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, Rezonings 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.

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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 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 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 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.
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.
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