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INTRODUCTION

Welcome to the HWL Ebsworth Newsletter for September.

Contaminated land issues affect purchasers, developers, landlords and tenants. Amendments are proposed to the current legislation for contaminated land which will result in a major overhaul of the current system. If the legislation is introduced, property interest holders will need to be aware of wider duties to notify the EPA and consider carrying out audits of existing sites which may need to be reported to the EPA.

From 1 October 2008, any donation or gift by a developer/owner associated with a development application must be disclosed.

The Productivity Commission Inquiry has made recommendations for changes to Retail Tenancy leases in Australia to address the balance between landlords and retail tenants. The recommendations are separated into short term, medium term and long term recommendations including standardisation of legislation between the States.

Contaminated Land Management Amendment Bill 2008

The *Contaminated Land Management Amendment Bill 2008* has been introduced into Parliament and if proclaimed will make significant amendments to the *Contaminated Land Management Act 1997 (Act)*.

The proposed amendments include the following:

- Clarification of the position that more than one person may be responsible for contamination.
- Imposition of a higher obligation on a person's duty to report contamination.
- The Environmental Protection Authority (EPA) will be able to regulate contaminated land if the EPA considers that the contamination is significant enough to warrant regulation (previously the threshold was whether the contamination presented a significant risk of harm).
- The EPA is given the power to order certain persons to carry out preliminary investigations in respect of contamination.
- In the event that a person provides false and misleading information in compliance or purported compliance with the Act, they can be charged with an offence.
- Changes to the approach of managing the remediation of contamination.

The differences between the current regime and the proposed regime in respect of two of the key changes are outlined below:

Responsibility for Contamination

Current Regime	Propose Regime
<p>Under the current regime, an appropriate person is chosen as being responsible for the contamination in the following order:</p> <ol style="list-style-type: none"> 1. Polluter of the land 2. Owner of the land 3. Notional owner of the land 	<p>Under the proposed regime the EPA is only required to follow the hierarchy in the current regime as far as is practicable.</p> <p>A possible consequence is that the person with the highest financial capability could become the one responsible to comply with a management plan to remediate land.</p>

Duty to Report

Current Regime	Propose Regime
<p>Under the current regime, a person who becomes aware that the person's activities have contaminated the land in such a way as to cause a significant risk of harm, must notify the EPA that the land has been contaminated.</p>	<p>Under the proposed regime a higher duty to report is imposed. A person whose activities have contaminated land must notify the EPA that the land has been contaminated. This duty is extended to persons who ought reasonably have been aware of the contamination.</p>

Written by Emma Napoli, Associate

Disclosure of Political Donations and Gifts

The Local Government and Planning Legislation Amendment (Political Donations) Act 2008 (**Act**) was passed by the NSW Parliament on 30 June 2008 and will come into effect on 1 October 2008 (deferred from 15 September 2008 to allow councils time for implementation and training).

Any reportable donation or gift must be disclosed when a planning application is made. The Act defines a "reportable donation or gift" as \$1000 or more to a "party elected member, group or candidate" and which is given within a 24 month period prior to the making and/or determination of a planning application.

The Act provides that not only does a developer have to disclose any donations or gifts but also "any person with a financial interest in the application" or any person "associated" with the developer must disclose reportable donations made within 24 months before the application was made and/or determined. Failure to comply with the disclosure requirements could result in a maximum \$22,000 fine and 1 year imprisonment.

The Department of Planning will be publishing a comprehensive guideline online to assist councils in the implementation of the Act.

Written by Simone Nokes, Solicitor

Retail Tenancy Leases in Australia - Productivity Commission Inquiry

The Productivity Commission Inquiry, released on 31 March 2008, analyses the current market for retail tenancies in Australia, seeking remedies to the difficulties encountered by small retailers. These difficulties are believed to be due to the imbalances in bargaining power between small tenants and large landlords.

The Commission has made a number of recommendations to the States and Territories (**States**), to be implemented within the next 2 years, the aim of which is to reduce constraints on the retail tenancy market, improve the efficiency within which it operates and provide a pathway to lowering compliance administration and information search costs.

The measures for the immediate future highlighted by the Commission are:

1. States should avoid widening the gap between the retail tenancy market and the market for commercial tenancies and avoid more stringent and prescriptive legislation.
2. The Commission recommends that transparency be increased in the market by facilitating the lodgement of a standard one page lease summary at a publicly accessible site.
3. Improve the national consistency of tenancy information - States in conjunction with the Commonwealth should encourage the development of a national reference lease.
4. The jurisdictional differences in the provisions for unconscionable conduct applying to retail tenancies should be aligned where practicable.
5. The Commission recommends the removal of retail tenancy legislation which provides no improvement in

operational efficiency, compared with the broader market for commercial tenancies.

The recommendations of the Commission for the medium term are:

1. That the more prescriptive elements of retail tenancy legislation are removed.
2. While recognising the merits of planning and zoning controls in preserving public amenities, the Commission recommends the examination and potential relaxation of the controls that limit competition and restrict retail space and its utilisation.

In the long term, the Commission recommends that States in conjunction with the Commonwealth facilitate the introduction of a voluntary national code of conduct, enforceable by the ACCC for shopping centre leases. The Commission also recommends the introduction of a nationally consistent regulatory framework with reference to a nationally consistent model legislation, with the view to lower compliance and administrative costs.

We will keep you informed on any new revelations in the retail tenancy legislation following the Commission's recommendations.

Written by Vincent Tripodina, Solicitor

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