

Property Law Update

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E-conveyancing program

by *Richard Williams and Tony Raunic – Partners, Hunt & Hunt*

There has been much in the news recently about Australia's electronic conveyancing (e-conveyancing) roll out.

Hunt & Hunt has been involved with the development of e-conveyancing since it began more than 15 years ago and continues its significant participation in the development of the system. Below we share insights into implementation of e-conveyancing.

WHAT IS E-CONVEYANCING?

- » Property Exchange Australia (PEXA) (owned by government agencies and a number of financial institutions), will in due course enable lawyers, licenced conveyancers, regulated financiers and government authorities (called 'subscribers') to lodge data with the titles offices in each Australian state and territory electronically, replacing paper documents.
- » E-conveyancing is essentially a process for settlement, stamping and lodgement of property transactions electronically in a paperless environment.
- » Functionally e-conveyancing in some ways can be better described as "e-settlements". The whole conveyancing transaction will not be electronic, only the settlement part including the electronic transfer of monies. This will mean that the old practice of the parties' representatives each physically attending a settlement where bank cheques and documents are exchanged will no longer be required.
- » National laws for e-conveyancing are in place and "model participation rules" have been introduced which set out protocols for:
 - creating documents in an electronic environment
 - settling transactions in real time and for value
 - arranging for stamp duty to be paid
 - lodging and registering documents at the applicable titles offices
 - simultaneous notification to authorities like council, water and land tax
- » Lawyers, conveyancers, financial institutions and government authorities need to sign a participation agreement to be authorised to join in e-conveyancing.
- » The four parties usually involved in a conveyancing transaction (vendor outgoing, bank, purchaser and incoming bank) will need to participate and be authorised to use the system before a transaction can be completed electronically.



HUNT & HUNT HAS BEEN INVOLVED WITH THE DEVELOPMENT OF E-CONVEYANCING SINCE IT BEGAN MORE THAN 15 YEARS AGO AND CONTINUES ITS SIGNIFICANT PARTICIPATION IN THE DEVELOPMENT OF THE SYSTEM.

IMPLEMENTATION AUSTRALIA WIDE

- » E-conveyancing will be introduced in various states and territories progressively over the next 2 years.
- » New South Wales is the first state in which fully functional e-conveyancing (lodgement of documents and complete financial settlement electronically) is being trialled in a few select locations.
- » In early 2015 Victoria will go “live” with fully functional e-conveyancing. Queensland will then follow and other states and territories progressively after that.
- » Trust accounts need to be established and relationships between participants and PEXA documented. IT systems need to link one with the other and authority needs to be given to PEXA to debit the bank accounts of participants.
- » All participants need to be verified and identified and give authority to transact. New verification of identity requirements (VOI) are being introduced progressively and can include production of a passport and a drivers licence or other appropriate forms of identification.
- » The old “manual” conveyancing system will continue to be available for the time being and apply particularly where the representative of one or other party is not a PEXA subscriber.

HUNT & HUNT AND E-CONVEYANCING

- » Hunt & Hunt has recently signed a participation agreement with PEXA and we are investigating ways of satisfying the new requirements for VOI.
- » Hunt & Hunt clients, whether developers, financial institutions or private clients will benefit from our close relationship with PEXA and understanding of the new e-conveyancing regime. We are participating in the piloting of the scheme in Victoria.

KEEPING YOU UPDATED

- » This article is a follow up to our article about [e-conveyancing](#)
- » We will continue to keep you updated on further developments. If you have any questions please contact a member of our team.



Digital fuels Asian appetite for Australian property

A market outlook from Jon Ellis – Founder, Investorist and Tony Raunic – Partner, Hunt & Hunt

Asian buyers represent a very significant component of purchaser demand in Australia, particularly in the capital cities. “At Hunt & Hunt Melbourne, we have acted for local vendors and purchasers in the sale and purchase of several large CBD and near CBD holdings in recent months”, says Tony Raunic.

“Most of the purchasers have been Asian based investors including two recent large sales in the \$30 to \$60 million AUD range where we represented clients selling entire CBD buildings.”

Hunt & Hunt is seeing this Asian appetite first hand, not only through handling property transactions involving Asian investors around our Australian offices, but also through activities in our Shanghai office.

The race to entice Asian investment into the Australian property sector is heating up. The right strategies and digital tools are vital to engaging with the market and its emerging needs.

As competition intensifies for the lucrative offshore property investor, Australian developers are becoming more agile and proactive in their efforts to market to their offshore networks effectively. Credit Suisse forecast that Chinese nationals will invest more than \$44 billion in Australian residential real estate over the next seven years. However, engaging with the Asian investor involves increasing sophistication and strategy.

“The rising interest in the Australian property sector means that developers need to be more strategic in how they deal with potential Asian buyers and their specific needs. In many cases the traditional methods of marketing and engagement are not as potent,” advises Investorist founder Jon Ellis.

China, Malaysia and Singapore are experiencing a trebling of growth in the number of property agents marketing Australian developments to local buyers. According to the Foreign Investment Review Board (FIRB), Chinese investors spent \$5.9 billion last year buying primarily residential property in Australia.

Ellis warns that listing properties via traditional means, such as using local online property websites like SouFun, is going to yield limited benefits.

“Asian buyers need a high degree of support and advice on their potential offshore investments; additionally, they need someone who will act as a conduit through the legal and cultural issues that arise,” says Ellis.

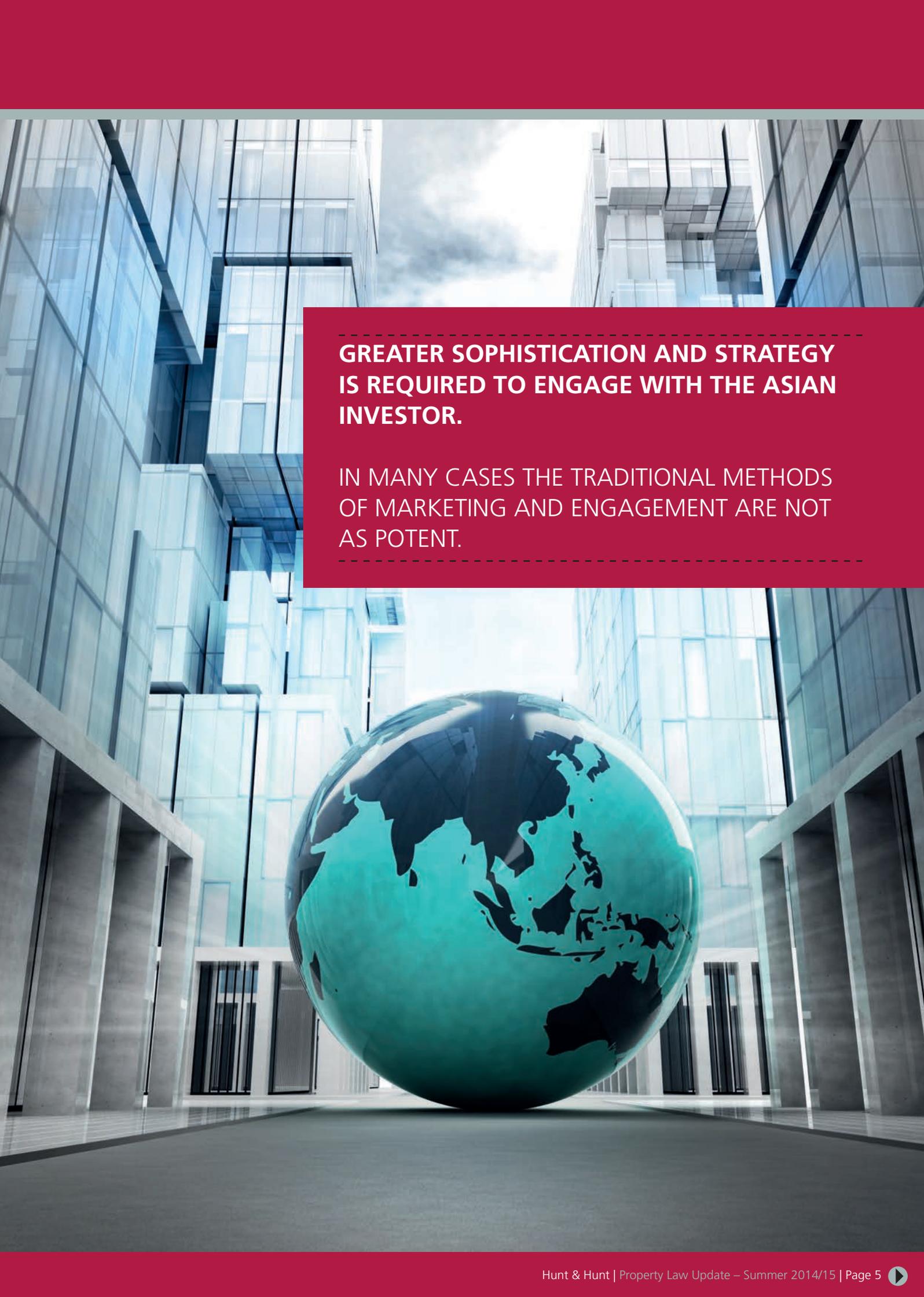
High digital adoption within these key Asian markets means online engagement is now vital to targeting the right market segment and buyer. Ellis says the B2B Investorist site has more than one-third of traffic coming from Malaysia, Singapore and China.

Tony Raunic agrees, noting that Asian based prospective purchasers are increasingly requiring a high level of information and intelligence on Australian property before they are prepared to board a plane to commence face to face negotiations on purchase terms.

As the Investorist site is squarely aimed at property agents, wealth creation experts and migration agents, it serves as a hub for a raft of relevant information, which is also available in Mandarin to aid transactions. The online presence includes regular seminars and is supplanted with local operatives in core Asian markets.

“Digital has changed the ball game for global property sales. It has quashed many cross-border issues simply by having real-time availability of material backed by technology that allows rich imagery and video, and messaging services that enable quick connectivity,” Ellis says.

To find out more, visit: <http://investorist.com/home>



**GREATER SOPHISTICATION AND STRATEGY
IS REQUIRED TO ENGAGE WITH THE ASIAN
INVESTOR.**

IN MANY CASES THE TRADITIONAL METHODS
OF MARKETING AND ENGAGEMENT ARE NOT
AS POTENT.

Don't be caught out by FIRB

by Kelvin Tam – Partner, Hunt & Hunt

Because of the recent influx of overseas interest in the Australian real estate market, owners and investors need to be familiar with the Foreign Investment Review Board (FIRB) requirements. FIRB's role is to review applications by foreign persons to invest in Australia. Foreign persons include: a person who does not ordinarily reside in Australia; or a corporation where a natural person, not ordinarily resident in Australia, holds a controlling interest or a foreign corporation holds a controlling interest. **Different policies apply to the purchase of commercial and residential property by foreign persons.**

COMMERCIAL REAL ESTATE

With developed commercial real estate, foreign persons must inform FIRB if they seek to buy an interest that exceeds \$54 million in value. If the property is heritage listed, then a \$5 million dollar ceiling applies. If the foreign persons are United States or New Zealand investors, and in the future when the China-Australia Free Trade Agreement is signed and legislation passed, Chinese investors, then a ceiling of \$1,078 million applies. Where a foreign investor seeks to buy vacant land for commercial development, FIRB approval is required, irrespective of the value of the land, but the applications are generally approved with conditions imposed.

RESIDENTIAL REAL ESTATE

For residential real estate, FIRB seeks to ensure foreign investment in residential property increases the supply of Australia's housing stock. So foreign persons are generally granted approval by FIRB to acquire a 'new dwelling'. To constitute a 'new dwelling' the property must be acquired directly from the developer and not been occupied for the preceding 12 month period.

Foreign persons may apply to acquire single vacant lots but the approval usually requires that person to start continuous construction of a dwelling on the land within 2 years of the approval. The same applies where the applicant wishes to acquire vacant land to develop multiple dwellings.

Foreign persons may also apply to redevelop an existing dwelling, if the existing dwelling is demolished and multiple properties constructed on the land. A 'redevelopment' is not a refurbishment of the existing dwelling. FIRB will only approve an application to demolish an existing dwelling and replace it with a single dwelling, if it can be established that the dwelling has exceeded its economic life as established by a report from a builder and/or licensed valuer.

Approval for a redevelopment is generally granted provided that the existing dwelling is not rented out prior to demolition and that substantial construction of the new dwellings occurs within 24 months.

HUNT & HUNT HAS CONSIDERABLE EXPERIENCE IN FIRB APPLICATIONS AND IS ABLE TO ASSIST YOU WITH ANY QUERIES ABOUT FIRB.

DEVELOPER ADVANCE FIRB APPROVAL

Developers can also apply to FIRB for a 'blanket' advance approval to sell new residential dwellings "off the plan" to foreign persons where 100 or more dwellings are to be constructed. This process allows the developer to sell up to all of the dwellings to foreign persons without those purchasers needing to seek separate FIRB approval.

In those cases, the developer is required to provide the pre-approval to the foreign purchasers at the time of sale (usually in the sale contract) and to the market the development both within Australia and abroad. When applying for the approval, the developer must attach certain information, including a schedule detailing the type of dwellings to be constructed (e.g. units or townhouses), the anticipated selling prices, the marketing plan for the project and the development approval from the relevant authority.

CHINA-AUSTRALIA FREE TRADE AGREEMENT

Under the China-Australia Free Trade Agreement announced in November 2014, private Chinese investors will be able to purchase Australian commercial property up to a value of \$1.078 billion without requiring FIRB approval.

This is a significant easing from the previous \$54 million threshold and brings arrangements for private Chinese investors into line with US and New Zealand investors.

However, existing arrangements requiring screening of foreign investors in residential real estate remain. FIRB will also screen Chinese private investment proposals in agricultural land over \$15 million and agri-business over \$53 million.



High Court clarifies GST position where property sold is subject to a lease

by Bill Hazlett – Partner, Hunt & Hunt



PREVIOUSLY ACCEPTED POSITION

There has been considerable controversy recently about the applicability of GST to continuing property leases after a change of property ownership. Prior to recent court decisions, it was widely accepted that a purchaser of property subject to an existing commercial lease was required to invoice a tenant for GST on rent under the lease. Correspondingly, if the lease was of a residential premises, the purchaser was not required to invoice the tenant for GST on the rent as the premises remained input taxed.

FULL FEDERAL COURT UPSETS POSITION

However, the Full Federal Court threw the practice about GST on rent into turmoil in *MBI Properties Pty Ltd v Commissioner of Taxation* [2013] FCAFC 112. The case involved MBI Properties Pty Ltd's ("MBI") purchase of 3 commercial residential apartments in a hotel complex, each of which was subject to an existing residential lease between the vendor South Steyne Hotel Pty Ltd ("SS") and the hotel operator, Mirvac Management Ltd ("MML"). MBI objected to the Commissioner's subsequent issue of a GST assessment which included an "increasing adjustment" for GST under section 135-5 of the GST Act, so making MBI liable to pay GST equal to 10% of the price it paid.

Section 135-5 requires the recipient purchaser of a supply (sale) of a going concern that intends to make supplies (leasing) which are neither taxable nor GST-free, to make an "increasing adjustment". The increasing adjustment is calculated by taking 1/10th of the price of the supply in relation to which the increasing adjustment arises and multiplying it by "the proportion of all the supplies made through the enterprise that you intend will be supplies that are neither taxable supplies nor GST-free supplies, expressed as a percentage worked out on the basis of the prices of those supplies".

The Full Federal Court decided that a purchaser of commercial residential premises subject to an existing lease as a going concern was not liable for GST, basing its decision on the finding that a lease involved the lessor making only one "supply", being the time at which the lease is granted. That finding presented practical difficulties and created considerable confusion for purchasers of properties subject to an existing lease or leases.

HIGH COURT RESTORES POSITION

Thankfully, the High Court, on 3 December 2014, has restored the previously held view that a lease involves a landlord making at least two supplies: a supply at the time of entering into the contract (entering into the lease) and a continuing supply at the time of performance (observing the covenant of quiet enjoyment). The court unanimously confirmed that the continuation of the lease after sale involved a "continuing supply" of residential premises to the tenant which remains input taxed. So, MBI as the purchaser landlord was not liable for GST on the rent it

continued to receive from the residential (input taxed) lease after the purchase. It follows that if the lease was commercial and so MBI was making a taxable supply, that MBI would have been liable for GST on the rent

But the High Court also held that:

1. the purchase by MBI of commercial residential was the purchase of a going concern;
2. as MBI intended to continue to make only input taxed supplies through the continuing residential leases, those supplies are neither taxable nor GST-free;
3. MBI's assumption of SS's rights and obligations with respect to MML constituted the making of supplies through an enterprise to which the supply was related; and
4. MBI was subject to assessment under the "increasing adjustment" provision and so liable to pay GST equal to one-tenth of the purchase price of the property.

WHAT DOES THIS MEAN?

A purchaser landlord will have to pay GST on rental received under a commercial lease previously entered into by the vendor or a predecessor of the vendor.

The purchaser may have an "increasing adjustment" if acquiring the property as a GST-free going concern and then making input taxed supplies of residential premises.

WE RECOMMEND THAT ANY CLIENT CONTEMPLATING THE SALE OR PURCHASE OF LEASED COMMERCIAL RESIDENTIAL PREMISES CONTACT US FOR ADVICE ABOUT THE IMPACT OF THE ABOVE DECISION ON THE PROPOSED TRANSACTION.



60 seconds with Robert Wilcher, Partner NSW

Robert Wilcher, legal adviser in planning and environment law in NSW, talks about the challenges and environmental liabilities for property developers in NSW.

Q IN YOUR VIEW, WHAT ARE THE MAJOR CHALLENGES FACING THE PROPERTY INDUSTRY?

A They are the complexity of the planning system in NSW, the difficulty of obtaining bank credit and limited land supply. The banks are freeing up somewhat now, but the planning system is not. It still remains highly politicised, lacks clear state driven direction and is often frustrated by conflicts between state and local government and interest groups. Meanwhile, the high demand for land, especially residential stock, means that land owners are asking prices for development sites that exceed developers' budgetary parameters.

Q WHAT ARE THE MAJOR ENVIRONMENTAL LIABILITIES FOR DEVELOPERS?

A Contamination issues remain a constant source of concern, especially for 'brown field' sites. Development assessment delays are a financial liability to be closely managed. Biodiversity management can also bedevil a development.

Q IF YOU COULD MAKE A CHANGE IN THE INDUSTRY WHAT WOULD IT BE?

A Simplicity of process and clarity of direction. The changes to the planning laws proposed in 2013 were a step in the right direction, but were shot down by political interest.

Q WHAT IS YOUR MAJOR CAREER ACHIEVEMENT?

A Some of the larger development sites I have worked on where we have resolved difficult issues affecting many parties. I am proud to have acted for the Minister for Planning on quite a few matters, including one where 6 or so parties joined together to preserve about 92 hectares of protected biodiversity in Eastern Creek, 35 kilometres west of Sydney's CBD while still extracting good development returns from the area.

ABOUT ROBERT WILCHER

Robert is a highly regarded legal adviser in planning and environment law and litigation for major property developers and government clients in New South Wales. His passion for the industry is evidenced by his contribution to the following groups:

- » Member, Planning Committee of the Property Council of Australia (NSW Division)
- » Member, Ministerial Working Party on Aboriginal Culture and Heritage Law Reform
- » Member, former Ministerial Biobanking Reference Group
- » Immediate Past Chair, Sustainable Development Committee of the Property Council of Australia (NSW Division)
- » Member, the Law Society of New South Wales

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

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Disclaimer: The information contained in this newsletter is not advice and should not be relied upon as legal advice. Hunt & Hunt recommend that if you have a matter that is legal, or has legal implications, that you consult with your legal adviser.

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