Uplisting of the Tasmanian Devil

The world's largest surviving marsupial carnivore has been given increased status under the Commonwealth EPBC Act. On 22 May 2009 Environment Minister, Peter Garrett announced that the Tasmanian Devil will be uplisted from vulnerable to the endangered category under the EPBC Act.

Amendments to the EPBC Regulations 2000

Amendments to the EPBC Regulations relating to the taking of fish in Commonwealth reserves and conservation zones commenced on 16 May 2009. The amendments provide for determinations by the Director National Parks in relation to these areas and provide restrictions and offence provisions in relation to activities which do not comply with those determinations.

Olympic Dam Mine Expansion – EIS released for public comment

The environmental impact statement for the Olympic Dam mine expansion in South Australia (including export of copper concentrate through the Port of Darwin) was released by BHP Billiton on 1 May 2009 for public comment until 7 August 2009. The EIS has been prepared to meet the requirements of the Australian, South Australian and Northern Territory governments.

Documents are available at http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=2270.

Determination Regarding Management of Acid Sulphate Soils by South Australian Government

The Environment Minister determined on 12 May 2009 that a proposal by the South Australian Government to take emergency action to manage acid sulphate soils in the Goolwa Channel, Finniss River and Currency Creek, SA, does not need further assessment under the EPBC Act. The South Australian Government has made a series of undertakings to ensure there are no significant impacts on nationally protected matters including:

- the provision of an additional 50 GL of freshwater into the Lower Lakes,
- delivery to the system of any water captured that is in addition to that required for emergency treatment, and
- an undertaking that no water will be extracted for irrigation from the water captured.

NEW SOUTH WALES

Nicholas Brunton

DUTY TO REPORT CONTAMINATION UNDER THE CONTAMINATED LAND MANAGEMENT ACT 1997

Camilla Charlton - Senior Associate Henry Davis York

Background

The remaining amendments to the Contaminated Land Management ACT 1997 (CLM Act) commenced on 1 July 2009, including the *'duty to report'* provisions under s.60.

The new *Guidelines on the Duty to Report Contamination under the Contaminated Land Management Act 1997* (the Guidelines), which provide guidance as to how the duty is to be interpreted, do not come into force until 1 December 2009 and the NSW Department of Environment, Climate Change (DECC) has indicated that the duty itself will not be enforced until that time.

However, the fact that the amendments have officially commenced, and that the original provisions are no longer in existence, means we have no other choice but to apply the new regime.

What is the duty to report?

Under the CLM Act:

- persons whose activities have contaminated land; and
- landowners whose land has been contaminated,

must notify DECC of that contamination.

What are the main changes to the duty?

Level of awareness/knowledge

An owner of land, or a person whose activities have contaminated land, must notify DECC of contamination as soon as practicable after the person *'becomes aware'* of such contamination. Under the new regime, the definition of awareness is expanded to include not only actual awareness,

but also circumstances in which a person *'ought reasonably to have been aware'* of the contamination.

A failure to identify and investigate potential contamination in such circumstances could mean the person has breached his/her responsibility to report under the CLM Act and large fines may apply.

To determine whether the person ought reasonably to have been aware, or should reasonably become aware, DECC will take into account:

- the person's abilities, experience, qualifications and training;
- whether the person could reasonably have sought advice that would have made he or she aware of the contamination; and
- the circumstances of the contamination.

If a person is considered to have the necessary experience and resources, then arguably he or she is under a duty to *'become aware',* by considering various indicators of contamination, as set out in the Guidelines, to determine whether or not contamination may be present.

Notification triggers

The new reporting regime no longer refers to *'significant risk of harm'* sites (or *'sites significant enough to warrant regulation'*, as they are now called), and reporting is now required simply when specific *'notification triggers'* are met.

Under the CLM Act, a person is required to notify DECC of contamination when:

- the level of contaminant in, or on, soil exceeds a level of contamination set out in any guidelines with respect to a current or approved use of the land, and a person has been, or foreseeably will be, exposed to the contaminant; or
- the contaminant has entered, or will foreseeably enter, neighbouring land, the atmosphere, groundwater or surface water, and the contamination exceeds, or will foreseeably exceed, a level of contamination set out in the Guidelines and will foreseeably continue to remain above that level; or
- the contamination meets certain criteria prescribed by the regulations; or

The Guidelines provide further detail as to the specific triggers, dividing them into several different categories, and set out the levels above which contaminants in groundwater will trigger the duty to notify.

What should a site owner or operator do?

- Step 1: Review site activities and history and undertake a site inspection
- Step 2: Carry out investigations
- Step 3: Assess the contamination
- Step 4: Assessment by DECC

Implications for landowners

- Regardless of whether or not they have any actual knowledge of contamination, there may be an obligation on landowners and operators to consider the various indicators of contamination to determine whether or not further investigation is required.
- As those indicators are fairly broad, there is likely to be a significant increase in the number of site investigations which will need to be carried out.
- Reporting triggers are more specific, with prescribed levels of contaminants. However, there is still a level of uncertainty as to the interpretation of *'indicators of contamination'* and when owners/persons responsible should seek further advice and undertake investigations.

REFORMS TO THE HERITAGE ACT

Janet McKelvey - solicitor Henry Davis York

Introduction

In July 2007, an independent review of NSW heritage legislation was conducted and various recommendations were made dealing with the process surrounding State significant heritage listing. Some of these recommendations have been now incorporated into the legislation by the passing of the *Heritage Amendment Act 2009* (the Amendment Act) in June 2009. The changes have yet to commence operation. Essentially, the Amendment Act aims to provide for owners of heritage (or potential heritage) items to have more influence over the listing process and to carry out minor works without the need for approval. The Amendment Act also gives the Minister more powers in relation to heritage items.

Heritage Council

The Heritage Council of NSW (the Heritage Council)

is constituted under the Heritage Act and is the body that makes recommendations to the Minister for Planning (the Minister) regarding the listing of, conservation and maintenance of heritage items. The Amendment Act proposes to reduce the number of members of the Heritage Council from 15 to 11. This will eliminate a representative from the Royal Australian Historical Society, Unions NSW, a joint nominee of the Royal Australian Institute of Architects and the Planning Institute of Australia and a member from the Department of Planning. The new Heritage Council will consist of eight experts appointed by the Minister, one of those being a representative of the National Trust of Australia. The other three members will be the NSW Government Architect, the Director-General of the Department of Planning and the Director-General of the Department of Environment and Climate Change.

The Listing Process

Previously, when the Heritage Council was considering listing an item on the State Heritage Register (the Register), they had to notify the Minister of the criteria they would be using to determine the matter. The Amendment Act requires the Minister to approve the criteria and publish it in the Gazette, and the Heritage Council may only use the published criteria. The Amendment Act is silent on whether the Minister can make amendments to criteria before it is approved and gazetted. Presumably, if the Minister has the power to approve the criteria, he/she also has the power to reject or amend it. Accordingly, the Minister will play a greater role in establishing the criteria for heritage listing.

The Amendment Act also introduces new criteria into what the Minister must consider when deciding whether an item is of State heritage significance and should be listed on the Register. Previously, the fact that it was recommended for listing by the Heritage Council was enough. Now, the Minister must consider:

- the recommendation of the Heritage Council that the item should be listed;
- whether the long-term conservation of the item is necessary;
- whether the listing would render the item incapable of reasonable or economic use (we note that there is no indication of what "reasonable or economic use" means); and
- whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.

The Heritage Council must also consider the above criteria before making the initial recommendation to the Minister, in an attempt to reduce the number of recommendations the Minister will have to determine.

The Amendment Act seems to attempt to reduce the number of recommendations for listing made to the Minister by establishing a higher threshold of criteria that must be met. The Heritage Act only requires that an item meet one of the Heritage Council's criteria for listing to be recommended. Under the amendments, an item will need to meet more than one criteria approved by the Minister to be recommended for listing or must be of "such State significance" that a recommendation should be made.

Similarly, the Minister can now remove an item from the Register if the Heritage Council recommends it or if the Minister is of the opinion:

- that the item does not require long-term conservation; or
- that the listing will render the item incapable of reasonable or economic use; or
- that the listing will cause undue financial hardship to the owner, mortgagee or lessee of the item.

The Amendment Act also allows any aggrieved owners, mortgagees, lessees or occupiers of items that are proposed to be listed to request the Minister to refer a listing recommendation to a Ministerial Review Panel or the Planning Assessment Commission. It is unclear whether an aggrieved owner will be able to make submissions to the Review Panel.

Conservation Management Plans

The Amendment Act has amended provisions relating to Conservation Management Plans (CMPs). A CMP must be endorsed by the Heritage Council and must be prepared in accordance with the Heritage Council's guidelines (which are yet to be released).

The second reading speech gives us an indication of what will be contained in the Heritage Council's CMP guidelines. For example, the CMP may contain provision for minor development that will not materially affect the heritage significance of the

item.

Once the CMP is endorsed, no further approval will be required by the Heritage Council. CMPs must also be considered by the Heritage Council if approval for other work is sought by the owner. This is aimed at reducing red tape for owners of heritage items who wish to carry out minor works.

Stop work orders

Currently, if any work is undertaken on a heritage listed item without approval, the only way to stop it is to seek an injunction by the Court. The Amendment Act will allow the Minister or the chairperson of the Heritage Council to issue stop work orders as an interim measure, allowing 40 days after the issuing of the order to take further Court action or negotiate with the person undertaking works. There is no appeal right against a stop work order.

Local Councils and Heritage

Local councils who wish to identify an item of heritage significance in their Local Environmental Plan (LEP) may refer any objections to an independent hearing and assessment panel. This amendment gives owners more influence over whether their property or heritage item will be listed on the Register or identified in an LEP.

The Amendment Act also states that local councils cannot refuse a development application on heritage grounds, if an approval has been obtained under the Heritage Act for the development. It may be that the Heritage Council will require a CMP before giving its approval to a proposed development.

Currently, any Crown development that is determined under the *Environmental Planning and Assessment Act 1979* does not attract the operation of integrated development provisions. However, the Amendment Act inserts a requirement for approval from the Heritage Council before the local council determines a development application for Crown development.

PLANNING REFORMS UPDATE - AUGUST 2009

Anneliese Korber - Senior Associate Henry Davis York

The Environmental Planning and Assessment Amendment Act 2008 (Amendment Act) was assented to on 25 June 2008 and introduced major reforms to the NSW planning system. What follows is a brief summary of the major changes.

Major Projects SEPP becomes Major Development SEPP

From 1 July 2009, the Major Projects SEPP became known as the State Environmental Planning Policy (Major Development) 2005 (the Major Development SEPP). The Major Developments SEPP now specifies the form of development that will be determined by Joint Regional Planning Panels (JRPPs) and those developments that fall under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A).

Joint Regional Planning Panels

From 1 July 2009, regionally significant developments will be determined by new entities called Joint Regional Planning Panels (**JRPPs**). There are currently five panels covering most of NSW, with exception of the City of Sydney and Wagga Wagga. A Western Region panel is to be established shortly. JRPP's comprise three members appointed by the Minister for Planning and two members appointed by the Councils that are part of a local government area in the region. Most members have now been appointed and a list is available on the Department of Planning website. JRPPs may exercise various planning functions as required by the Minister for Planning, but their most significant role is to act as a determining body for developments that are deemed to be regionally significant.

What type of development will the JRPPs assess?

Development that will require the approval of a JRPP, from 1 July 2009, includes:

- development with a capital investment value (CIV) of over $10 million;
- various public and private development which has a CIV over $5 million including affordable housing, air transport facilities, child care centres, community facilities, correctional centres, educational establishments, electricity generating works, electricity transmission or distribution networks, emergency services facilities, health services facilities, group homes, places of public worship, port facilities, public administration buildings, public ferry wharves, rail infrastructure facilities, research stations, road infrastructure facilities, roads, sewerage systems, telecommunications facilities, waste or resource management facilities, water supply systems, wharf or boating facilities;
- designated development;

- Crown development above $5 million;
- eco tourism development and a number of developments in coastal areas;
- crown development with a CIV over $5 million;
- development where a local council is the applicant, owner or person carrying out the development, and where it has a CIV over $5 million; and
- subdivision of land into more than 250 lots and some coastal development.

Certain development is excluded from the JRPP provisions including development for which consent is not required under another planning instrument (such as the Infrastructure SEPP), complying development, development within the area of the City of Sydney, Part 3A development, critical infrastructure and development for which the consent authority is not a council.

How will the JRPPs operate?

Development applications, plans, drawings, environmental impact statements and lodgment fees will continue to be submitted to the relevant council in the ordinary manner. Councils will retain the right to exercise their functions in relation to the assessment process including requesting information and public notification. Essentially, the JRPP is the final decision making body and has no administrative role. Once all information relevant to the DA has been submitted to the council, the council may make a submission on the development to the JRPP before referring the matter for determination. Following determination, councils retain the responsibility to notify applicants of the determination of the JRPP and are still responsible for monitoring the consent and enforcing any conditions.

As a consequence of the creation of JRPPs, some of the categories of Part 3A development have been altered. Part 3A development previously included, for example, residential, commercial or retail projects that have a CIV over $50 million. This threshold has been lifted to a $100 million.

Changes to SEPPs and REPs

The amendments also introduced changes to the making of environmental planning instruments (**EPIs**). All Regional Environmental Plans (**REPs**) have been repealed and the few remaining REPs are now known as State Environmental Planning Policies (**SEPPs**).

Draft SEPPs will now be subject to new consultation procedures and the Minister for Planning may publicise an explanation of the intended effect the proposed SEPP or seek and consider submissions from the public on a matter.

Changes to LEPs

Draft Local Environmental Plans (**LEPs**) have been replaced with 'planning proposals' which must explain the intended effect or purpose of a proposed LEP. These will usually be prepared by councils and forwarded to the Minister for review before community consultation takes place, under a new process known as 'gateway determination'.

Crown Development

Minor amendments have also been made to Crown development provisions in the EP&A Act. If the relevant consent authority does not determine a Crown DA within 70 days, the applicant or consent authority may refer the DA to the Minister or the relevant JRPP.

Previously, a consent authority could refer a Crown DA to the Minister if it had not determined in within 40 days. If the JRPP fails to determine the DA within 50 days, it may be referred to the Minister. JRPPs will determine all Crown DAs lodged after 1 July 2009 for development with a CIV over $5 million.

Section 149 certificates

Section 149(2) certificates have been updated to reflect changes in terminology as a result of the amendments to the *Contaminated Land Management 1997* (NSW). From 1 July 2009, section 149 (2) certificates will, for example, identify whether the land to which the certificate relates is significantly contaminated land, subject of an approved voluntary management proposal, subject to a management order or subject to an ongoing maintenance order.

Implications

These reforms substantially change the approval process for many types of developments. It has been somewhat depoliticised at the local government level but the Minister retains many significant powers and has a wide influence over planning. Whether it has become more streamlined and simpler is another question.