LAVAN NEWS

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WINTER 2011

Cockatoos impact land values

The State Administrative Tribunal in a recent decision (*Broadcast Australia Pty Ltd and Valuer General* [2011] WA SAT58 dated 13 April 2011) recently considered the impact of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and species protected under the EPBC Act, in particular, Carnaby's Black Cockatoo in relation to the valuation of land having environmental significance for those species.

Broadcast Australia Pty Ltd is the vested owner of a 44.7 hectare property from which the Hamersley Transmission Facility is operated, which operate and broadcast ABC, News Radio, Local Radio and Radio National Service to the Perth metropolitan area and regional areas. Broadcast Australia sought a review by the Tribunal of assessments by the Valuer General (for tax and rating purposes) and raised a number of issues for the Tribunal's determination.

Although the Tribunal held that the Hamersley Transmission Facility (and associated land holdings) were part of the National Transmission Network and subject to relevant Commonwealth legislation, the Tribunal proceeded to find that for valuation purposes, the land should be valued on an alternative zoning basis of R20.

In applying the principles for valuation of the market value of land under the well established principles of *Spencer v Commonwealth*, the Tribunal had to consider what proportion of the land would a hypothetical vendor and purchaser consider likely to be required to be set aside for conservation. The Tribunal considered a comprehensive environmental assessment report prepared by environmental consultants, which assessed the vegetation and quality of the land and extent of likely foraging habitat for Carnaby's Black Cockatoo. The Tribunal accepted a consultant's evidence that the land had significant value for conservation because it comprises a relatively large area of mature woodlands as a significant source for foraging food and because there was no habitat of comparable size for a distance of 10 km to the south, south-east and south west.

The Tribunal accepted the consultant's evidence that because of the significance of the land for Carnaby's Black Cockatoo, referral of any residential development proposal was likely to be required under the EPBC Act. The Tribunal accepted the consultant's analysis of areas that were of conservation significance, and other areas that were potentially available for development and accepted the consultant's advice that any development for residential purposes would have to address substantial offset requirements to improve vegetation conditions which would be a substantial cost of development. The Tribunal held that adequate and appropriate on-site offsets within the existing habitat areas were available by improving the quality of on-site habitat and that it was unnecessary to explore the question of whether any offsets would be required.

The Tribunal's decision has confirmed that the impacts on the EPBC Act on potential development, conservation and offset requirements are to be taken into account as the costs of development that impact on the valuation of land undertaken by the Valuer General for tax and ratings purposes. More generally, it also confirms the impact of environmental concerns of valuing land and development projects. This decision will be of significant concern to landowners and developers alike, in light of the fact that EPBC policy for the Carnaby's Black Cockatoo and environmental offsets is still in draft.

If you have any enquiries or questions about the environmental policy for Carnaby's Black Cockatoos or other endangered species, and the impact such policy will have on the value of land following this decision, please contact consultant Brian McMurdo on 9288 6893 / brian.mcmurdo@lavanlegal.com.au.

About Lavan Legal:

Lavan Legal is an independently owned law firm in Western Australia, comprising over 200 staff which includes 19 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. We offer a comprehensive range of services advising on all aspects of property transactions including acquisition, disposals, leasing and developments including syndications.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

Case summary – *Erujin Pty Ltd and Western Australian Planning Commission* [2011] WASAT 50

Background

Section 9 of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**) sets out the objectives of the Tribunal which, in essence, are achieved through the Tribunal's emphasis on facilitative dispute resolution methods (**FDR**), in particular through the making of consent orders.

The recent decision of *Erujin Pty Ltd and Western Australian Planning Commission* [2011] WASAT 50 (**Erujin**) involved a question of whether consent orders, which set out the subdivision conditions in respect of a previous application, were binding in a future subdivision application.

Facts

Erujin Pty Ltd made an application to the Tribunal to delete two subdivision conditions which required fencing, revegetation and protection of a creekline traversing rural property and fencing of specified area of remnant bushland. Relevantly, the Tribunal had imposed almost identical conditions by the making of consent orders in a previous proceeding between the same parties in relation to the subdivision of the same land and there were otherwise no material changes in the circumstances.

The Western Australian Planning Commission (**Commission**) sought to have the proceedings dismissed on the grounds that there was an abuse of process in that Erujin Pty Ltd sought to re-litigate a matter previously resolved in the Tribunal by consent orders.

The decision

The Tribunal agreed with the Commission and found that to allow the current proceedings to continue would bring the administration of justice into disrepute in three respects, namely:

- it would undermine the important public interest that there should be finality in litigation (**Ground 1**);
- it would potentially give rise to inconsistent decisions by the Tribunal in relation to the same conditions of planning approval at a time when both approvals remain operative (**Ground 2**); and
- it would be inconsistent with efficiency and economy in the conduct of litigation (**Ground 3**).

Erujin Pty Ltd sought leave to appeal the Tribunal's decision to the Supreme Court in respect of all three grounds. The Supreme Court allowed the appeal in respect of Ground 2, on the basis that the Tribunal had erred in law, in that the consent orders did not determine the basis for the imposition of the conditions. The Supreme Court dismissed the appeal in respect of Grounds 1 and 3 and remitted the matter to the Tribunal for its reconsideration.

Upon reconsideration, the Tribunal found that there had been an abuse of process in respect of Grounds 1 and 3. In reaching its conclusion the Tribunal stated:

'...[T]o allow Erujin to contest the conditions… would be manifestly inconsistent with the Tribunal's statutory objectives to act speedily as is practicable and to minimise cost to the parties. Not only would this set at nought the benefits of a non-adjudicative outcome in the earlier proceedings, but it would require the Tribunal and the parties to expend further resources in the adjudication of the current proceedings.'

Importantly, the Tribunal recognised that to allow Erujin Pty Ltd to contest the conditions previously the subject of consent orders, would create scepticism of the efficacy of consent orders.

Impact for developers

The *Erujin* decision indicates that where developers seek to resolve planning applications through consent orders in the Tribunal, unless there has been a material change in circumstances, those consent orders will be binding on any future applications, should the developer seek to use a different option.

How far the *Erujin* decision can be extended will depend on whether there has been 'a material change in circumstances'. Arguably, the *Erujin* decision may extend not just to where the developer seeks to use a different option on land that already has another approval, but also to staged subdivisions where similar issues to previous stages arise.

The *Erujin* decision means that developers should carefully review the terms of any consent orders, not just in the context of the current application under review, but of its potential repercussions on the project as a whole. Developers should seek legal advice where there is any doubt as to the extent of its obligations under consent orders.

For more information please contact solicitor Rebecca Somerford on (08) 9288 6820 / rebecca.somerford@lavanlegal.com.au.

Update – water services reform

By way of update, the Government's extensive legislative water reform, the Water Services Bill (Bill) and the Water Services Legislation Amendment and Repeal Bill, have recently been introduced into Parliament.

The Bill brings the following Acts together into one piece of legislation to cover the powers, functions and regulation of all water service providers:

- *Water Agencies (Powers) Act 1984*;
- *Country Areas Water Supply Act 1947*;
- *Country Towns Sewerage Act 1948*;
- *Land Drainage Act 1925*;
- *Metropolitan Water Authority Act 1982*;
- *Metropolitan Water Supply, Sewerage and Drainage Act 1909*;
- *Rights in Water and Irrigation Act 1914*;
- *Water Corporation Act 1995*;
- *Water Boards Act 1904*; and
- *Water Services Licensing Act 1995*.

Licensing for water services

Under the Bill, water service providers (including statutory providers) must be licensed by the Economic Regulation Authority (**ERA**). The penalty for failure to obtain a licence is $30,000 with a daily penalty of $1,500 and the Minister may exempt persons or classes of persons from the requirement to obtain a licence where it would be in the public interest to do so.

Importantly, the Bill defines a 'water service' as a:

- water supply;
- sewerage service;
- irrigation service; or
- drainage service.

This broad definition of what constitutes a 'water service' and therefore what is subject to licensing was the subject of many stakeholder submissions seeking clarification on the scope of the licensing regime. As a consequence of these submissions, the original form of the Bill was amended to provide that the following services constitute water supply services (section 3 of the Bill):

- a water supply service principally constituted by the supply of water (whether or not portable) by means of reticulated conduits and other appropriate water supply works;
- a sewerage service principally constituted by the collection, treatment and disposal of wastewater by means of reticulated conduits and other appropriate sewerage works;
- a drainage service constituted by the management of the flow of stormwater, surface water or ground water by means of reticulated drainage assets, or the management of soil salinity by means of reticulated drainage assets; and
- an irrigation service principally constituted by the provision of water for irrigation by means of reticulated conduits and other appropriate irrigation works.

Relevantly, the Department of Water also clarified in a statement that the following services do not constitute water supply services:

- a water supply service that consists of the carting of water;
- a sewerage service that consists of the carting of sewage or trade waste;
- the supply of bottled water; and
- mining camps that provide a non-commercial water service.

Other changes

In addition to establishing a licensing regime, the Bill includes provisions to establish:

- a procedure for the appointment of a supplier of last resort (**SOLR**);
- an Ombudsman; and
- licence fees.

The aim of introducing a provision for a SOLR is to ensure a continuity of service and uninterrupted supply of water to a community where an existing provider fails or is forced to exit the system. Importantly, indemnity for SOLRs is provided in the Bill.

The Bill provides for a licensee to cut off, reduce the flow or refuse to connect the supply of water in certain circumstances. The provision prohibits the cutting off of water to an occupied dwelling, but allows disconnection in other circumstances.

While annual licence fees are not currently charged and cost recovery not in place, the Bill provides the capacity for licence fees to be introduced.

Finally, the Bill enables the creation of a water Ombudsman to independently investigate and resolve disputes and complaints from customers affected by the provision of a water service. The aim of introducing a water ombudsman is to provide independent investigation and resolution of customer complaints that remain unsettled. At present such a function is performed by the Department of Water and licensees are required to provide information to assist with the investigation.

Summary

This update provides a snapshot of some of the provisions of the Bill and makes note of a significant shift away from the existing water services legislative framework. The final form of the Bill will be of interest to land developers and water service providers alike and we will continue to update you in relation to progress of the review in due course.

For further advice on your obligations under the Bill and any of the matters related to Western Australia's water service reform, please contact partner Paul McQueen on (08) 9288 6943 / paul.mcqueen@lavanlegal.com.au or solicitor Clare Gleeson on (08) 9288 6782 / clare.gleeson@lavanlegal.com.au.

We want your feedback

If you have topics or issues that you would like the team to write about please let us know. Suggestions can be sent to Laura Fischer at laura.fischer@lavanlegal.com.au.

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