

The International Comparative Legal Guide to: Real Estate 2008

A practical insight to cross-border Real Estate work



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Accura Advokataktieselskab
Ali Budiardjo, Nugroho, Reksodiputro
Ashurst LLP
Barbosa, Müssnich & Aragão Advogados
Blake, Cassels & Graydon LLP
Castrén & Snellman Attorneys Ltd.
CCA - Carlos Cruz & Asociadas
Clayton Utz
Drakopoulos Law Firm
Fangda Partners
Gide Loyrette Nouel
Glikman & Partnerid

Gómez-Pinzón Abogados
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Pachiu & Associates, Attorneys at Law
Paksoy Attorneys At Law
Pepeliaev, Goltsblat & Partners
Schellenberg Wittmer
Schoenherr Attorneys at Law
Wikborg, Rein & Co.
Žurić i Partneri

Australia



Julie Levis



Gary Best

Clayton Utz

1 Real Estate Law

1.1 Please briefly describe the main laws that govern real estate in Australia. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1

Australia is a federation comprising states including New South Wales (NSW), Victoria (VIC), Queensland (QLD), Tasmania (TAS) and South Australia (SA); and territories being the Australian Capital Territory (ACT) and the Northern Territory (NT).

The Australian constitution does not provide the Commonwealth with power over real estate law and accordingly it is governed by each individual state or territory.

The main categories of real estate legislation in Australia are:

- those relating to general property matters such as the *Conveyancing Act 1919* (NSW), *Property Law Act 1958* (VIC) and the *Property Law Act 1974* (QLD); and
- those regulating the title system such as the *Real Property Act 1900* (NSW); *Transfer of Land Act 1958* (VIC); and *Land Title Act 1994* (QLD).

1.2 What is the impact (if any) on real estate of local common law in Australia?

Australia has a common law system. Accordingly, real estate law in Australia is not only based on legislation but also judge-made law. Judge-made law assists with the interpretation of legislation and also provides a variety of principles and concepts.

1.3 Are international laws relevant to real estate in Australia? Please ignore EU legislation enacted locally in EU countries.

When applying and considering real property law the Australian judiciary take into account relevant international case law.

2 Ownership

2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

ACT

All freehold land in the ACT is held by the Commonwealth and accordingly no person can own land in the ACT. As a consequence,

the Commonwealth will grant 99-year crown leases for the use of the land.

Foreign Entities

The *Foreign Acquisitions and Takeover Act 1975* (Cth), gives the Treasurer power to block real estate transactions if they are deemed to be against the national interest. Certain acquisitions by foreign entities must be brought to the Treasurer’s attention, including:

- some non-residential real estate, irrespective of value, such as vacant land and hotels;
- developed commercial non-residential real estate, if valued at more than \$50M or if under a heritage listing of more than \$5M; and
- all residential real estate.

Under the Australia-United States Free Trade Agreement, US entities have a higher threshold figure for developed commercial non-residential real estate than other nationals - currently \$871M (this threshold is to be indexed on 1 January each year to the GDP implicit price deflator).

3 Real Estate Rights

3.1 What are the types of rights over land recognised in Australia. Are any of them purely contractual between the parties?

The main rights over land in Australia include:

Freehold Estate

An estate in fee simple is the most common form of land ownership in Australia. This estate provides unlimited land ownership.

Leasehold Estate

This is an interest which provides a right of exclusive possession to specific property or premises for a definite period of time. The start and end dates of the lease agreement must be known or ascertainable.

Leasehold estates can be entered into for fixed periods (which are most commonly utilised for business activities) or on a periodic basis such as on a month to month, or year to year basis.

Native title

The right to native title may be possessed only by indigenous inhabitants of Australia and was first recognised in the decision of *Mabo v State of Queensland No. 2* (1992) 175 CLR 1. The *Native Title Act 1993* (Cth) was enacted in response to this decision and implements a national scheme with respect to native title. The granting of rights by the Crown, which are inconsistent with native title, can extinguish native title.

Other interests

Other interests in land (in general terms):

- **Easements:** interests in land, which create a right to utilise land of a different ownership in a particular manner. An example is a right of carriageway over a neighbouring property.
- **Restrictive Covenant:** this is an agreement between two landowners restricting the use of one property for the benefit of the other.
- **Mortgages:** interests in land which are created as security for the repayment of a loan or the provision of an indemnity.

Contractual Rights

Contractual rights include options, licences and pre-emptive rights.

4 System of Registration

4.1 Is all land in Australia required to be registered? What land (or rights) are unregistered?

Registered

There is no requirement that land be registered, but as a general rule, all states and territories aim to register all land under the Torrens title registration system. Most of the land in Australia is registered under this system and any land not within the system is under old system title. Land is typically converted to the Torrens system by the Registrar General of a state or territory when a dealing arises with the property, such as a transfer of the land or if the landowner makes an application.

Unregistered

Land under the old system does not fall under the Torrens register. Crown land (owned by a state or territory) and commonwealth land (owned by the Commonwealth of Australia) are also often unregistered.

Unregistrable interests include options to purchase and trusts.

4.2 Is there a state guarantee of title? What does it guarantee?

Guarantee of title effectively occurs by registration of title on the Torrens register. Registration provides indefeasibility.

In situations where fraud occurs, errors, omissions or misdescriptions occur in the registry or by the Registrar General or his/her staff which give rise to loss of an estate or an interest in land, compensation is payable.

4.3 What rights in land are compulsorily registrable? What (if any) is the consequence of non-registration?

In order to gain the protection of the Torrens system, rights in land must be registered. Examples include transfers of land, mortgages and easements.

Unregistered interests may lose priority to, and may be defeated by, subsequently registered interests.

4.4 What rights in land are not required to be registered?

Some categories of leases need not be registered, although this will depend on the jurisdiction. Generally, leases of terms not exceeding three years (including an option for renewal) need not be registered, although there is some variation between the different jurisdictions.

- 4.5 Where there is both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

In each jurisdiction, the Registrar-General may bring old system title into the Torrens system. For example, in NSW, there will either be:

- a primary application - this is an application brought by the landowner requesting that the Registrar General bring the land under the Torrens system (the Registrar General will then carry out an investigation into the land rights before registering the property under the Torrens system); or
- an issue of a qualified title - where after investigating a primary application, the Registrar General is not satisfied a full Torrens title can be issued, the Registrar General has power to create a "caution" on the title, to the effect that the title is protected against subsisting interests but preserves the rights of prior unregistered interests. After 12 years, the qualification lapses and becomes full Torrens title.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Transfer occurs when registration is effected.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Broadly, the Torrens system is a system of priority by registration. A registered proprietor therefore holds their interest subject to prior registered interests, but free from unregistered interests. Thus it is the date of the registration rather than the date of the execution of the interest that is critical.

Some statutory exceptions to this include short-term leases, fraud, and misdescription of boundaries.

5 The Registry / Registries

5.1 How many real estate registries operate in Australia? If more than one please specify their differing rules and requirements.

Each state or territory operates an independent real estate registry. The differing rules and requirements are relevant to things such as fees and forms.

5.2 Can information on real estate ownership be accessed from the registry on line (electronically)?

The following states and territories allow electronic searches of their registry:

- NSW: at <http://www.lands.nsw.gov.au>;
- SA: at <http://www.landservices.sa.gov.au/>;
- TAS: at <http://www.thelist.tas.gov.au/>;
- VIC: at <http://www.land.vic.gov.au>;
- WA: at <http://www.landgate.wa.gov.au> (for certain searches);
- ACT: at <http://www.rgo.act.gov.au/landtitles3.shtml> (only available to subscribers); and
- NT: at <http://www.nt.gov.au/ntlis/support/index.shtml> (also only available to subscribers).

The following do not:

- QLD: can be requested by phone or fax at <http://www.nrw.qld.gov.au/property/index.html>; and
- WA: at <http://www.landgate.wa.gov.au/corporate.nsf/web/Land+Ownership+Information> (for certain searches).

5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Yes. Compensation can be claimed for loss arising out of the registry's error.

5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

There are no restrictions on access to the register. Subject to the payment of fees, a buyer can obtain all the information they require regarding the title and any encumbrances and other rights affecting property.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in Australia? Please briefly describe their roles and/or duties.

a) Selling and purchasing agents (or realtors)

Most sales in Australia involve the services of a real estate agent, who advertises the property to prospective buyers. Purchasing agents are generally used when a buyer wants to acquire property or properties for a specific purpose, such as development. The responsibility of real estate agents vary between jurisdictions (in some states real estate agents also prepare the contract documents).

b) Lawyers

Lawyers in commercial real estate transactions are usually closely involved with the preparation and execution of the contract for sale, and the completion of the sale. In NSW and VIC, this is also the case in residential transactions. In other jurisdictions, however, licensed conveyancers may undertake smaller transactions.

c) Notaries

Notaries are not required in real estate transactions in Australia.

d) Others

Other parties involvement will vary depending on the transaction, some examples include:

- building consultant or pest inspectors engaged to inspect the condition of the building on the property or compliance with the Building Code of Australia; or
- surveyors engaged to prepare survey plans (these will identify boundary and the location of buildings on the property).

6.2 How and on what basis are these persons remunerated?

Selling and purchasing agents (or realtors)

Selling agents are generally paid a commission following the completion of the sale as well as their disbursements such as advertising expenses.

Lawyers

Typically, large real estate transactions will be charged on a time basis (predetermined hourly rate) and smaller real estate transactions will be charged on a lump sum basis. These will be in addition to the general disbursement costs such as photocopying etc.

Others

Generally, consultants' charges will also depend on the scale of the transaction and follow a similar trend to lawyers'.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

Pre-exchange of contracts

In general, prior to exchange, the following actions will be carried out:

- title searches and other information including a planning certificate for the property will be obtained;
- a building condition report might be obtained and information as to the legality of the buildings will be reviewed (this might involve reviewing the property's Council file); and
- for tenanted premises, an investigation of the leases, service contracts and any other relevant agreements.

Exchange of contracts

- parties, the property and the price (each jurisdiction has their own standard form contract and typically, parties will include additional conditions and warranties to suit the transaction); and
- the buyer pays a deposit (generally 10% of the purchase price) to be held by the real estate agent or the seller's lawyer until completion.

Post-exchange

After exchange of contracts:

- any conditions precedent which are required to be carried out prior to settlement are undertaken;
- the completion figures are calculated (this includes determining council rates, water rates and whether any land tax is charged against the property); and
- any other outstanding issues will be resolved.

Settlement

Settlement will typically occur between 28 days (ACT) and 42 days (NSW) from exchange. On settlement:

- the final cheques are provided to the seller (the deposit is also released to the seller);
- title documents are handed to the purchaser; and
- all other original documentation required to be provided will be handed to the purchaser (for example where leases exist over the property, including bank guarantees these will be provided to the purchaser).

Post Settlement

Following settlement of the sale, the buyer's lawyer:

- will lodge the title document and the transfer of the property for registration in the Land Registry; and then
- will notify authorities such as the council and the water rate authority of the transfer of ownership of the property. In some jurisdictions this may fall to the responsibility of the Land Registry.

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

NSW, VIC, ACT and SA all have vendor disclosure legislation. In effect, the vendor must notify the purchaser of any defects to their title, any planning controls or interests in the land, such as easements or covenants. The failure to attach the required documents to the contract for sale gives rise to a right for the purchaser to rescind the contract within 14 days. The *Law of Property Amendment (Sales of Residential Property) Bill 2006* (NT), which confers similar responsibilities, had its second reading on 29 November 2006.

WA and QLD also encourage vendor disclosure at the time of exchange.

7.3 Can the seller be liable to the buyer for misrepresentation?

Trade Practices Act

Fair trading legislation at the commonwealth and state level, makes it an offence in each jurisdiction to make false or misleading statements in the sale of land. A buyer or seller who suffers loss or damage arising from the false or misleading statement is entitled to recover compensation for the amount of the loss.

At common law

The buyer may be entitled to rescind the contract if:

- the seller made a misrepresentation, whether innocently or fraudulently;
- there is sound evidence that the misrepresentation induced the buyer to enter into that contract; and
- the buyer exercised reasonable caution in making all reasonable enquiries before entering into the contract.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

Contractual warranties are often given in a commercial context where the purchaser has not been able to independently verify the correctness or accuracy of the purchaser's pre-contractual investigations.

The subject matter of such warranties may relate to tenancies on the property (such as a warranty stating that the leases are in force) or warranties relating to the state of the property - particularly in the case of contamination.

Not a substitute for due diligence, warranties may nonetheless give buyers some comfort that a vendors breach would give rise to an action in damages.

Statutory warranties also apply in some jurisdictions. For example, in NSW it is warranted that land is sold without any adverse affectation upon it, such as road widening proposals, orders to demolish buildings, or compulsory acquisition notices. A right to rescind the contract for sale of land, is attached to statutory warranties.

7.5 Does the seller warrant its ownership in any way? Please give details.

Typically, on settlement the seller will provide the buyer with original title documents which gives the buyer legal title. The legal title will then be provided to the registry for registration to the buyer.

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

Risks associated with the property

In some jurisdictions, at exchange, the risks associated with a property pass to the buyer, while in other jurisdictions the risk passes on settlement.

It is ideal to effect insurance from the time contracts are exchanged, even if the risk does not pass until settlement.

Settlement adjustments

On settlement, the purchase price will need to be adjusted for land tax, council rates and water rates.

In all states and the ACT, land tax is payable annually on the unimproved value of land, with some exceptions (if the property will be the buyer's principal place of residence).

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

There is no legislation specifically regulating the financing of real estate.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

- Ensure the borrower has the capacity to repay the loan.
- Obtain or require a valuation of the property (this will limit the amount of money lent to the borrower).
- Obtain a registered first mortgage over the property as security.

Company directors may also be required to give personal guarantees where the borrower is a corporation.

8.3 What minimum formalities are required for real estate lending?

At a minimum, a real estate lender would:

- value the property;
- carry out a due diligence on the property (obtain title documents, review leases etc.);
- register a first-ranking mortgage for security; and
- require the borrower to take out insurance over the improvements which specifically cover the lender's interest.

8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The lender is protected to the extent that it has a first ranking registered mortgage secured against the property.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

Transfer tax, or stamp duty, as it is known in Australia, applies to

the transfer of property. Each state or territory imposes the transfer duty at different rates, and against different parties. In all States, the purchaser must pay stamp duty on a conveyance, although in QLD and SA both the parties are liable for it.

Stamp duty is generally calculated on a sliding scale, becoming a greater proportion of the property cost as the purchase price increases. The rate of stamp duty is charged with reference to the higher of the value of the property; or the consideration paid for it. Principal residences may attract concessional rates.

As an example, in NSW, rates are as follows:

Dutiable Value	Rate of Duty
\$0 - \$14,000	\$1.25 for every \$100 or part of the dutiable value
\$14,001 - \$30,000	\$175 plus \$1.50 for every \$100 or part, by which the dutiable value exceeds \$14,000
\$30,001 - \$80,000	\$415 plus \$1.75 for every \$100 or part, by which the dutiable value exceeds \$30,000
\$80,001 - \$300,000	\$1,290 plus \$3.50 for every \$100 or part, by which the dutiable value exceeds \$80,000
\$300,001 - \$1m	\$8,990 plus \$4.50 for every \$100 or part, by which the dutiable value exceeds \$300,000
over \$1m \$40,490	plus \$5.50 for every \$100 or part, by which the dutiable value exceeds \$1,000,000

In NSW, a premium rate will apply to residential land with a value of \$3 million or more of \$150,490 plus \$7 for every \$100, or part, by which the dutiable value exceeds \$3 million.

9.2 When is the transfer tax paid?

The time for payment of stamp duty ranges from one month after the contract for sale is signed to three months after completion, depending on the jurisdiction. Penalties will apply for late payment of the stamp duty.

9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The Australian Goods and Services Tax (GST) of 10%, applies to transfers of real property. Generally the responsibility for GST is imposed on the seller, but can be passed to the buyer in commercial property transactions.

Transfers of farm land and grants of vacant land by government can be GST-free (zero-rated) in certain cases. Land transferred as part of a sale of an enterprise (including an enterprise of leasing the land) may also be GST-free if it is a supply of a "going concern".

9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

Capital gains tax is generally payable on the disposal of property. If the vendor is an individual, trust or Australian superannuation fund, and has held the property for 12 months or more, the capital gain may be discounted by a half, or two-thirds in the case of a superannuation fund. Individuals are generally exempt from tax on gains made from selling their principal residence.

If the property is held on revenue account, or is trading stock, the disposal of the property will be taxed at the income tax rate. Corporations pay 30% tax and the effective top marginal rate for individuals is 45% (the individual rate does not include the

Medicare Levy of 1.5% which most Australians are required to pay on top of the individual rate).

9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

All jurisdictions apply "land rich" provisions to the acquisition of shares in a company, or units in a trust which owns land. The acquisition of an interest in a landholding entity, even by indirect means, can result in a liability for "land rich duty". These provisions are put in place so that companies do not evade paying stamp duty.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

Business leases are typically considered in two categories - commercial leases and retail leases.

Commercial leases

Commercial leases are typically governed by the legislation dealing with general property matters and those dealing with the system of registration, as detailed in question 1.1.

An example of commercial lease legislation is the Property Law Act 1974 (QLD), which deals with issues such as the obligations of the lessee and lessor (such as repair and maintenance liability), assignment, termination and waiver provisions, subleasing abilities etc.

Retail Leases

Each Australian State and Territory has retail tenancy legislation (other than TAS, which has a Code of Practice) which applies to certain retail shops, typically including tenancies in a shopping centre. The aim of the legislation is to provide greater obligations on lessors and accordingly, greater protection for lessees.

10.2 What types of business lease exist?

As detailed in question 10.1 above commercial and retail leases are the typical types of business lease. Landlords will typically have their own form of lease for a property or building and it can sometimes be difficult to negotiate substantial changes unless the tenant has bargaining power.

10.3 What are the typical provisions for leases of business premises in your country regarding: a) length of term; b) rent increases; c) tenant's right to sell or sub-lease; d) insurance; e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and f) repairs?

- Length of term** - three to five years for a commercial premises with options to renew however with "anchor" tenants such as a government agency or a department store in a shopping centre the term can be longer.
- Rent increases** - it is normal for rents to increase on an annual basis. Common types of rent increases include fixed increases (such as 3-4%), annual increases based on the consumer price index (CPI) or market rent review (this typically occurs every three to five years and will normally be the basis of an increase prior to any option to renew).
- Tenant's right to sell or sub-lease** - typically acceptable

with consent of the landlord.

- d) **Insurance** - the tenant must keep public risk insurance, other insurances required by law or that the landlord reasonably requires for at least the amounts the landlord reasonably requires. Each policy is typically required to be on terms approved by the landlord.
- e) (i) **Change of control of the tenant** - typically acceptable with consent of the landlord.
- (ii) **Transfer of lease as a result of a corporate restructuring (e.g. merger)** - typically acceptable with the consent of the landlord.
- f) **Repairs** - the tenant is normally required to attend to the repair and maintenance of the premises subject to general wear and tear. Normally, a lease will have a redecoration provisions (which might require repainting etc.) towards the end of the lease term.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

Stamp duty

No stamp duty is payable on leases in VIC, WA, TAS, QLD, SA, NSW or the NT.

In the ACT, the current rate is 0.05% of the value of the lease however; the landlord's obligation to pay stamp duty in the ACT will be abolished from 1 July 2009.

GST

The landlord is liable for GST on any rent payments made by the tenant. This amount can only be recovered from the tenant if the lease contains an express provision to that effect.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Business leases will typically terminate on their expiry. In circumstances of default, generally the defaulting party will be liable for damages.

With respect to rights to renew a lease, normally, commercial and retail leases have options to renew (for specified periods) attached to the lease.

Retail tenancy legislation in some jurisdictions allows landlords an express right to terminate a lease if the landlord intends to demolish the premises for redevelopment, and this may be the subject of notice provisions in a lease.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?

Generally, a landlord will require the buyer to indemnify the landlord for any post-sale non-compliance. However, the landlord will still be liable for pre-sale non-compliance. Where the tenant seeks the landlord's consent for an assignment of the lease, the landlord will generally require a release of liability for pre-sale non-compliance.

The landlord will generally not release the outgoing tenant from the tenant's pre-sale non-compliance. Thus the outgoing tenant would usually turn to the purchaser to indemnify it in this respect.

11 Zoning and Environmental Issues

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land and buildings? Please briefly describe them and include environmental laws. Can the state force landowners to sell land to it? If so please briefly describe including price mechanism.

Planning and zoning

The use and particularly the development of land will often be affected by state and local government planning legislation. Statutes such as the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**) provide environmental assessment and/or approval requirements for most development and land use in the relevant State.

In NSW, a series of State, regional and local planning instruments made under the Planning Act determine whether a particular kind of development is permissible or prohibited and, if permissible, what the assessment and/or approval requirements are for that kind of development. These requirements often differ from one local government area to another. At the local level, development control is provided initially by establishing different land use zones.

If approval is required, the approval authority will usually be the relevant local council or the NSW Minister for Planning

The Commonwealth also has some development control legislation, which focuses on matters of national environmental significance and Commonwealth controlled land or entities. The *Environment Protection and Biodiversity Conservation Act 2000* (Cth) will impose development approval obligations in some cases.

Environmental Protection

Australia has an extensive array of environmental protection laws, at Commonwealth and State level. In very broad terms:

- the Commonwealth enacts laws to give effect to Australia's international obligations in relation to subject matter such as world heritage sites, threatened or migratory species, nuclear actions or the marine environment; and
- the states and territories enact laws to provide a full suite of environmental protection measures, and this includes environmental management or remediation work, for example in the case of contaminated land.

Acquisition of Land

Both the Commonwealth and many State and Territory governments have enacted legislation dealing with the acquisition by agreement and compulsory acquisition of land from landowners: i.e. *Land Acquisition Act 1989* (Cth), *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), *Acquisition of Land Act 1967* (QLD); *Land Acquisition Act 1969* (SA).

This legislation gives a person whose land has been acquired a statutory right to compensation determined generally by considering the market value of the land and certain other matters e.g. any special value of the land to the person on the date of the acquisition, any loss attributable to severance.

11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Governing bodies

Local councils will generally govern land development and related matters in their areas. However, some states provide mechanisms for state involvement. As an example, in NSW the Minister for

Planning has power under the Planning Act to assume the role of approval authority for a particular site.

In addition, the Commonwealth Minister for the Environment controls the operation of Commonwealth legislation.

Environment protection laws in each State are governed primarily by the relevant Environment Protection Authority in that State.

Information Access

Local councils provide information regarding zoning and the relevant planning instruments that apply to a property via what is commonly known as a planning certificate. Typically, a fee will be charged in order to obtain this information.

Information relevant to contamination, heritage significance or protected species information can be obtained by contacting the relevant state government department and in some cases can be found on the internet.

11.3 What main permits or licences are required for building works and/or the use of real estate?

Generally, under State and Territory laws, prior to building works or a new land use being undertaken, development approval is required from the appropriate approval authority (exceptions may apply for minor works but will vary in each jurisdiction) and penalties will apply for carrying out works without consent.

Usually, the appropriate approval authority is the relevant local council, but in some cases it will be a State or Territory Minister or agency.

In some cases, Commonwealth approval from the Commonwealth Minister for the Environment will be required in addition to relevant State/Territory approvals.

Depending on the building works further assessment and certification may be required for example:

- an environmental management plan may need to be prepared;
- prior to construction a construction certificate may be required from an authorised certifying authority;
- prior to occupation of the premise an occupation certificate may be required from an authorised certifying authority; or
- specific licensing requirement such as environment protection licences may be required.

These will vary between the States and Territories.

11.4 Are building/use permits and licences commonly obtained in Australia? Can implied permission be obtained in any way (e.g. by long use)?

Generally, development may not be carried out without approval from the appropriate consent authority. Some forms of development approval (such as development consent in NSW) attach to the site, and if the property is sold the consent will remain valid. However, consent may lapse if works are not commenced within a specified timeframe, usually between two and five years.

Where property has been used for a particular purpose for a long time but the use has subsequently been prohibited by a planning instrument which came into force after the use commenced, “existing use rights” may exist. In such cases the activity is permitted to continue.

11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?

The cost and time of obtaining building permits/consents will vary

on the type of application.

The fees payable in order to lodge a development application varies between each state and territory. The fees are typically based on the value of the development and can range from between \$200-\$10,000.

Generally, upon lodgement of a development application, a local council should make a determination within 40-45 days however in reality determinations do take longer.

In NSW for example, if the application has not been granted within this time parties may appeal to the Land and Environment Court as it the application will be deemed to be refused.

With respect to an application at state-level, approvals may take months or years to be determined.

11.6 In what circumstances (if any) is environmental clean up ever mandatory?

Environmental clean up requirements vary in each jurisdiction but typically relate to water and land. As an example:

- under the NSW *Protection of the Environment Operations Act 1997*, the *Environment Protection Authority (EPA)* is empowered to issue a clean up notice to a person who caused pollution or an occupier of the premises at which the pollution occurred (either a person or a corporation) if the EPA reasonably suspects that a “pollution incident” has occurred or is occurring; and
- under the NSW *Contaminated Land Management Act 1997*, the EPA may order a person who is principally responsible for contamination of land or, if that is not practicable, the owner of the relevant land, to investigate or remediate that land, if a certain contamination threshold has been reached.

11.7 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in Australia.

Australia has a number of mandatory and voluntary standards for environmentally sustainable buildings, and these include standards for energy efficiency.

The *Building Code of Australia (Code)* which sets out building regulations, and technical requirements that must be fulfilled prior to gaining building approval, has mandatory minimum energy performance requirements, and incorporates energy efficiency measures for various building classifications. The Code is brought into operation by building regulatory legislation which empowers subordinate legislation in the states and territories.

In NSW, the BASIX (or buildings sustainability index) scheme imposes mandatory standards for reductions in energy and water use for residential developments. The scheme is incorporated into the planning approval process for new residential buildings and alterations to existing buildings. Other States and Territories are considering similar schemes.

The NSW Department of Environment and Climate Change administers the *National Australian Built Environment Rating System (NABERS)*, which incorporates the *Australian Building Greenhouse Rating*. This is a voluntary performance-based rating system in which office buildings are assessed on the basis of energy and water use.

Another tool for assessing buildings is *Green Star*, administered by the Green Building Council of Australia. Like *NABERS*, *Green Star* is voluntary and includes energy use in its rating criteria, as well as a broad range of other factors such as land use, materials and emissions. Different rating tools are required for different types of

buildings, and the Council has an ongoing project to devise new tools to cover additional building types.

12 General

12.1 Are there any current proposals for significant reform of real estate law in Australia - please give details.

The *Property Law Reform Alliance (PLRA)* is a coalition of legal and industry associations committed to achieving uniformity by pursuing reform of real estate property laws and procedures in Australia, in order to facilitate the cost effectiveness of property transactions. The PLRA is chaired by Peter McMahon a Clayton Utz partner.

The PLRA is in active discussions with Attorneys General, at both Federal and State level, for the development of a model Real Property Act, which will establish leading practice approaches to property law and procedures in Australia.

Ultimately, it is intended that all States of Australia adopt the model Real Property Act. However, such significant law reform will take some years to implement.

12.2 Date at which law is stated

29 February 2008.



Julie Levis

Clayton Utz
Level 34, No 1 O'Connell Street
Sydney NSW 2000
Australia

Tel: +61 2 9353 4177
Fax: +61 2 8220 6700
Email: jlevis@claytonutz.com
URL: www.claytonutz.com

Julie Levis is recognised as a commercial property law expert. Julie has expertise in structured development projects, joint venturing, financing, leasing and property development. Julie's property development work involves site acquisition and amalgamation, joint venture documentation, construction and project management work, anchor agreements for lease, ownership financing and dissolution of the joint venture on completion or sale.

Julie has a particular interest and expertise in complex development techniques such as community titles, strata leaseholds, part strata-ing of buildings, building management statements and easement documentation.

She is highly regarded for her negotiating skills, ability to provide creative commercial solutions and for her commitment to client service and meeting time constraints. Julie has been ranked amongst Australia's top lawyers in Chambers Global, AsiaLaw Leading Lawyers, International Who's Who of Business Lawyers, PLC Which Lawyer and the Guide to the World's Leading Real Estate Lawyers.



Gary Best

Clayton Utz
Level 34, No 1 O'Connell Street
Sydney NSW 2000
Australia

Tel: +61 2 9353 4177
Fax: +61 2 8220 6700
Email: gbest@claytonutz.com
URL: www.claytonutz.com

Gary Best is recognised as one of the leading legal experts in the commercial property sector.

Gary specialises in major projects, structured property investments, corporate and project equity, finance investment structuring, corporate finance and tendering.

His practice includes major development projects, acting for financiers, developers, investors, public sector bodies and financial packagers. Gary also has extensive experience in tax effective, structured finance and off-balance sheet arrangements, joint ventures and other forms of contractual arrangements.

Gary enjoys a strong reputation amongst both his clients and legal colleagues. He has been ranked amongst Australia's top lawyers by numerous publications including, PLC Which Lawyer, Asia Pacific Legal 500, Best Lawyers International: Australia, Euromoney's Guide to the World's Leading Real Estate Lawyers, Euromoney's Guide to the World's Leading Banking Lawyers, AsiaLaw Leading Lawyers, Who's Who of Real Estate Lawyers and Chambers Global - The World's Leading Lawyers.

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Clayton Utz is one of Australia's most successful top tier law firms and is recognised as a leading adviser to Australia's major real estate market's players. The Clayton Utz Real Estate Markets team is one of the largest, and best regarded in Australia.

The team consists of specialists from multi-disciplines including funds management, structured and property finance, mergers and acquisitions, property development, taxation and stamp duty, construction and infrastructure.

We provide prompt, practical solutions at each stage of a real estate investment project - from initial structuring of the special purpose vehicle (whether listed or unlisted, wholesale or retail) to managing the underlying assets be they commercial, industrial, residential, hotel, retirement village, campuses or infrastructure.

Our approach is simple: to fully integrate our resources, knowledge and experience to devise innovative strategic advice, that takes full advantage of tax effective solutions and creative financing options. At Clayton Utz, we not only understand market drivers, we work with our clients to manage them.