

## Environmental Impact Assessment - is it necessary?

Each year hundreds of development proposals from a range of industries are referred to the office of the Environment Protection Authority (EPA) for environmental assessment and approval, but out of those hundreds how many actually need to be referred? The answer is perhaps surprisingly, none.

### Background

Pursuant to s38 of the *Environmental Protection Act 1986 (EP Act)* any person (including the proponent, the Minister for Environment (Minister) or a third party) 'may' refer a 'significant proposal' to the EPA for environmental assessment. The interpretation of the requirement set out in this section is such that it is a matter of discretion, not an obligation, whether or not to refer a significant proposal for assessment. Indeed, not referring does not result in an offence under the EP Act.

In the event that a significant proposal is referred under the EP Act, it will then be subject to a formal Environmental Impact Assessment (EIA) process, during which the EPA will set a level of assessment and make a recommendation to the Minister as to whether the proposal should be approved on an environmental basis (see section 44 of the EP Act).

If the Minister decides to approve the proposal he will then issue the proponent of the proposal with a Ministerial Statement containing a series of conditions on how the proponent is to implement the proposal (see section 45 of the EP Act). It is at this point that it becomes an offence under the Act if a proponent does not comply with the conditions contained in the Ministerial Statement and the proponent may be liable for a penalty of \$125,000 for an individual and \$250,000 for a body corporate, plus daily penalties.

### Who refers?

If there is no obligation for a proponent to refer a 'significant proposal' for EIA, why do they get referred?

The answer to this question is quite simply that significant proposals often get referred to the EPA by decision-making public authorities pursuant to the obligation set out in s38(5) of the EP Act, which states that as soon as a public authority has notice of a proposal that appears to be:

- a) a significant proposal; or
- (b) a proposal of a prescribed class,

then the public authority is to refer the proposal to the EPA.

### Significant proposal

Despite the power under s38(5) of the EP Act, there is considerable scope to argue whether or not the decision-making authority should refer the proposal in the first place. The foundation for this argument is based on the interpretation of the term 'significant proposal'.

Under s37B(1) of the EP Act a 'significant proposal' means 'a proposal likely, if implemented, to have a significant effect on the environment'. However, the term 'significant effect on the environment' is not defined within the EP Act, its regulations, supporting policies or the newly introduced *Environmental Impact Assessment Administrative Procedures 2010* (which were introduced to simplify the EIA process).

### Significant effect on the environment

According to the Oxford Dictionary the term 'significant' means 'important' and the term 'effect' means 'result or consequence'. Based on these definitions any proposal that is likely to have an important result or consequence on the environment, whether positive or negative, will be regarded as a 'significant proposal' for the purposes of the EP Act and may be referred to the EPA for environmental assessment.

The problem with this interpretation is that the test for determining whether something is 'important' is completely subjective and will vary depending on the views of the public authority and its respective personnel, which is contrary to the intention of the EP Act.

### Observation

The question of whether a proposal is likely to have a 'significant effect on the environment' has already been addressed by the Supreme Court on a number of occasions, particularly in relation to planning approvals (see *Roe v Director General, Department of Environment and Conservation for the State of Western Australia* [2011] WASCA 57).

However, the issues in the majority of matters with regard to the term have only addressed the merits of a proposal and the Court to date has not provided an objective interpretation of the term.

Therefore, in the absence of an overarching objective interpretation of the term 'significant effect on the environment' within either the Act, the Administrative Procedures, supported EPA guidelines or policies, it may not be necessary or appropriate for a public authority to refer a proposal based on their subjective views.

If you would like to know more about your obligations under the EP Act or other environmental legislation, please contact Paul McQueen, Partner or Shauna Mounsey, Associate.

### Disclaimer

This newsletter does not purport to provide legal advice and independent legal advice should be sought in regards to any objections or challenges of any EIA referrals. Further, the obligation to refer a proposal for environmental approval under the *Environmental Protection and Biodiversity Act 1999* (Cth) may still apply as approvals under this Act are separate from the EP Act.

## Environmental Focus Group

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## Shauna Mounsey

Associate, LLB, BSc, LLP

Shauna Mounsey joined Lavan Legal as an Associate in the Planning, Environment and Land Compensation team on 14 February 2011, after relocating to Perth from Darwin. During the course of her practice in Darwin, Shauna provided specialised environmental law advice to clients from a range of industries including energy and resources, pastoral, property development and government. Shauna also ran the environmental law practice at Ward Keller Lawyers, the Northern Territory's largest law firm.

Shauna has also worked as an environmental lawyer for Clayton Utz and as corporate in-house lawyer for URS Corporation Ltd, one of the world's largest environmental and engineering consultancy firms. Prior to becoming a lawyer Shauna was an environmental scientist with URS where she was responsible for the project management of some of the Northern Territory's most prominent projects.

Shauna has lectured in Environmental and Planning Law at Charles Darwin University for the past two years, been a co-author of *Global Climate Change: Australian Law and Policy*, taken up appointment as an Executive Committee Member of the Northern Territory branch of the Australia China Business Council and been an active Member of the Environment Committee of the Northern Territory branch of the Minerals Council of Australia.

In 2010 Shauna was recognised for her professional accomplishments and awarded the Northern Territory Young Career Achiever of the Year and in 2008 Shauna was awarded the Charles Darwin University Prize for Environmental and Planning Law.

### Areas of expertise:

- Environmental law
- Property law
- Climate change
- Renewable energy law

