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LAND USE AND ENVIRONMENT PROTECTION IN AUSTRALIA AND SOUTH AUSTRALIA

Peter J. S. Hawkes
Solicitor, Mellor Olsson, Adelaide.

INTRODUCTION

Depending on the nature of the land use proposed and where the land is in Australia, there are different pieces of legislation (more so at the State and Territory level than the Commonwealth level) that may be invoked. This report focuses on the legislation in the State of South Australia, and the new Federal legislation.

The *Development Act* 1993 (SA) and the *Environment Protection Act* 1993 (SA) regulate land use and environment protection in South Australia. Other pieces of legislation, such as the *Water Resources Act* 1997 (SA), whilst important, have not been considered in this report.

A proposed land use might be "general" or it may be "environmentally significant". This report outlines the legislative procedures that apply in South Australia when assessing whether a proposed land use should be allowed. The report also explains how the legislation partly allows these procedures to be avoided when the land use proposed is a "major project" or is proposed for Crown land. Finally the report explains how the Commonwealth might become involved as well as describing the policies and principles behind the legislation (both at State and Commonwealth levels).

GENERAL DEVELOPMENT

The *Development Act* 1993 (SA) incorporates planning, building and land division controls in one piece of legislation and sets out the applicable development control procedures. The primary objective of the *Development Act* 1993 (SA) is to provide for proper orderly and efficient planning and development in the State, and this objective is implemented through the creation of development plans "to facilitate sustainable development and the protection of the environment".[1]

These development plans set out objectives and principles relating to, inter alia, "the natural or constructed environment and ecologically sustainable development" and "the management or conservation of land, buildings, heritage places and heritage areas".[2]

Development plans are prepared and used by the Local Councils which in the majority of cases are the relevant authority responsible for land use decisions. The plan divides the whole of the

[1] *Development Act 1993 (SA)*, Section 3.
[2] ibid, Section 23

Council area into various zones indicating the land's suitability for particular purposes, prohibiting inconsistent uses and granting discretion to the local planning authority for the cases in between.

All development requires approval[3] and "development" is widely defined in section 4 of the *Development Act* 1993 (SA) to include building works and a change in the use of the land.

Whilst the relevant authority to assess whether the proposed development should be approved or refused is normally the Local Council, in some cases it is the Development Assessment Commission (DAC)[4], which is a centralised body established under the Act.

When assessing a proposed development the relevant authority must have regard to the relevant provisions of the local development plan.

If the development is "complying" as specified in the Development Plan or regulations then it must be approved and a third party cannot appeal this decision.[5]

If the development is "non-complying" under the Development Plan then it can only be approved with the concurrence of the DAC or the Council/Minister.[6] If non-complying development is refused development approval then the applicant has no right of appeal. However, a third party does have a right of appeal.

If a development is neither complying nor non-complying, then its approval or refusal must be determined on its merits.

A proposed development is classified as either a category 1, category 2 or category 3 development[7] which categories relate to public or personal notification.

A category 1 form of development does not require public notification and there are no appeal rights for third parties.

A category 2 form of development requires limited public notification. There is a right of representation to those who are notified. However, there is no right of hearing and there are no appeals by third parties.

A category 3 form of development requires extensive public notification. Any person can then make a representation to the relevant authority and also has a right to be heard and a right of appeal.

In making a decision about an application for development approval, the provisions of the Development Plan are of prime concern. Even without specific statutory direction, environmental considerations are also a legitimate planning consideration and may therefore influence decision-making on the merits of the application.

[3] ibid, Section 32.
[4] ibid, Section 34.
[5] ibid, Section 35.
[6] ibid, Section 35.
[7] ibid, Section 38.

If the relevant authority decides to approve the development then it may impose conditions in relation to the development as it sees fit.[8]

DEVELOPMENT OF ENVIRONMENTAL SIGNIFICANCE

When the proposed land use is "environmentally significant" the *Development Act* 1993 (SA) integrates the development control procedures with the environmental authorisation processes under the *Environment Protection Act* 1993 (SA), to a greater extent.

The procedure for assessing a development application of this nature is the same as outlined above for "general" development, with one important difference. When the development proposal involves an "activity of environmental significance" or an "activity of major environmental significance" then the planning authority must, before determining such application, consult with the Environment Protection Authority (EPA).[9]

In the case of an "activity of environmental significance" the planning authority is only required to "have regard" to the EPA's comments.

In the case of an "activity of major environmental significance" the EPA can either direct the planning authority to refuse planning consent or impose certain conditions should the proposal warrant planning approval.

When the EPA is determining its response to the application, it must[10] have regard to, and seek to further, the objects of the *Environment Protection Act* 1993 (SA) as well as having regard to the general environmental duty and any relevant environment protection policies.

Whilst there is some overlap between the roles of the planning authority and the EPA, there is a clear distinction. While a relevant authority must consider the consequences for the area or locality of the activity proposed in order to properly assess the proposal against the relevant provisions of the appropriate development plan, the approval of the operation of the activity is a matter taken away from the relevant authority once it is clear that what is proposed is prescribed as an activity of environmental significance.

There is also a distinction in the type of conditions to be imposed by the EPA. The Environment Resources and Development Court of South Australia has held that any conditions considered necessary or appropriate concerning the construction or establishment of the facility for the prescribed activity should be attached to the provisional development plan consent, whereas conditions necessary or appropriate concerning the operation of the prescribed activity should be attached by the EPA to the environmental authorisation.[11]

Anyone wishing to undertake a prescribed activity of environmental significance must obtain an environmental authorisation. There are three types of environmental authorisations:

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[8] ibid, Section 42.

[9] *Development Act* 1993 (SA), Section 37 and Schedules 8, 21, & 22.

[10] *Environment Protection Act* 1993 (SA), Section 57.

[11] *Hayes & Ors -v- District Council of Murray Bridge; Murray Bridge Bacon Pty Ltd & The Environment Protection Authority* (ERD Court Judgement No. OE512, Delivered 20/11/98)

A works approval which is required for the construction or alteration of a building or structure for use for a prescribed activity of environmental significance.[12]
A licence which is required to undertake a prescribed activity of environmental significance.[13]
An exemption which may exempt a person from the application of a specified provision of the Act. However, conditions may be imposed.[14]

When the EPA is determining an environmental authorisation, it must have regard to, and seek to further, the objects of the *Environment Protection Act* 1993 (SA) as well as having regard to the general environmental duty and any relevant environment protection policies.[15]

A general environmental duty on the community to avoid causing environmental harm is contained in section 25 of the *Environment Protection Act* 1993 (SA). It states that "a person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm".

The objects of the *Environment Protection Act* 1993 (SA) are:

To promote the principles of ecologically sustainable development (ESD) (these are defined)
To ensure that all reasonable and practicable measures are taken to protect, restore and enhance the quality of the environment having regard to the principles of ESD.[16]

Importantly, it is specifically stated that all persons and bodies involved in the administration of the *Environment Protection Act* 1993 (SA), including the Minister and the EPA, must have regard to and seek to further the objects of the *Environment Protection Act* 1993 (SA).[17]

In summary, a land use that is of major environmental significance will only be approved if it satisfies the relevant authority that the objectives and principles of the development plan will be met and if the EPA is satisfied that environmental authorisation and the environmental conditions imposed on the development application are adequate to protect the environment.

MAJOR PROJECTS

Despite the well integrated process described above to efficiently deal with land use approval and environment protection, there are specific provisions in the *Development Act* 1993 (SA) allowing the normal approval process to be avoided in the interests of "fast-tracking" "major projects".

The environment impact assessment (EIA) process is only activated by the Minister's subjective opinion that a declaration is necessary or appropriate for the proper assessment of development

[12] *Environment Protection Act* 1993 (SA), Section 35.
[13] ibid, Section 36.
[14] ibid, Section 37.
[15] ibid, Section 47.
[16] ibid, Section 10(1).
[17] ibid, Section 10(2).

or a project of major environmental, social or economic importance.[18] There are no legislative guidelines to assist in this process.

A declaration is normally made in relation to a specific project but can also be made in relation to a kind of development in the state or a specified part of the state, generally.[19] Once a declaration is made then the normal development control procedures no longer apply.

After making the declaration the Minister refers the proposal to the major developments panel (an independent body established under the Act).

The panel has to examine the application, seek public comment and determine what level of EIA will apply and what guidelines should apply to that level of assessment.

There are three levels of EIA. The highest level is an environmental impact statement (EIS). The next level down is a public environment report (PER). The other level is a development report (DR).

An EIS provides a detailed description and analysis of a wide range of issues relevant to a development or project and incorporates significant information to assist in an assessment of environmental, social or economic effects associated with the development or project and the means by which those effects can be managed.[20]

A PER is a report on a development or project that includes a detailed description and analysis of a limited number of issues and a description and analysis of other issues relevant to the development or project, or a description and analysis of a wide range of issues relevant to the development or project where a considerable amount of relevant information is already generally available, and incorporates information to assist in an assessment of environmental, social or economic effects associated with the development or project and the means by which those effects can be managed.[21]

A DR is a report that includes a description and analysis of general issues relevant to a development and the means by which those issues can be addressed.[22]

Once the panel has determined the level of assessment and what guidelines apply (if any), the Minister can require the applicant to undertake the appropriate assessment or arrange for it to be done.

The preparation of the EIA involves consulting not only the EPA and the Local Council but also the public. However, ultimately public comments may be of little influence where the processing of the proposal as a major project is politically motivated.

Section 48C of the *Development Act* 1993 (SA) provides the Minister with the power to require specified tests and monitoring to be carried out. This may be in order to address

[18] *Development Act* 1993 (SA), Section 46(1).
[19] ibid, Section 46.
[20] ibid, Section 4(4).
[21] ibid, Section 4(5).
[22] ibid, Section 4(6).

concerns about the project. There is no obligation for the results of these tests to be made available to the public.

Once the EIA is complete the Minister prepares a detailed assessment report and hands it and the EIA and the application documents to the Governor who will make the final decision having regard to those documents, the relevant legislation (including the *Environment Protection Act* 1993 (SA)), the development plan, and the Strategy (which is a non-statutory policy document required to be prepared for the whole of the State).

There are no rights of appeal available in relation to any decision to approve or refuse a major project, either for the applicant or any person who objects to the project.[23]

Section 48E of the *Development Act* 1993 (SA) excludes the possibility of judicial review, declaration, injunction, writ, order or other remedy seeking to challenge or question any decision or determination of the Governor, Minister or panel, or any proceedings or procedures under the division or any act, omission, matter or thing incidental or relating to the operation of the division.

DEVELOPMENT ON CROWN LAND[24]

Both the general development control provisions of Division 1 and the major projects provisions of Division 2 of Part 4 of the *Development Act* 1993 (SA) apply to private development. On their face, they also would apply to developments by the Crown. However, by operation of Division 3 of Part 4, developments proposed by the Crown or State agencies are exempt from the need to comply with either Division 1 or 2. They must comply only with the provisions of Division 3 itself.

An agency wishing to undertake development must lodge an application with the DAC, and give notice of the proposal to the Local Council in accordance with Regulation 69 of the *Development Regulations* 1993 (SA).

The role of the DAC is to assess the proposal, and prepare a report to the Minister on the matter. In its report, the DAC must indicate if the proposal is seriously at variance with the development plan, and must include a copy of the Council's report if the Council has opposed the proposal.

Following receipt of the DAC's report, the Minister may either approve or refuse the development.

The process is essentially political. The only control on the Minister is that if he or she approves a development which the Local Council has opposed, or which the DAC assesses as being seriously at variance with the development plan, the Minister must prepare a report on the matter and cause copies of that report to be laid before both houses of parliament. What effect this might have is entirely in the hands of parliament.

There are no rights of appeal available, either to members of the public, or the applicant agency.[25]

[23] ibid, Section 48(12).

[24] The discussion in this section relates to development by the Crown in right of South Australia and does not cover development on Commonwealth land.

[25] ibid, Section 49(17).

COMMONWEALTH INVOLVEMENT

The Commonwealth's role with respect to environment protection has recently been thoroughly overhauled. The *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (the EPBC Act) is an extensive piece of legislation. The objects of the EPBC Act include the promotion of ESD.

Commonwealth involvement in the environment assessment and approval process in relation to land use in South Australia will be triggered only by projects or activities that are likely to have a significant impact on specified matters of national environmental significance, namely:

The Commonwealth Marine Environment (generally outside 3 miles from the coast)
World Heritage Properties
Ramsar Wetlands of International Importance
Nationally Threatened Species
Migratory Species
Nuclear Actions

Additional matters of national environmental significance may be prescribed after consultation with the States and Territories.

The Government has agreed to begin a process of consultation with the States and other stakeholders on the issue of applying a greenhouse trigger in relation to new projects that would be major emitters of greenhouse gases.[26]

The EPBC Act enables the Commonwealth Environment Minister to trigger the assessment and approval process, and gives the Minister power to grant environmental approval to an action and to impose environmental conditions. Administrative guidelines will be developed to guide the Minister in determining whether an impact on one of the six matters of environmental significance is significant.

The EPBC Act makes provision for the Commonwealth to accredit State or Territory assessment and approval processes through bilateral agreements, and for the establishment of prescribed criteria for such agreements. Bilateral agreements will enable the Commonwealth to rely on State environmental assessment and approval processes to meet its own obligations under the EPBC Act. The Government has stated its intention to accredit only State and Territory practices that meet "best practice" criteria, and sees bilateral agreements as a mechanism for promoting the application of rigorous and nationally consistent standards across all jurisdictions.

The provision of accreditation through bilateral agreements is intended to eliminate any duplication which might occur where a proposed "controlled activity" attracts the EIA requirements of both the Commonwealth and the State in which the activity is located. The

[26] The relevant consultation paper can be viewed at www.environment.gov.au/epbc/
[27] ibid.

EPBC Act provides that, if there exists a bilateral agreement between a State and the Commonwealth governing how assessments are to be undertaken, then the activity is not a "controlled activity" within the terms of the legislation and will not be subjected to the processes set out in the Act.

Regulations outlining the form and content for these bilateral agreements are yet to be developed. The view is to harmonise state and Commonwealth approval systems as much as possible.[27]

Reaction to the new Act has been mixed and there remains significant opposition from conservation organisations to some aspects of the new legislation. Criticisms relate to:

> The limited range of matters used to define national environmental significance and the exclusion of greenhouse pollution, land clearing, forest protection, water allocation, and the release of genetically modified organisms[28]; and
> Perceived problems with the bilateral agreement process, including the view that this process involves the Commonwealth abdicating responsibility for assessment and approval of matters of national environmental significance that should remain with the Commonwealth.

It is anticipated that the legislation will have important ramifications for State and local governments in the administration of development assessment and approval processes. Any activity that is a "controlled activity" will require a Commonwealth assessment of environmental impacts on the matters of national environmental significance, and a Commonwealth approval with associated conditions and enforcement issues. This will be in spite of any other assessment or approval that may (or may not) be required under State law, including a development consent granted by a Council under the *Development Act* 1993 (SA).

POLICIES FOR LAND USE AND ENVIRONMENT PROTECTION

Development plans are the essential statutory policy for determining development approvals.

Likewise, environment protection policies (EPPs) play an important role in the environment protection system and the assessment of applications for environmental authorisations. EPPs are an essential management tool of the system and are matters which the EPA is required to take into account when assessing applications for environmental authorisation or development applications under the *Development Act* 1993 (SA) referred to the EPA by the planning authority.[29]

In addition to the EPP's (statutory policies) the EPA has created several informal policies (which they call "codes of practice") relating to issues such as storm water and building and construction issues. Whilst not enforceable as EPPs, the EPA treats codes of practice as the EPA's interpretation of the general environmental duty. Accordingly, a breach of the provisions of a code is indicative of a breach of the general duty and therefore any enforcement action would be related to the breach of the general duty.

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[28] ibid.

[29] *Environment Protection Act* 1993 (SA), Sections 47 and 57

[30] Leadbeter, Gunningham and Boer, *Environmental Outlook No. 3: Law and Policy* (Federation Press, 1999), p158.

"All Governments presumably want to develop environmental and planning policies which are acceptable to and adopted by the general community. Such acceptability will only be achieved if there is a completely open and transparent policy formulation process. Policy decisions made outside of the statutory perimeters which particularly affect the community are likely to alienate the community, creating a feeling of distrust, hostility and confrontation".[30]

ESD PRINCIPLES

Ecologically sustainable development (ESD) is not defined in the *Development Act* 1993 (SA). However, it may be implied that the term "ecologically sustainable" when used in relation to "development" in the provisions of the relevant development plan, embraces the principles of ecologically sustainable development. Thus the relevant authority should take care not to approve development that would breach the ESD principles.

The *Environment Protection Act* 1993 (SA) defines the principles of ESD as:[31]

> The use, development and protection of the environment should be managed in a way, and at a rate, that will enable people and communities to provide for their economic, social and physical well-being and for their health and safety while:
>
> - sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations;
> - safeguarding the life-supporting capacity of air,water, land and ecosystems; and
> - Avoiding, remedying or mitigating any adverse effects of activities on the environment; and
>
> Proper weight should be given to both long and short term economic, environmental, social and equity considerations in deciding all matters relating to environmental protection, restoration and enhancement.

The two South Australia Acts considered here are silent on the method or approach which should be adopted when there is a conflict between environmental protection and economic development, and whilst the Environment Resources and Development Court has addressed the procedural relationship between the two Acts, it has not been called upon as yet to resolve the substantive issues which might arise from such conflict.

The EPBC Act defines the principles of ESD as:[32]

> Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
>
> If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
>
> The principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
>
> The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and
>
> Improved valuation, pricing and incentive mechanisms should be promoted.

[31] *Environment Protection Act* 1993 (SA), Section 10(1)(a).

[32] *Environment Protection and Biodiversity Conservation Act* 1999 (Cth), Section 3 A.

These differ slightly from those stated in the *Environment Protection Act* 1993 (SA) and also differ slightly from the Guiding Principles of the National Strategy for Ecologically Sustainable Development (NSESD). The Guiding Principles are stated in the strategy as (pp 8-9):

Guiding Principles:

> Decision making processes should effectively integrate both long and short term economic, environmental, social and equity dimensions;
> Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (the precautionary principle);
> The global dimension of environmental impacts of actions and policies should be recognised and considered;
> The need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised;
> The need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised;
> Cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms; and
> Decisions and actions should provide for broad community involvement on issues which effect them.

The differences in the definitions are obvious. A totally consistent approach clearly does not exist. Perhaps this is due to the fact that the EPBC Act is the most recent statement of the principles, and this might mean that the NSESD and the *Environment Protection Act* 1993 (SA) need updating.

The statutory expression of ESD principles has occurred randomly and in a mostly vague, and non-binding form which is not useful for instructing procedures. A "crucial point is that these principles have been reproduced or referred to as objects in dozens of Australian statutes, and are meant to inform "whole of government" approaches. These principles represent the only cogent statement over what we mean by and think we should do about ESD. And, ESD remains the only cogent statement of how we might integrate issues of environment and human development, nationally and internationally".[33]

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[33] S Dovers, *"The rise and fall of the NSESD, or not?"* (1999) 4 AELN 30, at p35.