

## Property

March 2010

### Vendors beware – further changes to the form 1 vendor statement commencing 1 March 2010

On 1 March 2010 further amendments to the new Form 1 Vendor's Information Statement, introduced on 1 September 2009 came into force.

The *Land and Business (Sale and Conveyancing) Act 1994* requires a person selling land to disclose information to the purchaser using a Form 1 Vendor Statement. As published in our last briefing, changes to the Act introduced a new Form 1 in South Australia on 1 September 2009. The next round of changes to the Regulations mean that another set of amendments to the Form 1 came into effect on 1 March 2010.

The intention of the changes to the Form 1 is to provide clearer information for purchasers. The changes require a vendor to disclose additional information about site contamination recorded by the Environmental Protection Authority (EPA), in Item 3 of the "Particulars relating to Environment Protection".

The additional information required to complete Item 3 of the "Particulars relating to Environment Protection" will also now form

part of the Property Interest Report produced by the Department for Transport, Energy and Infrastructure. It is essential that up to date searches are obtained if you are preparing a Form 1 on or after 1 March 2010. Transitional provisions preserve the validity of a Form 1 prepared in January and February 2010 if certain requirements are complied with.

#### Upcoming Launch:

In response to feedback on the difficulties faced by agents in the preparation of Form 1's and the significant consequences of not getting them right, Lynch Meyer will very soon be launching its online service for preparation of Form 1 Vendor Statements. All instruction forms will be available for download from Lynch Meyer's website and this service is backed by experienced property lawyers. Keep an eye on our website at [www.lynchmeyer.com.au](http://www.lynchmeyer.com.au) for the launch of this new service.



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#### Implications for Vendors

- All vendors and agents for vendors should ensure that all Form 1's prepared from 1 March 2010 are in accordance with the amendments to the Regulations.
- If an incorrect Form 1 is served on a purchaser (i.e. one which has not been updated at 1 March 2010) then the cooling period available to the purchaser does not commence until a correct Form 1 is provided.
- If the contract has settled and a purchaser was not provided with a correct Form 1 then the purchaser can seek compensation for any loss they have incurred due to receiving an incorrect Form 1 from the vendor.
- Vendors and agents should take note that the next round of amendments to the Form 1 come into effect on 31 August 2010.

“...changes require a vendor to disclose additional information about site contamination recorded by the EPA...”

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## Regulated Trees

The removal or damage of 'significant' trees is a serious offence in South Australia and is the cause of much angst among property developers and builders. In September 2009 the Development (Regulated Trees) Amendment Act 2009 was passed which introduces another class of trees called 'regulated' trees. While it is not yet law, it is something you should be aware of before it affects you.

### Background

South Australia's 'significant' tree controls came into effect on 20 April 2000. The purpose was to create a system where a tree which, due to its large size, was highly likely to contribute to aspects of the urban environment including landscape character, amenity, habitat and native fauna, local biodiversity, remnant native vegetation, or rare or endangered species.

A 'significant' tree is any tree in Metropolitan Adelaide and/or townships in the Adelaide Hills Council or parts of the Mount Barker Council with a trunk circumference of 2 metres or more measured at 1 metre above natural ground level (in the case of trees with multiple trunks, it is those with trunks with a total circumference of 2 metres or more and an average circumference of 625mm at 1 metre above natural ground level).

The controls enable Councils to require a development application for the removal of, or damage to, any significant tree in the Adelaide metropolitan area and the urban and township areas in the Adelaide Hills and Mount Barker Councils.

It was identified that the current legislation was making it expensive and time consuming for property owners and developers to remove large trees, despite those trees not contributing to aspects of the urban environment. The applications were also clogging up the planning system causing unnecessary delay.

In September 2009 the Development (Regulated Trees) Amendment Act 2009 was passed, but it is not yet law.

### What is a Regulated Tree?

The exact definition of a 'regulated' tree will not be apparent until the regulations are drafted, however it is possible that a tree will be 'regulated' even if it does not meet the current trunk circumference tests.

### Planning Test for Regulated Tree

The Council will make a preliminary assessment of a 'regulated' tree to determine whether the tree is 'significant'. The Act provides a framework for a 'planning test' in the regulations to determine this question.

A tree determined by a Council to be 'significant' will then be subject to a second tier of the assessment process and stronger Development Plan policies for retention. It is for this second tier that Councils may require an applicant to provide an arborist's report to determine the health, safety and integrity of the tree. In other cases, no professional report should be required unless there are special circumstances and a simpler assessment process will apply.

*Therefore just because your tree is large (and is deemed 'significant' under the current legislation) it will not necessarily be 'significant' under the Amendment Act.*

*On the other hand, the Amendment Act makes it possible that any tree of any size may be 'regulated' and then deemed 'significant' if it meets the new 'planning test'.*



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## Replacement of Trees or Payment to the Urban Tree Fund

The Amendment Act also provides that if a Development Application provides for the killing, destruction or removal of a 'significant' tree or 'regulated' tree then Council must add a condition to the approval providing that a certain number of trees must be planted and maintained to replace the tree.

Alternatively, you may apply to the Council to make a payment to the new 'Urban Trees Fund' in lieu of planting replacement trees.

The money in the Urban Trees Fund will go towards:

1. maintaining or planting trees which are or will (when fully grown) constitute 'significant' trees
2. purchasing land in order to maintain or plant significant trees

## Summary

The Amendment Act:

- establishes that trees may be 'regulated'.
- provides a framework for a less costly and streamlined assessment path for those 'regulated' trees that are not classified as 'significant' trees.
- revises and simplifies the criteria for the designation of a 'significant' tree or group of trees in a Development Plan.

- provides a framework for a 'planning test' in the regulations to determine if a regulated tree that is the subject of a development application is a 'significant' tree and, therefore, requires a more exhaustive assessment process.
- provides that when allowing a significant tree to be removed Council must add a condition providing for the replacement of the tree or a payment into the Urban Tree Fund.

## What this means for you...

You will need to be aware of what constitutes a Regulated Tree (which will become apparent once the Regulations are drafted). Before removing or damaging any tree (of any size) you will need to check whether that tree is 'regulated'.

You should also note that Palm Trees have now expressly been included in the Amendment Act as a tree.

While it is going to be tricky establishing whether a tree is 'regulated' or not, the framework for a less costly and more streamlined assessment process to remove 'regulated' trees will be welcomed by everyone.

We will keep you informed of the progress of the regulations.



## Site contamination update

In our last property briefing, we wrote about transferring liability for site contamination in land sale contracts.

Section 103E of the Environment Protection Act 1993 (the Act), says that if site contamination exists, for a vendor to transfer liability, they must:

- first give the purchaser a notice in an approved form
- transfer liability in the contract
- have the contract registered with the EPA.

In our view, the definition of site contamination is wide enough to include substances that are present but are not known, or proved to be present if the presence of those substances has resulted in actual or potential harm.

The EPA has confirmed its view that it will not record a contract transferring liability unless it is satisfied that site contamination exists.

### What are the implications of this?

In our experience it is not an unusual situation for an owner of property who doesn't really know if there is contamination, to agree with a purchaser as part of their deal for the sale of the property, that the purchaser will take on the liability for any contamination.

To determine whether there is actually site contamination is often a costly and time-consuming process. There is also the risk that if site contamination is then found to be present, a purchaser will not assume a transfer of liability or will not purchase the land at all. The vendor will then normally be required (under the Act) to clean up the site contamination if the polluter cannot be found.

**Under the EPA approach, vendors are practically prevented from being able to transfer liability for suspected or unknown site contamination under the mechanism in the Act**

This is likely to disappoint some people, in particular, vendors who have unwittingly caused site contamination, suspect it exists (but don't know for sure) and want to offload the possible risk on to an incoming purchaser. For those vendors, if site contamination caused by them is discovered in the future and they did not properly transfer their liability, then they may be held liable under the Act.

Under the Act, after transferring the land, parties who did not cause site contamination will not normally be held accountable if latent site contamination is found later.

The circumstances of each case will differ and until the position is clarified expert legal advice should be obtained.



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## SENIOR APPOINTMENTS



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Rebecca is a property lawyer specialising in retirement villages and aged care. She advises on sales and acquisitions of facilities, conducts regulatory due diligence on facilities and advises on regulatory compliance and other issues relating to the Aged Care Act and the Retirement Villages Act.



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David Martin has been appointed to our family law practice following the retirement of Jill Cooper. David is a senior practitioner in family law with 25 years experience. David advises clients in all areas of family law and has acted as counsel in the Family Court, Federal Court, Supreme Court, District Court and Industrial Court.



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Jody has been practising since 1998. She spent several years as Legal Counsel with the Real Estate Institute of South Australia and has a strong background in property, and planning and environmental law. Jody specialises in advising developers on planning, development, environment, Local Government, Native Vegetation and Water Licensing issues.