Global Corporate Real Estate Guide - Australia

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Select a topic from the menu and explore the questions within.

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# Authors

# Real Estate Law

## 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.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

The usual documents involved in the acquisition of real estate include the following:

Title searches of relevant lots

Survey to establish boundaries, encroachments and in some cases lettable areas

Planning and other statutory certificates to establish zoning and use controls and matters affecting the real estate

Environmental reports, including contamination reports

Building condition reports

Due diligence report in the case of commercial transactions

Sale and purchase agreement

Financing documentation

## What are the warranties given by a seller to a buyer?

A seller usually gives warranties in relation to tenancies on the property and other third-party rights and warranties relating to the state of the property, particularly in the case of contamination. Additionally, where a buyer is concerned about specific risks, or is aware of certain risks but is unable to quantify those risks, the buyer may request that the contract for sale includes warranties from the seller in relation to those risks.

In most states and territories, statutory warranties are required by law from a seller. These warranties can be quite extensive and usually cannot be modified or contracted out of. Most warranties relate to any interest or proposal by government authorities and other third parties such as orders and notices affecting the property. The buyer usually has a right to terminate the contract for sale for a breach of these statutory warranties unless relevant disclosures are made.

## When is the sale legally binding?

Parties are usually only legally bound when they sign and exchange the formal contract of sale documents. The sale documents are often drafted to be conditional upon matters such as satisfactory due diligence or approval under the FATA and 2015 Regulations, meaning the parties to the sale documents cannot be compelled to complete these contracts until the relevant conditions are satisfied.

Other conditions precedent may include the approval of another party such as a head lessor (if the transaction involves the acquisition of a leasehold interest) or the approval of the transfer of a liquor license by the relevant state-based government authority (where alcohol is sold at the target property).

## When is title transferred?

Under the Torrens title system, legal title is only transferred upon the registration of the title transfer documentation, into the buyer’s name, which usually takes place immediately on the closing of a property transaction.

Australia has recently introduced electronic conveyancing, which facilitates the settlement of property transactions in secure online workspaces. Under this approach, certain registered parties (e.g., legal practitioners) may undertake the settlement process in an online portal, including completing and lodging instruments, transferring funds and ultimately settling the transfer of an interest in real estate. This replaces the need to physically lodge paper transfer documentation and registration instruments with the relevant government authority.

Property Exchange Australia (PEXA) is the only electronic conveyancing platform available in Australia and in certain states and territories the use of PEXA for certain property transactions is mandatory.

## What are the costs usually shouldered by the parties?

In respect of sales, the buyer usually pays for the following:

Buyer’s legal costs (including the preparation of a due diligence report)

State-based stamp duty

Registration fees

The seller usually pays for the following:

Seller’s legal costs

Real estate agent’s commission and fees

Any income or capital gains tax on any profit made on the sale

With commercial leases, it is not usual for the landlord to require the tenant to pay the landlord’s costs of preparing, negotiating and settling the lease documentation.

# Leases

## What are the usual forms of leases?

In Australia, arrangements between commercial landlords and tenants are primarily governed by lease documentation. These documents, especially those used by institutional landlords, contain detailed provisions that regulate the relationship between the landlord and the tenant.

**Commercial leases**

Commercial leases are commonly net leases, i.e., the tenant pays an agreed rent (subject to rent increases on agreed terms) and a contribution to the landlord’s operating expenses for the building or land.

The proportion of the tenant’s contribution to operating expenses is generally calculated by reference to the proportion (expressed as a percentage) the lettable area of the tenant’s premises bears to the total lettable area of the building or property involved.

**Retail leases**

Most states and territories have enacted separate retail lease legislation to enshrine certain statutory protections on retail tenants that are considered to have little or no bargaining power against institutional landlords. The retail lease legislation differs between states and territories, including as to what falls within the category of a “retail lease” in that jurisdiction. However, all forms of retail lease legislation share the common objective of ensuring that retail tenants are entitled to certain minimum conditions that override any provision to the contrary in a lease.

**Ground leases**

Another form of leasing arrangement is a long-term ground lease, typically granted from a government authority over larger types of developments under which the ground tenant or developer usually leases vacant land for development. Once the development is completed, the ground tenant will sublet the space to retail, office or industrial subtenants, depending on the type of development. Ground leasehold interests may be bought and sold in a manner similar to freehold property interests.

**Residential leases**

Residential lease terms are strictly regulated by state and territory legislation to provide residential tenants with tight consumer protections.

## Are lease provisions regulated or freely negotiable?

Generally, commercial lease provisions are freely negotiable but are subject to common law and the legislation dealing with general property principles and title registration. There is limited opportunity to opt out of the provisions of the retail tenancy legislation, which applies to certain retail tenancies, including tenancies in a shopping center.

There are also usually limited rights to amend residential lease terms where they are prescribed by state or territory legislation.

## Is there a maximum term for leases? Can these be extended?

There is no prescribed maximum term for a commercial lease. However, there may be rights in a particular jurisdiction to convert a very long-term lease of several hundred years into freehold. The duration of the lease term can be for any number of years or up to a fixed date (and sometimes Crown land can be subject to leases in perpetuity). Parties can often negotiate a right to extend or renew the lease for a further term through lease options in favor of the tenant.

Alternatively, a lease may contain a holdover clause that allows tenants to remain in occupation of the leased premises on the basis of a monthly tenancy or some other agreed period after the lease term has expired, but typically only with the prior consent of the landlord.

In some circumstances, planning approval may be required to grant a lease of part of land (not part of a building) for a certain period, and some leases require approval under the FATA and 2015 Regulations.

Note that in most jurisdictions, leases with a longer term are required to be registered, whereas shorter term leases (e.g., a lease with a one-year term) may be, but are not required to be, registered. The only state that does not require any leases to be registered is Victoria.

## What are the usual lease terms?

The length of commercial leases in Australia can vary depending on the nature of the premises and the intention of the parties. The typical term of a commercial lease for commercial premises is usually between three and five years for smaller tenancies and approximately 10 years for major tenants, with or without option rights in favor of the tenant to extend. For major retail leases, such as those to anchor supermarkets or department store tenants, lease terms can significantly exceed 10 years and generally include a series of option rights to extend, sometimes up to a total of 40 years.

Many retail leases are governed by specific legislation and, in most jurisdictions, have a minimum term of five years (inclusive of options for renewal) unless the tenant agrees to waive that right.

## Are there instances where tenants may demand an extension of the lease?

There is no right imposed by statute that entitles a tenant to a renewal of a lease. In the case of leases that are subject to retail lease legislation, the landlord can be required to give prior notice as to whether it intends to extend the retail lease on expiry, and the lease will continue until a set period after this notice is given.

## On what grounds may a lease be terminated?

A landlord can generally terminate a lease only when the tenant is in breach of their essential obligations under the lease. Generally, if a tenant defaults under a lease, the lease will provide the tenant with a period (e.g., 14 days) to rectify the default or otherwise pay compensation to the landlord in circumstances where the breach cannot be rectified. Leases usually also contain clauses that allow for a party to terminate in the event of damage or destruction of the premises or if the land involved is resumed.

Additionally, for retail leases, some jurisdictions allow the landlord to terminate a lease if the landlord intends to demolish the premises for redevelopment subject to limited compensation, if these provisions are clearly set out in the disclosures prior to the grant of the retail lease and in the lease itself.

## Must rents be paid in local currency?

It is standard practice that rents be paid in Australian dollars.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

Usually, rent is paid on a monthly basis, in advance and on the first day or business day of the month.

## How is rent reviewed? Are there limits to the increase in rent?

Generally, commercial rents are reviewed in the following three ways:

Fixed annual percentage increase (e.g., presently around 3%-5%)

Determination of a market rent value usually settled by an independent valuation

Cost of living increases measured by the Consumer Price Index published by the Australian Bureau of Statistics

Parties may also agree to use a combination of these types of reviews during a lease term, such as providing for a fixed rent increase every year with a market rent review upon commencement of an option term.

Additionally, landlords often seek to include a “ratchet” clause that provides that the rent will not decrease, regardless of the outcome of the review. In most jurisdictions, ratchet clauses and certain other forms of rent reviews are controlled or prohibited in retail leases.

## What are the basic obligations of landlords and tenants?

The following is usually required of landlords:

Repair and maintain the structural parts of the property, rectify inherent defects and be responsible for fair wear and tear of the premises

Ensure that the tenant has quiet enjoyment of the premises

Provide certain services to the tenancy

The following is usually required of tenants:

Pay rent on time

Pay a proportion of the building’s outgoings (which may include cleaning costs)

Maintain the premises in a good and clean condition

Repair damage caused by the tenant or by the tenant’s property

Give the landlord access for inspections and landlord’s work

Yield up the premises to an agreed condition at the expiry of the lease (which is generally an obligation to return the premises in the same state as they were at the commencement of the lease, although a lease drafted more in favor of the landlord may impose significant “make-good” obligations on the tenant)

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

Commercial tenants are typically permitted to assign or sublet the premises with the landlord’s prior written consent. Where the landlord’s consent is required, the landlord is usually required to act reasonably and promptly when considering the tenant’s request to assign or sublet the leased premises. The lease may also set out certain criteria that the proposed transferee or sublessee must satisfy as a condition of the landlord’s consent to the transfer or sublease. The underlying principle behind such criteria is that the current tenant may only transfer or sublet to a person of the same caliber as the current tenant.

In more sophisticated leases, there are detailed change of control provisions affecting the tenant that can trigger the transfer and assignment provisions in the lease.

## What happens in the event of destruction of the leased premises?

If the premises is substantially destroyed, rent generally abates and the lease may be terminated by either party subject to certain preconditions. In most leases, there is an obligation for the landlord to undertake repair works within a certain period, with the failure of the landlord to undertake such works giving rise to a right for the tenant to terminate.

The definition of “substantially destroyed” will usually be the subject of negotiations between the parties, although the typical approach is to define this concept by reference to a percentage of the premises that is rendered unusable as a result of the destruction.

If the premises are not substantially damaged, the landlord may choose to repair the damage or, alternatively, terminate the lease. Typically, rent will abate (on a proportional basis) until the premises are fully repaired unless the damage has been caused by the tenant, in which case, the right to rent abatement is usually lost.

## Who is usually responsible for insuring the leased premises?

Commercial landlords are generally responsible for insuring the building in which leased premises are located. However, the cost of this insurance is typically passed on to the tenant as part of the building outgoings.

The tenant will normally be responsible for maintaining insurance policies for the leased premises that relate to their use and occupation of the premises (such as public liability insurance, plate glass insurance and tenant’s property insurance). The level of public liability insurance required by commercial landlords from tenants is relatively high when compared to other overseas jurisdictions and is usually set between AUD 20 million to AUD 50 million.

## Will the lease survive if the owner sells the leased premises?

The tenant has the right to remain in occupancy until the end of the lease term, subject to the registration of the tenant’s interest under the Torrens title (where required).

## Will the lease survive if the leased premises are foreclosed?

Foreclosure is not a common mortgagee remedy in Australia as the mortgagee is usually required to offer the property for sale by public auction. There are also other controls that limit the vesting of property in the mortgagee.

Nevertheless, a lease entered into before a mortgage is placed on the property will survive a foreclosure, as will any lease that has been consented to by the mortgagee during the term of the mortgage, noting that the mortgagee’s consent is required as a precondition of registration of a lease under the Torrens title system, for the mortgagee to be bound by a lease granted after the registration of the mortgage.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

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

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

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

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

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

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

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

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

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

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

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

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

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

## Can an environmental cleanup be required?

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

## Are there minimum energy performance requirements for buildings?

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

**Green Star ratings**

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

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

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

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

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

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

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

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