

# News

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## A brave new world in planning law

A package of planning reform legislation passed through the NSW Parliament in the second half of 2008 containing significant reforms to the NSW Planning System aimed to create:

- a better development assessment system;
- a more accountable infrastructure contribution system;
- a tailored plan making process;
- tougher rules and penalties for accredited certifiers; and
- some discrete parts of the new legislation have commenced operation but the more significant reforms are unlikely to come into effect until 1 July 2009.

Some of the more significant changes to development assessment, reviews and appeals are as follows:

### New planning bodies

The planning system will become more layered following the establishment of a number of new planning bodies: the Planning Assessment

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Commission (**PAC**), the Joint Regional Planning Panels (**JRPPs**) and Planning Arbitrators (**PAs**) each with differing roles.

## Planning Arbitrators

PAs will functionally sit as an additional layer between council/consent authorities and the Land and Environment Court. As a result, it is expected the PAs will play a larger role in small scale development applications.

Regulations will identify "*planning arbitration matters*" which are expected to include the following developments provided they have an estimated cost of under \$1 million:

- single or dual occupancy residential dwellings not exceeding two storeys;
- alterations and additions to or demolition of such dwellings; or

- commercial or retail premises under 9 metres in height or with a gross floor area of less than 2,000 square metres but excluding bulky good and licensed premises; or
- proposals to change the use of commercial or retail premises for the gross floor area of less than 2,000 square metres to another permissible use.

## Joint Regional Planning Panels

JRPPs will be established by the Minister for specified parts of the State with each part covering more than one local government area. It is likely that matters to be dealt with by JRPPs will be defined either in the Local Environmental Planning Instrument or a specific State Environment Planning Policy (**SEPP**).

The Minister has announced that JRPPs will determine applications for:

- commercial/residential/mixed use/retail and tourism development with a capital investment of \$10 million or more;
- community infrastructure and eco-tourism developments valued at more than \$5 million;
- certain coastal development listed in Schedule 2 of the Major Projects SEPP;
- designated development;
- development where the council is a proponent or has a conflict of interest;



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- development (other than single dwellings) where the development standards is proposed to be varied by more than 25%.

Local councils will conduct the assessment and community consultation and make recommendations to the JRPPs for determination. The JRPPs will be made up of three State Government appointed members and two council appointed members.

#### Planning Assessment Commission

The PAC has commenced operations.

The PAC will effectively be an independent assessment body for major development referred to it by the Minister. It will determine certain Part 3A projects and concept plans (major and critical infrastructure), will determine other development applications as delegated to it and will review and advise on those and a wide body of other matters.

#### Changes to development assessment

In its policy statement in May 2008 and Second Reading Speeches in May and June 2008 the State Government signalled its intention to:

- omit the "Stop the Clock" provisions;
- reduce concurrence time frames from 40 to 21 days in respect of those development applications requiring the concurrence of another statutory authority; and

- change the deemed refusal periods from 40 days and 60 days to 50, 70 or 90 days depending on the circumstances.

These proposed changes were not implemented by the amending legislation but presumably will be achieved by further amendments to the Regulations.

#### New review and appeal rights

Generally the period in which any appeal can be brought has been reduced from 12 months to 3 months.

Where a development application is a "*planning arbitrator matter*" an appeal cannot be made to the Land and Environment Court immediately but rather a review before planning arbitrators is compulsory unless the council agrees to a direct appeal to the Court. The opportunity for legal representation at the planning arbitration hearings is limited but legal advice can be provided to assist in the conduct of the matter prior to the hearing. An applicant can appeal to the Land and Environment Court if unsatisfied with a PA determination.



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For non-PA matters, applicants can opt between an internal review by the council or an appeal to the Court (largely similar to the current section 82A reviews).

The new review system will provide for objector initiator reviews of development applications of a size and scale identified in the Regulations – essentially, major residential/commercial retail or mixed developments which are not designated development, integrated development or Crown development.

To qualify as an objector a person must have made a submission and own or have occupied land for six months within 1 kilometre which is the subject of a development application. In this regard it is important to

note that consent authorities will now have the power to reject objections particularly those made “*primarily to secure or maintain a direct or indirect commercial advantage for the objector*”.

There are circumstances in which JRPPs and the PAC will be the initial review body before an applicant has a right to appeal to the Land and Environment Court.

## Summary

These planning reforms have the stated objective of improving the planning system and strengthening review and appeal rights. Time will tell whether this new legislation has that effect.

## First Home Owner Boost Scheme

The First Home Owner Boost Scheme (**FHOB**) supplements the First Home Owner Grant Scheme and has the following features:

1. First home buyers who purchase established homes will receive a boost of \$7,000 that will double their grant to \$14,000.
2. First home buyers who build a new home or purchase a newly constructed home will receive an extra \$14,000 to take their grants to \$21,000.



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3. First home buyers will be eligible for FHOB from 14 October 2008 until 30 June 2009.
4. All contracts entered into by 30 June 2009 will be eligible for new additional assistance.
5. All newly constructed homes will have to at least meet their relevant State/Territory energy efficiency and sustainability standards.
6. To be eligible for a \$14,000 boost benefit for purchasing a new home off-the-plan, the contract must be made between 14 October 2008 and 30 June 2009 (inclusive) and the contract must specify a completion date on or before 31 December 2010. If not specified, the contract must be completed on or before 31 December 2010.

#### Ineligible first homes

The First Home Owner Boost Scheme will not apply when a contract:

- to purchase or build a home replaces a rescinded contract made before 14 October 2008 to purchase the same home or to build the same or a substantially similar home;
- was made or in the case of owner-builders construction commenced before 14 October 2008; and
- was made or in the case of owner-builders construction commenced on or after 1 July 2009.

The previous lower First Home Owner Grants will continue to be available to first home owners after 1 July 2009.

In addition to the First Home Owner Grant and First Home Owner Boost benefits, the NSW Government provides exemptions and concessions on duty for first home owners under the First Home Plus Scheme.

#### False claims and penalties

There are substantial penalties for knowingly making false or misleading statements in connection with an application for the first home benefits. The New South Wales Office of State Revenue conducts investigation and compliance checks to ensure First Home Owner Grants and FHOB benefits are only given to applicants entitled to receive them.

Therefore, be careful when completing your application and ensure that you comply with the requirements of the Grant.

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## Biodiversity Banking and Offsets Scheme

The Biodiversity Banking and Offsets Scheme (**Biobanking**) commenced in July 2008. The scheme has been introduced by the NSW Government to help address the loss of biodiversity values including the impact on threatened species from the clearing of

native vegetation for development. The framework for the scheme was established under Part 7A of the *Threatened Species Conservation Act 1995 (Act)* and is supported by the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008 (Regulation)* and the BioBanking Assessment Methodology (**Methodology**).

There are four main elements of the Biobanking scheme:

- the establishment of biobank sites on land through Biobanking agreements between the Minister for Climate Change and the Environment (**Minister**) and landowners;
- the generation of biodiversity credits for management actions that landowners have carried out or propose to carry out on the site to improve or maintain its biodiversity values;

- the trading of biodiversity credits once they have been created and registered; and
- the retirement of biodiversity credits to offset the impact of development on biodiversity values.

The Methodology will be the instrument used to determine the number of credits that will be attributable to a particular Biobanking site and the management actions proposed to be carried out on that site. The Methodology will also be used to determine the number and class of credits that must be retired to offset the impact on biodiversity of a particular development.

Under the scheme, landowners will be able to enter into a Biobanking agreement with the Minister to establish a biobank site on their land. The agreement will specify the number and class of credits that may be created. Biobanking agreements will be similar to a covenant and will be registered on the title to the land of the biobank site. The intention is that the agreement will have effect in perpetuity so as to offset the impacts of development on biodiversity values. The Director General of the Department of Environment and Climate Change NSW (**DECC**) will maintain a register of biobank sites which will be publicly available. Only registered sites will be able to generate and trade biodiversity credits.

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The Act provides for the creation of a Biobanking Trust Fund (**Fund**) to be managed by a fund manager appointed by the Minister. The purpose of the Fund is to provide a source of revenue for the ongoing maintenance and management of Biobanking sites. When biodiversity credits are first transferred from one landowner to another, a specified sum set out in the Biobanking agreement must be deposited into the Fund. This requirement will set a minimum cost for biodiversity credits. Each year landowners will be entitled to a payment from the Fund subject to the landowner complying with the maintenance obligations under the relevant Biobanking agreement.

At this stage, the Biobanking scheme is voluntary. Developers can elect to obtain a Biobanking statement as an alternative to the current threatened species assessment of significance process. The Biobanking statement will determine the number of credits a particular development requires to “*improve or maintain*” biodiversity values. After the Biobanking statement is obtained, the relevant consent authority must incorporate the Biobanking credit requirements (and any other conditions of the Biobanking statement) into the conditions of the Development Consent. The developer must then source the relevant credits required for the development, purchase them from the landowner with the Biobanking site and retire the credits in accordance with the terms of the Biobanking statement and Development Consent.



It is suggested that Biobanking will provide a number of significant advantages for developers including:

- greater certainty with respect to threatened species responsibilities in the development approval process;
- early identification of potential threatened species constraints and consequently, the financial feasibility of a project;
- reduced costs and time associated with biodiversity assessments; and
- the fact that biodiversity offsets can be managed by biobank site landowners interested in conservation rather than developers.

Subject to the Regulations, anyone is able to purchase Biobanking credits. Whilst typically most buyers will be developers seeking to offset the impact of a development on biodiversity values, other buyers could include government bodies and philanthropic

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organisations who wish to achieve conservation outcomes. Credits may also be purchased as an investment for resale at a later date. Ultimately, market forces will determine the price paid for a particular credit. Landowners and purchasers will be free to negotiate any price provided that the prescribed amount from the initial sale of credits is paid into the Trust Fund. The Act provides that all trading of credits must be registered by the Director General of the DECC.

There are a number of enforcement powers in the Act to ensure compliance with the scheme. The Minister

can order a landowner to carry out work, at the landowner's cost, to rectify a breach of the Biobanking agreement. In addition, any person can bring proceedings in the Land and Environment Court to remedy or restrain a breach of a Biobanking agreement. In some limited circumstances, the Minister may also seek an order from the Court that the land subject to the Biobanking agreement be transferred to the Minister. The Minister can also require the retirement of credits by a developer in order to ensure that the conditions of a Biobanking statement are complied with.

## GST on forfeited deposits

The High Court's decision in *Federal Commissioner of Taxation v Reliance Carpet Company Pty Limited* (2008) HCA 22 has confirmed that GST is payable on forfeited deposits under a terminated contract for sale, which would have been a taxable supply itself.

Subject to certain exceptions, where a sale of real property is terminated as a consequence of default by the purchaser, and all the other requirements for a taxable supply are satisfied, the vendor will be liable to remit GST on the deposit. The judgment overturned a previous Federal Court decision which found that where the contract for the sale of property had not been completed, there was no supply in connection with the forfeited deposit.

The facts in *Reliance Carpet*

The vendor entered into a contract for sale of commercial property with a purchaser. The purchaser failed to pay the balance of the purchase price when due and the vendor terminated the contract. The



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deposit was forfeited to the vendor who was subsequently required to pay GST on the forfeited deposit.

The vendor argued that the forfeited deposit was not in connection with the supply as the contract if completed would constitute a single supply of real property, however in the absence of completion of the contract that there was no supply.

What is the impact of this decision for GST registered vendors?

There will be three immediate impacts of this decision:

1. GST registered vendors that sell property as part of their business will now be liable for GST on any forfeited deposits.
2. Vendors that have ceased paying GST on forfeited deposits following the earlier Federal Court decision may now be required to pay GST on these deposits.
3. Vendors that may have been intending to claim GST refunds in light of the earlier Federal Court decision will now not be entitled to any refunds.

The High Court's decision

The High Court found that there was "a supply" for consideration, even though the supply by the vendor

occurred before the forfeiture of the deposit for the following reasons:

- Payment of the deposit created obligations for the parties to enter into mutually legal relations and operated as a security for performance of the obligations of the purchaser to complete the contract.
- The supply was the grant by the vendor to the purchaser of contractual rights exercisable over or in relation to the land.

The vendor was therefore liable to pay the GST in the GST period in which the deposit was forfeited.

Future implications

What is likely to be controversial about the decision of the High Court is whether the judgment of the Court should be confined to land transactions (and the forfeiture of deposits under them) or whether it has broader application. This is important because the Court made a number of observations in the context of the facts before it which, if they are not confined to deposits forfeited under land contracts, will create significant ramifications to the way GST is applied in Australia going forward.

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## Green Leases

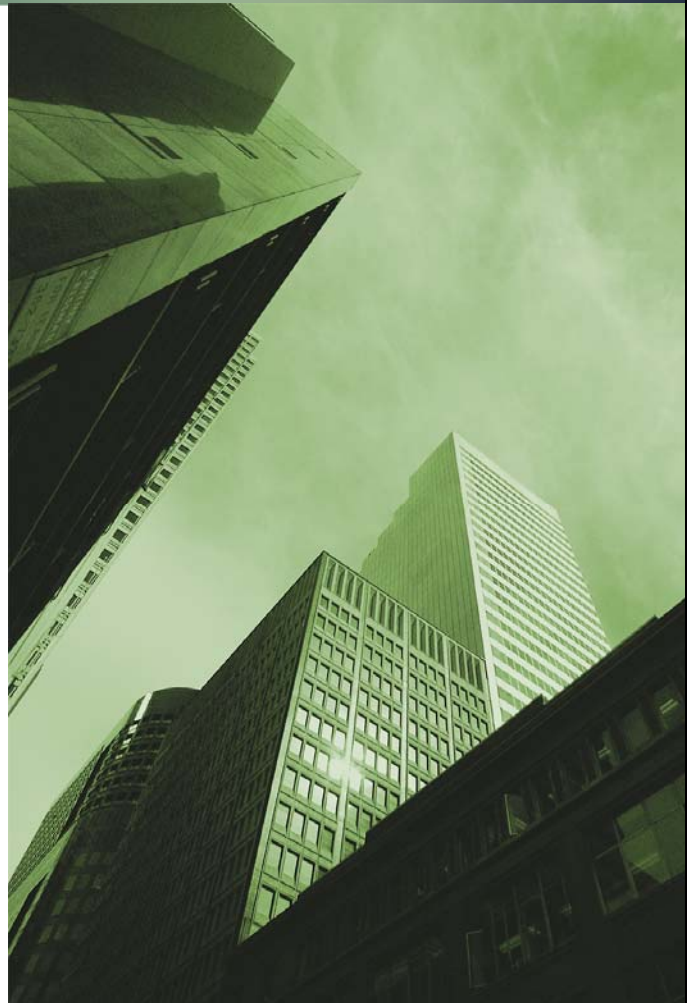
In recent years, with an increasing emphasis by government bodies and a rising awareness by the public in relation to ecological sustainability and environmental issues in general, increasing numbers of lessors and lessees are looking for ways to minimise the environmental impacts of the use and operation of their leased premises or building.

This has led to increasing pressure on developers to design and construct buildings which perform efficiently and sustainably so that potential lessors and lessees can be confident that the building will, in the present and future, have low running costs and minimal environmental impacts. Although we may see a rise in the design and construction of such environmentally efficient buildings in years to come, there are other options for lessors and lessees who wish to 'go green'.

Lessors and lessees can enter into what is known as a 'Green Lease', which is simply a lease which contains provisions and mutual obligations agreed upon by the lessor and lessee of appropriate buildings which aim to achieve efficiency targets, meaning that the premises or building is operating in a more ecologically sustainable manner.

### EEGO and the Green Lease Schedule

Although the Australian Government can be seen, through numerous initiatives over the past decade, to



be encouraging business to take action to reduce greenhouse emissions and prevent climate change, currently adherence to these measures and initiatives is voluntary. On 5 September 2006, however, the Australian Government released its Energy Efficiency in

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Government Operations Policy (**EEGO**) which applies to:

1. all Australian Government departments and agencies covered by the *Financial Management and Accountability Act 1997*; and
2. all agencies and statutory bodies covered by the *Commonwealth Authorities and Companies Act 1997*,

whose operations are substantially Budget dependent.

The Green Lease Schedule contains mutual obligations for tenants and owners of office buildings to achieve efficiency targets and sets ongoing minimum energy performance standards.

The EEGO requires that every time a new office building lease is signed (subject to certain exceptions) a Green Lease Schedule should be included to form part of the lease. Green Lease Schedules are to be incorporated into base leases, therefore creating a legally enforceable green lease regime.

The EEGO applies to all premises leased, owned or occupied by the Commonwealth meaning that the Green Lease Schedule must be used in leases taken by commercial lessees of Australian Government owned property and for leases entered into by the Australian Government as a tenant of privately owned commercial property.

There are eight green lease schedules which are designed to be used in a variety of situations. The appropriate green lease schedule is selected by considering the area of the premises and what proportion the net lettable area of the premises bears to the net lettable area of the building.

Private sector organisations

Private sector organisations and other public organisations (which do not fall within the scope of the EEGO) are also being encouraged to adopt green lease



The EEGO is administered by the Department of the Environment and Water Resources which has, in conjunction with the Australian Government (through the Australian Greenhouse Office) developed a new type of leasing arrangement known as the Green Lease Schedule.

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principles. The Green Lease Guide has been developed for this purpose, to help tenants commit to creating highly productive and environmentally friendly workspaces.

The Green Lease Guide sets out that the way you can choose, design and manage your workplace to:

- enhance your reputation by demonstrating corporate social responsibility;
- attract and retain talented employees;
- enhanced employee wellbeing and productivity;
- enhance and protect organisational knowledge;
- reduce your liability; and
- increase your profitability, by combining the above benefits with real cost savings such as lower electricity bills.

The Green Lease Guide also explains the most important things to look for in a building and how it is of value to an organisation in terms of annual savings, employee wellbeing and reputation and sets out how an organisation can add value to its business at the fit-out stage and through office management and operation.

A green lease certificate has also been developed to support the Green Lease Guide. The certificate is individually tailored for each lease and expresses the tenant's and landlord's green lease commitments. It is hoped that the design of the green lease certificate

makes it suitable for display to staff and visitors at the entrance to the tenant's offices as an incentive to 'go green'.

## Rating systems

There are several rating systems in place which help to determine the level of 'environmental friendliness' of a building. The two major ones are:

1. National Australia Built Environmental Rating System (**NABERS**) which now incorporates the Australian Building Greenhouse Rating System (**ABGR**). As of May 2008, the ABGR scheme was renamed NABERS Energy.

NABERS provides a star rating to buildings

according to actual performance using 12 months' energy data.

The scheme rates buildings from 0 to 5 stars in half star increments. The EEGO provides that as a minimum a building must be assessed at 4.5 stars (with 5 stars representing exceptional greenhouse performance and energy savings).



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2. Green Star is a scheme run by a non-governmental organisation (Green Building Council of Australia - a national non-profit organisation).

Green Star rates the capability of the office design to reduce environmental impact rather than its actual performance and operation. The ratings for 1 to 6 are reported in full star increments.

#### The way forward

As only a voluntary approach is being taken by private parties in relation to incorporating green lease provisions into commercial leases, it is thought that this may in time not prove sufficient to be of consequence in lowering greenhouse emissions and a more mandatory regime may need to be implemented.

## Land tax increase

On 7 November 2008 the NSW Government advised that the land tax rate will be increased by 25% for properties over \$2.25 million in land value.

The effect of this is that the land tax rate for property investors whose land holdings and value have more than \$2.25 million will be increased from 1.6% to 2% with effect from the 2009 land tax year.

In the current climate environmental issues are increasingly at the forefront of discussion and business is being encouraged to be more environmentally responsible. With the numerous benefits associated with adopting green lease principles it seems that looking to enter into green lease negotiations with your lessor or lessee is a good place to start.

We understand that submissions are being made to the State Government to review this decision but at this stage the Government has indicated it will not change its position.

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## Assistance

If we are able to assist you in relation to the matters contained in this newsletter or other property matters, please contact one of our Property & Construction Practice Group Team:


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