

# NELR recent developments

temporary restriction on exploration tenure applications in south-east Queensland, and in designated urban areas, plus a 2km buffer. An urban area is a town with a population of more than 1 000.<sup>5</sup> The government has also requested existing tenure holders to voluntarily relinquish their tenure over such areas. This ban is intended to be an interim measure while the government seeks consultation on a more permanent solution.

## \$172 000 fine imposed for clearing marine plants

On 22 July 2011 the Maryborough Magistrates Court imposed a fine of \$172 000 for clearing marine plants in contravention of the *Fisheries Act 1994 (Qld) s 123(a)*. The defendant, Ronald Blyth, was found guilty of clearing mangroves along the bank of the Mary River. The clearing occurred in conjunction with a development approval for construction of a marina, despite a clause stating that 'the pontoon in no way may involve the disturbance, removal, destruction or damage of any marine plants'. Mr Blyth pleaded not guilty, and

<sup>5</sup> <http://mines.industry.qld.gov.au/assets/mines/Interim-restrictions-overview.pdf>.

## TASMANIA

### Dispute over continuing work at pulp mill site

A community organisation, Pulp the Mill Inc, has begun prosecution proceedings against Gunns Limited in the Magistrates Court, claiming that ongoing work on the pulp mill's Bell Bay site is unlawful as the permit issued for the project has lapsed.<sup>1</sup>

Under the *Pulp Mill Assessment Act 2007 (Tas) s 8(4)*, the State 'Pulp Mill Permit' lapses if the project is not 'substantially commenced' within 4 years of the Permit coming into force, a period which expired on 30 August 2011. Earthworks and road construction work have been occurring on the mill site since 26 August 2011, when Gunns announced that it had entered into a contract for the work. Prior to that date, some vegetated areas of the site had been cleared, but little else had occurred on the site.

Pulp the Mill Inc claims that the amount of work carried out by Gunns up to 30 August 2011 was not sufficient

<sup>1</sup> For an overview of the charges, see [tasmaniantimes.com/index.php?/article/pulp-the-mill-launches-prosecution-of-gunns-ltd/](http://tasmaniantimes.com/index.php?/article/pulp-the-mill-launches-prosecution-of-gunns-ltd/)

claimed that he was unaware of the clause when he undertook the clearing. Magistrate John Smith rejected this defence, noting that the failure of the defendant to check the terms of the development approval before proceeding was foolish and reckless, and did not satisfy the requirements of the defence of mistake of fact.

In determining the appropriate penalty, Magistrate Smith took the following factors into account:

- the defendant's cooperation once the offence was detected
- the defendant's good character
- the maximum penalty of \$300 000
- the fact that approval would likely have been given to clear the mangroves, with appropriate offsets, had the defendant sought approval
- the need for the penalty to outweigh the likely commercial gain derived from the offending.

Magistrate Smith awarded a penalty of \$172 000 plus costs, and declined to record a conviction.

## by Jess Feehely and Tom Baxter

to demonstrate that the project had been 'substantially commenced'. Gunns maintains that the project had substantially commenced, and continues working on the site. The prosecution proceedings will commence on 14 October 2011.

Gunns applied to the EPA to vary its permit conditions regarding storm water management, and at the time of writing the Director of the EPA was assessing whether the permit had lapsed. The director was considering a submission made by Gunns documenting the works it alleged demonstrated substantial commencement. He was expected to report before the end of September 2011 on whether he was satisfied that the permit remained in force. Tasmania's Attorney-General Brian Wightman declined to intervene in the matter. However, the Premier acknowledged that regardless of the outcome of the EPA review, the issue of 'substantial commencement' may need to be determined by a court.

The *Pulp Mill Assessment Act 2007 (Tas)* also provides that permits issued for dam works associated with

the project lapse if the works are not 'substantially completed' by 30 August 2011. As construction of the three approved dams had not commenced on 30 August 2011, Gunns conceded that the permits had lapsed and applied for new permits to authorise future dam work. This application will be assessed by the Assessment Committee for Dam Construction under the *Water Management Act 1999* (Tas).

The Tasmanian Greens have questioned whether new permits can be issued, given the restricted application of legislation other than the *Pulp Mill Assessment Act 2007* (Tas) to the pulp mill project. The Tasmanian government maintains that it has legal advice confirming that new permits can be issued, but has refused to release the advice.<sup>2</sup>

## TCT withdraws legal challenge

As reported in the last edition of NELR, the Tasmanian Conservation Trust commenced legal action in the Federal Court in June 2011 seeking judicial review of Minister Tony Burke's decision to amend permits issued to Gunns Limited under the EPBC Act. The amendments authorised a revised pipeline corridor (on the basis that landowner agreement could not be reached in respect of the originally proposed corridor) and allowed future amendments to the Environmental Impact Management Plan (EIMP) to be made without public consultation. The TCT application alleged that the:

- failure to obtain landowners' consent was not a relevant consideration which would justify amendment of the approved route
- Minister failed to consider the impact of the new pipeline corridor on listed threatened species
- proposed fast-tracking of future amendments to the EIMP was not lawful.

The matter had been set down for a further directions hearing in October 2011. However, on 21 September 2011 the TCT announced that it had withdrawn its application. The TCT Director, Peter McGlone cited costs as a significant factor in the decision, noting that Gunns' opposition to a restrictive costs order agreed to by the Minister 'presented a financial risk that the TCT was unwilling to take.'<sup>3</sup>

<sup>2</sup> Minister for Primary Industries and Water media release 30 August 2011, [www.media.tas.gov.au/release.php?id=33083](http://www.media.tas.gov.au/release.php?id=33083)

<sup>3</sup> 'Pulp Mill Case Pulped', ABC News, 21 September 2011. [www.abc.net.au/news/2011-09-21/](http://www.abc.net.au/news/2011-09-21/)

## More Ministerial discretion under Permanent Native Forest Estate Policy

The Tasmanian Government has had a formal policy regulating the extent of clearing and conversion of the native forest estate since 1996. This is consistent with commitments under the Tasmanian Regional Forest Agreement (RFA) to phase out broadscale clearing and conversion of native forests, and maintain 95% of the Comprehensive Regional Assessment (CRA) native forest area within the state.

Broadscale clearing and conversion of native forest on public land ceased in 2009. In order to manage the phase out of clearing on private land by 2015, the *Policy for Maintaining a Permanent Native Forest Estate* released in 2009 limited the area of private forest that could be cleared and converted on any property to 40ha per year (subject to limited exemptions).

On 20 September 2011, the Tasmanian Minister for Forests, Bryan Green, released a revised policy which allows an exemption from this property conversion limit where the Minister is satisfied that a development proposal 'demonstrates substantial public benefits'.<sup>4</sup> The implementation guidelines for the revised policy state:

During the phase-out of broadscale clearing and conversion it is not the intent of the Policy to limit major projects that can demonstrate substantial public benefits to the Tasmanian community and where any associated conservation benefits are secured through formal agreements.

The revised policy states that it will be implemented solely through the issue of Forest Practices Plans by the Forest Practices Authority, despite legislative amendments in 2009 which exempted clearing associated with buildings approved by local planning authorities from the requirement to obtain a Forest Practices Plan.

## Tasmanian Forests Intergovernmental Agreement

Some 12 months after the historic Tasmanian forestry negotiations commenced, the parties to the negotiations released a Signatories Agreement in June 2011. On

<sup>4</sup> Available at [www.dier.tas.gov.au/](http://www.dier.tas.gov.au/)

# NELR recent developments

7 August 2011 the Prime Minister and the Premier signed the *Tasmanian Forests Intergovernmental Agreement (IGA)* to give effect to the signatories' agreement.<sup>5</sup> A key commitment under the IGA includes the establishment of an Independent Verification Group, to be chaired by Professor Jonathon West, to:

- verify the conservation values of the 572 000ha of nominated high conservation value forest
- verify industry claims regarding minimum wood supply requirements and availability of resources outside nominated high conservation value forests
- make recommendations by 31 December 2011 regarding final boundaries and appropriate reserve categories (if any) for the nominated high conservation value forests
- designate 430 000ha of the nominated high conservation value forest in informal forest reserves immediately. Harvesting in those reserves is prohibited while the report is being finalised, with work planned for those areas to be rescheduled and compensation to be paid for any contracts where rescheduling is not possible.

Forestry Tasmania has advised that it cannot meet current contractual requirements without harvesting in the 430 000ha, and has allowed continued harvesting in several identified reserve areas. The ENGO signatories have called on the government to direct Forestry Tasmania to cease work, but the government has yet to act. The Verification Group is conducting an expert review of Forestry Tasmania's claims and will make recommendations to the government by 10 October 2011.<sup>6</sup>

The Tasmanian Government is to introduce legislation to give effect to the recommendations of the Verification Group by 30 June 2012, with \$7m to be provided annually by the federal government to support the management of new reserves if the legislation is passed.

The federal government will provide \$45m to support voluntary buy backs of native forest contracts before 30

<sup>5</sup> *Tasmanian Forests Intergovernmental Agreement between the Commonwealth of Australia and the State of Tasmania*. Available at [www.dier.tas.gov.au/forests/tasmanian\\_forests\\_agreement](http://www.dier.tas.gov.au/forests/tasmanian_forests_agreement)

<sup>6</sup> 'Review to Decide Forestry Dispute', 22 September 2011. [www.abc.net.au/news/2011-09-22/20110922-review-to-decide-forestry-dispute/2911494?section=tas](http://www.abc.net.au/news/2011-09-22/20110922-review-to-decide-forestry-dispute/2911494?section=tas)

June 2012, to allow retired forestry rights to be allocated to conservation reserves. Controversially, \$23m of this has been paid to Gunns Limited, and \$11.5m to Forestry Tasmania. The Tasmanian Premier has said that these payments were to achieve the joint objectives of settling a dispute between the corporations over outstanding debts which Forestry Tasmania alleges Gunns owes it, and formally extinguishing Gunns' residual rights to harvest native forests under two native forest wood supply contracts.

Some have questioned the necessity for the payments, given Gunns' failure to meet conditions in the wood supply contracts regarding pulp mill construction and Forestry Tasmania's previous assertion that Gunns had already voluntarily given notice to terminate its key wood supply agreement after deciding to exit native forestry.

## Security for the forest industry

The IGA commits to the annual supply of the following minimum wood volumes:

- 155 000m<sup>3</sup> of high quality sawlogs
- 265 000m<sup>3</sup> of peeler billets
- up to 12 500m<sup>3</sup> of specialty timbers (to be used for artisan products, furniture etc).

The Verification Group is required to have regard to these minimum quotas when determining the final reserve boundaries and rescheduling opportunities.

The commitment to minimum volumes of peeler billets to supply Malaysian company Ta Ann's operations has been strongly criticised as providing inappropriate protection for the company, and running the risk that compensation may be payable if such supplies cannot be sustained.

## Assistance to workers

The Statement of Principles recognised that significant support was needed to assist forestry workers and the community to adjust to changes in the industry. The IGA outlines a range of commitments to assist forestry workers and the community to adjust to changes in the industry, including:

- \$14–\$25m to provide employment, training and relocation support for redundant forest workers

- \$15m transition support payments to workers directly affected by closure of Gunns' mills
- \$1m for counselling services to forest workers and their families
- consultation with affected communities to develop appropriate adjustment packages and identify alternative job opportunities
- \$120m over 15 years to fund regional redevelopment projects, including research and analysis projects.

The governments have committed to consultation with affected communities to develop appropriate compensation and adjustment packages. The support payments are currently being finalised and should be delivered by December 2011.

Some industry groups have criticised the support package for providing only meagre compensation. Other groups, including the CFMEU and the Tasmanian Forest Contractors Association, have expressed strong support for the Agreement.<sup>7</sup>

The regional development funding is contingent upon legislative protection of reserve areas identified through the verification process. \$20m will be available in 2011–2012, but must be repaid in the event that legislation to protect high conservation value forests is not passed.

The most significant stumbling block to implementation of the Intergovernmental Agreement remains the Tasmanian Parliament, which will be required to pass legislation to give effect to the agreed minimum supply volumes and new protected areas. The Tasmanian Liberal Opposition, and several members of the upper house, remain opposed to the IGA outcomes and have called for the deal to be scrapped.<sup>8</sup>

## National Heritage listing for the Tarkine delayed again

The Australian Heritage Council was due to provide a final report to Federal Environment Minister Tony Burke in September 2011 regarding the proposal to include

<sup>7</sup> 'Tasmanian Forest contractors welcome the Intergovernmental Agreement on Tasmanian Forestry'. *Daily Timber News*, 8 August 2011. [www.forestsandtimber.com.au/dtn/details.asp?ID=677](http://www.forestsandtimber.com.au/dtn/details.asp?ID=677)

<sup>8</sup> See, for example, 'Liberals to Oppose Disastrous Forestry Agreement'. Michael Ferguson media release. 8 August 2011. <http://michaelferguson.com/2011/08/liberals-to-oppose-disastrous-forestry-agreement/>

the Tarkine Rainforest on the national heritage list. The Heritage Council has now requested more time to complete its assessment, and no new timeframe has been set.

The Tasmanian Minerals Council opposes the proposed listing. Tasmania's Minister for Energy and Resources, Bryan Green, has also announced that he and Environment Minister, Brian Wightman, will meet with Tony Burke in October 2011 to outline their concerns that the proposed heritage listing would jeopardise future investment in mining and forestry in the area.<sup>9</sup>

## Agricultural spraying regulations under review

The Minister for Primary Industries and Water, Bryan Green, introduced the *Agricultural and Veterinary Chemicals (Control of Use) Amendment Bill 2011* on 20 September 2011.<sup>10</sup> The Bill proposes a range of amendments to 'improve chemical use practice in Tasmania', and paves the way for introduction of regulations regarding ground and aerial spraying.

Draft agricultural spraying regulations were released for public comment in May 2011, and are currently being considered by the Agricultural, Silvicultural and Veterinary Chemicals Council. The Council anticipates that the regulations will be introduced before the end of 2011.

Significant issues addressed in the draft regulations include:

- prohibiting any chemical residue within 2m of water bodies. The original draft recommended a 10m buffer zone, however this was reduced following lobbying from the agricultural sector about the compliance costs of a wide buffer
- increased record keeping requirements
- notification of spraying activities. The regulations set out the detailed information required to be provided with notification, but reduce the area within which notification must be given.

## Canal Estate Ban Bill rejected

The *Canal Estates (Prohibition) Bill 2011*, which sought to prohibit the use or development of residential

<sup>9</sup> Bryan Green media release 22 September 2011, [www.media.tas.gov.au/release.php?id=33206](http://www.media.tas.gov.au/release.php?id=33206)

<sup>10</sup> [www.parliament.tas.gov.au/bills/pdf/48\\_of\\_2011.pdf](http://www.parliament.tas.gov.au/bills/pdf/48_of_2011.pdf)

# NELR recent developments

canal estates in Tasmania, was passed by the House of Assembly on 14 June 2011, with the support of both Labor and the Greens. However, on 7 July 2011, the Legislative Council (comprised predominantly of independent members) voted 10:4 against the Bill. Opponents argued that the Bill would send a negative message to future investors about development in Tasmania.

## Tasmanian Economic Development Plan released

Economic Development Minister for Tasmania, David O'Byrne, released the Tasmanian Economic Development Plan on 26 August 2011.<sup>11</sup> The plan, which was a commitment under the Intergovernmental Agreement to facilitate regional development, sets out strategies for attracting investment in key sectors, including mining, forestry, agriculture and marine farming. Strategies include streamlining the planning system

<sup>11</sup> [www.development.tas.gov.au/economic/economic\\_development\\_plan](http://www.development.tas.gov.au/economic/economic_development_plan)

## VICTORIA

### NELA hosts EPA statutory policy roundtable discussion<sup>1</sup>

On 16 August 2011 NELA (Victoria) and the Victorian Bar Climate Change and Environmental Law Panel hosted a roundtable discussion with senior practitioners as part of the EPA's Review of Statutory Policy. Attendees discussed their views about the State Environment Protection Policy and other statutory environmental policies, including the role of SEPPs and the role of the EPA as policy maker and regulator. NELA provided the minutes of the meeting to the Statutory Policy Review team. Details of the Statutory Policy Review are available at: [http://www.epa.vic.gov.au/about\\_us/legislation/statutory-policy.asp](http://www.epa.vic.gov.au/about_us/legislation/statutory-policy.asp)

### Victorian Parliamentary Committee report on Environment Effects Act

On 1 September 2011 the Environment and Natural Resources Committee of the Victorian Parliament tabled the report of its inquiry into the Environment Effects Act Statement Process. The report sets out a

<sup>1</sup> [http://www.epa.vic.gov.au/about\\_us/legislation/statutory-policy.asp](http://www.epa.vic.gov.au/about_us/legislation/statutory-policy.asp)

and supporting infrastructure development. The plan identifies as a government priority the development of a Business and Environmental Sustainability programme, including:

- strategic emission reductions partnerships with the state's biggest emitters
- establishment of a carbon price roundtable to assess likely impacts on Tasmanian businesses and identify commercial opportunities arising from the carbon pricing scheme
- a business energy efficiency pilot
- development of environmental indicators to support market branding for Tasmanian products
- an environmental and social labeling feasibility study.

by Barnaby McIlrath

number of recommendations which will be of interest to practitioners. Of particular note are the following recommendations:

(3.6) The environmental impact assessment legislation be amended to:

(a) confirm ecologically sustainable development (ESD) principles as the overarching principles underpinning decision-making under the Act

(b) emphasise that environmental matters are to be considered first when making decisions under the Act – decision-making should integrate long-term and short-term environmental, social, economic and equitable considerations effectively.

(3.7) The objects of the Victorian environmental impact assessment legislation be revised to state:

(a) the primary object of the Act is to protect the environment