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SOUTH AUSTRALIA

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Development (Assessment Procedures) Amendment Act 2007

The Development (Assessment Procedures) Amendment Act 2007 came into operation on 26 April 2007 and is a further initiative of the Government to amend the Development Act 1993 ("the Act").

The amendments consist of, but are not limited to, the following:

- The language used in the Act has been simplified. 'Provisional' has been removed from the terms 'provisional development plan consent' and 'provisional building rules consent';
- The maximum penalties have been increased for breaches regarding:
 - Section 44 – General Offences
 - Section 45 – Building Work Offences
 - Section 55 – Removal of work not substantially completed
 - Section 66 – Classification of Buildings
 - Section 67 – Certificates of Occupancy
 - Section 84 – Enforcement Notices;
- Development Assessment Panels must comprise at least one male and one female, with a preference for an equal gender balance, unless otherwise exempted by the Minister;
- Prescribed authorities will now be able to issue enforcement notices under Section 84 of the Act;
- Sustainability of proposed buildings will become a consideration of development assessment; and
- Appeal rights to the Environment, Resources and Development Court have been expanded.

The Act has a number of provisions for which operation is delayed such as:

- The opinion of a prescribed body obtained under Section 37 of the Act may be obtained before a development application is lodged. If the prescribed body is of the opinion that the development application should be granted approval no further referral to that body is then required under Section 37.
- The introduction of a fourth category of public notification, Category 2A, for the notification of adjoining owners and occupiers to land upon which building work is proposed which abuts the common boundary. Notification will be required in prescribed circumstances, providing that the land of the adjoining owner or occupier is used for residential purposes.
- The Swimming Pools (Safety) Act 1972 will be repealed and all swimming pools will be addressed under the Act regardless of the date of construction.

Native Vegetation Variation Regulations 2007

The Native Vegetation Variation Regulations 2007 No. 26 (SA) came into operation on 29 March 2007 amending the existing Native Vegetation Regulations 2003 by including an additional exemption from the requirement to obtain consent in order to clear native vegetation under the Native Vegetation Act 1991.

The new exemption, Regulation 5(1)(ab), enables clearance in the absence of consent from the Native Vegetation Council where an approval has been obtained to undertake a land division for use for residential purposes (after the construction of roads and other infrastructure has been taken into account), provided that certain criteria are satisfied and provided that the clearance is undertaken in accordance with an approved management plan. The exemption will only apply if a payment is made into the Native Vegetation Fund of an amount sufficient to achieve a significant environmental benefit that outweighs the value of retaining the vegetation.

Local Government (Stormwater Management) Amendment Act 2007

The Local Government (Stormwater Management) Amendment Act 2007 (“the Act”) was proclaimed on 10 May 2007. The Act makes a number of amendments to the Local Government Act 1999, such as the creation of a special purpose authority, known as the Stormwater Management Authority, to oversee the preparation and implementation of Stormwater Management Plans.

Environment Protection (Site Contamination) Amendment Bill 2007

On 1 May 2007 the Environment Protection (Site Contamination) Amendment Bill 2007 progressed through the second reading of the Legislative Council.

TASMANIA*Tom Baxter***RFA amended to override *Wielangta* decision**

The Australian and Tasmanian Governments have amended the Tasmanian Regional Forestry Agreement (which covers the entire State) in an effort to override the Federal Court’s decision in *Wielangta (Brown v Forestry Tasmania (No 4) [2006] FCA 1729; see NELR, 2006 (4))*. In a media release of 23 February 2007, Premier Lennon stated, *inter alia*, “The amendments reinstate the Forest Practices System that prevailed before the judgment.”

As reported in *NELR, 2006 (4)*, in *Wielangta* Marshall J held, *inter alia*, that Forestry Tasmania’s forestry operations were subject to the EPBC Act. This was so notwithstanding s 38(1) which exempts from Pt 3 of the Act “an RFA forestry operation that is undertaken in accordance with an RFA.” Justice Marshall held that forestry operations in *Wielangta* had not been carried out in accordance with the Tasmanian RFA. Nor was he confident that they would be carried out in accordance with the RFA in the future. Consequently, s 38 did not exempt Forestry Tasmania’s operations in *Wielangta* from the provisions of Pt 3 of the EPBC Act (*Wielangta*, at para 293).

Given this, and since Forestry Tasmania’s operations and proposed operations in *Wielangta* were likely to have a significant impact on three endangered species the subject of the proceedings, Marshall J granted the declarations, injunction and costs sought by Senator Brown.

In his decision, Marshall J examined the relevant forestry operations against requirements in the Tasmanian RFA, including clause 68 which (then) provided, under the heading ‘Protection of priority species’:

“The State agrees to protect the Priority Species ... through the CAR [Comprehensive Adequate and Representative] Reserve System or by applying relevant management prescriptions.”

Justice Marshall considered extensive expert evidence, then found that the State had not protected any of the three Priority Species and that such protection was unlikely in the future. For example, in determining whether or not the State had protected the Tasmanian wedge-tailed eagle, Marshall J stated (*Wielangta*, at para 270-271):

“270 The evidence supports the view that the State has not protected the eagle through the CAR Reserve System.

Will the State protect the three species through the CAR Reserve System in the future?

271 The best indicator of future behaviour is past behaviour. There is no evidence on which to conclude that the State can or will protect the species through the CAR Reserve System, in isolation, in the future.”