

ENVIRONMENT AND PLANNING LAW

NATIONAL REVIEW
2016

CLAYTON UTZ





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INTRODUCTION

Complying with environmental law remains challenging, with separate regimes in each State and Territory, and the Commonwealth. The last few years have seen attempts to streamline the Commonwealth/State approach via bilaterals, but the different regimes between jurisdictions look like remaining a basic fact of life for the near future at least. And with environmental and planning law being a very dynamic area, that means there's always a lot of legislative change to contend with.

Some of the highlights in this year's review are the significant changes to NSW mining law, (another) seismic shift or two in Queensland, and the Northern Territory beginning its reform process. But that doesn't mean other States and Territories have been quiet. Regulators have been flexing their muscles, and community groups have been identifying new issues and concerns, which can (and do) get translated into new policy and regulation – witness the rise of CSG activism, and Queensland's extended legal responsibility laws.

Regular readers of our review will notice a few changes. We've shifted to a financial year cycle (but don't worry, this edition captures all the key changes from our last one). And since having a helicopter view of environmental and planning law is crucial if you're operating across State lines, we've made it easier for you to find all the developments across the country in the issues you care about.

If you have any questions about how any of these changes affect your operations, please contact us.



Brad Wylynko
Review Co-ordinator



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FEDERAL ENVIRONMENTAL LAW

At the time of writing the 2015 / 2016 Review, the Commonwealth Government was in caretaker mode, and the policy position to be taken in relation to many of the policy positions outlined below remains to be seen.

MEETINGS OF THE ENVIRONMENT MINISTERS

Commonwealth, State and Territory Environment Ministers held three meetings in 2015 to discuss the matters previously overseen by COAG's Standing Council on Environment and Water, covering:

- ▶ **National Review of Environmental Regulation** – the Ministers committed to considering removing unworkable, contradictory or incompatible environmental regulation and identifying opportunities for collaboration between jurisdictions. The Department of the Environment also released the [Interim Report of the National Review of Environmental Regulation](#) as part of an audit of all environmental regulation at State and Federal levels of Government.
- ▶ **National Clean Air Agreement** – the Ministers endorsed the [National Clean Air Agreement](#) on 15 December 2015. The Clean Air Agreement and associated [work plan](#) establish a range of actions to strengthen management of air quality and reduce pollution where co-operative management is required. The initial work plan includes a variation of the Air Quality NEPM including for increased particulate reporting standards, and a review of the need for air toxics and diesel vehicles NEPMs. See more in our **Pollution and contaminated land** chapter. It is expected that the Agreement will be finalised by 1 July 2016.
- ▶ **National Waste Initiatives** – waste initiatives undertaken by the Minister include a national project to develop a market strategy for end of life targets, to be considered in 2016, a ministerial round table was convened in February 2016 to inform a harmonised approach to reducing the environmental impact of plastic shopping bags and work towards securing a voluntary agreement from industry to phase out microbeads by no later than 1 July 2018.
- ▶ **Environmental Management of Industrial Chemicals** – Ministers either agreed or agreed in principle to establishing a national standard for environmental management of industrial chemicals. The national standard is to be established under Commonwealth legislation and implemented by each jurisdiction. In May 2016 Department of the Environment released a discussion paper on a new National Industrial Chemicals Notification and Assessment Scheme (**NICNAS**). The scheme provides for a harmonised assessment of industrial chemicals in Australia based on the chemical's level of concern to the environment.
- ▶ **Common assessment and listing of threatened species** – the Ministers endorsed a common assessment method to list nationally threatened species and ecological communities. It was agreed that as a priority, the Commonwealth would lead the development of a recovery plan for the listed koala, with the Commonwealth and Victoria to co-lead the development of national koala translocation guidelines.

INDEPENDENT REVIEW OF THE “WATER TRIGGER”

The EPBC Act was amended in 2013 to include as an assessment trigger coal seam gas and large coal mining developments that have, or are likely to have as a significant impact on a water resource. The amendments were enacted relatively quickly, and without the benefit of a Regulation Impact Statement, which is generally prepared to assess the impact and benefits of legislative amendments.

The amendments have affected a large number of resources projects, with 23 coal seam gas and large coal mine developments approved, and a further 42 undergoing assessment. Under the transitional provisions for the amending act, the Minister determined that 48 existing projects had to be assessed.

The amending legislation required an independent review to be undertaken of the operation of the legislation, including whether the legislation was appropriate, effective and efficient in protecting water resources from the impacts of coal seam gas and large coal mining developments.

The Commonwealth Department of the Environment released an [issues paper](#) on 30 November 2015 to inform the review. The submission period closed on 29 January 2016.

The review report will be finalised and provided to the Minister who will table the report before Parliament within 15 days of receiving the report.

GREAT BARRIER REEF – UNESCO DECISION

In June 2015 UNESCO published its final decision not to list the Great Barrier Reef as “in danger” on the World heritage list. The decision was based in part on the [Reef 2050 Long Term Sustainability Plan](#), including in particular:

- ▶ establishing an 80% reduction in pollution run-off by 2025;
- ▶ investing \$200m to accelerate water quality improvement programs;
- ▶ restricting major new port developments; and
- ▶ a five-yearly evaluation of the plan.

Australia is to submit an update on progress with implementation of the Reef 2050 plan by 1 December 2016 and an overall state of conservation report by 1 December 2019.

As part of the implementation of the Reef 2050 plan, the [second edition of the implementation strategy](#) was released in December 2015, which is updated every six months. The process has identified 97 immediate priority actions.

EPBC ACT AMENDMENTS TO REMOVE EXTENDED STANDING

The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 was before the Senate, but lapsed at the end of the Parliamentary session on 17 April 2016.

The Bill proposed to repeal section 487 of the EPBC Act which provides “extended standing” to seek review of decisions made under the EPBC Act to include individuals and organisations that have engaged in activities relating to environmental protection at any time in the two years before the decision was made. The Bill was introduced in response to the successful challenge by the Mackay Conservation Group against the Commonwealth Environment Minister’s approval of Adani’s Carmichael Mine in the Galilee Basin in Queensland. The Minister subsequently made a second decision to approve the Carmichael Mine in October 2015, which is currently the subject of a legal challenge by the Australian Conservation Foundation.

The Bill did not propose to repeal section 475 of the EPBC Act. This section provides extended standing for an “interested person” to make an application for an injunction under the Act in relation to conduct that constitutes a contravention of the EPBC Act.

OUTCOMES-BASED CONDITIONS POLICY

In August 2015 the Department of the Environment released for consultation the [draft outcomes-based conditions policy](#). Although still in draft, the policy will be applied to proposals referred under the EPBC Act after 10 August 2015. Consultation on the draft policy closed in October of 2015. The policy sets out the Government’s approach to the use of outcomes-based conditions, including what outcomes-based conditions are, when they are appropriate and who is a suitable approval-holder for outcomes-based conditions.

**“THE REVIEW
INTO THE
WATER
TRIGGER
WILL REPORT
SOON.”**

ADVANCED ENVIRONMENTAL OFFSETS

In August 2015, the Department of the Environment released for consultation its “[Draft Policy Statement: Advanced environmental offsets under the EPBC Act](#)”. Consultation on the draft policy concluded in October 2015. The final policy has not yet been released.

The EPBC Act Environmental Offsets Policy that was finalised in 2012 encourages the use of advanced environmental offsets, recognising that impacts of an action can be minimised by avoiding offset time delays.

Offsets that deliver a conservation gain after the commencement of the EPBC Act (16 July 2000) can be considered as advanced environmental offsets. Under the draft Policy, proponents would also need to show that the site was established for the purposes of advanced offsetting, that there is sufficient baseline information to enable a clear assessment of the conservation benefit and that offsets are additional to other obligations.

There are a number of advantages to the use of advanced environmental offsets. In addition to improved conservation outcomes, proponents are likely to have smaller offset requirements (as risk of delivery and time-lag for delivery are reduced) and the post-approval timeframes for offsets to be accepted are either removed or reduced. Proponents or third parties proposing advanced environmental offsets do however need to take care with advanced environmental offsets that the offset not only is acceptable to the Department, but also is suitable for the action (or actions) it is proposed to offset. Offsets will not be considered by the Minister as part of the original controlled action decision under the EPBC Act.

THE ONE-STOP SHOP

The “one-stop shop” remains an aspiration, with none of the draft approval bilateral agreements between the Commonwealth with each of the States and Territories yet finalised.

The Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 was before the Senate and lapsed at the end of the Parliamentary session on 17 April 2016. Its aim was to amend the EPBC Act to facilitate the implementation of the draft approval bilateral agreements with each of the States and Territories by:

- ▶ clarifying that a referral is not required for actions that are covered by an approval bilateral;
- ▶ allowing a broader range of State and Territory approvals processes to be accredited, with a broader range of decision makers (eg. local government);
- ▶ removing the current restriction in the EPBC Act that prevents an approval bilateral covering the water trigger;

- ▶ providing some flexibility to accommodate amendments to State or Territory legislation after the approval bilateral is made.

While the approvals bilaterals have not been finalised, a review of the assessment bilaterals has been undertaken to increase communication between the different levels of government, and provide greater upfront certainty as to approval conditions.

The Department of the Environment also released its [Assessment Bilateral Agreement Draft Conditions Policy](#) for public comment in March 2015. The draft Conditions Policy has not yet been finalised, but would apply to projects in New South Wales, reflecting the Commonwealth endorsement of a number of policies, and is aimed at further streamlining the consideration of projects by the Federal Environment Minister, reducing assessment timeframes and reducing duplication in conditions. The draft Conditions Policy would provide guidance on setting conditions, however the Commonwealth Environment Minister retains a discretion in relation to decision-making and is not bound by the policy.

It remains to be seen whether the Bill will be proceeded with at the next session.

EPBC ACT CUMULATIVE IMPACTS CONSIDERED BY FEDERAL COURT

The Full Federal Court judgment in *Tarkine National Coalition v Minister for the Environment* [2015] FCAFC 89 considered whether the Environment Protection and Biodiversity Conservation Act 1999 (Cth) requires the Minister, in deciding whether to approve a controlled action, to consider cumulative impacts. This decision gives some certainty to the scope of cumulative impact assessment, and shows that they must have some relationship with the project being assessed.

Essentially, even if a cumulative impact assessment is completed for a proposed controlled action, but it does not cover every other project, present or anticipated, the Act only requires the Commonwealth Environment Minister to consider those impacts which are a direct or indirect consequence of the project being assessed as “cumulative impacts”.

The decision emphasises that the scope of any cumulative impact assessment needs to be clearly understood and scoped by the regulator and proponents. That scope may depend on the assessment requirements of any accredited process under an assessment bilateral, or guidelines for assessment made under the Act, and the different requirements within each State and Territory jurisdiction. All these requirements will need to be considered in the preparation of any environmental assessment and scoped out carefully during the terms of reference stage of the assessment.



CLIMATE CHANGE AND POLICY

COMMONWEALTH

United Nations Framework Convention on Climate Change adoption of the Paris Agreement

On 12 December 2015, the Paris Agreement was adopted under the United Nations Framework Convention on Climate Change (**UNFCCC**). Australia is a party to the UNFCCC.

The key elements of the Paris Agreement are:

- ▶ commitment by signatories to hold the increase in global average temperature to well below 2 degrees Celsius above pre-industrial levels, and pursue a limit of 1.5 degrees Celsius;
- ▶ parties must prepare, communicate and maintain nationally determined commitments;
- ▶ every five years there will be a review which will take into account global stocktakes of the anticipated impact of those commitments. The first global stocktake is scheduled for 2018;
- ▶ developed country parties shall provide financial resources to assist developing country parties to assist them in meeting their commitments. It is estimated that the amount of aid should reach US\$100 billion annually by 2020; and
- ▶ a recognition of the importance of averting, minimizing and addressing climate change-related loss or damage. This is the first time the concept of aversion has been incorporated into an international environmental agreement, but it rules out possibility of parties being liable for climate change-related “loss or damage”.

The Paris Agreement opened for signature at the United Nations Headquarters in New York on 22 April 2016 and will close on 21 April 2017.

Australia signed the Paris Agreement on 22 April 2016; it has not yet ratified the Agreement.

The second and third Emissions Reduction Fund auctions

The second Emissions Reduction Fund auction was held on 4-5 November 2015. At that auction:

- ▶ 129 contracts were awarded committing to purchase 45,451,010 tonnes of abatement;
- ▶ contracts were awarded to 77 contractors (131 projects in total); and
- ▶ the largest single contract was for 2.5m tonnes of abatement while the smallest was for 15,333 tonnes.

Unlike the first auction which imposed an 80% limit, the Clean Energy Regulator could accept anywhere between 50-100% of the volume of abatement offered at auction below the benchmark price.

The Clean Energy Regulator also announced additional funding for the Emissions Reduction Fund of \$200m per year in 2018-2030, bringing the total amount of public money available to purchase reductions from domestic projects to \$4.95bn.

While using international credits to meet the target remains an option, the new target will place increased importance on the effective role that can and should be played by the Safeguard Mechanism.

The third auction was held on 27-28 April 2016. At the third auction:

- ▶ 73 contracts were awarded committing to purchase 50,500,000 tonnes of abatement; and
- ▶ contracts were awarded to 33 contractors (73 projects in total).

After three auctions, a total of 309 carbon abatement contracts have been awarded to deliver more than 143 million tonnes of abatement under the Emissions Reduction Fund.

National Climate Resilience and Adaptation Strategy

On 2 December 2015 the Government released the National Climate Resilience and Adaptation Strategy. The strategy is part of the National Climate Adaptation Framework introduced in 2007 and the Government's commitment to meet the post-2020 emissions target. It gives an overview of Australia's current climate change initiatives and guides climate change adaptation through the following set of principles:

- ▶ share responsibility amongst government, businesses, communities and individuals;
- ▶ factor climate risk into decisions;
- ▶ assist communities that are vulnerable to climate change;
- ▶ adopt an evidence-based risk management approach;
- ▶ collaborate with those affected and make value-based choices; and
- ▶ revisit decisions and outcomes.

The strategy identifies key sectors of the environment which are vulnerable to climate change and proposes the following priorities to maintain and improve Australia's climate resilience and adaptation:

- ▶ improve understanding and communication of the risks of climate change;
- ▶ develop and implement co-ordinated responses to climate risk;
- ▶ evaluate progress of climate change initiatives;
- ▶ collaborate with government, communities and individuals to identify emerging risks and interdependencies and share learning.

Safeguard Mechanism

The Safeguard Mechanism is part of the Emissions Reduction Fund and is designed to ensure purchased reductions are not displaced by a significant rise in emissions above business-as-usual levels.

The Mechanism will commence on 1 July 2016.

The following legislative instruments were introduced in 2015:

- ▶ National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015;
- ▶ National Greenhouse and Energy Reporting Amendment (2015 Measures No. 2) Regulation 2015; and
- ▶ National Greenhouse and Energy Reporting (Audit) Amendment Determination 2015 (No. 1).

The mechanism will apply to facilities that emit more than 100,000 tonnes of greenhouse gas annually, but the applicable baselines vary, depending upon the

sector. It is estimated that the Safeguard Mechanism will apply to approximately 140 businesses. The Safeguard Mechanism will apply to direct emissions.

Climate Change Authority releases a draft report for the Special Review

As part of a wide-ranging Special Review into Australia's climate change action, the Climate Change Authority has published a draft report summarising the options for carbon reduction policies.

"THE NATIONAL CLIMATE RESILIENCE AND ADAPTATION STRATEGY SUGGESTS HOW TO IMPROVE CLIMATE RESILIENCE AND ADAPTATION."

The report was released at the start of the UNFCCC conference, and is a comprehensive overview of the principles for assessing climate policies, including:

- ▶ mandatory carbon pricing;
- ▶ voluntary carbon pricing; and
- ▶ other mandatory price-based policies.

Submissions on the draft report closed on 19 February 2016 and the publication date for the final report has been postponed. The final report of the Special Review will be released after the Federal election.

AUSTRALIAN CAPITAL TERRITORY

Amendments to bring forward target of zero net emissions to 2050

On 13 May 2016, the Renewable Energy Legislation Amendment Act 2016 commenced, making amendments to the Climate Change and Greenhouse Gas Reduction Act 2010 and the Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011 (FiT Act) to meet the main aim of the Paris Agreement to keep global temperature rise this century well below 2 degrees Celsius, and to drive efforts to limit the temperature increase even further to 1.5 degrees Celsius above pre-industrial levels.

To meet this target in the ACT by mid-century, the Act amends the Climate Change Act to bring forward the target date for zero net emissions from 30 June 2060 to 30 June 2050.

To meet the zero net emissions target a decade earlier than originally required under the Climate Change Act, it also amends the FiT Act to:

- ▶ increase the total FiT capacity of the generating systems of large renewable energy generators in relation to which FiT entitlements may be held under the FiT Act from 550MW to 650MW; and
- ▶ allow FiT entitlements to be granted to large renewable energy generators immediately after the total FiT capacity is increased (ie. upon commencement of the amending legislation).

QUEENSLAND

Climate Action Plan

On 11 May 2016 a discussion paper Advancing Climate Action in Queensland: Making the transition to a low carbon future was released by Environment Minister Dr Steven Miles for public consultation.

The Queensland Government is currently working with leading science bodies to develop a detailed understanding of how global warming will affect Queensland in the future under different warming scenarios. This research supports the new Queensland Climate Adaptation Strategy, which is being developed in partnership with a wide range of sectors to address the risks to our economy, infrastructure, environment and communities from current and future climate impacts.

The Climate Action Plan is part of the Queensland Government's strategy to respond to our changing environment and contains examples of work being done by governments, businesses and individuals in Australia and elsewhere to illustrate what is possible in managing the transition to a low-carbon world. It outlines what Queensland is already doing in terms of climate adaptation, renewable energy, land sector management (ie a new Bill to reinstate the vegetation management

framework), transport, built environment, energy efficiency and innovation.

The Climate Action Plan also contains a series of questions that the community and industry should consider and respond to in their submissions.

The submission period closes on 5 August 2016.

TASMANIA

Draft climate change action plan

In December 2015, the Tasmanian Government released a draft climate change action plan, "Embracing the Climate Challenge 2016-2021", which seeks to focus on sensible and practical actions concerning:

- ▶ meeting the climate challenge – managing climate risk;
- ▶ maximising Tasmania's energy advantage – encouraging energy innovation and improving energy efficiency;
- ▶ maximising Tasmania's business advantage – relying on Tasmania's status as a low emitter of greenhouse gases; and
- ▶ maximising Tasmania's liveability advantage – enhancing Tasmania's naturally cool, temperate climate and liveability.

The submission period for the draft action plan concluded on 25 March 2016. The final action plan is expected to be released in September 2016. It will incorporate the results of stakeholder and community consultation, the implications of COP21 and the review of the Climate Change (State Action) Act 2008 which sets Tasmania's emissions reduction target.

Once finalised, the action plan will provide a framework for the Tasmanian Government's response to climate change, setting policy directions and priorities over a five-year period through to 2021.



POLLUTION AND CONTAMINATED LAND

COMMONWEALTH

Air Quality NEPM

The National Environment Protection (Ambient Air Quality) Measure introduced Australia's first national ambient air quality standards, and sets national standards for the six key air pollutants to which most Australians are exposed: carbon monoxide, ozone, sulfur dioxide, nitrogen dioxide, lead and particles. The standards have been binding on each level of Government since 2008 and the NEPM requires monitoring of air quality to identify potential air quality problems.

In April 2014, the Ministers, as part of the National Environment Protection Council, signalled their intention to vary the Air Quality NEPM based on the latest scientific understanding of the health risks arising from airborne particle pollution. This sought to establish a more stringent reporting standard for particle pollution. An Impact Statement on the proposed variation was released for public consultation, with submissions due by October 2014. Submissions are currently being considered as part of a development of a final proposal to vary the AQ NEPM.

The National Clean Air Agreement was established by Australia's Environment Ministers on 15 December 2015. The agreement focuses on actions to reduce air pollution and improve air quality through co-operation between industry and government at the national, state and local level. Actions under the Agreement over the next two years will target priority issues of concern, including reviewing and strengthening air quality monitoring and reporting standards, targeted measures to reduce emissions from key sources of air pollution, improving access to air quality information for communities, and fostering partnerships with industry. All jurisdictions have agreed to implement strengthened standards for particles, as well as move to tighter standards for annual average and 24-hour PM2.5 particles in 2025. Emission

standards for new non-road spark ignition engines are planned for this year, to be based on US Environmental Protection Agency and equivalent international standards.

NEW SOUTH WALES

Duty to report contamination

On 3 July 2015, the new Guidelines on the Duty to Report Contamination under section 60 of the Contaminated Land Management Act 1997 took effect, replacing the previous 2009 version. The guidelines set out the duty of landowners and those responsible for contamination to report it to the EPA.

Compared with the 2009 guidelines, the updated guidelines:

- ▶ more comprehensively adopt the contaminant trigger levels in the National Environment Protection Measure for Assessment of Site Contamination 2013 (**NEPM**) which now gives the NEPM standards statutory force in NSW (in the context of reporting contamination) and promotes a stronger national approach to contamination assessment; and
- ▶ include new guidance on notification triggers for groundwater, surface water, vapour intrusion and asbestos in soils.

Maximum penalties for polluters failing to report contamination in accordance with section 60 of the Act remain a maximum of \$1m for a corporation (plus further daily penalties). The maximum penalty for a landowner, in the case of a corporation, is \$165,000.

Of course, landowners and persons whose activities might have caused pollution may have other obligations to notify as well, including a duty to report pollution incidents under the Protection of the Environment Operations Act 1997 (NSW). A key feature of the Contaminated Land Management Act obligation is that it applies when a person becomes aware or ought reasonably to be aware of the need to notify in any given situation.

The adoption of the NEPM and introduction of new, lower thresholds, **may require reporting of sites that previously fell below relevant triggers and thresholds**. We recommend that current and former owners and occupiers of sites which may be contaminated examine the new guidelines and seek legal and technical advice to ensure reporting obligations are met.

Challenger Listed Investments Limited v Valuer General (No 2) [2015] NSWLEC 60

The NSW Land and Environment Court held that contaminated land is a matter which must be considered in determining “land value” under the Valuation of Land Act 1916 (NSW) where the contamination of land has been caused by operations or improvements occurring on the land.

In the Challenger case, the Valuer-General had determined the land value of an industrial site in Yennora NSW, owned by Challenger, at approximately \$7.5 million, while Challenger contended that the land had nil value. The site had been declared “significantly contaminated land” by the Environment Protection Authority pursuant to section 11 of the Contaminated Land Management Act.

Prior to the Challenger case, the Valuer-General’s valuation methodology did not account for the costs of remediating the contamination if the current use of the land can continue in perpetuity. However, the Court held that the construction of section 6A(2) of the Valuation of Land Act requires the Valuer-General to take into account the effect, and likely costs of remediating contaminated land, in conducting a valuation.

This case is particularly important for land tax, council rates and many lease rent reviews which adopt the Valuation of Land Act definitions.

Moorebank Recyclers Pty Ltd v Benedict Industries Pty Ltd [2015] NSWLEC 40

In this case, the Land and Environment Court held that development consent granted by the Sydney West Joint Regional Planning Panel (JRPP) was invalid because the decision maker did not comply with clause 7 of State Environmental Planning Policy No 55 – Remediation of Land (SEPP 55).

Clause 7 of SEPP 55 says that a consent authority must

not consent to the carrying out of any development unless:

- ▶ it has considered whether the land is contaminated;
- ▶ if so, whether the land is suitable for the proposed development in its contaminated state; and
- ▶ if the land requires remediation to be made suitable, whether it is satisfied that the land will be so remediated.

In addition, a consent authority cannot grant consent until it has considered an investigation report provided by the proponent and carried out in accordance with the contaminated land planning guidelines.

The JRPP granted consent to Benedict Industries Pty Ltd in August 2014 with conditions, one being to obtain a report by a contaminated land consultant. However, the timing of this report after the development consent was granted (rather than being provided with the development application to allow the decision-maker to properly assess the application in accordance with clause 7 of SEPP 55) constituted an error of law which Chief Justice Preston found invalidated the consent.

Kempsey Shire Council v Slade [2015] NSWLEC 135

The Land and Environment Court ruled that a party incurring clean-up costs associated with pollution can recover those costs under the Protection of the Environment Operations Act 1999 (POEO Act) from directors personally, not only the corporate polluter. Kempsey Shire Council was successful in recovering its expenses it incurred in cleaning up asbestos waste illegally dumped at a commercial waste facility. The Council had leased the relevant land initially to one of the directors himself, and then to the company of which they were the directors. There was some dispute about when the relevant pollution events occurred. After the relevant leases had ended, the Environment Protection Authority found the asbestos and issued a POEO Act clean-up notice to the Council. The Council complied with the order then sought to recover its clean-up costs from the directors pursuant to section 105(1) of the POEO Act, which allows a public authority to require a person that it “reasonably suspects” of causing the pollution in question to pay all reasonable costs incurred in connection with the remediation.

The Court focused on the scope of the term “reasonable suspicion” in finding the directors liable on the facts of this case, but it also noted that section 105 would allow a claim against a company and/or its directors.

NORTHERN TERRITORY

Directors' liability redefined for environmental offences

The Statute Law Amendments (Directors' Liability) Act 2015 commenced on 14 October 2015 and redefined directors' liability for corporate offences in 40 Acts and two Regulations by inserting new liability provisions which are consistent with the three types of director liability outlined in the Council of Australian Governments' guidelines:

- ▶ **Type 1** – the failure of the director to take reasonable steps to prevent the corporation's offending must be proved by the prosecution beyond reasonable doubt.
- ▶ **Type 2** – a director is deemed to be liable unless they can produce enough evidence to suggest that there is a reasonable possibility that a defence applies. The prosecution must prove beyond reasonable doubt that the defence does not apply.
- ▶ **Type 3** – a director is deemed to be liable for a corporate breach unless they can produce enough evidence to prove their defence on the balance of probabilities.

Relevantly, a director's personal criminal liability to offences committed by a corporation under the Energy Pipelines Act is now limited to certain offences, which no longer includes an offence against the general environmental provisions of this Act, however a director will continue to be personally liable under the general environmental provisions where that director has personally committed the offence. Under the Waste Management and Pollution Control Act a director will now have personal criminal liability for an offence against the general environmental provisions and a duty to notify which is committed by a corporation unless the director can prove one or more of the defences on the balance of probabilities. The director will bear the legal burden to establish their defence which reverses the usual onus of proof in criminal law.

The new liability provisions will only apply to all of the conduct constituting the offence that occurred after 14 October 2015. Executive officers, either a director or other person who is concerned with, or takes part in, the management of the body corporate, should familiarise themselves with the new provisions in the Northern Territory where that body corporate will operate within the Northern Territory jurisdiction.

QUEENSLAND

New contaminated land provisions

A number of significant changes to the regulation of contaminated land were made after amendments to the Environmental Protection Act 1994 commenced on 30 September 2015. The amendments include:

- ▶ new duties to notify of contamination;
- ▶ changes to the grounds and process for inclusion of land in the environmental management register (**EMR**) and contaminated land register (**CLR**); and
- ▶ changes to the content and submission requirements for "contaminated land investigation documents".

A new duty applies to a person who is the owner or occupier of contaminated land or an auditor who is performing the function of preparing a certification for a site investigation report, validation or draft site management plan (**SMP**) or draft amendment of a SMP. Where the person becomes aware of:

- ▶ the happening of an event involving a hazardous contaminated on the contaminated land;
- ▶ or a change in the condition of the contaminated land,

that is causing, or is reasonably likely to cause, serious or material environmental harm, the person must give the administering authority a written notice within 24 hours, unless the person has a reasonable excuse. There are also new duties applying to local governments, requiring notice to be given to the administering authority in certain circumstances.

The amendments also change the grounds and process for inclusion of land in the EMR and CLR. The administering authority can record the particulars of land in the EMR at any time if satisfied that a notifiable activity has or is being carried on the land, or the land is contaminated land; and on the CLR if the land is already recorded on the EMR and it is satisfied that the land is contaminated land and it is necessary to take remediation action.

The process for inclusion on the relevant land register involves a show cause notice being sent to the land owner, giving the land owner an opportunity to make a submission. The submission will be considered by the administering authority, but the administering authority must still record the land on the register if the administering authority still believe grounds exist to do so.

The amendments introduce the concept of a "contaminated land investigation document" (a site investigation report, validation report or draft SMP). Uniform content and submission requirements now apply for all contaminated land investigation documents.

Review of regulated waste regime

Waste in Queensland is managed depending on the level of harm it poses to human health and the environment. Wastes with known impacts to human health and to the environment are “regulated wastes” listed in Schedule 7, Part 1 of the Environmental Protection Regulation 2008 (Qld). Under the Environmental Protection Act 1994 (Qld) and the Environmental Protection Regulation 2008 (Qld) there are stronger requirements for dealing with the transport, storage and disposal of regulated wastes, as opposed to waste that is not regulated.

The Department of Environment and Heritage Protection is conducting a review of the regulated waste framework. The aim of the review is to update the list of regulated wastes within Schedule 7, Part 1 of the Environmental Protection Regulation 2008 (Qld) and to simplify the process for identifying and managing regulated waste.

The Department has made a proposed regulated framework available, which contains a new schedule of regulated wastes and a method for identifying regulated waste in the new framework. The objective of the framework is to clarify how and why regulated wastes are categorised.

Public consultation on the proposed changes closed on 25 September 2015. The Department has not provided a date by which to expect the new changes to occur.

New enforceable undertakings regime

Parts of the Environmental Protection and Other Legislation Amendment Act 2014 (Qld) commenced on 30 September 2015, which amended the Environmental Protection Act 1994 (Qld) to introduce enforceable undertakings. Enforceable undertakings are binding agreements between a person and the administering authority, which require the person to agree to take specified action to rectify an identified non-compliance with the Environmental Protection Act 1994 (Qld), in return for the administering authority not seeking prosecution.

The administering authority may accept an enforceable undertaking in response to a contravention of the Environmental Protection Act 1994 (Qld) if the undertaking will secure compliance and enhance the protection of the environment. A copy of the enforceable undertaking will be published on the administering authority's website. The undertakings are available for all contraventions, or alleged contraventions, other than for an indictable offence. Contravention of an enforceable undertaking is an offence.

The Department has prepared “Guideline: Enforceable undertakings under the Environmental Protection Act 1994” to provide information about the administering authority's expectations and management of enforceable undertakings, and to assist persons in preparing an enforceable undertaking.

Enforceable undertakings are also available under the Federal Environment Protection and Biodiversity Conservation Act 1999 (Cth).

SOUTH AUSTRALIA

Waste industry review

Working in conjunction with the South Australia's Waste Strategy 2015-2020, the South Australian Parliament's Environment, Resources and Development Committee is conducting a review of the waste industry. Its terms of reference are:

- ▶ whether the current method of charging and collecting the solid waste levy has been successful in ensuring a level playing field in the waste sector while encouraging resource recovery over landfilling or stockpiling of materials;
- ▶ the adequacy of regulatory and legislative powers within the Environment Protection Act 1993 (SA) to manage the waste sector, including licence enforcement and current penalties;
- ▶ best practice methods in the resource recovery and waste sectors;
- ▶ minimisation of hazardous risks in the resource recovery and waste sectors;
- ▶ relevant themes from the 2015 EPA/ZWSA Waste Summit which will inform this inquiry; and
- ▶ any other matter.

Submissions to the Committee closed on 21 December 2015. The release date for the report has not yet been announced.

From 1 July 2015, the Office of Zero Waste SA was renamed as the Office of Green Industries SA. We expect that legislation to establish Green Industries SA will be developed this year.

**“Queensland's
new enforceable
undertakings
regime
commenced on
30 September
2015.”**

New Environment Protection (Water Quality) Policy introduced

The Environment Protection Authority introduced a new Environment Protection (Water Quality) Policy 2015 to replace the previous Environment Protection (Water Quality) Policy 2003.

The policy operates under the Environment Protection Act 1993 and gives legal effect to codes of practices. It allows for a more flexible approach to the regulation and management of South Australia's surface, marine and underground water sources in South Australia.

Its key changes are:

- ▶ expanding the application of the policy to include water within pipes and tanks of a water reticulation system, water within a sewage system or wastewater management system, water within a closed tank constructed of or lined with material impervious to water and swimming pool water;
- ▶ clarifying the definition of "public stormwater system" to ensure catchment management infrastructure is included. This clarifies that any public infrastructure for the purpose of collecting, treating or conveying stormwater is part of the public stormwater system;
- ▶ creating a general duty requiring a person who discharges or deposits a pollutant into any water to take all reasonable and practicable measures to ensure that any applicable guidelines are met. This obligation can be enforced by issuing an environment protection order;
- ▶ clarifying that a person involved in cleaning the hull of a vessel has a duty to ensure all material removed does not get into water; and
- ▶ adding pollutants to the scheduled pollutants list.

The new policy came into effect on 1 January 2016.

Draft policy on air quality

On 13 November 2015, the Environment Protection Authority released a new draft Environment Protection (Air Quality) Policy 2016 for public consultation. The draft policy will replace the Environment Protection (Air Quality) Policy 1994 and consolidate the Environment Protection (Solid Fuel Heaters) Policy 2015 and the Environment Burning (Protection) Policy. It:

- ▶ consolidates the current Air Quality, Burning and Solid Fuel Heaters policies as well as the air impact assessment and odour assessment guidelines;
- ▶ includes criteria to assess applications for environmental or development authorisations as well as general monitoring of air quality. This allows the Authority to review and update the criteria on a more regular basis;
- ▶ creates a fast-track method to allow the update of assessment criteria;
- ▶ empowers the Authority to declare localised air quality objectives for a specific area;

- ▶ requires solid fuel heaters sold and installed comply with relevant Australian Standards;
- ▶ prohibits the sale of firewood with more than 20% moisture content; and
- ▶ empowers councils to manage burning in the open in their areas.

Public consultation on the draft Policy ended on 15 January 2016 with the final Policy notified on 21 July 2016 and commencing on 23 July 2016

Waste Strategy for 2015-2020 released

South Australia's Waste Strategy for 2015-2020 was released on 13 November 2015. The strategy aims to reduce the following by 2020:

- ▶ 2003 landfill levels by 35%;
- ▶ municipal solid waste to landfill by 70%;
- ▶ commercial and industrial waste to landfill by 80%; and
- ▶ construction and demolition waste to landfill by 90%.

The strategy focuses on the following priorities:

- ▶ build knowledge and data on waste and recycling;
- ▶ maximise diversion to the extent practically and economically achievable;
- ▶ reduce waste generation by 5% per capita by 2020 (from the 2015 baseline);
- ▶ review and support levies, financial instructions and penalties in relation to landfill;
- ▶ collaborate with waste management sector and businesses in relation to innovative recycling and waste management procedures;
- ▶ research methods to address the challenges of wasteful consumption and how to change behaviour; and
- ▶ realise the potential of creating energy from waste.

The strategy replaces the two previous strategies for 2005-2010 and 2011-2015.

Draft guidelines for the assessment and remediation of site contamination

The Environment Protection Authority has introduced a new draft guideline for the assessment and remediation of contaminated land. The new guideline will supersede the following guidelines and information sheets:

- ▶ Site contamination: What is site contamination? (2009);
- ▶ Site contamination: Determination of background concentrations (2008);
- ▶ Site contamination: How to determine actual or potential harm to water that is not trivial resulting from site contamination (2008);
- ▶ Site contamination: Responsibility for assessment and

remediation of site contamination (2009);

- Site contamination: Honesty in reporting (2008);
- Site contamination: Guidelines for the assessment and remediation of groundwater contamination (2009);
- Composite soil sampling in site contamination assessment and management (2005); and
- Pollutant management for water well drilling (2004).

The draft guideline, once published, will consolidate and update all these documents. The guideline has been prepared to reflect the Authority's practice in applying site contamination provisions in the Environment Protection Act 1993 (SA) (which commenced in 2009) and the 2013 amendments to the National Environment Protection (Assessment of Site Contamination) Measure 1999.

The Authority expects to publish the guideline this year.

Increase in civil penalties under the Environment Protection Act 1993 (SA)

Under the Environment Protection Act 1993 (SA), the Environment Protection Authority can seek a civil penalty from an alleged offender for specific contraventions of the Act. The civil penalty can be sought as a negotiated civil penalty or a court imposed penalty. The "Policy for calculation of civil penalties" creates a framework for the Authority to negotiate consistent civil penalties.

Following recommendations made in the 2013 review of the Policy for calculation of civil penalties, in June 2015 the Environment Protection Authority introduced a new policy for the calculation of civil penalties under the Environment Protection Act 1993 (SA).

The policy provides the following civil penalties calculation:

- for category 1 offences (actions that cause actual harm), the foundation penalty constitutes 70% of the maximum criminal penalty; and
- for category 2 or 3 offences (actions that result in potential harm or constitutes an administrative breach), the foundation penalty constitutes 45% of the maximum criminal penalty.

The previous policy capped the foundation penalty at 60 and 35% respectively.

The policy commenced in August 2015.

Local Nuisance and Litter Control Act 2016 (SA)

On 2 December 2015 the Local Nuisance and Litter Control Bill 2015 (SA) was introduced to Parliament and received in the House of Assembly on 24 April 2016. The Bill received assent on 26 May 2016. The Act will commence on 1 February 2017.

The Act, once it comes into operation, will regulate littering and activities that cause nuisance such as noise, smoke and dust. It will also make related amendments to:

- Local Government Act 1999 (SA);
- Motor Vehicles Act 1959 (SA); and
- Summary Offences Act 1953 (SA).

The Act delegates the responsibility for the management of nuisance in the community to the local government. More serious offences and activities that cause nuisances on licensed sites will continue to be managed by the Environment Protection Authority.

The Act also introduces a maximum penalty of \$250,000 for corporations and \$120,000 or two years imprisonment for individuals for the offence of littering hazardous "class A" waste (asbestos-contaminated material). For "class B" waste (which includes glass, syringes and live cigarette butts) the Act introduces a maximum penalty of \$60,000 for corporations and \$30,000 or six months' imprisonment for individuals.

Currently councils can only impose a maximum penalty of \$5,000 for all types of litter.

The Act will regulate littering and nuisance causing activities through:

- categorisation of litter classes with increased maximum penalties;
- application of a presumption of liability on vehicle owners for offences committed in association with or from their vehicle to declare the responsible third party (if any);
- formalise litter reporting, with such reports being able to constitute evidence of an offence;
- provision of civil remedies for affected parties; and
- ability of Minister, councils or administering bodies to negotiate a civil penalty with the offender as opposed to seeking a criminal penalty through the court.

Reformed Financial Assurance System

The EPA has reformed its financial assurance system. Financial assurances are required for certain premises licensed under the Environment Protection Act 1970, and are intended to ensure that funds are available for a clean-up should the business responsible for the damage fail.

Following a consultation process throughout 2015, the EPA has released the following guidelines to clarify financial assurance requirements:

- ▶ Financial assurance for licences and works approvals (publication no. 1594), which sets out EPA's position on how financial assurance applies to licences and works approvals;
- ▶ Types of financial assurance (publication no. 1595), which describes the different types of financial assurance and when they may be acceptable; and
- ▶ Calculation of financial assurance for landfills, prescribed industrial waste (PIW) management and container washing (publication no. 1596), which outlines the method for calculating financial assurance.

The guidelines were released on 27 April 2016 to clarify how financial assurances will be applied to licences and works approvals, provide an overview of the types of financial assurance that the EPA may consider and when each time of financial assurance may be applied, and assist duty-holders in calculating the financial assurance required as a condition of a licence or works approval for landfills. The following types of financial assurance are available under the guidelines:

- ▶ bank guarantee;
- ▶ guarantee (by deed poll);
- ▶ mutual fund;
- ▶ accumulating third party trust fund;
- ▶ letter of credit;
- ▶ security over land (certificate of title);
- ▶ bond;
- ▶ contract performance bond; and
- ▶ insurance.

There are few significant changes between the draft guidelines and the published version, save that contaminated sites have been included in the list of scheduled activities required to have a financial assurance as a condition of a licence or works (together with prescribed industrial waste management, landfills, bulk storage and container washing).

As a result of the new guidelines, all sites that have a licence condition to maintain a financial assurance will be reviewed against the new model. The EPA will prioritise the implementation based on risk and will work with duty-holders to agree reasonable timeframes for

submitting a new financial assurance, setting out the amount (including supporting calculations), types, an overview of the premises and operations, an overview of the company and any information supporting the environmental track record of the company.

EPA guidelines approvals proposal pathway

In August 2015, the EPA released guidelines to assist applicants for environmental approvals through the introduction of an Approvals Proposal Pathway Form (APPF) (publication no. 1560.1). The APPF initiates the approval application process, and provides guidance on the applicable approvals pathway that should be followed in relation to applications for new works, new research, or for current licence-holders seeking an amendment to their current licence.

The seven approval pathways provided for in the APPF are:

- ▶ no approval required;
- ▶ general exemption;
- ▶ exemption under the EP Act;
- ▶ research, development and demonstration;
- ▶ licence amendment;
- ▶ fast-track works approval; and
- ▶ standard works approval.

The EPA pathway selection tool is designed to assist applicants in deciding the appropriate pathway for their application. The EPA uses the tool as a risk-based and responsive model to determine the focus areas for assessment of development proposals. Applicants may use the tool to assist in determining their likely approval pathway prior to submitting the APPF.

EPA guidelines on transportation of industrial waste

The EPA guidelines "Permit to transport prescribed industrial waste" (publication no. IWRG811.10) released in July 2015 provide details about EPA permit requirements for vehicles used to transport prescribed industrial waste (**PIW**). These requirements apply unless the waste is destined for an exempt site or the net load is less than 50 kilograms and the transporter receives no fee.

In August 2015, further EPA guidelines "Movement of prescribed industrial waste from Victoria" (publication IWRG832.1) were released providing information on the steps to be followed for movements of PIW from Victoria to another State or Territory. These guidelines make clear that EPA approval is required before moving PIW out of Victoria, and highlight that such approval will only be issued if the EPA is satisfied that the PIW will be:

- ▶ reused, recycled or used for the recovery of energy; or
- ▶ destroyed/deposited at a facility with better environmental performance standards than are available in Victoria.

EPA guidelines on environmental auditors

In December 2015, the EPA published a range of updated guidelines relating to environmental auditors, setting out procedures around appointment and conduct, contaminated land auditing, certificates and statements.

The “Environmental auditor guidelines for appointment and conduct” (publication no. 865.11) cover EPA procedures in making, suspending and revoking environmental auditor appointments and the expected conduct of environmental auditors. The guidelines explain the environmental auditor selection process and reiterate that environmental auditors owe a primary duty of care to the environment and Victorians.

Contaminated land auditors should refer to the updated “Environmental auditor (contaminated land): Guidelines for the issue of certificates and statements of environmental audit” (publication no. 759.3), which clarify the roles and responsibilities of the environmental auditor, how to identify the beneficial uses of a site, and contaminated land issues, such as groundwater. The guidelines provide a range of pro forma documents to assist the contaminated land auditor.

The preparation of environmental audit reports on the risk to the environment from an industrial process or activity, waste, substance or noise is regulated by its own guideline (“Preparation of environmental audit reports on the risk to the environment”, publication no. 952.5). The guidelines make clear the circumstances in which such an audit is required and how to conduct the audit.

The guidelines on the provision of environmental audit reports, certificates and statements (“Environmental auditor guidelines – provision of environmental audit reports, certificates and statements”, publication no. 1147.2) contain particular requirements for electronic submission and retention consistent with the Victorian Government’s “Long Term Preservation Formats” and should be considered carefully by environmental auditors.

Winky Pop v Mobil [2015] VSC 348

In December 2006, more than 486,000 litres of petroleum hydrocarbon leaked from a Mobil Refining Australia Pty Ltd pipeline in Altona, contaminating groundwater on the plaintiffs’ land. The plaintiffs were seeking to rezone the land at the time of the leak, intending to develop it for residential purposes. The plaintiffs claimed against Mobil in negligence, nuisance, and for compensation under section 151 of the Pipelines Act 2005 (Vic), and against the State of Victoria in negligence. Mobil accepted responsibility for the leak, however disputed the measure of damages. The plaintiffs claimed that it was entitled to be compensated for loss of opportunity as a result of the contamination. Mobil argued that this was not the appropriate measure of damages, and that damages should be determined by reference to diminution in value of the affected land and the costs of investigating the leak.

The Court held that the proper basis for measurement for damages is diminution in value of the plaintiffs’ land. In addition to finding that calculation of damages on a lost opportunity was insufficiently certain, the Court held that prior to the leak, it was unlikely the land would have been rezoned, or permits granted to allow construction of a residential development. The opportunity to develop the land residentially had no real prospect of being successfully pursued, with the result that the land should not be valued on that basis. Accordingly, the plaintiffs had not lost the opportunity as claimed. Further, the leak per se would not necessarily be a permanent impediment to future residential development of the land.

The plaintiffs have appealed the decision to the Court of Appeal. The application for leave to appeal is currently reserved.

Metropolitan Fire and Emergency Services Board v Yarra City Council [2015] VSC 773

In this case, the relevant site was Crown land in the possession of the Council, and was used as an abattoir and quarry, with a brick refuse destructor, tar distilling plant, and a storage tank for coal tar. The site was subsequently sold to the Metropolitan Fire and Emergency Services Board (MFB), which sought a planning permit for the construction of a training facility. The Council granted a planning permit, however construction was delayed when a test hole identified coal tar, and the EPA issued a clean-up notice under section 62A of the Environment Protection Act 1970 (Vic) requiring an assessment to be undertaken of the contamination present on site.

The MFB claimed compensation from Yarra City Council for the costs of complying with the clean-up notice. It also claimed that the Council owed a duty of care not to pollute the site, to ensure that the site was properly cleaned up or remediated before it was sold, and/or to disclose the previous uses of the site to future owners and occupiers to protect the MFB from loss or damage.

The Court held that Council was liable to compensate the MFB for the costs incurred in complying with the clean-up notice, despite the pollution having occurred before the Environment Protection Act commenced. However, it did not agree that the Council owed the MFB a duty to ensure that the site was properly cleaned-up or remediated, or to disclose the prior uses of the land to future owners and occupiers.

The Council has appealed the decision to the Court of Appeal. A hearing is set down for late July 2016.

Review of the Waste Avoidance and Resource Recovery Act 2007 (WA)

In September 2015, the Department of Environment Regulation published its review of the Waste Avoidance and Resource Recovery Act 2007 (WA). The review found that the Act meets its objectives and aligns with government policy. No legislative amendments are proposed; however the State government will continue to implement mechanisms to support better alignment of waste management and disposal across local government and the industry. One of these mechanisms is the Construction and Demolition Product Procurement Incentive Program introduced this year, which provides funding to support the recycling of construction and demolition material.

On 21 October 2015, the Minister for Environment tabled a report on the review in Parliament.

Draft guidance statement on identifying, reporting and classifying contaminated sites

Following review of the Contaminated Sites Act 2003 (WA) earlier this year, the Department of Environment Regulation on 17 September 2015 released a draft guide on identifying, reporting and classifying contaminated sites.

The statement notes that environmental consultants have a professional duty of care to ensure they act in a way that is consistent with protecting human health and minimising environmental harm.

It also confirms that the following persons have a duty to report known or suspected contamination:

- ▶ owners and occupiers of contaminated sites;
- ▶ persons who suspect they have contributed to contamination;
- ▶ contaminated sites auditors engaged to provide a report; and
- ▶ persons who commission a site assessment or voluntary audit ahead of leasing or buying a site have a duty when making the purchase or taking up the lease to report any known or suspected contamination.

However, the statement did not go so far as to require environmental consultants to report known or suspected contaminated sites.

Consultation on the draft guidance statement closed on 12 November 2015. The final version has not yet been published.

Draft Guidance Statements on approval and licensing process

The Department of Environment Regulation published and released a number of new and draft environmental assessment guidance statements throughout 2015 to support the new approval process under Part V of the Environmental Protection Act 1986 (WA).

These include:

- ▶ Regulatory Assessment Framework (consultation closed 11 March 2016);
- ▶ Environmental Risk Assessment Framework (consultation closed 11 March 2016);
- ▶ Regulatory Controls (consultation closed 11 March 2016); and
- ▶ Environmental Siting (consultation closed 5 February 2016).

The final version of these guidance statements have not yet been published.

The published Guidance Statements are:

- ▶ Setting Conditions;
- ▶ Licence and works approval process;
- ▶ Land Use Planning; and
- ▶ Regulatory Principles.

The new Part V approval process is a risk-based approach to the Department's regulatory functions. The Guidance Statements are generally composed of flow charts and tables to explain each step of the process and allow for more transparent, consistent and accountable environmental regulation under the Environmental Protection Act 1986 (WA).

The licensing process is also supported by the draft guideline Annual Audit Compliance Reports which assists licence-holders under Part V of the Act in complying with the preparation of the annual audit compliance report condition.

Draft Guidance Statement on regulation of mine dewatering

On 11 November 2015, the Department of Environment Regulation released a draft guidance statement and a consultation paper on the regulation of mine dewatering. Currently miners are required to obtain approvals to drill bores and extract water from the Department of Water under the Rights in Water and Irrigation Act 1914 (WA) as well as receive works approval from the Department of Environment Regulation under the Environmental Protection Act 1986 (WA) to enable a transfer and discharge of water from the infrastructure. Both departments agree that the regulation of the extraction and discharge of water should be regulated by one entity. The guidance statement administratively removes this duplication.

The draft guidance statement proposes that the extraction and discharge of water is to be regulated by the Department of Water under the Rights in Water and Irrigation Act unless the dewatering discharge has been potentially contaminated or may impact downstream environments. In such circumstances, the Department of Environment Regulation will continue to regulate the extraction and discharge of water.

Draft Environmental Standard on composting

A revised draft environmental standard on composting was released for public consultation in March 2016. Public consultation closed on 16 June 2016. The document sets out the standard for prescribed premises carrying out aerobic composting in Category 67A of Schedule 1 of the Environmental Protection Regulations 1987.



COMPLIANCE, ENFORCEMENT AND PROSECUTIONS

COMMONWEALTH

Prosecutions – EPBC Act

Under the Department of Environment's Compliance Auditing Plan, four compliance audits were completed by the Department during 2015 in relation to a range of projects, including LNG and dredging projects.

In its 2014-15 Annual Report, the Department reported that it had examined 275 incidents representing potential breaches of Part 3 of the EPBC Act. Australian enforcement authorities issued 858 seizure and caution notices in 2014-15 for the import and/or possession of suspected CITES specimens without permission under Part 13A of the EPBC Act.

AUSTRALIAN CAPITAL TERRITORY

ACT amends duty scheme rewarding purchasers of "green vehicles"

The ACT Government has implemented a new emissions reduction scheme under which duties payable by purchasers of new vehicles will be determined exclusively according to the amount of carbon dioxide that those vehicles will emit. Previously the duties scheme took into account other air pollutants in addition to carbon dioxide.

Under the new scheme, duties will only be payable on new vehicles which emit over 130g of carbon dioxide per kilometre. Duties range from 1-4% of the purchase price, with vehicles emitting over 220g per kilometre paying \$4 to every \$100 spent.

NEW SOUTH WALES

NSW EPA implements risk-based licensing regime

From July 2015, the NSW EPA's "risk-based" licensing regime has determined the terms of environmental licences, under which businesses that are good performers are eligible for less onerous licence conditions and potentially lower licence fees. In determining "risk ratings", the EPA will use a "risk assessment tool" to investigate the potential for environmental damage at any given site. This will be complemented with an assessment of the licensee's "environmental management", where the EPA will consider the licensee's compliance history, environmental management systems and improvement programs.

Businesses should be aware that those sites that are ranked as poor performers could face up to double the administrative fees from 1 July 2016. Unlike other States that have implemented risk-based licensing, the EPA will publish risk determinations on a public register.

Prosecutions

The NSW EPA has maintained its strong focus on prosecution, recording 79 convictions in FY 2014-15 according to its Annual Report.

Environment Protection Authority v Riverina Australia Pty Ltd [2015] NSWCCA 165

In this case, the NSW Court of Criminal Appeal determined that a summons issued by the EPA in an environmental prosecution was "duplicious".

Riverina (Australia) Pty Ltd runs a stock feed manufacturing mill near Casino. The EPA charged Riverina with unlawfully disposing of waste material by sending it down stormwater drains and into drainage lines and waters. In its summons, the EPA alleged that Riverina disposed of a number of pollutants in a number of ways. Relevantly, the items on the lists were separated by the words “and/or”.

At first instance, Justice Pepper found that the use of the words “and/or” suggested that the EPA was charging Riverina with multiple offences, but had not identified the facts leading to the alleged breaches. She stated that “a person prosecuted under section 120 is entitled to be provided with particulars of the alleged conduct – when, how and where – that is the time, manner and location of an alleged contravention” or the accused will not know with certainty the charge to be met. She ordered that the summons be amended or struck out and this decision was upheld on appeal.

Following this ruling, businesses should expect a greater degree of detail in EPA summons, and be aware of their options where it is considered that a summons is worded ambiguously.

Environment Protection Authority v Alcobell Pty Ltd, Environment Protection Authority v Campbell [2015] NSWLEC 123

The NSW Land and Environment Court in this case found that companies and their directors may be liable for providing false and misleading information even where there was no intention to do so.

In this matter, the Court fined Alcobell Pty Ltd and its sole director Alistair Campbell close to \$300,000 for the illegal dumping of 6,500 tonnes of waste containing asbestos at three sites close to Lithgow. The company had been paid to transport the waste from skip bins in Sydney.

Justice Pain accepted that the defendants had deposited the waste on the sites for the purposes of earthworks and roadworks and had not understood that the waste was not compliant with “resource recovery exemption” rules. The false and misleading information charge related to internal worksheets which were provided in the course of investigations but which had not been prepared with the intention of misleading a third party.

This case highlights the need for companies to maintain accurate internal records and stay up-to-date with the legislative requirements concerning waste disposal.

Newcastle Port Corporation trading as Port Authority of New South Wales v Dudgeon; Newcastle Port Corporation trading as Port Authority of New South Wales v Svitzer Australia Pty Limited [2015] NSWLEC 139

The NSW Land and Environment Court has imposed fines of \$600,000 on Svitzer Australia Pty Ltd and \$81,000 on an engineer following a diesel spill from a boat in Newcastle Harbour. The boat’s engineer had

commenced a transfer of fuel oil but had forgotten to turn off the transfer pump before leaving the vessel, thereby disabling the alarms that would have otherwise sounded in the event of an overflow. Consequently, 8,000 litres of fuel flowed into the harbour.

Although the spill did not extend beyond the boat’s berth or cause any environmental harm or damage, Acting Justice Moore found that “the absence of actual harm in this instance is not proof that there is no potentiality for harm”. He took into account the quantity of the oil spilled and the fact that the clean-up had taken three days in concluding that there had been “a real and foreseeable potential” for harm. He also accepted that Svitzer had mandated procedures to avoid such a scenario but that these procedures had not been followed by its employee. Therefore, while the company was held vicariously liable for the engineer’s actions, he found that the company’s conduct had not given rise to “any general risk of harm to the environment” and reduced its penalty accordingly.

This case demonstrates that the potential for environmental harm will be treated very seriously, even if there is no actual environmental harm. Companies should also ensure that they have evidence of the procedures they have implemented to avoid potential environmental harm.

NORTHERN TERRITORY

Prosecutions

Krucible Metals Ltd v Department of Mines and Energy [2015] NTSC 71

The NT Department of Mines and Energy had prosecuted Krucible Metals Ltd (now known as TopTung Ltd) for carrying out exploratory drilling on October 2014 without having obtained an authorisation or provided a mining security, resulting in the NT Chief Magistrate fining Krucible \$300,000.

On appeal, Chief Justice Riley halved that penalty, describing the \$300,000 fine as “manifestly excessive”. However, the Chief Justice acknowledge that the offence was a “blatant breach” of section 35(4) of the Mining Management Act 2001 (NT) carried out under Krucible / TopTung’s former management.

The Chief Justice noted the following:

- ▶ the offence had occurred when the company was under a management regime that had subsequently been replaced, “partially as a consequence of the offending”;
- ▶ upon discovering the illegal conduct, the new management reported it, and voluntarily conducted remedial work “at significant cost to itself” and had entered an early guilty plea;
- ▶ the remedial work had been done to the satisfaction of

the department and the landowner; and

- ▶ given the new management regime it was unlikely the company would reoffend.

While the Chief Justice halved the penalty imposed on the company, he did not accept the company's argument that a conviction should not be recorded against it.

QUEENSLAND

Department of Environment and Heritage Protection compliance strategy

In June 2014, the Department of Environment and Heritage Protection (DEHP) released its updated Regulatory Strategy to reflect its commitment to the Government, the community and industry. The updated Regulatory Strategy also reflects a significant and fundamental shift in the way environmental and heritage regulatory activities will be undertaken by DEHP. Importantly, and as outlined in the Regulatory Strategy, DEHP has taken a greater focus on compliance activities, with enforcement actions becoming stronger, where required, and more consistent.

It has undertaken significant work to revitalise and reshape its proactive compliance methodology and framework to provide improved utilisation of compliance resources to target the highest risks to the environment and monitor performance of clients. DEHP has stated that it is moving away from annual compliance planning and reporting towards a new dynamic framework which will allow a more rapid and timely response to emerging trends or changes in risk. This new framework will continue to provide accountability and transparency with the added benefit of allowing greater flexibility to respond to changing risks to the environment and identify areas where immediate action is needed to address poor performance or mitigate environmental harm.

The key compliance tools which DEHP can use, and which have been bolstered recently, include:

- ▶ inspection powers;
- ▶ environmental evaluation and investigation;
- ▶ environmental audits;
- ▶ clean-up notices; and
- ▶ stronger penalties for non-compliance.

New enforceable undertakings regime

On 30 September 2015, the introduction of enforceable undertakings became an alternative to prosecution for environmental offences. Enforceable undertakings are binding agreements between the administering authority (usually the Department of Environment and Heritage Protection) and an alleged offender as a way to support the environmental outcomes in response to alleged contravention of the Environmental Protection Act 1994, which would generally be considered appropriate for prosecution.

Enforceable undertakings may be appropriate only in circumstances where the administering authority reasonably believes that the enforceable undertaking will secure compliance with the Act and enhance protection of the environment. Examples include:

- ▶ inadvertent or accidental acts;
- ▶ no serious prior non-compliance with environmental or similar legislation;
- ▶ remediation has been effective or partially effective, or a demonstrated genuine attempt at remediation has been made;
- ▶ there was no motivation or intention to derive financial or material benefit from the non-compliance;
- ▶ the impact or risk of impact resulting from the contravention was not reasonably foreseeable; or
- ▶ the impact or risk of impact was not prevented by high standards of operation.

The Department of Environment and Heritage Protection has provided a new guideline on enforceable undertakings, which offers guidance on how an enforceable undertaking should be drafted and what generally needs to be included. If accepted, the enforceable undertaking will be published on the Department's website.

Extended legal responsibility for environmental protection orders

The Environmental Protection Act 1994 has been amended to incorporate provisions which now empower the regulator, the Queensland Department of Environment and Heritage, the power to extend responsibility for clean-up, rehabilitation and associated costs to persons and companies who are related to a company that has been issued an Environmental Protection Order (EPO), exercise discretion to issue an EPO to a "related person" at the same time as the primary company and regardless of whether that entity has complied with the EPO and issue an EPO to a related person of a "high risk company" even if an EPO has not been issued to the high risk company. The amendments will allow the regulator to pursue companies and directors who seek to utilise insolvency or similar processes to avoid liability for clean-up, rehabilitation and associated costs, and many of the amendments will apply retrospectively.

The scope of the amendments to include a "related person" is perhaps the most notable aspect of the amendments as this category is so broad and drafted to capture:

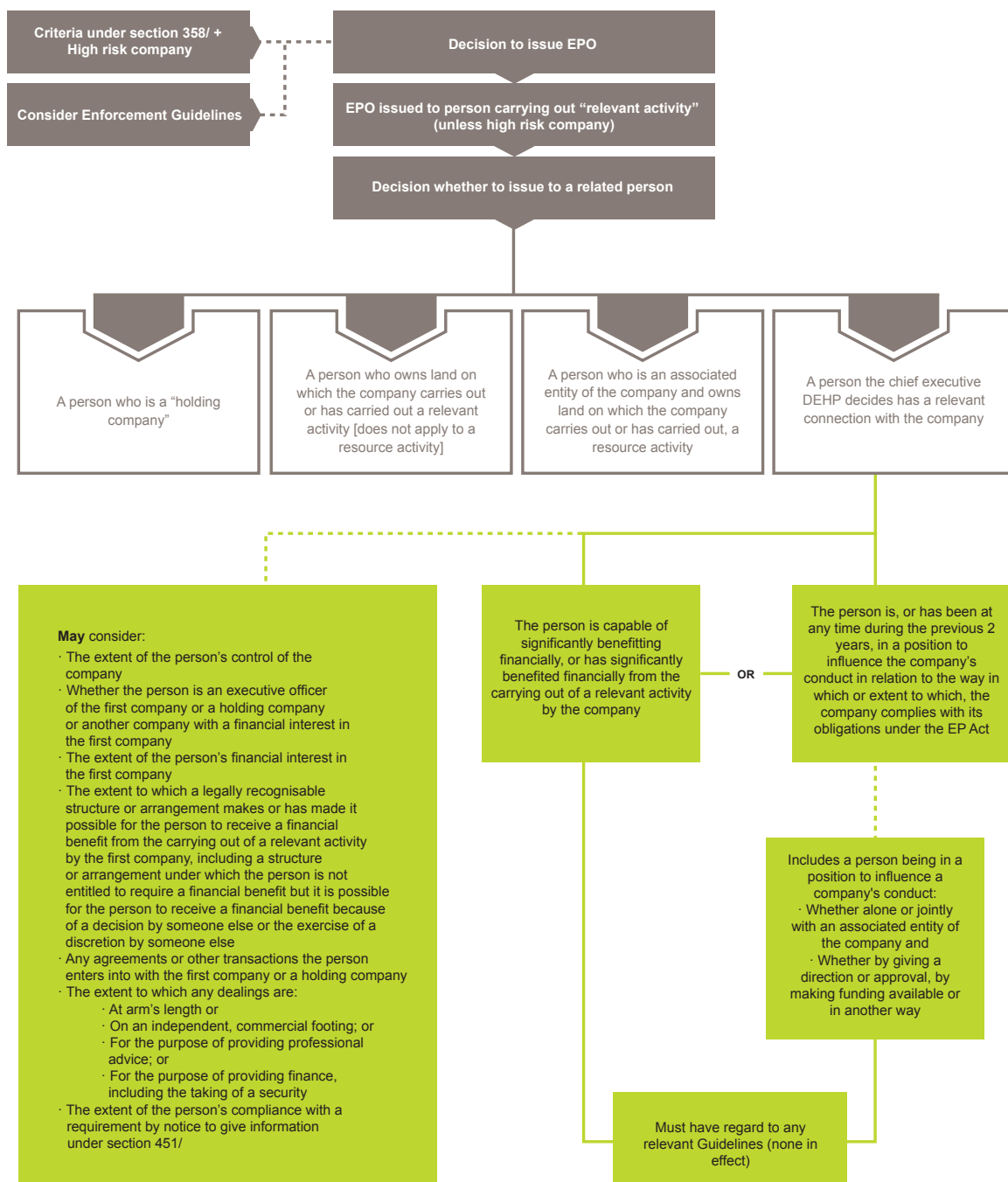
- ▶ those persons or entities that can or have received a "significant financial benefit" (which is not defined) from the carrying out of the relevant activity; or
- ▶ the degree of influence over the company's conduct (such as a person who in the previous two years in a position to influence the company's conduct in relation to the way in which or extent to which the company complies with the Environmental Protection Act)

In making the determination on who is a related person, the Department must have regard to any relevant guidelines. These guidelines have not yet been developed but a working group of various industry stakeholders has been established to work with Government on development of the guideline, which is expected to be finalised by the end of 2016.

While noting that the “related person” provisions are only triggered where an EPO has been issued to the primary company (with the exception of high-risk companies) and that an EPO is one of a range of enforcement tools under the Environmental Protection Act issued to secure compliance with the Act, we are not aware of comparable provisions elsewhere in Australia that are drafted with such equivalent breadth. It is noted that Victoria is considering introducing similar law to deal with parent companies of coal mine operators who do not meet their rehabilitation obligations.

The Act also allows the Department to impose financial assurance conditions on the transfer of an environmental authority (for example a transfer between entities) and extends its cost recovery, investigation and enforcement powers. It is noted that an individual may no longer claim privilege against self-incrimination where the regulator questions an individual (including an executive officer) in relation to their involvement or knowledge of a breach of the Act.

ENVIRONMENTAL PROTECTION (CHAIN OF RESPONSIBILITY) AMENDMENT ACT (QLD)



Prosecutions

The Queensland Department of Environment and Heritage (**DEHP**) commenced a number of compliance actions including prosecutions over the last 12 months.

Its 2014-15 Annual Report reports that it recovered approximately \$430,000 in penalties and fines. Some of the more significant prosecutions included:

- ▶ The operator of an abandoned gold mine near Rockhampton has been found guilty of one offence of failing to comply with an Environmental Protection Order and fined \$125,000. Its Managing Director was also fined \$20,000 for failing to ensure the corporation complied with the Environmental Protection Act 1994. In delivering his sentence on 7 May 2015, the Magistrate said that the seepage of contaminated water into local waterways had become a chronic problem with grave concerns to all members of the Queensland community.
- ▶ The operator of a marine vessel refuelling facility has been fined \$20,000 after pleading guilty to two offences under the Environmental Protection Act 1994, including material environmental harm and depositing prescribed water contaminant in waters. The offences relate to the discharge of 23,000 litres of diesel near the water's edge. The Magistrate said that the defendant had failed its obligations to repair and keep the facility in good repair.
- ▶ A major Queensland quarrying company was fined \$250,000 in the Brisbane Magistrates Court after pleading guilty to nine offences under the Environmental Protection Act 1994, including serious environmental harm, providing a false Annual Return to DEHP and breach of permit offences about erosion and sediment control, recording complaints and failure to notify DEHP. The Magistrate said the defendant had a clear obligation to supervise and manage its employees and it was a significant concern that a company of the defendant's size could so profoundly fail to meet its obligations.
- ▶ A Queensland coal seam gas company has been fined \$65,000 after pleading guilty to four charges of contravening conditions of its environmental authority by unlawfully constructing CSG wells and a dam in environmentally sensitive areas. The Magistrate also ordered the company to publish advertisements in three Queensland newspapers outlining the company's offences in order to educate both industry and the community about the requirements of the Environmental Protection Act 1994 and the protection of environmentally sensitive areas.

SOUTH AUSTRALIA

Prosecutions

Circelli v The Corporation of the City of Adelaide (No 2) [2015] SAERDC 52

In this matter the Environment, Resources and Development Court of South Australia found the City of Adelaide breached its environmental licence conditions for four consecutive years commencing in 31 October 2008. The licence related to a former waste landfill site at Wingfield Road, Dry Creek.

The licence conditions required the City of Adelaide to cap the former landfill site. The capping process manages landfill gas and minimise water infiltration, which are key concerns for landfill sites.

The Court found that the charges for breaches of the licence condition in 2008 and 2009 were out of time. The City of Adelaide was found guilty of the breaches of the condition in 2010 and 2011. According to section 45(5) of the Environment Protection Act 1993 (SA) a maximum fine of \$120,000 can be imposed on a body corporate for breach of a licence condition.

The deadline for sentencing submissions was 25 February 2016.

Aldinga Aviation Pty Ltd v EPA [2015] SAERDC 45

In this case the Environment, Resources and Development Court considered an appeal by an aviation company of the Environment Protection Authority's decision to impose conditions on its licence.

At the preliminary hearing the Court found that aviation activities such as take-off and landing of commercial or charter aircraft at the Aldinga aerodrome are of "environmental significance" and thus require environmental authorisation in the form of the licence under the Environment Protection Act 1993 (SA).

The substantive hearing will be heard in 2016. Companies conducting or planning to conduct similar aviation activities should take note that a licence under the Environment Protection Act is required.

SACAT opened in 2015

On 30 March 2015, the South Australian Civil and Administrative Tribunal (**SACAT**) opened to the public. The tribunal aims to increase accessibility and efficiency of the dispute resolution process in South Australia.

The Residential Tenancies Tribunal, the Guardianship Board, and the Housing Appeal Panel have been relocated to the tribunal. The SACAT will also hear land valuation matters which have previously been heard in the Supreme Court.

It is expected that approximately 120 Acts will move to the SACAT as it expands its role over time.

TASMANIA

First EPA civil court action

In September 2015, the EPA reached a compliance agreement with the owner of Tomahawk Caravan Park in relation to a decommissioned underground petroleum storage system (UPS). The owner had failed to undertake a site assessment within four months of decommissioning the UPS as required by the Environmental Management and Pollution Control (Underground Petroleum Storage Systems) Regulations 2010. The EPA sought an Order to comply with the Regulations in the Resource Management and Planning Appeal Tribunal.

EPA Director Wes Ford said that it was the first time that the EPA used civil action to enforce environmental regulations, and commented that it was an effective means of achieving compliance in certain circumstances.

The case is a reminder of the importance of regulatory compliance, the potential liability associated with owning sites with UPSs, and the EPA's preparedness to use a range of enforcement options. It evidences regulatory authorities' increasing willingness to explore enforcement mechanisms other than straight prosecutions as a way to drive compliance outcomes, while avoiding the need to pursue prosecutions, which can be more costly to run with more unpredictable outcomes.

"THIS IS THE FIRST TIME THAT THE TASMANIAN EPA HAS USED CIVIL ACTION TO ENFORCE ENVIRONMENTAL REGULATIONS."

VICTORIA

Independent Inquiry into EPA

On 16 May 2016 the Environment Minister released the Ministerial Advisory Committee report into the EPA following the public inquiry which commenced on 1 June 2015.

The Committee made 48 recommendations for Government to consider, including strengthening prosecutorial powers, significant changes to the legislative framework aimed at strengthening the EPA's role as a science-based regulator, and an increased role in government decision-making. If implemented, the

changes will have a significant impact on infrastructure providers, businesses and developers. Its key recommendations are:

Reporting of Incidents: Introduction of a mandatory requirement for businesses to notify the EPA or local government of pollution incidents, with a state-wide network of environment protection officers within local government to assess and respond to smaller scale or localised incidents.

Enforcement: The report is critical of the EPA's risk-averse approach to prosecutions and recommends broader inspection powers for authorised officers, as well as an expansion of the range of available sanctions with increased severity.

The report also recommends legislative change introducing a general duty to take reasonable steps to minimise risks of harm from pollution and waste, as well as the right for third parties to seek a court order restraining or remedying breaches of environmental protection laws.

Land use planning: Introduction of a statutory trigger or Ministerial Direction under the Planning and Environment Act 1987 requiring responsible authorities to seek the EPA's advice in the early stages of planning processes such as rezoning or planning scheme amendments involving significant human health and environmental risks or developments in close proximity to licenced facilities.

Licensing: Numerous changes to licencing are recommended, including:

- ▶ introducing fixed terms for new licences;
- ▶ regular review of current licences to ensure compliance with environmental standards;
- ▶ expansion of the number of activities requiring licences to capture those having significant impacts on human health or the environment;
- ▶ requiring licence holders to develop and implement pollution incident plans and make emissions monitoring information available to the public; and
- ▶ broadening VCAT's jurisdiction to be able to review works approval and licencing decisions.

Following the report's publication, the Government has agreed to establish an interim board with a broad range of skills and experience to guide the EPA in the implementation of reforms, work with the Department of Health and Human Services to gradually shift environmental health functions to the EPA and employ a Chief Environmental Scientist to strengthen the EPA's focus on science. The formal response to the report and recommendations is expected to be released later in 2016.

EPA v Australian Tallow Producers Pty Ltd (24 November 2015)

On 24 November 2015, the Melbourne Magistrates Court found Australian Tallow Producers Pty Ltd (**ATP**) guilty of causing air pollution.

ATP operates from a site in Brooklyn that functions as a rendering facility, manufacturing tallow from abattoir material. After receiving numerous complaints on 22 June 2011, 23 June 2011 and 21 September 2011, the EPA investigated and an officer documented “a strong offensive odour comprising of a mixture of ‘manure, blood, bone and tallow’ coming from ATP’s premises.”

After proceedings that involved 11 witnesses, two expert witnesses and nine environment protection officers, the court convicted ATP and ordered it to pay Hobsons Bay City Council a fine of \$200,000 for the purposes of carrying out an environmental project in fulfilment of Stage 3 of the 2010 Brooklyn Reserve Master Plan. The project will involve design and construction of a play space and informal recreation zone and tree planting.

EPA v Gippsland Waste Services Pty Ltd (21 December 2015)

On 21 December 2015, the Morwell Magistrates Court sentenced Gippsland Waste Services Pty Ltd (**GWS**), its directors, a general manager and a truck driver in relation to illegal dumping of tyres and industrial waste at landfill sites in Bairnsdale and Cann River.

Although both sites were nominated for dumping, GWS had not paid the fee for the Bairnsdale site and tyre dumping was illegal at the Cann River site. Relatively minor environmental damage was caused. However, the offences went beyond “mere fraud” because “they breached the principle of integration of economic, social and environment considerations provided for in section 1B [of the EP Act].”

Holding GWS primarily responsible, the court fined it \$30,000. One director was found to have played a part in attempting to create false records and the other director to fail to demonstrate due diligence; each was fined \$20,000. The general manager was found to have had an active role in supervising his employees and was also fined \$20,000 while the truck driver was found to have had full knowledge of the offending and was fined \$10,000. The EPA stated that the case highlighted its focus on the illegal dumping of industrial waste and the seriousness with which the court regards such offences.

Amendment to protest laws

On 25 February 2015, the Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA) was introduced to the Legislative Council. The Bill introduces two new offences to the Criminal Code, targeting activists who use lock-on devices at site protests.

The second reading speech notes that recent development in lock-on devices has caused difficulty in removing the locks without a skilled technician. A standard feature of lock-on devices is that they cannot be unlocked by the protester themselves and removing these locks is often “extremely dangerous” and will cause some degree of injury to the protestor. The second reading speech notes that currently persons are able to carry such lock-on devices legally and thus enforcement authorities are unable to act until the device has been used.

One of the proposed offences makes it an offence to make or possess a lock-on device for the purpose of preventing work at a protest site, or have such a device in your possession while in the vicinity of a protest site.

The Bill was introduced to the Legislative Assembly on 23 February 2016.

Judicial review: Save Beeliiar Wetlands v Jacob [2015] WASC 482

The Supreme Court held that the Environmental Protection Authority was legally bound to take account of its relevant policies in relation to environmental impact assessment when making its recommendation to the Minister for Environment.

The case involved a judicial review of the Environmental Protection Authority’s recommendation to the Minister for Environment to approve a proposal to extend Roe Highway subject to certain conditions. One of the grounds for review was whether three relevant statements of policy were taken into account by the Authority when making their recommendation.

The Supreme Court found the Authority had failed to “take account” of the three policies and accordingly the environmental impact assessment conducted by the Authority and its recommendations to the Minister were invalid. As the Minister’s decision was based on an invalid recommendation, the Court found the Minister’s decision was also invalid.

The State Government has appealed the decision to the Court of Appeal. The appeal was heard on 2 May 2016, where State Counsel argued there was no requirement for the three policies to be treated as mandatory considerations. Counsel for Save Beeliiar Wetlands proposed that even if the policies were not a mandatory consideration, failing to take them into account amounted to an unreasonable process. The Court of Appeal handed down its decision on 15 July 2016, upholding the appeal. The Court found the policies were not mandatory relevant considerations.



LAND DEVELOPMENT LAW

AUSTRALIAN CAPITAL TERRITORY

Amendments to planning, building and environment legislation

The Planning, Building and Environment Legislation Amendment Bill 2015 (No 2) was passed in the ACT Parliament on 9 February 2016 and notified on 23 February 2016. The aim of the amending provisions is to ensure the ACT planning, building and environment legislation is up-to-date and consistent with technological and societal change. This is the ninth bill to amend ACT's planning law since 2011. The Bill provides for policy, technical and editorial amendments to the Planning and Development Act 2007 and its Regulation, the Building (General) Regulation 2008, the Nature Conservation Act 2014 and the Environment Protection Act 1997 and its Regulation.

Two important amendments to the Planning and Development Act are:

- ▶ Key documents which lead to an exemption for a project from the requirement for an EIS must be considered in the assessment of that project. Typically, such projects are subject to the "impact track assessment". It is proposed that any EIS exemption, and any associated recent study on which the exemption is based and revised EIS exemption application, be included as additional matters which the decision-maker must consider when deciding an application for development approval in an impact track assessment.
- ▶ The planning and land authority will be bound to comply with the advice of the Conservator in relation to a protected matter (ie. matters of national environmental significance under the EPBC Act) only when making a decision on whether to give a development approval. Any advice of the Conservator that is not related to a protected matter still must be taken into account, together with any advice from any other referral agency, but it is not binding.

New regulations for exemption of minor development on heritage properties

In September 2015, the ACT Government amended the Planning and Development Regulations 2008 to modify the standard provisions for the exemption of minor development on heritage properties from the need to apply for a development approval in certain circumstances. This amendment was aimed at reducing red tape and decreasing the regulatory burden where minor development is proposed to be undertaken on heritage properties, and the development is of no significance to the existing heritage values.

Essentially, the amendment allows the standard exemption provisions to apply to development that is to be undertaken at a place or on an object in the ACT Heritage Register or under a heritage agreement that would otherwise be exempt from requiring approval if not at a heritage property where. For this to apply, the ACT Heritage Council must provide written advice to the Planning and Land Authority that, if carried out, that development will not:

- ▶ will not diminish the heritage significance of the place or object;
- ▶ is in accordance with heritage guidelines;
- ▶ is in accordance with a conservation management plan approved by the ACT Heritage Council;
- ▶ is in accordance with a permit to excavate; or
- ▶ is an activity described in a statement of heritage effect approved by the ACT Heritage Council.

New streamlined planning and environmental processes

On 15 April 2016, the Planning and Development (Efficiencies) Amendment Act 2016 commenced which made amendments to the Planning and Development

Act 2007 to allow the following, where elected by the proponent, planning and environmental processes to occur concurrently.

- ▶ Territory Plan 2008 variations;
- ▶ environmental assessment; and
- ▶ development application assessment.

For example:

- ▶ a development application can now be lodged in anticipation of a Territory Plan variation, and that application will be assessed concurrently with the draft Territory Plan variation itself. The Authority will assess the development application against the draft Territory Plan variation rather than the existing Territory Plan. Where the draft Territory Plan variation is not approved, the development application will also be refused; and
- ▶ a development application in the impact track which triggers the requirement of an EIS can now be lodged for assessment where it is accompanied by either a draft environmental impact statement (EIS) or an application for an EIS exemption. Therefore, the proponent will be able to complete the EIS or have the EIS exemption assessed at the same time as the assessment of the development application.

Amendment was also made to the public notification timeframes where the concurrent process is selected, with a combined consultation period of not less than 35 working days applying. While this period is longer than the periods currently stipulated for individual processes, it is one single consultation period and it is likely to result in shorter timeframes for an approval, compared to two separate consultation periods which are likely to occur months apart.

The Act also provides a new process to allow for technical amendments of the Territory Plan to be made.

NEW SOUTH WALES

Greater Sydney Commission

In November 2015, the NSW Parliament passed the Greater Sydney Commission Act which provides for the creation of the Greater Sydney Commission. The Act commenced by proclamation on 27 January 2016 and also includes amendments to the Environmental Planning and Assessment Act 1979 (**Planning Act**) to provide for a scheme of strategic planning within NSW, and it appoints the Commission as the relevant authority for making local environmental plans under the Planning Act for all of the Greater Sydney region.

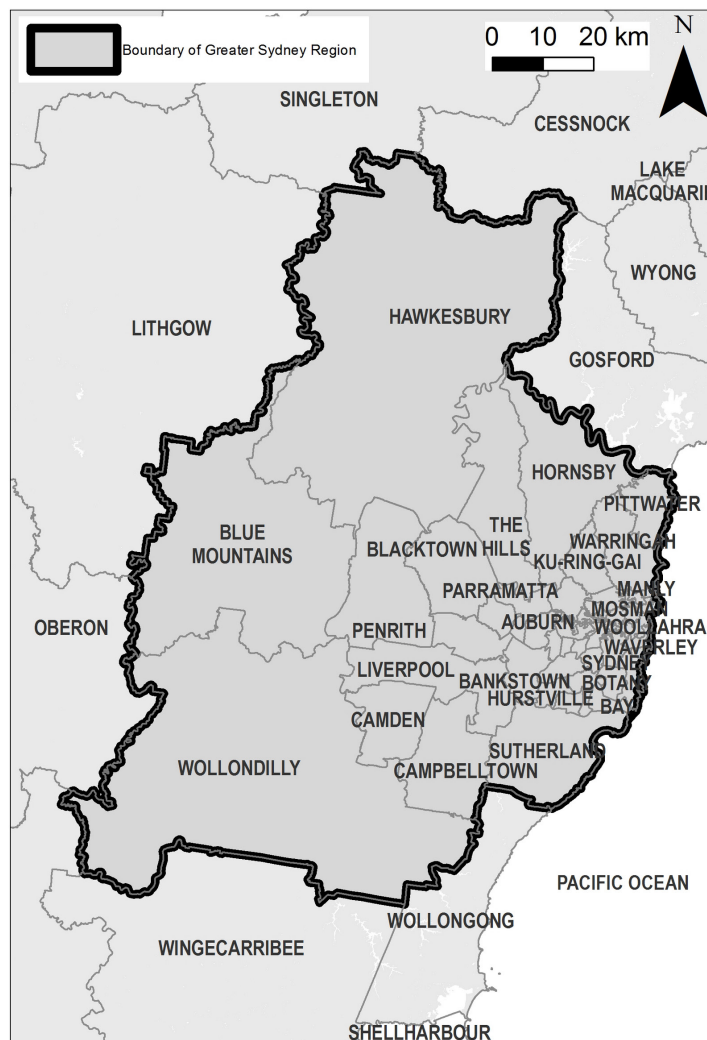
Importantly, the Greater Sydney Commission Act provides for:

- ▶ the creation and implementation under a new Part 3B of the Planning Act to deliver strategic planning for the Greater Sydney region and other regions in NSW through a system of regional plans and plans which

will then be implemented via Local Environmental Plans;

- ▶ the constitution of a new body called the Sydney Planning Panel, which effectively will replace the Sydney East and Sydney West joint regional planning panels and so will conduct reviews of zoning proposals and determine development applications in place of those joint regional planning panels; and
- ▶ co-ordination of land use planning with delivery of infrastructure that Government has already committed to fund (including the Sydney Metro and WestConnex) as well as future infrastructure proposal.

The Act represents a significant step forward in strategic planning for the Greater Sydney region and NSW more broadly. Among other things, it confirms that the first regional plan for the Greater Sydney region is “A Plan for Growing Sydney” (December 2014). The below plan shows the Greater Sydney Region and the current local government areas.



Developers should consider the potential for impacts on any early stage proposals which may arise out of the new plans and seek advice regarding the transition to the new strategic planning system.

New coastal management legislation and policy

In June 2016, the NSW Government passed the Coastal Management Act 2016 (although it is yet to commence), designed to provide for the management of the coastal environment consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of New South Wales.

The Act introduces four classifications for coastal regions: vulnerability areas, wetlands and littoral rainforests, environment areas and use areas. These areas will be mapped and incorporated into a supporting coastal management State Environmental Planning Policy (**SEPP**), which will replace three existing SEPPs that deal with coastal wetlands, littoral rainforests and coastal protection.

The Act also requires councils to prepare coastal management programs (**CMPs**) that would replace existing coastal zone management plans. Councils would have to prepare their CMPs in consultation with their communities and relevant government authorities, and in accordance with a new coastal management manual.

When it commences, the Act will repeal the Coastal Protection Act 1979 and Coastal Protection Regulation 2011.

New Community Consultative Committee Guidelines for State significant projects

The Department of Planning and Environment released its draft “Community Consultative Committee Guidelines: State Significant Projects” and the public consultation period ended 31 March 2016. The revised guidelines will apply to all new State significant projects in NSW, including major mining projects.

A more detailed review of the draft guidelines is contained in the **Mining and Petroleum** chapter.

Revised EPBC Act assessment bilateral agreement for NSW

On 26 February 2015, a revised version of the environment assessment bilateral agreement between the Federal and NSW Governments commenced.

The Department of the Environment states that the current agreement will deliver on the objective of promoting efficient, thorough and transparent regulation while minimising duplication of environmental assessment processes.

The new agreement has a broader scope than the 2013 version, allowing for the NSW biodiversity offsets policy to be used instead of the Federal policy, strengthening intergovernmental co-operation, and implementing measures to streamline the benefits of the one-stop shop policy in advance of an approval bilateral agreement.

NORTHERN TERRITORY

Development Guidelines for NT Controlled Roads

The Northern Territory Department of Transport released the Development Guidelines for Northern Territory Controlled Roads on 26 August 2015 which sets out the processes and requirements for development on land and the construction of infrastructure on controlled roads and within road reserves. The new Guidelines are aimed at streamlining the development approval process for any development or infrastructure that impacts on the road network or that will ultimately be transferred to the Government by providing clarity for developers about their obligations and the approval process.

When preparing a development application which involves development or infrastructure that impacts on the Northern Territory road network you should consider these Guidelines.

New regulatory framework for port management

A new package of legislation commenced in mid-2015 which overhauled the existing port regulatory framework, giving the Northern Territory Government more power to impose tighter controls and regulations for designated ports, and opened the door to the privatisation of the Port of Darwin.

Relevantly, the Ports Management Act 2015 established a regulatory framework for the management and control of the privately operated Port of Darwin, and amalgamated the other legislative regimes. Importantly, it also creates a mechanism to regulate those ports which are not currently regulated.

A consequential amendment removed the Port of Darwin’s blanket major hazard facility exemption under the Work Health and Safety (National Uniform Legislation) Regulations. Now the Port of Darwin will only remain exempt from the major hazard facility requirements under the Regulations while the methods of storage and handling of Schedule 15 chemicals remain consistent with the “in transit” definition (ie. the Schedule 15 chemical is supplied to, or stored at, a workplace in containers that are not opened at the workplace, is not used at the workplace and is kept at the workplace for not more than five consecutive days). When however these methods change so as to fall outside the scope of this exemption, the requirements to register and be licensed as a major hazard facility will be triggered.

New strategic planning framework

In 2015 the Northern Territory Government continued its planning for future infrastructure and a growing population with the release of consultation and discussion papers and draft regional land use and area plans, including the finalisation of the Darwin Regional Land Use Plan. Now approved by the Minister, the

Darwin Regional Land Use Plan forms part of the NT Planning Scheme and establishes the direction for future growth within the Darwin Region.

Consultation on a number of area plans, regional land use plans and subregional land use plans concluded in 2015 / early 2016, including the Darwin Inner Suburbs Area Plan, draft Holtze Area Plan, Litchfield Subregional Land Use Plan and Alice Springs Regional Land Use Plan. The Darwin Inner Suburbs Area Plan, Litchfield Subregional Land Use Plan, Alice Springs Regional Land Use Plan and Darwin Mid Suburbs Area Plan have now been recommended to the Minister by the NT Planning Commission. It is expected that the Minister will publicly exhibit those plans as amendments to the NT Planning Scheme. Once approved by the Minister, the plans will be incorporated into the NT Planning Scheme.

The NT Planning Scheme was also amended to include the Compact Urban Growth Policy which applies to higher density residential proposals in urban brownfield and greenfield localities throughout the Northern Territory. This Policy will be used to assess the appropriateness of delivering higher density residential land uses and will be used to guide the development of Area Plans, Rezoning and Exceptional Development Applications where higher density residential land uses are proposed.

These overarching policy documents should be considered when making any applications for development under the NT Planning Scheme.

Balancing the environment

In February 2015, the NT Government released its Balanced Environment Strategy Discussion Draft for public consultation, with submissions closing in March. The Draft Strategy identified nine principles which the Government proposed to use to guide its future decision-making to ensure the responsible use, management and safeguarding of the unique Northern Territory environment. The release of the Draft Strategy was part of the Government's reforms following on to put in place a robust regulatory system to safeguard the Northern Territory environment as the existing system has not been substantially amended since its creation over 30 years ago.

The Draft Strategy identified the key challenges the Northern Territory environment faces, sets goals to avoid, manage and mitigate risks to the Northern Territory environment caused by these challenges and the actions it proposes to take to achieve these goals.

At a glance, the aims and actions proposed in the Draft Strategy include things such as:

- ▶ risk-based regulation of activities;
- ▶ the use of the best available scientific knowledge to guide government decision-making;

- ▶ research and innovation to develop options to protect the environment and manage any risks;
- ▶ strengthening the regulatory system and making it more efficient and transparent, with legislative reform and more opportunity for consulting with key stakeholders and the community;
- ▶ developing and implementing policy and guidelines to facilitate and manage key issues relevant to balancing land use and the environment; and
- ▶ planning of cities, towns and infrastructure to ensure a balance between development and sustainability is achieved, including streamlining of key processes and introducing recognised standards and processes.

It is understood that the final Strategy will be supported by a series of detailed implementation plans which will outline:

- ▶ those government agencies which are responsible for delivery of the specific actions identified in the final Strategy; and
- ▶ the monitoring and reporting process to be put in place to track the progress of achieving those actions.

New Planning Acts passed

On 12 May 2016, the Parliament passed three bills as part of a package of planning reform which together will repeal and replace the current Sustainable Planning Act 2009 (Qld) (SPA):

- ▶ Planning Bill 2015
- ▶ Planning and Environment Court Bill 2015; and
- ▶ Planning (Consequential) and Other Legislation Amendment Bill 2015.

The new legislation is expected to commence in 2017.

In addition to the Planning Acts, the State also released a number of draft statutory instruments for public consultation, including a draft Planning Regulation, draft Development Assessment Rules and draft Plan Making Rules.

The Planning Acts introduce changed terminology for many of the planning concepts that would be retained, and deregulates and streamlines a number of processes that exist under SPA. There are a number of matters under SPA that would be discontinued under the Bills, such as:

- ▶ State planning regulatory provisions and standard planning scheme provisions (although elements will be continued through other instruments, including the Regulations);
- ▶ the EIS process; and
- ▶ compliance assessment.

For local government, these changes would mean new assessment and approval processes, new planning instruments, and some new compliance obligations. The Government has stated it will offer local governments assistance to examine their planning schemes and to transition them before the Planning Bill commences.

For developers, the key issues will be the whole of the assessment process, and the transitional arrangements for any applications or appeals under way at commencement. It is understood that the Department of Infrastructure, Local Government and Planning will be releasing a suite of material in July 2016 to explain how the new planning system will work.

Planning for natural hazards – flooding, coastal mapping

A new coastal management district (CMD), dated 17 November 2015, was declared under the Coastal Protection and Management Act 1995 and took effect from 3 February 2016. The CMD delineates the area where development must be referred to the State for assessment under the “coastal triggers” of Sustainable Planning Act.

The new CMD mapping follows the release of revised coastal hazard maps, which have been amended to

reflect a projected sea level rise of 0.8 meters to 2100. The revised coastal hazard mapping came into effect on 8 July 2015.

According to information published on the Department of Environment and Heritage's website, the new CMD mapping retains the existing CMD mapping in its current form, but includes additional lots where permanent inundation by tidal water is expected to occur from sea level rise. Generally, only lots in proximity to tidal water (creeks, rivers or the open coast) are included. Lots which may be inundated, but occur well inland from the coast, or those lots with relatively minor areas of inundation, are not included.

The CMD mapping is available on the interactive mapping system on [the Department of Infrastructure, Local Government and Planning's website](#).

State Infrastructure Plan

In 2015 the Queensland Government committed to developing a State Infrastructure Plan in early 2016, the purpose of which was to:

- ▶ set the strategic direction and foster innovation in planning and delivering infrastructure;
- ▶ identify the anticipated service needs and infrastructure investment opportunities for a prosperous Queensland;
- ▶ develop a sustainable and credible program of investment for industry, which will be informed by the independent advice of Building Queensland; and
- ▶ provide a framework for greater co-ordination between public and private infrastructure.

The draft State Infrastructure Plan was released in October 2015 in two parts:

- ▶ **Part A: Strategy**, which aims to set a vision for the future with a new approach to infrastructure planning and prioritisation that articulates the response to key opportunities and challenges facing Queensland; and
- ▶ **Part B: Program**, which provides certainty through the program of investment over the next four years, with future opportunities over the next 15 years. It does not specify solutions, in order to encourage innovation and ideas from industry.

The Plan, which was released in final on 13 March 2016, identifies the infrastructure that the Queensland Government ultimately wants and how this can be best achieved. It aims to encourage investment from the private sector by providing confidence and certainty through the five to 15 year program, as well as providing the opportunity to develop innovative solutions.

The Plan is an overarching document, with Infrastructure Plans at the local government level to follow.

Draft amendments to State Planning Policy released

The draft amendments to the State Planning Policy (SPP) July 2014 were released in November and are largely administrative in nature, including updates to outdated information and consequential amendments resulting from new or amended legislation and administrative references.

Of particular relevance, amendment is proposed to “natural hazards, risks and resilience” (and to a lesser extent the “coastal environments”) sections (Part D), which results in the SPP acknowledging that climate change is projected to impact on the footprint, frequency and intensity of those natural hazards already discussed in the SPP.

This appears to only be a subtle change to the SPP as the existing natural hazards section already addressed those hazards which are considered to be impacts of climate change. However, a further amendment is proposed which sees the words “prepared for” replaced with “effectively avoided or mitigated” with regards to what land use planning and development decisions can do in terms of natural hazards such as flood, bushfire, landslide, storm tide inundation and coastal erosion. This arguably demonstrates a shift in Government policy to place more emphasis on the need for planning and development controls in areas that will be affected by climate change.

The final version of the SPP commenced on 29 April 2016.

Amendments to Queensland Heritage Act

The Queensland Heritage and Other Legislation Amendment Act 2014 was assented to on 7 November 2014, with part 2A of the Act commencing on that day, and the remaining provisions commencing on 1 August 2015.

The Amendment Act makes a number of reforms to the Queensland Heritage Act 1992, aimed at reducing regulatory burden and streamlining the statutory processes. Some of the more major changes include amending the application process for entering or removing a property on the heritage register, the introduction of an application to permanently exclude a place from the heritage register, and changes to compliance and enforcement provisions. It also requires the heritage register to be made available online for ease of public access.

Of particular note is the changes to the process of entering or removing a place from a heritage register. The Queensland Heritage Act prescribes the information and documents which must accompany an application to enter a place in, or remove a place from, the heritage register. The Amendment Act significantly amends this process by prescribing more detailed requirements of

what needs to be included with an application. Some of the more significant changes to the application process include:

- ▶ having to satisfy **each** of the cultural heritage criteria in section 35 of the Queensland Heritage Act, instead of just one or more of the criteria; and
- ▶ the application to enter or remove a place on the heritage register must be based on, and refer to, historical research.

If their application does not comply with these requirements, the applicant will be notified by the chief executive of the non-compliance, and given reasons and an explanation of how to meet the requirements for future applications. Significantly, the Amendment Act introduces a five-year waiting period which prevents a person from reapplying for the same decision under the Queensland Heritage Act if an application has been made and a place has been entered or removed, or the Heritage Council decides not to enter or remove a place from the register.

Sustainable Ports Development Act 2015

The Sustainable Ports Development Act 2015 was assented to on 20 November 2015. These new laws aim to balance the protection of the Great Barrier Reef with the development of Queensland’s major ports.

The majority of Queensland’s trading ports are located adjacent to the Great Barrier Reef World Heritage Area, and these laws implement a number of actions within the Reef 2050 Plan.

The Sustainable Ports Development Act 2015:

- ▶ restricts new port development to within current limits and outside Commonwealth and State marine parks, for areas within and adjoining the Great Barrier Reef World Heritage Area;
- ▶ prevents major dredging for the development of new ports or for the expansion of existing ports in the Great Barrier Reef World Heritage Area. This does not apply to priority ports of Gladstone, Abbot Point, Townsville and Mackay (Hay Point);
- ▶ prohibits disposal of port-related capital dredge material within seas of the Great Barrier Reef World Heritage Area.

The Act declares the ports of Gladstone, Abbot Point, Townsville and Mackay (Hay Point) as priority ports. Port master planning is required under the Act, which will aim to optimise the use of existing infrastructure and address operational, economic, environmental and community relationships. Port master planning for the Port of Gladstone is currently underway, and master planning will commence for Abbot Point and Townsville in 2016, with Mackay (Hay Point) beginning in 2017.

The Act also supports the development of the Port of Cairns, but only where it does not impact the Great

Barrier Reef World Heritage Area. It allows for port-related capital dredging in the Port of Cairns inner harbour, with specific conditions. This includes no sea-based disposal of capital dredge material within the Great Barrier Reef World Heritage Area.

Amendments to water legislation

The Water Reform and Other Legislation Amendment Act 2014 (Qld) was passed in November 2014 and made a number of changes to the Water Act 2000 (Qld). It aimed to:

- ▶ reform the Water Act to deliver a more responsible and productive water management framework for the use of Queensland's water resources; and
- ▶ create a consistent framework for managing the take of groundwater by resource industries.

A number of these provisions have already commenced, including:

- ▶ a new map showing the extent of mapped watercourse and drainage features across Queensland;
- ▶ changing the onus of proof to require the Government to prove that an unauthorised take of water has occurred, rather than the authorisation-holder having to prove their innocence;
- ▶ provisions for a more flexible process for the release of unallocated water; and
- ▶ amendments to the River Improvement Trust Act 1940 (Qld) to simply reporting requirements, introduce flexibility in determining membership of the trusts and broaden the scope of activities that can be undertaken to manage issues such as erosion, sediment loss and water quality.

The remaining provisions were set to commence at various intervals, with full implementation of the new regime by September 2015. This has been stalled because of changes made by the Palaszczuk Government.

The Water Legislation Amendment Bill 2015 was introduced to Parliament on 10 November 2015 to reverse some of the changes made by the Water Reform and Other Legislation Amendment Act 2014 (Qld), in order to align the water legislation with the policy of the Palaszczuk Government. The Bill retains the proposed framework but:

- ▶ removes water development options, which would have allowed proponents to access water resources before the EIS process began;
- ▶ removes provisions relating to "designated watercourses", which would have removed the requirement for a water permit or licence in order to take or interfere with water;
- ▶ inserts the principle of ecologically sustainable development into the new purpose of the Water Act; and

- ▶ replaces references to "responsible and productive management" with "sustainable management".

The Bill was referred to the Infrastructure, Planning and Natural Resources Committee and its final report was provided on 1 March 2016.

New Planning Schemes approved, adopted or commenced

In 2015/2016 financial year planning schemes for, the following Queensland local government planning schemes were either approved or adopted or have commenced:

- › Bundaberg Regional Council;
- › Cairns Regional Council;
- › Douglas Shire Council;
- › Gold Coast City Council
- › Moreton Bay Regional Council;
- › Somerset Regional Council;
- › Cassowary Coast Regional Council;
- › Central Highlands Regional Council;
- › Charters Towers Regional Council;
- › Gladstone Regional Council;
- › Mackay Regional Council;
- › Palm Island Aboriginal Shire Council;
- › Rockhampton Regional Council; and
- › Tablelands Regional Council.

Extension of deadline for LGIPs and changes to ICNs

On 20 November 2015, the Local Government and Other Legislation Amendment Act (No. 2) 2015 commenced, extending the deadline for the completion of Local Government Infrastructure Plans (**LGIPs**). Councils now have until 1 July 2018 to prepare and adopt their LGIP, which is a two-year extension to the original two-year deadline of 30 June 2016 that was originally set by the State Government.

Other relevant amendments will be made to the Sustainable Planning Act 2009 (**SPA**) and the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (**SEQ Water Act**) in relation to including information about any offsets or refund that may apply in Infrastructure Charges Notices (**ICNs**).

The SPA currently requires a local government that intends to levy an infrastructure charge to include a LGIP in its planning scheme by 30 June 2016, however according to the Bills Explanatory Note, many local governments had said that they would not be in a position to prepare an LGIP by 30 June 2016 and so would not be able to impose charges on a development approval after this date. However, the State Government had concerns that this would result in councils delaying or avoiding approving development applications that

would have otherwise attracted significant charges. The new legislation will have no impact on local governments who have an LGIP in place by 30 June 2016.

An ICN currently must include information about any offset or refund that may apply. However, this could result in unnecessary delays in development approvals where:

- ▶ the offset or refund is large enough to necessitate the approval of the local government's budget committee (which can take a considerable amount of time to obtain); and
- ▶ an applicant is either unconcerned about the prospect of an offset or refund, or is prepared to receive information about these matters at a later time.

The amendment to SPA will now allow an applicant to advise the local government that they are not seeking information about an offset or refund in an ICN, thus avoiding those unnecessary delays.

Similarly for distributor-retailers, a large development, may face delays in receiving a connection approval and ICN due to an offset or refund being of a magnitude that it requires specific budget approval within the distributor-retailer. The amendment to the SEQ Water Act will now allow an applicant that may be unconcerned (at the time of approval) about the prospect of an offset or refund, or is prepared to receive information about these matters at a later time, to provide the distributor-retailer with advice that the applicant is not seeking offset or refund information in an ICN.

Amendments to South East Queensland Koala Conservation State Planning Regulatory Provisions

The South East Queensland Koala Conservation State Planning Regulatory Provisions (Koala SPRP) regulates assessable development in koala habitat areas.

A draft amended Koala SPRP took immediate effect on 26 June 2015 before the Environmental Offsets (Transitional) Regulation 2014 expired, to give continued effect to the offset provisions. The amended Koala SPRP was made on November 2015.

The amendments require site design to avoid clearing of non-juvenile koala habitat trees in certain listed areas, with any unavoidable clearing minimised and offset under the Environmental Offsets Act 2014 (Qld). The previous version of the Koala SPRP required unavoidable clearing to be minimised and offset at a ratio of five new koala habitat trees for every one non-juvenile koala habitat tree removed (or an equivalent cash contribution).

SOUTH AUSTRALIA

Reform of planning and development system

On 21 April 2016, the Planning, Development and Infrastructure Act 2016 received assent. Upon commencement, the Act will repeal the Development Act 1993 and make related amendments to various pieces of legislation. The purpose of the new legislation is to overhaul the existing planning and development system in response to the recommendations of the Expert Panel on Planning Reform contained in its report "The Planning System We Want". The Act proposes three categories of assessment in relation to planning consent:

- ▶ **accepted development:** does not require planning consent;
- ▶ **code assessed development:** if classified as deemed-to-satisfy development planning, consent must be granted or if classified as performance assessed development, assessed on its merits against the Planning and Design Code; and
- ▶ **impact assessed development:** includes restricted development (if the Commission decides that the development is to be impact assessed); or classified by the regulations as impact assessed development; or declared by the Minister as being impact assessed development. This will be subject to a scalable environmental impact assessment process to decide planning consent.

The new Act provides for:

- ▶ **A new rule book for planning:** the Planning and Design Code will replace the current 23,000+ pages of planning rules.
- ▶ **A new infrastructure delivery scheme:** based on funding defined infrastructure and not on an infrastructure charge or levy with costs being recovered by a "charge on land" in the contribution area, which will be collected by the relevant council(s).
- ▶ **A Community Engagement Charter:** to allow community members to have reasonable, meaningful and ongoing opportunities to participate in planning processes.
- ▶ **A new state design quality policy:** to set standards for the design quality of development.
- ▶ **A new e-planning system:** an online portal will be established for digital lodgement options and planning information.

The Act will come into operation on a day to be fixed by proclamation. The implementation of the new planning system will take three to five years.

TASMANIA

Single State-wide planning scheme

The Land Use Planning and Approval Amendments (Tasmanian Planning Scheme) Act 2015 commenced on 17 December 2015 to provide for the development of the single State-wide Tasmanian Planning Scheme.

The new legislation repealed provisions for the making, amending and review of planning schemes (including interim planning schemes) as well as those provisions for the making, amending and revoking of planning directives (including interim planning directives) under the Land Use Planning and Approvals Act 1993.

The substituting provisions provide for the making, amending and review of the Tasmanian Planning Scheme, which will consist of:

- ▶ the State Planning Provisions (**SPPs**) – to be developed by the Minister or the Tasmanian Planning Commission on the direction of the Minister; and
- ▶ Local Provisions Schedule – to be developed by local planning authorities for their respective municipal areas.

The SPPs and Local Provisions Schedule will form all of the planning controls that apply to a local municipal area and both must be publicly exhibited before they come into effect. Submissions made during the exhibition period must be considered.

Other amendments include changes to the Planning Commission's powers, the requirements in relation to additional information requests, the processes in relation to regional area and regional land use strategies declarations and special planning orders (to be known as Special Local Provisions Schedules).

Draft SPPs

The final draft State Planning Provisions were approved by the Minister on 7 March 2016. The Planning Commission has until mid-August (or longer if the Minister grants an extension requested by the Commission) to consider the draft SPPs along with any submissions made and report to the Minister. The Minister will then make a decision about whether to approve, refuse or amend the SPPs.

Infrastructure Tasmania established

The Tasmanian Government established Infrastructure Tasmania in 2015 to assess and prioritise all major publicly funded infrastructure investment proposals and coordinate all major infrastructure funding submissions.

In April 2016, Infrastructure Australia released the Tasmanian Integrated Freight Strategy which sets out Infrastructure Australia's policies and actions across the following four areas:

- ▶ supporting competition and service choice across Bass Strait and beyond;

- ▶ efficient freight gateways;
- ▶ high-standard, responsive land freight connections; and
- ▶ delivering a single-integrated freight system.

Key aspects of the strategy include finalising a Tasmanian Land Freight Network, developing a Burnie to Hobart Corridor Strategy, and delivering a new Tasmanian Rail Access Framework.

Woolcott Survey v Meander Valley Council and G7 Generation [2016] TASRMPAT 04

In March 2016 the Resource Management and Planning Appeal Tribunal considered, amongst other issues, whether an application for a pipeline development could be amended or whether proposed change to the development were of such substance as to constitute a different application.

The proposed changes in this case included half a kilometre of pipeline being relocated to a nearby riverbed. The Council argued that this would necessitate the clearance of vegetation and that the application did not contain any form of environmental assessment for this.

The Tribunal highlighted the considerations that will be relevant in determining whether there is a "significant difference" between a development and proposed changes to that development. It noted that the test is a question of fact that requires a qualitative comparison between the development applied for and the development as sought by the amendment.

The Tribunal found in this case that the amendments would constitute a significant change to the development. Importantly, the Tribunal found that whether or not proposed changes constitute improvements agreed by the parties, a new application may nevertheless be required.

Transport initiatives

A number of large-scale transport initiatives canvassed by the Victorian Labor Government in its Project 10,000 transport election policy were progressed during 2015, including the Level Crossing Removal Project and the Melbourne Metro Rail Project, as well as the market-led Western Distributor Project.

The Level Crossing Removal Project aims to remove 50 level crossings around Melbourne by 2022 to improve safety, decrease congestion, and allow more frequent train services. The Victorian Government plans to remove at least 20 level crossings by 2018. The Level Crossing Removal Authority was established in February 2015 to deliver the project, and construction has commenced in relation to several level crossings. On 13 January 2016, the level crossing removal at Burke Road, Glen Iris, was removed.

The Melbourne Metro Rail Project comprises twin nine-kilometre rail tunnels connecting the Sunbury and Cranbourne-Pakenham lines between South Kensington and South Yarra and five new underground stations at Arden, Parkville, CBD North, CBD South and Domain. It aims to address congestion in the CBD and improve the capacity and efficiency of Melbourne's rail system. In February 2015, the Victorian Government established the Melbourne Metro Rail Authority to co-ordinate all aspects of the project, including the planning and development, construction and commissioning stages. The Authority expects tenders to be submitted in 2016. Major works are scheduled to start in 2018 with the new lines to be operational by 2026.

The Western Distributor Project is the subject of a market-led proposal by Transurban to partner with the Victorian Government to provide an alternative to the West Gate Bridge by widening the West Gate Freeway from 8 to 12 lanes between the M80 and Williamstown Road, tunnelling under Yarraville and constructing a second river crossing over the Maribyrnong River, building an elevated road along Footscray Road connecting with the Port of Melbourne, and widening the Monash Freeway. The Victorian Government is currently conducting exclusive negotiations with Transurban in line with Stage 4 of the Market-led Proposals Guideline.

Melbourne CC v Minister for Planning [2015] VCAT 370

This case concerned the proposed redevelopment of the former Melbourne Theatre Company site at 25 Russell Street and refurbishment to the exterior of the nearby Forum Theatre. A question of jurisdictional fact arose over the issue of who was the responsible authority for approving the proposed development. Under the planning scheme, the City of Melbourne is the responsible authority for considering developments with a gross floor area of under 25,000 square metres, while the Minister for Planning is the responsible authority for developments which exceeded this size.

Applying principles of statutory interpretation, Gibson DP held that the two proposals were separate, and that they should not be considered integrated simply because they were included by the applicant in the same permit application. The Tribunal held that the buildings had two different owners and that they were on two separate parcels of land.

Although the developer was relying on a combined permit application to satisfy the requirement of "net community benefit", Deputy President Gibson did not consider that this made the proposal an integrated development for the purposes of determining the correct responsible authority. The gross floor area for each development was less than 25,000 square metres and therefore the application was referred to the City of Melbourne as the correct responsible authority.

This case provides a warning against forum shopping, suggesting that VCAT will not look favourably upon attempts to remove authority from councils to Ministerial level.

Ileowl Pty Ltd v Environment Protection Authority [2015] VCAT 1105

In July 2015, VCAT held that it was not the appropriate forum for Ileowl to seek a declaration as to whether EPA works approval was required for its use of land.

The Tribunal, pointing to its existence as a "creature of statute" dismissed the application for want of jurisdiction. VCAT held that it would not have jurisdiction until a "reviewable decision" had been made by the EPA.

This outcome creates practical difficulties for applicants who are uncertain about the need for a works approval, requiring these parties to either commence buildings and works without an EPA works approval (risking possible enforcement action by the EPA) or to seek a works approval with the accompanying costs and delay, in circumstances where the approval may not be required. Alternatively, parties in this position may have to pursue declaratory relief in the Supreme Court (although in this case the EPA suggested there may be jurisdictional impediments in that forum also).

Hanson Construction Materials Pty Ltd v Department of Economic Development, Jobs, Transport and Resources [2015] VCAT 1375

In September 2015, VCAT upheld the decision of the Department of Environment, Land, Water and Planning to refuse to statutorily endorse a proposed variation to an approved work plan under the Mineral Resources (Sustainable Development) Act 1990 (Vic).

Hanson Construction was seeking to vary an approved work plan to expand its "extraction area" in relation to land near the Ovens River flood plain in Wangaratta, a proposal to which two local water authorities objected.

The water authorities were considered to be referral authorities under the planning scheme. A referral

authority under the new “streamlined” Act scheme no longer plays a role in the planning process, although they do have a right of veto over the statutory endorsement of a work plan. The Tribunal held that while this alters the processes involving a referral authority, all matters that were relevant for a referral authority to consider under the planning scheme should be given the same weight in the context of considering a work plan under the Act.

As there are no decision guidelines in the Act which expressly apply to the statutory endorsement of a work plan, the Tribunal confirmed that the decision-maker should have regard to the purpose and objectives of the Act (essentially to maximise use of resources with minimal adverse impact on the environment), as well as the principles of sustainable development included in the Act.

The Tribunal refused to approve the variation with conditions because the proposal was not fundamentally acceptable having regard to all these matters. Through the application of the precautionary principle and principles of sustainable development, where risks of serious or irreversible damage to the environment exist a proposal must not be approved until it is shown that these can be appropriately managed.

Platinum King Investments Pty Ltd v Manningham CC [2015] VCAT 1484

This case considered the requirement of a Cultural Heritage Management Plan (**CHMP**) under the Aboriginal Heritage Regulations 2007 and in particular how the Tribunal should construe a provision which did not require the preparation of a CHMP for parts of the land which had been subject to significant ground disturbance.

Member Potts held that, where it is established that part of an activity area has not been impacted by significant ground disturbance, there is no discretion to waive the need for a CHMP. That is, there should be no consideration of how “material” this part is where it is clearly established that the part is not exempt by reason of significant ground disturbance.

Although it was acknowledged that this interpretation may result in undesirably onerous requirements to prepare CHMPs, Member Potts considered that the purpose of the Aboriginal Heritage Act 2006 – to recognise and protect Aboriginal cultural heritage – supported this interpretation.

It may therefore be prudent for applicants, where uncertain about CHMP requirements, to prepare a CHMP to avoid delays at the review stage. In light of the burden placed on the capacity and resources of Council to deal with CHMP assessments, the Tribunal recommended that clearer directions were required about the operation of the regulations.

Frontlink Pty Ltd v Commissioner of State Revenue [2016] VSC 25

On appeal from a decision of the Victorian Civil and Administrative Tribunal, the Supreme Court considered the meaning of section 201RF of the Planning and Environment Act 1987 which provides that specific type of subdivisions may not constitute events triggering the payment of Growth Areas Infrastructure Contributions (GAIC). Excluded subdivisions of land include subdivisions the sole purpose of which is to provide land for transport infrastructure or any other public purpose.

In this case, both parties accepted that the plaintiff was liable to pay GAIC, however there was a dispute as to which subdivision constituted the first GAIC event (triggering the payment of GAIC). This was in issue because depending on which event was considered the GAIC event, the quantum of GAIC payable would vary.

The court relied on the principles set out in *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 which provides that to determine “the sole purpose of a transaction” one should look at its “immediate and proximate purpose”. The Court held that the clear intention of excluding subdivision provisions is to ensure that GAIC only applies to proposals that lead to significant new urban development with demands on infrastructure.

Caydon Cremorne No.1 Development Pty Ltd v Yarra CC (Red Dot) [2016] VCAT 423

This decision relates to one of the three planning permit applications lodged with the Yarra City Council in relation to the redevelopment of the old Richmond Maltings Site where the Nylex sign is located. Both the Nylex Sign and the Site are listed on the Victorian Heritage Register. The application before the Tribunal was an application for review of the Council’s failure to decide a permit application within the prescribed time. The permit application was for a substantial mixed use development including 18 and 13 storey residential towers and lower built forms. The application the subject of this decision did not relate to the part of the land on which the Nylex sign is located.

The Director General of Heritage Victoria refused the application for a heritage permit and issued its decision while the VCAT hearing was in progress. A separate appeal has been lodged in relation to the Heritage Victoria decision.

The Tribunal’s key findings were as follows:

- ▶ While a staged approach was proposed for the development with the Stage 1 application being reliant on approvals being obtained for Stages 2 and 3, the Tribunal found that the application was not piecemeal especially as it applied the method set out in *Rowcliffe Pty Ltd v Stonnington CC* [2005] VCAT 1535.

- ▶ The tower component of the development would exceed the recommended height limits for the site and would result in a number of adverse impacts.
- ▶ Notwithstanding the lack of local policies on car parking in the municipality, the Tribunal recommended a reduction in the number of car parking spaces to encourage a greater use of alternative transport modes.
- ▶ With 80% of the proposed dwellings being one bedroom apartments, the development did not comply with the planning scheme policies in relation to housing options diversity.

The Tribunal rejected the Council's submission that the application ought to be remitted so that it could be considered with the stage 2 and 3 applications which are still before Council.

The Tribunal provided an opportunity for the applicant to submit amended plans to address the concerns raised.

478 St Kilda Road Land Pty Ltd v Port Phillip CC (Red Dot) [2016] VCAT 445

This decision builds on the findings of the Tribunal in several red dot decisions, including *The King David School v Stonnington CC (Red Dot) [2011] VCAT 520* and *Marone Pty Ltd Joint Venture v Glen Eira CC (Red Dot) [2011] VCAT 1650*, on of section 87A of the Planning and Environment Act 1987.

In this case, the applicant sought to amend a permit issued at the direction of the Tribunal following successful mediation. The Tribunal held that caution is required when considering section 87A requests in circumstances where an application seeks to win back something forgone at mediation. However the Tribunal also noted that the principles set out in previous decisions were not absolute and that in some circumstances it may be necessary to change a permit issued as a result of a successful mediation. Contextual considerations are relevant in deciding whether it is appropriate to amend a permit post-mediation.

The amendments to the permit in this case were allowed as they were deemed acceptable when assessed under the relevant policies and provisions of the Port Phillip Planning Scheme.

Hotel Windsor Holdings Pty Ltd v Minister for Planning (Red Dot) [2016] VCAT 351 (9 March 2016)

In this case the Tribunal considered an application to review the failure by the Minister for Planning to grant an extension of time under section 69 of the Planning and Environment Act 1987 within the prescribed time. The Minister opposed the application on the basis that there had been a change in planning policy specifically targeting the Bourke Hill precinct and the need to protect its low scale, resulting in the introduction of a mandatory height limit of 23 metres. The height of the proposed development was to be 93 metres.

The Tribunal applied the principles in *Kantor v Murrindindi Shire Council (1997) 18 AATR 285* and considered the new policy, the adequacy of the time limit, the implications of not granting an extension, the absence of evidence of warehousing and intervening circumstances and found that on balance, the extension of time to commence construction of the redevelopment should be refused.

This confirms the principle that where there is a change in planning policy such that a permit may not be granted if it was a fresh application, developers may be unable to obtain an extension of time to commence works.

Aboriginal Heritage Amendment Act 2016

The Aboriginal Heritage Amendment Act 2016 (Vic) (**AHA Act**) was assented to on 5 April 2016 and amends various sections of the Aboriginal Heritage Act 2006 (Vic). The AHA Act will commence on 1 August 2016, unless it is proclaimed before that date.

The changes seek to better protect and promote respect for Aboriginal cultural heritage. This includes broadening the scope of actions that harm Aboriginal cultural heritage to include actions that damage, deface, desecrate, destroy, disturb, injure or interfere with Aboriginal cultural heritage. Amendments to sections 27 and 28 have created a strict liability offence with respect to harming Aboriginal cultural heritage. Under section 27 the word “knowingly” has been removed, which now means that an offender will be found guilty if, at the time of the act, he or she knew that their action was likely to harm Aboriginal cultural heritage.

In addition, significant changes have been made to the Registered Aboriginal Party (**RAP**) application process. Section 150(1) now requires RAP applicants to set out how they intend to consider the interests of any Aboriginal people for whom the area in respect of which the application is made has cultural heritage significance, but who are not the traditional owners of the area.

The CHMP regime has also been overhauled. The following changes to the CHMP regime are of particular note:

- ▶ Introduction of Aboriginal Heritage Officers under Division 1A of Part 11. The officers are responsible for monitoring compliance of CHMPs, cultural heritage permits and Aboriginal cultural heritage land management agreements. They also have the power to issue 24-hour stop orders where there are reasonable grounds for believing harm may be caused to Aboriginal heritage.
- ▶ Introduction of an optional process allowing land users to seek confirmation from the Secretary as to whether a CHMP is required for a proposed activity (new Division 2A of Part 4) .
- ▶ Approved CHMPs may now be subsequently amended if the proponent applies to the relevant authority, with minor changes able to be approved

within 14 days. The definition of a minor amendment is at the discretion of the relevant authority. An assessment of an area under section 42(1)(a) is not required for a proposed amendment if that area has already been subject to an assessment as part of the initial cultural heritage management plan. Otherwise, it is intended that an amendment to a cultural heritage management plan be treated as if the amendment were a new cultural heritage management plan for the purposes of its evaluation and approval or refusal.

- ▶ A mandatory CHMP will also now be required if the Secretary receives an application for the certification of a preliminary Aboriginal heritage test determining that a proposed activity requires the preparation of a CHMP, and the Secretary certifies that the test is correct.

Planning and Environment Amendment (Recognising Objectors) Act 2015

The Planning and Environment Amendment (Recognising Objectors) Act 2015 (Vic) commenced on 12 October 2015, requiring responsible authorities and VCAT to have regard to the number of objectors when considering whether a proposed use or development may have a “significant social effect”.

Previously, responsible authorities were required to consider, amongst other things, all objections and submissions which it had received and “which have not been withdrawn”. The Act now makes the number of objectors a matter to which regard must be had (where appropriate) when considering the social effect of a proposed use or development. However, the Act does not indicate how much weight should be given to the number of objectors, and mandates that the requirement operates only where the responsible authority considers it “appropriate”.

Although it may appear to encourage large volumes of objections, the Act makes it clear that the substance and the relevance of each objection remains the paramount consideration.

Environmentally Sustainable Development Planning Policies

On 19 November 2015, new Environmentally Sustainable Development (ESD) policies for six metropolitan councils were approved by the Minister for Planning and gazetted. The amendments were the result of a planning panel review and report, organised through the collective effort of the six local councils throughout 2013-4.

The policies recognise that development should achieve best practice in environmentally sustainable development, and that sustainable policies must be recognised during the planning process, rather than

just at the building stage. The amendments require the responsible authority to consider ESD policies at the planning approval stage, providing for design responses including building orientation and footprint, which are paramount to sustainable design outcomes.

The policies apply to both residential and non-residential developments (however in some councils single

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dwelling developments are exempt) and require either a Sustainable Design Assessment or a Sustainability Management Plan, depending on the size of the development.

Delivering Victorian Infrastructure (Port of Melbourne Lease Transaction) Act No 10 2016

The purpose of the legislation is to authorise and facilitate transactions under which land in the port of Melbourne is leased, and assets of the Port of Melbourne Corporation are disposed of to a private sector entity. It also establishes the Victorian Transport Fund which will support key infrastructure initiatives throughout Victoria. Under it, the 50-year lease is for the port’s commercial operations only. The Victorian and Commonwealth Governments will retain responsibility for regulating the port’s safety and environment functions. The Act was assented to on 22 March 2016 and came into operation on 30 June 2016.

Planning and Development Legislation Amendment (Western Trade Coast Protection Area) Bill 2015

In October 2015 the Department of State Development and Planning released the draft Planning and Development Legislation Amendment (Western Trade Coast Protection Area) Bill 2015. If enacted the Bill will amend the Hope Valley Wattleup Redevelopment Act 2000 and the Planning Development Act 2005 to formalise a buffer zone in the Western Trade Coast area.

The Western Trade Coast is comprised of the Kwinana Industrial Area, the Latitude 32 Industry Zone, the Rockingham Industry Zone and the Australian Marine Complex. If enacted the Bill together with the regulations will prohibit “sensitive land use” such as residential housing, short stay accommodation, schools and hospitals within the buffer zone in order to ensure that new residential and “sensitive land use” areas are separated from industrial activities.

The draft Bill was initially expected to be introduced into Parliament in early 2016. In June 2016, the Bill was referred to the Environmental Protection Authority, delaying the progress of the legislation.

Planning and Development (Local Planning Schemes) Regulations 2015

On 19 October 2015, the Planning and Development (Local Planning Schemes) Regulations 2015 took effect, replacing the Town Planning Regulations 1967. The Regulations are part of WA's planning reform agenda and introduce a set of deemed provisions that will form part of every local planning scheme. The provisions deal with the local planning framework; heritage protection; structure; activity centre and local development plans; development approval and enforcement and administration provisions. The Regulations also include a template planning scheme as well as several flowcharts to assist local councils in amending or adopting their local planning scheme.

The objective is to provide a more consistent planning system with faster scheme amendments.

Conservation and Land Management Act 1984 Amendments

On 19 October 2015 the Conservation and Land Management Amendment Act 2015 was assented to. The Act will amend the Conservation and Land Management Act 1984, the main changes being:

- ▶ the provision of joint management of national parks. This amendment allows for conservation reserves to be jointly vested in State Government and native title-holders;
- ▶ the creation of a single Conservation and Parks Commission which will replace the current two vesting authorities, the Marine Parks and Reserves Authority and the Conservation Commission of Western Australia;
- ▶ to allow minor excisions from State forests and marine parks to be conducted administratively to increase efficiency;
- ▶ infringement notice provisions for parking in conservation and marine reserve zones.

Some of the amendments came into operation on 12 December 2015.



BIODIVERSITY AND OFFSETS

COMMONWEALTH

Advanced environmental offsets

In August 2015, the Department of the Environment released for consultation its “Draft Policy Statement: Advanced environmental offsets under the EPBC Act”. Consultation on the draft policy concluded in October 2015, and the [final policy](#) was released in February 2016.

The EPBC Act Environmental Offsets Policy that was finalised in 2012 encourages the use of advanced environmental offsets, recognising that impacts of an action can be minimised by avoiding offset time delays.

Offsets that deliver a conservation gain after the commencement of the EPBC Act (16 July 2000) can be considered as advanced environmental offsets. Under the draft Policy, proponents would also need to show that the site was established for the purposes of advanced offsetting, that there is a sufficient baseline information to enable a clear assessment of the conservation benefit and that offsets are additional to other obligations.

There are a number of advantages to the use of advanced environmental offsets. In addition to improved conservation outcomes, proponents are likely to have smaller offset requirements (as risk of delivery and time-lag for delivery are reduced) and the post-approval timeframes for offsets to be accepted are either removed or reduced. Proponents or third parties proposing advanced environmental offsets do however need to take care with advanced environmental offsets that the offset not only is acceptable to the Department, but also is suitable for the action (or actions) it is proposed to offset. Offsets will not be considered by the Minister as part of the original controlled action decision under the EPBC Act.

NEW SOUTH WALES

NSW Government releases a comprehensive biodiversity and native vegetation reform package

The Independent Biodiversity Legislation Review Panel presented its final report of New South Wales biodiversity legislation and policy to the Minister for the Environment on 18 December 2014. While there was no formal NSW Government response to the final report, the NSW Government stated that it would adopt all 43 recommendations made by the Panel.

In May 2016, the NSW Government released its long-awaited draft reform package for biodiversity conservation and native vegetation management.

Key features of the reform package include a draft Biodiversity Conservation Bill. This would establish:

- ▶ a new Biodiversity Assessment Method to assess biodiversity impacts via a single, uniform biodiversity assessment pathway;
- ▶ revised offset rules that adopt an “avoid, minimise, offset” principle for development proposals and a “like for like or better” offset standard; and
- ▶ a New Biodiversity Conservation Fund for discharging offset obligations;

The package also proposes amendments to the Local Land Services Act 2013 to address native vegetation land management in rural areas, including:

- ▶ a Native Vegetation Regulatory Map showing designated areas (exempt, regulated and excluded land) for clearing of native vegetation; and
- ▶ various Land Management Codes of Practice permitting various land management and clearing activities.

Finally, the Government is proposing to repeal the Native Vegetation Act 2003, Threatened Species Conservation Act 1995 and parts of the National Parks and Wildlife Act 1974.

The draft Biodiversity Conservation Bill takes an outcomes-focused, integrated and risk-based approach to biodiversity conservation and simplifies the current legislative framework. Its objects are:

- ▶ to conserve biodiversity and ecological integrity at bioregional and State scales;
- ▶ to facilitate ecologically sustainable development; and
- ▶ to improve and share knowledge, including local and Aboriginal knowledge, about the status and values of biodiversity and ecosystem services and the effectiveness of conservation actions.

The public consultation period ended for the reform package ended on 28 June 2016.

The Government has indicated it would like to have legislation in place to implement the reform package by the end of 2016. We think that any new legislation would be implemented in a phased, transitional approach over several months in 2017.

“Queensland offsets can be delivered through financial settlements, proponent-driven offsets, or both.”

QUEENSLAND

Implementation of Environmental Offsets Act and new guidance material

In July 2014 the Queensland Government introduced a new framework for environmental offsets. This included:

- ▶ the Environmental Offsets Act 2014 (Qld);
- ▶ the Environmental Offsets Regulation 2014; and
- ▶ The Queensland Environmental Offsets Policy.

The Environmental Offsets Act 2014 (Qld) co-ordinates the delivery of environmental offsets and the Environmental Offsets Regulation 2014 provides details of prescribed activities regulated under existing legislation and matters to which the Environmental Offsets Act 2014 (Qld) applies. The Queensland Environmental Offsets Policy provides a whole-of-government policy for the assessment of offset proposals.

An environmental offset may be required as a condition of an approval where an activity is likely to result in significant residual impact on prescribed environmental matters. The Significant Impact Guideline aids in determining if a residual impact from a prescribed activity is likely to be significant.

The Queensland Environment Offsets Policy outlined that offsets can be delivered through financial settlements, proponent-driven offsets (such as land-based offsets and/or the delivery of actions in Direct Benefit Management Plans) or a combination of both. Direct Benefit Management Plans are pre-approved package investments that outline priority actions in particular prescribed environmental matters. Numerous tools and templates are available in assisting proponents their offset commitments.

The Environmental Offsets Act 2014 (Qld) requires administering agencies to make a register of offsets publicly available for inspection, which is available here. The Vegetation Management Reinstatement and Other Legislation Amendment Bill 2016 amends the Environmental Offsets Act to provide that environmental offsets will be required to counterbalance any “residual impact” of particular activities on a prescribed environmental matters. Further details on this Bill are discussed below.

Queensland – changes to native vegetation clearing laws

Amendments to the Sustainable Planning Regulation 2009 (Qld) affecting exemptions for approvals for clearing native vegetation commenced in September 2015.

The amendments:

- ▶ replaced previous clearing exemptions for roadworks and ancillary works on State-controlled and future State-controlled roads, and routine transport corridor management on rail, non-rail and commercial corridor land with a more general exemption for government supported community infrastructure for transport; and
- ▶ restrict the clearing exemption for community infrastructure to land that is subject to a community infrastructure designation.

Transitional provisions apply to clearing where:

- ▶ a development application for community infrastructure is made before 1 September 2015 but not decided before 2 August 2013; and
- ▶ a development approval is given (on or after 2 August 2013); and
- ▶ clearing for the approved development, in relation to one of the amended exemptions listed above, takes place after 1 September 2015.

Reinstatement of vegetation clearing laws

On 17 March 2016, the Government introduced the Vegetation Management Reinstatement and Other Legislation Amendment Bill 2016. The Bill contains significant amendments to a number of Acts, including the Vegetation Management Act 1999, Water Act 2000 and Environmental Offsets Act 2014.

Its primary policy objective is to reinstate the vegetation management framework that was in existence prior to 2013, by:

- ▶ reinstating restrictions on the clearing on high value regrowth on freehold and indigenous land;
- ▶ prohibiting the clearing of vegetation mapped as high value agriculture or irrigated high value agriculture;
- ▶ reinstating the reverse onus of proof for unlawful clearing offences – owners and occupiers of land on which there has been unauthorised clearing are presumed to be responsible in the absence of contrary evidence; and
- ▶ removing the “mistake of fact” defence for vegetation clearing offences.

The Bill also introduces “Category R” restrictions beyond the Burdekin, Mackay-Whitsunday and the Wet Tropics to include the Burnett-Mary, Eastern Cape York and Fitzroy catchments. Category R vegetation is native vegetation located within 50 metres of a regrowth watercourse, identified on a regulated vegetation map.

Land mapped as Category R is subject to self-assessable clearing codes that allow landholders to undertake vegetation clearing without the need for a development approval if the clearing code can be complied with. Landholders are required to give notice to the Department of Natural Resources and Mines before the commencement of clearing. If the code cannot be complied with, a development approval will be required.

The Bill amends the Environmental Offsets Act to provide that environmental offsets will be required to counterbalance any “residual impact” of particular activities on a prescribed environmental matters. Currently, under the EO Act an environmental offset can only be required where a prescribed activity will have a “**significant** residual impact” on a prescribed environmental matter.

The Bill reintroduces the restriction on destroying vegetation in a watercourse, lake or spring without a riverine protection permit. Once enacted, a riverine protection permit would be required before a person could destroy vegetation, excavate or place fill in a watercourse, lake or spring.

The Bill was referred to the Agriculture and Environment Committee which reported back to Parliament on 30 June 2016.

SOUTH AUSTRALIA

New environmental benefit provisions for native vegetation clearance commence

Amendments were made to the Native Vegetation Act 1991 through the Native Vegetation (Miscellaneous) Amendment Act 2013, which were aimed at providing flexibility for how a significant environmental benefit (**SEB**) can be achieved.

On 3 December 2015 stage 2 of the SEB reforms was completed with the commencement of the final provisions of the Amendment Act which relate to the credit, assignment and third party establishment of SEBs for native vegetation clearance. The associated Native Vegetation (Credit for Environmental Benefits) Regulations 2015 also commenced on 3 December 2015, which sets out the requirements for applications relating to credit and accredited third party providers.

Generally when an application for the clearance of native vegetation is approved, conditions are attached to the approval to ensure that the clearance is offset by restoration work that provides a SEB. The amendments which commenced in December 2015 provide for credits which can be applied, assigned or achieved by accredited third party providers in order to achieve a SEB to satisfy those approval conditions relating to SEB.

Where a person has achieved the following and the Council is satisfied that it is of a significant value, a credit (at a value determined by Council, monetary or otherwise) may now be applied:

- ▶ an environmental benefit which is not a benefit already required in relation to a consent to clear native vegetation or otherwise (**benefit**); or
- ▶ an environmental benefit, in accordance with a consent to clear native vegetation, that exceeds the value of the minimum benefit needed to offset the loss of the cleared vegetation (**excess benefit**).

Where a person has been credited with having achieved an environmental benefit (the assignor) they may, with the written approval of the Council, assign the whole or part of the credit to another person or body (the assignee).

The new provisions also provide that the requirement that an environmental benefit be achieved by a person may, with the written approval of the Council, be satisfied by an accredited third party provider.

Stage 3 of the SEB reforms involved the release of the following policy, guide and manuals for public consultation which closed on 19 February 2016:

- ▶ Policy for Significant Environmental Benefit under the Native Vegetation Act 1991 and Native Vegetation Regulations 2003
- ▶ Guide for calculating a Significant Environmental

Benefit under the Native Vegetation Act 1991 and Native Vegetation Regulations 2003

- ▶ Native Vegetation Council Scattered Tree Assessment Manual
- ▶ Native Vegetation Council Bushland Assessment Manual
- ▶ Native Vegetation Council Rangeland Assessment Manual (Draft).

We expect the reforms to be implemented before the end of the 2016 calendar year.

**“CROWN LAND
SUBJECT TO A
PASTORAL LEASE CAN
NOW BE USED FOR
WIND FARMS.”**

Low carbon investment plan

On 2 December 2015 the State Government released a low carbon investment plan, with the objectives of:

- ▶ providing a \$10 billion investment into low carbon energy generation; and
- ▶ targeting that 50% of the State's electricity production to be generated using renewable energy resources by 2025.

The plan follows the Climate Change Strategy 2015-2050 introduced on 26 November 2015, which had the principal goal of being zero net emissions by 2050. The Strategy proposes to amend the Climate Change and Greenhouse Emissions Reduction Act 2007 (SA) to reflect the new emission target.

Pastoral Land Management and Conservation (Renewable Energy) Amendment Act 2015 (SA)

On 19 September 2015, the Pastoral Land Management and Conservation (Renewable Energy) Amendment Act 2015 (SA) was enacted. Under it:

- ▶ wind farm developers are able to apply for licences to build and operate a wind farm on Crown land that is subject to a pastoral lease;
- ▶ wind farms can co-exist with pastoral leaseholders; and
- ▶ access to pastoral land for solar energy projects is expedited.

The Act works in conjunction with the Climate Change Strategy 2015-2050 and the Low Carbon Investment Plan.

TASMANIA

Tasmanian Wilderness World Heritage Area Management Plan Update

In 2015, the Department of Primary Industries, Parks, Water and Environment began a review of the Tasmanian Wilderness World Heritage Area Management Plan.

The Plan governs the planning and management of the Tasmanian Wilderness World Heritage Area, an area occupying almost a quarter of Tasmania which is recognised as a World Heritage Property in the World Heritage Convention. Under the World Heritage Convention, Australia must identify, protect, conserve, present and transmit the cultural and natural heritage of the Area.

The majority of the Area is managed according to a Plan developed in 1999. There have been a number of extensions to the Area in 2012 and 2013 and the Plan is now outdated. As a result, the Department consulted on and released a new draft Plan.

The draft Plan contains a number of changes, particularly regarding the permitted use of the Area. The draft Plan will permit special species timber harvesting and does not explicitly deal with mining, unlike the existing Plan which expressly restricts it. UNESCO has stated that mineral exploration and exploitation is incompatible with world heritage status and has sought amendment to the draft Plan on this basis. The draft Plan also allows low-scale tourism ventures in the Area through a Tourism Master Plan.

The Minister is expected to determine the final Plan in the second half of 2016.

Regional Forest Agreement likely to continue

The Tasmanian Regional Forest Agreement, an inter-governmental agreement between the Tasmanian and Australian Governments providing for the sustainable management of Tasmania's forests, was reviewed in 2015.

The Agreement was established in 1997 and applies for 20 years with five-yearly reviews.

After a period of public consultation, the independent reviewer, Dr Glen Kile, has issued a report making 16 recommendations to take the Agreement forward. The Tasmanian and Australian Governments made a joint response to the recommendations in April 2016, concluding the third five-yearly review of the agreement.

In responding to the report, both Governments stated their commitment to the agreement as the appropriate mechanism to balance the environmental, social and economic values of forests within Tasmania into the future.

VICTORIA

Changes to the specific offsets requirements

On 21 October 2015, the Department of Environment, Land, Water and Planning amended the method of calculating specific offset requirements for rare or threatened species habitat for site clearing.

The new method is now consistent with the method used to calculate specific offsets available at offset sites, ensuring that the biodiversity assessment guidelines regarding clearing of native vegetation are streamlined. The amendment reduces the species habitat area used to calculate Specific Biodiversity Equivalence Units from the native vegetation area determined by the habitat hectare assessment, to the species area shown on the species habitat importance map. This change has the potential to reduce or negate offset obligations for projects that would otherwise need specific offsets.

The changes do not affect applicants with only general offset requirements, or the amount of specific offsets held by credit owners or offset providers. Relevant permit applicants should contact the Department to request their data be reprocessed in line with the new obligations.

“The EPA’s interim strategic advice illustrates a shift towards a “broader environmental” approach.”

WESTERN AUSTRALIA

Perth and Peel Green Growth Plan

In 2015 the Western Australian Planning Commission commenced drafting strategic land use planning documents for the Perth and Peel area. The Perth and Peel region is projected to have a population of 3.5 million people by 2050. The Commission drafted four planning frameworks for the different sub-regions of the area; these frameworks were released for public comment in May 2015.

In August 2015 the Environmental Protection Authority released an interim strategic advice in relation to the Perth and Peel region. The report recommended large-scale offsets to address multiple values rather than a single species. This illustrates a shift towards a “broader environmental” approach rather than targeted species

or ecological communities. The Authority recommended that the State Government develop an offset policy framework for future development in the Perth and Peel region which focuses on rehabilitation and revegetation of degraded areas generally to achieve a net improvement in habitat and other environmental values.

On 17 December 2015, the Department of Planning released the draft Perth & Peel Growth Plan. It is designed to accommodate the estimated populated growth and minimise cumulative environmental impacts by:

- ▶ securing upfront Commonwealth environmental approval and streamlining State environmental approvals for the development required to support the projected growth in population; and
- ▶ developing a conservation plan to protect bushland, rivers, wildlife and wetlands.

The draft Plan sets out the following development actions which will require approval:

- ▶ urban and industrial development;
- ▶ rural residential development;
- ▶ infrastructure development;
- ▶ basic raw materials extraction; and
- ▶ harvesting of pine plantations.

The draft Plan’s conservation program includes the following initiatives:

- ▶ protection of 170,000 ha of new and expanded conservation regions;
- ▶ improved protection of Bush Forever sites;
- ▶ establishment of the Peel Regional Park;
- ▶ implementation of an action plan to cut nutrient run-off into the Swan Canning and Peel Harvey estuaries and a long-term plan to ensure the health of these systems; and
- ▶ implementation of a program of on-ground management to improve protection of threatened species, wetlands of international significance and threatened ecological communities.

The public consultation period ended on 13 May 2016. The release date for the final documents has not yet been announced.

Biodiversity Conservation Bill 2015

On 25 November 2015, WA Environment Minister Albert Jacob introduced the Biodiversity Conservation Bill 2015 (WA) to the Legislative Assembly to repeal the outdated Wildlife Conservation Act 1950 (WA) and the Sandalwood Act 1929 (WA) and to introduce penalties of up to \$2.5m.

The objectives of the Bill are:

- ▶ to conserve and protect biodiversity and biodiversity components in the State; and

- ▶ to promote the ecologically sustainable use of biodiversity components in the State.

The key new elements of the Bill are:

- ▶ listing of ecological communities, threatening processes and critical habitats by the Minister for Environment with differing levels of protection;
- ▶ increased penalties for taking, or disturbing listed flora and fauna without lawful authority; and
- ▶ providing for programmes, plans and conservation agreements and covenants.

It also defines “disturbing” as:

- ▶ in relation to fauna, to chase, drive, follow, harass, herd or hunt fauna by any means, to apply an identifier to fauna by any means, to engage in an activity that has the effect of altering the natural behaviour of fauna to its detriment;
- ▶ in relation to flora, to engage in an activity that has the effect of altering the long term persistence of the flora in its habitat; and
- ▶ in both cases to cause or permit an activity which would “disturb” the flora or fauna.

New Western Australian Biodiversity Science Institute

On 15 October 2015 Premier and Science Minister Colin Barnett launched the new Western Australian Biodiversity Science Institute, a collaboration between government agencies, research institutions and industry groups.

The Institute aims to protect and conserve WA’s unique flora and fauna through facilitating scientific studies into WA’s biodiversity and ensuring the information is available to the government, industry, land managers and other stakeholders. It proposes to consolidate the knowledge of different groups and use this knowledge to manage research and develop a database consolidating the information for public use.

The key areas of focus for the Institute are:

- ▶ creating an information management system consolidating research by research agencies and industry through a public database;
- ▶ undertaking and co-ordinating a biodiversity survey of WA;
- ▶ investing in the understanding of the processes and threats to the biodiversity of WA; and
- ▶ collaborating with industry and researchers to restore and conserve biodiversity.

The Institute currently manages more than \$60m of fully-funded research and aims to attract additional research funding to WA.

Continuous Emission Monitoring System Updates

The Department of Environment Regulation has updated its guideline on Continuous Emission Monitoring System Code for Stationary Source Air Emissions. The guideline does not apply directly to industries but can be prescribed to apply through licence conditions.

The updates in the guideline relate to formatting and administrative edits.



MINING AND PETROLEUM

COMMONWEALTH

Offshore Petroleum Resource Management Review

In November 2015, the Federal Government released an interim report of its review of the governing framework for oil and gas resource management in Commonwealth waters (which commenced in 2014).

The Review highlighted issues of a maturing resources industry. As the tenement-holders of mature exploration areas have focused on in-fill resources for existing projects, smaller resource areas are becoming stranded, infrastructure is being prematurely decommissioned and the costs are rising due to global competition.

The Review does not propose any drastic changes to the current framework but makes numerous recommendations, including:

- ▶ provide a regular annual report which identifies the current and emerging resource management concerns and a transparent basis for engagement with the industry and the public;
- ▶ clear focus on promoting investment in exploration;
- ▶ engage with the industry to determine how to better support exploration;
- ▶ clear articulation of the regime's processes to provide better transparency for the industry and the public;
- ▶ a holistic, rather than title-by-title, approach to development;
- ▶ recognise and utilise the latest technology to identify producible modest-sized resources
- ▶ establish a clear policy framework for decommission of projects and infrastructure; and
- ▶ streamline legislation and administration arrangements to increase efficiency.

The Review identifies four strategic areas in which to implement them:

- ▶ move towards a systems-based management of Australia's resources;
- ▶ stimulate exploration;
- ▶ improve timelines and efficiency of development and production; and
- ▶ provide a clear framework for managing post-production commissioning.

The Government sought stakeholder comments on the interim report with the consultation period ending on 28 February 2016. No formal date has been set for delivering the final report to Parliament.

EPBC Act consent for renewal or extension of the term of "prior usage rights" petroleum titles

On 29 February 2016, the Offshore Petroleum and Greenhouse Gas Storage Amendment Bill 2016 received assent. The legislation amends the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (**OPGGS Act**) to validate past Joint Authority decisions to grant renewals or extensions of "prior usage rights" petroleum titles to correct an administrative oversight.

The amendments will only validate those Joint Authority decisions to grant renewals or extensions of the term of "prior usage rights" titles, where the consent of the Minister was neither sought, nor given under the EPBC Act, and which were made prior to 1 January 2016.

NSW Integrated Mining Policy

The NSW Integrated Mining Policy (IMP) is a whole-of-government project designed to improve the assessment, determination and regulation of significant mining projects.

The IMP was publicly exhibited in stages during 2015 and a brief overview of the documents that were finalised following public consultation is below.

Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals – assists applicants with providing the necessary information under section 79C of the Environmental Planning and Assessment Act 1979 (NSW). The guidelines focus on the following two key considerations of a consent authority when determining a development application:

- ▶ the collective public interest of households in NSW; and
- ▶ the likely impacts of development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

The Guidelines also consider the following two key methodologies to inform a consent authority about the likely impacts of a proposal:

- ▶ **cost-benefit analysis:** an assessment of the public interest by estimating the net present value of the project to the NSW community; and
- ▶ **local effects analysis:** an assessment of the likely impacts of the development in the locality.

The Guidelines set out the methodologies, parameters and assumptions for undertaking an economic assessment of a proposed project.

According to the Guidelines, the two key steps to estimate economic value are:

- ▶ identifying the physical change in the environmental condition (ie. the duration and extent of impact, whether the change is temporary or permanent or irreversible); and
- ▶ estimating the economic value associated with the physical change (using non-market valuation techniques such as choice modelling and benefit transfer where necessary).

Indicative Secretary's Environmental Assessment Requirements – the Indicative Secretary's Environmental Assessment Requirements (SEARs) were prepared with input from the NSW Environment Protection Authority and the Division of Resources and Energy of the Department of Trade and Investment (now the Department of Industry). The Indicative SEARs assist proponents with advance notice of standardised assessment requirements for a development application, an application for an EPA licence and an application for a mining lease.

Key areas of focus include the mine design, particularly in respect of rehabilitation potential and options for post-mining use. This is consistent with the increasing emphasis on lifecycle assessment and compatibility with surrounding land uses.

Mine Application Guideline – major mining projects are typically State significant development, which means they need development consent from the NSW Government, and an Environmental Impact Statement (EIS) will be required.

The Guideline briefly outlines what the NSW Government expects to see in a Preliminary Environmental Assessment (the assessment that guides the preparation of SEARs) and an EIS, providing a more strategic guidance to proponents.

Annual Review Guideline –helps State significant development operators to prepare annual reviews.

Web-based Reporting Guideline –encourages mine operators to electronically publish relevant operational and compliance information on their websites in a clear and transparent manner.

Independent Audit Guideline –ensures that independent audits of State significant developments in NSW have a consistent approach and minimum delivery standard.

Water Regulation Overview – provides an overview of the current policies and regulations in relation to possible water impacts from mining and petroleum developments in NSW

Future IMP reform – further IMP documents are being revised following public consultations, including the following documents that were exhibited during 2015:

- ▶ **Planning Agreement Guidelines** – assists councils and mining companies in negotiating planning agreements for State significant mining developments; and
- ▶ **Swamp Offsets Policy** – addresses the calculation and provision of biodiversity offsets for subsidence impacts of longwall coal mining on upland swamps and associated threatened species.

Metgasco Limited v Minister for Resources and Energy [2015] NSWSC 453

The Supreme Court of NSW addressed, amongst other issues, whether irrelevant considerations had been taken into account by the Minister for Resources and Energy, by his delegate, when his determination to suspend mining operations.

Justice Button considered the meaning of the provision for “genuine and effective community consultation” in the NSW Strategic Regional Land Use Policy Delivery Guidelines.

He held that the failure of a consultation process to actually persuade the community to support a project is an irrelevant consideration for a decision-maker to take into account in determining whether consultation has been genuine and effective, in accordance with the guidelines. Instead, the focus of “effective consultation” is on the quality of the consultation process, as opposed to the outcome.

The Court was not required to determine the merits of the consultation process. However, it did find that “the guidelines are not prescriptive and admit a degree of flexibility depending on the circumstances” and have a “tone of constructive suggestions”.

Reduced emphasis on significance of the resource

On 2 September 2015, amendments to State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (NSW) (**Mining SEPP**) removed clause 12AA of the Mining SEPP, which previously made the significance of the resource the primary consideration under the Mining SEPP for the determination of applications for planning approval of large-scale mining or onshore petroleum projects.

The amendment reflects the legislative requirement for decision-makers to consider the likely environmental, social and economic impacts of a mining development proposal. Under the Environmental Planning and Assessment Act 1979 (NSW) it is clear that economic and social factors as well as environmental factors must be taken into account in assessing an application for planning approval. The removal of clause 12AA does not change that and, in our view, the significance of the resource will remain a relevant consideration.

It’s also worth noting that the “principal consideration” requirement in the now repealed clause 12AA only applied to the various considerations in Part 3 of the Mining SEPP, and it did not make the significance of a resource the “principal consideration” of all considerations under the Act.

NSW Government response to the Minerals Industry Action Plan

On 6 November 2015, the NSW Government released its response to the Minerals Industry Action Plan prepared by the Minerals Taskforce. The NSW Minerals Industry Taskforce had published its final “Industry Action Plan: NSW Minerals” in February 2015.

The response addresses a number of reforms undertaken by the NSW Government in 2015, commits to further action and flags recommendations that are unlikely to be adopted.

We outline some key NSW Government responses below.

Faster, more accountable Planning Assessment Commission decisions

The NSW Government declined to remove the PAC or return decision-making to the Minister for Planning. Currently the PAC determines most applications for planning approval for mining projects, under delegation from the Minister for Planning.

Alternatively, the NSW Government’s response is to focus on making the NSW planning system more streamlined, accessible, transparent, predictable and balanced. It highlighted that:

- ▶ the PAC’s assessment timeframes, and its accountability to meet those timeframes, would be made clear;
- ▶ an independent expert panel would be set up to advise the NSW Government and the PAC on technical issues; and
- ▶ the NSW Government would give the PAC clearer guidance on the application of government policies in determining planning applications.

No lead agency

The NSW Government rejected the recommendation for a single lead agency and instead introduced end-to-end assessment timeframes for mining development applications and the assignment of case managers to work with proponents to facilitate project assessment and minimise delay. It also proposed an inter-departmental panel to co-ordinate agency input on mining applications and develop inter-agency assessment protocols.

Ongoing regulatory reform

The Improved Management of Exploration Regulation (**IMER**) and Integrated Mining Proposal (**IMP**) (which we highlighted earlier in this part) are two key policy reforms that the Government has adopted to streamline decision-making processes and address policy gaps as recommended for immediate action by the Taskforce.

The IMER is a risk-based regulatory framework that has reduced 158 resources exploration activity conditions to a standard set of 13 conditions, while maintaining a high level of environmental protections.

The IMP has been released in stages to improve access to information and regulation and assessment of major mining projects.

Lower administrative costs

The NSW Government elected to not to adopt a freeze to the ad valorem royalty rate for 25 years. However, in 2015-16 an internal review will be conducted by the Department of Trade and Investment (Division of Resources and Energy) (now the Department of Industry) in relation to the fees and levies imposed on explorers and mine production companies.

Keeping NSW informed

The Government will regularly report its implementation progress and the impact of actions undertaken in response to the Action Plan to the Department of Industry. Stakeholders and the general public will be able to access consolidated and factual information through various online information hubs, which include:

- ▶ Common Ground, launched in June 2015, provides exploration, mining and production titles for minerals, coal, petroleum and gas in NSW; and
- ▶ Environmental Data Portal, stage one to be released in July 2016, will provide a single access point for environmental information related to water, land and air currently held by various Government entities.

Land resources legislative reform

On 2 November 2015, the NSW Government's reform package for the regulation of resource exploration and production in NSW received assent.

The package introduced required legislative changes that form part of the recently introduced Improved Management of Exploration Regulation (**IMER**) framework.

Strategic release of coal and gas exploration areas

The Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015 (NSW) introduced a new system for the granting of various mining and petroleum prospecting titles. Key changes include the:

- ▶ designation of "controlled release areas" that will apply to coal;
- ▶ introduction of "operational allocation licences" which will only be permitted in limited circumstances as prescribed by the regulations;
- ▶ introduction of a mandatory competitive tender process for exploration licences in "controlled release areas" and a broad range of tender assessment criteria, including a commitment to exploration and

work programs. All of NSW has been designated as a "controlled release area"; and

- ▶ creation of the Advisory Body for Strategic Release to oversee the release of areas for allocation.

However, transitional provisions allow for existing consents and pending applications prior to commencement to be dealt with under the previous regime.

Legislative harmonisation

Amendments under the Mining and Petroleum Legislation Amendment (Harmonisation) Act 2015 (NSW) relate to the regulatory framework governing the administration, compliance and enforcement of mining and petroleum titles. Key amendments include:

- ▶ an increase in the maximum term of the exploration licence from five to six years;
- ▶ a more defined criteria to be applied by the decision-maker when deciding whether to grant, renew, transfer, suspend or cancel a title (eg. minimum financial and technical capacity standards and environmental performance);
- ▶ a requirement for prospecting title-holders to obtain an "activity approval" for any prospecting operations that are not exempt development under planning legislation from 1 July 2015;
- ▶ the Minister may impose conditions on a title, including a mining lease, will be able to be varied for any reason and at any time with written notice to the title-holder;
- ▶ broader investigative and enforcement powers for the Minister and inspectors;
- ▶ introduction of a corporate penalty for provision of false and misleading information (maximum penalty of \$110,000) and increased penalties in respect of contravening authorisation conditions (maximum penalty of \$1 million for a corporation); and
- ▶ the ability to enter into enforceable undertakings where there has been an alleged breach of the Mining Act 1992 (NSW) or Petroleum Onshore Act 1991 (NSW).

New land access processes

The Mining and Petroleum Legislation Amendment (Land Access Arbitration) Act 2015 (NSW) gives effect to the recommendations made by Bret Walker SC in his review of the existing access arrangement, negotiation and arbitration processes. Key reforms include:

- ▶ a requirement for title-holders and landholders to participate in mediation prior to arbitration and negotiate in good faith;
- ▶ the ability for both parties to be legally represented during mediation and arbitration;
- ▶ a requirement that the title-holder pay the landholder's reasonable legal costs for each stage of the land access process (up to a specified fee cap);

- ▶ a structured and rigorous selection process for the appointment of members to the formal Arbitration Panel by the Minister; and
- ▶ the amendment to the definition of “compensable loss” under section 107A of the Petroleum (Onshore) Act 1991 (NSW) which, consistent with section 262 of the Mining Act 1992 (NSW), will include six specific areas of compensable loss, including loss caused, or likely to be caused, by severance of land from other land of the landholder or surface rights of way and easements.

Uniform work health and safety regulation

The Work Health and Safety (Mines and Petroleum) Legislation Amendment (Harmonisation) Act 2015 (NSW) also established a consistent legislative framework for work health and safety across the petroleum and mining sectors.

“THE REVISED GUIDELINES WILL APPLY TO ALL NEW STATE SIGNIFICANT PROJECTS IN NSW, INCLUDING MAJOR MINING PROJECTS.”

New Community Consultative Committee Guidelines for State significant projects

The Department of Planning and Environment released its draft Community Consultative Committee Guidelines: State Significant Projects and the public consultation period ended 31 March 2016. The revised guidelines will apply to all new State significant projects in NSW, including major mining projects.

There are eight key differences between the revised guidelines and previous 2007 guidelines

First, a Committee can be established at different stages of a project (for example before an application is lodged) rather than only after approval is given. Previously, a Committee was to be established after approval was given.

It is now an express requirement that the establishment of a Committee will be decided by the Department and will either be included in the:

- ▶ Secretary’s environmental assessment requirements (SEARs) for the project; or
- ▶ conditions of approval for the project.

A Committee may now have a defined life and can be dissolved after a particular stage of the project is completed or if the Committee decides there is little benefit in continuing the operations of the Committee.

There are revised selection criteria for community representatives, to include:

- ▶ current residents of the area;
- ▶ demonstrated involvement in local community groups and/or activities;
- ▶ knowledge and awareness of the project and related issues of concern to the local community;
- ▶ an ability to represent the local community and other stakeholders; and
- ▶ a willingness to adhere to the Committee’s code of conduct;

New selection criteria for environmental organisations now require:

- ▶ a representative of a recognised environmental organisation;
- ▶ knowledge and awareness of the project and related environmental issues of concern to the broader community;
- ▶ an ability to represent the environmental concerns of the broader community; and
- ▶ a willingness to adhere to the Committee’s code of conduct.

There are revised procedures for the establishment of a Committee, including:

- ▶ a new process for selecting and appointing the Independent Chairperson;
- ▶ involving the Independent Chairperson in the selection of community representatives. The Independent Chairperson will now review all applications and provide those applications to the Department along with the recommended candidates; and
- ▶ clear procedures for replacing committee members.

A new toolkit contains prescribed form templates to be used in the process of establishing and operating a Committee.

Finally, there is stronger guidance on the conduct of Committee meetings, including a requirement for Committee members to sign a Code of Conduct Agreement, a template of which is contained in the toolkit, and steps for non-compliance with that Code.

Once finalised, the revised guidelines will apply to all new State significant projects where a requirement to establish a Committee is contained in the SEARs for the project conditions of approval.

We understand from discussions with the Department that the revised guidelines may also apply retrospectively to existing projects which require a Committee, however only to the extent of guiding the continued operation of the Committee. The details of how the revised guidelines

will apply to existing projects will be clarified further once submissions have been considered and the revised guidelines finalised.

The revised guidelines apply to mining projects, but also to other projects of State significance.

Updated DRE Codes and Guidelines

In March 2016, the NSW Department of Industry (Division of Resources and Energy) released a number of revised Codes and Guidelines as outlined below.

- ▶ **Exploration reporting: A guide for reporting on exploration and prospecting in New South Wales** – assists authority holders in NSW to prepare geoscientific reports and data required by the Mining Act 1992 (NSW) and Mining Regulation 2010 (NSW). The purpose of the guideline is to specify the format, contents and standards required to prepare and submit geoscientific reports and data.
- ▶ **Exploration Code of Practice: Community Consultation** – sets out mandatory requirements and provides title holders with related guidance regarding the expected performance for engagement in adequate, inclusive and appropriate community consultation in relation to the planning for, and conduct of, exploration activities under a prospecting title. The code enables proponents to:
 - » adopt a risk-based approach to ensure compliance with mandatory requirements related to community consultation;
 - » commit to measurable performance standards;
 - » monitor performance and take corrective action if outcomes are not being achieved; and
 - » keep and maintain relevant records of activities and/or actions.
- ▶ **Mineral Exploration Drilling: Drilling and Integrity of Petroleum Exploration and Production Wells** – provides guidance for drilling for the exploration of coal and minerals and align with the Exploration Code of Practice: Environmental Management.
- ▶ **Guideline: Enforceable undertakings** – outlines the process of obtaining, and general purpose of, an enforceable undertaking under the Mining Act 1992 or Petroleum (Onshore) Act 1991.
- ▶ **Guideline: Prosecutions** – explains prosecution under the Mining Act 1992 (NSW) and the basis for the department making a decision to prosecute offences.

Mine Safety Regulatory Reforms

In May 2016, the Department of Industry (Division of Resources and Energy) issued an update on the implementation of its Mine Safety Regulatory Reform: Incident Prevention Strategy dated 16 February 2016 to outline the mine safety regulatory reforms and provide an overview of future mine safety.

The update details changes to the internal operation of NSW Mine Safety and implementation of:

- ▶ a centralised framework for the reporting of all verbal and written notifications of incidents;
- ▶ streamlined processes for the lodgement of written notification of incidents through standardised online forms; and
- ▶ a human and organisational factors tool kit to be used by NSW Mine Safety in regulatory inspections and investigations, and by industry in reviewing incidents. Comprehensive human and organisational factor training and education packages will also be developed to support industry.

The work of NSW Mine Safety will be shaped by two key programs:

- ▶ the Targeted Assessment Plan (**TAP**) – provides a planned, proactive approach to assessing how effective an operation is overall when it comes to controlling critical risk. A TAP will involve a team of inspectors from various disciplines to assist NSW Mine Safety to determine which mines to visit and which critical risk issues to target; and
- ▶ the Targeted Intervention Program (**TIP**) – provides a responsive approach to assessing how effective critical risks are being managed. A TIP will involve a team of inspectors from various disciplines that will document assessments, engage with mine operators, conduct site visits and monitoring of follow-up activities.

NORTHERN TERRITORY

Reforms to environmental assessment and mining (oil and gas) industry

Strategy for oil and gas industry

In 2014 the NT Government commissioned Dr Allan Hawke AC to conduct an independent inquiry into the use of hydraulic fracturing as a method to extract oil and gas resources in the Territory. The Terms of Reference for the Inquiry included an assessment of the environmental risks and actual environmental impacts of hydraulic fracturing, and the effectiveness of methods for mitigation potential environmental impacts before, during, and after hydraulic fracturing is undertaken. The findings of the Inquiry were released to the public on 26 February 2015; these included that there is no justification for the imposition of a moratorium on hydraulic fracturing in the NT.

In November 2015, the NT Government released the draft Oil and Gas Industry Development Strategy for public consultation until 31 December 2015. When finalised, this Strategy will be used when assessing future petroleum exploration and production licences.

Reforms to environmental assessment and approvals processes

The Hawke Inquiry also recommended that the NT Government consider possible amendment of the NT Environmental Assessment Act to ensure alignment with the existing petroleum and mineral royalty framework. The NT Government subsequently commissioned Dr Hawke to conduct a review of the Northern Territory's environmental assessment and approvals processes.

Dr Hawke delivered his second report in May 2015 and in November 2015 the NT Government released its response. Essentially, the review report provides the following three options for reform, with Option 3 being Dr Hawke's recommendation for the NT Government:

- ▶ **Option 1** – retain the current system with incremental improvements; or
- ▶ **Option 2** – create a single “stand-alone” environment approval process with the Environment Minister as decision-maker; or
- ▶ **Option 3** – strengthen the “sectoral one-stop-shop” model, supported by enhanced transparency and independent performance monitoring. A “sectoral one-stop shop” refers to project authorisation based on approvals issued under various legislative instruments (such as the Minister for Mines and Energy or Minister for Planning) which are brought together under a primary sectoral approval.

The report also contained 22 recommendations which could be applied irrespective of which option was chosen) to strengthen the NT environmental management system's operations, build community confidence and improve decision-making efficiency.

In its response, the NT Government adopted Option 3, with a long-term goal of moving towards an Option 2 model, and outlined its in-principle support of the other 22 recommendations.

Measures announced for the release of land for oil and gas activities

On 18 November 2015, the NT Government announced its criteria for determining whether to approve oil and gas activities can occur in the Territory. This followed the earlier release of the Onshore Oil and Gas Guiding Principles which are being utilised by the NT Department of Mines and Energy for the assessment of future petroleum exploration and production licences. The Guiding Principles and measures will act as an interim measure while the Government continues with its review of the existing regulatory framework.

The Guiding Principles contain five overarching guiding principles in addition to a range of operational guidelines which apply to key risks and areas of impact (such as well design, construction and operation; water management; land access; air and noise emissions; community and social impacts; general operations; hydraulic fracturing; chemical and waste handling and management; rehabilitation and decommissioning; local context). They will need to be considered by any future permit applications.

The NT Government announced three additional measures on 18 November.

First, it will remove the exemption in the Water Act relating to oil and gas activities.

Secondly, it will not grant titles in residential areas as they are not considered as being compatible with oil and gas exploration or development.

Finally, it will not grant acreage release and exploration permits where there is a land use conflict, based on the following criteria:

- ▶ **Urban living areas including rural residential areas** – where land is not zoned, but the land use is consistent with these purposes, oil and gas activities will not be permitted.
- ▶ **Areas of intensive agriculture** – Department of Mines and Energy will assess the compatibility of land use, however oil and gas activities will not take place on areas such as melon farms, mango orchards and aquaculture operations.
- ▶ **Areas of high ecological value** – as determined through the NT's environmental assessment process following implementation of the Hawke review into the NT's environmental assessment and approvals processes.
- ▶ **Areas of cultural significance as advised by the Aboriginal Areas Protection Authority** – there is no change for Aboriginal land under the Aboriginal Land Rights or Native Title Acts.
- ▶ **Areas that include assets of strategic importance**

to nearby residential areas – including areas with high potential for other uses such as tourism related development around Bitter Springs at Mataranka.

It was announced on 24 November 2015 that applications for Palatine Energy's proposal for Watarrka National Park and NT Gas' proposal for the Coomalie Council Region were refused as they were assessed as not satisfying all of the recently announced criteria.

New process for land access agreements between mining, petroleum and agriculture industries

On 30 November 2015 the Northern Territory Government announced a new process for land access agreements between the mining, petroleum and agriculture industries to achieve a balance between the rights of resource companies to explore and the rights of pastoralists to be advised, informed and consulted before exploration begins.

Under the current regulatory process for the approval of mining and petroleum activities, Mining Management Plans (**MMPs**) and Environment Plans (**EPs**) (respectively) are to be approved before the relevant approvals under the Mining Management Act or Petroleum Act are given to allow those activities to commence.

The Government announced that the process will also include:

- ▶ The establishment of a land access agreement for those exploration activities considered to create more disturbance and requires the lodgement of an MMP or EP.
- ▶ If agreement over conditions for land access cannot be reached within 60 days by mutual consent, the matter will be referred to an arbitration panel to be made up of high-level Government and industry representatives.
- ▶ The arbitration panel will arbitrate between the parties for a successful agreement within 21 days of the formation of the panel.
- ▶ Once agreement has been reached, the Department of Mines and Energy may approve the MMP or EP, as the case may be.

It remains to be seen whether this new process will be successful in striking the right balance between the competing rights as some of the detail is missing. Concerns have already been raised that this new process may be introducing more red tape which could stifle the capacity for new investment in the mining and petroleum industry. However, in theory it appears to be a step in the right direction as it should allow all parties involved in land access arrangements to have meaningful engagement prior to mining and petroleum activities commencing and time limits for those agreements have now been set.

New draft environment regulations for oil and gas industry

On 5 March 2016, the NT Government released its draft Petroleum (Environment) Regulations which have been prepared as the next step to establishing a robust best-practice environmental regulatory regime.

The key principles of the draft Regulations have been identified as:

- ▶ **Risk-based** – focus on the key risks and impacts that must be managed.
- ▶ **Outcome-focused** – do not prescribe what actions oil and gas companies must take, but require clear definition of environmental outcomes and performance standards and measurements criteria to ensure outcomes are met.
- ▶ **Ecologically Sustainable Development (ESD)** – all onshore oil and gas activities must be consistent with the principles of ESD.

The key principles will be delivered through a mandatory requirement for an interest holder, who proposes to carry out a regulated activity, to prepare, and have approved, an EMP before the activity can commence.

The draft Regulations set out the requirements for the form and content of an EMP and the "approval criteria" against which the Minister will assess the EMP, which includes a detailed list in Schedule 1.

The other key features of the draft Regulations include:

- ▶ The requirement for revision of an EMP where certain events occur.
- ▶ The EMP is to be published by the Minister.
- ▶ Revocation of approval of an EMP where certain events occur.
- ▶ Review of certain decisions to the Civil and Administrative Tribunal.
- ▶ Offence provisions for failure to comply with requirements under the Regulations.

The draft Regulations also include transitional provisions, under which:

- ▶ An approved plan in place immediately before commencement of the Regulations will continue to apply after commencement for the lesser period of either the period for which it is approved or 12 months after commencement.
- ▶ Environmental directions will continue to apply after the commencement.
- ▶ Where an EMP has already been prepared and submitted to the Minister for approval but no decision has been made immediately prior to commencement of the Regulations, the Minister must continue to consider that EMP as if the Regulations had not commenced and once approved the EMP has effect as if it were approved under the Regulations.

The draft Petroleum (Environment) Regulations were approved with amendment on 28 June 2016 and are now in force.

Amendment to NT Petroleum Act for making regulations to protect the environment

On 26 May 2016, the NT Government passed the Petroleum Amendment Bill 2016 which will allow the Administrator under the Petroleum Act to, when prescribing regulations for the protection of the environment, provide for the functions and powers of the Minister including the way in which the Minister may perform those functions and exercise those powers and exercise his discretion.

It is understood that in developing the draft Petroleum (Environment) Regulations (discussed above) it became clear to the NT Government that the current provision under the Petroleum Act was not broad enough to allow the Administrator to make the draft Regulations in their current form, namely to prescribe powers and functions which allows the Minister to exercise discretion and make decisions about EMPs for onshore petroleum activities, including the discretion to consider the principles of ESD and matters such as the recommendations from the NT Environment Protection Authority.

Upon commencement, the Bill will insert into the Petroleum Act that in regulations prescribing matters for the protection of the environment, the Administrator may provide for:

- ▶ functions to be performed, and powers to be exercised, by the Minister; and
- ▶ the way in which the Minister may perform a function or exercise a power, including the way in which the Minister may exercise a discretion.

North East Gas Interconnector Pipeline

In November 2015, the Northern Territory Government selected Jemena Northern Gas Pipeline Pty Ltd to construct and operate the North East Gas Interconnector Pipeline from Tennant Creek in the NT to Mount Isa in Queensland. This pipeline will connect NT's gas supplies to the eastern seaboard gas markets. In December, the North East Gas Interconnector Pipeline (Special Provisions) Act 2015 commenced to make special provision for the pipeline, including facilitating construction and operation of the pipeline.

QUEENSLAND

EPOLA changes for mining – delayed commencement

The Mineral and Energy Resources (Common Provisions) Act 2014 (**MERCP Act**) made changes to the notifications and objections process for mining projects in Queensland. The State Development and Public Works Organisation and Other Legislation Amendment Act 2015 was assented to on 22 July 2015.

The Amendment Act repeals section 47D of the State Development and Public Works Organisation Act, which prevented submitters to an environmental authority from requesting their submission be taken to be an objection on an environmental authority application for mining proposals evaluated by the Coordinator-General (but only where the Coordinator-General has stated all conditions), and reinstates the rights of objectors to what was in place prior to the commencement of section 47D on 24 October 2014.

The remainder of the provisions of the MERCP Act relating to notifications and objections have not yet commenced, and their commencement has in fact been further postponed to allow for the Queensland Government to enact changes in line with its election promises.

The commencement of the relevant provisions has been postponed until 27 September 2016.

Amendments to water legislation effecting the take of groundwater by resource industries

The Water Reform and Other Legislation Amendment Act 2014 (Qld) (**WROLA Act**) was passed in November 2014 and made a number of changes to the Water Act 2000 (Qld). The aims of the WROLA Act included creating a consistent framework for managing the take of underground water by resource industries.

The Water Legislation Amendment Bill 2015 was introduced to Parliament on 10 November 2015 to reverse some of the changes made by the Water Reform and Other Legislation Amendment Act 2014 (Qld), in order to align the water legislation with the policy of the Palaszczuk Government. The Bill proposes to allow the chief executive to determine whether tenure is considered to be within a cumulative management area in instances where a tenure is only partially within the area.

Under the Water Act, declaring a cumulative management area enables assessment of future impacts using a regional modelling approach and the development of management responses (such as monitoring programs) that are relevant to the potential cumulative impacts. It also enables responsibilities to be assigned to each tenure-holder in the area for monitoring, bore and baseline assessments, as well as negotiating make good arrangements.

The Bill makes no other changes to the underground water framework.

Under the existing regime, there has been some confusion as to whether a mining lease authorised the taking or interference with groundwater, and whether the impact on groundwater was a matter for the Land Court to consider when determining to grant a mining lease and related environmental authority.

The WROLA Act proposed to make changes to the rights and obligations of a mining lease or mineral development licence-holder in respect to the take, interference and use of underground water, and brings those rights and obligations in line with those applicable to holders of petroleum tenements. Under the proposed new regime, the holder of a mining lease or mineral development licence may take or interfere with groundwater in the area of the mining lease or mineral development licence if the taking or interference occurs during the course of, or results from, the carrying out of an authorised activity. The holder need no longer obtain a water licence for these activities. The holder must measure and report the volume of associated water taken and the Land Court has jurisdiction to determine disputes between the holder and the landowner, if make good agreements cannot be made.

While the Bill makes no changes to this framework, the Government has stated that the provisions cannot commence until the amendments in the Water Legislation Amendment Bill 2015 are passed. The Bill has been referred to the IPNR committee with a public hearing to be conducted on 15 February 2016. The final report was provided to Parliament on 1 March 2016.

Financial assurance

Financial assurances are security deposits held by an administering authority (such as the Department of Environment and Heritage Protection) that are often required under the conditions of an environmental authority in order to cover potential rehabilitation costs or required for some prescribed environmentally relevant activities. The amount of financial assurance is calculated based on:

- ▶ the risk of environmental harm;
- ▶ the likelihood that rehabilitation will be required once the approved activities cease; and
- ▶ the environmental record of the person carrying out the activity.

Following concerns about the financial assurance system, the Queensland Government undertook a review under the Environmental Protection Act 1994 (Qld).

A discussion paper was released in June 2014 which proposed the introduction of a “pool fund model” for the holders of environmental authorities undertaking mining and petroleum activities in Queensland. Holders of environmental authorities would have been required to contribute to a pool fund that could be used to meet any future outstanding rehabilitation costs.

Following the consideration of submissions on the Discussion Paper, the Queensland Government announced that it would not be proceeding with the reforms in the structure that was proposed. It is understood that the Government’s budget contains allocation for a review of the financial assurance framework and we expect that details of that review will be known in the coming months.

**“ONE OF THE
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Tenure reforms project

The Department of Natural Resources and Mines released a discussion paper in August 2015 outlining proposed reforms to the tenures framework for the resource industry. The Department states that the current tenure framework does not operate effectively within the modern and globalised resource sector, being perceived as inflexible and focused on prescriptive compliance, not more effectively promoting performance outcomes.

Recent pressures on the resources industry, including the downturn in commodity prices and the difficulties in raising capital to fund exploration and commissioning of resource projects have highlighted to the Queensland Government the need to design a regulatory framework that is responsive to these changes. Specific issues have been identified with the current framework, including:

- ▶ the requirement of strict compliance with exploration permits;
- ▶ relinquishment provisions for exploration that are considered to be too short to achieve effective exploration results;
- ▶ lack of effective pathways to production; and
- ▶ shortage of available land for exploration due to low land turnover.

The current framework is perceived as being unable to provide certainty of tenure, which is critical to enable holders of exploration permits to develop long-term

commercial strategies. The industry is regulated by six pieces of legislation that deal with different aspects of mining and petroleum exploration and production:

- ▶ Mineral Resources Act 1989 (Qld);
- ▶ Petroleum Act 1923 (Qld);
- ▶ Petroleum and Gas (Production and Safety) Act 2004 (Qld);
- ▶ Geothermal Energy Act 2010 (Qld);
- ▶ Greenhouse Gas Storage Act 2009 (Qld) and
- ▶ Mineral and Energy Resource (Common Provisions) Act 2014 (Qld).

It provides different frameworks for various resources, with inconsistent pathways and types of tenure. The Department recognised that this can be confusing for landowners and other stakeholders. The discussion paper, “Innovative resource tenure framework: policy position paper”, aims to address these issues and to modernise the way that tenures are regulated.

The key changes relate to the exploration phase of the resource lifecycle so that the new resource tenures framework facilitates effective exploration. New exploration authorities are proposed for maximum terms of:

- ▶ eight years for minerals;
- ▶ 10 years for coal; and
- ▶ 12 years for petroleum, geothermal and greenhouse gas.

One of the major changes proposed is to introduce uniform tenure types across the different resource legislation. It is also proposed that tenures could be managed on a project basis by obtaining “project status”, meaning that proponents will be able to group and manage several related tenures as one project.

A regulatory impact statement is expected to be released sometime this year, which will examine areas of the proposed policy that are identified as having the most impact. Once a Bill is drafted there will also be consultation on any proposed changes to the legislation and feedback will be sought as part of the Parliamentary Committee process.

More amendments to resources legislation

The Mineral and Other Legislation Amendment Bill 2016 (**MOLA**) was passed by Parliament on 24 May 2016 and commenced on assent on 14 June 2016. This new Act amends the Mineral and Energy Resources (Common Provisions) Act 2014 (Qld) (**MERCPA**), which is expected to fully commence on 27 September 2016 (unless proclaimed earlier). This is an unusual scenario where amendments are being made to legislation which was passed in 2014 but still (in most part) has not commenced.

With the passing of MOLA:

- ▶ All members of the community will have the right to object to the Land Court about any mining lease, irrespective of whether the objector is an owner of land within or adjacent to the mining lease application area, or has any connection to the land or the area in which the mining lease is being sought.
- ▶ Public notification obligations will be reinstated, so that the proponent of a mining lease application will need to publish a notice of the application in the relevant local newspapers and not simply provide notice of the application to those directly impacted by the mining operations as proposed by MERCPA.
- ▶ The restricted land framework proposed by MERCPA will be extended (or substantially return it to the pre-MERCPA position) to include this agricultural infrastructure being principal stockyards, bores, artesian wells, dams and water storage facilities within a protection zone of 50 metres. MOLA also proposes to distinguish between the above provisions which will apply to production and exploration resource authorities and other resource authorities where the protected zone will be 50 metres for all of the prescribed infrastructure.
- ▶ MERCPA will be amended to clarify the intended operation of the transitional provisions for land access arrangements in MERCPA.
- ▶ An amended framework for entering land to identify mining boundaries (such as for a mining lease application) for proposed mining tenements will be introduced.
- ▶ MERCPA will be amended to address industry concerns and clarify the operation of the overlapping tenure framework for coal and coal seam gas. The proposed amendments include the following:
 - » reduce the requirement to have a joint development plan in situations involving overlapping production tenures (ie. a Mining Lease and a Petroleum Lease);
 - » replace the concepts of proposed and agreed mining commencement dates with a single mining commencement date, which is identified by the coal resource authority holder;
 - » strengthen requirements for information exchange between overlapping tenure holders; and
 - » clarify the operation of the dispute resolution process.

SOUTH AUSTRALIA

Published Minerals Regulatory Guidelines

In 2015 the Department of State Development published the following minerals regulatory guidelines for programs for environment protection and rehabilitation required under Part 10A of the Mining Act 1971 (SA):

- ▶ Preparation of a program for environment protection and rehabilitation for metallic and industrial minerals (excluding coal and uranium) in South Australia;
- ▶ Preparation of a program for environment protection and rehabilitation for low impact mineral exploration in South Australia.

Both outline the content and form required for a program for environment protection and rehabilitation required under their respective Ministerial Determinations (005 and 006).

These Ministerial Determinations were amended on 5 November 2015 and the new guidelines reflect these amendments.

New PACE initiatives

Since PACE (Plan for Accelerating Exploration) was first launched in April 2004 it has been a leading driver of growth in the mining sector of South Australia. PACE provides online geological and geophysical information to support the mining industry.

PACE Copper Program and PACE Copper Strategy

On 30 November 2015, the PACE Copper program was launched as part of the early implementation of South Australia's Copper Strategy. The PACE Copper program is a \$20 million initiative which aims to:

- ▶ fund the creation of a state-of-the-art airborne geophysical and terrain imaging program for exploration in South Australia's Copper Belt;
- ▶ encourage industry and government collaboration on new drilling targets; and
- ▶ use the geophysical and imaging program to provide data and analysis for untouched mineral provinces in the far west region of South Australia which was discovered by PACE using a large airborne survey earlier this year.

On 23 February 2016, the Premier of South Australia and the Minister for Mineral Resources officially launched South Australia's Copper Strategy. The Copper Strategy provides an action plan that aims to triple South Australia's copper production over the next two decades.

The Copper Strategy provides an action plan that falls into each of the following three themes:

- ▶ exploration, discovery and information;
- ▶ developing innovative infrastructure, services and research; and
- ▶ building industry and community capacity.

PACE Supply Chain Development Program

On 3 December 2015, as part of the overall PACE program, the PACE Supply Chain Development Program was launched. The program provides industry mentors for companies exploring the resource industry for the first time.

Under the program:

- ▶ stage one will identify companies that wish to access the resources sector for the first time and conduct roundtables and industry seminars to provide market information;
- ▶ stage two will aim to strengthen these companies' capabilities by studying the company business model and making recommendations;
- ▶ stage three will connect up companies that display technical and commercial capability to industry-specific mentors.

Nuclear Fuel Cycle Royal Commission

On 19 March 2015, the Nuclear Fuel Cycle Royal Commission was established to undertake an independent and comprehensive investigation into the potential of South Australia's participation in the nuclear fuel cycle. An issues paper in relation to each area was released and submissions received in 2015. The final report was delivered to the Governor of South Australia on 6 May 2016 and released to the public on 9 May 2016.

"THE COPPER STRATEGY AIMS TO TRIPLE SOUTH AUSTRALIA'S COPPER PRODUCTION OVER THE NEXT TWO DECADES."

The report focused on:

- ▶ exploration, extraction and milling;
- ▶ further processing and manufacture;
- ▶ electricity generation; and
- ▶ management, storage and disposal of nuclear and radioactive of waste.

The report considered the risks and opportunities associated with each activity and any measures that might be required to facilitate and regulate each activity. The Commission made the following recommendations to the South Australian Government:

- ▶ define a concept for the storage and disposal of international used fuel and intermediate level long-lived waste in South Australia, on which the views of the South Australian community be sought;
- ▶ establish a dedicated agency to undertake community engagement to assess whether there is social consent to proceed;
- ▶ task the agency with:
 - » preparing a draft framework for future development of the concept;
 - » seek the support and cooperation of government;
 - » determine whether and on what basis potential client nations would be willing to commit to participation.

The Commission hoped that by following the above recommendations, the Government will be in the position to take the following future steps:

- ▶ pass legislation to facilitate and regulate the development of international used fuel and intermediate level long-lived waste storage and disposal facilities in South Australia; and
- ▶ support the community development including a consent-based process for facility siting.

**“THE COURT
ORDERED THE
MINISTER
TO PROVIDE
REASONS.”**

Inquiry into Unconventional Gas (Fracking)

On 19 November 2014, the Inquiry into Unconventional Gas (Fracking) was referred by the Legislative Council to the Natural Resources Committee. The terms of reference for the inquiry are to inquire into potential risks and impacts in the use of hydraulic fracture stimulation (fracking) to produce gas in the South East of South Australia and in particular:

- ▶ the risks of groundwater contamination;
- ▶ the impacts upon landscape;
- ▶ the effectiveness of existing legislation and regulation; and
- ▶ the potential net economic outcomes to the region and the rest of the state.

Following extensive consultation, the Committee released an interim report on 17 November 2015. The interim report lays the foundations for the final report which is scheduled to be delivered in 2016 and will contain the Committee’s recommendations. After summarising evidence and submissions received, the interim report establishes basic meanings and concepts. It notes that 74% of public submissions to the inquiry do not support hydraulic fracturing in the South East. Finally, the interim report foreshadows that the Committee may seek out expert witness evidence to inform the final report which is due to be delivered this year.

TASMANIA

Tarkine National Coalition Inc v Minister Administering the Mineral Resources Development Act 1995 [2016] TASSC 11

In March 2016 the Supreme Court considered the ability of an environmental group to access a Minister’s reasons for a decision to grant mining leases.

At issue was whether an association concerned with the conservation and management of the Tarkine area, the Tarkine National Coalition, could require the Minister to provide a statement of reasons for the decision to grant two mining leases in Tarkine.

The Court held that the association possessed an interest in the activities greater than an ordinary member of the public and had demonstrated an ongoing commitment to the conservation and protection of the Tarkine area. As such, it was held that the association was adversely affected by the decision to grant the lease, and that it had a genuine interest in knowing why the decision to grant the leases was made. On this basis, the Court ordered that the Minister’s reasons be provided.

Hydraulic fracturing moratorium extended

The Tasmanian Government will maintain a moratorium on hydraulic fracturing (fracking) until March 2020 after the results of the Review of Hydraulic Fracturing in Tasmania Project which concluded in February 2015. The report resulted in 17 findings, including that further exploration by industry is required to establish the potential for any economically viable resources in Tasmania.

In a policy statement released in March 2015, the Tasmanian Government stated that fracking in Tasmania is a possibility, not a probability. The Tasmanian Government commented that there is considerable concern around potential negative consequences from the use of fracking relating to Tasmania's agricultural industries, branding and markets and public and environmental health. A further review will be conducted prior to the moratorium expiring in March 2020.

VICTORIA

Resources Legislation Amendment Act 2015

On 23 September 2015, the Resources Legislation Amendment Act 2015 (Vic) (**RLA Act**) commenced, amending the Mineral Resources (Sustainable Development) Act 1990. The amendment was introduced partly in response to recommendation four of the Hazelwood Mine Fire Inquiry. The RLA Act seeks to increase penalties for unlawful activity by mine and quarry operators, and to give the Government new powers to ensure they minimise risks.

Specifically the RLA Act:

- ▶ introduces new maximum fines of \$151,670 for corporations that breach the Mineral Resources (Sustainable Development) Act or its regulations;
- ▶ mandates that work plans for mines must consider a broader range of risks, and specifically address fire prevention, mitigation and suppression requirements for coal mines;
- ▶ empowers the Minister to require extractive industry to report publicly on its performance in meeting licence and approval conditions; and

provides that authority-holders may be requested to bring existing work plans in line with new risk-based provisions.

WESTERN AUSTRALIA

Mining Act Amendment Bill 2015

On 20 October 2015 the Minister for Mines and Petroleum introduced the Mining Legislation Amendment Bill 2015 (WA) to the Legislative Council. The Bill proposes to amend the Mining Act 1978 (WA), the Environmental Protection Act 1986 (WA) and the Mining Rehabilitation Fund Act 2012 (WA).

The Bill consolidates environmental protection obligations on tenements into the Mining Act 1978 (WA) and provides a risk-based and outcomes-focused approach.

The key features include:

- ▶ exempting low impact mining activity from requiring a programme of works approval – instead an activity notice is sufficient. The definition of “low-impact” activity is expanded from 0.25ha to 1.5ha;
- ▶ imposition of an obligation in all mining tenement licenses and leases requiring the tenement-holder to have an environmental management system; and
- ▶ exempting mining operations approved under the amended Mining Act 1978 (WA) from the obligation to have a separate vegetation clearing approval under the Environmental Protection Act 1986 (WA).

The Department of Mines and Petroleum has introduced a Proposed Low Impact Authorised Activities Framework which will provide details on the notification process for low impact mining activities. The Framework will come into force once the Bill is in effect.

On 23 February 2016, the Bill was discharged and referred to the Standing Committee on Legislation.

Mining Rehabilitation Fund

The Mining Rehabilitation Fund is part of the Department of Mines and Petroleum's regulatory changes in recent years following a 2011 report by the WA Auditor-General. According to Phil Gorey, head of Environment at the Department, the recent resources industry downturn has “stress tested” the Fund and the Fund has proved that it is adaptable enough to fulfil its role in funding the remediation of abandoned mines.

In July 2015, the Department issued a draft policy for Abandoned Mines which will operate in conjunction with the Mining Rehabilitation Fund Act 2012 (WA) and the Mining Act 1978 (WA). The policy aims to provide a consistent approach to:

- ▶ collection of abandoned mine site information;
- ▶ prioritise sites for gazetting; and
- ▶ manage and/or rehabilitate abandoned mine sites.

Five pilot sites have been identified as high priority for rehabilitation using the Fund's resources.

Hydraulic fracking

After more than two years, the Legislative Council's Standing Committee on Environment and Public Affairs has concluded its inquiry and released its report, "Implications for Western Australia of Hydraulic Fracking for Unconventional Gas".

The Report follows the ALP (WA Branch) advocating a moratorium on hydraulic fracturing and provides a prelude to the Senate's recent establishment of a Select Committee on Unconventional Gas Mining.

Significant findings by the Committee include:

- ▶ Western Australian regulators and proponents are ideally placed to build upon overseas experience and develop a strong regulatory framework;
- ▶ the views of those communities directly affected by hydraulic fracturing should hold significant weight;
- ▶ baseline information (required in regulator approved environment plans) is essential to regulate ongoing environmental effects and establishing a successful social licence to operate;
- ▶ many of the concerns of environmental and health impacts can be addressed through robust regulation and ongoing monitoring. The Committee has a high level of confidence that the State's regulators are committed to, and competent in, their respective roles; and
- ▶ the legislative framework needs to be amended to include an equivalent to the Mining Rehabilitation Fund mechanism.

Other findings include:

- ▶ WA requirements for the use of three casing strings during drilling represents international best practice;
- ▶ despite a lack of data around long-term well durability, research and modelling of carbon capture and storage concludes that cement well sealing is a successful strategy;
- ▶ perceived secrecy surrounding proponent chemical use is an important community issue that must be addressed through disclosure obligations formalised in subsidiary legislation;
- ▶ unacceptable and unnecessary environmental and health risks arise from the use of benzene, toluene, ethylbenzene and xylene, and those chemicals should be banned;
- ▶ cumulative impact remains an important assessment factor;
- ▶ WA's geology and low background seismicity mean that the risk of induced seismicity is negligible;
- ▶ the likelihood of hydraulic fractures intersecting underground aquifers is negligible;
- ▶ the risks of chemical spills/contamination and fugitive methane impact can be adequately managed. Naturally-occurring "methane seeps" have long been observed around the world and demonstrate that not

all methane found in water sources is linked to industrial contamination;

- ▶ there are sufficient safeguards and water source protection policies in place to protect Public Drinking Water Source Areas, without introducing 1.5 km buffers;
- ▶ proponents should pay for the reasonable legal and other associated costs of landowners during negotiations for land access; and
- ▶ an independent statutory body should be established to address inequality in bargaining power between proponents and landowners.

We await the Government's response to this report.



THE 2016-17 YEAR AHEAD

COMMONWEALTH

With the calling of the Federal Election and the lapsing of Federal Bills, the year ahead at a Federal level will depend on who forms the next Government.

The Department of the Environment completed a number of consultations in the past 12 months, which we expect to see finalised over the next year. Those consultations include:

- ▶ the Independent Review of the Water Trigger Legislation;
- ▶ the Draft Policy Statement For Advanced Environmental Offsets Under The EPBC Act;
- ▶ the Draft Outcomes-Based Conditions Policy And Guidance; and
- ▶ the Assessment Bilateral Agreement Draft Conditions Policy.

The Department of the Environment and the Queensland Government will also continue with the implementation of the Reef 2050 Plan. The Department of the Environment released the Reef 2050 Policy Guideline for Decision Makers for public consultation, which ended on 26 February 2016.

Renewable energy is likely to be a hot topic at the Federal level for the 2016/2017 financial year, including the administration of policy and planning to encourage the development of the renewables sector.

AUSTRALIAN CAPITAL TERRITORY

Upon commencement of the Renewable Energy Legislation Amendment Act 2016, on 24 February 2016, FiT entitlements can now be granted to large renewable energy generators at the increase total FiT capacity of 650MW. The ACT Government believes that the 100% renewable energy target will easily be achieved by 2020 (a decade earlier than first set by the Minister) through the large-scale wind and solar projects being funded by contracts with the ACT government.

NEW SOUTH WALES

The Greater Sydney Commission Act commenced on 27 January 2016. This established the 2014 NSW Government document “A Plan for Governing Sydney” as the first regional plan for the Greater Sydney region and the six districts identified in that plan have been adopted. In the coming months, stakeholders should look out for:

- ▶ the appointment of District Commissioners to the Commission;
- ▶ the public exhibition of draft district plans for Greater Sydney – these will shape Sydney’s LEPs going forward;
- ▶ the establishment of the Sydney planning panel, to replace one or more Sydney joint regional planning panels;
- ▶ some realignment of Greater Sydney districts to reflect potential local government amalgamations;
- ▶ more strategic, integrated planning for Sydney;
- ▶ the declaration of other regions in NSW.

The commencement of this legislation will have a significant impact on potential development in the Greater Sydney Area and the public should ensure that it avails of the opportunity to provide comments on

the draft plans as the consultation provisions after the strategic phase will be more limited.

The Exposure Draft of a Bill for the proposed reform of biodiversity legislation and policy is open for consultation. This Exposure Draft takes an outcomes-focused, integrated and risk-based approach to biodiversity conservation and simplifies the current legislative framework.

Public consultation on the NSW Government's proposed coastal management reform package which will result in the repeal of the Coastal Protection Act 1979 and Coastal Protection Regulation 2011 as well as the replacement of three state environment planning policies that deal with coastal wetlands, littoral rainforests and coastal protection closed on 29 February 2016 and the Coastal Management Bill was introduced to the Lower House on 3 May 2016. This Bill will progress through the Lower and Upper houses over the coming months. Also, a draft Coastal Management state environmental planning policy and corresponding maps of the coastal management areas will also be released separately for public comment in the coming months.

Another suite of Integrated Mining Policy documents are being revised following public consultation, including the Planning Agreement Guidelines and the Swamp Offsets Policy and will likely be introduced in 2016/2017. The new land access agreement, compensation and arbitration processes in the Petroleum (Onshore) Act 1991 (NSW) the Mining Act 1992 (NSW) are also set to commence in 2016.

NORTHERN TERRITORY

The Territory Government will continue with its public consultation on the proposed reforms to the environmental assessment and approvals processes until September 2016, with the implementation of reforms to occur by 1 January 2017. It has also set the wheels in motion for reforming the development of the oil and gas industry and will look to:

- ▶ release its Oil and Gas Industry Development Strategy in final, the draft of which concluded its public consultation process on 31 December 2015; and
- ▶ finalise the draft Petroleum (Environment) Regulations, which upon commencement will impose a mandatory requirement for an interest holder, who proposes to carry out a regulated activity, to prepare, and have approved, an EMP before the activity can commence. It is understood that with the passage of Petroleum Amendment Bill 2016, it now means that the proposed draft Regulations can be made by the Administrator in June 2016.

Consultation and the finalisation of a number of area plans to amend the NT Planning Scheme will continue as part of the Government's planning for future infrastructure and a growing population.

QUEENSLAND

It is expected that the Queensland Government's Planning Reform agenda will be implemented in the next financial year. The project has been ongoing for a number of years, and was adjusted following the change in Government in 2015. Now that the Planning Bills have been passed, they are expected to commence in 2017. In the interim, the Department of Infrastructure, Local Government and Planning will be releasing a suite of material to explain how the new planning system will work.

On the planning theme, we also expect to see the review of the South East Queensland Regional Plan, with the draft expected to be released for public consultation in October 2016, and the draft climate change adaption strategy.

We predict the themes for regulatory reform to watch for the 2016/2017 financial year will be vegetation management, environmental offsets, water resource management and the management of the Great Barrier Reef Marine Park.

Environmental litigation continues in Queensland, with a number of significant resources projects being challenged in both the Federal Court and the State Courts.

Compliance with environmental laws is also increasingly the focus of attention, with the regulators increasingly focused on compliance activities and associated regulatory tools. Operators will need to be vigilant in implementing risk management and reporting systems, and demonstrating due diligence in activities with the potential to impact on the environment.

"THE NSW EXPOSURE DRAFT TAKES AN OUTCOMES-FOCUSED, INTEGRATED AND RISK-BASED APPROACH TO BIODIVERSITY CONSERVATION."

SOUTH AUSTRALIA

The Planning, Development and Infrastructure Act 2016 will be brought into operation over the coming financial year and over the next three to five years. The Act proposes to revamp the existing planning and development system. The proposed system will create a tiered assessment process for proposed developments aimed at streamlining the planning approval process. The South Australian Parliament are developing a subsequent bill which will deal with the implementation measures under the Act

The Environment Protection Authority is expected to publish the following guidelines in the coming financial year:

- ▶ guideline on assessment and remediation of site contamination; and
- ▶ guideline on preparation and implementation of closure and post-closure plans.

Pollution has become a focus this financial year and will continue in the coming financial year with harsher penalties imposed for breaches of the Environment Protection Act 1993 (SA) under the Policy for calculation of civil penalties and increased penalties for littering under the Local Nuisance and Litter Control Act 2016 (SA). These harsher penalties complement the targets in the new Waste Strategy for 2015-2020 which was released in November 2015.

**“THE ACT WILL
REVAMP SOUTH
AUSTRALIA’S
EXISTING
PLANNING AND
DEVELOPMENT
SYSTEM.”**

Following the United Nations Framework Convention on Climate Change, the coming financial year will continue to focus on climate change initiatives. The State Government low carbon investment plan (released on 2 December 2015) indicates the government’s strategies to achieve its target of zero net emissions by 2050.

TASMANIA

Review of natural resource management regime

The Tasmanian Government has reviewed Tasmania’s two principal instruments for natural resource management: the Tasmanian Natural Resource Management Framework 2002 and the Natural Resource Management Act 2002. The Framework and the Act are directed at delivering effective management of natural resources in Tasmania.

The Tasmanian Government released a Discussion Paper reviewing the framework in July 2015. Following a period of public submissions, the Discussion Paper was reviewed and a final report provided to the Minister in November 2015 for consideration of possible policy or legislative reform.

Single State-wide planning scheme

Once the SPPs have been made by the Minister, local planning authorities will then be required to develop the draft Local Provisions Schedules (**LPSs**) for their respective municipal areas for submission to the Commission. It is anticipated that submission of the first draft LPSs will occur in late 2016. The draft LPSs will then be released for public consultation. The Tasmanian Planning Scheme will then come into effect in each municipal area once the relevant LPS for that area is in place.

The Government is aiming to implement the Tasmanian Planning Scheme by the end of 2017, until which time the current interim planning schemes in each council (apart from Flinders Council, which has not yet provided an interim planning scheme) will continue to apply.

Independent Inquiry into EPA

On 16 May 2016 the Environment Minister released the Ministerial Advisory Committee Report into the EPA following the public inquiry which commenced on 1 June 2015.

The Committee made 48 recommendations for Government to consider, including:

- ▶ the adoption of new legislation focussed on improved coordination and collaboration across government on environment protection and including a new general duty to minimise harm from pollution and waste;
- ▶ the establishment of a new state wide network of local government environment protection officers to address localised pollution and waste complaints;
- ▶ the confirmation of the EPA's role as a technical advisor in emergency management; and
- ▶ the adoption of a tougher approach to enforcement.

The Government is now considering its formal response to the Report, which will be released later in 2016.

Scheduled Premises Regulations review

The Department of Environment, Land, Water and Planning and the EPA are currently reviewing the Environment Protection (Scheduled Premises and Exemptions) Regulations 2007 (Vic), which are due to lapse in mid-2017. The Regulations specify the types of premises for which works approvals, licences and financial assurance are required. The Department and the EPA published a discussion paper about their review on 6 November 2015 and the period for public feedback on the discussion paper closed on 14 December 2015. Both agencies expect to release draft regulations and a draft regulatory impact statement later this year and will provide opportunities for the public to provide feedback on those drafts.

New Smart Planning System

The Minister for Planning has announced that the Victorian Budget 2016/17 will invest \$25.5 million to give Victorians a quicker and simpler way to navigate the State's planning process. The changes are aimed at creating a less complicated approach to accessing planning applications and decisions, with online planning applications and a reduction in the number of smaller projects requiring permits. It is anticipated that the changes will result in savings for property owners, investors and the state amounting to millions of dollars a year and make it easier to buy and build in Victoria. The changes will also capture regional councils, with an additional \$2.1 million allocated for strategic planning.

Key changes include:

- ▶ the creation of an online portal for applications to be used by homeowners and the property industry alike;

- ▶ improved zone controls to reduce duplication between schemes and maintain consistency;
- ▶ improvement to the approvals process for commercial and industrial zones in terms of speed and cost;
- ▶ provision of accessible online tools for homeowners to encourage participation in the planning process; and
- ▶ easy to access assessments for decisions relating to windfarms, development in the CBD, Environmental Effects Statements and heritage applications.

It is anticipated that the Smart Planning System will improve efficiency and transparency and encourage national and international investment.

New regime for infrastructure contributions

The Government introduced a new Planning and Environment Amendment (Infrastructure Contributions) Bill 2015 into Parliament on 10 June 2015. The Bill was passed with amendments on 20 August 2015 and received assent on 1 September 2015.

The Act, which is expected to commence in early 2016, inserts a new Part 3AB into the Planning and Environment Act. Part 3AB establishes a new system for levying and collecting contributions towards the provision of infrastructure in relation to the development of land by introducing infrastructure contributions plans (ICPs). The amendments will operate separately and independently to the current regime of existing development contributions that are part of planning schemes.

ICPs will only be utilised in relation to new "priority growth areas": Greenfield Growth Areas and Strategic Development Areas. In these two areas, ICPs will operate to the exclusion of the current regime and will be incorporated in planning schemes. ICPs will impose a predetermined (and indexed) Standard Levy which will fund infrastructure items predetermined as "Allowable Items". The Standard Levy may be complemented by a Supplementary Levy, which is intended to be used where the Standard Levy is insufficient to cover the required or additional infrastructure, or where the Growth Areas Infrastructure Contributions Scheme does not apply.

Review of Heritage Act 1995

On 20 June 2015, the Planning Minister launched a discussion paper for the review of the 20-year-old Heritage Act 1995. The discussion paper canvasses ways to improve heritage registration processes, simplify heritage permit and consent processes, and strengthen compliance and enforcement measures.

Significantly, the discussion paper proposes a single heritage registration process to replace the four separate processes under the Heritage Act and a reformed nomination process; an increased role of local government and a one-stop shop for subdivision applications; and consolidated offence provisions and an increase in maximum penalties for unauthorised works and infringement notices.

The Government conducted public consultation between July and August 2015 and is currently assessing the submissions reviewed.

Review of Victoria's State Environment Protection Policies (SEPPs) for Noise

A public consultation report was released by the Department of Environment, Land, Water and Planning and the EPA in September 2015 as part of the review into the two State Environment Protection Policies for noise (SEPP-N1 and SEPP-N2). The report followed a process of public consultation, public submissions and web-based surveying.

The process of stakeholder engagement addressed a variety of different noise issues, with 48% of responses concerning amplified music noise, and 19% of responses identifying concerns with industrial noise.

An additional provision that was considered was an "agent of change" principle, whereby developers must bear the cost of soundproofing their developments where the new use results in existing industrial or commercial uses becoming non-compliant. This change was broadly supported, with the following recommendations made:

- ▶ principles must apply to all agents of change (ie. also to new industrial uses) rather than just residential premises;
- ▶ noise levels must not be allowed to increase over time without the industrial agent paying for additional residential soundproofing; and
- ▶ developers must bear the cost of subsequent noise mitigation where impact of noise only becomes apparent after their property is sold.

The report also identified the need to adopt a clearer, more effective and transparent system of compliance and enforcement framework which clarifies the regulatory roles of the EPA, local councils and the police. While many respondents expressed concern about the complexity of the noise SEPPs, the report confirmed that the "level of complexity is necessary to ensure that robust decisions are made".

The EPA and DELWP have now commenced the process of developing options for new noise policy and options to be presented to stakeholders in a broader consultation process in late 2016.

Infrastructure Victoria

The Infrastructure Victoria Act 2015 (Vic) commenced on 1 October 2015, establishing an independent statutory body charged with preparing and publishing a 30-year infrastructure strategy that assesses the current state of infrastructure in Victoria and identifies Victoria's infrastructure needs and priorities for the next 30 years.

Infrastructure Victoria has been undertaking stakeholder and public consultation for the purpose of developing the infrastructure strategy in 2016; it published a consultation report on 21 April 2016 and plans to release a discussion paper in May and conduct citizen juries for the next phase of the consultation process. The infrastructure strategy will cover nine key sectors:

- ▶ energy;
- ▶ water and waste;
- ▶ transport;
- ▶ education and training;
- ▶ health and human services;
- ▶ justice;
- ▶ culture, civic, sport, recreation and tourism;
- ▶ science, agriculture and environment; and
- ▶ information and communications technology.

Infrastructure Victoria will be responsible for giving infrastructure advice to the Victorian Government and researching and publishing on various infrastructure matters.

Plan Melbourne Refresh

The Victorian Government launched a discussion paper for the Plan Melbourne refresh in October 2015 and community comments and submissions on the discussion paper closed in December 2015.

The discussion paper notes that much of Plan Melbourne 2014 continues to enjoy bipartisan support and highlights that the scope of current discussion centres on the key issues of housing supply, diversity and affordability, current transport network priorities and climate change. Key initiatives of Plan Melbourne 2014, such as supporting increased development in strategic locations and maintaining a fixed urban growth boundary, will remain.

The refresh aims to focus on long-term actions and implementation measures. The refresh will also allow for current transport commitments to be incorporated.

WESTERN AUSTRALIA

This financial year, the Department of Environment Regulation will begin applying the new approval process under Part V of the Environmental Protection Act 1986 (WA) supported by guidance statements released in 2015. This includes granting licences for new prescribed premises for a duration of 20 years, rather than five years, after taking into account matters such as the risk of harm to public health or the environment.

On 17 December 2015, the Department of Planning released the draft Perth and Peel Green Growth Plan for 3.5 million for public comment. The public consultation period closed on Friday 13 May 2016.

The following bills were introduced in 2015 but have not yet passed:

- Mining Legislation Amendment Bill 2015 (WA);
- Biodiversity Conservation Bill 2015 (WA); and
- Criminal Code Amendment (Prevention of Lawful Activity) Bill 2015 (WA).

The Department of State Development and Planning proposes to introduce to Parliament the Planning and Development Legislation Amendment (Western Trade Coast Protection Area) Bill 2015 (WA). The draft Bill was referred to the Environmental Protection Authority for consideration in June.

On 19 October 2015 the Conservation and Land Management Bill 2015 received assent. The Bill will amend the Conservation and Land Management Act 1984 by:

- combining the Conservation Commission with the Marine Parks and Reserves Authority into a single Conservation and Parks Commission;
- enabling joint vesting of national parks, nature reserves and conservation parks between the Commission and native title parties;
- introducing zoning schemes in marine parks;
- recognising fire management (including planned burning) as part of the land management functions of the CALM Act CEO; and
- extending the maximum term of CALM Act leases for recreation, tourism and other purposes from 21 years to 99 years.

Several of these amendments came into effect on 12 December 2015, other amendments are yet to be proclaimed.

On 10 March 2016, as part of the Western Australian Waste Strategy, the State Government provided up to \$10 million in funding for local councils to use recycled construction and demolition waste in civil engineering projects.

This funding is available through two streams. The first \$8 million stream provides a pre-allocated, non-competitive financial incentive payment for councils that use recycled construction and demolition waste. The second \$2 million stream is for open, competitive funding to purchase and use recycled construction and demolition products.

Projects in the first stream must be completed before 30 June 2017; applications for first stream funding close on 28 July 2017. For projects in the second stream, applications closed on 30 June 2016.

The Department of Environment Regulation will release the following draft guidelines and standards for public consultation in the coming financial year:

- Environmental Standard: Rural landfills;
- Guideline: Emissions to air;
- Guideline: Odour;
- Guideline: Emissions to land;
- Guideline: Emissions to water;
- Environmental Standard: Metropolitan landfills;
- Environmental Standard: Waste water treatment plants; and
- Environmental Standard: Tailings Storage Facilities.

**“THERE
ARE FIVE
KEY CHANGES
TO WA’S
CONSERVATION
AND LAND
MANAGEMENT
ACT.”**

Following the Save Beeliar Wetlands v Jacob [2015] WASC 482 decision

On 17 December 2015, the Minister for Environment announced that independent legal and governance auditors would conduct an assessment of the Environmental Protection Authority legislation and policy following the Supreme Court decision in *Save Beeliar Wetlands v Jacob* [2015] WASC 482. In that decision, the Supreme Court held that the Environmental Protection Authority was legally obliged to take account of certain policies which it had developed in relation to environmental impact assessments and had not done so (see the **Compliance, enforcement and prosecutions** chapter for more information).

The Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments report was released on 17 May 2016. The report recommended the adoption of a new, hierarchical policy framework that reflects the objectives and principles of the EP Act. The EPA has announced it will revise its procedures and policies before the end of the year in order to satisfy the recommendations of the review.

Following the decision, on 30 March 2016, Ms Corina Abraham commenced proceedings against WA Aboriginal Affairs minister, Peter Collier and members of the Department of Aboriginal Affairs' cultural materials committee. Ms Abraham alleges the committee denied her procedural fairness by failing to re-consult with her before overturning its previous recommendation to oppose the Roe 8 highway.

The State Government has appealed the decision to the Court of Appeal. The Court of Appeal handed down its decision on 15 July 2016, upholding the appeal on the basis that the policies were not relevant mandatory considerations. *Save Beeliar Wetlands* has foreshadowed a possible High Court challenge.

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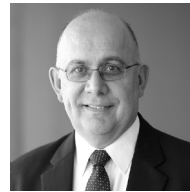


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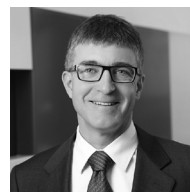
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