Global Corporate Real Estate Guide - Australia

Planning and Environmental Issues

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# Who has authority over land development and environmental regulation?

State, territory and local governments primarily control the development and use of land throughout Australia, through a combination of planning policies and instruments, and legislation. Local councils generally assess, approve and regulate the majority of developments within their local government boundaries with exceptions relating to projects of regional or national significance.

Environmental regulation is primarily governed by the relevant environmental protection authority in each state and territory. Additionally, at the Commonwealth level, there is legislation that regulates any developments that will have a significant impact of matters of **national** environmental significance.

# What environmental laws affect the use and occupation of real estate?

Australia has extensive environmental protection laws at both Commonwealth and state or territory levels.

In broad terms, the Commonwealth legislation (being the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) (“**EPBC Act**”)) deals with Australia’s international environmental obligations such as world heritage sites, nuclear activity and the marine environment (i.e., matters of national environmental significance). Accordingly, where a development is likely to have a significant impact on such matters, the developer must seek approval from the Commonwealth government, or else risk being charged with a serious offense under the EPBC Act.

Through state or territory-based legislation and environmental protection agencies, each state and territory regulates and manages systems for pollution control, contamination, hazardous materials, waste disposal and biodiversity protection. While states and territories take different approaches in some areas regarding environmental matters, they share many common elements. Typically, these state and territory authorities will require a person proposing to undertake a development to apply to have the development assessed and approved in accordance with the relevant environmental protection act. Where there is a risk that a development may cause environmental harm, the developer will need to obtain a license that will set out the strict conditions that will apply to the development (for example, setting out the way in which waste generated by the development must be disposed of).

The EPBC Act and the state and territory laws operate concurrently. To streamline the approval process, bilateral agreements have been entered into between the states and territories and the Commonwealth, enabling the assessment of the proposed development to be undertaken in the state or territory in which the development is being undertaken.

# What main permits or licenses are required for building or occupying real estate?

At a local council level, plans designate zones for all land under that local council’s jurisdiction and then prescribe for each zone the types of development that will be permitted or prohibited (e.g., residential, commercial, industrial and the like, with further divisions within each category), and, where development is permitted, the level of consent that is required. Generally, very little development is permitted without requiring some level of local council consent.

Consent must also be obtained before any building work can be started. Again, the requirements vary between the jurisdictions and from council to council, but common to all is the requirement for detailed construction (and in some cases, landscaping) plans and specifications to be submitted to the local council for approval.

Once building work has been completed in accordance with the consent documents and the conditions imposed by them, the local council (or private certifier, in some cases) will issue a certificate that enables the building or areas of new work to be occupied legally and used for their purposes.

Annual certification of essential services is also a requirement in all states and territories. These are designed as a means of ensuring that buildings are safe, particularly in relation to fire safety issues.

Depending on the nature of the use of the property, other annual licenses may have to be obtained, for example, for the operation of lifts, waste disposal or for storage, transportation and use of hazardous substances.

# Can an environmental cleanup be required?

Each state and territory has specific statutes dealing with land contamination and laws with respect to cleanup and remediation of contaminated land. These laws differ as to who is primarily responsible for the cleanup and the hierarchy of the parties (government, owner, past owner or occupier) who can be served with a notice or order attributing some responsibility for contaminated land.

# Are there minimum energy performance requirements for buildings?

Currently, there are two principal systems to rate the sustainability of new and existing commercial buildings in Australia:

**Green Star ratings**

Developed by the Green Building Council of Australia (GBCA), the Green Star rating system is typically used to assess the sustainability of the building design and construction for a new building. It considers nine criteria, including energy, waste, water efficiency, materials conservation, indoor environment quality, land use and ecology, alternative forms of transport, emissions levels, innovations promoting sustainability as well as the overall management of a buildings design, construction and ongoing operation. Points are awarded where a building achieves sustainability in the relevant criteria and a star rating is awarded based on the number of points achieved (ranging from one star to six stars). Where a building achieves a star rating of four or more, it will be certified by the GBCA and entitled to use the Green Star trademark.

**The National Australian Built Environment Rating System (NABERS)**

NABERS is administered by the NSW Office of Environment and Heritage but operates Australia-wide. The focus of NABERS is on the “operation” of existing buildings and can be used for the whole building or specific tenancies. It has separate tools to assess energy use (called NABERS Energy, the most commonly used NABERS rating tool), water use, waste and indoor environment quality. While initially developed for office buildings, NABERS has also developed rating tools to be used for residential houses, hotels, shopping centers and data centers. NABERS is also developing further rating tools for industrial premises, schools, hospitals and transport facilities.

The fact that there are two competing green rating systems has caused some confusion in the market, although there are moves to harmonize these two systems. Currently, compliance with either regime (i.e., obtaining a Green Star or NABERS rating) is voluntary, although there are significant incentives to do so. The Property Council of Australia (Australia’s national organization of building owners and managers) will only award a new office building “Grade A” or “Premium” status if the building obtains a five-star Green Star rating and a five-star NABERS Energy rating. The “Grade A” or “Premium” status is important for encouraging tenants concerned about their own energy consumption to lease space.

In addition, Commonwealth and state and territory governments have set minimum rating standards for buildings owned or leased by government agencies. Moreover, it is becoming increasingly common for commercial leases in Australia for new premises and with major commercial tenants to include obligations imposed on the landlord to maintain a minimum NABERS or Green Star rating.

# Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

Importantly, all Australian commercial office buildings over 1,000 square meters must obtain a Building Energy Efficiency Certificate before any listing for sale and leasing transactions in relation to the building. The certificate must contain a NABERS energy rating. This rating must also be included in any listing for sale or lease.

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