Department of Planning Industry and Environment to discuss whether it would be appropriate to make a COVID-19 Ministerial Order to enable this.

EXISTING COVID-19 MINISTERIAL ORDERS

The COVID-19 Ministerial Orders made to date authorise:

- health service facilities carried out by a public authority

- construction work to be carried out on a Saturday, Sunday or Public Holiday (Construction Work Days Order)
- retail premises to operate 24 hours a day (Extended Operation Order)
- the use of existing premises to provide takeaway food and beverages and mobile food and drink outlets
- temporary workers' accommodation at two key NSW Power Stations to help ensure continued electricity generation during the COVID-19 pandemic.

There are restrictions on the application of the COVID-19 Ministerial Orders so it is very important that you check these and understand how they apply to your operations before you carry out any development in reliance on them.

Copies of each of the orders are available on the Department of Planning, Industry and Environment [website](#) and further details on the Construction Work Days Order and the Extended Operation Order are provided below.

CONSTRUCTION WORK DAYS ORDER

The Construction Work Days Order authorises certain construction work to be carried out on a Saturday, Sunday or Public Holiday in line with the construction hours permitted on week days.

The Construction Work Days Order currently applies only to construction work which is being carried out under a development consent, including a State significant development consent, under the EP&A Act. This means it does not currently apply to:

- construction work being carried out as exempt development under the EP&A Act
- development being carried out on behalf of a public authority under Part 5 of the EP&A Act
- major projects being carried out under a State significant infrastructure approval under the EP&A Act.

The Construction Work Days Order:

- requires that all reasonable and feasible measures be taken to minimise noise associated with construction works being carried out on Saturdays, Sundays or Public Holidays
- does not apply to rock breaking, rock hammering, sheet piling, pile driving or similar activities which remain subject to existing restrictions on construction hours.

The Construction Work Days Order operates to suspend, to the extent necessary to enable construction work to be carried out on a Saturday, Sunday or Public Holiday:

- any agreement, covenant or other similar instrument. This includes any restrictions on work hours contained in construction contracts
- any condition of an environment protection licence granted under the Protection of the *Environment Operations Act 1997* (NSW) held in relation to the construction work.

However, it is important to bear in mind that this suspension only relates to clauses and conditions which limit the hours of construction works. All other clauses and conditions must continue to be complied with.

Further, the Construction Work Days Order does not enable extended construction hours in circumstances where this would be inconsistent with any COVID-19 related orders made under the *Public Health Act 2010* (NSW) (Public Health Orders). At present, there are no Public Health Orders which directly limit construction hours but this may change if further public health restrictions are imposed in response to the COVID-19 pandemic.

EXTENDED OPERATION ORDER

The Extended Operation Order applies to all retail premises and authorises the use of retail premises which are authorised by a development consent or complying development certificate under the EP&A Act at any time.

In order to ensure supply chains have the capacity to service 24 hour operations, a corresponding amendment has also been made to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* to enable port facilities, warehouses and retail premises to operate at any time to supply goods to retail premises as exempt development until 1 October 2020.

The Extended Operation Order:

- does not remove the obligation to comply with all conditions of your development consent or complying development certificate apt from those which restrict hours of operation
- does not overcome any provisions in any leases or other agreements which may restrict hours of operation. Accordingly, you should continue to comply with all operating hours in your leases unless otherwise agreed with your landlord
- requires measures to be taken to reduce noise when operating outside the hours permitted by your development consent or complying development certificate. However, no specific measures are required so we recommend that you consider what is appropriate for your specific operations on a case by case basis.

Like the Construction Work Days Order, the Extended Operation Order does not enable extended operating hours in circumstances where this would be inconsistent with Public Health Orders. At present, there are no Public Health Orders which directly limit retail operating hours but this potentially may change if further public health restrictions are imposed in response to the COVID-19 pandemic.

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