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National Greenhouse and Energy Reporting Act 2007 - Implications for the property industry

The issue of climate change very rarely escapes the tabloid headlines and it appears only a matter or time before Australia has in place an emissions trading scheme (**ETS**) to seek to reduce its greenhouse gas emissions in line with other developed nations in the world.

As most people are aware the legislative framework proposed to date, comprises the *National Greenhouse and Energy Emissions Reporting Act* (**NGER Act**) and the *Carbon Pollution Reductions Scheme Bill* (**CPRS**).

It is the second of these elements that contains the framework for the proposed ETS and has been the subject of much political debate in Parliament. It remains to be seen when, or indeed if, the ETS will be implemented and it appears that any consideration of the CPRS Bill is likely to follow the UN conference for Climate Change scheduled for December 2009 in Copenhagen.

The first element has been operational for some time now and in essence, requires certain businesses exceeding the corporate or facility thresholds set out in the NGER Act to report on their energy use, production and greenhouse gas emissions. Companies exceeding either threshold were required to register to report by 31 August 2009 and to report no later than 31 October 2009. Failure to do so carries the potential for substantial penalties of about $220,000 for each offence, with additional daily penalties of $11,000.

Why is this important for the property industry?

There is a common misconception by many in the property industry (property owners and tenants alike) that they will not be affected by either the NGER Act or the proposed CPRS Bill. The truth is that property groups will be affected by many aspects of the legislation, regardless of whether or not they are caught by any of the thresholds set out in the NGER Act.

Below is a discussion of the myths and a brief outline of the responsibilities relevant to property owners and tenants under the NGER Act.

Threshold

The NGER Act requires companies at the top of their Australian corporate group (defined as 'controlling corporations') to register and report on behalf of their corporate groups.

Determining whether or not that controlling corporation has to report will depend on whether the energy use (production and consumption) and emissions from 'facilities' under the 'operational control' of the corporation, including all of the entities in it's group, exceed the relevant threshold.

There are two thresholds for both greenhouse gas emissions and energy production and consumption, namely:

- corporate level thresholds (125 kt of greenhouse gas equivalent – 2008/9 financial year); and
- facility level thresholds (25 kt of greenhouse gas equivalent – 2008/9 financial year).

Application of NGER Act

Contrary to popular misconception, the NGER Act applies not just to emissions intensive industries (electricity generation, mining and steel production), but also to those industries who are responsible for large greenhouse emissions as a result of their electricity use. This includes property developers, construction companies and potentially large firms in the professional services industry if their energy bills are large enough.

Presently, the NGER Act is intended to cover only the top emitters in Australia, however, the threshold is to be lowered in 2010 (and again in 2011) and is expected to cover an even greater selection of companies.

About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia. Lavan Legal has more than 200 staff, including 21 partners.

Our Planning, Environment and Land Compensation Team offers advice on environmental enforcement and licence conditions, legislation and its impacts on proposed developments, advising government on amendments to planning legislation and sensitive developments which include rail freight facilities and claypit redevelopments. Injurious affection caused by the reservation of land is a frequent issue facing our clients and we represent them in the State Administrative Tribunal for compensation for their land.

We understand the intricate web of environmental laws encompassing all levels of regulation from Commonwealth to Local Government. We service an established client base which includes leading town planners, engineers and environmental consultants, as well as large public and private developers, local councils and State Government authorities.

Our vast experience in land compensation, planning and environmental law allows us to meet all our clients' needs with integrated and highly efficient services.

Implications for the construction industry

In the construction industry, many companies have mistakenly assumed that the contractor will retain operational control because the latter is the principal contractor with clear operational health and safety responsibilities. However, the NGER Act sets out that where more than one entity satisfies the 'operational control' test, then the company with the 'greatest' authority will have the obligation to report (the introduction of health and safety policies is irrelevant).

Importantly for property developers and contractors, the delegation of operational control may need to be the subject of careful drafting in relevant contracts and will require careful examination of existing agreements for sites against the legal test set out in the NGER Act.

Implications for the property industry

It is often very difficult to determine who has the responsibility for energy consumption and emissions, taking into account the relationship of a landlord and tenant in a commercial building.

The Property Council of Australia discussion paper dated July 2009 has been drafted as a guideline for any property industry entity required to report under the NGER Act and outlines a best practice approach to reporting in line with the framework set out in the legislation. In addition, the Policy Paper published by the Department of Climate Change, sets out that responsibility for energy billing would be a proxy for 'operational control' in the context of a commercial building.

Accordingly, in order to ascertain responsibility under the NGER Act for reporting, it will be necessary to look carefully at the terms of any lease or any other contract which affects the operations of a building. This will help in not only determining who is responsible for reporting, but also in determining which entity has the requisite authority (principally those entities with power to introduce or implement operational, health and safety or environmental policy) and consequently obligation to report.

The Property Council discussion paper is important reading for both landlord and tenant and tenants should be aware that even in the event that they themselves do not meet the relevant threshold set out, their landlords may be required to report. As a result the tenant may be required to provide information in relation to energy consumption and/or greenhouse gas emissions for these purposes to the landlord who must report pursuant to the NGER Act. Accordingly, parties to property leasing transactions required to report may need to carefully consider the contractual requirement in the property management agreement and/or lease in order to ensure compliance. Tenants, even if they themselves do not meet the corporate or facility thresholds, should nevertheless be aware of the obligations under the NGER Act in order to ensure that they are capable of meeting any requirements imposed on them by their landlord.

Following from this, it is important to be aware of the importance the NGER Act places on providing accurate information and that a failure to comply with the requirements for data collection and reporting may result in corporations being entered on to a national register, a civil and criminal penalty for non-compliance and/or potential personal liabilities for executive officers of that corporation.

Lavan Legal can assist you in applying the legal test across your corporate group's activities and in drafting new clauses for contracts that take the NGER Act into account. This may help secure a competitive advantage, protect against non compliance with the necessary compliance issues in relation to the collection and reporting, and protect against any potential liabilities under the proposed CPRS in the future.

Please do not hesitate to contact Paul McQueen, Partner, Craig Wallace, Senior Associate, or any member of our environment/ climate change team for further information.

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Carnaby's Cockatoo - an update

In our Autumn 2009 edition of LA News we highlighted the issue of Carnaby's Cockatoo and the consideration of the clearing of habitat of the species as a 'significant impact' requiring referral to the Federal Department of Environment, Water, Health and the Arts (**DEWHA**) pursuant to the *Environment Protection and Biodiversity Conservation Act* 1999 (**EPBC Act**).

It was our recommendation at the time that, as there was uncertainty surrounding the issue, all property developers and landowners maintain a watching brief on any future clarification of the guidelines on the issue.

Some three months have passed and, as at the date of this publication, no formal guidelines have been released by DEWHA and/or the Federal Minister. The issue has however become more prevalent and has caused particular concern in relation to the 'policy' stance adopted by DEWHA in relation to the clearing of habitat for Carnaby's Black Cockatoo.

The approach adopted by DEWHA is evidence of the recent trend away from the policy to protect just the breeding habitat of Carnaby's Cockatoo, towards protecting the foraging habitat as well. This trend has developed over a number of years and can be seen in the manner in which foraging habitat for Carnaby's Cockatoo has been dealt with by the DEWHA in the development of the Northwest Corridor, where:

- the 'policy' threshold for referral reduced from 50 hectares to 1 hectare of habitat cleared;

- the relevant habitat expanded to include foraging habitat and not just breeding habitat; and
- the accepted ratios for the clearance of foraging habitats increased from 4:1 to 10:1 (in the case of a large development in Alkimos).

Relevantly, DEWHA have also now indicated to a number of developers that the level of off-site mitigation they consider necessary for the clearance of foraging habitats, is as follows:

1 for every hectare of foraging habitat cleared, four hectares are to be created through new planting of foraging species and/or infill-planting of degraded habitat; or
2 for every hectare of foraging habitat cleared, six hectares of existing habitat is to be protected in perpetuity; or
3 a combination of new plantings and/or infill-planting and/or protection of existing habitat in perpetuity that produces similar overall results to those above.

As a result, developments incorporating one hectare or more of Banksia Woodland will not be able to avoid the need to consider a referral to DEHWA as a 'significant impact' for the purposes of the EPBC Act and potentially a requirement to offset any clearing of the habitat on the land or on nearby land. Needless to say, this may be an expensive exercise, and may result in the viability of the development of smaller tracts of land being affected.

It is worth noting however that no formal guidelines have yet been formally adopted and are currently only in 'draft'. In addition, it would appear that the assistance for developer and landowner on the extent of clearing that will constitute a 'significant impact' under the EPBC Act and the offsets required, is contained in internal DEWHA policy documentation only.

This is an unsatisfactory situation for developers and landowners alike and may give rise to:

1 requests for reconsideration of decisions; and/or
2 judicial review of those decisions declaring the clearing of foraging habitat as 'controlled actions'.

In our view, actions of this nature are only a matter of time due to the sums of money required to be spent in order to obtain the relevant offsets (consultants costs to prepare the necessary referral documentation and the land and rehabilitation costs of providing the resulting offsets).

Should you have a similar issue in relation to your own development and would like to consider your strategies to address any of the issues raised above, please do not hesitate to contact Paul McQueen, Partner, or a member of the Environment team at Lavan Legal.

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Development Assessment Panels – Good news or not?

The Department of Planning released a discussion paper in September 2009 proposing the implementation of development assessment panels (**DAPs**) in WA. The discussion paper identifies development industry bodies' criticism of the development approval process, particularly in relation to how long the development assessment process takes, with large non-compliant applications for development providing the most cause for concern.

The following issues are identified in the discussion paper as requiring attention in the current development approval process:

- the requirement for dual approval from the Western Australia Planning Commission (**WAPC**) and the relevant local government;
- the lack of local government resources; and
- the lack of regional planning in some remote areas.

The period for consultation has now expired and we wait to see if the proposal will be progressed. The view across the property industry tends to be supportive of the initiative; however there are other, not so optimistic opinions.

The initiative to implement DAPs as the solution to the problem could be seen to deflect from the real issue, namely the need for a reform of the policy framework for strategic development throughout the State. Delays predominantly occur in situations where the policy framework for development/subdivision of land is outdated or otherwise inadequate. In those circumstances, a significant amount of time is required by both the developer and the decision-making authorities to amend/put in place the relevant policy framework to allow for the proposed development/subdivision to occur. It is only once that framework is in place, that the timeframes within which development approvals take place can be avoided.

Local government resources

It is accepted that some local authorities in the State are under-resourced and/or politicised to an extent that development approvals take an inordinately long period of time to be obtained (predominantly through appeal to the State Administrative Tribunal).

On the other hand, there are other local authorities in the State that have efficient, well run planning departments that operate to assist land owners/developers alike and actively seek to facilitate development in their localities. This is down not only to good management of those departments, but also the policy framework set out in the relevant local planning schemes which makes for 'informed' applications for development, which are more likely to pass muster with elected members attending the Planning Committee/ Council meetings.

The proposal to remove the decision making

authority from all local governments (subject to the proposed thresholds) and to place it in the control of the DAP is a 'one size fits all' solution and unnecessary in certain circumstances. In particular, the predominant cause of delay in obtaining development approvals (as identified in the discussion paper) is in the assessment of the proposal, rather than the making of the decision. Importantly, as the current assessment process will not change with the implementation of DAPs, i.e. the Council officers will still perform that task, it is unlikely that any real change in the timeliness of development approvals will occur. Therefore the bottle jam for most development applications, the delay arising as a result of the assessment of the proposal, remains.

It would therefore pay more dividends to focus attention to amending the policy framework on a State-wide basis in order to rectify the inefficiency in the assessment process itself.

Development Assessment Panels

The implementation of DAPs, however, will be of significant benefit to developments of regional/local significance and should not be discounted altogether. For this proposal to be seriously considered as a viable option to streamline the current development approval process, additional criteria (including development value and regional/local significance of the development) should be considered.

Interestingly, under similar legislation in New South Wales, the Minister has the power to appoint a planning assessment panel in only four circumstances, namely:

1 where, in the opinion of the Minister, the Council has failed to comply with its obligations under the planning legislation;
2 where, in the opinion of the Minister, the Council has unsatisfactorily performed in its development assessment or planning role;
3 where the Independent Commission against Corruption has written a report recommending the appointment of the panel due to serious corrupt conduct by a councillor in connection with the exercise functions by the Council; or
4 the Council agrees to the appointment.

In addition, the criteria of development value in the New South Wales legislation seeks to capture only those developments of regional/local importance. For example, the creation of joint regional planning panels is required only in the following circumstances:

- commercial, residential, mixed-use, retail and tourism development with a value of between $10 million and $100 million;
- community infrastructure and eco-tourism developments with a value of more than $5 million;
- certain coastal developments (requiring environmental impact statements); or
- development where the Council is the proponent or has a potential conflict of interest.

In our view, the raising of the threshold for the implementation of Development Assessment Panels would allay some of the concerns raised by local governments in relation to the proposal to date i.e. the initiative will effectively remove the local government authority to consider applications for development approval in all but the most minor of circumstances.

This buy-in from local government is imperative for a number of reasons, the most important of which is that the appeal of decisions of the DAPs still remains to the State Administrative Tribunal. Importantly, although no decision making power can be exercised by the local governments in the circumstance where a DAP is appointed, the conduct of appeals, including the associated cost, will still rest with either the local government or the WAPC.

What this means is that local governments will still be responsible for the cost of conducting any appeals arising from circumstance into which they have no input (other than at an officer level in the assessment process) and little or no buy-in into the decision. If there is no confidence/buy-in into the process, a situation similar to that occurring in New South Wales is likely, where some local authorities have refused to appoint representatives to the assessment panels with a result that no quorum was possible and the panel was unable to function.

Summary

In summary, the concept for the implementation of Development Assessment Panels is valid. However, the current planning system in WA is not mature enough (in a policy framework context) to allow for Development Assessment Panels to work efficiently in all localities. As indicated above, Development Assessment Panels would have the most benefit in circumstances where the local planning framework is inadequate or out of date and would be of little or no use, and possibly a hindrance, to those authorities that currently operative effectively.

To overcome this in part, consideration could be given to providing an element of choice into the suggested DAP framework. This could be achieved by allowing developers and local governments the choice to refer matters to DAPs where the other criteria are satisfied. This choice could be in addition to the ability of the Minister to call-in development applications of State or Regional significance. Such a process would enable competent local governments with adequate resources to deal with larger proposals and at the same time provide an avenue for situations where smaller, under resourced municipalities could refer large proposals to DAPs.

To achieve local government buy-in to this latest initiative, thought should be given to increasing the threshold for the appointment of DAPs (on the basis of development value and the significance of the proposal), as well as the possibility discussed above of developer and local governments having the option to refer applications to DAPs rather than the referral being mandatory.

It is only in these circumstances that we consider that the proposal will bear any fruit and assist the beneficiaries of the amendment, namely developers and landowners, in achieving more timely approval of their development/subdivision.

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Martin Flint is a full time Consultant in the Planning, Environment and Land Compensation Team within the Property Services Group.

Martin practises in the specialist areas of town planning, environmental and land compensation law. He has more than 15 years experience in these areas as well as experience in the conduct of planning appeals, Supreme Court planning litigation and land compensation claims. He also provides clients with legal and strategic planning, environmental and land compensation advice.

Martin has been involved in a number of the most significant planning appeals in Western Australia in the last two decades, including those involving the Whitford City Shopping Centre and the Claremont Town Centre.

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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.

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