Global Corporate Real Estate Guide - Australia

Real Estate Law

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# What is included in the term “real estate”?

Under Australian law, the term “real estate” includes the following:

Land

All improvements (i.e., buildings and structures) and fixtures to the land

# What laws govern real estate transactions?

Under the Australian federal system of government, real estate transactions are governed by the laws of each individual state or territory making up the Commonwealth of Australia. These laws consist of a combination of common law and legislation, which vary slightly between these jurisdictions, although they are all based on English property law principles.

# What is the land registration system?

There are four systems of landownership and title registration in Australia:

Old system title

Torrens title

Crown land title

Native title

The vast majority of commercial and residential land in Australia is held under the Torrens title system.

**Old system title**

Old system title (or common law title) was the title system in force before the introduction of the Torrens title system in 1863. Old system title is based on original documentation forming a chain of title that traces the ownership of the property back to a good “root of title” (or at least for a specified period). These documents must be examined every time the property is sold or dealt with. With a few exceptions, the majority of the remaining old system land is rural land or land that has been rarely transferred or dealt with and, therefore, has not undergone the conversion procedure to Torrens title land.

**Torrens title**

The Torrens title system operates on the principle of “title by registration” (giving indefeasibility of title to the registered holder of an interest in land). Under this principle, a buyer of land obtains legal title to the land upon registration of the transfer of land, rather than upon execution of the underlying contract for sale.

Torrens title gives priority by registration under which a registered proprietor of an interest in land holds their interest subject to prior registered interests but free from all unregistered interests (subject to limited exceptions). Some notable exceptions to this rule include (among other things) fraud, misdescription of boundaries and unconscionable conduct, although the exact scope of these exceptions varies from state to state. Torrens title is a “state” guarantee-based system of title ownership and no separate title insurance is required to support the ownership of land interests.

**Crown land**

The third type of land is Crown land, which is land held by a particular state or territory of the Commonwealth so that it can better control the use of the land (for example, as a reserve or subject to a pastoral lease). Crown land is often involved with mining and rural land acquisitions and can be the subject of native title claims.

**Native title**

Native title is the term used in Australian law to describe the rights afforded to Indigenous Australians, which have derived from their traditional laws and customs that are recognized by common law. The recognition of those rights is comparatively recent, although the rights themselves existed prior to the European settlement of Australia. If, at the time of settlement of Australia, any Indigenous Australians or indigenous groups had rights to unalienated Crown land under their laws or customs, and have continuously enjoyed those rights, they exist despite the Crown’s sovereignty that came with the European settlement of Australia. For acquisitions of commercial real estate in Australian cities, it is relatively rare for the target land to be subject to a claim for native title.

It is more common for native title rights to exist in regional areas with little existing development. Accordingly, purchasers of commercial real estate outside of major cities (e.g., for proposed farming or mining developments) should carefully consider whether there are any subsisting native title claims over the target land.

# Which authority manages the registration of titles?

Each state and territory has its own land titles registry or authority that manages the registration of titles. Each registry has its own rules, requirements and forms.

There is no national land title registry. However, there is a separate Commonwealth register specifically for native title claims.

# What rights over real property are required to be registered?

While there is no legal requirement that interests in land are registered, the central premise of the Torrens title system is that for a legal right or interest to exist, that interest must be registered. This makes registration of interests in land usually essential to establish rights and to enforce claims against third parties.

As a result, all states and territories provide for the registration of most forms of interests in land including the following:

Freehold title

Leasehold title (in most states and territories, although there may be some exemptions for shorter-term leases)

Mortgages

Easements

Restrictive covenants

Caveats

# What documents can landowners use to prove ownership over real property?

Under the Torrens system, registration of an interest in land is conclusive evidence of title except in certain limited cases such as fraud. Traditionally, landownership was proven through production of the certificate of title supported by a current title search from the relevant state or territory land registry. However, it is not always mandatory for a certificate of title to be issued for a property and, therefore, in some cases, a title search may be sufficient where a certificate of title is not issued depending on the state or territory jurisdiction involved. More recently, some states and territories (such as New South Wales (NSW)) have abolished physical certificates of title altogether, meaning that proof of ownership is determined solely through a search of the electronic register.

In the case of an old system title (which is now very limited), ownership may be proven by reviewing a series of original documents comprising a chain of title over many years to establish a good “root of title” to the property, together with evidence of registration of these documents in a separate deeds register to establish priority.

# Can a title search be conducted online?

Generally, title searches can be conducted online across all states and territories. Searches of the Torrens title system are available to the public for a small fee and usually include information on ownership as well as any encumbrances, and other rights or interests affecting the title in question.

# Can foreigners own real property? Are there nationality restrictions on land ownership?

Foreign investment in Australian real estate is subject to certain controls and is primarily regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). For the purposes of FATA, the following persons and entities are considered “foreign persons”:

Individuals who are not ordinarily resident in Australia

Foreign governments or foreign government investors (which, in addition to sovereign wealth funds and state-owned enterprises, may also include entities that have some level of government ownership)

Corporations or trusts where a **single** individual not ordinarily resident in Australia, foreign corporation or foreign government holds an interest of at least 20%

Corporations or trusts where **at least two individuals** not ordinarily resident in Australia, foreign corporations or foreign governments hold an aggregate interest of at least 40%

Foreign citizens and companies can acquire real property in Australia but notification to and preapproval by the Australian treasurer (assisted and advised by the Foreign Investment Review Board (FIRB)) is compulsory for the acquisition of a wide range of interests in real property. This also extends to foreigners acquiring securities in an Australian company or trust that owns land.

Foreign real estate investment covers investment in residential real estate, commercial real estate, accommodation facilities as well as urban land corporations and trusts (i.e., the trust or corporation holds more than 50% of its assets in certain land). In particular, there are strict controls on the foreign acquisition of vacant land and residential property.

Separate controls apply for the acquisition of nonurban or rural and agricultural land by foreign interests.

Certain acquisitions of commercial property do not require notification or preapproval under the FATA and the supporting Foreign Acquisitions and Takeovers Regulation 2015 (“**2015 Regulations**”). However, foreign investors need to carefully determine if their proposed acquisition is affected by these laws in each instance.

Current exemptions can include transactions involving an interest in “nonsensitive developed” commercial property valued below AUD 1,339 million for investors from countries that have a free trade agreement with Australia (“**FTA Partners**”), which include the US, Japan, South Korea, Singapore, Chile, New Zealand and any other countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is in force (noting these figures are indexed annually). For Hong Kong and Peruvian investors only, where the commercial property is considered “sensitive land,” the relevant threshold is AUD 67 million.

For investors from countries that are not FTA Partners, only commercial transactions for property valued below AUD 310 million are exempt (or, if the target land is considered “sensitive land,” valued below AUD 67 million). No exceptions apply where the target land is residential land, vacant commercial land or national security land. Additionally, all acquisitions of Australian real estate by a foreign government interests require notification and approval.

If a notification or approval is required, application fees will apply and presently range from AUD 4,000 to AUD 1,045,000 depending on the transaction. In circumstances where a proposed transaction has multiple characterizations for FIRB purposes (e.g., the acquisition of a commercial development that also includes a residential component), the highest applicable fee must be paid. If a proposed transaction is canceled for whatever reason after payment of the FIRB fee, an applicant can apply for the fee to be refunded, although in practice it is rare for refunds to be provided unless exceptional circumstances apply.

Applications are subject to a national interest test, whereby the Australian treasurer can block a transaction if the transaction is considered contrary to the national interest or national security. The concept of “national interest” is not defined in the FATA, meaning that the Australian treasurer has a significant amount of discretion in determining whether to approve a transaction. Notwithstanding this, proposals for the acquisitions of developed commercial real estate are normally approved.

If a transaction requires FIRB approval and the foreign investor fails to notify or seek approval for the proposed transaction, the Australian treasurer may exercise their power to unwind the transaction. Criminal and civil penalties may also apply in certain circumstances.

In addition to the obligation to obtain FIRB approval in certain circumstances, from 1 July 2023 any foreign person who acquires an interest in Australian land will also be required to register their interest with the Australian Taxation Office. Unlike the requirement to seek FIRB approval, the obligation to register an interest is not subject to any monetary thresholds. Moreover, the obligation to give notice also applies where a registered circumstance ceases or changes (e.g., if a foreign person sells or increases their ownership interest in Australian land). The penalty for not providing notice within 30 days of the relevant event taking place is 250 penalty units a day (currently AUD 68,750 per day).

# Can the government expropriate real property?

The Commonwealth government and each of the state and territory governments have enacted laws that deal with the compulsory acquisition of land and acquisition by agreement with landowners. As a rule, the relevant government may compulsorily acquire land for proper public purposes. Legislation dealing with compulsory acquisition of land generally entitles the landowner and others with legal interests in the land to a right to fair compensation. The amount of compensation is usually determined by considering the market value of the land and certain other matters, such as any special value of the land to the person on the date of the acquisition and any loss attributable to severance of the acquired land from other land in the possession of the respective owner.

# How can real estate be held?

Generally, an interest in real estate is held under one of the following forms of title:

Freehold — This provides the owner with an absolute right to the land (subject to applicable laws) for an unlimited amount of time.

Leasehold — This provides the leasehold owner (the tenant) with possession of the land for a period, as set out in the lease granting the leasehold interest. The rights and obligations of the tenant are governed by the lease.

Strata title — This provides the owner of a “strata lot” within a larger complex with rights to that lot, as well as a share in the ownership of the common property of the complex.

Crown land — See description in “What is the land registration system?".

Native title — See description in “What is the land registration system?".

# What are the usual structures used in investing in real estate?

The major types of investment vehicles used in Australia by both residents and nonresidents are the following:

Companies, including branch offices of foreign companies

Joint ventures (incorporated or unincorporated)

Partnerships

Trading trusts

Discretionary trusts

Unit trusts, e.g., real estate investment trusts;

Sole trader

Co-ownership

The choice of an appropriate structure will depend on the nature of the particular property and parties involved with the acquisition.

# How are real estate transactions usually funded?

The majority of commercial real estate transactions in Australia are funded by a mix of equity and debt, with gearing levels often between 40% and 60%. The type of funding is usually influenced by the asset class and location of property to be acquired.

Institutional lenders such as banks are the main sources of debt financing. On larger acquisitions, it is common for lenders to require a hedging strategy to manage interest rate risk over the term of the financing. While security structures vary, lenders will typically take a first registered mortgage over the real estate asset and also take security in the form of a registered general security interest over all the assets of the borrower and any entity that holds ancillary or related rights over the real estate.

Where the underlying asset is intended to be run as a business, with a third party being appointed to oversee the operation of that business (such as a hotel), the financier may as a condition of financing require that the financier, owner and operator enter into a tripartite non-disturbance deed. This will provide the financier with step-in rights if the owner defaults on its loan (and often providing the operator with a right to request that the financier step in to remedy any default by the owner under the terms of their agreement), ensuring that business operations can continue without interruption.

# Who usually produces the documentation in real estate transactions?

Generally, the party selling or providing the interest (e.g., vendor or landlord) will prepare the initial drafts of the documentation required for the particular real estate transaction. The parties may then negotiate the form and substance of the documents until agreement is reached and the documents are executed.

# Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Generally, upon registration of its interest in real estate, an owner or occupier will assume liability for all matters relating to that property. On the acquisition of real estate, this would include certain liabilities under any existing leases and other registered interests on the title. Typically, on an acquisition of land, any existing mortgages or charges over the land will be discharged.

Rates and taxes (in particular, land tax) run with the land as a statutory charge and can be an inherited liability if not discharged on acquisition.

To protect itself from liabilities that cannot be confirmed or quantified prior to completion of a transaction, a buyer may request that the contract for sale include warranties from the seller in relation to specific risks.

# Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

Certain liabilities relating to rates, taxes and stamp duty affecting land can remain with a seller following a sale, but these are usually adjusted and discharged on settlement of a property sale.

Residual liabilities can remain with a seller of a property under leases it has granted where the subsequent buyer does not comply with the lease term. However, in practice, this is usually not a material issue.

In a typical real estate transaction, the parties will negotiate for the contract for sale to set out the way in which responsibility for liabilities will be distributed, with the seller typically retaining responsibility for any liabilities arising prior to completion and the buyer assuming responsibility for liabilities arising after completion. Apart from contractual liabilities toward the buyer that may remain with the seller following the disposal of the property, the seller may retain liability in connection with contaminated land or pollution in any of the following circumstances:

If a seller or occupier has contaminated land, it may incur a statutory liability to either investigate or remediate the contamination, even after it has disposed of the land

If a seller or occupier has caused pollution, it may be civilly or criminally liable for that pollution even after it has disposed of the land

Notwithstanding the above, in certain circumstances such as where the seller (i.e., the original polluter) cannot be found or no longer exists, the current owner/occupier of the land may be liable to undertake remedial works for the pollution or contamination. For this reason, it is imperative for foreign investors to undertake rigorous due diligence to determine the extent of any pollution or contamination (if any) on target land.

Note that in Australia all states and territories have enacted legislation in relation to pollution and contamination.

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