

Protect yourself - legal professional privilege and the *Environmental Protection and Biodiversity Conservation Act 1999*

It is increasingly important for land developers, or those operating facilities that require clearing of native vegetation on land, to consider their potential obligations to refer their proposals to the Commonwealth Department of Environment, Water, Health and the Arts (DEWHA) for assessment as 'controlled actions' pursuant to part six of the *Environmental Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act).

Although many developers and operators are aware of their obligations in this regard, it has come as a surprise to some that DEWHA are investigating not only proposals to clear but also historical clearing which has taken place since the EPBC Act came into force on 16 July 2000.

Investigations into historical clearing generally include the requirement to respond to questions such as:

- the extent of historical clearing occurring after the commencement of the EPBC Act;
- the nature of environmental approvals obtained for such clearing, if any (relevant for the purposes of determining if the prior authorisation exemption applies); and
- what steps (if any) have been taken in order to determine whether or not any clearing which has been carried out constitutes 'a significant impact' on matters of a national environmental significance.

The responses to questions asked during the course of these investigations can determine whether or not enforcement action will be taken. As a result, and due to the significant penalties capable of being levied under the EPBC Act legislation, it is imperative that all stakeholders carefully analyse the actions already taken as well as ensuring that relevant considerations are made in relation to actions to be carried out in the future.

Legal professional privilege

In our September 2009 Environmental E-newsletter, we highlighted the importance of obtaining legal advice and retaining legal

professional privilege on all communications in order to provide protection from disclosure where action is being taken against an entity under investigation. Legal professional privilege preserves the confidentiality of certain communications, whether oral or written, between a lawyer and a client. Such communications cannot be required to be disclosed in any prosecution or other legal proceedings.

The traditional approach

In our experience, the traditional approach in dealing with referral obligations under the EPBC Act is to instruct an environmental consultant to undertake flora and fauna assessments of the area of land to be developed or cleared.

What happens in the majority of cases is that the resulting environmental reports contain only an assessment of the fauna and flora characteristics of an area of land and do not set out any clear recommendations on whether or not a referral pursuant to the EPBC Act is necessary.

Traditionally, such assessments are referred to solicitors for legal advice after the report has been finalised, with the consequence that the assessment does not have the protection of legal professional privilege, and can be subpoenaed in any subsequent legal proceedings regardless of whether or not the assessment was referred to DEWHA for a determination.

A strategic approach

Lavan Legal recommends the following strategy in respect of such assessments:

- 1 the developer or operator seeks legal advice prior to engaging environmental consultants;
- 2 environmental consultants are instructed at the earliest possible opportunity in order to carry out an assessment of the fauna and flora characteristics of the development site - such instruction should originate from legal advisors in order to ensure the application of legal

professional privilege;

- 3 prior to finalisation of the environmental report, the draft report is referred to legal advisors for comment as part of the assessment of the environmental issues and in particular, whether or not the proposed action constitutes a 'significant impact' on any protected species found on the land to be developed or cleared; and
- 4 the environmental report is finalised to include not only an assessment of the fauna and flora characteristics of the land but also the referral obligations pursuant to the EPBC Act.

Lavan Legal comment

The complexities and potential ramifications of the EPBC Act requirements should be addressed by the stakeholder's legal advisors at the outset.

Adopting this strategy will result in environmental reports being completed in a comprehensive manner and being capable of providing greater certainty to stakeholders in relation to the legal issues. The instruction of environmental consultants by a stakeholder's legal advisors, and legal guidance in the environmental assessments, will enable a full and frank consideration of legal issues arising out of the assessment under the protection of legal professional privilege.

In relation to investigations into instances of historical clearing, careful consideration should be given to the environmental assessments conducted and approvals obtained at the time that clearing took place. This will help to determine if adequate assessment of both flora and fauna has been carried out and if any consideration was given as to whether or not the clearing constituted 'a significant impact' on matters of a national environmental significance.

If you have any concerns in this regard, we would recommend that you seek legal and environmental advice in order to determine the risk of potential prosecution proceedings and the application of exemptions for the referral obligations.

If you would like further information regarding your obligations to refer a project to DEWHA pursuant to the EPBC Act or whether or not legal professional privilege attaches to a communication, please contact Paul McQueen, Partner, on (08) 9288 6943 or paul.mcqueen@lavanlegal.com.au or Craig Wallace, Senior Associate, on (08) 9288 6828 or craig.wallace@lavanlegal.com.au.

Environmental Focus Group



Peter Beekink
Partner
Property Services
Tel +61 8 9288 6751
peter.beekink@lavanlegal.com.au



Paul McQueen
Partner
Planning, Environment and Land
Compensation
Tel +61 8 9288 6943
paul.mcqueen@lavanlegal.com.au



Tony Chong
Partner
Corporate Services, Tax
Tel +61 8 9288 6843
tony.chong@lavanlegal.com.au



Craig Wallace
Senior Associate
Planning, Environment and Land
Compensation
Tel +61 8 9288 6828
craig.wallace@lavanlegal.com.au



Bronwyn Davies
Senior Associate
Energy and Resources
Tel +61 8 9288 6837
bronwyn.davies@lavanlegal.com.au



Tamara Heng
Associate
Property Services
Tel +61 8 9288 6869
tamara.heng@lavanlegal.com.au



Mona Gill
Associate
Tax
Tel +61 8 9288 6949
mona.gill@lavanlegal.com.au



Rebecca Somerford
Solicitor
Planning, Environment and Land
Compensation
Tel +61 8 9288 6820
rebecca.somerford@lavanlegal.com.au