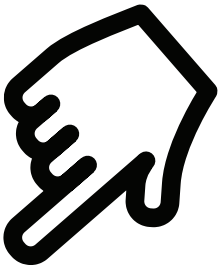
hunt & hunt lawyers

Property Law Update

Spring 2015

In this issue

E-conveyancing a state of the nation update



by Andrew J Campbell, Lawyer, under the supervision of Richard Williams, Partner

LOCATION	PROGRESS – WHERE ARE WE AT?
NSW	Live
VICTORIA	Live
QUEENSLAND	Live
WESTERN AUSTRALIA	Live
SOUTH AUSTRALIA	Currently targeting early May 2016
TASMANIA	Date in 2016 not yet confirmed
NORTHERN TERRITORY	Date in 2016 not yet confirmed

Legislation enabling electronic conveyancing has been enacted across the majority of Australian states and territories. Lawyers in New South Wales, Victoria, Queensland and Western Australia have been invited to subscribe to PEXA (Property Exchange Australia), the platform for electronic conveyancing. Hunt & Hunt has completed registration of caveats using PEXA and is moving towards completing its first transfer of a title using PEXA.

PEXA allows its subscribers to complete, in an electronic workspace, transactions such as transfers of titles, lodgement and withdrawal of caveats, registrations of mortgages and their discharges, refinances and others. PEXA transfers of titles cannot be completed in Queensland until amendments to the *Duties Act 2001* (Qld) receive royal assent, which is expected to occur soon.

USEFUL LINKS

What does it mean for your business
Hunt & Hunt Property Newsletter 2014
Hunt & Hunt Property Newsletter 2013

It is expected that PEXA will be available in South Australia, Tasmania and the Northern Territory later in 2015.

PEXA subscribers must adhere to the *Model Participation Rules* (Rules) created by ARNECC (the Australian Registrars' National Electronic Conveyancing Council). Recently ARNECC has consulted with stakeholders including the legal associations and banking sector, and based on the feedback received, it is expected that an amended more user-friendly form of Rules will be circulated in the near future. Subscribers have asked that the updated Rules make practical improvements to the "safe harbour" mechanism, making it clearer which steps lawyers and banks must take to be protected from claims arising regarding fraud, stolen identity and more. This aspect largely centres on the relationship between an initial verification of identity and the later signing of transfer documents.

HUNT & HUNT WILL PROVIDE FURTHER UPDATES AS THE UPDATED RULES ARE CIRCULATED AND AS PEXA IS FURTHER ROLLED-OUT.

What does the **2015 Federal Budget** mean for foreign property investors?

by Bill Hazlett – Partner

While the release of the 2015 Federal Budget displayed a strong focus on small business, child care and a crackdown on tax avoidance by multinationals, there are also considerable changes for foreign investors involved in the property market.

KEY ASPECTS

On 2 May 2015, the Federal Government announced a package of reforms to strengthen the foreign investment framework. This followed the release in February 2015 of an Options Paper which received 192 responses. At the time of this newsletter the Foreign Investment bills have been introduced to Parliament and are expected to apply from 1 December 2015. Key aspects include:

- The Australian Taxation Office will be given responsibility for regulating foreign investment in residential real estate, including stronger enforcement, audit and compliance of the existing regulations.
- Greater enforcement will be supported by enhanced data matching systems to detect instances of potential non-compliance.
- A foreign ownership of land register will be established to monitor the level of foreign ownership of Australian real estate and land.
- Application fees for foreign purchases of real estate will be introduced.
- Additional and more stringent civil and criminal penalties will be introduced for breaches under the Foreign Acquisition and Takeovers Act 1975 (Cth).

NEW APPLICATION FEES

Application fees on all foreign investment applications will be introduced from 1 December 2015.

For residential real estate, the fees are as follows:

- $5,000 for property valued under $1 million
- $10,000 for property valued over $1 million
- $10,000 incremental fee per additional $1 million in property value.
- Other application fees for business and agriculture include:
- $25,000 for commercial real estate
- $100,000 for business acquisitions where the value of the target's assets are greater than $1 billion
- $5,000 for rural land valued under $1 million
- $10,000 incremental fee per $1 million in property value for rural land equal or greater than $1 million.

NEW CIVIL AND CRIMINAL PENALTIES

Tougher penalties for individuals, companies and third parties (including lawyers and real estate agents) who knowingly assist breaches will be introduced.

For residential real estate, the maximum criminal penalty for individuals will increase to $135,000 or 3 years imprisonment and for companies an increase to $675,000. The maximum civil penalty will be the greater of capital gain or 25% of the value of the property.

For business and agriculture investments, the maximum criminal penalties mirror those for residential real estate and the maximum civil penalty is $45,000 for individuals and $225,000 for companies.

Can self-managed superannuation funds engage in property development?

by Andrew Sinclair, Associate and Bill Hazlett, Partner

There is a common misconception that self-managed superannuation funds (**SMSFs**) cannot engage in property development. However there are no provisions in the *Superannuation Industry (Supervision) Act 1993* (Cth) (SIS Act), the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**), the Income Tax Assessment Act 1997 (Cth) (**ITAA97**) or the Income Tax Assessment Act 1936 (Cth) (**ITAA36**) that expressly prohibit SMSFs from engaging in property development.

While the SIS Act and SIS Regulations do not prohibit property development, there are certain obligations under the SIS Act and SIS Regulations that can be breached by the activities involved in property development. However, with the right advice and structure, the risks of breaching the SIS Act or SIS Regulations when developing a property can be eliminated. Some of the different ways in which SMSFs can engage in property development are:

DIRECT INVESTMENT IN PROPERTY DEVELOPMENT

SMSFs can invest in property directly through the purchase of land and buildings or structures. The major advantage of direct investment is that those assets can be developed and the resulting income and capital growth will be taxed at low SMSF rates. A key restriction however is that SMSFs are not allowed to borrow for funding property developments through direct investment.

INDIRECT INVESTMENT IN PROPERTY DEVELOPMENT THROUGH UNIT TRUSTS

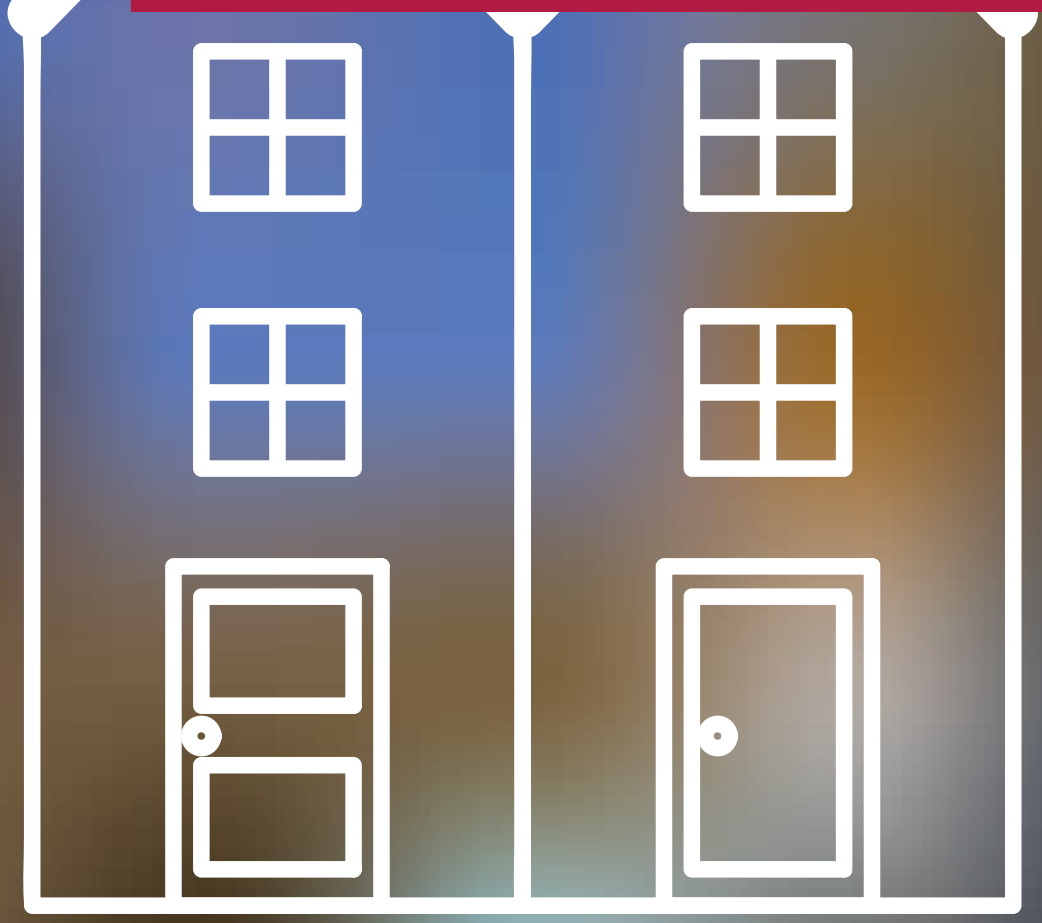
SMSFs can also invest in property indirectly through related and unrelated unit trusts. These different structures can enable a SMSF to engage in property development and property development activities without breaching the SIS Act or the SIS Regulations.

These structures are flexible and allow SMSFs to engage in property development jointly with other entities (including other SMSFs) and may also allow for the property development activities to be funded using borrowed funds. These structures can also provide asset protection for your SMSF.

WHAT SHOULD YOU DO IF YOU LOCATE A DEVELOPMENT SITE AND WANT TO USE YOUR SMSF IN THE PROJECT?

The structure most suitable for your SMSF will depend on a variety of factors. To discuss how your SMSF can engage in property development and the best way for it to do so please contact your local Hunt & Hunt property contact.

THERE IS A COMMON MISCONCEPTION THAT SELF-MANAGED SUPERANNUATION FUNDS (SMSFs) CANNOT ENGAGE IN PROPERTY DEVELOPMENT.



Landlords be warned: you may be liable for your tenant's failure to comply with planning laws

by Nick Sissons, Associate, under the supervision of Bill Hazlett, Partner and Maureen Peatman, Partners

A recent decision in the Victorian Civil and Administrative Tribunal, *Hume CC v Ecotec Woodwaste Pty Ltd* [2015] VCAT 599 ("**Hume**") has again highlighted the strict liability application of section 126 of the *Planning and Environment Act 1987* (Vic) against the owner of land even though the offence was caused by a lawful occupier of the land.

The decision involved the granting of enforcement orders against both the tenant (and associated parties) and the landlord for breaches of the local planning scheme arising from the use of the property by the tenant for a "materials recycling" facility without a planning permit. The tenant had been dumping building material waste on the land in piles up to and exceeding 10 metres high.

The Tribunal found that a permit was required for 'Materials Recycling'. As one had not been obtained the Tribunal ordered all material deposited on the land was required to be removed and the land restored to its original condition.

The landlord argued it had relied on representations by the tenant that the activities did not require a planning permit. The landlord also argued it had taken appropriate action to serve a 'notice of default' under the lease and that it would be put to significant cost to clean up the land at the end of the lease if the tenant did not do so.

The Tribunal dismissed the landlord's arguments and included the landlord in enforcement orders noting that "*a prudent landlord should if necessary take strong and decisive steps early in the negotiations with the occupier, with a view to reaching an appropriate outcome before the situation gets out of control*".

At the time of writing Hume City Council has filed the Tribunal's orders in the Supreme Court of Victoria. This means that further orders could be sought against the landlord, including forfeiture of the land (and other assets if required) to the Council to cover the Council's costs of clean up.

In Victoria, as in many jurisdictions in Australia, the planning legislation is regarded as regulatory in nature so liability for offences is often considered strict or absolute. So a landlord can be guilty of a planning offence on their land even if the offence was caused by the default or negligence of the tenant.

A landlord in Victoria could also be in breach of the:

- *Environment Protection Act 1970* (Vic) for offences relating to discharge of industrial waste or pollution of land; and
- *Country Fire Authority Act 1958* (Vic) if a fire prevention notice is served and is not complied with.

Similar legislation applies in other states.

WHAT SHOULD LANDLORDS DO?

- Ensure when entering into a lease that the tenant's intended use either complies with any relevant local planning scheme requirements or that there are appropriate mechanisms for the tenant to provide evidence of compliance with the relevant planning requirements (and a letter on Council letterhead advising what is proposed is 'ok' or doesn't need a permit, may not be legally sufficient). before taking occupation;
- Actively monitor the tenant's use of the land to ensure the tenant is not carrying out any activity that could breach the applicable planning scheme, environmental protection legislation or is unlawful.

The short-term letting stoush

by Andrew Suttie, Partner

PRIVATE SHORT-TERM LETTING IN STRATA

Increasing numbers of strata unit investor owners are trading traditional letting arrangements for private holiday letting. The recent surge in popularity of websites such as *Airbnb* and *Stayz* enables owners to market their properties to millions of holidaymakers from all over the world. And it's not just investor owners who are cashing in on the digital economy; residents are letting out spare rooms and even couches to supplement their income (and to meet interesting new people). Some utilise the system so effectively they enjoy close to rent-free accommodation or, in some cases, profit from the arrangement.

POTENTIAL IMPACTS ON PERMANENT TENANTS

If allowed to continue, this paradigm shift will diminish the availability of permanent or long-term accommodation and drive up the rent of the remaining stock. Coupled with whispers of a federal government consideration to abolish negative gearing for some taxpayers, permanent tenants are likely to suffer significantly.

POTENTIAL IMPACTS FOR BODIES CORPORATE

Private short-term letting doesn't always have a significant negative impact on a body corporate (a.k.a. *owners corporation*). If the building is designed for short-term letting and has facilities you'd expect to find in a hotel, the impact of a handful of owners conducting their own short-term rentals is likely to be minimal in terms of effect on the body corporate. That's not to say that there won't be any impact, particularly from the perspective of the building manager who may have to spend additional time and resources dealing with the private short-term guests. However, the administrative and sinking fund budgets, for example, would have been prepared with knowledge that the primary use of the building was to accommodate short-term guests.

The greatest impact is evident in small schemes with permanent residents and no building manager. In those types of buildings, dealing with the potential unplanned impacts of short-term letting (including increased noise, illegal parking, overuse of shared facilities, nuisance, damage to common property and safety and security issues) can be very time consuming and frustrating for the volunteer committee members, and very expensive for the body corporate as a whole.

WHAT POWERS DO BODIES CORPORATE HAVE TO DEAL WITH PROBLEMS ASSOCIATED WITH SHORT TERM LETTING?

In Queensland, a body corporate doesn't have much ammunition to regulate against the use of lots for private short-term letting. A body corporate can self-regulate, to a certain extent, by adopting by-laws that are enforceable against owners and occupiers of the building. However, legislation limits the extent of those by-laws.

For example, the legislation provides that, where a lot can lawfully be used for residential purposes, a by-law cannot restrict the type of residential use. In other words, a body corporate has no power to adopt a by-law preventing short-term letting in residential lots.

Okay, so we can't ban short-term letting. What about if we impose additional costs on owners who make their lots available for short-term letting in circumstances where the body corporate has evidence that short-term tenants significantly increase body corporate expenditure? Surely it's not fair to make all owners pay for that increase in expenditure when there are only one or two culprits who are clearly responsible? Sounds fair in principle, but again the legislation prevents the body corporate from adopting a by-law (other than an exclusive use by-law) that imposes a monetary obligation on an owner or occupier. So, irrespective of what's going on in a particular lot, the contributions payable by the owners are fixed in stone.

Right, so our options are diminishing. I know… why don't we impose a by-law that restricts short-term tenants from using common facilities? Well, again, the legislation has that covered. The body corporate cannot adopt a by-law that discriminates between types of occupiers. In other words, you can't have one set of rules for owners or permanent residents and another set of rules for tenants.

HOW CAN BODIES CORPORATE BETTER REGULATE THE POTENTIAL PROBLEMS ARISING FROM SHORT TERM TENANTS?

The body corporate could review its by-laws to ensure they effectively regulate the behaviour of tenants in lots and on common property, including noise, nuisance, parking and the use of common facilities. However, even if the body corporate

adopts what appear to be effective by-laws to combat the difficulties often associated with transient tenants, enforcement of those by-laws is likely to be problematic.

The legislation imposes a number of crucial steps in the dispute resolution process, including self-resolution, conciliation and adjudication. In practical terms, where an offending tenant is residing in the building for only a few days, it will often be impossible to even identify the offender let alone effectively enforce by-laws or statutory provisions against that person. The dispute resolution provisions are hopelessly deficient in facilitating the effective enforcement of by-laws.

The only real win we've seen in relation to this issue is where bodies corporate have implemented security systems which enable them to restrict access to services and facilities by unauthorised users. Whether or not that is a legitimate means to regulate those users is yet to be tested, but for now its implementation appears to be creating some positive results.

Complaints relating to short-term letting are being referred back to local authorities until effective solutions are provided. The NSW government has released the draft strata legislation to be introduced to Parliament this year that tackles overcrowding by allowing strata schemes to pass by-laws limiting the number of occupants per bedroom. Queensland is considering similar changes as part of its current property law review.

OTHER APPLICABLE LAWS

The development approval and zoning for the building may limit the extent to which short-term letting can be conducted from a lot.

In Victoria under the *Planning and Environment Act 1987* (Vic) the use of land for short-term letting could be considered as a 'residential hotel' or 'residential building' land use as opposed to a 'dwelling' land use. If an existing planning permit for a building specifies that the land use of the building is 'dwelling', then any short-term letting may not be included within that land use definition and so be a breach of the permit. The body corporate could be jointly liable in enforcement proceedings.

Additionally, Victoria's model rules (by-laws) include a rule that "*an owner or occupier of a lot must give written notification to the owners corporation if the owner or occupier changes the existing use of the lot in a way that will affect the insurance premiums for the owners corporation*". While a change in land use from dwelling to residential hotel or building may not affect the insurance premiums, it may invalidate the insurance policy for the building if the building's use is not lawful.

Other local laws, such as the "party house" provisions recently adopted by the Gold Coast City Council following amendments to the *Sustainable Planning Act 2009* in 2014, may also assist to better regulate the negative impacts of short-term letting.

The *Work Health and Safety Act 2011* (Qld) may also have some applicability to owners who decide to embrace the allure of the digital economy and become a person conducting a business or undertaking for the purposes of that Act. Failure to comply with that Act has potentially very grave consequences, including imprisonment and significant fines.

And let's not forget the fate of Al Capone, seemingly untouchable during his reign as crime boss. It was tax evasion that put him behind bars. Owners shouldn't let the unregulated nature of online short-term rentals lull them into a false sense of security – any rent received for those bookings must be declared as income.

WHAT WE CAN LEARN FROM THE UNITED STATES

California has a very different regulatory regime from ours. In a recent decision, *Watts v Oak Shores,* the Court found in favour of a home owners' association who decided to prohibit short-term letting altogether, impose higher levies on owners who rented out their lots (based on anecdotal evidence that tenants exposed the community to greater expenses than owner-occupiers) and impose additional fees on tenants who wished to utilise the common facilities. So, all those things mentioned above that we're not allowed to do here; they're allowed to do there.

Consequently, as the digital economy rapidly evolves, we require significant and urgent statutory reform to enable bodies corporate to control their own fate.

60 seconds with Andrew Suttie, Partner QLD

Brisbane based lawyer Andrew Suttie is the national head of our strata law group. He has extensive experience in advising bodies corporate and other stakeholders of their rights and obligations under the Body Corporate and Community Management Act 1997 (Qld) and related legislation. He is a director of Strata Community Australia (Qld) and the chairperson of the legislation committee which has been actively collaborating with the Attorney General and the legislative review panel in relation to proposed changes to the relevant Queensland legislation.

When he is not solving strata disputes Andrew can be found assisting performers, artists and agents with contractual matters.

Q WHAT ARE YOUR TOP TIPS FOR A SUCCESSFUL STRATA SCHEME?

A To be "successful" from an operational perspective you need a professional strata manager and an active (but, arguably, not too active) executive committee. Homogenisation of stakeholder interests also helps – for example, where all the owners are absentee investors in a holiday complex or all the owners are owner-occupiers in the burbs, things usually tick along nicely. It's when those interests converge in a single development that my phone usually starts ringing.

Q DOES EVERY MULTI-DEVELOPMENT NEED TO HAVE A STRATA SCHEME?

A There are other ways to do it (for example, up here in sunny Queensland we have a handful of old company title buildings) but from a development and consumer perspective, it makes most sense to adopt the strata framework because it's simpler and more cost effective to set-up, easier to operate and understand and is constantly being refined to better meet the needs of developers and consumers.

Q IF YOU WEREN'T A LAWYER WHAT WOULD YOU BE?

A Well, I played music professionally for a decade before concerns about my dwindling retirement options got the better of me, so I'd probably blow the cobwebs out of my saxophone.

Q WHAT IS THE MOST SIGNIFICANT CHANGE TO QLD STRATA LAWS IN THE LAST 12 MONTHS?

A There have been no significant changes for a couple of years now. The previous government commissioned a major review of all property legislation in Queensland but lost office prior to finalising changes to our strata legislation. The new Attorney-General has assured me she will continue with the review and I'm hopeful we will see some significant changes for the better in the next 12 months.

Q THERE IS RECENT TALK ABOUT STRATA LAW REFORMS IN QLD, WHAT DO YOU THINK IS THE MOST PRESSING ISSUE?

A Greater empowerment for self-regulation. Currently, in Queensland, bodies corporate (or "owner's corporations" for those south of our border) have no power to tow illegally parked vehicles, impose fines on owners who breach by-laws, impose blanket bans on pets, prevent short-term letting, etc and disputes for simple by-law breaches can take more than a year to resolve. The system is a great example of a toothless tiger and recalcitrant residents are well aware of that. I think giving the body corporate greater power to regulate itself (within reasonable limits) will reduce the occurrence of minor disputes.

Q DESCRIBE YOUR PERFECT WEEKEND.

A EITHER:

1. Friday night: dinner at Sails Noosa;
   Saturday morning: flight to Narita, early dinner at the New York Bar at the Park Hyatt Shinjuku, Steely Dan live at the Blue Note in Aoyama; overnight flight to Queenstown;
   Sunday: spot of trout fishing; long lunch at the Botswana Butchery; fly home; OR
2. Camping on Teewah Beach.

CONTACTS

If you would like to discuss any of the issues raised in this update or require further information, please contact

SYDNEY

Ned Boyce, Senior Consultant
Penny Cable, Partner
Peter Dent, Senior Consultant
Maureen Peatman, Partner
Hasti Kalarostaghi, Partner

NORTH RYDE

Ian Miller, Partner
Mark Byers, Partner
Harold O'Brien, Partner

MELBOURNE

Bill Hazlett, Partner
Tony Raunic, Partner
Anton Dunhill, Partner
Richard Williams, Partner

ADELAIDE

Egils Olekalns, Partner
Rick Harley, Partner
Andew Fisher, Partner

BRISBANE

Paul Morris, Partner
Matthew Weaver, Partner
Paul Baynes, Partner
Andrew Suttie, Partner

PERTH

Darren Miller, Partner
Marchus Easthope, Partner

HOBART

Antony Logan, Partner

DARWIN

Christine Osborne, Partner

SHANGHAI

Hongliang Liu, Special Counsel

Sydney

Sydney (City)

Gateway, 1 Macquarie Place
Sydney NSW 2000
T +61 2 9391 3000
F +61 2 9391 3099

Sydney (North Ryde)

Level 2, 1 Innovation Road
North Ryde NSW 2113
T +61 2 9804 5700
F +61 2 9804 5799

Newcastle

Level 4, 50 Hunter Street
Newcastle NSW 2300
T +61 2 4928 7500
F +61 2 4926 5241

Melbourne

Level 26, 385 Bourke Street
Melbourne VIC 3000
T +61 3 8602 9200
F +61 3 8602 9299

Brisbane

Nicholsons Solicitors
Level 12 , 110 Eagle Street
Brisbane QLD 4000
T +61 7 3226 3944
F +61 7 3221 3756

Adelaide

Level 10, 400 King William Street
Adelaide SA 5000
T +61 8 8414 3333
F +61 8 8211 7362

Perth

Culshaw Miller Lawyers
Level 1,16 St Georges Terrace
Perth WA 6000
T +61 8 9488 1300
F +61 8 9488 1395

Hobart

Level 9, 85 Macquarie Street
Hobart TAS 7001
T +61 3 6231 0131
F +61 3 6234 3774

Darwin

Level 2, 13 Cavenagh Street
Darwin NT 0800
T +61 8 8924 2600
F +61 8 8941 0012

Shanghai

Room 701, Summit Centre
1088 Yan An Xi Road
Shanghai China 200052
T +86 21 6249 3543
F +86 21 6249 3545

The Australian Member of Interlaw

INTERLAW®
An International Association of Independent Law Firms