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LAWYERS

Moratorium on Clearing of Endangered Regrowth

The Bligh government has followed through on an election promise and initiated a three-month moratorium on clearing regrowth vegetation from 8 April 2009. The primary stakeholders affected are, landowners (in particular graziers and developers), and the conservation movement. While the clearance ban affects landholders across the State, the most affected regions are rural areas and the Great Barrier Reef catchment areas.

The government claims the moratorium was put into place to prevent landowners from wholesale 'panic' clearing, and on 23 April 2009 passed the *Vegetation Management (Regrowth Clearing Moratorium) Bill 2009*. The Vegetation Management Bill (the Bill) was fast tracked as the government's first priority in the new Parliament, and effectively puts the breaks on clearing to allow the government 'breathing space' to determine how regrowth with high conservation value can be better protected in the future. The Bill which now awaits assent, legislates against the clearing of endangered regrowth vegetation in rural areas, and riparian vegetation in identified priority reef catchments.

Regrowth for the purposes of the Bill includes both:

- **endangered regrowth vegetation**: regrowth that is an endangered regional ecosystem located within an area shown on the moratorium map as a moratorium regrowth vegetation area; and

- **riparian regrowth vegetation**: regrowth located within 50m of a watercourse identified on a moratorium map as a moratorium watercourse.

'Regrowth vegetation' is native vegetation which is not classified as 'remnant', that is, it is regrowth of previously cleared remnant vegetation which has not reached the height, canopy cover, and species characteristics that would meet remnant status under the *Vegetation Management Act 1999* (VMA). It seems that even very immature 'regrowth' would be covered by the Bill.

Natural Resources Minister, Stephen Robertson has indicated the moratorium may be extended to ensure stakeholders are consulted about future protection of regrowth vegetation in these areas.

What does the moratorium mean for landholders?

The Department of Environment and Resource Management (DERM) has identified on a map the areas affected by the moratorium. Certain clearing will be prohibited under the moratorium from **12:01am on 8 April 2009** until 7 July 2009 (or at a later nominated period) except where exemptions apply. The moratorium covers the clearing of:

- all native vegetation within 50 meters of a mapped watercourse in priority reef catchments of the Mackay/Whitsunday, Wet Tropics and Burdekin; and

- mapped endangered regrowth vegetation in rural areas across the State.

It should also be noted that Property Maps of Assessable Vegetation (PMAV) applications made before 26 March 2009 will be considered under the existing legislation, with applications for PMAV's received on or after that date (and not decided at the commencement of the legislation) to be dealt with under the provisions of the moratorium.

Broadly speaking, the following vegetation clearing should not be affected:

- in areas shown as Category X on a PMAV;

- where a landholder has a valid development approval for which clearing is a necessary part;

- clearing of non-native plants, grasses and mangroves (landholders may be required to obtain approval under other legislation for the removal of these plants);

- to reduce fire hazard or to protect life and property from fire forest practice; and

- clearing for an 'urban purpose' in 'urban areas'.

Vegetation Management (Regrowth Clearing Moratorium) Bill 2009

The Bill, contrary to usual legislative principle, proposes a **retrospective commencement date to 8 April 2009**, that date being the announcement of the moratorium on regrowth clearing made by the State government. The explanatory memorandum has sought to justify the retrospective application of the Bill on the basis that the public interests outweigh the rights of individual land owners affected by the

moratorium. The Bill attempts to restrict the effect of the retrospectivity by expressly excluding criminal liability during the moratorium period, although landowners breaching the moratorium will be subject to compulsory rectification of cleared vegetation.

The 'moratorium period' will begin from 8 April 2009 and end 7 July 2009, however as provided for by clause 7, the Minister may nominate a date that is not more than 3 months, after 7 July 2009, the day the moratorium ends.

Significantly, clause 11 modifies the effect of schedule 8 of the *Integrated Planning Act 1997* (IPA), for the duration of the moratorium. The Bill annexes a modified and revised schedule in relation to operational works for the clearing of native vegetation on freehold and indigenous land. Of notable significance for developers is schedule 8, part 1, table 4, 1A (ja) which is an exemption for clearing for a 'specified activity', defined in the IPA as clearing under a development application for a material change of use (MCU) or reconfiguration of a lot (ROL) for which the DNRW was a concurrence agency. The exemption only applies to the extent it is not for the clearing of endangered or riparian regrowth vegetation, meaning that developers (who have obtained such an approval prior to the moratorium period, for a MCU or ROL) may require a further approval to clear endangered or riparian regrowth.

Clause 12 is the catalyst for most of the oppressive ramifications stemming from the Bill for landowners, developers and graziers. It provides that during the moratorium period, a relevant development application (an application that involves modified schedule 8 development) is **not a properly made application and the assessment manager must refuse the application.** Applications already submitted for assessment have not escaped the wide net cast by the Bill, with clause 13 placing restrictions on changing particular existing applications to include a moratorium area or part of a moratorium area.

Clause 14 provides that during the moratorium period, a person may apply to the chief executive for an exemption for assessable development in a moratorium area. Such an exemption would allow land owners to clear endangered regrowth and riparian vegetation without a development approval. If the chief executive grants the exemption, the development is taken to be an exempt development. However, the operation of clause 14 can quite simply become futile by virtue of clause 34 of the Bill which allows the chief executive to **stop the processing of development applications** (not approved before the halt) **including exemption applications** (see below).

Clause 22 defines 'prohibited development' for the purposes of Part 5 of the Bill which deals with offences and enforcement. Prohibited development means development that is the clearing of endangered or riparian regrowth vegetation if:

- it became assessable development under the modified schedule 8;
- the chief executive did not grant an exemption under clause 14; and
- the clearing was carried out between the beginning of 8 April 2009 and **immediately before the date of assent of the Act**.

Clause 23 is notable in that it prevents the imposition of criminal liability if the clearing was carried out from 8 April 2009 and ending immediately before the date the Bill is given assent. Up until the Bill is given assent, prohibited development is not an offence under s4.3.1(1) of IPA (being that a person must not carry out an assessable development without a development permit), although clauses 24 to 26 provide for rectification notices for cleared vegetation.

Clause 27 prevents a person exercising a right of review under the *Judicial Review Act 1991* in relation to:

- certain applications for PMAV;
- certification or amendment of a moratorium map by the chief executive; or
- a decision, or cessation of decision making, made or permitted under clause 34.

Clause 28 then removes all rights of appeal 'under any Act or other law'. Clause 29 to 32 provides an exemption to this rule allowing a person who has been refused an exemption or granted an exemption with conditions for a 'relevant development' a right of appeal. By virtue of clause 30, an appeal requires a notice of appeal to be filed within 28 days after the appellant receives notice of the decision.

Clause 34 of the Bill allows the chief executive to stop processing development applications during the period of the moratorium for which the chief executive is an assessment manager, or a concurrence agency. This provision affects:

- exemption applications under the Bill;
- relevant vegetation clearing applications which are development applications defined under IPA

that are assessable development under schedule 8, part 1 and made before or during the moratorium period; and

- 'relevant development applications' which are development applications defined under IPA.

Clause 37 of the Bill provides that a person is not entitled to claim compensation (including reimbursement) under statute law or common law as a result of the Act affecting landowner's rights. The explanatory memorandum justifies the exclusion of compensation under the Bill noting that moratorium is only being implemented as a means of exploring longer term options.

Practical consequences for land owners

The State government in 2003 introduced a similar piece of legislation in the form of the *Vegetation (Application for Clearing Act) 2003* (VACA), which had serious ramifications for landowners' rights to clear native vegetation. It was passed and commenced on 2 June 2003, but had retrospective effect in that it effectively halted the acceptance of any new applications to clear remnant vegetation (except in very limited circumstances) as from midday on 16 May 2003. It marked the introduction of, in essence, a ban on broadscale clearing of native vegetation.

The VACA was a temporary 'stop-gap' piece of legislation, which was ultimately repealed by the *Vegetation Management and Other Legislation Amendment Act 2004* (VMOLAA) effective on 21 May 2004. However, the VMOLAA at the same time introduced Section 22A of the VMA, which essentially replicates the provisions of the VACA so that the restrictions on broadscale clearing can be continued, despite the repeal of the VACA. We may see similar amendments to the VMA at the conclusion of the moratorium period, which will effectively continue the restriction on the making of an application for clearing to the extent that it involves endangered and riparian regrowth vegetation.

The effect of this Bill will be far reaching and detrimental to land owners. Land owners now face further restrictions even to maintain the productivity of their land. The Bill also fails to provide compensation for loss of property value as a result of the restrictions imposed by the Bill. As stated in the explanatory memorandum, the Bill is justified by the fact that it serves what is considered to be the 'public interest' in ensuring endangered and riparian regrowth is protected. However, it fails to recognise the cost of its effect on the loss of property value, and loss of income as a direct result of the removal of basic rights such as use and enjoyment of land. Land owners are effectively being asked to assume the burden of the cost of this 'public benefit', without compensation. Whilst the landowners' land is still freehold, it may no longer have the potential to deliver income to the landowner.

This Bill, soon to be given assent, will be seen by many as removing many basic rights afforded to land owners. The problem of impracticality and confusion regarding compliance with the Bill may well be revealed as an additional flaw over the coming months as land owners are asked to interpret the complex legal effect of 'moratorium maps', 'prohibited developments', and amended schedules.

It is recommended that property owners check at the soonest possible time to identify the impact of the moratorium on their property. Land owners may visit the DERM website at (http://www.nrw.qld.gov.au/vegetation) to create a map showing the areas affected by the moratorium. If you are affected, the State government will be consulting with stakeholders while the moratorium is in place, and developers, peak industry, agricultural and conservation groups should provide submissions by 15 May 2009 to DERM.

If you have any queries regarding the effect of the moratorium on your land, please contact HopgoodGanim's Planning and Development team.

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