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Australian Real Estate

A legal guide for foreign investors

2015

Welcome to Australian Real Estate – A legal guide for foreign investors, one of the publications in our series of real estate guides.

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We are a full service commercial law firm advising leading Australian and global corporations, financial institutions and government clients across key sectors including financial services, energy and resources, projects and infrastructure. We have the privilege to advise on some of Australia's and the world's largest and most complex deals.

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Ranked in Investment Funds (Real Estate), Real Estate and Property Finance

Chambers Asia Pacific, 2015

"Works on significant real estate matters for lenders, developers and investors. Represents clients across a range of sectors, including retail, office, leisure, hotels and infrastructure."

Chambers Asia-Pacific, 2014

Foreword

The recent environment for real estate investment has seen many global markets continue to navigate challenging environments which have continued over a prolonged period. At the same time, the global financial crisis has tested the resilience of the Australian real estate market. Unlike some markets, most sectors of the Australian real estate market are showing clear signs of emerging from a difficult period, with investors continuing to view Australia as a "safe haven". The robust nature of the Australian real estate market has added to the overall positive view of Australia's economy.

In these circumstances, foreign investors' appetite for Australian real estate has surged. Increased confidence in the fundamentals underpinning the Australian real estate market coupled with a weaker Australian dollar has been the basis for an upturn in foreign inbound real estate investment comprising many new entrants, previously unable to access real estate opportunities in Australia due to the intense competition from domestic sources of capital, which after a temporary retreat are again returning to the market.

The new investors are well versed in the benefits of a balanced exposure to real estate, which now includes Australia, underpinned by a strong Australian economy with a track record built on well-established and detailed legal principles.

The legal and regulatory framework underpinning the Australian real estate market has helped in protecting this market and seen it outperform other markets.

A continued combination of a sophisticated real estate market, an investor friendly framework and strong medium to long-term consistent returns will continue to support demand for clear advice on regulation, structuring and taxation of Australian real estate transactions.

We hope this guide will give foreign investors a helpful overview and practical information, so enabling them to gain a sound base of knowledge and understanding that will assist in their dealings with Australian real estate opportunities.

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Real Estate, Australia
Ashurst

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Cover image: Aurora Place, 88 Phillip Street, Sydney. Photo by Belinda Parton

Australian real estate markets

Australia has one of the most sophisticated and transparent real estate sectors in the world. This, combined with a stable political environment, a wealth of natural resources and a burgeoning services sector, provide compelling reasons for foreign investors to invest in Australian real estate.

Australian real estate markets lead the world in terms of transparency, ranked third on the 2014 Jones Lang LaSalle Global Real Estate Transparency Index, alongside the USA, UK, Netherlands, New Zealand, Canada, France, Finland, Sweden and Ireland. In Australia, foreign investors face the same type of market conditions as local investors and can expect:

- accurate market and financial information
- reliable performance benchmarks
- clarity regarding taxation and regulation
- fair treatments in the transaction process
- high ethical and professional standards.

Global Real Estate Transparency Index

The Jones Lang LaSalle Global Real Estate Transparency Index is a biennial exercise that utilises quantitative market data and information gathered through a survey of the global business network of Jones Lang LaSalle and LaSalle Investment Management. A total of 115 separate factors are assessed. These factors are grouped into five sub-index categories – a) performance measurement, b) market fundamentals c) governance of listed vehicles d) regulatory and legal and e) transaction process. A Composite Index for each market is created from the weighted scores of the 115 factors.

The Transparency Index helps investors, corporate occupiers and retailers anticipate the challenges of transacting, owning or operating in a foreign market.

Transparency is important for investors in the following areas:

Risk Management

- transparency scores help assess risk premiums in different markets
- historic performance benchmarks and market statistics help investors assess likely future investment returns.

Operational

- yield compression in developed markets leads investors to less transparent markets for higher-than-core returns
- free flow of information enhances decision-making. Less transparent markets require knowledgeable advisors, local partners, or higher due diligence costs
- development of global investment strategies and country target allocations informed by risk profiles and expected returns.

Global Real Estate Transparency Index 2014

Global Rank	Composite Score	Market	
1	1.25	United Kingdom	Highly transparent
2	1.34	United States	
3	1.36	Australia	
4	1.44	New Zealand	
5	1.52	France	
6	1.52	Canada	
7	1.57	Netherlands	
8	1.62	Ireland	
9	1.69	Finland	
10	1.73	Switzerland	
11	1.79	Sweden	Transparent
12	1.79	Germany	
13	1.81	Singapore	
14	1.87	Hong Kong	

Note: Scores shown rounded to two decimal places; rankings are based on unrounded scores
Source: Jones Lang LaSalle's 2014 Global Real Estate Transparency Index

The map below shows Australia's major cities. Sydney and Melbourne are the most populous, followed by Greater Brisbane, which benefits from the proximity of the large and rapidly growing Gold Coast and Sunshine Coast populations, and Perth.

Capital cities

Other major cities

Australian population
On 10 July 2013, the resident population of Australia was projected to be: **23,111,066***

Major Australian Cities

Source: Australian Bureau of Statistics, Australian Demographic Statistics, December 2014.

* This population projection is based on the estimated resident population at 30 September 2014 of 23,581,000 (including Other Territories not displayed on map comprising Jervis Bay Territory, Christmas Island and the Cocos (Keeling) Islands).

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An introduction to the Australian legal system

Australia is a federation consisting of six States and two Territories. State and Territory laws apply to real estate.

Australian States and Territories

The States and Territories and their capital cities are:

- The Australian Capital Territory (ACT) – Canberra, Australia's national capital
- The Northern Territory (NT) – Darwin
- New South Wales (NSW) – Sydney
- Queensland (QLD) – Brisbane
- South Australia (SA) – Adelaide
- Tasmania (TAS) – Hobart
- Victoria (VIC) – Melbourne
- Western Australia (WA) – Perth.

Australian governments and legislation

The Federal Government, which is based in Canberra, is the major governmental body. Federal Parliament effectively comprises two levels: the House of Representatives (the Lower House) and the Senate (the Upper House). Members of each House are elected by popular vote. All States have equal representation in the Senate.

- A Federal Constitution shares power between the **Federal Government** and the State and Territory governments. The Constitution vests legislative power in the Federal Government to pass laws on various specific areas such as taxation, defence, trade and commerce, immigration, foreign investment, communications, banking, corporations and external affairs.
- The second tier, the **State and Territory governments**, pass their own laws, except on matters exclusive to the Federal Government. They are particularly concerned with the running of State and Territory facilities (for example, water and electricity supplies, education and hospitals).
- The third tier is **Local government**, which has restricted powers. Land use and development usually fall within Local government control, although Federal, State or Territory government bodies may have some authority, especially on major development and infrastructure projects.

Australian governments and their areas of legislation

Federal Government	State and Territory Governments	Local Governments
• Taxation • Defence • Trade and commerce • Immigration • Foreign investment • Communications • Banking • Corporations • External affairs	• Water and electricity supplies • Education • Hospitals	• Land use and development

The judicial system

Australia has two sources of law:

- legislation enacted by the Federal and State or Territory governments; and
- common law which comprises judicial (court) decisions.

Under the separation of powers, the judicial system is completely separate and independent from the other branches of government.

The Australian judicial system includes:

- **High Court** of Australia, established under the Federal Constitution, deals with Constitutional matters and is the ultimate appellate court for Federal, State and Territory matters.
- **Federal Court** of Australia principally deals with matters arising under Commonwealth legislation.
- **Supreme Courts** in each State, together with the Australian Capital Territory and the Northern Territory, which deals with matters arising under the legislation in each state and territory.
- **District and Local Courts** in each State, together with the Australian Capital Territory and the Northern Territory. These courts also deal with (smaller)matters arising under the legislation in each State and Territory.

There are also specialised boards and tribunals established under specific legislation to handle disputes of a particular nature.

In addition to the formal judicial resolution of disputes, a variety of alternative dispute resolution techniques are increasingly being used by parties in Australia. Some of these methods, such as mediation and arbitration, are now formal requirements of the court system and are designed to facilitate the commercial resolution of disputes.

Common Law

Common law (or case law) are laws that are widely understood to have been developed through court decisions rather than through legislation. Under this system, a decision in a case before the court depends on decisions in previous cases with similar circumstances. The court will consider the precedent set by earlier cases when interpreting the law. Therefore, real estate law in Australia is governed by legislation supported by case law.

"In addition to the formal judicial resolution of disputes, a variety of alternative dispute resolution techniques are increasingly being used by parties in Australia."

3

Foreign investment in Australian real estate

A stable and transparent real estate market, robust legal framework and an efficient titles system makes Australian real estate attractive to local and foreign investors.

While there are some restrictions on foreign investment, the Australian government recognises that foreign real estate investment can enhance Australia economically and socially. Accordingly, the government actively promotes foreign investment provided that it is consistent with the national interest.

This chapter sets out an overview of the regime applicable generally under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) as supplemented by government policy.

Overview

Foreign investment in Australia is regulated primarily through a regime established under the FATA. Foreign investment may also be regulated under other Federal, State and Territory laws applicable to Australian and foreign investors because of the particular investment activity (for example, foreign ownership in the banking sector must be consistent with the *Banking Act 1959* and other applicable legislation).

The FATA regime is administered by the Australian Treasurer and the Foreign Investment Review Board (FIRB). Under FATA:

- notification to or pre-approval by FIRB is compulsory for the acquisition of:
  - certain interests in Australian land
  - securities in Australian corporations and trusts which are considered to be Australian urban land corporations or trust estates
- the Treasurer has powers to prohibit foreign investment proposals and to order divestiture or unwinding of foreign investment arrangements if they are considered *contrary to the national interest*.

According to the Australian Treasurer the largest number of foreign investment proposals involve the purchase of real estate. The FIRB Annual Report for 2012-13 reports that there were approvals in the real estate sector worth a total of $59.9 billion, and no proposals were rejected.

Who needs to apply – "foreign persons"

A foreign person includes:

- a natural person not ordinarily resident in Australia
- a corporation or trust in which a natural person not ordinarily resident in Australia or a foreign corporation holds a **substantial interest** (15% or more)
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an **aggregate substantial interest** (40% or more in aggregate).

What real estate transactions require approval or notification?

Acquisition of interests in Australian rural land

"**Australian rural land**" includes all land situated in Australia that is used wholly and exclusively for carrying on a substantial business of primary production. Generally, land that is used for commercial farming or forestry purposes will be normally regarded as being "rural land".

The Australian Government has introduced new rules for acquiring agriculture/rural land. Under the new rules foreign persons must notify and get prior approval from FIRB for a proposed acquisition of an interest in rural land where the value of the acquisition, combined with the value of interests in rural land already held by the investor, exceeds or is likely to exceed $15 million, which would mean that once the cumulative threshold has been reached, any subsequent acquisition of an interest in rural land (even for nominal value) would need to be notified and approved.

The new rules state that an interest in rural land includes land which is indirectly acquired through acquiring a substantial interest in a corporation or trust where more than 50% of the assets of the corporation or trust comprise rural land.

In accordance with Australia's commitments under certain free trade agreements, the cumulative $15 million threshold will not apply to private investors from the United States, New Zealand, Chile, Singapore and Thailand. FIRB approval will only be required by investors from these countries when the investor acquires a substantial interest in a primary production business valued above the following:

- $50 million for Singaporean and Thai Investors; and
- $1,094 million for US, NZ and Chilean Investors.

Acquisition of interests in Australian urban land

"**Australian urban land**" includes all land situated in Australia that is not rural land.

An "interest in Australian urban land" includes, among other things, an interest:

- as owner of the land
- as lessee or, licensee in a lease or licence giving rights to occupy the land where the term of the lease or licence is reasonably expected to exceed five years
- to share profits from land
- as mortgagee (unless such interest is acquired in good faith in the ordinary course of carrying on a business of lending money).

Under current regulations and policy, proposals that must be notified to FIRB and require approval include acquisitions of:

Acquisition Type	Acquisition description	When approval is required and when approval is available under current FIRB policy
Vacant land	Vacant land.	Any acquisition of vacant land (no monetary threshold) requires approval. Applications are normally approved subject to conditions, such as: • continuous construction begins within 24 months • minimum development spend.
Developed non-residential land	Includes commercial, retail, industrial premises and hotels.	Approval is normally required unless the land is valued at: • less than A$54 million or A$1,078 million for US and NZ investors (as at 1 January 2015); or • less than A$5 million for heritage listed land. Applications are normally approved, provided not contrary to the national interest.
New residential	Residential land not previously sold by the developer AND not occupied for more than 12 months.	Any acquisition of requires approval (no monetary threshold). Applications are normally approved for foreign residents and non-residents, provided not otherwise contrary to the national interest.
Used residential	Any residential land which is not new residential land.	Any acquisition of requires approval (no monetary threshold). Normally, temporary residents are approved to buy one used dwelling only to live in. Non-resident foreign persons cannot buy used residential land as investment properties or homes. Foreign companies can acquire for staff housing (subject to conditions).
Used residential for development	Any used residential land which requires demolition of existing buildings and the erection of new dwelling(s).	Any acquisition of requires approval (no monetary threshold). Applications are normally approved for residents and non-residents, but subject to conditions such as: • cannot be rented out prior to demolition • continuous construction begins within 24 months.

There are some specific exemptions. For example:

- New Zealand citizens, foreign nationals with permanent residency visas and foreign nationals buying property as joint tenants with an Australian citizen spouse all do not need approval to buy residential real estate.
- No approval is required for interests in time share schemes which allows use up to 4 weeks per year.
- No approval is required for new dwellings bought from a developer who has a FIRB pre-approval letter.

Acquisition of mining tenements

Approval is required to acquire mineral rights, mining leases and mining tenements where either:

- they provide a right to occupy Australian urban land for a period likely to exceed 5 years
- they provide an interest in a profit sharing arrangement or income from the use of or dealings in Australian urban land.

Acquisition of interests in Australian urban land corporations or trusts

Notification is required in the case of the acquisition of shares in a company or units in a trust if the value of its (and its subsidiaries) total Australian urban land assets exceeds 50% of the value of its total assets, irrespective of the total value of the company, trust or the value of the proposal.

When considering whether a proposed investment is notifiable, funding arrangements including debt instruments having quasi-equity characteristics are treated as direct foreign investment.

The Australian government recommends that where any doubt exists as to whether a proposal is notifiable to FIRB, it should be notified.

What non-real estate transactions require approval?

Foreign investment proposals (non-specific to real estate) subject to FATA include:

- Acquisitions by a foreign person or persons of a substantial interest in an Australian corporation, business or trust valued at A$252 million or more. For US and New Zealand investors, a higher notification threshold of A$1,094 million currently applies, unless the proposed investment is in one of the prescribed sensitive sectors (including for example media, telecommunications, transport, military goods), in which case the threshold is currently A$252 million (thresholds are as at 1 January 2015)
- All investments of 5 per cent or more in the media sector (daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media))
- Direct investment by foreign government related investors including sovereign wealth funds irrespective of the size of the proposal.

Foreign government related investors

Proposed investments by foreign governments and their agencies irrespective of the size of the proposal must be notified to FIRB. Foreign government investors must also notify and get prior approval to start a new business or when acquiring any interest in a prospecting, exploration, mining or production tenement.

Foreign government investors include:

- a body politic of a foreign country
- entities in which governments, their agencies or related entities from a **single** foreign country have an aggregate interest (direct or indirect) of 15% or more
- entities in which governments, their agencies or related entities from **more than one** foreign country have an aggregate interest (direct or indirect) of 40% or more
- entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.

In examining foreign investment proposals by foreign governments and their agencies, FIRB will consider (among other criterion):

- whether or not an investor's operations are independent from the relevant foreign government
- if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest
- whether or not an investor is subject to and adheres to the law and observes common standards of business behaviour
- whether or not the investment may impact on Australia's national security.

Proposals from foreign government related entities operating on a fully arms length and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

How do you apply?

Applications must describe in sufficient detail the proposed transaction and parties, include the required notification form and contain the required supporting information and documents (as set out in current FIRB policy). Applications are normally lodged via the online system, and there is no fee payable on lodgement.

In February 2015, the Australian Government released the "Strengthening Australia's Foreign Investment Framework" Options Paper (the Consultation Paper) which contemplates the introduction of new application fees. The Consultation Paper proposes:

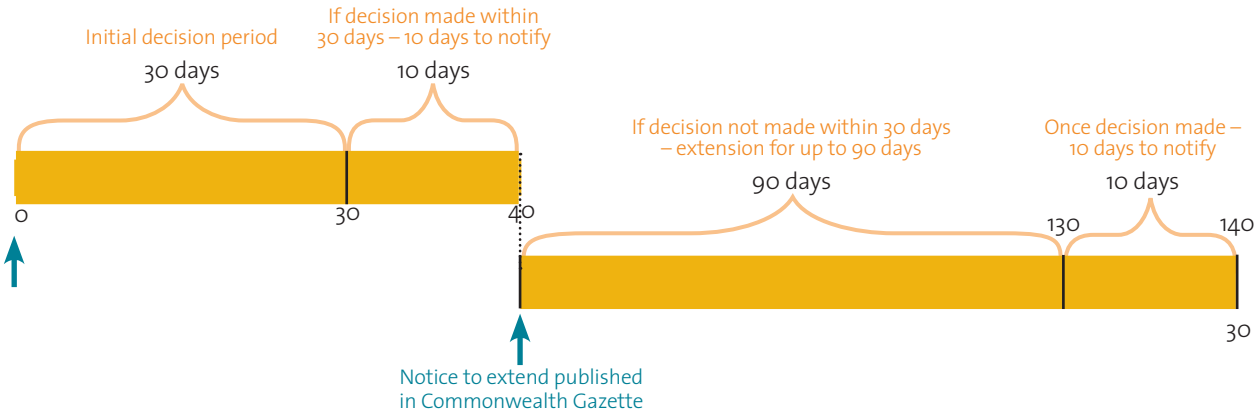
- a fee of up to $5,000 be charged for residential real estate and rural land acquisitions valued at under $1 million – this is significantly higher than the $1,500 fee suggested in the House Economics Committee report;
- a fee of up to $10,000 be charged to purchase a property equal to or greater than $1 million. (This fee would then increase in $10,000 increments for each additional $1 million increase in property value);
- property developers seeking an off-the-plan certificate be charged an application fee based on the number of dwellings to be sold to foreign investors; and
- business, commercial real estate and agribusiness investments be subject to a charge of between $10,000 and $100,000 depending on the size and sector of the investment. The proposal does not specifically outline how the applicable fee will be calculated, including for multiple FIRB applications.

What is the application process?

Usually, the Treasurer cannot issue such adverse orders after the expiry of a 30-day period (plus an additional 10 days to notify of the decision) from notification of the proposal to FIRB, or if it has issued a "no objection" letter to the foreign investment.

The 30 (+10)-day period applies in most circumstances, and can be extended by the Treasurer by an additional 90 days by the issue of an "interim order". Interim orders are rarely issued. In 2012-13, only one non-real estate related interim order was published in the Commonwealth of Australia Gazette.

FIRB Statutory Approval Timeline (Non-Policy)



Decisions

The Treasurer determines what is **contrary to the national interest** by considering the widely held community concerns of Australians. The government policy is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

Conditions can be imposed by the Treasurer (for example, time periods for the commencement and completion of construction or development works (if applicable)). More recently, conditions are increasingly being imposed on foreign government related investors.

FIRB reports (in its 2012-13 annual report) that the following factors are normally assessed in respect of each proposal, on a case by case basis:

- national security
- competition
- impact on other Government policies (including taxation)
- impact on the economy and the community and the character of the investor.

Contracts

It should be noted that any contracts by foreign persons to acquire real estate in Australia must be made conditional upon FIRB approval (unless approval has already been granted). Contracts should provide for a minimum 40 days from date of lodgement for a decision from FIRB.

For real estate to be purchased at auction, prior FIRB approval must be obtained.

Consequences of non-compliance

Where notification under FATA is compulsory, it is a criminal offence to proceed with a proposal which is not subject to FIRB approval, unless notification has been given and either the proposal has been cleared or FIRB has not responded within the required notification period.

As noted above, the Treasurer also has wide powers under FATA to order divestiture or unwinding of foreign investment arrangements in respect of Australian companies and businesses if they are considered contrary to the national interest.

US, New Zealand, Korean and Chilean investors

As noted above, the Australia-United States Free Trade Agreement (AUSFTA) had the effect of increasing the notification and approval thresholds for eligible US investors.

US investors benefiting from the relaxed rules include nationals and permanent residents of the USA and US enterprises. A US enterprise includes various entities constituted under US law and branches of other entities located and carrying on business in the USA.

On 1 March 2013 the Investment Protocol with New Zealand came into force which gave New Zealand investors access to the same treatment as United States investors.

On 12 December 2014 Korea-Australia Free Trade Agreement came into force which gave Korean and Chile investors access to the same treatment as United States and New Zealand investors, in most circumstances.

Thresholds

Thresholds are subject to annual indexation. Accordingly, the thresholds prevailing from year to year should be checked.

Key issues

The regulation of foreign investment in Australia is governed by a combination of FATA and Australian government policy.

Notification to and approval from FIRB may be required by foreign persons investing in Australian land, companies and trusts.

In considering an application for approval, the Treasurer determines what is contrary to the national interest in the context of the current FIRB policy.

it is a criminal offence to proceed with a proposal which requires FIRB approval and such approval is not obtained.

Investment structures

A foreign investor may invest directly or indirectly in Australian real estate through a number of different structures.

The choice of structure most suited to a foreign investor's particular circumstances will depend on various factors including the commercial opportunity and the different legal, accounting and taxation implications. The most common choices of vehicles used to make direct and indirect real estate investments are through:

1. Unit trusts
2. Establishing a subsidiary company in Australia – private or public companies
3. Registration of a foreign company in Australia
4. Partnership
5. Joint Ventures
6. REITS including wholesale real estate fund structures (see chapter 5).

1 Unit trusts

What is it?	A unit trust is a trust in which the beneficiaries' interests (unitholders) are divided into units. A trustee (invariably a company) owns the legal (but not the beneficial) title to the assets.
Requirements	The **unit trust deed** is required which provides the mechanics for the creation and transfer of the units and investment of the trust funds. **A unit register** will also be established confirming the ownership of units in the trust. The shareholders in the trustee and the management company can be the same parties as the unitholders in the unit trust if appropriate.
Management	The trustee manages the trust in accordance with the terms of the trust deed. The trustee may also appoint a manager to undertake and manage the investment. Unitholders in the trust are also able to make some decisions in relation to the trust by passing unitholder resolutions.
Regulation	Generally, the business of investing in and owning units in a private unit trust is not governed by the *Corporations Act 2001* (Cth), although the *Corporations Act* regulates investment in public unit trusts. However, as the management of the trust business is usually undertaken by an Australian corporate vehicle (as trustee) and so the provisions of the *Corporations Act* with respect to the management of the business itself apply.
Liability	The trustee is usually fully indemnified out of the assets of the trust for its actions, except to the extent of fraud, negligence or default. The unitholders may be fully liable for the debts of a unit trust where recourse to the venture itself does not satisfy the debt. It is usual to include a provision in the unit trust deed seeking to limit the liability of the unitholders and the use of a corporate manager can assist in limiting this liability.
Tax treatment	Where income is earned by the trust and distributed to unitholders, the various unitholders include the income in their individual tax returns. The trustee files a tax return but is itself not taxable on income which it has distributed to the unitholders. If the income is not distributed to the unitholders then the trustee is liable for tax on the income. In the case of losses, losses are not available to the unitholders but stay in the trust and may be carried forward for offsetting against the trust's income in future years. Many of the restrictions that exist in the case of a company carrying forward tax losses do not apply to trusts in a tax loss position.

2 Establishing a subsidiary company in Australia – private or public companies

	Private company	Public company
What is it?	• A proprietary company limited by shares incorporated pursuant to the *Corporations Act 2001* (Cth). • Has "Pty Limited" in its name • Cannot have more than 50 non-employee shareholders • Most common type of company – simpler to manage and less expensive to administer.	• A public company can be limited by shares or be limited by guarantee. In a public company limited by guarantee no shares are issued and the company has "members" not shareholders. • A public company will have "Limited" in its name. • For a company to be able to be listed on the ASX it must be a public company.
Key Requirements	Must: • have at least one Australian resident director • appoint an Australian resident "public officer" for tax purposes • maintain a registered office in Australia • have a corporate register • appoint an auditor if it is a large proprietary company • Normally a company will also have a constitution governing the internal management of the company. In the absence of a constitution, provisions of the *Corporations Act* will apply.	Must: • have at least 3 directors, 2 of which must be Australian residents • have an Australian resident company secretary and appoint an Australian resident "public officer" for tax purposes • maintain a registered office in Australia • have a corporate register • appoint an auditor • have a constitution which must be lodged with ASIC.
Management	• Directors are responsible for managing the company's business. • Shareholders can also make decisions about the company by passing resolutions.	• Directors are responsible for managing the company's business although generally directors are appointed and removed by shareholders. • Shareholders can make decisions by passing resolutions, and an annual general meeting must be held.
Regulation	• Regulated under the *Corporations Act* by the Australian Securities and Investments Commission (ASIC). • Ongoing notification obligations to ASIC, for eg annual company statements and for large proprietary companies, the lodgement of financial statements.	• Also regulated under the *Corporations Act* by ASIC. • Additional ongoing obligations to that of a private company – for example requirements to hold annual general meetings and to disclose changes to the constitution.
Liability	• Shareholders of a company are not liable for the company's debts. As shareholders, their only obligation is to pay the company any amount unpaid on their shares if they are called upon to do so. • Directors of a company are required to comply with their duties as directors imposed by the *Corporations Act* and by law. Directors may be required to compensate a company for a breach of its directors duties or could be subject to civil penalties. A director may be liable for debts incurred by the company if incurred at a time when the company is insolvent.	• The liability position for a public company limited by shares is the same as for a private company. • For a company limited by guarantee, the members' liability is limited to an amount that has to be contributed should the entity be wound up.
Tax treatment	See Chapter 11.	

3 Registration of a foreign company in Australia

A foreign company must not carry on a business in Australia unless it is registered as a foreign company in Australia.

A foreign company that carries on business in Australia without being registered commits an offence. A person who aids and abets the offending company also commits an offence.

To register, an application must be made to ASIC which requires certified copies of incorporation documents and translations if necessary. The foreign company must also appoint a local agent representative in Australia.

Once registered, foreign companies are required to:

- lodge financial statements at least once every calendar year and at intervals of not more than 15 months
- maintain a branch register in Australia
- notify ASIC of certain changes to the company.

4 Partnership

What is it?	A form of unincorporated joint venture, involving two or more people (but no more than 20, with some exceptions) going into businesses together in order to make a profit. A partner has no title to specific partnership assets. A partner's interest is merely a right on the dissolution of a partnership to a proportion of the surplus remaining after realisation of all assets and payment of partnership liabilities.
Requirements	Partnership agreement is entered into. Registration of the partnership is required in some state and territory jurisdictions.
Regulation	A partnership is governed by the contract between the parties as well as by both legislation and the common law relating to partnerships.
Liability	Each partner has unlimited liability for all of the partnership's debts. Forms of limited partnership are available in all Australian jurisdictions. They are intended to limit the liability of passive investor partners (known as "limited partners"). However, the limited partners lose the tax advantages otherwise enjoyed and income is taxed at the corporate rate. Partners have both common law and statutory duties to one another. A partnership is a fiduciary relationship of mutual confidence and trust. A partner generally has power to pledge the credit of fellow partners within the scope of the partnership business. This can be limited by agreement between the partners but will not be effective against a third party if that third party does not know of the limitation.
Tax treatment	The main advantage of this type of structure is that the partnership itself is not a taxable entity (although the partnership files a tax return). Both income and losses are included along with other income and losses each partner may have. However as noted above limited partners lose the tax advantages otherwise enjoyed and income is taxed at the corporate rate.

5 Joint Ventures

Commonly, an investment may be made jointly by two or more parties. Joint ventures may be either incorporated or unincorporated, with advantages and disadvantages of each structure.

	Incorporated joint venture	Unincorporated joint venture
Structure	Operated by a special purpose joint venture company or trust in which the joint venture participants are shareholders. The joint venture has its own separate legal identity.	The participants agree to co-operate in relation to a commercial undertaking and to hold their interests and entitlements in the investment separately rather than jointly. The joint venture does not have its own separate legal identity.
Documented by	Shareholders Agreement or Unitholders Agreement Company/trust formation documents	Joint venture agreement.
Regulated by	The contract between the parties (Shareholders Agreement) and the *Corporations Act*.	The contract between the parties (joint venture agreement). It is also usual for an unincorporated joint venture to have a manager – often a nominee corporate entity – which acts as agent for the participants.

6 REITS including wholesale real estate fund structures

See Chapter 5

Key issues

When choosing an investment structure, you need to ensure that the structure will serve, rather than obstruct, your proposed objectives in Australia.

Your choice of investment structure should only be made after you have also considered the taxation consequences of investing in Australia (see Tax, chapter 11).

Australian Real Estate Investment Trusts (REITs)

Australia has one of the largest, most sophisticated and transparent REITs markets in the world. Australia's first listed REIT was established in 1971 and real estate funds now extend across most real estate asset classes.

Investor friendly

The Australian legal and regulatory framework for the REIT market is investor focused. The legal framework has allowed flexible investment structures supported by well-established and detailed legal principles, while at the same time requiring rigorous disclosure and corporate governance. These features have allowed the market to address investor requirements such as liquidity, security of title, tax pass through treatment, expert management, and transparent and responsive corporate governance.

The legal framework is responsive to cross border investment. The REITs listed on the Australian Securities Exchange (ASX) include a number of funds with substantial or exclusive offshore assets (e.g. mandates focused solely on US, European or Japanese assets).

The main legal vehicle used for both listed and unlisted REITs in Australia is the trust, as it is well understood particularly by investors who are from jurisdictions with common law systems.

Legal and regulatory framework

In Australia REITs are typically established as trusts. This differs from jurisdictions such as Japan where the legal vehicle is a special form of corporation supported by the statute under which it is formed.

The general law of trusts provides a comprehensive set of core legal principles governing the relationship between trustees (as the holder of the fund), the investors (as beneficiaries) and the fund assets, and can be applied when addressing issues such as:

- who owns the assets and in what capacity
- powers of the trustee to deal with the assets, to borrow and generally to manage the fund
- kinds of securities that the trustee can issue (i.e. units in the trust)
- fiduciary duties owed by the trustee to the investors (i.e. the unitholders)
- liabilities of the trustee and unitholders.

Like other trusts, REITs are governed by the doctrines of equity. Further, they are also subject to the provisions of trust legislation which exists in all States and Territories of Australia.

Overlaid onto this general law is a detailed regulatory structure implemented through the *Corporations Act 2001* (Cth) (*Corporations Act*) which applies, broadly, when interests in the REIT are offered or issued to retail clients. REITs which are regulated under this legislation are called registered managed investment schemes (MIS). They are required to be registered, to have a licensed public company as a Responsible Entity to operate the fund, to have a constitution which meets the requirements of the *Corporations Act*, to maintain a majority of external directors or a compliance committee, to have a compliance plan and a compliance plan auditor, to issue a Product Disclosure Statement when interests in the fund are offered to retail clients, and to comply with the ongoing management and disclosure requirements applying to registered managed investment schemes.

Registered managed investment schemes are also subject to the provisions in the *Corporations Act* concerning financial reporting, takeovers and related party transactions. Recent consolidation of funds in the industry has put particular focus on these aspects of the law.

A REIT which is listed on the ASX is also subject to the listing rules of the ASX. As a result, there may be circumstances when a Responsible Entity may have to seek investor approval to certain matters in relation to a listed REIT, for which approval would not need to be sought if the REIT was not listed.

Aside from the general trust law aspects, special features which distinguish Australia's REITs from REITs in other jurisdictions include:

- the principle of external management and its recent restructuring through stapled securities
- the impact of Australian takeovers law on the terms of underlying co-ownership and asset management agreements
- the fact that voting rights conferred on investors in registered managed investment schemes to, for example, remove the Responsible Entity or wind up a registered managed investment scheme, can result in control transactions of a type which may not be seen in other jurisdictions where control may only be secured through takeover or scheme merger transactions
- the impact of tax and stamp duty on the structure and activities of funds.

External management and stapled securities

The idea of an external manager is deeply rooted in the legal structures used for many real estate funds in Australia. In a classic structure, the real estate is held on trust for the investors by a trustee and the business of managing the fund is carried on by a separate manager. More recently, for REITs and for some unlisted real estate funds such as wholesale real estate funds, the role of the trustee and manager has been combined into a single Responsible Entity. This still represents external management because the ownership and control of the manager or Responsible Entity is separate from the ownership of the beneficial (and economic) interest in the real estate assets. In recent years, this external management model has been under threat, as investors have questioned the value delivered by responsible entities and managers seeking to generate returns for their own stakeholders.

Recently in Australia, there has been a shift away from the external management model and there have been a number of transactions which have resulted in the external management of the REIT becoming internalised (in other words, management is owned and operated by the trust at the cost of and for the benefit of the investors only.) This has occurred in the Australian market in recent years partly in response to investor demand for the interests of the manager to be more closely aligned with investor interests and partly due to the vulnerability of managers in REIT takeovers.

Commonly, this has been achieved through a stapling of the shares in the Responsible Entity or manager to the units in the REIT which are then listed and quoted and traded on the ASX as if they were a single security. They cannot be traded separately.

The stapled structure effectively changes the REIT to an internal management structure for investor purposes.

The stapled structure is often preferred in Australia to a simple corporate structure where a listed company holds all of the property assets, both those which are generating passive returns (like capital gains and rent) and those which are delivering more active returns (such as those generated from the development and sale of property). Primarily, this is because there are tax advantages for investors when passive assets are held on trust for unitholders and the active management is undertaken by a separate vehicle (such as a company or a public trading trust).

Tax Treatment of REITs in Australia

Australia's tax and trust laws have been instrumental in creating a class of professional fund managers skilled at long-term ownership of real estate assets and a market that relies heavily on equity for REITs financing.

The tax structure requires the real estate holding vehicle to be a passive fund and allows the fund to distribute 100% of the cash it derives from its assets. This allows Australian REITs to maximise their yields but it is in turn dependent on their ability to raise equity in the market for refurbishment and other management requirements. The regulatory structure supports this raising of equity through rigorous disclosure, licensing and registration requirements, all designed to promote transparency and investor confidence. See also the section on taxation of REITs in the Tax chapter (chapter 11).

Net income, depreciation and cash distributions

Under Australia's tax laws, a trustee will not normally be liable to pay income tax on the income of the trust to the extent that unitholders are presently entitled to the income of the trust. Instead, the unitholders are taxed on the share of net taxable income corresponding to their share of the trust income distributed to them.

Significantly for real estate funds, the deduction for depreciation allowed to owners of real estate is included in the calculation of the net taxable income of the fund. Thus, from a tax perspective, investors in real estate funds effectively enjoy the same tax treatment for depreciation on real estate assets as direct owners of real estate (except that losses do not flow through to investors in a real estate fund).

As a result, the cash available for distribution may be higher than the net income for tax purposes. If the amount distributed to unitholders is greater than the net income for tax purposes, it is treated for tax purposes as a distribution of capital and reduces the unitholders' cost base in its investment (which is relevant only to non-resident unitholders if the units qualify as "taxable Australian property" the capital gains in respect of which are taxable in the hands of the non-resident). Unitholders do not pay tax on this part of the distribution unless its cost base is eroded to zero or until they sell their units in the trust and then possibly only at the concessional capital gains tax rate for individuals.

Managed Investments Trusts (MITs)

Special tax rules are applicable to trusts which qualify as Managed Investment Trusts (MITs). Very broadly, a MIT is an Australian resident trust which is a widely held trust that carries on passive investment activities (such as investing in real estate in Australia) and meets certain regulatory requirements under the *Corporations Act 2001* (Cth).

Where a trust qualifies as a MIT, a final withholding tax applies to distributions of certain Australian source income (other than dividends, interest and royalties) to foreign residents. Where the foreign resident is a resident of a country with which Australia has an effective exchange of information (EOI) agreement on tax matters, as specified in the regulations (EOI country), the final withholding tax rate is 15%, which is further reduced to 10% if the MIT holds only newly constructed energy efficient commercial buildings (or equivalent standard in retail and residential buildings).

Residents of countries which are not EOI countries are subject to a 30% withholding tax.

A MIT can make an irrevocable election to treat certain assets (including shares in a company, units in a trust and interests in land) on capital account for tax purposes. This election can help alleviate uncertainty around whether the assets of a MIT are capital assets eligible for Capital Gains Tax (CGT) treatment or revenue assets subject to ordinary income tax treatment.

Stapled securities

The stapled security structure allows the trust component of the stapled security to enjoy the tax treatment available to passive trusts. By contrast, that tax treatment would not always be available to a single trust holding and managing the real estate assets. In the case of REITs with stapled securities, the dividends derived from the shares in the Responsible Entity are subject to the usual tax treatment of corporate dividends, including franking credits.

Division 250

Very broadly, capital allowance (depreciation) deductions available to a taxpayer may be denied or reduced under the rules in Division 250 of the *Income Tax Assessment Act 1997* (Cth) where (among other things) the relevant asset is being put to a "tax preferred use" by a tax exempt entity or a non-resident for an arrangement period greater than 12 months, and where the taxpayer who would otherwise claim capital allowance deductions lacks a "predominant economic interest in the asset". (For example, if an Australian trustee of a trust acquires Australian real estate with more than 55% limited recourse funding and leases the land to a non-resident it would be necessary to consider Division 250.) Further advice should be sought on whether Division 250 applies in the circumstances of the individual taxpayer.

Public trading trusts

This general tax treatment for trusts does not apply to public trading trusts which are treated as companies for income tax purposes. A public trading trust is a public unit trust which, at any time during the relevant year of income, either carried on a trading business itself, or directly or indirectly controlled the affairs or operations of another person who was engaged in a trading business. A trading business does not include a business consisting wholly of investments in land for the purpose (or primarily for the purpose) of deriving rent. For this reason, REITs are structured so that the trust holds the real estate as an investment in land for the purpose of, or primarily for the purpose of, deriving rent. However, certain "excluded rent" is treated as part of a trading business. If the rent is worked out by reference to profits of an entity using land, and such rent is under an arrangement that is designed to result in the transfer of all or substantially all of what would otherwise be the profits of the entity to another party to the arrangement, that rent is excluded rent.

Stamp duty

State and Territory governments in Australia impose duty on conveyances of real estate at maximum rates of between 4.5% and 7.25% calculated on the higher of the purchase price and the unencumbered value of the real estate. In addition, a land rich or landholder duty is imposed at the transfer rate on certain acquisitions of equity interests in corporations or trusts which, directly or indirectly, hold land.

In general, the landholder/land rich duties do not apply to a transfer of units in a widely held REIT or wholesale fund which does not involve a significant change in interests. These rules have had an impact on the preferred arrangements for wholesale funds and for the intermediary vehicles (such as sub-funds) through which a REIT may invest. See further details regarding the operation of the land rich and landholder duty provisions in the Tax chapter (Chapter 11).

Transparency and investor confidence

In Australia the reliance of the REIT market on equity financing requires a high level of investor confidence. This is promoted through the regulation of REITs as MISs and by the high level of transparency. The REIT market is one of the most analysed sectors of the economy. Analysts are assisted by a title registration system that requires significant detailed disclosure of real estate dealings and by continuous disclosure requirements for securities, including REIT units that apply to listed and certain other entities.

Regulation of managed investment schemes

Most real estate funds will be managed investment schemes for the purposes of the *Corporations Act*. This is because they involve the pooling of investor's money for investment in a scheme (deriving a return from real estate) where the members of the scheme do not have day-to-day control over the operation of the scheme.

Registration

All REITs, and some unlisted real estate funds, will need to be registered as managed investment schemes under the *Corporations Act*. In general, a managed investment scheme must be registered under the Act if:

- it has more than 20 members;
- it was promoted by a person, or an associate of a person, who was in the business of promoting managed investment schemes when the scheme was promoted; or
- it has been identified by the Australian Securities and Investments Commission (ASIC) as part of a group of closely related managed investment schemes that together have more than 20 members.

However it does not need to be registered if all of the issues of interests in the managed investment scheme occur in circumstances where no Product Disclosure Statement is required. This is most likely to be the case when the interests in the scheme are only offered to wholesale clients. These scheme are commonly called "wholesale trusts" or "wholesale unregistered managed investment schemes".

If a person operates a managed investment scheme in breach of the registration requirement, ASIC, the operator or any member of the scheme can apply to the court to have it wound up.

Compliance plan

Each registered scheme must have a Compliance Plan that sets out the measures which a Responsible Entity is to apply in operating the managed investment scheme to ensure compliance with the Act and the scheme's Constitution. Chapter 5C of the Act and ASIC's policies set out the requirements for a Compliance Plan which include ensuring: scheme property is clearly identified as such and held separately from other scheme property and property of the Responsible Entity, scheme property is regularly valued, and adequate scheme records are kept.

External directors or compliance committee

Where the board of directors of the Responsible Entity does not consist of at least half "external" directors, as defined in the Act, a scheme must have a Compliance Committee. The Compliance Committee must consist of at least three members, the majority of which are "external" (effectively, this means they are independent from the Responsible Entity).

The role of the Compliance Committee consists of:

- monitoring the extent to which the Responsible Entity complies with the scheme's Constitution, the Act and the scheme's Compliance Plan;
- recording any breaches of the Act or the scheme's Constitution to the Responsible Entity; and,
- where the Responsible Entity does not take appropriate action to deal with such breaches, or the breach is "significant", to report the matter to the ASIC.

Responsible Entity

The aim of the Australian legal and regulatory framework is to locate in one clearly identified entity (i.e. the Responsible Entity) full responsibility for the management of registered managed investment schemes on behalf of the members.

Chapter 5C of the Act imposes extensive duties on the Responsible Entity and its officers. These include the duty to:

- act honestly;
- exercise a reasonable degree of care and diligence;
- act in the best interest of members of a scheme; and
- treat scheme members of the same class equally and members of different classes fairly.

Licensing requirements

The Responsible Entity (RE) of a registered managed investment scheme must be a public company that holds an Australian financial services licence authorising it to operate a registered managed investment scheme. A trustee of a wholesale unregistered managed investment scheme will also usually require an Australian financial services licence, but the authorisations will be different.

To obtain a licence the applicant company will need to satisfy financial requirements and a series of non-financial criteria administered by ASIC. The financial requirements for a licensed operator of a registered managed investment scheme include:

- risk management systems
- positive net assets and be solvent
- a cash needs requirement based on projections of cash requirements for 12 months
- net tangible assets of the greater of
  - A$150,000
  - 0.5% of the average value of all scheme property for schemes and Investor Directed Portfolio Service (IDPS) of which the Responsible Entity is the operator
  - 10% of average Responsible Entity and IDPS revenue if the Responsible Entity has a qualifying custodian holding scheme property, and otherwise the greater of A$10 million or 10% of average Responsible Entity and IDPS revenues
- cash or cash equivalents of the greater of A$150,000 or 50% of the net tangible asset requirement
- liquid assets of at least 100% of the net tangible asset requirement
- surplus liquid funds of A$50,000.

The financial requirements applicable to a trustee of a wholesale unregistered managed investment scheme are generally not as onerous.

The non-financial criteria applicable to a licensee focus on systems, supervision, training and adequate staff, IT and other resources.

Custodian

The Act also imposes a duty on the Responsible Entity to hold the scheme property on trust for the members. The Responsible Entity may appoint an agent to fulfil its duty of holding the scheme property. In order to hold scheme property itself, a Responsible Entity must have the greater of A$10 million or 10% of average RE and IDPS revenue in net tangible assets. Otherwise, ASIC requires the Responsible Entity to appoint another person who has A$5 million in net tangible assets to hold the assets of the scheme. Persons appointed to hold scheme property are usually referred to as "custodians". At the time or writing this Guide, ASIC has just released new financial requirements for persons who act as asset holders for registered managed investment schemes, and those new financial requirements will apply with effect from 1 July 2013 for new licensees. For existing licensees, there will be a one year transition period and compliance will be required from 1 July 2014. The new financial requirements for custodians are higher and more extensive than those which have applied to date.

Scheme assets that qualify as "special custody assets" within the meaning of ASIC Regulatory Guide 166 need not be held by a person who is a qualifying custodian. Examples of special custody assets include currency and chattels. There are other exceptions eg where the Responsible Entity manages real property, physical assets and cash deposits and has at least A$500,000 in net tangible assets. At the time of writing this Guide, ASIC is expected to shortly release a new definition of "special custody assets". It has also provided new guidance on the financial requirements applicable to entities which act as trustees of wholesale unregistered managed investment schemes and hold financial products in that capacity.

Disclosure requirements

Initial Offer of Interests

Where an interest in a registered managed investment scheme is offered to a retail client, a Product Disclosure Statement (PDS) must be given to the retail client. Generally, interests in wholesale unregistered managed investment schemes cannot be offered to retail clients.

The PDS must include certain information and statements about the product as reasonably required for the purpose of making a decision as a retail client whether to acquire the product. This includes information about benefits, risks, costs, commissions, significant characteristics, significant tax implications, dispute resolution, cooling off periods, and the extent to which labour, environmental, social or ethical standards are taken into account in the investment decisions of the scheme.

A PDS is not required to be given where the offer or issue is made to a professional investor or a person holding a qualified accountants' certificate with net assets or gross income for the last two financial years above the prescribed threshold (currently A$2.5 million and A$250,000 respectively) who is not acquiring it for use in a business, where the investor will invest more than A$500,000 or in other circumstances that do not constitute an offer or issue to a retail client. There are also exemptions for small scale offerings, takeovers and other specific situations.

Ongoing Disclosure

There are ongoing disclosure requirements applying both in relation to the registered managed investment scheme and the PDS.

Annual audited financial and directors' reports for the registered managed investment scheme as well as the usual financial reporting obligations of the Responsible Entity as a public company are required. The Responsible Entity must also provide an annual report to members and a statement as licensee to ASIC. A REIT (and any other registered managed investment scheme which is a disclosing entity) must also provide half-yearly audited financial reports and directors' reports.

In the case of ASX-quoted managed investment products as well as any other registered managed investment scheme with more than 100 members, there are further obligations which essentially require disclosure of information that is not generally available and that a reasonable person would expect to have a material effect on the price or value of the REIT units. REIT units, where they are enhanced disclosure securities, also attract periodic reporting obligations.

Mergers, Takeovers Reconstructions

Over the last few years there has been consolidation in the REIT sector in Australia giving rise to both friendly and hostile takeover bids, and more recently reconstruction and recapitalisation activity.

There are three main legal techniques that have been used in Australia to take control of a REIT or the assets or management of a REIT. These are a takeover bid, a scheme and a change of Responsible Entity.

A takeover bid – this involves a potential acquirer making an offer to all unitholders of a target REIT to acquire their units in the REIT on the same terms. The bid may be made "off-market" (involving written offers to all unitholders) or "on-market" (where the bidder's broker stands in the market for a minimum period of one month and offers to buy all securities offered at the bid price). On-market bids are relatively rare because they must be for cash and unconditional.

Schemes merger – a REIT can merge with another REIT by agreement through a scheme approved by a special resolution of the members of the target REIT (Trust Scheme). The Scheme provisions are incorporated in the constitution of the target REIT. A Scheme can be used for either a listed REIT or an unlisted REIT. If the target REIT is listed, the Scheme would also need the approval of target members under the takeovers provisions of the *Corporations Act*. The Responsible Entity of the target REIT may choose to apply to the court to approve the Scheme under the *Trustee Act* – while this is not an essential step for a Scheme, it has become a generally accepted practice. Where the proposed transaction involves a company (or other registrable Australian body) as well as a REIT, the Trust Scheme for the REIT could be combined with a member and court approved scheme of arrangement for the company (or other registrable Australian body) under the arrangement and reconstruction provisions in the *Corporations Act*.

Replacing the Responsible Entity – the third technique is to replace the Responsible Entity. The Responsible Entity of a REIT can be replaced by a resolution of unitholders – an ordinary resolution in the case of a listed REIT and an extraordinary resolution in the case of an unlisted REIT. If the acquirer's aim is to takeover the business of managing the REIT, rather than ownership and control of the REIT itself, it will usually be cheaper and faster for it to seek to be appointed as Responsible Entity of the REIT in place of the current Responsible Entity at a unitholders' meeting.

These techniques have also been considered for reconstructions, along with recapitalisation by way of rights issues and private placements.

In all three cases, the REIT's constitution is a key factor in the legal analysis, particularly as to the powers of the Responsible Entity (as a trustee), and the extent of the unitholder approvals required for the proposed transaction.

Other issues of significance in REIT mergers and takeovers include:

- **Pre-emptive rights** – the impact of pre-emptive rights in co-ownership and management agreements exercisable upon relevant changes in control
- **Constitution** – whether the REIT's constitution needs to be amended by unitholder resolution and, if so, the analysis of voting rights
- **Voting rights** – whether interests held by the Responsible Entity or its associates are precluded from voting
- **Fees** – whether the existing fee arrangements will apply to the benefit of the new Responsible Entity and its group after the proposed transaction is implemented
- **Related party transactions** – whether the proposed transaction involves any related party transactions that require unitholder approval
- **Issue pricing** – if the transaction involves the issue of units in the REIT the constitution, which regulates the issue price, may require amendment to enable the issue to proceed
- **Statutory novation** – whether the statutory novation of the Responsible Entity's rights, obligations and liabilities extends to all relevant liabilities
- **Tax** – the tax implications of stapling arrangements for the structure of transaction
- **Stamp duty** – the stamp duty implications of any pre-transaction restructuring and the process of privatisation or delisting
- **Conflicts of interest** – the arrangements required to address potential conflicts of interest where the new Responsible Entity continues to be the Responsible Entity of another REIT
- **Financier consents** – whether any change of Responsible Entity or change in control triggers any financier consent requirements
- **ASIC/ASX approvals** – depending on the transaction, it may be necessary to obtain approvals from the ASX and/or ASIC or obtain a review of any relevant disclosure materials e.g. the Scheme booklet for a Trust Merger
- **FIRB approval** – where the proposed acquirer or new Responsible Entity is foreign owned or controlled, whether approval is required under Australia's foreign investment laws (see the chapter on Foreign investment in Australian real estate on page 10).

Foreign investment in REITs in Australia

Foreign institutional investment in REITs in Australia will not usually give rise to issues under Australia's foreign investment laws because the investment will usually fall below relevant thresholds. However, foreign control over Australian real estate funds or fund managers, and changes in controlling interests in a Responsible Entity, may do so (see Chapter 3 on Foreign investment in Australian real estate).

Key issues

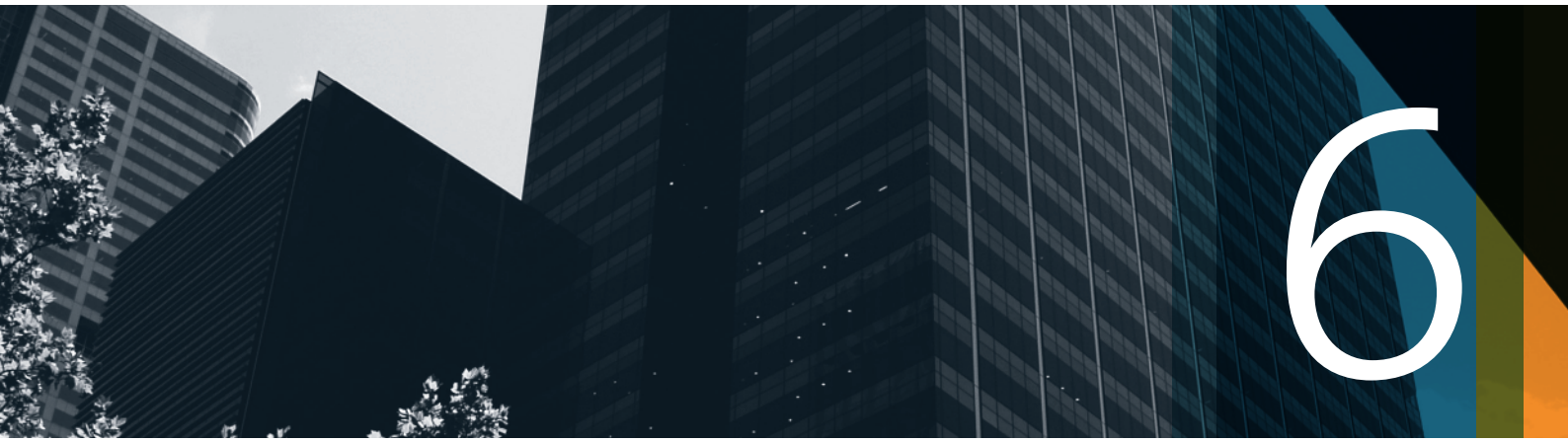
REITs are a very important aspect of real estate investment in Australia, with more than 70% of institutional grade real estate securitised.

The Australian legal and regulatory framework for the REIT market:

- is investor focused
- allows flexible investment structures
- requires rigorous disclosure and corporate governance
- is responsive to cross border investment.

These features have allowed the market to meet investor requirements such as:

- liquidity
- security of title
- tax pass through treatment
- expert management
- transparent and responsive corporate governance.



Real estate transactions

In Australia a number of parties are involved in real estate transactions, in addition to the buyer and seller. The parties involved, as well as the processes undertaken, while substantially consistent throughout Australia can vary slightly across the various States and Territories.

What is the usual sale process?

Pre-exchange

- Seller appoints agent and prepares contract
- Buyer due diligence
- Negotiate contract
- Non binding LOU can be signed

Exchange of contracts

- Sign contract
- Buyer pays deposit (normally 10%)

Pre-settlement

- Normally 28-42 days, depending upon conditions precedent
- Agree settlement adjustments
- Buyer pays duty

Settlement

- Pay price
- Transfer of title
- Sign other transfer documents

Post-settlement

- Register title documents
- Notify tenants and authorities
- Pay agent commission

Buyer due diligence

Legal due diligence normally requires investigations on:

- Title documents
- Leases
- Plan and survey
- Planning certificate and development approvals
- Property costs – such as land tax, water rates, council rates and so forth
- Requisitions on the seller
- Standard property enquiry searches
- Environmental issues (eg contamination)
- Service contracts
- Litigation
- Tax

A buyer's due diligence usually extends beyond legal due diligence to, for example, physical due diligence, financial due diligence and environmental due diligence.

The Sale Contract

There are different standard form contracts in each Australian jurisdiction which deal with the rights and obligations of the seller and the buyer of real estate. However, specific conditions and warranties are often negotiated to reflect the type of the asset and the nature of the transaction.

The deposit is sometimes invested and there are specific requirements regarding the manner in which the deposit is held, how it is invested and who will be entitled to the accrued interest on the investment of the deposit which can be agreed between the parties.

On exchange of contracts, the buyer pays a deposit to be held by the selling agent or another stakeholder such as the seller's lawyer. The deposit is generally 10% of the price however this may alter depending upon the size and type of transaction.

Some of the key issues negotiated in a sale contract are set out in the diagram below.

Key issues negotiated in sale contacts

Key issues negotiated in sale contacts

Limitations on claims
- Claims to be made within a limited time period after completion
- Monetary cap and minimum threshold for claim amounts
- Retention of money for claim amounts

Deposit
- Usually 10% of purchase price
- Whether deposit is refundable or non-refundable (eg. failure to complete due to non-satisfaction of conditions precedent)

GST
- GST inclusive or GST exclusive price
- Going concern
- Margin scheme

Conditions precedent
- Sunset date
- Consequences for failure to satisfy conditions precedent

Inclusion
- Land
- Personal property and assets
- Intellectual property
- Licences

Representations, warranties and indemnities
- Scope of disclosure required by vendor
- Reliance by purchaser on its own due diligence
- Claim for damages for breach

Contamination and environment
- Representations and warranties
- Responsibility for contamination and environmentissues

During contract period
- Risk of damage during contract period
- Management of any existing tenancies

Disclosure obligations

NSW, VIC and SA have seller disclosure legislation which require a seller to provide detailed information on the seller's title, the planning controls and other matters relating to the property before the contract is entered into or settled.

If the seller fails to attach the required documents to the contract for sale the buyer has the right to rescind the contract within 14 days after the contract is entered into.

Contractual warranties

In commercial real estate transactions contractual warranties by the seller may include the following:

- where real estate is tenanted, warranties such as those stating that the leases are in force, the tenancy details (including rent) disclosed in the contract are correct and the seller has disclosed all material information
- where real estate may have had some industrial use or may have been exposed to contamination, warranties relating to the state of the property and existence of contamination.

Remedies for breach of a contractual warranty are usually damages.

The function of the warranties in this context is to give buyers comfort in relation to aspects of the information relating to the property which the buyer has relied on and which the buyer has not been able to independently verify through their own pre-contractual investigations.

While in some cases, more extensive warranties from the seller can be negotiated, generally the seller's warranties are not a complete substitute for the buyer carrying out its own due diligence.

Statutory warranties

Some jurisdictions have statutory warranties. For example, in NSW, the *Conveyancing (Sale of Land) Regulation 2005* contains warranties to the effect that the land is not subject to any adverse affectation. The buyer's remedy for a breach of a statutory warranty is usually the right to rescind the contract at any time before the contract is completed.

Statutory warranties were introduced to shift the burden of disclosure on to the seller, however it is not a substitute for the buyer carrying out its own due diligence.

Passing of risk

The standard form contracts used in the different jurisdictions provide for the timing of the passing of risk in relation to the property. In some jurisdictions the risk of the real estate on some asset classes passes to the buyer on exchange of contracts, while in other jurisdictions the risk passes on completion or closing.

This is particularly relevant in considering when insurance needs to be effected and in negotiating the provisions of the sale contract.

Insurance

The buyer will usually liaise with its insurance brokers to obtain the relevant insurances for the property. Although title insurance is available in Australia, given the "indefeasibility of title" (refer to Chapter 7 on Australian property law), it is rarely used as a substitute for the buyer's due diligence enquiries.

Australian Real Estate transactions – who is involved?

Agents

- Real estate is generally sold through real estate agents, who introduce the buyer to the seller.
- Purchasing agents are used occasionally by buyers.
- Normally paid a commission on settlement (closing).

Surveyors

- In some jurisdictions it is common practice to obtain a survey report showing the location of the buildings on the property in relation to the boundaries.
- A survey can confirm the boundaries of the property and if there are any encroachments on or from the land.

Office of State Revenue

- Stamp duty is payable on real estate transactions.
- The amount of duty differs between the various States and Territories – see Tax, chapter 11.

Lawyers

- Lawyers are closely involved in the sale process.
- Lawyers for the seller prepare and negotiate the contract for sale and manage the transaction through to settlement (or closing).
- Lawyers for the buyer carry out due diligence, review and negotiate the sale contract and manage the transaction through to settlement.

The Buyer and the Seller

Local Councils

- The legality of the buildings on the property is established through enquiries at the local municipal council.
- This could involve inspecting the Council file or obtaining an appropriate certificate from the council.
- Councils charge fees for the inspection of building files and/or for giving certificates as to the legality of buildings.

Building Consultants

- Buyers will generally engage a building consultant to give them a report on the condition of a building.
- They can provide a comprehensive building condition report regarding the building structure, mechanical and engineering services, and compliance with the Building Code of Australia.

Other consultants

- The involvement of other specialist consultants is determined by the nature of the property.
- It is common to obtain a valuation – and this is usually required by any financier.
- For example, a geotechnical engineer's report might be obtained if the property was in a land subsidence area.

Environmental Consultants

- For some properties it may be necessary to engage an environmental consultant to determine if there is any contamination in the land.
- This is particularly important in vacant land for development or land previously used for some industrial purposes.

Australian property law

Torrens title and common law

The Torrens title system, named after its inventor Sir Robert Richard Torrens, began operating in Australia in 1858. The Torrens system is now used in many parts of the world.

Under the Torrens system, title or ownership right to real estate is created by the act of registration in a central register or record. Normally the person who is recorded as the owner of a parcel of land cannot have their title challenged or overturned. This concept is known as "**indefeasibility of title**". There are some exceptions in limited circumstances to this general rule which are discussed below.

Each State and Territory has its own legislation and a different registration system, however they are all based on the Torrens Title system.

Real estate registration

Under the Torrens system, priority between interests is determined by their order of registration and not their order of execution. The general principle of the Torrens system is that upon registration the registered proprietor holds their interest subject to prior registered interests, but free from all interests which are not registered. This general principle of indefeasibility is subject to a number of statutory exceptions such as fraud, some short-term leases and misdescription of boundaries.

In order to obtain the protection of registration under the Torrens system, transfers of land, mortgages, easements and restrictive covenants must be registered. The consequences of non-registration are that the holder of the unregistered interest has an equitable interest only, will lose priority to subsequent interests, and the interest will be defeated by the registration of a later dealing.

On a sale of Torrens land, title is transferred to the buyer on the registration of the transfer in the Titles Office of the particular State or Territory.

"...it was Torrens and a German lawyer Dr. Ulrich Hubbe (with a knowledge of the real property laws of the Hanse Towns), who put the present method into practical shape, and fought it through parliament in spite of violent opposition from the legal profession."

The Advertiser 17 February 1932

The title registries

Each State or Territory has its own land titles registry. The differences between the land titles registries are generally procedural – eg as to forms and lodgement fees.

Title information from the registries is publicly available and can normally be accessed online.

Converting from old system title to Torrens title

The policy in all jurisdictions of Australia is for land to be registered under the Torrens system where possible. Most land is now under the Torrens system. Some areas of land, typically rural, in NSW, TAS, VIC and WA have not yet been converted to the Torrens system and remain under old system title. The jurisdictions that still have unregistered land all have procedures for bringing land into the Torrens system, but these vary.

Unregistered rights

The interests that can be registered vary between States and Territories but generally include transfers of land, life estates, leases, easements, mortgages, and restrictive covenants.

The main rights in land which are not required to be registered are some categories of leases. The criteria for protection differ considerably between State and Territories. For example, the applicable legislation will protect unregistered tenancies for terms not exceeding one year in SA, three years in the ACT, NSW, QLD, NT and TAS, five years in WA and terms of unlimited duration in VIC.

Some rights that cannot be registered include options to purchase. Because an option is regarded as an interest in land, it may be protected by way of a caveat which is lodged against a title to give notice of the option. However, the option does not receive the full benefits of indefeasibility with the registration of a caveat, and, for the purposes of resolving priority disputes, it is treated as being unregistered.

Caveats are also used to protect the interests under dealings that are registrable but have not yet been registered, provided such interests in land are validly claimed.

Types of interests in property

Registered rights

Freehold estates	Fee simple	This is the most common form of land ownership in Australia and is an estate of unlimited duration.
	Life estates	This grants a person exclusive possession of the property during their lifetime. These are not common.
Leasehold estates	Fixed term	This grant of exclusive possession of the land for a fixed period. This is the most common form of lease.
	Periodic tenancies	This is a grant of exclusive possession of the land on a periodic basis, such as from week to week, month to month or year to year, until one party terminates it by giving the appropriate amount of notice.
	Tenancies at will	Arises when a person occupies land on the terms that either party may terminate it at any time.
	Tenancies at sufferance	Arises when a tenant remains in possession after the expiration of a lease without the landlord's assent or dissent.
Crown Land		Land owned by the Commonwealth or a State or Territory.
Mortgages		An interest in land created in favour of a party to secure repayment of a loan or other financing arrangement.
Easements		An interest in land to the extent that it creates a right to use, but not occupy, the land of another for a specific purpose. For example, a right of way or a right to drain water.
Caveats		A registered instrument on the title to the land which records a "caveatable" interest in the land, for example pursuant to a contract to buy the land.

Contractual rights

The following rights are purely contractual between the parties:

- Licence – a grant of non-exclusive use or access to land
- Options – a call option or put option to acquire land
- Right of first refusal to acquire land – where the land owner agrees with a person not to sell the land without first offering it to that person.

Key issues

Central to Australian real estate law is the Torrens Title system.

The Torrens Title system is based on a guarantee of registered title by the States and Territories. While all jurisdictions are covered by Torrens Title, registration requirements vary.

When investing in Australian real estate foreign investors should ensure they are familiar with the registration requirements in the State or Territory in which they are investing.

It is also important to understand the legal rights applicable to specific real estate investments.

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Leases

Leases deal comprehensively with the rights and obligations of the landlord and tenant. In the absence of express agreement, the applicable legislation and the common law will imply some covenants into the lease – for example, a covenant for quiet enjoyment granted by the landlord to the tenant.

Each Australian State has specific retail tenancy legislation which applies to retail shops. This legislation protects the interests of small or specialty retail tenancies.

Typical lease terms

Lease terms are commercially negotiated between a landlord and a tenant. The following descriptions outline the terms of a typical lease.

Lease term	Commercial Lease	Retail Lease
Pre-lease documents	A non-binding heads of terms is usually signed but is not legally required.	A non-binding heads of terms is usually signed but is not legally required. A landlord must normally also issue a "disclosure statement" to a tenant a specified period before the entry into the lease.
Lease document costs	Normally a landlord will require a tenant pay the lease preparation and registration costs.	Retail tenancy legislation prohibits a landlord from recovering most lease preparation costs. A tenant will normally be responsible for payment of registration costs. Landlords are also prohibited from requiring payment of any "key money".
Length of term	A small tenancy may be 3 to 5 years, with options to renew. Options to renew are exercisable at the sole discretion of the tenant, subject to the tenant complying with its obligations under the lease. Larger tenancies are typically for longer periods.	All jurisdictions except Queensland specify a minimum term for a retail lease of 5 years, unless the tenant agrees to a shorter term and provides evidence of legal advice to such agreement.

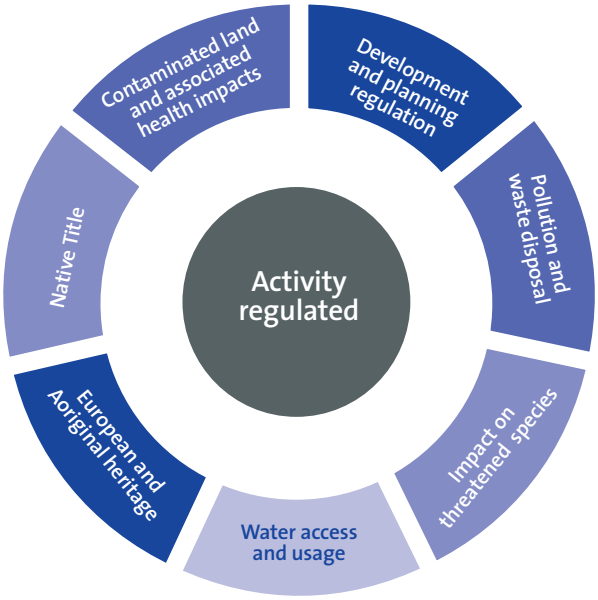
Lease term	Commercial Lease	Retail Lease
Rent	Normally the rent is a fixed amount which is payable monthly in advance. Landlords may offer incentives in the form of rent free periods, reduced rental period or fitout contributions. Rent is subject to GST.	Normally the rent includes a fixed amount plus a turnover rent, which is payable monthly in advance. Landlords may also offer incentives in the form of rent free periods, reduced rental period(s) or fitout contributions. Rent is subject to GST.
Rent reviews	Rent is usually reviewed on each anniversary of the commencement date. Commonly rent is reviewed by a fixed percentage increase or a CPI increase, with market rent reviews at larger intervals, for example every 5 years or on exercise of an option.	Rent is usually reviewed on each anniversary of the commencement date. Rent is commonly subject to fixed rent increases. CPI rent review and market reviews are less common, noting that retail leasing legislation prohibits 'rent ratchets' in various jurisdictions (provisions stating rent cannot decrease).
Outgoings	Outgoings includes all of the costs of the whole of the building, such as rates, taxes, insurance, management, common area cleaning and repair, water rates and charges and so forth. Normally a tenant will be required to pay a proportion of the total outgoings for the building referable to the proportionate size of the premises.	Landlords will normally include in the rent calculation an amount in respect of outgoings. Some retail leasing legislation imposes: • restrictions on what outgoings can be charged to retail tenants – for example, land tax is not recoverable in some states; and • obligations on reporting on outgoings and forms of "outgoings statements".
Repair and maintenance	Usually the responsibility of the tenant, fair wear and tear excepted. Landlord's normally retain responsibility for capital and structural repair and maintenance.	The same applies. Some retail leasing legislation imposes obligations on landlords in relation to repair and/or compensation regimes (for example in relation to breakdown of plant and equipment).
Insurance	A lease does not normally impose insurance obligations on a landlord, although a prudent landlord would normally still effect its own public liability and building insurance. A tenant will normally be required to provide evidence of public liability insurance, contents insurance and plate glass insurance. A landlord may require that it be noted on the certificate of currency.	The same applies.
Security	Landlords typically require a bank guarantee or security deposit of 6 months rent and outgoings (and GST).	Landlords typically require a bank guarantee of 6 months rent and outgoings (and GST). In some jurisdictions security deposits are required to be lodged with the relevant Retail Tenancy Board.

Lease term	Commercial Lease	Retail Lease
Assignment and change of control	Usually permitted with the consent of the landlord. The incoming tenant is normally required to assume all obligations under the lease, enter into a deed of consent with the landlord and pay the landlord's costs of consent. Change of control is normally treated as an assignment of the lease.	The same applies, however the retail leasing legislation normally restricts the grounds upon which a landlord may refuse to give its consent and/or time frames for responding to a request for consent.
Termination	A landlord normally has rights to terminate the lease if the tenant defaults in its obligations and does not rectify such default after notice. A landlord may negotiate to include additional early termination rights – such as on a redevelopment of the property.	A landlord normally has rights to terminate the lease if the tenant defaults in its obligations and does not rectify such default after notice. Landlords also have specific obligations in some jurisdictions to notify a tenant within a specified period before a lease ends as to whether the tenant will be offered a renewed lease, and failure to give such termination could give the tenant a right to extend the term of the lease. Termination of a lease for redevelopment is subject to specific requirements in the retail leasing legislation (for example as to notice periods and compensation).
Dispute resolution	As agreed by the parties.	The applicable retail leasing legislation imposes a dispute resolution regime on the parties.
End of term obligations	Tenants normally have obligations to: • remove all of the tenant's property • "make good" the premises to a specified standard – eg, base building configurations.	The same applies.

Environmental responsibility and land use

Businesses need to be aware of their environmental responsibilities, both in regard to land use and development activities, as well as pollution controls.

Throughout most of Australia there are increasingly stringent environmental controls restricting or regulating activity in the following areas:



Federal and State/Territory regulation

Most environmental controls are imposed by State or Territory legislation. However, since 1999, the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* also regulates development having an impact on matters of "national environmental significance" including:

- migratory species
- threatened species
- World Heritage properties
- RAMSAR wetlands
- Commonwealth property and marine areas
- the nuclear industry (including uranium mining)
- natural heritage places
- Great Barrier Reef Marine Park
- a water resource (in relation to coal seam gas development and large coal mining development).

Areas of predominantly State or Territory-based regulation are discussed overleaf

Development and planning regulation

The State and Territory systems of planning and development regulation are based primarily on comparable UK legislation, and have also been influenced by US environmental impact assessment legislation.

Land use is controlled at the broadest level by the division of land into "zones". Depending on the zoning of land, a particular use or development may be permitted without regulatory approval, only permitted with regulatory approval, or prohibited. For example, land in an urban area may be zoned "residential" and only certain kinds of uses and dwellings and associated infrastructure may be permissible with development consent from the applicable local council. The details of the controls vary from State to State.

The relevant State or Territory government will usually be involved in the process of considering and approving large projects, and projects with regional significance. For example, the Minister for Planning in Victoria has extensive powers to assess and approve major projects of State or regional significance and to override other assessment and approval requirements. The relevant State or Territory planning department will frequently be the approval body, and the responsible State or Territory Minister will often be involved in the approval process.

An environmental impact assessment must usually be prepared in support of projects. Projects that are likely to have a significant environmental impact may require a detailed environmental impact statement (EIS). The level of detail required for an EIS is steadily increasing. For example, an EIS for a significant mining or infrastructure project typically runs to several volumes and is compiled by a team of planners, ecologists, engineers and other technical experts. The requirements for environmental impact assessment under the *Environment Protection And Biodiversity Conservation Act 1999* (Cth) are also relevant to major projects.

In some jurisdictions major projects can be subject to more abbreviated and focused consultation and assessment regimes that can have the result of speeding up the approval process.

For large projects, there is often a public inquiry process at which opponents or the community generally may express their position before a panel, Commissioner or other arbitrator. In some States, specifically constituted "environmental courts" are given a role in this process. In most jurisdictions there are "open standing" provisions allowing third parties to take legal proceedings to ensure compliance with environment laws. These inquiry and litigious processes must be carefully managed to minimise delays in the approval process for a project.

Development approvals may impose detailed conditions with which the project needs to comply. In some cases, these include a requirement that the project be commenced and completed within prescribed periods. There may be further approval requirements before a project can proceed, such as the grant of mining leases or pollution licences.

Approvals can impose requirements that the applicant pay levies or contributions towards the provision of public services, infrastructure and amenities.

Pollution and waste disposal

There are comprehensive and onerous pollution and waste disposal laws in most jurisdictions.

Typically, a pollution licence is required to authorise certain water, land or air discharges or other impacts such as noise or vibration or to carry out activities listed in the legislation. Pollution licences impose discharge limits and regulate the polluting activity in some detail.

Pollution licences are generally granted by the relevant State or Territory environment protection authority (EPA). Each EPA periodically reviews the performance of licence holders. Managers or directors of licence holders may be required to certify compliance with relevant licence conditions on an annual basis.

A breach of a licence condition or of a control imposed by legislation is an offence. There are a range of enforcement options, including prosecution or the issue of penalty notices (and on the spot fines) for less serious contraventions. Significant penalties, including fines in the millions of dollars and imprisonment, can be imposed by the courts for significant pollution offences. Generally, liability is strict, meaning that the fact of pollution is all that the EPA will be required to prove in any court proceedings. For the more serious offences (usually associated with maximum penalties of A$1 million or more), negligence or intent must be proved.

Typically, if a corporation commits an offence, then each person who is a director or person concerned in the management of the corporation is taken to have committed the same offence, unless certain defences can be established. These defences typically require the exercise by the person of due diligence. In some jurisdictions, related corporations may also be liable.

Waste disposal is similarly regulated and disposal to licensed landfills or facilities is generally required. The owner of waste may in some cases be deemed liable for leakage or spillage and incidents on a "no fault" basis.

Impact on threatened species

There are increasingly restrictive regulations being imposed in most jurisdictions regulating development with an impact on threatened species. Much of this legislation is modelled on the US *Endangered Species Protection Act 1973*.

In New South Wales, for example, the *Threatened Species Conservation Act 1995* (NSW) lists a large number of threatened species, populations and "ecological communities". Development or activities impacting on the listed items is prohibited in the absence of a licence, which is granted only after consideration of appropriate environmental impact assessment. The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (Cth) also requires assessment and approval of actions that are likely to have a significant impact on species and ecological communities listed under that Act.

Water access and usage

In general, licences are required from the relevant State or Territory department or water authority for the sinking and use of artesian bores and the use of river or stream water. Capacity limits will be imposed. Regulation is becoming more stringent, and water trading schemes have been introduced.

European and Aboriginal heritage

State and Territory legislation protects significant items of post-settlement European heritage. Regulatory approvals may be required if a proposed development could affect European heritage items. Such legislation is frequently based on a list of significant heritage items located in the relevant State or Territory. Some legislation allows the relevant State or Territory authority to issue stop work or protection orders to protect such items.

Aboriginal heritage is also given broad protection by Commonwealth, State and Territory legislation. Regulatory approvals are required before Aboriginal heritage objects and places are impacted by developments. Comprehensive Aboriginal heritage assessment and management is necessary for mining and other major developments. Impacts on Aboriginal heritage are also frequently matters of political sensitivity, which need to be carefully managed to ensure optimal project outcomes.

Native title

Native title has become an area of major significance since the rights of Indigenous groups to certain land were recognised by the High Court of Australia in the 1988 *Mabo* decision. Federal legislation was introduced in 1993 to regulate dealings in land that may affect native title and grant procedural rights to those claiming native title. Native title has an impact on many mining and infrastructure projects. In many cases, a project developer must negotiate a suitable agreement with the Indigenous groups claiming native title before the project can proceed.

Contaminated land and associated health impacts

Contaminated land issues are particularly relevant to urban renewal projects of former industrial, commercial and defence sites, mining rehabilitation, agricultural "dipping" sites and areas with shallow groundwater or groundwater usage.

Legislation in most States and Territories regulates the use of contaminated land. The relevant EPA may have power to issue investigation or remediation orders in relation to contaminated land. Typically, the EPA can serve orders on the original polluter or on the owner or occupier of the contaminated land.

In some circumstances, receivers or other financial administrators or intermediaries with an interest in the land may be ordered to carry out investigations or remediation. The costs of complying with such orders may in some cases be recovered from the original polluter, if they can be located.

Remedial standards vary across jurisdictions; but, generally, there is an acceptance of risk-based assessments to determine an appropriate level of remediation. This approach is described in the National Environment Protection Measure for the Assessment of Contaminated Sites, issued by the National Environment Protection Council.

Numerous occupational health and safety issues arise in relation to work on a contaminated site, and State and Territory legislation deals with such matters.

Risk and liability containment issues become important where contaminated land is concerned, necessitating careful drafting of contracts for purchase and sale of contaminated land.

Greenhouse/climate change

The Australian Government ratified the Kyoto Protocol in December 2007. The Kyoto Protocol imposes binding commitments for the reduction of greenhouse gas (GHG) emissions from developed countries. In the second commitment period, Australia has committed to reducing national GHG emissions to a level equivalent to a 5% reduction of 2000 levels by 2020. In parallel with the Kyoto Protocol, Australia is also participating in international negotiations for a post 2012 agreement, which is intended to be a broader more comprehensive framework, with emission reduction commitments from developed as well as developing countries.

The current Federal Government has repealed the Carbon Pricing Mechanism, and replaced it with its "Direct Action Plan", which is based on incentives to reduce emissions rather than obligations. A central component of the Plan is an Emissions Reduction Fund which is a reverse auction mechanism whereby the projects that are able to reduce emissions at the least cost are funded by the Government to do so. There will however be a safeguard mechanism (to commence 1 July 2016) to ensure that reductions paid for through the Emissions Reduction Fund are not offset by significant increases in emissions elsewhere in the economy. Overall, the Government is committed to the 5% reduction commitment, but plans to meet the target through regulatory action rather than market-based measures.

The National Greenhouse and Energy Reporting Scheme (NGERS) commenced in 2007. For corporate groups that exceed the reporting thresholds, NGERS requires the corporation at the top of the corporate structure in Australia to report to the Government, on an annual basis, the GHG emissions, energy consumption and energy production from facilities under the operational control of members of the group.

There are also obligations for the sourcing of electricity from renewable sources. Legislation has been passed to require a 20% share of renewables in Australia's electricity market by 2020. The large-scale RET scheme requires certain large electricity users to meet a share of the renewable energy target in proportion to their share of the national wholesale electricity market. The RET may be reviewed as a result of the expert panel completing its review of the RET in 2014. Its report has been provided to the Government for consideration.

The previous Government established a $10 billion commercially-oriented Clean Energy Finance Corporation (CEFC). The objective of the CEFC is to overcome capital market barriers that hinder the financing, commercialisation and deployment of renewable energy, energy efficiency and low emissions technologies. It had an initial budget of A$2 billion over five years and commenced funding of projects from 1 July 2013. While the current Government has attempted to shut down the CEFC, the operations of the CEFC continue at this time.

The Federal Government has enacted legislation to regulate offshore carbon capture and storage and some States have enacted legislation to regulate onshore carbon capture and storage.

These measures will have a commercial and legal impact on investments in Australia but also provide opportunities for businesses which are able to take advantage of renewable energy and carbon capture and storage projects.

Energy efficiency and green buildings

In 2010, the Building Energy Efficiency Disclosure legislation was passed requiring owners or lessors of certain commercial office buildings to disclose energy efficiency performance data (in a Building Energy Efficiency Certificate) to prospective buyers and tenants when space is offered for sale, lease or sublease. The Building Code of Australia also sets out energy efficiency requirements for new buildings and major refurbishments.

There is also State-based regulation. For example, in NSW, there is a program known as the Building Sustainability Index (BASIX) which assesses a residential building's energy efficiency and water reduction achievements. The design must meet minimum targets before a BASIX Certificate can be issued, and every development application for a new home or residential flat building must be submitted to the relevant local council with a BASIX Certificate. There are also a number of voluntary environmental rating tools that have been developed to assist in quantifying and comparing the "sustainability" of buildings, such as the National Australian Built Environment Rating System (NABERS) and the Green Star rating tool.

Recommended action

Environmental responsibilities are wide ranging and affect many businesses and industries. You will need specific advice regarding your particular business or project.

You need to understand the environmental aspects of your business activities and implement an environmental management plan to help ensure compliance and to fulfil due diligence requirements.

If you are planning to undertake major projects or land development activities you may need to obtain a number of approvals from Local, State and Commonwealth authorities. You need to identify these approval requirements and the risks involved in obtaining approvals and factor these into project budgets and timelines. You need to understand the decision-making processes of the authorities and have a strategy in place to efficiently progress assessments and applications.

Water allocation is an increasingly controversial issue. For projects with high dependency on water availability be careful to put in place a strategy for validly securing water entitlements.

You will need to consider the impact of your business on greenhouse gas emissions and factor regulations and commercial opportunities into the structuring of your business or project.

Before buying land or committing to a project, carry out due diligence to help ensure the environmental constraints and liabilities are identified, assessed and can be efficiently managed.

Banking and finance

Australia has an extensive, competitive and well developed banking and finance system, comprising both bank and non-bank sectors.

Australia's efficient State and Territory based Torrens Title systems also provide security for both buyers of property and their financiers. A real property mortgage can be granted by the relevant landowner in favour of a financer and registered with a first ranking priority over the title to the corresponding property. A combination of a sophisticated banking sector, secure titles systems and a robust legal system creates a highly efficient commercial and legal environment structure for financing real estate, thus boosting investor confidence and facilitating real estate investment.

The banking sector

The banking sector consists of:

- the Reserve Bank of Australia (RBA) – Australia's central bank
- the Australian Prudential Regulation Authority (APRA)
- Australian-incorporated banks, credit unions and building societies
- foreign banks licensed to operate through a branch in Australia
- Australian-incorporated foreign bank subsidiaries.

The non-bank sector consists of numerous types of domestic and international financial institutions, including:

- merchant/investment banks
- finance companies
- building or cooperative societies
- credit unions
- friendly societies
- mortgage originators
- insurance companies
- institutional funds
- superannuation (ie, pension) funds
- public unit trusts
- cash management trusts.

Credit facilities and financial markets

Borrowers in Australia can raise debt finance either from banks and other credit providers or direct from domestic and/or offshore capital markets.

Requirements for real estate finance

The minimum formalities for real estate lending with banks are as follows:

- obtaining a valuation of the relevant property
- undertaking title searches and due diligence of the relevant property
- undertaking other due diligence, including:
  - in the case of development financings, due diligence of the building contract
  - in the case of residential development financings, due diligence of presale contracts
  - in the case of commercial development financings, due diligence of material agreements to lease
  - in the case of investment financings, due diligence of key revenue contracts, such as material leases
- being granted security in the form of a real property mortgage (customarily first-ranking) over the property, which mortgage is registered in the applicable State or Territory land titles office
- requiring the borrower to insure the improvements with an insurance policy which notes the lender's interest and if applicable, notes the lender as loss payee
- entering into appropriately tailored facility and related documentation in connection with the real estate financing.

To protect against default by the borrower, a lender for a real estate transaction would also typically:

- undertake stringent credit checks and assessment of the borrower and other security providers (for example, guarantors) and / or project which the lender is seeking to finance
- require appropriate covenant protection in the facility documentation, including:
  - in the case of development financings, loan-to-value and loan-to-cost covenants, and restrictions on distributions during the development phase
  - in the case of investment financings, loan-to-value, interest cover and weighted average lease expiry covenants
- obtain and perfect (including by registration on the Personal Property Securities Register) a security interest over all of the personal property (ie, assets other than the property subject to the mortgage) of the borrower and guarantors under the regime imposed by the *Personal Property Securities Act 2009* (Cth)
- if the structure of the transaction permits, obtain a perfected specific security interest over the shares in the borrower (assuming it is a corporate entity acting in its own capacity) and / or a perfected specific security interest over the units in a Unit Trust (if the borrower is established as trustee of a special purpose unit trust)
- obtain or require guarantees from creditworthy entities or individuals if the borrower is a special purpose vehicle or private company
- if necessary, require entry into tripartite deeds with material contract counterparties, including:
  - in the case of development financings, with the builder
  - in the case of commercial development financings, with any proposed anchor tenant
  - in the case of investment financings, with any anchor tenant
- require satisfaction of appropriate conditions precedent prior to provision of finance, including, in the case of development financings:
  - provision of a quantity surveyor report
  - provision of an agreed project budget (including contingency)
  - provision of a satisfactory equity contribution
  - establishment of bank accounts.

Key issues

Australia's banking system and debt and derivatives markets provide a secure basis for investor opportunities, offering a wide range of sophisticated products.

Australia's efficient and secure real estate titles systems also provide security for both buyers of real estate and finance providers.

When making the decision to invest in Australian real estate you will need to consider your financial management strategy including funding options and typical requirements of lenders.

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Tax

Australia's three levels of government – federal, State and local – all impose taxes on real estate related transactions and investment.

In order to facilitate cross border investment the Australian government has also established taxation agreements with numerous foreign governments to simplify the taxation of foreign investors and avoid double taxation.

The main taxes that apply to real estate investment and transactions for both local and foreign investors in Australian real estate include:

- income tax – which encompasses capital gains tax (CGT) and withholding tax for foreign investors
- goods and services tax (GST)
- stamp duty
- land tax.

Income tax

Income tax is imposed by the Australian government and is levied on individuals, companies, superannuation funds and, in some circumstances, trustees. The income of partnerships (other than limited partnerships) and trusts (other than certain public unit trusts) is generally taxed in the hands of partners or beneficiaries.

Income tax is levied on taxable income, being assessable income less allowable deductions. Assessable income includes net capital gains under the capital gains tax CGT) rules.

Taxable income is generally calculated for an income year, which is the year ending 30 June, unless the taxpayer has been given leave by the Commissioner to adopt a substituted accounting period. Leave will usually be granted for an entity with a foreign parent to adopt an accounting period that ends at the same time as that of its parent.

A tax loss may arise for an income year if the allowable deductions exceed the total assessable and certain exempt income for the year. Such losses may be carried forward and deducted in future years, subject to satisfying certain loss utilisation tests in the case of companies and trusts.

Foreign investors

A foreign investor's Australian assessable income in a given year of income can include Australian sourced income and any capital gains from an investment in "taxable Australian property".

Taxable Australian property includes direct holdings in Australian real estate. It also includes any property that the foreign resident had used at any time in carrying on a business through a permanent establishment, as defined in the Tax Acts, in Australia.

Indirect interests in real property are taxable Australian property if it is shares or other interests in Australian land-rich companies or entities such as trusts and the holding of the investor, together with holdings of associates, constitutes at least a 10% interest in that entity (determined at the time of the disposal or the CGT event, or in any 12 month period that began no earlier than 24 months prior). A company or trust is considered land rich if more than 50% (measured by market value) of its assets consist of Australian real property.

Australia has a final withholding tax regime for the following types of income:

- interest is subject to withholding tax at the rate of 10% (certain exemptions can apply)
- "unfranked" dividends (i.e. dividends paid out of profits on which no company tax has been paid) is subject to a withholding tax at the rate of 30% – no withholding tax is payable on "franked" dividends (i.e. dividends paid out of taxed profits)
- royalties are subject to withholding tax at the rate of 30%.

Australia's double tax agreements generally reduce the tax on unfranked dividends to 15% (and in some cases to 5% or nil under some agreements) and on royalties to 10% (5% under some agreements). The tax on interest is generally not reduced below 10% (unless specific exemptions are available under certain agreements to reduce it to nil).

As explained further below, Australia also has a "Managed Investment Trust" (MIT) regime for qualifying Australian REITs. Under this regime, non-resident investors who are resident in "exchange of information" countries are generally taxed at 15% on their income from the REIT (10% if the MIT holds only newly constructed energy efficient commercial buildings (or equivalent standard in retail and residential buildings)).

Australia also has a non-final withholding tax regime which applies to a small range of payments made to non-residents (such as payments for construction and installation activities). In the 2013 budget, a 10% non-final withholding tax is proposed to apply from 1 July 2016 for disposals by foreign investors of certain taxable Australian property.

Taxation of real estate transactions

Gains on the disposal of real estate can be taxed as ordinary income or as capital gains.

The company tax rate on income is 30% and the top marginal tax rate for individuals is currently 45% plus 2% Medicare levy for Australian residents and 2% Temporary Budget Repair Levy (which will apply until 30 June 2017). From an income tax perspective, both an Australian resident taxpayer and a foreign resident taxpayer can be subject to capital gains tax on interests in Australian real estate holding companies or entities.

Individuals are generally exempt from tax on gains made from selling their principal residence.

Where the seller is an Australian resident individual, trust or Australian complying superannuation fund and has held the real estate for at least 12 months, a discount (CGT concession) may apply so that only 50% (or 33.3% in the case of a superannuation fund) of any capital gain will be subject to tax. There is no discount for companies. The CGT discount no longer applies to non-residents in respect of assets acquired after 8 May 2012. For assets held prior to 8 May 2012, the CGT discount rules may be partially applicable depending on the circumstances.

The following sections outline taxation rules for different entities. Please also see chapter 5 on REITs for more detailed information on the taxation of investments in REITs.

Income tax rates – resident individuals

Taxpayers who are residents of Australia are liable to tax on income derived from all sources, whether in or out of Australia.

The marginal rate of tax applicable to an Australian resident individual is scaled according to his or her annual taxable income. The resident individual tax rates for the 2014/15 tax year are, generally, as follows:

Resident Individual Tax Rates 2014/15 Taxable Income Band (A$)	Marginal Rate*
0 – 18,200	0%
18,201 – 37,000	19%
37,001 – 80,000	32.5%
80,001 – 180,000	37%
> 180,000	45%

* These rates do not include the Medicare levy, Medicare levy surcharge or Temporary Budget Repair Levy (if applicable).

Income tax rates – non-resident individuals

Non-residents are liable to tax only on income derived from Australian sources. The non-resident individual tax rates for the 2014/15 tax year is as follows:

Non-Resident Individual Tax Rates 2014/15 Taxable Income Band (A$)	Marginal Rate*
0 – 80,000	32.5%
80,001 – 180,000	37%
> 180,000	45%

* Non-residents do not pay the Medicare levy, nor are they entitled to rebates. These rates do not include the Temporary Budget Repair Levy (if applicable).

Non-resident individuals are taxed on their Australian source income (apart from dividends, interest and royalties and certain payments from managed investment trusts, which are subject to withholding tax) at the above rates. In some situations a non-resident individual may be relieved from Australian tax under an applicable double tax agreement (see page 51).

Companies

Taxation of Australian resident companies

An Australian resident company is liable for tax at the rate of 30% on its worldwide taxable income.

A company is defined for tax purposes as including all bodies corporate and unincorporated but excluding partnerships (other than limited partnerships, which are generally taxed like companies). Certain public unit trusts are also taxed like companies.

Australia has a tax consolidation regime where Australian entities treated as companies for tax purposes can generally choose to consolidate for income tax purposes with all its wholly-owned Australian entities.

Taxation of non-resident companies

A non-resident company is taxed on its Australian source income (apart from dividends, interest and royalties, which are subject to withholding tax) at the same rate as resident companies. A non-resident company may be relieved from Australian tax under a relevant double tax agreement.

Certain foreign hybrid entities may be treated as companies or partnerships for tax purposes at the election of the Australian shareholder or partner.

Trusts

Investors in a resident trust are generally taxed on the share of the net taxable income equal to the share of trust income they are presently entitled to receive. If no beneficiaries are presently entitled to receive income of the trust estate the trustee must pay income tax (potentially at the top marginal rate for individuals plus Medicare levy and Temporary Budget Repair Levy).

The net income of a trust estate is generally the difference between its assessable income (including net capital gains) and all allowable deductions, calculated as if the trust was a resident taxpayer. A net loss of a trust is not deductible to beneficiaries. Resident beneficiaries, whether individuals or companies, are required to include in their assessable income the share of the net income of a resident or non-resident trust estate equal to the share of the trust income to which they are presently entitled, and are subject to tax on their share of the net income at the rates generally applicable to them.

Non-resident beneficiaries who are presently entitled to a share of the trust income are subject to tax on their share of the net income of the trust estate that is attributable to sources in Australia, at the rates applicable to non-residents.

Special rules apply to the taxation of distributions to foreign investors from trusts that qualify as Managed Investment Trusts (see below).

Australian real estate investment trusts (REITs)

Australian REITs are a specific application of the general law of trusts in Australia. The tax structure of REITs requires the real estate holding vehicle to be a passive fund and allows the fund to distribute 100% of the cash it derives from its assets. This allows REITs to maximise their yields but it is in turn dependent on their ability to raise equity in the market for refurbishment and other management requirements. The regulatory structure supports this raising of equity through rigorous disclosure, licensing and registration requirements, all designed to promote transparency and investor confidence.

Australian REITs that qualify as "Managed Investment Trusts" are provided with additional tax concessions in Australia including the ability to treat assets such as real property as assets held on capital account (which allows its eligible beneficiaries to access the CGT discount concession) and to apply a reduced 15% withholding tax on distributions made to its non-resident beneficiaries that are tax resident in countries that is on an "exchange of information" list of countries.

Australian investors in Australian REITs are taxed as ordinary beneficiaries of a trust. To the extent that the distributions exceed the investor's share of the net taxable income of the trust (eg, cash distributions that are sheltered by building or plant depreciation) are considered "tax deferred" as that excess reduces the investor's cost base of its interest in the trust. If the cost base is reduced to nil, a capital gain is realised for the remaining excess. However, from 1 July 2015, it is proposed that a new attribution regime will apply to REITs that are qualifying MITs. Under this regime, it is proposed that investors will be taxed based on the amounts attributed to them. Legislation to effect this change has not yet been introduced to Parliament.

Foreign investors in Australian REITs are subject to the following:

- Australian tax on their share of the REIT's net income attributable to Australian sources (including capital gains) at their personal tax rates or at 15% in the case of a qualifying investor in REIT that is a Managed Investment Trust
- withholding tax of 10% on interest and 30% on unfranked dividends. This may be reduced by double tax treaties (if applicable)
- capital gains tax on the investor's interest in the Australian REIT whether held directly or indirectly through an interposed entity. Individuals may qualify for part of the CGT discount concession if assets are disposed of that were held prior to 2012. The 50% CGT discount is not available to foreign resident individuals in respect of assets acquired after 8 May 2012. Similar to Australian residents, tax deferred distributions reduce foreign investors' cost base of the interest in the REIT. When the cost base is reduced to nil, a capital gain is then realised.

Double tax agreements

Australia has entered into agreements with a large number of countries for the purposes of eliminating double taxation of income. The general effect of a double tax agreement is to limit Australia's taxing rights in respect of certain classes of income derived by a resident of the other country and vice versa.

Although similar, the double tax agreements are not all identical and similar payments may lead to different Australian tax consequences, depending on the country of residence of the taxpayer.

For residents of countries with which Australia does not have a double tax agreement, Australia will generally tax Australian source income derived by such a person determined in accordance with Australia's domestic source rules. Dividends, interest and royalties, are subject to withholding tax as described above.

Thin capitalisation

Thin capitalisation rules operate to deny debt deductions (including interest and borrowing costs) where an entity's debt levels exceed certain prescribed thresholds.

The main thresholds in relation to general foreign investment in Australia are:

- broadly, the average value of total debt used to fund the investment must not exceed 60% of the average value of the total assets (subject to some adjustments for non-debt liabilities and associate entity equity); or
- if debt exceeds the threshold (referred to above), the debt must not exceed an "arm's length" amount or a "worldwide gearing ratio".

The characterisation of debt and equity for the purposes of applying the thin capitalisation rules is based on the debt/equity rules in the Australian tax law. These rules, broadly speaking, seek to characterise instruments as debt or equity for tax purposes based on economic substance rather than legal form.

There is a de minimis rule which provides that where the total debt deductions of the entity and its associate entities do not exceed A$2 million for the income year, the thin capitalisation rules will not apply to deny the entity's debt deductions regardless of the entity's gearing ratio.

Transfer pricing

International transfer pricing rules are contained in both Australian domestic law and double tax agreements. These rules allow the Commissioner to determine and substitute an arm's length price for Australian tax purposes if the Commissioner is satisfied that the parties are not dealing at arm's length. Parties will broadly be dealing at arm's length with each other if they deal with each other as if they were independent persons entering into transactions at market value.

In order to satisfy the Commissioner that an acceptable arm's length pricing methodology has been adopted in relation to such a transaction (in accordance with Organisation for Economic Cooperation and Development (OECD) guidelines), sufficiently detailed documentation must be maintained.

Foreign exchange

There are comprehensive rules for translating foreign currency amounts into Australian currency for income tax purposes, and for taxing foreign exchange gains and losses.

Anti-avoidance Rules

There are numerous specific anti-avoidance rules and general anti-avoidance provisions in the Australian tax law. In almost every significant transaction, consideration of the general and specific anti-avoidance provisions is necessary.

The general anti-avoidance rule ("Part IVA") enables the Commissioner to make determinations to cancel tax benefits obtained by a taxpayer (and include an amount of assessable income, disallow a deduction or a foreign income tax offset or impose a withholding tax liability) if, having regard to various matters, it would be concluded that a "scheme" was entered into for the sole or dominant purpose of obtaining the tax benefit. The promoter of a scheme to which the general anti-avoidance provision applies may also be subject to substantial civil penalties.

Goods and Services Tax

Transfers of real estate are subject to Australian Goods and Services Tax (GST) if the requirements for a taxable supply are satisfied. A supply is defined very broadly and includes the supply of goods, services or real estate and the creation, grant, transfer, assignment or surrender of any right.

GST, generally calculated as 10% of the selling price of the real estate, is imposed on the seller, but in non-residential real estate the cost is normally passed to the buyer under the contract (who can usually claim input tax credits for the GST).

Land transferred as part of a sale of an enterprise (which includes an enterprise of leasing the land) by agreement between the seller and purchaser can be GST-free under an exemption for the supply of a going concern. The parties to the transfer of leased commercial premises will generally agree to treat the supply as a supply of a going concern as this avoids the cashflow cost of GST being passed on to the buyer, and also reduces the stamp duty cost (as stamp duty is calculated on the GST inclusive price).

The concessional margin scheme can apply to reduce GST on the transfer of real estate, subject to agreement by the seller and buyer. Under this scheme GST is generally paid on the difference between the price paid to acquire real estate and the price received when selling. Where the seller acquired the real estate after 1 July 2000 (when GST was introduced), this price difference, or margin, is calculated by using the actual price paid by the seller when it acquired the real estate. Where the seller acquired the real estate prior to 1 July 2000, the margin is generally calculated by reference to the value of the real estate as at 1 July 2000. The margin scheme can only be applied on a sale where the margin scheme was applied to the acquisition of the real estate.

While the margin scheme can reduce the GST payable, the buyer cannot claim input tax credits for GST paid if the margin scheme applies. Because of this, in practice, the margin scheme is generally only applied where the real estate will (or may) be ultimately redeveloped and sold as new residential premises (as buyers of new residential premises will generally not be entitled to claim input tax credits and so GST will need to be absorbed into the end sale price).

Transfers of farm land and grants of vacant land by government can be GST-free if specific conditions are satisfied.

Transfers of residential premises, other than new residential premises or commercial residential premises, are input taxed and so do not attract GST (but input tax credits are generally denied for GST paid on acquisitions which relate to such input taxed supplies).

A transfer of shares or units is also input taxed and so does not attract GST.

Stamp duty on land transfers

Australian States and Territories impose stamp duty at varying rates on land and certain other property transferred with the land. This may include goods and certain business assets sold with land.

The rate of stamp duty is charged on an increasing scale. As an example, the rates in NSW start at 1.25% and gradually increase to a top rate of 5.5% for land with a dutiable value in excess of A$1,000,000. The rate may also vary depending on the characterisation of the land. For example, the purchase of a principal residence may be subject to concessional rates.

Stamp duty is usually payable by the buyer, although in some States both parties to the transaction are liable.

It is normal commercial practice for the buyer to bear the duty.

Stamp duty is payable from one to three months after the contract for sale (or in the case of VIC and TAS, after the transfer) is signed, depending on the State or Territory. Penalties can apply for late payment. For off-the-plan purchases, in NSW there is an extension of time for payment of duty while in VIC, there is a duty concession available. The land transfer cannot be registered until duty has been paid.

Transfer Duty (excluding shares/units)

Top sliding scale rates for transfers of dutiable property[1], including freehold land (please note that concessional rates of duty may apply to property that is intended to be a home).

State	Value of dutiable property	Rate of duty
ACT	More than A$1,650,000	5.50% [2]
NSW	More than A$1,000,000	5.50% [3]
NT	More than A$3,000,000	5.45% [2]
QLD	More than A$1,000,000	5.75%
SA	More than A$500,000	5.50%
TAS	More than A$725,000	4.50%
VIC	More than A$960,000	5.50% [2]
WA	More than A$500,000	5.15%

1 The categories of dutiable property differ among the States and Territories but typically include certain estates and interests in land, goods transferred with land and, in jurisdictions other than VIC, ACT and TAS, intellectual property and goodwill.

2 This rate of duty applies at a flat rate for dutiable properties over the value threshold. For dutiable property below this value, a sliding scale applies. In NT, a formula applies for dutiable property below the value threshold.

3 Residential land with a dutiable value exceeding A$3,000,000 attracts a premium rate of 7% on the excess over A$3,000,000.

Land rich/landholder stamp duty

Some States and Territories do not impose stamp duty on transfers of shares or units, or impose duty at rates below the rates applicable to transfers of land. To prevent stamp duty on the transfer of land being avoided by interposing an entity, all jurisdictions apply land rich or landholder duty to certain acquisitions of shares in a private company, or units in a private trust which owns land. Except for ACT and TAS, all jurisdictions also apply landholder duty to the acquisition of a significant interest in listed companies and trusts. The acquisition of an interest in a landholding entity, whether by way of direct transfer or, for example, by means of the issue or the redemption of units or buy-back of shares, can result in a liability for land rich or landholder duty, which is calculated by reference to the proportionate interest in the underlying land at the transfer duty rates.

The land rich/landholder duty provisions vary considerably from State to State and Territory. However, in general, the provisions only apply to changes in "significant" interests in companies and trusts (generally 50% for private companies or trusts and 90% for listed companies or trusts) where the company or trust holds land with significant value. For example, the provisions in VIC apply to changes of interests of 50% or more in an unlisted company or wholesale unit trust (20% or more in a private unit trust) where land held by it, or entities linked to it, has a value of A$1,000,000 or more.

Tasmania is the only jurisdiction which still operates under a land rich model. All of the other jurisdictions have moved from the land rich model to a landholder model under which the land rich threshold has been removed. For the land rich provisions to apply in Tasmania, the land held by the company or trust must represent 60% or more of the entity's total property.

The table below summarises the current land rich/landholder duty thresholds.

Landholder duty (at transfer duty rates)

State	Land rich threshold test	Local land holdings value test	Acquisition threshold						Duty base	
			Companies		Trusts					
			Listed	Private	Listed	Unlisted Widely Held[1]	Wholesale Unit	Private Unit	Land and Fixtures	Goods
ACT	Nil	Nil	N/A	50%	N/A	N/A	50%[2]	50%	✓	×
NSW	Nil	$2,000,000	90%[3]	50%	90%[3]	90%[3]	50%	50%	✓	✓
NT	Nil	$500,000	90%[4]	50%	90%[4]	50%	50%	50%	✓	×
QLD	Nil	$2,000,000	90%[3]	50%	90%[3]	N/A[5]	50%[2]	Nil[6]	✓	×
SA	Nil	$1,000,000	90%[3]	50%	90%[3]	90%[3]	50%	50%[7]	✓	✓
TAS	60%	$500,000	N/A	50%	N/A	N/A	50%	50%	✓	×
VIC	Nil	$1,000,000	90%[3]	50%	90%[3]	90%[3]	50%[2]	20%	✓	×
WA	Nil	$2,000,000	90%	50%	90%	50%	50%	50%	✓	✓

1 Differing requirements must be satisfied in order to be widely held.
2 Various requirements must be satisfied in order to qualify as a wholesale trust. In Queensland, this concession also applies to certain pooled public investment trusts.
3 Duty applies at a concessional rate of 10% of the duty otherwise payable.
4 Or 50% for a "merger vesting" of shares or units.
5 Subject to satisfying the widely held spread tests.
6 Duty is imposed on trust creations, acquisitions and surrenders independently of landholder duty regime.
7 There is a separate regime for trusts that are not registered MIS, PST or ADFs in South Australia.

Land tax

If the seller is liable to pay land tax on the real estate, the general practice is for the land tax to be adjusted between the seller and the buyer on completion or closing even if the real estate will not be liable to land tax in the buyer's ownership.

In all States and the ACT, land tax is payable on an annual basis on the unimproved value of land, subject to certain exemptions eg for a principal place of residence or land used for primary production. Except in the ACT, tax free thresholds apply. These thresholds and land tax rates vary. In NSW the top rate is 2%, while in VIC the top rate is 2.25% with a surcharge of up to 0.375% for landholdings held by certain trusts with an unimproved land value of between A$25,000 and A$3 million.

Key issues

Australia's three levels of government – Federal, State and Local – all impose taxes on real estate transactions and investment.

A foreign investor's Australian assessable income in a given year of income can include any capital gains and losses from an investment in taxable Australian real estate.

Foreign investors are generally not liable to pay income tax on dividends, interest and royalties derived in Australia. Rather, they are liable for a final withholding tax.

Australia has double tax agreements with other countries which will vary the amount of tax paid by foreign investors.

Australia has a concessional Managed Investment Trust regime that can provide a reduced 15% withholding tax on Australian sourced income and gains.

State based stamp duties often represent a significant transaction cost and need to be carefully considered.

Useful websites

ASHURST
www.ashurst.com
The Ashurst website includes information about our firm, updates on recent legal developments, partner profiles and contact details.

AUSTRADE
www.austrade.gov.au
The Australian Trade Commission (Austrade) is the Australian Government's trade and investment development agency offering services to potential investors.

FOREIGN INVESTMENT REVIEW BOARD
www.firb.gov.au
FIRB examines proposals by foreign interests to undertake direct investment in Australia.

GOVERNMENT INFORMATION
www.gov.au
The Government Entry Point provides access to Australian Federal, State, Territory and Local Government websites.

www.business.gov.au
The Business Entry Point is a government resource for business.

www.ausindustry.gov.au
AusIndustry provides a range of incentives for Australian businesses to foster investment and innovation.

www.treasury.gov.au
The Treasury provides information on Australian tax treaties (double taxation agreements and double taxation conventions).

CORPORATE REGULATION
www.asic.gov.au
The Australian Securities and Investments Commission regulates Australia's companies.

AUSTRALIAN SECURITIES EXCHANGE (ASX)
www.asx.com.au
ASX operates Australia's primary national stock exchange.

TAXATION
www.ato.gov.au
The Australian Taxation Office's website includes information for business, large corporates and multinationals.

COMPETITION
www.accc.gov.au
The Australian Competition and Consumer Commission promotes competition and fair trade.

ENVIRONMENT
www.environment.gov.au
The Department of the Environment, Water, Heritage and the Arts manages national policy, programs and legislation.

PROPERTY
www.propertyoz.com.au
The Property Council of Australia is a leading industry body for the Australian commercial real estate sector.

AUSTRALIAN CUSTOMS
www.customs.gov.au
The Customs website includes a business guide on customs procedures and requirements.

PROTECTION OF INTELLECTUAL PROPERTY
www.ipaustralia.gov.au
IP Australia administers Australia's IP rights system: patents, trade marks, designs and plant breeder's rights.

WORKPLACE RELATIONS
www.deewr.gov.au
The Department of Education, Employment and Workplace Relations website provides information on employment and workplace relations.

IMMIGRATION
www.immi.gov.au/skilled/business
The visas and immigration website includes information on Australia's entry options designed to meet the needs of business.

AUSTRALIAN BUREAU OF STATISTICS (ABS)
www.abs.gov.au
The ABS website provides statistics for a wide range of social, economic and environment indicators.

AUSTRALIAN LEGAL MATERIALS (LEGISLATION AND CASE LAW)
www.austlii.edu.au
This website provides access to Australian legal information.

TOURISM AUSTRALIA
www.australia.com
This website is the gateway to Australian tourism information.

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