

REAL ESTATE MATTERS

May 2015

Landmark Native Title Settlement

The Western Australian Government has reached a landmark settlement with Noongar traditional owners of the State's south-west.

Native title over the south-west is being exchanged for the formal recognition of Noongar people as traditional owners of Noongar country, along with a funding package worth AU\$1.3 billion.

The settlement includes:

- recognition of Noongar people through the Noongar Recognition Bill;
- establishment of the Noongar Boodja Trust (**Trust**) with annual funding support of AU\$50 million for 12 years;
- establishment of six Noongar Regional Corporations with annual funding support of AU\$10 million for 12 years;
- creation of a Noongar Land Estate through the transfer of 320,000 hectares of Crown land; and
- transfer and refurbishment of 121 properties to the Trust by the Department of Housing.

The next step will be for the Government to execute and file the six Indigenous Land Use Agreements (**ILUAs**) with the National Native Title Tribunal. It is anticipated this will occur in June 2015.

Once the ILUAs are registered on the Register of Indigenous Land Use Agreements native title will be fully and finally resolved across the South West of Western Australia. It is anticipated that settlement will be finalised in July 2016 or June 2017, depending on whether any objections are received.

Our Recent Awards

- Squire Patton Boggs is recommended as a Leading WA Property Law Firm 2015 by Doyle's Guide
- Carl Black is recommended as a Preeminent Lawyer in Doyle's Guide 2015 WA Property Lawyers
- Fabio Fior is listed by Best Lawyers in Australia for Construction/Infrastructure Law, Government Practice, Real Property Law 2016
- Carl Black is listed by Best Lawyers in Australia for Real Property Law 2016.



Changes to Regulations Give Development Applicants More Choice

The Western Australian Government recently announced changes to the opt-in and mandatory thresholds for development applications under the *Planning and Development (Development Assessment Panels) Regulations 2011 (WA)*. These regulations provide thresholds for the assessment of planning applications by the Development Assessment Panel.

The reduction of opt-in thresholds will enable smaller-priced developments to be reviewed by an independent panel if applicants prefer. Additionally, the increase in mandatory thresholds will allow higher-priced developments to be considered by local government.

Location of Project	Previous Range and Threshold	New Range and Threshold
City of Perth	AU\$10-15 million (AU\$15 million threshold)	AU\$2-20 million (AU\$20 million threshold)
Outside City of Perth	AU\$3-7 million (AU\$7 million threshold)	AU\$2-10 million (AU\$10 million threshold)

These changes signify a win for property developers who can enjoy more choice when it comes to receiving government approval for their proposed developments.

Email Exchange Leads to Binding Agreement

Preliminary lease negotiations that occur through the exchange of emails may lead to a legally binding agreement in light of the Western Australia Court of Appeal's (**Court**) recent decision of *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASCA 21.

The Facts

Gamol Pty Ltd (**Gamol**) leased part of a commercial building in West Perth (**Premises**) to Vantage Systems Pty Ltd (**Vantage**) in 2003 (**Original Lease**). The lease term was three years, and the option to renew for a further three years was exercised in 2006. The arrangement also included a licence to use six car bays on the Premises for the duration of the Original Lease. Vantage also sub-let part of the Premises to Deugro Projects Pty Ltd (**Deugro**) for the Original Lease period. In 2007, Priolo Corporation Pty Ltd (**Priolo**) purchased the Premises from Gamol. Priolo became both the owner and lessor of the Original Lease as a result of the purchase.

Negotiations between agents for Priolo and Vantage for a new lease began in May 2009 (**New Lease**), as the Original Lease was expiring in June. On 4 June 2009 Priolo sent an email to Vantage stating that Priolo was prepared to proceed with a New Lease on the basis of the proposal outlined in the email. Notably, the proposal contained an error in the amount of the car park licence fee which was stated as AU\$375 annually instead of AU\$375 per month.

On 10 June 2009, Vantage replied to the proposal by email stating that both Vantage and Deugro were agreeable with the proposal and to proceed with preparing the documents.

On 11 June 2009, Priolo began to prepare draft lease and licence agreements using the email proposal and the Original Lease as a base for the terms of the lease. In September 2009 Vantage contacted Priolo stating that they were holding over on the Original Lease, and that Vantage intended to vacate the Premises with one month's notice, pursuant to the Original Lease. However, Priolo sought to rely on the email proposal and the exchange of emails between the parties, as constituting a binding agreement for lease and licence.

The Decision

Priolo sued Vantage for damages due to breach of the agreement. At first instance, the trial judge found that the parties intended to create a legally binding relationship, although formal lease and licence documents were yet to be executed. Vantage's acceptance of the email proposal amounted to a sufficient meeting of minds for there to be an agreement.

Vantage appealed against the initial decision. On appeal, Vantage argued that the licence fee error and negotiations over the 'make good' clause in the New Lease, plus the failure to finalise formal documents meant that an agreement had not been reached.

The Court focused on Priolo and Vantage's 'intention to contract', as opposed to what the parties intended by the alleged agreement, and ultimately upheld the initial decision. The Court found that the parties objectively intended to be bound immediately and exclusively by the email proposal after the email negotiations ended.

Significance for Transactions

This decision highlights the importance of clarity and caution in email correspondence. Despite the casual nature of this communication, parties may still find themselves bound to an agreement during negotiations. If parties do not intend to be bound until the final documentation is executed, this should be clearly communicated during the pre-contractual phase.



Pastoral Leases Set to Expire

Pastoral leases that currently exist in WA will expire on 30 June 2015. This also means that any interest recorded against pastoral leases, such as mortgages, caveats and subleases, will expire on this date. If pastoral leases are to carry forward after this date, a lease renewal process must be conducted with the Department of Lands. Similarly, if any interests recorded against the pastoral lease are to be transferred, interest holders will need to note the interest in a new form, obtain the Minister for Lands' consent and re-register the interest by lodging the appropriate documents with Landgate. Please contact us if you believe you will be affected by these changes, and have not yet commenced the process of protecting your interests.

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Update: E-conveyancing is Online!

With the final phase of PEXA being rolled out in WA in May 2015, e-conveyancing in WA will soon be fully functional. The first release (which occurred in June 2014) allowed for the stand alone discharge of mortgages and has been successfully implemented with banks. The second and final phase allows lawyers and settlement agents to conduct transfers of land and other transactions on line. Lawyers will be required to verify their client's identity at the beginning of the transaction, and then obtain an authority to conduct the settlement.

If e-conveyancing is used for any sale of land, it is important to ensure that the electronic conveyancing annexure is attached to the Joint Form of General Conditions. This covers the conditions applicable to an electronic transfer of land.

Benefits of e-conveyancing include:

- Efficiency – settlement and lodgement occur simultaneously;
- Reduction in manual processes and paperwork – no need for parties to physically attend settlement; and
- Reduction in failure rate of settlements – an online pre-verification system is used.

The e-conveyancing system does not replace the existing paper system but works alongside it. At present, not all settlements are able to be conducted online, but PEXA will have more capability as it develops.

Squire Patton Boggs will be a subscriber to PEXA, and can authorise and conduct conveyancing transactions online on your behalf. Please contact us if you require any further information, or wish to discuss how to use PEXA in your business.



Darwin Update

The Northern Territory (NT) Government just released its budget for the 2015-16 financial year (**Budget**), and it has a heavy focus on infrastructure and housing development.

Specifically:

- Over the next 10 years, 6,500 homes will be released in the NT. The NT Government has announced it will invest AU\$45.5 million in land release programs, which are aimed to deliver these homes.
- Another AU\$56.4 million will be injected into commercial and industrial releases, including the Brewer Estate Heavy Industrial subdivision, Middle Arm, Darwin Business Park and the Wishart Road developments.

- The Budget also includes investment in remote housing, including AU\$147 million to construct new housing and upgrade existing housing in remote communities, plus AU\$73.7 million to provide property and tenancy management for remote indigenous public housing.

Overall, the Budget will allocate AU\$1.39 billion for investment in roads and infrastructure.

Our Darwin office is currently working with the NT Government on its largest and most important land release, being the 168 hectare Berrimah Farm land release. This will yield 3,000 – 4,000 residential blocks, plus a range of other mixed commercial and social infrastructure uses.

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