

## Bush Forever - MRS amendment nears completion

The Minister for Planning has recently endorsed a modified form of the *Metropolitan Region Scheme Amendment 1082/33 (Bush Forever and Related Lands) (Bush Forever Amendment)* which has now been presented to both houses of Parliament. If no disallowance motion is passed within the required 12 day period, the Bush Forever Amendment will come into effect.

The Bush Forever Amendment will in effect reserve 91 identified sites for Parks and Recreation purposes, while other Bush Forever sites are to be designated as Bush Forever Areas, intended to overlay the relevant town planning scheme zonings. Altogether approximately 51,000 hectares will be affected by the Bush Forever Amendment.

The Bush Forever Amendment originally proposed the inclusion of specific provisions for Special Control Areas (**SCA**) called Bush Forever Protection Areas. Subsequently, in March 2006, the Western Australian Planning Commission (**WAPC**) resolved to delete the SCA provisions and make reference to those areas as Bush Forever Areas. The intention behind this shift was to have a provision

in the delegation arrangements with local governments concerning those areas when dealing with development applications.

Under these arrangements the local government will be required to seek referral advice from the Department of Environment and Conservation (**DEC**) and either adhere to the DEC recommendations or otherwise refer to the WAPC for determination of a development application. These referral requirements to the DEC will not remove the separate requirement for a clearing permit under the *Environmental Protection Act (1986)*.

In those cases where the Bush Forever Amendment reserves a property for Parks and Recreation purposes, the affected landowners will have the opportunity to claim compensation when their properties are sold, or where applications for development approval in those areas are frustrated by decisions either to refuse applications or where they are approved with conditions unacceptable to the owner.

There are, however, no express compensation provisions provided for areas to be designated

as Bush Forever Areas under the Bush Forever Amendment.

The policies for protection of identified sites of regional significance under Bush Forever 2000, and supported by the adoption of the WAPC Statement of Planning Policy 2.8, will accordingly be given further statutory enforcement under the Bush Forever Amendment.

Owners of properties affected by the Bush Forever Amendment should be aware of the implications for any development being planned for these properties, and for potential issues of compensation where applicable. Due to the complexity of the area of land compensation, it is our recommendation that landowners likely to be affected seek legal advice in order to ensure that any right to claim compensation is not lost.

If you have any queries concerning the proposed Bush Forever Amendment, please contact Paul McQueen, Partner, on (08) 9288 6943 or [paul.mcqueen@lavanlegal.com.au](mailto:paul.mcqueen@lavanlegal.com.au) or Brian McMurdo, Consultant, on (08) 9288 6893 or [brian.mcmurdo@lavanlegal.com.au](mailto:brian.mcmurdo@lavanlegal.com.au).

### About Lavan Legal:

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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.

# EPA to consult proponents on environmental conditions

On 8 June 2010 the Environmental Protection Authority (EPA) released Bulletin 11, which adopts a new administrative arrangement to consult proponents and key decision making authorities when recommending conditions for proposals to the Minister. The aim of the consultation is to ensure conditions are workable prior to final approval being granted. The hope is that through these arrangements proponents will be spared the cost and delay of appealing conditions on a technical basis.

## Background

The position in the *Environmental Protection Act 1986* is that the EPA provides advice to the Minister as to whether a proposal should be implemented, and then recommends conditions for the implementation of the proposal.

Currently, the first opportunity a proponent has to see the recommended conditions is after the EPA's report has been issued for public comment and it is only at this stage that a proponent, if dissatisfied with the conditions, may appeal to the office of the Appeal's Convenor.

This process has historically caused delays, particularly where conditions are appealed for technical reasons due to mistakes of fact or irregularities with respect to implementation and enforcement of the conditions.

## How Bulletin 11 will work

Bulletin 11 proposes to introduce an avenue for proposals to be consulted upon prior to final approval being granted.

It is important to note that the consultation process set out in Bulletin 11 is not a negotiation into the merits of the condition, but rather whether the conditions are workable once the proposal is implemented.

Bulletin 11 states that comments will be limited to whether the recommended conditions:

- contain errors of fact;
- are technically feasible;
- are clear and relevant to the proposal; or
- present any practical opportunities for strengthening environmental outcomes.

It follows that the consultation will occur at the end of the EPA report process, after the EPA is clear on the outcome it plans to recommend. The proposed consultation period is five business days but this may be extended for more complex projects at the request of the proponent.

The relevant decision making authorities will be consulted simultaneously during this five day period. As part of the consultation process the EPA may, under 'special circumstances', consult with third parties for technical advice.

The outcome of the consultation period will be published in the EPA report to the Minister, which is issued for public comment, thereby ensuring the transparency of the process. As the outcome of consultation forms part of the final EPA report, it may be appealed on grounds of judicial review, in the same way as any other aspect of the EPA report.

## What it means for you

The administrative reforms are effective immediately. Proponents are not required to formally request consultation, the EPA will actively seek their comments. The reforms should signify an end to unnecessary appeals on technical aspects of conditions which are otherwise agreed in principle by the parties. What it does mean, however, is that detailed consideration will need to be given to the conditions earlier in the process than usual and may necessitate detailed advice on the implications of these conditions for consultants employed by you as well as your legal advisors. That aside, this reform represents a significant step forward in avoiding the need for proponent driven appeals of a technical nature, with the corresponding benefit that both time and money will be saved.

If you have any queries about the impact of EPA's Bulletin 11 on your proposal, please contact Paul McQueen, Partner, on (08) 9288 6943 or [paul.mcqueen@lavanlegal.com.au](mailto:paul.mcqueen@lavanlegal.com.au) or Rebecca Somerford, Solicitor, on (08) 9288 6820 or [rebecca.somerford@lavanlegal.com.au](mailto:rebecca.somerford@lavanlegal.com.au).

## Court orders \$40,000 fine for environmental ‘oversight’

In the decision *Minister for the Environment, Heritage and the Arts v PGP Developments Pty Limited* [2010]FCA 58 (**Decision**), the Federal Court considered the Department of Environment, Heritage, Water and the Arts’ (**DEWHA**) first prosecution for the breach of a section 77A notice.

Section 77A of the *Environmental Protection and Biodiversity Conservation Act 1999* (**Act**) gives the Minister the power to issue a notice that an action is not a controlled action if it is taken in a particular manner, as set out in the notice. Should a proponent carry out a proposal in a manner other than that set out in the notice, section 77A of the Act is breached, carrying a heavy maximum penalty of \$1.1m in the case of a corporation.

Relevantly in this matter, the court ordered a \$40,000 fine despite the breach being the result of an oversight and despite there being no actual environmental damage established.

### Facts

PGP Developments Pty Ltd (**PGP**) is the developer of Whitsunday Shores, a golf course and residential development approximately 500m from the Great Barrier Reef World Heritage listed property, attracting protection under Part 3 of the Act. As a result of this protection, stage 2 of the proposed development was referred to the DEWHA in 2004. Following the referral, the Minister issued a section 77A notice on 11 November 2004, stating that stage 2 would not be a controlled action provided that, amongst other things, PGP construct two lagoons with a minimum size of 7,800m<sup>3</sup> and 2,300m<sup>3</sup>. The purpose of the lagoons was to allow the settlement of

sediments prior to any discharge which might affect the Great Barrier Reef through tidal and subtidal ecosystems.

When DEWHA conducted a compliance survey of the site in 2007 however, it was established that one of the lagoons had a capacity of only 450m<sup>3</sup>, well under the required 2,300m<sup>3</sup> set out in the 11 November 2004 notice.

### Decision

It was acknowledged by the parties that a breach of section 77A of the Act had occurred and the Decision related to the amount PGP was to be fined. Justice Stone balanced the factors the Court should take into account in determining an appropriate penalty, as set out in section 481(3) of the Act. The key facts in reaching the amount of \$40,000 were:

- the breach was the result of ‘inadequate attention to the design and construction’ of the lagoon, and there was no evidence to suggest the contravention was ‘deliberate or conscious’;
- PGP had fully co-operated during the DEWHA’s investigations and subsequent proceedings;
- PGP had undertaken remedial action with respect to the second lagoon; and
- the risk of damage to the Great Barrier Reef was significant, however no damage was identified and Justice Stone accepted PGP’s submission that the nature and extent of the damage was at the low end of possible contravention.

In her judgment, which may sound harsh in the circumstances, Justice Stone pointed out the

need for general deterrence of contraventions of the Act, stating ‘the penalty must not invite potential contraveners to discount the consequences of contravention’.

### What the Decision means for other proponents

The Decision itself is not of monumental significance. Rather, the fact that DEWHA investigated and prosecuted the breach, which was relatively minor in nature, though to hearing, sends a message to proponents that compliance with Federal environmental approvals and laws is being carefully watched by the DEWHA and enforcement action will ensue where breaches can be established.

This is equally applicable to the referral and approval process, and not just limited to compliance with the ongoing environmental obligations under those approvals. Proponents are recommended to seek advice where there is any doubt as to whether the relevant approvals have been obtained and to clarify the obligations required under those approvals, particularly in light of the propensity of the courts prosecuting these types of offences to impose significant penalties for the purposes of deterring future contraventions.

If you have any queries about the implications of this decision on your projects, please do not hesitate to contact Paul McQueen, Partner, on (08) 9288 6943 or [paul.mcqueen@lavanlegal.com.au](mailto:paul.mcqueen@lavanlegal.com.au) or Rebecca Somerford, Solicitor, on (08) 9288 6820 or [rebecca.somerford@lavanlegal.com.au](mailto:rebecca.somerford@lavanlegal.com.au).



## Brian McMurdo, Consultant

### B Juris, LLB

Brian is a full time Consultant in the Planning and Environment Team within the property services group. His practice focuses on planning, environment, land development, public infrastructure, land acquisition and compensation and he has more than 25 years experience in these areas.

Brian has practised both within Government and the private sector. In his previous role as a Senior Assistant Crown Solicitor Brian acted for the Government in areas of land compensation,

land acquisition, major projects and public infrastructure and had involvement in planning and environmental processes.

Brian's clients include LandCorp, Midland Brick, Peet & Co, Satterley Property Group and Water Corporation.

#### Contact

Tel: (08) 9288 6893

Email: [brian.mcmurdo@lavanlegal.com.au](mailto:brian.mcmurdo@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 Asha Clucas at [asha.clucas@lavanlegal.com.au](mailto:asha.clucas@lavanlegal.com.au).

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