LA News

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Update: Directions 2031 and Beyond

The Minister for Planning has now released the final version of the *Directions 2031 and Beyond* planning framework (**Directions 2031**) in conjunction with the consultation drafts of the sub-regional strategies for Central Metropolitan Perth and Outer Metropolitan Perth and Peel (the closing date for submissions in relation to these sub-regional strategies close on Monday, 29 November 2010).

The Directions 2031 document is not substantially different from the previous drafts circulated. The final document will result in some questions and concerns are likely to be raised in relation to how the strategy will be implemented in the coming weeks and months.

Background

Directions 2031 supersedes the Network City, Metro plan and all other metropolitan strategies as the highest level spatial framework and strategic plan for metropolitan Perth and Peel region.

Direction 2031 provides a framework to guide the detailed planning and delivery of housing, infrastructure and services necessary to accommodate a range of growth scenarios and in particular, provides direction on:

- how we provide for a growing population whilst ensuring that we live within available land, water and energy resources;
- where development should be focused and what patterns of land use and transport will best support this development pattern;
- what areas we need to protect so that we retain high quality and natural environments and resources; and
- what infrastructure we need to support our growth.

Importantly, the document is premised upon the significant growth projected for Western Australia (conservatively estimated to reach 2.2 million by 2031) and the planning that will be required for these extra residents, including housing, infrastructure, services and jobs.

Synopsis of Directions 2031

Directions 2031 is based on this vision statement: 'By 2031, Perth and Peel people will have created a world class liveable city; green, vibrant, more compact and accessible with a unique sense of place'.

This vision is supported throughout the Directions 2031 document in the form of five strategic themes and objectives namely:

- liveable – living in, or visiting our city should be a safe, comfortable and enjoyable experience;
- prosperous – our success as a global city would depend on building on our current prosperity;
- accessible – all people should be able to easily meet their education, employment, recreation, service and consumer needs within a reasonable distance of their home;
- sustainable – we should grow within the constraints placed on us by the environment we live in; and
- responsible – we have a responsibility to manage urban growth and make the most efficient use of available land and infrastructure.

About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia, comprising over 200 staff which includes 19 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. Advising on all aspects of property acquisition, disposals and developments including syndications, we have one of the few accredited leasing experts available to clients who has significant Australia-wide experience on very large and complicated leasing developments.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

Directions 2031 identifies three integrated networks that form the basis of the special framework, including:

- activity centres network – a network and hierarchy of centres that provides for the distribution of activity centres and jobs throughout Perth;
- movement network – an integrated system of public and private transport networks designed to support and reinforce the activity centres network; and
- a network of parks, reserves and conservation areas that support biodiversity, preserve natural amenity and protect natural value for resources.

Directions 2031 identifies the connected city model as the preferred medium-density growth future growth scenario for metropolitan Perth and Peel regions. To achieve a connected city pattern of growth, Directions 2031 has set the following targets as medium to long term aspirations and to ensure growth of the city can be sustained beyond 2031:

- 47% or 154,000 of the required 328,000 dwellings as in-fill development; and
- 15 dwellings per gross urban zoned hectare of land in new development areas.

Implementation framework

A number of critical mechanisms are required to support the implementation of Directions 2031, including:

1. the central metropolitan Perth sub-regional strategy addresses issues relating to creating more housing opportunities across the 19 local government areas in the inner/middle sectors of metropolitan Perth;
2. the outer metropolitan Perth and Peel sub-regional strategy focuses on ensuring that there is an adequate supply of suitable urban land to support the strategic and sustainable growth of the city to 2031 and beyond; and
3. urban expansion management programme to ensure an adequate supply of land that is suitable for urban development to meet medium to long-term residential needs. This programme is to be introduced as a key component of the outer metropolitan Perth and Peel sub-regional strategy.

Further, Directions 2031 has also identified a number of key policy and planning actions such as the implementation of the Activity Centres Policy for Perth and Peel (recently adopted by the WAPC) and the development of a 20 year public transport vision.

Lavan Legal comment

Whilst it is accepted that Directions 2031 represents a step in the right direction in relation to establishing certainty for development in metropolitan Perth and beyond well into the future, it is almost certain to evoke significant discussion between landowners/developers and the relevant decision making authorities in relation to their interpretation of how land is to be developed in the future.

In particular, we foresee the following issues arising:

- infrastructure constraints: regardless of whether a development is proposed on an in-fill site, or greenfield site, infrastructure constraints will almost certainly top the agenda (including the provision of waste water treatment, water, energy and transport infrastructure). Of primary concern to private developers is who will bear the cost of upgrading or providing the infrastructure and perhaps more fundamentally, if it is possible to overcome the infrastructure constraints for any given project. The infrastructure request of develoment may be of such magnitude so as to make a project viable.

Target

- Directions 2031 requires a 47% in-fill target to be achieved in the Perth metropolitan area. It is undoubtedly the case that in-fill development is more expensive as a consequence of construction cost and increased approval time frames than greenfield developments. As a consequence, questions will arise as to how stringently the relevant decision making authorities will apply the target and if so, what incentives will be provided to developers to meet that particular target without it being a burden (e.g. relaxation of density and building height requirements to maximise yield).

Population projections

- Directions 2031 states that Perth's estimated population in 2031 is to be in the region of 2.2 million people. I note however that this particular figure is at the lower end of the Australian Bureau of Statistics estimate (i.e. 2.4 million to 2.88 million) for the same time frame. As a consequence it may not take very long before challenges are made in relation to whether or not the Department of Planning has underestimated the growth rate that is likely to be experienced in the region (i.e. inadequate release of greenfield land for development).

The next 20 years represent a challenge for all concerned in the development industry and we look forward to addressing these issues and others in relation to the strategy framework.

If you have any queries in relation to any aspect of this note, please contact Partner, Paul McQueen on 08 9288 6943 or paul.mcqueen@lavanlegal.com.au or Senior Associate, Craig Wallace on 08 9288 6828 or craig.wallace@lavanlegal.com.au.

Recent decisions on extinguishment of Native Title

Akiba v Northern Territory; Brown (for Ngarla People) v Western Australia (No2)

Two recent decisions of the Federal Court have re-examined the principles underlying the extinguishment of native title.

In *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* (2010) 268 ALR 149 delivered 21 May 2010, the Federal Court had to determine whether mineral leases granted under a State agreement conferred a right of exclusive possession thus extinguishing any pre-existing native title, or, if not, the extent to which those leases extinguished native title. In *Akiba (on behalf of the Torres Strait Islanders of the Regional Seas Claim Group) v Queensland No 2* (2010) FCA 643, delivered 2 July 2010, the Federal Court, amongst other things, had to determine whether 130 years of State and other legislation controlling commercial fishing had extinguished native title rights in the Torres Strait to take marine resources.

Brown concerned the Mount Goldsworthy leases granted pursuant to an agreement ratified by the Iron Ore (Mr Goldsworthy) Agreement Act 1964 which were associated with the Mt Goldsworthy iron ore project in the Pilbara region. The leases granted under that State agreement have remained on foot, and construction of the Goldsworthy project began in 1965. The total area of the Goldsworthy Mine and township was about one third of the area of the first mineral lease and infrastructure included a railway, roads and a power station. The mine at Goldsworthy was closed in December 1982 and the town officially closed in July 1992.

Bennett J. found that the right to occupy granted by the State for the purposes of the State agreement did not amount to a right of exclusive possession, and that the leases granted did not confer such a right because:

- while a mining lease of its nature granted a right to exclude other miners from exercising mining rights, it did not necessarily entail a right to exclude all others (such as native title holders);
- even if there were any right to prevent persons without lawful authority remaining on the land, that could not apply to people exercising native title rights and interests if those rights had not been extinguished;
- it could not have been the intention in granting the leases that the tenement holders would exert their rights over the whole of the leased area, which was borne out by the fact a significant part of the leased area had not been subject to the exercise of those rights; and
- it could not have been intended (and was not feasible) for the grant to be for exclusive possession of the whole of the leased area.

In relation to the developed areas within the leases, however, Bennett J. found that the rights exercised within the developed areas were analogous to rights of exclusive possession, and found that the rights to construct the mine and the town site, together with the associated infrastructure, were inconsistent with the continued existence of any native title rights within those areas. Bennett J. however, found that the leases were not inconsistent with the continued existence of non-exclusive native title rights and interests in that part of the leased area that was not developed.

It was found that the tenement holders continued to have rights under the State agreement to explore and ascertain appropriate sites for new mines and infrastructure within the leased area, and if such development occurs, native title will have been extinguished once the, land on which that development occurs, is identified. Bennett J. concluded that all of the non-exclusive native title rights are wholly extinguished in respect of the developed areas and native title had been wholly extinguished in the areas of the mine, the town sites and the associated infrastructure.

Bennett J subsequently made a determination of native title giving effect to these findings in *Brown (on behalf of the Ngarla People) v State of Western Australia (No3)* (2010)FCA 859 dated 6 August 2010.

Akiba concerned an application for determination of native title in a major part of the sea area of Torres Strait. The Court (Finn J.) noted that the history of steps taken for acquisition of Australian sovereignty over the Torres Strait was distinct from that acquired for the Australian mainland. The Court found that unlike much of Aboriginal Australia, the acquisition of sovereignty over the Islands of the Strait did not lead to the Islanders being dispossessed of their lands or sea domains or deprived of their traditional means of livelihood.

Finn J. concluded that the claimants had for the most part established their claim which related to sea areas and rejected the contentions of the State and of the Commonwealth, that the expansion of regulatory controls placed upon commercial fishing by legislation had extinguished any native title rights to take fish for commercial purposes.

The Court held that those legislative controls were not directed at the underlying rights of the native title holders who were nevertheless obliged to comply with the regulatory measures imposed on them if they were to enjoy their native title rights. The various Acts, severally or together did not and do not evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes in the claim area. Notwithstanding that, the Court emphasised that the native title holders must, in enjoying their native title rights, observe the legislative regimes regulating commercial fishing in those waters.

The Court summarised the principles concerning extinguishment of native title and concluded that the legislative regimes of the State (since 1877) and of the Commonwealth (since 1952) concerning fisheries, did not evince a clear and plain intention to extinguish native title rights to take fish for commercial purposes. To the extent that those legislative regimes regulate

the manner in which, and the conditions subject to which, commercial fishing can be conducted, the native title holders must, in enjoying their native title rights, observe the legislative regimes.

The issue of extinguishment of native title in *Brown* to a large degree turned upon a finding by the Court of whether there was an intent to wholly exclude native title either in the grant of the rights under the State agreement, or in the grant of leases under that State agreement. The Court held that there was no such intent except where areas were developed which necessarily excluded ongoing native title interests. In *Akiba* the Court held that upon a detailed examination of the background of legislation concerning fisheries in the area there was no intent to extinguish rights held by the inhabitants. The native title clamants were nevertheless subject to the regulatory regime imposed by the legislation.

The implications as to the extent to which native title may be extinguished through the grant of any interest in land or other rights will be of relevance to the primary resources industries, infrastructure providers, developers and others dealing with Government in such matters.

If you want to obtain more information on this and other aspects of Native Title please contact Consultant, Brian McMurdo at Lavan Legal on 08 9288 6893.

Approvals and Related Reforms (No.4) Planning Act 2010 – Development Assessment Panels

The *Approvals and Related Reforms (No.4) Planning Act 2010* (**Act**) received royal assent on 19 August 2010.

The Act amends the *Planning and Development Act 2005* (**PD Act**) in several key areas including:

1. a new Part 8, Division 2 (Improvement Schemes) to provide for the content, preparation, approval, amendment and review of improvement schemes, the effect of improvement schemes on development control and other planning schemes as well as applicable fees in related matters;
2. insert a new Part 11A (Development Assessment Panels and Development Controls) to require 'prescribed development applications' to be determined by a Development Assessment Panel (**DAP**) and to enable regulations to be made with respect to this procedure;
3. insertion of provisions with respect to preparation of regulations regarding the operation of DAP's, including their establishment, constitution, procedures and administration;
4. insert a new section 77A to enable the Minister to order a Local Government to amend a Local Planning Scheme so that it is consistent with a State Planning Policy; and
5. various other miscellaneous and consequential amendments.

Of particular importance is the amendment of the PD Act to formally establish the concept of DAP's for the purposes determining the development applications that meet the relevant criteria. The provisions inserted into the PD Act however only provide the heads of power for the establishment of DAP's. Regulations will be required to be prepared to establish how the panels will function, how fees will be paid, what qualifications of the DAP members will be etc.

It is unclear at this point in time when those regulations will be forthcoming and consequently when the DAP's will be able to commence operation.

If you have any queries and/or concerns in relation to how the amendments apply to you or your development please do not hesitate to contact Senior Associate, Craig Wallace on 08 9288 6828 or any member of the Planning Team at Lavan Legal.

We want your feedback

If you have topics or issues that you would like the team to write about please let us know. Suggestions can be sent to Asha Clucas at asha.clucas@lavanlegal.com.au.

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Our People

LAVAN LEGAL Leaders in Law

Property Services Group
Planning, Environment and Land Compensation Team

The Lavan Legal Property Services Group consists of dedicated legal teams specialising in:

- planning, environment and land compensation;
- property;
- corporate and business transactions;
- banking and finance;
- energy and resources; and
- competition and regulation.

Our teams take the time to understand our clients, their businesses and the industries in which they operate. We tailor our teams to suit our clients' business needs, ensuring we provide the most effective and appropriate legal services.

Planning, Environment and Land Compensation Team

Specialising in town planning, environmental and land compensation law, our team provide advice on development and subdivision proposals, the conduct of compensation claims and appeals against planning and environmental decisions. We advise on issues of legal compliance, project management and implementation, as well as providing representation in court and tribunal cases.

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