SQUIRE PATTON BOGGS

Real Estate Matters

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The Traps and Pitfalls of Development Contribution Schemes and How Best to Avoid Them

What Is a DCS?

Development contributions allow a local government to recoup some of the benefit gained by developers in return for its permission to undertake a given development. These contributions are applied to provide infrastructure such as roads, utility service ways or public open space. Development Contribution Schemes (**DCSs**) are incorporated into the local town planning scheme document and carry the same weight as State legislation.

Why Is Everyone Talking About DCSs?

In recent months, we have received multiple instructions to advise on the operation, interpretation and reform of DCSs. These schemes are proving to be a thorn in the side of local governments and developers alike.

We expect to see more clients presenting with issues around the operation and interpretation of DCS, including possible litigation of statutory interpretation issues by developers.

What Is Going Wrong and What Can Be Done About It?

DCSs are often complex statutory instruments, which may encompass:

- Complex contribution formulas for the collection developer's contributions
- Varied descriptions of the relevant works for which contributions can be collected
- Alternate ways in which contributions may be applied
- One or more methodologies for the audit of contributions collected
- Various mechanisms regarding how excess contributions may be returned to landowners

Complex agreements often give rise to interpretive issues. In our experience these difficulties are often compounded in the case of DCSs, as:

- Local governments do not always follow a pro forma scheme for any two development areas
- The schemes tend to be poorly drafted documents

In our experience this means that complex and costly statutory interpretation advice may be required to:

- Resolve issues surrounding definitions
- analyse the proper function of contribution formulas
- interpret how excess contributions may be properly returned

Due to the large volumes of money that may be collected under DCSs, any interpretation errors are potentially costly. Interpretation issues may not be limited to the scheme itself and tax considerations should not be neglected. For example, we have advised on the GST implications of land acquisitions and disposals under DCSs.

To avoid these difficulties, some clients have sought a legal review *prior* to the DCS reaching the local government forum for debate. This is a proactive way that local governments can limit their exposure to the pitfalls of DCSs that are becoming increasingly common.

Other clients have invited us to be part of a holistic review of existing schemes in order to develop a sound pro forma scheme to address historical difficulties encountered, or if money has not started to flow, where future issues are anticipated.

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Squire Patton Boggs' South Perth Success

The proposed high-rise apartments in South Perth have attracted significant media attention. Margie Tannock and the Planning & Regulatory Approvals team have been acting for two individual property owners in the vicinity, who recently won a Supreme Court judicial review of the decision to grant the planning approval to a 29 storey building on Mill Point Road. The matter has been appealed to the Court of Appeal by the property developers, and is expected to be heard later this year. Despite the ongoing legal proceedings, the developer of the site lodged another application on the same site, this time for 44 storeys. The 44 storey application was refused by the Metro Central Joint Development Assessment Panel (JDAP) on 13 July, marking a further victory for opposing residents. However the battle over the site may continue if the developer appeals the JDAP's decision to the State Administrative Tribunal.

Also in the City of South Perth, Margie Tannock and her team had another successful win in the Supreme Court with respect to the proposed Dan Murphy's development in Como. The City of South Perth sought a judicial review of a JDAP decision to approve the development. The development proposed includes the demolition of an existing bottle shop, the construction of a Dan Murphy's, internal and external refurbishment of the Como hotel and an upgrade and expansion of the car park.

The City initially sought to appeal the Supreme Court's decision, but has since withdrawn that appeal.

Squire Patton Boggs continues to be involved in the liquor licensing process for the proposed Dan Murphy's in Como through Carl Black's Hospitality Team.

Shake Up to Land Administration Act to Utilise Untapped Rangelands

The WA Government is proposing to introduce significant reforms to permit more varied uses of the Rangelands, while ensuring sustainability is maintained.

This is a snapshot of Margie Tannock's Lexology contribution in late April. The full article is available here.

What Are the Rangelands?

Rangelands account for over 87% of the land mass in Western Australia, and the land value is estimated to be approximately AU$73 billion. The Rangelands currently comprise of a mix of pastoral leases, unallocated Crown land, unmanaged reserves, conservation reserves and other tenure. Current commerce in the Rangelands relates to pastoralism, resources, agriculture and tourism activities, but remains substantially under-utilised.

What Is on the Reform Agenda?

The Rangelands reforms relate to the *Land Administration Act 1997* (WA) (**LAA**), and will mostly affect the agricultural, pastoral, resources and finance sectors. Among other changes, the proposed amendments:

- Increase the maximum area subject to pastoral or rangelands leases from 500,000 to 1.5 million hectares
- Promote support for new investment opportunities and land uses
- Provide for alternative tenure options
- Include more security and certainty of tenure

At this stage, there will be no change to water rights schemes or established processes to obtain development approvals.

Key reforms include:

- **Changes to pastoral leases**: Presently, pastoral leases are granted for extensive periods of time, and have no right of renewal. The proposed changes will allow short tenure to be extended to a term of 50 years (upon application) and introduce a statutory right of renewal for pastoral leases that conform to lease conditions imposed, as well as the LAA, during the given term.
- **Transfer of diversification permits**: under the reform, 'diversification' permits will be permitted to be transferred from lessees to purchasers. Among other things, this will enable the asset value of the lease to reflect income streams earned from these activities
- **Native Title:** Rangelands leases will warrant compliance with the 'future act' procedures, as per the *Native Title Act 1993* (Cth), in order to meet native title requirements. Often, this will mean the lessee must enter into an Indigenous Land Use Agreement with the relevant native title group/s.
- **Land Management:** the proposed reforms will impose more stringent land management obligations for pastoral and rangelands lease holders, including broader enforcement powers for the Minster for Lands.

Can I Have a Say?

The draft Land Administration Amendment Bill 2016 was released for public comment by the Department of Lands on 5 April 2016. Public comment closed on 5 May 2016.

We are keeping clients updated on these important legislative and policy changes. Please let us know if you would like a direct briefing.

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Strata Title Reform Stalls in WA

In our previous February edition of Real Estate Matters, we brought you an overview of the state government's plans to reform the *Strata Titles Act 1985* (WA). At that time, the legislation was due to be read in parliament in late 2016. Despite an industry push for finalisation of the reforms by this time, the Minister for Lands indicated earlier this month that the introduction of a new Bill to Parliament before the end of the year would be "unlikely".

This news has disappointed key industry stakeholders who have been keenly anticipating changes since public and industry consultation commenced around five years ago.

New Withholding Requirements for Purchasers of Interests in Australian Land

From 1 July 2016, purchasers of direct and indirect interests in land in Australia could potentially be subject to an additional cost of 10% of the purchase price if they fail to withhold that amount from payments made to vendors if the relevant clearance certificates or residency declarations are not provided. The new rules apply to contracts entered into from 1 July 2016, but both purchasers and vendors will need to get ready for these changes well before any sale is executed to ensure they are not adversely affected.

Summary

The withholding provisions apply to require the purchaser to pay to the Commissioner of Taxation (**Commissioner**) an amount equal to 10% of the purchase price (including the money paid and the market value of any property given) of the asset on or before becoming the asset owner for assets acquired from a non-resident which are:

- Taxable Australian Real Property (**TARP**) such as land, fixtures, mining tenements in Australia
- Indirect Australian real property interests (for example more than 10% of the shares in a company where 50% or more of the assets of the company are TARP)
- An option or right to acquire TARP or indirect Australian real property interests

There are a number of exceptions and exemptions, and the procedures are quite different for direct and indirect real property interests.

Payments to the ATO

In the case of both direct and indirect interests of property, the purchaser may withhold the required amount from the purchase price payable to the vendor. However if the purchaser fails to withhold, the obligation to pay to the Commissioner still exists and the purchaser may be liable for an administrative penalty and interest costs. These rules therefore place onerous obligations on the purchaser.

Practical Points

This legislation raises a large number of important issues for purchasers, vendors and secured creditors. These include:

1. All vendors who are considering selling direct interests in land which could have a value over AU$2 million should consider whether their tax affairs are in order and apply for a clearance certificate well before the proposed settlement date.
2. Vendors of shares or units in trusts should consider whether the stake would constitute an indirect real property interest in order to determine whether they were able to make an appropriate declaration to avoid having tax withheld.
3. If the vendor is not able to obtain a clearance certificate or make a relevant declaration, they should consider whether they would be entitled to a variation of the amount of tax withheld. They should allow plenty of time prior to settlement to obtain the variation certificate.
4. Secured creditors who become aware of a proposed sale should consider whether they should seek a variation certificate.
5. Purchasers of direct real estate need to ensure that a clearance certificate is provided on or before settlement.
6. Purchasers should ensure the appropriate declarations are included in all contracts of sale of indirect interests in land.
7. If the purchaser is required to pay an amount to the ATO, they will need to ensure that they have sufficient funds available to make the payment at settlement (this is particularly relevant if the acquisition is made for non-cash consideration), and they complete an online "Purchaser Payment Notification" form on or before settlement.

Please contact our team if you have any queries regarding how the new withholding requirements may affect you.

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Update on Roe 8

Controversy over the Perth Freight Link continued last week when the WA Supreme Court of Appeal overturned Chief Justice Wayne Martin's finding last December that the EPA's assessment of the project was invalid.

The court unanimously found that the policies were "a permissive relevant consideration, not a mandatory relevant consideration".

The Environment and Planning Team have been keenly awaiting the outcome of the Roe 8 appeal, which is an important decision on the issue of policy verses law in the context of environment and planning matters.

Media reports have foreshowed that the environmental group which brought the proceedings last year may appeal the decision.

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