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Property Alert

November 2012

Lease considerations - carbon pricing and increased energy and compliance costs

The implementation of the Clean Energy Future Legislative Package on 1 July 2012 brings with it the carbon pricing mechanism (**CPM**) which will have an effect on leasing transactions Australia wide. The relevant legislation includes the *Clean Energy Act 2011*, the *Clean Energy Regulator Act 2011*, the *Climate Change Authority Act 2011* and the *Clean Energy (Consequential Amendments) Act 2011* and other Acts relating to clean energy.

Businesses, property owners and occupiers should be aware of the impact the CPM will have on the property sector particularly in respect of increased electricity costs. Landlords and tenants alike should seek to implement strategies to limit or reduce its impact in current and future leasing transaction.

What is it?

The CPM applies to Australia's biggest polluters (most notably electricity generators) who must report on, and pay a price for emitting carbon pollution. This scheme adds a cost to electricity generation and attempts to encourage polluters to invest in less carbon intensive technology, aimed at reducing Australia's total greenhouse gas emissions.

Who is affected?

It is expected that the companies directly affected by the CPM will seek to pass those costs down the supply chain. As the CPM costs are passed down, the flow on effect is likely to cause increased building expenses particularly electricity and gas costs, increased operational costs for buildings including construction costs and upward pressure on CPI (although this has been predicted to only be a once off 0.7% increase) which will impact both landlords and tenants.

The relevance of the CPM to leasing transactions is the passing on of costs under the terms of the lease document.

Not all cost increases will be directly associated with the CPM. For example, increased electricity costs may be attributed to the additional costs of transmission of electricity and there may also be increased compliance costs.

As such, lease clauses which seek to only pass on costs associated with the CPM will not necessarily permit recovery of increased costs due to transmission costs or compliance costs.

We are seeing leases which contain obligations on tenants relating to the CPM and environmental assessments of leased premises. Some clauses seek to pass on costs that may be incurred by landlords in respect of the CPM including additional repair and maintenance costs and costs of upgrading plant, equipment and services to reduce greenhouse gas emissions. Other clauses require tenants to provide assistance and information including assistance and information required by the landlord due to the CPM or to assist landlords to obtain environmental assessments of premises.

These clauses are complex and should be considered carefully as they will affect the amounts paid by tenants under a lease.

Considerations

Landlords and tenants should consider their position and obtain legal advice in relation to the below issues which are likely to arise following the CPM:

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- Gross leases and accounting/forecasting for potential cost increases
- Semi-gross leases and the importance of the value of the base year taking into account any estimated CPM increases
- Where outgoings are capped, the level at which they are capped
- Fixed costs such as after hours air-conditioning charges where a fixed fee is recoverable
- Annual rental review methods; fixed percentage vs CPI
- The ability of landlords to recoup potential cost increases and the contractual and legislative barriers to renegotiating lease terms
- Improving building energy efficiency and utilising or upgrading to low emission technology
- The need for adequate disclosure of potential increases under relevant state legislation

Landlords and tenants should dissect their energy bill to determine whether prices have gone up because of the CPM or because of other reasons such as additional costs of the transmission of electricity or compliance costs. This will impact on the lease negotiations in respect of responsibility for the increased costs and will also dictate what clauses need to be included in the lease document.

Summary

It will take some time for the effects of the CPM to filter through the supply chain to landlords and tenants. It is expected that the initial impact of the CPM will be greatest for landlords using a gross leasing structure however all members of the property sector should be prepared for the potential effects and endeavour to limit or at least control the impact the CPM has on their business.

While the overall impact of the CPM on leasing transactions is uncertain, there are positives to be taken from the likely improvement in building energy efficiency and the reduction of CO2 emissions well into the future.

Please click here to refer to our earlier publication on the carbon pricing.

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Foreign ownership of Australian agricultural land

Introduction

If you are a private foreign investor which currently owns or is looking to purchase agricultural land in Australia, you should be aware of new measures announced by the Federal Government which are aimed at improving transparency of foreign investment in Australian agricultural land. Those measures include improvements to the Australian Bureau of Statistics' data collection and consultations on the development of a national foreign ownership register for agricultural land. On 15 June 2012, the Federal Government established a working group to consult on the creation of a national register. On 23 October 2012, in her address to the National Farmers' Federation Congress in Canberra, Prime Minister Julia Gillard announced the introduction of such register.

Under the foreign investment regime currently in place a private foreign investor must seek the approval of the Foreign Investment Review Board (**FIRB**) to acquire an interest in an Australian business, including a primary production business, where the value of that interest exceeds a certain monetary threshold ($244 million or $1,062 million in the case of US investors).

The FIRB approval process involves application of a 'national interest' test. The Senate Standing Committee on Rural and Regional Affairs and Transport is currently finalising its inquiry into the application of the national interest test to purchases of Australian agricultural land by foreign companies, foreign sovereign funds and other entities in the past 12 months. The report of this inquiry is scheduled to be published on 28 November 2012.

Consultations on a national foreign ownership register for agricultural land

As set out in the Green Paper published by the Government in July 2012, the policy focus is to achieve greater transparency in relation to foreign ownership of agricultural land without imposing unnecessary burdens on investors and duplicating work already undertaken by State and Territory governments.

The Federal Government has recently announced that its working group will formally seek stakeholder views on the establishment of a national register. The consultations will involve examining:

- what ownership interests should be captured under a register;

- how the register would interact with existing state and territory land title registers, including the *Foreign Ownership of Land Register* in Queensland;
- ways to monitor and enforce compliance; and
- how information would be reported on and disclosed.

According to the Federal Government's media release, the working group will soon begin consultation with stakeholders and the States and Territories. The consultations will be led by Federal Treasury and include senior officials from the relevant Departments and agencies. On 23 October 2012 Julia Gillard has also announced the release of a discussion paper about the design and content of the register. The dates for the consultations or release of the discussion paper have not yet been confirmed.

State and Territory legislation

The Queensland State Government currently maintains the Foreign Ownership of Land Register which operates as a public register. The *Foreign Ownership of Land Register Act 1988* (**Act**) sets out the notification obligations with respect to the acquisition and disposal of land in Queensland by foreign persons and foreign companies as defined under the Act. There are a number of exemptions from the notification requirements which apply, for example, to personal representatives and beneficiaries of deceased persons. The relevant interest in land is defined under the Act to exclude various interests, including security interests, easements, leases for a term not exceeding 25 years, minerals and petroleum and natural gas deposits. The Act contains complex provisions to determine level of foreign control required for the Act to apply. The Act prescribes penalties for non-compliance or giving false or misleading information. If a foreign person or foreign corporation is convicted of an offence under the Act in respect of the land, the land may, in certain circumstances, be forfeited to the State of Queensland.

As a separate initiative, the Family First Party introduced the *Foreign Ownership of Land Bill 2012* into the South Australian Parliament in July this year. The Bill mirrors the *Foreign Ownership of Land Register Act 1988* which currently operates in Queensland, and arguably reflects the mood of the Federal Government.

The *South Australian Foreign Ownership of Land Bill 2012* contains identical provisions to the Queensland Act. The Bill is currently being considered by the South Australian Legislative Council.

Watch this space

Any further regulation of foreign ownership of land in Australia, including introduction of a national register, will involve striking a balance between addressing the concerns of the Australian public and achieving the Government's policy objective of fostering foreign investment in Australian agriculture. It remains to be seen what format will be adopted for the proposed register. We will provide further updates in relation to any changes to the legislative regime affecting foreign ownership of land in Australia in our upcoming e-Alerts.

If you require any advice on FIRB requirements, foreign ownership disclosure obligations in Queensland or any of the measures proposed by the Federal Government, please contact us.

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Insolvency and real property - disclaimer of lease by landlord

In a recent decision by the Victorian Supreme Court (Court of Appeal) in *Re Willmott Forests Ltd* [2012] VSCA 202 (**Willmott**) it was held that a landlord in liquidation can bring both the contractual and proprietary aspects of a lease to an end by disclaiming the lease as an onerous contract under the winding up provisions of the *Corporations Act 2001* (Cth) (**Act**).

Background

In Willmott, the landlord was a forestry company who granted leases to growers under a managed investment scheme. The landlord went into liquidation and its liquidator sought leave of the Court to sell its land to third parties, free of the leases.

Section 568 of the Act allows a liquidator to disclaim 'property' of a company in liquidation or contracts entered into by the company. 'Property' is defined under that section as consisting of (among other things) 'land burdened with onerous covenants' or 'a contract'.

The growers contested the proposed disclaimer, basing their argument on the legal principle that a lease is both a contract and an interest in property. The growers argued that disclaiming the leases (while ending the contractual obligations) should not bring to an end the proprietary interests in the land enjoyed by each tenant (in respect of which it was agreed that the landlord's covenant to provide possession and quiet enjoyment was the only continuing liability).

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Issue and decision

The critical question facing the Court of Appeal was whether a leasehold interest in land could be fully extinguished by the disclaimer of the lease agreement by the liquidator of the landlord, pursuant to section 568(1) of the Act.

The Court ruled that it could.

In the Court's view, section 568 of the Act was designed to enable a liquidator to be released from its obligations and to release a company from liability. Section 568D(1) of the Act limits the effect of a disclaimer on third party rights and liabilities only to the extent necessary to 'release the company or its property from liability'. The Court held that the word 'liability' should be given its widest possible meaning, and includes the obligation of a landlord to provide possession and quiet enjoyment.

In the context of section 568, the leases in question must be treated as a contract and not as a proprietary interest, meaning that if the contract is disclaimed, the proprietary leasehold interest is also extinguished. This view continues the recent trend of Australian courts to consider contemporary commercial leases from a contractual, not proprietary, perspective.

However, the Court emphasised that statutory remedies under the Act were available to tenants and other aggrieved parties. For example, under section 568D(2) a tenant may seek to recover losses incurred as a result of the disclaimer by proving as a creditor of the landlord following liquidation.

Sections 568B and 568E provide a further remedy by allowing a tenant to apply to the Court to have the disclaimer set aside on the basis that the prejudice they will suffer is 'grossly out of proportion' to the prejudice to the landlord's creditors.

Practice note

It will not always be in the interests of a liquidator to disclaim a lease under which a commercial rent is being paid, as such a lease would generally improve the value of the land as an asset. A disclaimer is more likely to occur where a lease is a burden on the land, as it was in Willmott where the leases were part of a wider forestry scheme and were restricting the sale of the unencumbered title to the land.

In light of this decision, tenants and third parties might need to consider the solvency of a landlord where rent payable is under market or the arrangements impose other adverse obligations on a landlord. In such cases, it would therefore be prudent to investigate and consider the landlord's financial position prior to entering into a lease.

If the lease secures a key strategic location for a tenant, or a tenant invests heavily in the construction or fitout of the premises, the potential loss to the tenant upon disclaimer of the lease can be substantial. Whilst these factors may be relevant to a tenant's claim under the statutory remedies mentioned above, the availability of those remedies is dependent upon other factors going to the prejudice to be suffered by the landlord's creditors which are beyond the control of the tenant. In extreme cases a prudent tenant may require some form of security from the landlord.

If you think you may be affected by the disclaimer of a lease as a result of the liquidation of the landlord company, please contact us. As noted above, the Act provides a number of remedies to affected parties to address the consequences of the disclaimer. We can provide specific advice in relation to available remedies and other options to protect your interests.

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Legislation update

CPI Index Re-referencing

Summary

The Australian Bureau of Statistics (ABS) has, for the first time in over 20 years, announced that it will be 're-referencing' the Consumer Price Index number to 100 from the end of the September 2012 quarter.

This will have an effect on the calculation of increases in annual amounts payable under contracts (including, for example, how rent is reviewed under a lease).

How does this affect CPI reviews in a lease?

If a lease contains a clause requiring the rent to be reviewed in line with the CPI, the review mechanism may be expressed by reference to either:

- a percentage increase (being the percentage change in the relevant CPI number over a 12 month period); or
- a formula that refers to the change in the relevant quarterly CPI index over a 12 month period.

The change to the index reference period **does not** change how a CPI review clause is to be drafted. It **does** however change how a CPI review clause affects the rent payable under a lease.

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Calculating CPI increases

In instances where a percentage change clause is used to calculate increases in rent, the ABS will ensure that those percentages are calculated by reference to indexes with the same index reference.

When using the formula method described at paragraph 2 above, care will need to be taken to ensure that the indexes used have the same index reference period.

Where to from here?

CPI increase provisions in contracts (including leases) should be reviewed to determine whether the appropriate adjustments need to be made to take the re-referencing into account. The ABS will issue a conversion factor for each CPI group (which can then be used to calculate the true differences in CPI from quarter to quarter), once the re-reference is published.

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Section 9AA- Sale of Land Act 1962 (Vic)

The amendment to section 9AA of the *Sale of Land Act 1962* which proposed that certain warnings be placed on the front page of off-the-plan contracts of sale has been abandoned due to stakeholder concerns about the possibly ambiguous meaning of 'front page'. On 1 December 2012, the *Residential Tenancies and Other Consumer Acts Amendment Bill 2012* will come into operation which will require that the notice of warning to purchasers be placed conspicuously in the contract.

The warnings relate to:

- the ability of a purchaser to negotiate the deposit amount payable under the contract
- the possibility of a lengthy period between signing the contract and becoming the registered proprietor of the land
- the possibility that the value of the land may change during the period between signing the contract and settlement

The original Bill proposed that a purchaser would have the right to rescind a contract on the basis that the warnings had not been included however, the revised Bill removes a purchaser's right to rescind a contract for an off-the-plan sale of land under section 9AE of the Sale of Land Act 1962 where there has been a failure to include warnings in a conspicuous place in the contract. Property developers should be aware of these changes.

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Retail Leases Amendment Bill 2012

A Bill to amend the *Retail Leases Act 2003* (Vic) (**the Act**) has recently been introduced into the Victorian Parliament. The Bill repeals section 25 of the Act and removes the obligation on landlords of retail premises to notify the Small Business Commissioner of particular details within 14 days of entering into, or renewing, a lease. Such details included the landlord and tenant's name and addresses in the Act, the date the lease was signed and the expiry date. Currently, there is no mechanism or requirement to update the register on termination or amendment of the lease. The information collected served no significant purpose and was a source of unnecessary costs. The amendments are said to be consistent with the Victorian Government's commitment to cut business costs and red tape, with an estimated $700,000 per annum in compliance costs to be saved by Victorian retail landlords. The proposed amendment has the support of the Victorian Competition and Efficiency Commission and the Productivity Commission.

The Bill will also address ambiguities in the Act surrounding the obligations on landlords and prospective landlords to provide a copy of the proposed lease, prescribed information brochure and a disclosure statement, as well as the prohibition on seeking or accepting key money.

Landlords should be aware of this Bill and watch for updates as to its progress through Parliament.

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Sustainable Planning and Other Legislation Amendment Bill 2012

On 13 September 2012, the *Sustainable Planning and Other Legislation Amendment Bill 2012* was introduced into Queensland Parliament (**the Bill**). The Bill has since been referred to the State Development, Infrastructure and Industry Committee for review, with the committee being required to report back by 6 November 2012.

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The Bill is seen as the first major piece of planning reform introduced by the State Government, with the objective being to further streamline Queensland's current planning and development system that has been touted by many within the industry as being overly complex, time consuming and expensive.

The Bill seeks to achieve a more streamline process by:

1. Providing for the Chief Executive of the Department of State Development, Infrastructure & Planning to assess particular development applications as assessment manager or referral agency enabling the coordination of all State responses to a development application so that there will be a consolidated State response.
2. The removal of master planning and structure planning arrangements, as those arrangements have been considered to be inefficient and to have not added value.
3. The removal of the 'pre-requisite' requirement for developers to obtain, where appropriate, State Resource Entitlements (e.g. entitlement to interfere with a State Controlled Road), prior to lodging a development application with the assessment manager.
4. Providing the assessment manager with discretion to receive and decide a development application that is lodged without the mandatory supporting information as indicated in the relevant Integrated Development Assessment System form.
5. Providing a maximum level of assessment for certain 'low risk' operational works applications.
6. Providing the Planning and Environment Court with greater powers in regard to the issuing of costs orders against parties to a proceeding. In particular, changing the default cost position from each party bearing its own costs to costs following the event, that is, in the event a party is successful in a proceeding, the successful party gets its costs.
7. Providing the Chief Judge of the District Court with the power to issue directions to the ADR Registrar to exercise specific powers of the Court, such as deciding minor disputes and routine procedural applications, for example the making of orders to progress a matter in circumstances where there is no objection by a party to the terms of the Order.

It is expected that the Bill is likely to take effect in December 2012. However, the provisions relating to points 1, 6 and 7 above are expected to take effect early in the New Year to enable administrative arrangements to be finalised.

Overall the Bill ought to be seen by most in the development industry, particularly developers, as a positive attempt by State Government to stimulate growth in Queensland by streamlining those requirements of the development application process that were seen by many as being overly onerous, time consuming and expensive.

However, in light of the overhaul of the cost regime in the Court, developers/commercial competitors will need to carefully evaluate the prospects of their case, prior to commencing proceedings against a decision of the assessment manager. Similarly, assessment managers, most often local governments, will also need to carefully assess the conditions/grounds of refusal they impose on the development and ensure they are reasonable, relevant to and not overly onerous on a development approval.

For more information on the Sustainable Planning and Other Legislation Amendment Bill 2012 please contact Thomsons Environment, Planning and Climate Change team.

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A New Planning System for NSW – the reforms continue

Outline

Following its release on 14 July 2012, more than 1000 written submissions were received in relation to the Government's Green Paper.

Our alert on the Green Paper is available here and public submissions made can be reviewed here.

Meanwhile, planning reforms continue at a rapid pace in NSW ahead of the release of the White Paper.

Restructuring of the Department

On 6 September 2012, the Planning Minister announced a restructuring of the Department of Planning and Infrastructure (**DoPI**), to some extent, as part of the new 'Delivery Culture' proposed in the Green Paper.

Closer analysis of the new DoPI executive structure reveals certain priorities beginning to emerge among the '23 transformative changes' contained in the Green Paper. For instance, priorities in the restructure appear to be: 'delivery culture', 'community participation', 'increased code assessment', 'ePlanning' and 'Subregional Delivery

Plans'. Potential metropolitan, rural and regional planning 'regions', which are to be aligned with some of the proposed Plans in the new system, are also noticeable.

Further information about the DoPI restructure is available here.

White Paper Workshop

On 11 October 2012, the Planning Minister hosted a half day White Paper workshop at Technology Park to discuss the Government's preparation of the White Paper. The workshop was attended by some 350 to 400 people.

The workshop included discussion about the Green Paper, submissions received, and facilitated presentations about relevant issues. Among other things, the Minster raised two key issues:

- Methods of community engagement – including the concept of 'random selection' of communities to test public interest and input into the planning system; and
- Local government working together at a regional level.

The workshop also included the use of handheld voting devices and a question and answer panel discussion. Overall, based on the questions asked:

- 84% supported a community participation charter;
- 70% supported 'random selection' as a means of community panel representation;
- 89% supported strategic planning to streamline development approval;
- 84% supported the four proposed levels of new plans; and
- 31% supported plan-based infrastructure levies (as set out in the Green Paper).

The full results of the voting can be viewed here. The outcomes of the White Paper workshop are to assist with the creation of the White Paper.

Exempt & Complying Codes

On 12 October 2012, the Government released proposed:

- Major changes to the *State Environmental Planning Policy (Exempt and Complying Development) Codes 2008* (**Codes SEPP**); and
- Supporting amendments to the *Environmental Planning and Assessment Regulation 2000* (**Regulations**).

The proposal allows a wider range of commercial, retail, industrial and residential development types to obtain code-based approvals.

The Green Paper recommends the expansion of code-based assessment, as one element of a new Streamlined approvals process in which code-based approvals are to be issued within ten days. While State Environmental Planning Policies are proposed to be abolished as part of the new planning system, these amendments to the Codes SEPP appear to herald the expansion of code-based assessment.

(**Exempt**) The proposed changes introduce new types of exempt development, that do not need planning or construction approval, including:

- An expanded range of 'use change' provisions to include retail, industrial and commercial premises not previously included (eg. 'self-storage premises');
- Six common types of business signage;
- Community notice, public information, internal advertising, real estate and election signs;
- Outdoor footway dining of up to 20m^2 (for no more than 20 persons) for restaurants and cafes;
- Temporary uses and structures;
- Temporary expansion of trading hours for licensed premises at specified times; and
- Temporary expansion (to 24 hours) of commercial trading hours in the lead-up to Christmas.

(**Residential**) The proposed complying development changes for residential, requiring a complying development certificate, include:

- Maximum site coverage and floor area of dwellings;
- Construction on the boundary and setbacks (including corner allotments) for dwellings and outbuildings;
- Detached studios;
- Internal alterations/refurbishments to residential accommodation including common areas in strata buildings; and
- Excavations and basements.

(**Retail, Commercial and Industrial**) The proposed complying development changes for retail, commercial and industrial include:

- Additions to existing shops of up to 50% of the existing floor area or 1,000m^2, whichever is lesser;
- Additions to commercial offices of up to 50% of the existing floor area of 2,500m^2, whichever is lesser; and
- New industrial buildings of up to 20,000m^2 on land already zoned for industrial development.

(**New approvals and conditions**) Changes to the

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Regulations include new provisions which assist in the proposed expansion of exempt and complying development in the Codes SEPP. These changes include requirements for new approvals, such as:

- (**classified roads**) certification being required from Roads and Maritime Services where a new building or additions over 5,000m^2 are proposed adjacent to a classified road;
- (**contaminated land**) certification being required by a qualified person where a new building or change of use is proposed on contaminated land; and
- (**fire safety**) an independent report on potential fire safety upgrades for additions and alterations to existing commercial and industrial buildings constructed before 1993.

The changes to the Regulations also specify conditions for complying development certificates, including:

- (**contributions**) the payment of section 94 contributions for complying development in accordance with a contributions plan and, where timing is not specified in the plan, prior to the commencement of work;
- (**security deposits**) the payment of a security bond for complying development of $25,000 or more, in certain circumstances, where the council has a policy in place requiring the payment of bonds; and
- (**public infrastructure**) the protection of road, rail and other public infrastructure during construction.

(**New notification requirements**) Under the proposed changes, neighbours are to be notified by a relevant certifier if they are within 50 metres of a proposed new house, additions to a house, a new commercial or industrial building, or if demolition is to take place. Approval cannot be given for five days after this notice is given. A further five days written notice to the same neighbours is required prior to building commencing.

(**Covenants**) For the purpose of enabling development, under the proposed changes, any agreement, covenant or other similar instrument that restricts the carrying out of development does not apply even if registered on the title to a property, including a covenant imposed by a council in certain circumstances.

The proposed amendments incorporate improved design standards for a number of development types (including front facades, car parking and access and landscaped areas) and include a new Fire Safety Code.

A range of materials is available here which supplement this brief snap shot of these significant changes.

The Government is now requesting submissions on the proposed changes to the Codes SEPP. Written submissions can be made:

- **online** via: codes@planning.nsw.gov.au
- **by mail** to: GPO Box 39, Sydney NSW 2001

The closing date for submissions is **9 November 2012**.

Big changes to DCPs

On 24 October 2012, the *Environmental Planning and Assessment Bill 2012* was introduced into Parliament and passed the lower house without change. Among a number of key changes in the Bill are those which relate to Development Control Plans (**DCPs**), including new provisions which:

- Set out the principal purpose of a DCP – being the provision of guidance on the following:
  - giving effect to the aims of any environmental planning instrument (**EPI**);
  - facilitating development that is permissible; and
  - achieving the objectives of land zones;
- State that the provisions of a DCP are not statutory requirements;
- Provide that a provision of a DCP (whenever made) has no effect to the extent that:
  - it is the same as a provision in an EPI applying to the same land;
  - is inconsistent or incompatible with any such EPI; or
  - it has the practical effect of preventing or unreasonably restricting development that is otherwise permissible under any such EPI and that complies with the development standards in any such EPI;
- Clarify how DCPs are to be taken into account during the development assessment process, for example:
  - a consent authority is to give DCP provisions less weight and significance than is given to an EPI;
  - if a DCP sets standards with respect to an aspect of development and a development application complies, the consent authority is not to set more onerous standards for that aspect of the development;
  - if a DCP sets standards with respect to an aspect of development and a development application does not comply, the consent authority is to be flexible in applying those standards and allow alternative solutions for that aspect of the development; and
  - a consent authority is not to have regard to how the provisions of a DCP have been applied previously or may be applied in the future.

Overall, these represent big changes to DCPs which are likely to be welcomed by the development industry. Over time DCPs have become cumbersome and overly detailed documents often containing extremely prescriptive development controls. There is some doubt this was ever the original intention of DCPs.

DCPs have been prominent is case law. The NSW Court of Appeal held in 2001 that a DCP had to be a 'fundamental element' in, or a 'focal point' of, the determination of a development application. In 2004, the NSW Land and Environment Court held that where a DCP had been applied consistently by a council it would be given significant weight.

The proposed changes alter the primary purpose of DCPs by specifying they are for 'guidance only', have no effect when inconsistent or incompatible with an EPI, are to be given less weight and significance than an EPI, and their previous application in the past or future is not to be taken into account.

If the Bill is passed by the upper house, the proposed amendments are likely to assist the development industry by enabling a more flexible approach in the application of DCPs. Coupled with proposed amendments to the Codes SEPP, overall these changes are likely to boost development in NSW.

With regard to proposed transitional provisions in the Bill, there is likely to be potential for the development industry to take advantage of these beneficial changes for planned development.

Other changes in the Bill include enabling regulations to be made to:

- Exclude certain residential development on bush fire prone land from the special consultation and development requirements of the NSW Rural Fire Service; and
- Require the payment of development contributions under complying development certificates, in particular, where a contributions plan has not made provision for development approved as complying development.

A full copy of the Bill is available here.

White Paper

The Planning Minister has stated that the Government will release a White Paper and draft legislation for public exhibition later in 2012. The White Paper will provide greater refinement on how the new planning system is to be implemented in practice.

At that time, community and industry submissions will be invited on the White Paper and the draft laws, for what is expected to be an extended period of up to three months into early 2013.

The Government anticipates introducing new legislation into the Parliament in early 2013 with a commitment to have new planning laws in place early next year.

With the pace of reform showing no sign of abatement, we will be providing targeted briefings on the White Paper and accompanying draft laws to keep you up-to-date and informed of the latest developments. These will focus on the keys issues to be considered by the community and industry.

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