definition of 'development' in the Development Act, including tree-damaging activity undertaken to a tree that is within 20 metres of an existing dwelling within Bushfire Protection Areas of Medium and High Bushfire Risk.

Since 17 November 2011, a number of instances where trees which were protected under the previous legislative regime have been removed have attracted high-profile media attention.

Further, on 23 November 2011, a motion to disallow the *Development (Regulated Tree) Variation Regulations* was moved in the Legislative Council by the State's Liberal Opposition. This motion was adjourned.

So whilst the Regulated Trees provisions are in force, there may well be some amendments to them in the near future. We will report on such developments in the future.

NEW SOUTH WALES

Dr Nicholas Brunton

Implementation of planning and development reforms

On I October 2011, most of the provisions of the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011* (NSW) (the Repeal Act) commenced operation. This had the effect of repealing Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

The accompanying *Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011 (Repeal Regulation)* and *State Environmental Planning Policy (State and Regional Development) 2011* (SEPP(SRD)) also commenced on 1 October 2011.

These reforms implemented one of the Coalition's major election promises – to repeal the unpopular Part 3A provisions of the EP&A Act. Indeed so unpopular were those provisions that the new elected government quickly put in place transitional arrangements for projects already in the Part 3A system, pending its repeal. These arrangements included removing from Part 3A projects involving residential, commercial or retail development with a capital investment value greater than $100m and coastal subdivisions. Projects that were yet to have environmental assessment requirements issued by the Director-General were sent back to local councils for determination. Projects that had been substantially progressed under the Part 3A system were to continue to be determined under Part 3A, however, they were to be assessed by the Planning Assessment Commission (PAC) or a senior member of the new Department of Planning and Infrastructure.

However, while the political rhetoric was all about transferring projects back to councils, empowering communities and removing the taint of 3A, associated as it was, with many dubious decisions of the former Labor Government, the Government still retains a significant role in the planning system. In effect, it winds back the clock to much the same arrangements that were in place before Part 3A so dramatically expanded the Minister's role, powers and functions. In addition, the Repeal Act also increased the thresholds for what is called 'regional development' and which are sent to a Joint Regional Planning Panel (JRPP). It also amends the composition of the JRPP to give local councils greater power to appoint panel members.

Thus the legislation performs a clever dual function. Some projects are devolved back to elected councils to satisfy local political demand, while State control over major projects is retained to satisfy major proponents and ensure growth is not stymied. An expertise-based role for decision making is also retained but with some enhanced political representation, with the JRPPs to achieve both ends.

What the Repeal Act did on 1 October 2011 was insert a new Division 4.1 into Part 4 of the EP&A Act. These provisions introduce two new categories of development: State significant development (SSD) and State significant infrastructure (SSI).

State significant development

SSD is intended to be the assessment process for larger development that is sought by private proponents. Schedule 1 of the SRD SEPP sets out the classes of development that are SSD. These include intensive livestock agriculture, mining, petroleum (oil, gas), extractive industries, road, rail and related transport facilities, waste and resource management facilities and remediation of contaminated land. Development in each class must also meet the capital investment value threshold of $30 m to be classified as SSD.

Specific sites may also be declared by the Minister to be SSD, but only if the Minister has obtained, and made publicly available, advice from the Planning Assessment Commission about the State or regional planning significance of the development.

Schedule 2 of the SRD SEPP retains many of the sites which were previously Part 3A sites including the Sydney Opera House, Sydney Olympic Park, The Rocks and Barangaroo as SSD sites. Development on a specified site must also meet the capital investment threshold to be classified as SSD.

The consent authority for SSD will be the Minister for Planning, although it is expected that the Minister will delegate his decision-making authority for most SSD to the PAC or senior officers of the Department.

A major change to the assessment process is that because SSD is now within Part 4 of the EP&A Act, many of the current development assessment processes that apply to development applications lodged with councils will apply to SSD. For example, there is an express provision (s89H) that the relevant matters set out in s79C are to apply to the determination of an SSD application.

This has the effect that environmental planning instruments and development standards will need to be considered in the determination of an SSD application. However, the SRD SEPP specifically excludes the operation of development control plans to SSD. SSD will also be subject, with one minor exception, to the modification powers in s96 of the EP&A Act.

State Significant Infrastructure

SSI has been inserted into a new Part 5.1 of the EP&A Act and applies to development for which, generally, a government authority is the proponent. Schedule 3 of the SRD SEPP provides for classes of development that are SSI.

These classes include activities of a public authority that would otherwise require an environmental impact statement under Part 5, rail infrastructure, pipelines and water storage or treatment facilities. In order to be SSI however, development specified in Schedule 3 must be capable of being carried out without development consent under Part 4 of the Act. Additionally, development in a particular class must also meet the capital investment value threshold to be classified as SSI.

Specified sites may also be declared by the Minister to be SSI. In relation to SSI, the Minister may simply declare a specified site to be SSI. There is no need for the Minister to seek advice as required to specify a site as SSD. Currently there are no specified SSI sites under the SRD SEPP other than certain transitional projects.

Development can be declared Critical SSI if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons (s115V).

The SRD SEPP identifies the Pacific Highway projects and certain rail infrastructure projects as Critical SSI.

The Minister for Planning is the consent authority for SSI projects. It is expected that applications will be determined by senior officers of the Department if there are fewer than 25 submissions by members of the public objecting to the proposal and the relevant local council does not object to the proposal.

The pre-approval and assessment provisions under the former Part 3A are generally comparable with the new provisions for SSI. There are also SSI provisions governing staged infrastructure applications that are comparable with concept plans under the former Part 3A. Critical SSI is still generally immune from legal challenge except in limited circumstances.

Transitional Part 3A projects

The provisions of Part 3A as in force immediately before the commencement of the Repeal Act (including provisions relating to modification applications under s75W) will continue to apply to projects that fall within the definition of 'transitional Part 3A projects'. These include approved projects and projects that have been the subject of a Part 3A project application and for which environmental assessment requirements have been notified or adopted. In addition, any SEPP or other instrument remaining in force and as amended after Part 3A's repeal will continue to apply to a 'transitional Part 3A project'.

In addition, concept plans that were approved before the repeal of Part 3A will continue to have effect.

However, all future applications for development under those concept plans will now be assessed under Part 4 of the EP&A Act.

Joint regional planning panels (JRPP)

Projects that are not SSD or SSI will be determined by local councils or, if the development meets specified capital investment thresholds, by the applicable JRPP. The capital investment value threshold for development to be sent to the JRPP will increase from $10m to $20m. Development of less than $20m that would have been sent to the JRPP will be returned to local councils.

The capital investment value threshold for referral of applications to a JRPP will be reduced to $5m for Crown development applications; applications where the council is the applicant; applications for certain private infrastructure; and community facilities or eco-tourist facilities.

The Repeal Act also introduces a new provision relating to the composition of JRPPs. One of the three State-appointed members of a JRPP will now have to be appointed by the Minister with the concurrence of the Local Government and Shires Association. This aims to alleviate concerns that local councils are not able to control development that occurs in their own area.

The Repeal Act also allows a JRPP to determine development applications that have a capital investment value of between $10m and $20m if an application has not been determined by the local council within 120 days of being lodged. This provision is subject to the applicant making a written request to the council for the application to be dealt with by the JRPP and the chairperson of the relevant JRPP determining that the delay in the determination of the development application was not caused by the applicant.

Amendments to the EP&A Regulation

The *Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011* (Amending Regulation) commenced on 1 October 2011. It introduced a number of significant changes to the *Environmental Planning and Assessment Regulation 2000* (EP&A Regulation). A new Division 6 has been inserted which sets out the public participation requirements for SSD. In addition, the Amending Regulation inserts a new Division 15 into Part 6 of the EP&A Regulation which details the processes to be followed when SSD is called in by the Minister under the EP&A Act. Recent guidelines for the use of the call in power have been published.

Provisions relating to SSI are located in a new Part 10 of the EP&A Regulation and set out requirements relating to applications for SSI, owners' consent and notification, the exhibition period for SSI applications and other matters.

New provisions prescribing the fees payable for SSD and SSI applications are contained in a new Division 1AA of Part 15 of the EP&A Regulation.

Also, a new Schedule 2 has been inserted into the EP&A Regulation which sets out new requirements relating to environmental impact statements and environmental assessment requirements.

Other Instruments

The SRD SEPP also makes minor changes to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Regulation 2007* (NSW); and the *State Environmental Planning Policy (Infrastructure) 2007* (NSW).

Review of the NSW planning system – issues paper released

Submissions closed on 17 February 2012 on an issues paper for the NSW planning system review being conducted by Commissioner Tim Moore and Ron Dwyer. The paper, released in December 2011, addresses the structure and objectives of a new planning system, and includes an extensive list of questions inviting feedback. A Green Paper is expected to be released in April 2012 and draft legislation should be available for consultation in the second half of 2012. A copy of the issues paper can be found at <http://www.planningreview.nsw.gov.au>

Consultation has included 91 community forums spread across 44 locations in NSW attended by almost 2 000 people. Approximately 70 meetings were also held with stakeholders from across the spectrum, ranging from those with property development interests to environmental groups. More than 330 written submissions were lodged from the public and interested parties.

The issues paper explores Guidelines on exercise of call in powers

As noted above, the changes to the EP&A Act included the making of a new SEPP for State Significant Development (SSD) and other relevant matters. A full list of SSD development types and specified sites can be found in Schedules 1 and 2 of the State and Regional Development SEPP.

Development that is not identified in Schedule 1 or 2 of the SEPP may be declared to be SSD by the Minister for Planning and Infrastructure after obtaining, and making publicly available, advice from the Planning Assessment Commission (PAC) as to the State or regional planning significance of the proposed development.

Following consultation with key industry stakeholders, the Minister has released a Guideline which sets out how a request can be made to declare a development proposal as SSD. The Guideline also provides further information about matters that are relevant in deciding whether a proposal is of State or regional planning significance. The Minister has sent a request to the PAC to consider these matters when providing advice on the planning significance of development proposed to be declared as SSD.

SSD projects are assessed by the NSW Department of Planning and Infrastructure, with input sought from local government, other NSW Government agencies and the community as part of the assessment process. A copy of the guideline can be found at <http://www.planning.nsw.gov.au>.

Environmental Legislation Amendment Act 2011 (NSW)

Following a major emission from the Orica plant at Newcastle, the NSW Government introduced significant change to the reporting requirements for holders of environment protection licences and any person responsible for a pollution incident.

Occupiers of licensed premises will be required to immediately notify all relevant authorities of pollution incidents, or face a $2m fine. Additional obligations regarding the public notification of pollution monitoring data and the preparation of incident response management plans will also be imposed on all licence holders.

The Protection of the *Environment Legislation Amendment Act 2011* (NSW) received Royal Assent on 18 November 2011. The Act has made substantial changes to reporting requirements for premises licensed under the Protection of the *Environment Operations Act 1997* (the POEO Act).

Immediate notification of pollution incidents

Formerly, the POEO Act required a person who became aware of a pollution incident to notify the appropriate regulatory authority 'as soon as practicable'. Now a licence holder must verbally notify the EPA by telephoning the pollution hotline 'immediately' after the pollution incident. This must be followed up by a written report within 7 days.

The new reporting requirement will apply to licence holders and any person who is responsible for a pollution incident. The EPA will also have the power to direct persons who make a notification of a pollution incident to notify the public and any other government departments of the incident.

The maximum penalty for not complying with the new reporting requirements has doubled to $2m for corporations and $500 000 for individuals. Daily penalties for failing to report a pollution incident have also doubled to $240 000 for corporations and $120 000 for individuals.

Pollution incidents must now be notified to both the EPA and the local Council regardless of which body is the appropriate regulatory authority for the purpose of the Act. The Ministry of Health, WorkCover Authority and Fire and Rescue NSW must also be notified.

Publication of monitoring data

It will be mandatory for licence holders who are required to prepare pollution monitoring data as a condition of their licence to make such data freely and publicly available. This will only apply to data collated after the commencement of the Amendment Act.

If the licence holder maintains a business website for the activity the subject of its licence, then the monitoring data must be published on that website. On commencement, licence holders will have three months to comply with this section. Corporations will face fines of up to $4 400 for publishing false or misleading data.

Pollution incident response management plans

All licence holders must prepare and implement a pollution incident response management plan. The EPA can also direct any other person to prepare such a plan. Licence holders will have six months from the date the Act commences to comply. Corporations face fines of up to $2m for non-compliance.

Health and environmental risk analysis

The EPA will have new powers to undertake an environmental risk analysis, or to direct the Ministry of Health to undertake a health risk analysis, if it reasonably suspects that a pollution incident has occurred. The EPA can recover the costs of undertaking such an analysis from the person who allegedly caused or is causing the pollution.

Administrative matters

The Act also provides for the appointment of a Chairperson of the Environment Protection Authority (the EPA) who will have the function of managing and controlling the affairs of the EPA, and it reconstitutes the Board of the EPA.

***Heritage Amendment Act 2011* (NSW)**

The *Heritage Amendment Act 2011* (NSW), passed on 24 November 2011, aims to improve the independence of the Heritage Council and remove red tape that slows down the approval system. It reverses some of the previous government's changes by:

- reducing the number of members of the Heritage Council from 11 to 9
- abolishing Ministerial Review Panels
- requiring the Heritage Council, once it makes a decision to recommend the listing of an item on the State Heritage Register under s33 of the *Heritage Act 1977* (the Act), to make the recommendation to the Minister within 14 days of giving of notice of the decision
- requiring the Minister to publish all decisions relating to whether or not to direct the listing of items on the State Heritage Register and the reasons for the decisions
- requiring a consent authority in relation to certain State significant development that affects State heritage matters
- enabling the Heritage Council, rather than the Minister, to approve forms for the purposes of the Act
- making other minor and consequential amendments.

***National Parks and Wildlife Legislation Amendment (Reservations) Act 2011* (NSW)**

This Act received assent on 25 October 2011. The Act amends the *National Parks and Wildlife Act 1974* (NSW):

- to change the reservation of part of Wianamatta Regional Park to a nature reserve to be known as Wianamatta Nature Reserve
- to add certain land to Hunter Wetlands National Park
- to revoke the reservation of certain other land that is currently reserved as part of Hunter Wetlands National Park

The Act also amends the *National Park Estate (South-Western Cypress Reservations) Act 2010* (NSW) to delay the commencement of the reservation of certain State forests as part of Lachlan Valley National Park and Yathong Nature Reserve.

Local Government Amendment Bill 2011 (NSW)

The Local Government Amendment Bill 2011 Bill was introduced into Parliament on 14 October 2011. It aims to create favourable conditions for councils to engage in structural reform to achieve a strong and sustainable local government sector now and in the future. The proposals cover a range of matters including provisions to reduce the period of the employment protections provisions for council staff following amalgamation of councils, return to councils their body corporate status, introduces caretaker provisions to regulate council decision-making before ordinary elections, makes changes to the system of vote counting in local government elections, extends the maximum term of the lease or licence of community land from 21 years to 30 years, and clarifies provisions relating to pecuniary interest and simplify pecuniary interest exemptions in relation to the adoption of standard local environmental plans.

Marine Pollution Bill 2011

The Marine Pollution Bill 2011 (NSW) was introduced to Parliament on 23 November 2011. It aims to protect the State's marine and coastal environment from pollution by oil and other marine pollutants discharged from ships by:

- repealing and re-enacting the *Marine Pollution Act 1987*, which prohibits discharges of oil and noxious liquid substances
- implementing additional provisions of the International Convention for the Prevention of Pollution from Ships, 1973 (known as MARPOL), to prohibit discharges of harmful substances in packaged form and discharges of sewage and garbage.

Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011

The object of the Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011, introduced to Parliament on 5 August 2011, is to amend the *Threatened Species Conservation Act 1995* (the Principal Act) to establish an accreditation scheme for ecological consultants preparing or carrying out certain assessments, impact statements or surveys under the Principal Act, the *Fisheries Management Act 1994* or the *Environmental Planning and Assessment Act 1979* (the Planning Act), and certain other documents and activities (ecological assessments).

The Bill will make it an offence for a person to:

- prepare or carry out an ecological assessment if the person is not an accredited ecological consultant (unless the person is acting in accordance with the directions of, or under the supervision of, an accredited ecological consultant), or
- prepare or carry out an ecological assessment requiring specialist accreditation if the person has not obtained specialist accreditation in accordance with the scheme (unless the person is acting in accordance with the directions of, or under the supervision of, a specialist ecological consultant), or
- make representations, or cause or allow any representation to be made, that the person is accredited or has specialist accreditation under the scheme (unless the person is so accredited).

The Bill also:

- establishes the processes for the grant and renewal of accreditation
- enables the Chief Executive of the Office of Environment and Heritage (the Chief Executive) to impose, vary or revoke conditions in respect of accreditation or to revoke or suspend accreditation in certain circumstances
- establishes an accreditation panel to perform certain functions relating to accreditation, such as making certain recommendations to the Chief Executive and conducting peer reviews of any ecological assessment that has been prepared or carried out by an accredited ecological consultant, and
- establishes a process for the conduct by the accreditation panel of peer reviews of ecological assessments, so that the accreditation panel may make recommendations in respect of revocation or suspension of, or the imposition, variation or revocation of conditions on, a person's accreditation.