HERBERT SMITH FREEHILLS

DOING BUSINESS IN AUSTRALIA

ENVIRONMENTAL AND PLANNING REGULATION

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Chapter 17

Environmental and Planning Regulation

The Australian Government and the governments of each Australian state and territory have enacted detailed laws regulating:

- the use of land;
- the development of land and the erection of improvements on land; and
- the emission of pollutants from or to land.

As a result, most corporate acquisitions and nearly all real estate transactions in Australia will involve planning, land use and pollution control issues.

This chapter contains a brief overview of the main federal environmental legislation and a discussion of the types of legislation which have now been enacted by each state and territory in Australia.

If you intend to acquire real estate, develop land or acquire or set up a business in Australia you should obtain legal advice in relation to the specific planning, land use and pollution legislation which will regulate your proposed transaction or project.

Federal legislation

The primary federal legislation governing planning and environmental matters is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). The EPBC Act prohibits the carrying out of 'actions' which will have a significant impact on:

- the environment of land or seas owned by the Commonwealth; or
- certain specific matters of national environmental significance (such as items of national heritage, listed threatened species and communities, and nuclear actions),

unless the approval of the Minister for the Environment has been obtained or one of the other exceptions contained in the EPBC Act applies. Any requirement to obtain approval under the EPBC Act is separate from and in addition to any requirement to obtain approval under state or territory legislation, although sometimes the same documentation may be used for both applications.

State and territory legislation

Separate land use planning and environmental legislation has been enacted by each Australian state and territory. While the legislation which has been enacted differs (sometimes widely) between the different jurisdictions, it is possible to identify some common themes in relation to:

- land use planning pollution control;
- land contamination; and
- greenhouse gas and renewable energy issues.

A brief overview of each of these issues is set out below.

Land use planning

In general, the land use planning legislation in each jurisdiction utilises environmental planning instruments to control the use and development of land. Environmental planning instruments classify land into different zones and specify the types of development which may be:

- permitted without any requirement to obtain approval;
- prohibited; or
- permitted only after approval has been obtained.

In general, approval is required to change the use of land or a building (for example, from a house to a commercial office) or to erect any substantive structure, such as a building, on land. Failing to obtain approval where it is required is a criminal offence and may also entitle an authority to issue an order requiring you to stop using the land for an unapproved purpose or to demolish any structures built without approval.

If approval is required to change the use of land or erect a structure, then:

- an environmental impact assessment (which involves making an assessment of the potential environmental impacts of carrying out a particular project or development) may be required to be carried out; and
- certain members of the public may have to be notified and given a right to make submissions before any approval may be granted.

As land use approvals are usually granted by the local municipal councils or, in the case of some high impact types of development, the state or territory government, the approval process may be influenced by political considerations. Given this and the multi-layered levels of environmental planning instruments which often apply, you should obtain specific advice as to the land use planning approvals which will be required before you can carry out your project.

Pollution control

Each state and territory has enacted laws which aim to control pollution and regulate waste.

Most jurisdictions:

- require licences to be obtained before activities which are regarded as likely to cause pollution (such as mining or certain types of industry) may be carried out, and
- make it an offence to pollute land, air or water or to emit noise pollution unless this is authorised by a licence.

The regulators in each state and territory are able to take a range of actions to enforce the pollution control legislation. The enforcement measures available to regulators range from the issuing of orders and civil penalties to criminal prosecutions which may result in heavy fines or even imprisonment.

As the laws regulating pollution vary between jurisdictions and have heavy penalties for breaches, it is necessary to obtain specific advice as to the licences required and the legislative requirements which must be met before carrying out any project which may result in pollution.

Land contamination

The states and territories in Australia all have legislation regulating land contamination. Land is usually regarded as being contaminated if it contains a substance at a concentration above that which is naturally occurring (for example, lead) and at a level which poses a risk of harm to

human health or any aspect of the environment. In general, liability for contamination is directed first at the person who caused the contamination but if that person cannot be located or is unable to pay for the clean-up of the contamination, the owner of the land (or even the relevant local government) may be liable.

The acquisition, disposal and remediation of land which is or may be contaminated involves particular risk management issues and specific legal advice should be obtained to manage the risks.

Greenhouse and renewable energy

Laws relating to climate change are already in existence and are continuing to evolve in Australia.

In mid-2012 the *Clean Energy Act 2011* (Cth) and a suite of 18 related Acts came into effect in order to create a comprehensive Carbon Pricing Mechanism. These Acts were repealed in mid-2014 and were replaced by the Direct Action Plan, which is discussed further in Chapter 18 of this publication, 'Energy & Renewables'.

Another existing program is the Carbon Farming Initiative (**CFI**), introduced under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth). The CFI supersedes several pre-existing policy measures which had been implemented at both state and federal levels to encourage voluntary greenhouse gas abatements and investments in renewable energy technologies. The CFI enables parties to generate government-backed tradeable 'credits' from Australian land-based actions which reduce or store carbon pollution. These credits can be sold domestically (to parties wishing to offset their carbon emissions voluntarily) or internationally (for voluntary offsetting purposes, or for compliance purposes, under binding schemes such as the EU emissions trading scheme). The CFI is now incorporated into the Emissions Reduction Fund scheme, which forms part of the Direct Action Plan.

The principal reporting program is the National Greenhouse and Energy Reporting Scheme (**NGERS**), implemented under the *National Greenhouse and Energy Reporting Act 2007* (Cth). The NGERS requires a broad range of corporations to submit annual reports concerning their operations' emissions of greenhouse gases and their production and consumption of energy. The NGERS is discussed further in Chapter 18 of this publication, 'Energy & Renewables'.

The Australian Government has also implemented the Renewable Energy Target (**RET**) which requires electricity suppliers in Australia to source a certain amount of their electricity from renewable sources. The RET is discussed further in Chapter 18 of this publication, 'Energy & Renewables'.

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