

Australia

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THE CORPORATE REAL ESTATE MARKET

1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

The slowing economic conditions in the last 12 months have created a challenging environment for the real estate market in Australia. Factors which have impacted on the real estate market include:

- Increasing pressure on valuations caused by factors such as increasing rental vacancies. The correction in commercial real estate prices and valuations has been severe and further rental declines are expected. As businesses either fail or become smaller and access to credit remains tight, more office space is expected to be vacant as the market demand for space declines. However as business conditions improve, the office sector is expected to improve with a lag of 12 to 18 months.
- Expansion of capitalisation rates (that is, reducing the effective value of property to reflect the increasing yield returns required by investors).
- Pressure on Australian Real Estate Investment Trusts (A-REITs) to reduce gearing leading to substantial capitalisation of A-REITs. In this sector, a sudden collapse of key lending channels led to dramatic falls in equity prices. As a result some REIT managers sought to secure long-dated debt, while others sought to sell assets or raise more capital in an effort to reduce their gearing ratios.
- Substantial concern regarding debt rollovers over the next 12 to 36 months.
- Reluctance by financiers to force sales.
- Prospective buyers waiting until the market is perceived to have bottomed.
- The larger Australian listed property trusts are likely to grow over the coming period through mergers and acquisitions.

We have seen limited significant transactions with the exception of market activity driven by major insolvencies.

Many major companies in the industry such as Stockland, GPT, Macquarie Office Trust and Dexus Property Group have downgraded profit forecasts over the year and devalued their office portfolios dramatically. For instance, Stockland experienced a 4.2% drop in the value of its commercial property portfolio to A\$82 billion (about US\$66 billion) for the first half of 2008 to 2009. Stockland divested A\$288 million (about US\$233 million) worth of commercial assets over the period.

REAL ESTATE INVESTMENT

2. Please briefly outline the opportunities for investing in real estate in your jurisdiction. In particular, consider:

- The structures commonly used (for example, property companies and partnerships).
- Are real estate investment trusts (REITs) available? If so, are they commonly used?
- Institutional investors.
- Private investors.

In Australia, unlisted funds (Funds) are commonly used to invest in Australian real estate. These Funds will usually be structured as unit trusts. In circumstances where a Fund carries on a “trading business” together with a non-trading business, it is common in Australia to use a “stapled structure” for tax benefits. This means that units of the trust are stapled to the shares of a company. This allows any “trading activity” to be undertaken by the company while the trust only holds passive investments. However if no passive investments are held, and the investor is engaged in a “trading activity”, a simple company structure is often used.

Institutional investors will sometimes invest in property directly, but more usually will invest through Funds. They often use unlisted wholesale funds, but sometimes invest through listed Funds.

Separately, private investors who do not invest through a company or trust will commonly invest in Australian real estate through participating in an unincorporated joint venture. This allows an investor to hold a direct interest in the real estate rather than through an entity.

A further structure commonly used to invest in Australian real estate is an A-REIT. An A-REIT is a form of Fund structured as a unit trust and is listed on the Australian Stock Exchange. As with a Fund, an A-REIT may also take the form of a stapled structure.

REAL ESTATE LEGISLATION

3. Please briefly set out the main real estate legislation that applies in your jurisdiction.

Australia is a federation comprising six states, two major mainland territories and other minor territories. The states are New South Wales (NSW), Victoria (VIC), Queensland (QLD), South Australia (SA), Western Australia (WA) and Tasmania (TAS), and

the two major mainland territories are the Australian Capital Territory (ACT) and the Northern Territory (NT). The states and the two major mainland territories are the subject of this chapter.

The Australian Constitution does not provide the Commonwealth with power over real estate law and accordingly real estate is governed by the laws of 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), the Property Law Act 1958 (VIC) and the Property Law Act 1974 (QLD).
- Those regulating the title system such as the Real Property Act 1900 (NSW), the Transfer of Land Act 1958 (VIC) and the Land Title Act 1994 (QLD).
- Those regulating retail tenancies such as the Retail Leases Act (NSW), the Retail Shop Leases Act 1994 (QLD) and the Retail Leases Act 2003 (VIC).
- Those regulating planning and environmental matters such as the Environmental Planning and Assessment Act 1979 (NSW), Planning and Environment Act 1987 (VIC), Planning and Development Act 2005 (WA) and the Development Act 1993 (SA).

TITLE

4. Please briefly state what constitutes real estate in your jurisdiction. Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

In Australia real property includes land and fixtures, such as buildings, that are attached to the land.

Under the Torrens system, described in more detail at *Question 5*, interests in Torrens title land are registered. There is no separate register recording ownership of fixtures that are attached to land.

5. How is title to real estate evidenced, for example by registration in a public register of title? Which authorities manage the public title register?

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. The ownership of each parcel of land under the Torrens system is recorded on a separate certificate, a folio, kept at a central registry in the capital city of each state. 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 for conversion.

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

Each state or territory operates an independent real estate registry with differing rules, requirements and forms. These include the Land and Property Management Authority (NSW), Department of Environment and Resource Management (QLD), and Landgate (WA).

6. Please briefly set out the information and documents registered in the public register of title, for example a description of the real estate, the owner, matters affecting the title and any relevant documents.

The information and documents registered in the public registry differ for each state and territory. The certificate or folio of title will commonly record a description of the real estate, for example the lot and plan details and if the land is an estate in fee simple (being the most common form of land ownership in Australia), the boundaries of the land, the name of its registered proprietor and the nature and extent of all registered encumbrances affecting the land, such as those listed below.

Registerable interests in land include:

- Easements: an interest in land which creates 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 covenants: an agreement between two landowners restricting the use of one property for the benefit of the other.
- Mortgages: an interest in land which is created as security for the repayment of a loan or the provision of an indemnity.
- Leases: a right to exclusive possession of the whole or part of land or a building given by the landowner to a third party for a specified term.

Unregisterable interests such as options to purchase and trusts can also exist in relation to land.

7. Can confidential information or documents be protected from disclosure in the public register of title?

All documents registered in the public register of title are accessible by the public. The purpose of the register is to provide notice of existing property interests through public access. There are no mechanisms available to prevent the disclosure of documents once they are registered in the public register.

8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?

Guarantee of title effectively occurs by registration of title on the Torrens register. Registration provides indefeasibility. In situations where fraud occurs or an error, omission or misdescription occurs in the registry which give rise to loss of an estate or an interest in land, compensation is payable from the assurance fund administered by the registrar or other government official.

Title insurance is not normally part of real estate acquisitions in Australia. Buyers rely on title in effect guaranteed on registration under the Torrens systems applicable in each jurisdiction, for instance the Real Property Act 1900 in NSW.

9. How can real estate be held (that is, what types of tenure exist)?

The main types of tenure that exist in land in Australia include the following.

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. 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.

Crown land

Crown land refers specifically to any land which, pursuant to legislative enactment, is the property of the Commonwealth, a State or a Territory. Current legislation in each jurisdiction except the ACT, empowers the Crown to grant, sell, lease or otherwise alienate Crown land at the relevant Minister's discretion, with varying conditions and requirements attached. In NSW the Minister of Lands may grant leases over Crown land for terms not exceeding 100 years in duration.

SALE AND PURCHASE OF REAL ESTATE

10. What are the main stages and documents in the sale and purchase of real estate? In particular:

- How is real estate marketed, when does commercial negotiation occur and what pre-contractual arrangements are used?
- When is the sale contract negotiated and executed?
- When are the parties legally bound?
- When is the change of title registered?
- When does title transfer and what are the formal legal requirements to transfer real estate (for example, in writing and signed by the parties)? Is notarisation required?

Marketing

Most sales in Australia involve the services of a real estate agent, who advertises the property to prospective buyers. Purchasing agents can also be used when a buyer wishes to acquire property for a specific purpose, such as development.

Commercial negotiation

Commercial negotiations with respect to real estate transactions are often undertaken with the assistance of lawyers represent-

ing each party. Lawyers are usually also closely involved in the preparation and execution of the contract for sale and the completion of the sale. It is important that parties receive appropriate taxation and transaction structuring advice when entering into substantial real estate transactions.

Pre-contractual arrangements

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

- Title searches and other information, including a planning certificate for the property, are obtained. In some jurisdictions, prescribed documentation must be attached to the contract of sale before exchange. For instance, in NSW, the prescribed documents include a title search, certified plan and a section 149 environmental and planning certificate. A failure to attach prescribed documentation will, in some instances, entitle a buyer to rescind a contract of sale.
- A building condition report may be obtained by the buyer and information as to the legality of the buildings may be reviewed (this might involve reviewing the property's council file).
- For tenanted premises, the leases, service contracts and any other relevant agreements are investigated.
- More comprehensive due diligence may be undertaken in substantial commercial transactions, for instance enquiries with statutory authorities such as road and rail authorities, to get a better understanding of all interests that may affect the land.

Sale contract

The terms of the sale contract will often be negotiated and documented with the assistance of lawyers. In many jurisdictions there are standard forms of contract and typically parties include additional conditions and warranties tailored to a particular transaction. The buyer usually pays a deposit (generally 10% of the purchase price), to be held by the real estate agent or the seller's lawyer until completion.

After execution and exchange of contracts:

- Any conditions precedent, for instance that the buyer obtain finance approval or that due diligence be undertaken, which are required to be carried out prior to settlement are satisfied.
- The completion figures are calculated (this includes determining council rates, water rates and whether any land tax is charged against the property and adjusting these as between the seller and the buyer).
- Any other outstanding issues are resolved.

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).

Settlement typically occurs between 28 days (ACT) and 42 days (NSW) after exchange. However, it is not uncommon for this period to be longer in the case of substantial commercial transactions. On settlement:

- The final cheques are provided to the seller (the deposit is also released to the seller).

- Title documents are provided to the buyer (or, if there is to be a registered mortgage, to the buyer's financier).
- All other original documentation required to be provided under the contract of sale, for instance existing leases, are provided to the buyer.

When legally binding

In all jurisdictions the contract of sale must be in writing and is binding once contracts have been signed and exchanged.

Registration

Following settlement of a contract of sale, the title documents and the transfer of the property are registered by the buyer's or incoming mortgagee's representative. The buyer's representative will usually then notify authorities, such as the council and the water rate authority, of the transfer of ownership of the property. In some jurisdictions this notification is the responsibility of the registry.

When title transfers

Transfer occurs when registration of the title documentation and duly executed and stamped transfer documentation is effected. The Torrens system is a system of priority by registration. Therefore, it is the date of registration rather than the date of execution of that interest that is crucial.

After registration of the transfer, the registry then issues the certificate of title under the relevant legislation in each jurisdiction. For example in NSW the Real Property Act 1900 provides that this certificate is conclusive evidence of the registered proprietor's interest.

11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate, for example to disclose real estate information, or in relation to title?

In land transactions, the general rule has been *caveat emptor* (let the buyer beware). However, some Australian jurisdictions (NSW, VIC, ACT and SA) have in place legislative regimes requiring a seller to disclose certain matters to a buyer. What must be disclosed varies from jurisdiction to jurisdiction. In NSW, the seller must attach documents prescribed by the Conveyancing Act 1919 (NSW) to the contract for sale. Failure to do so gives the buyer a right to rescind the contract within 14 days after the making of the contract.

Fair trading legislation at the Commonwealth and state levels 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 both:

- The seller made a misrepresentation, whether innocently or fraudulently.
- The misrepresentation induced the buyer to enter into that contract.

12. Please briefly outline the real estate due diligence that is typically carried out before an acquisition (including title investigation and searches of public authorities).

In general, prior to exchange of a contract of sale, the following actions are carried out by or on behalf of a buyer:

- Title searches, copies of documents registered on the title and other information, including a planning certificate for the property, are obtained. In certain jurisdictions this may form part of the prescribed documentation that must be attached to a contract of sale (see *Question 10, Sale contract*).
- A building condition report may be obtained and information as to the legality of the buildings may be reviewed (this might involve reviewing the property's council file).
- A pest inspector may be engaged to inspect the condition of the building on the property.
- A surveyor may be engaged to prepare survey plans (which will identify boundary and the location of buildings on the property).
- For tenanted premises, the leases, service contracts and any other relevant agreements are investigated.

In the case of substantial commercial transactions more comprehensive due diligence will usually be carried out, for instance further information may be sought from statutory authorities and will often be undertaken by a team of consultants such as lawyers and accountants.

13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?

Contractual warranties are often given in a commercial context where the buyer has not been able to independently verify the correctness or accuracy of the buyer's pre-contractual investigations or to deal with issues arising out of the buyers 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 a buyer some comfort that the seller's 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 and compulsory acquisition notices. A right to rescind the contract for sale is attached to statutory warranties.

14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it? For example, environmental liability, or liability under a lease.

In general, on registration of its interest in real estate a buyer will assume liability for matters relating to that real estate, including liabilities under any existing leases.

Under NSW environmental laws, if environmental pollution occurs the liability for the pollution usually lies with the polluter or the occupier of the land on or from which the pollution occurred. In the case of contamination, liability usually lies within the person who is responsible for the contamination or, if it is not practicable to make that person liable, the land owner.

It is clear that a land owner can be liable for contamination which predates that person's ownership. In addition, the land owner has a broad obligation to notify the relevant state Environment Protection Authority of contamination which reaches a specified threshold even if the contamination predates its ownership.

In substantial commercial transactions the due diligence process is crucial in ensuring that the buyer has a clear understanding of any existing and potential liabilities that will be assumed by a buyer on the acquisition of real estate. In some circumstances the seller and buyer may agree to adjust the purchase price to allow for a known liability. In other circumstances appropriate warranties from the seller may be obtained to limit the buyer's potential liabilities. The buyer will have an action in damages if the warranty is breached (see *Question 13*).

15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it? For example, environmental liability, defects in the real estate, and contractual liability to the buyer.

The timing of the transfer of risk associated with a property is determined by either common law, the terms of the agreement reached by the buyer and seller, or by statute. In some jurisdictions the risks associated with a property pass to the buyer at exchange, while in other jurisdictions the risks pass on settlement.

Often liabilities that may arise after completion are identified in the due diligence process and the seller and buyer's obligations with respect to those liabilities are negotiated and are reflected in the contract of sale. In these circumstances some contractual liabilities may remain with the seller despite disposal of the property.

If a seller or occupier has contaminated land, it may incur a statutory liability to either investigate or remediate, 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.

16. What costs are usually paid by the buyer? What costs are usually paid by the seller?

The obligation to pay the costs of real estate transactions is usually a matter of negotiation between the parties involved and typically depends on each party's commercial bargaining power. Usually each party bears its respective negotiation costs while stamp duty and registration costs will be the responsibility of the buyer. The seller will usually pay the seller's real estate agents commission plus fees.

REAL ESTATE TAX

17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate? Who pays? What are the rates? Are there any exemptions?

The Australian equivalent of VAT is the Goods and Services Tax (GST). The standard rate of GST in Australia is 10%, and is payable on "taxable supplies" that an entity makes. Entities may also be entitled to claim a credit for the GST on their inputs (input tax credit). Different property transactions have different GST implications. For example:

- A sale of vacant land, commercial property or new residential premises will generally be a taxable supply that is subject to GST where the seller is registered or required to be registered for GST purposes. In such a situation, the seller will be liable for GST on the sale of the property. However, depending on the contractual arrangement between the parties, the buyer may be required to pay an additional amount to the seller on account of GST. In certain circumstances, a seller may make a taxable supply of property under the margin scheme and calculate the GST payable on the margin for the supply rather than the consideration received. However, where the margin scheme is applied, the buyer is unable to claim an input tax credit on the acquisition of the property.
- A sale of existing residential premises will generally be treated as an input taxed supply (that is, an exempt supply), which means that no GST will be payable on the sale of the property and the seller will not be able to claim input tax credits on its acquisitions relating to the sale of the property.
- Where land is sold as part of a going concern, the sale of the going concern may qualify as a GST-free supply (that is, a zero-rated supply). This means that no GST will be payable on the sale of the property and the seller will be able to claim input tax credits on its acquisitions relating to the sale of the property.

18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase? Who pays? What are the rates? Are there any exemptions?

Transfer duty (also referred to as conveyance duty) is a form of stamp duty that is charged in each of the states and territories on the agreement to transfer or the transfer of dutiable property (for example, residential or commercial land and buildings, or an interest in land or buildings).

Each state and territory charges *ad valorem* transfer duty at sliding scale rates (referred to as the general rate) based on the dutiable value of the dutiable property transferred. The dutiable value is the greater of the consideration, being the amount of monetary consideration or the value of non-monetary consideration and the unencumbered value of the dutiable property.

The top rate of transfer duty across the jurisdictions is as follows:

- 4% in TAS.

- 4.95% in the NT.
- 5.15% in WA.
- 5.25% in QLD.
- 5.5% in NSW, VIC and SA.
- 6.75% in the ACT.

NSW also charges premium property duty on the transfer of valuable residential land with a dutiable value that exceeds A\$3 million (about US\$2.4 million). The premium rate of duty is 7% calculated on any amount by which the dutiable value of the residential land exceeds A\$3 million.

The party liable to pay the transfer duty is the transferee (that is, the buyer of the property) in all the jurisdictions except in QLD and SA where the parties to the transaction are liable.

A transfer of property in accordance with an agreement that has been duly stamped with *ad valorem* transfer duty will attract nominal or nil duty payable if the transfer is made in conformity with the agreement. There are also various exemptions from transfer duty across the jurisdictions which may only attract concessional duty (that is, nil duty or minimum duty) if certain conditions are satisfied. For example, transfers on change of trustee, property passing to a beneficiary where the trust deed was stamped with *ad valorem* duty, a transfer from an apparent buyer to the real buyer or a transfer back from a nominee.

Transfers of property between members of the same corporate group (that is, group companies) may be eligible for a corporate reconstruction exemption from transfer duty in each of the jurisdictions, except in TAS. In SA and the ACT the relief is provided only up to a maximum of 95% of the stamp duty otherwise payable on the eligible transaction. Certain pre- and post-association tests are required to be satisfied and the transferee cannot be a trustee of a discretionary trust.

Where real estate is to be acquired indirectly by a purchase of shares or units in a landholding company or trust there is a special set of stamp duty rules known as landrich or landholder duty. These rules (which are quite complicated) are designed to deliver an equivalent amount of stamp duty to the revenue authorities.

19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?

Property transactions are commonly structured as GST-free supplies of going concerns, or supplied under the margin scheme (see *Question 17*). In considering alternative property transaction structures, it is essential for buyers to consider and take into account their input tax credit entitlement (if any) on the acquisition of a property, and the interaction with other taxes (for example, stamp duty).

It is sometimes possible to replace ownership of real estate assets with a contractual right that delivers a necessary economic benefit and in this way to avoid the transfer transaction which would otherwise attract stamp duty. However, when these sorts of transactions are contemplated detailed legal advice is necessary largely because most Duties Acts contain general anti-avoidance provisions.

HOLDING BUSINESS PREMISES

20. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

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 Building 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 have implemented, or are considering, similar schemes.

The NSW Department of Environment, Climate Change and Water 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.

21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties, for example through outsourcing transactions? If yes, please give brief details.

Although some property owners may manage their real estate portfolios themselves it is also common for property owners to appoint third parties, such as real estate agents, to undertake this role. The functions undertaken by these third party providers may include procuring tenants for the property, on-going management of tenanted properties and facilities management.

22. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?

ACT

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

quence, the Commonwealth grants 99-year Crown leases for the use of the land.

Foreign entities

Foreign entities considering the acquisition of Australian urban real estate must seek approval from the Foreign Investment Review Board before proceeding with the acquisition, unless the transaction falls within an exempt category. Urban real estate means all Australian real property other than rural land, being land used wholly and exclusively for carrying on a substantial business of primary production.

Proposals requiring approval include residential real estate, vacant non-residential land, developed non-residential commercial real estate valued at A\$50 million (about US\$40.5 million) or more (subject to certain exemptions in relation to prescribed foreign investors), accommodation facilities, and residential or commercial leases for five years or more.

Acquisitions that are exempt include:

- Residential real estate by foreign nationals holding a permanent resident visa.
- Developed non-residential commercial real estate (except where the land is an accommodation facility) where the real estate is valued at less than A\$5 million (about US\$4.05 million) for commercial heritage real estate where the acquirer is not a prescribed foreign investor and in any other case less than A\$50 million (or A\$953 million (about US\$772 million) (for the calendar year 2009 and which amount is indexed annually) for prescribed foreign investors).
- Developed commercial real estate where the land is to be used immediately in its present state for industrial or non-residential commercial purposes and the acquisition is required for the purchaser's proposed or existing business activities.

Under the Australia-United States Free Trade Agreement, US entities have a higher threshold figure for the acquisition of developed non-residential commercial real estate.

23. Does change of control of a company affect its holdings of real estate?

A change in shareholdings of a corporate entity does not typically impact on the identity of the owner and accordingly will not result in a change to the registered proprietor described in the register.

24. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?

The Commonwealth and many state and territory governments have enacted legislation dealing with the acquisition by agreement and compulsory acquisition of land from landowners. Generally government authorities have the power to compulsorily acquire land for public purposes such as the delivery of public infrastructure.

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, 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 landowner.

25. Are municipal taxes paid on the occupation of business premises, for example business rates? Are there any exemptions?

There are no specific municipal taxes levied with respect to the occupation of business premises in Australia. However, it is common for occupiers of leased business premises to contribute to the rates and taxes levied on the owner of those premises, such as rates levied by the local government authority.

REAL ESTATE FINANCE

26. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?

Acquisitions of large real estate portfolios will often be financed through a combination of debt and equity, and sometimes using corporate hybrid structures.

Debt finance may be procured either on or off balance sheet, and may be structured as separate stand-alone project finance facilities or general corporate finance facilities not tied to specific project investments.

Quasi-equity financing arrangements may also be used including off balance sheet financing arrangements, especially where those providers of funding lines are offered returns which are beyond traditional interest returns on senior debt arrangements.

Capital markets facilities are also used to finance large portfolios through securitisation of commercial mortgage backed securities (CMBS Programs).

27. How is real estate commonly used to raise finance?

The most common ways in which real estate is used to raise finance is when it is used as security to source funding from financial institutions or from private lenders. Following the global financial crisis, financiers have tightened their requirements for real estate financing. Typically loan to security ratios have increased and it is difficult to procure development finance in the current market.

Residential financing is still very strong in Australia, although there has been some tightening by the major banks of their lending requirements. Available finance for commercial property lending is limited with many of the major property owners having to raise capital to retire debt because of the tightness in the credit markets in the Australian market.

28. What are the most common forms of security granted over real estate to raise finance? How are they created and perfected (that is, made valid and enforceable)?

The most common forms of security granted over real estate are first ranking mortgages and charges over land.

A mortgage of Torrens title land should be prepared in the prescribed form relevant to each jurisdiction and registered to ensure that the registered mortgagee obtains the benefits of indefeasibility of title enjoyed by all registered interests and before the mortgagee can exercise the powers or obtain the benefits of the remedies conferred by legislation.

Like a mortgage, a charge is a form of security for the payment of a debt or performance of an obligation. It consists of a right of a chargee to receive payment out of the proceeds of the realisation of the charged property, such as real estate. Charges can be (and in certain cases must be, such as a floating charge on the whole or part of the property) registered on the Australian Register of Company Charges maintained by ASIC. The statutory priority rules set out in the Corporations Act 2001 (Cth) will give priority to a chargee under a registered charge.

29. Is real estate securitisation common in your jurisdiction? If yes, please give brief details.

The CMBS market in Australia has grown and matured since its inception in 1999. In Australia, the description of CMBS has been expanded and accepted in the market to include a form of securitisation of direct property assets as well as the traditional definition of the securitisation of commercial mortgages. Accordingly, the underlying security pool may comprise of the same property type or different types of real estate such as commercial, industrial and/or retail properties. The rating agencies play a critical role in the Australian CMBS market and examine the characteristics of the underlying loan pool such as the debt service coverage ratio, the loan-to-value ratio, the quality and diversity of the pool of properties supporting a particular CMBS, the level of collateralisation provided, the credit quality of the tenant(s), the geographical concentration, and the weighted average lease maturity of the collateralised pool. The CMBS market remains an important financing tool for commercial property owners and an alternative source of diversification for fixed income investors, although it has suffered some setbacks in recent times with the onset of the global financial crisis.

REAL ESTATE LEASES

30. Are contractual lease provisions regulated or freely negotiable?

Business leases typically fall into two categories: commercial leases and retail leases.

Commercial leases' contractual provisions are freely negotiable and are typically governed by the legislation dealing with general property matters and those dealing with the system of registration (see *Question 3*). Although some provisions are implied by law,

in NSW and QLD, for example, there are covenants implied by statute involving covenants for:

- The payment of rent by tenants.
- Tenants to keep the premises in good repair.
- Permitted landlords to:
 - enter and view the state of repair of premises;
 - undertake repairs; and
 - carry out the requirements of statutory authorities.

It is common practice for these to be expressly excluded from commercial leases and for the parties to negotiate their respective obligations with respect to these matters.

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 shopping centres. In general, the intent of the retail tenancy legislation is to give greater protection to tenants. For example, in NSW the minimum term of a retail lease is five years (including any option for renewal). There is limited scope to contract out of the provisions prescribed by the retail tenancy legislation.

31. How are rent levels usually reviewed and are there restrictions on this? Is VAT (or equivalent) payable on rent?

It is usual for rents to be increased on an annual basis. Common types of rent increases include fixed annual increases (such as 3% to 4%), annual increases based on the consumer price index (CPI) and market rent review (typically determined by an independent expert).

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.

32. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term? If yes, please give details.

In the context of commercial leases, the length of term of a lease is a matter for negotiation between the landlord and tenant. However, a lease in perpetuity is generally void.

The typical term of a lease of commercial premises is three to five years with options to renew. However with "anchor" tenancies, such as government agencies, department stores in a shopping centre or supermarkets, the term can be longer. In all jurisdictions except QLD, retail leases that are governed by the retail tenancy legislation must be for a term of not less than five years, including the term of any option.

There is no right imposed by statute that entitles a tenant of commercial premises to a renewal of a lease. This is a matter to be agreed by the landlord and the tenant as part of their contractual negotiations and to be documented in the lease.

In the majority of states and territories, leases (other than short term leases in certain circumstances, such as leases of premises

in NSW for terms of less than three years), must be registered to protect the tenant's rights as against any subsequent registered dealing. Alternatively, in some circumstances a caveat may be able to be registered to protect the tenant's rights under the lease by providing notice of the tenant's interest or, in some cases, by preventing the registration of subsequent interests.

33. What provisions or restrictions typically apply to the disposal of the lease by the tenant (for example, can the tenant assign or sublet the lease with the landlord's consent)?

A tenant's rights to dispose of its interest in a lease, for instance by way of assignment or subleasing are, in the context of commercial leases, typically a matter to be agreed by the landlord and the tenant as part of their contractual negotiations.

Most commercial leases contain restrictions prohibiting or limiting a tenant's right to assign, sublet, part with possession, or share use of the premises, such as by granting licences, without the landlord's consent and, in the case of a proposed assignment, without satisfying the landlord as to the financial capacity of the incoming tenant to meet the tenant's obligations under the lease. It is also usual to include some limitations on change in the control of a corporate tenant. When a lease contains no restriction on assignment, it is generally freely assignable by the lessee.

With respect to retail leases governed by the retail tenancy legislation, in most jurisdictions the landlord is only entitled to refuse consent to an assignment of a retail lease in limited circumstances. For instance, in NSW a landlord is only entitled to withhold consent to the assignment of a lease if the incoming tenant proposes to change the use of the shop, the assignee has financial resources or retailing skills inferior to the assignor, or the tenant does not comply with the prescribed procedure.

34. Can tenants usually share their business premises with companies in the same corporate group? If yes, on what terms?

It is common for leases to expressly prohibit a tenant sharing possession of premises leased by it. The use of the premises by an entity other than the tenant, even if the entity is a related group entity, may be considered to be a breach of the lease by the tenant. In these circumstances it is prudent to get a specific acknowledgement and consent from the landlord that such action will not constitute a breach of the lease.

35. Who is usually responsible for keeping the leased premises in good repair?

The landlord and tenant's respective obligations to keep commercial leased premises in good repair are matters to be agreed between the parties and to be documented in the lease.

Generally, a tenant is required to attend to the repair and maintenance of the premises, subject to general fair wear and tear, while a landlord is responsible for repairs of a capital or structural nature. Normally, a lease requires the tenant to redecorate the premises (for instance by repainting) towards the end of the lease term.

36. Who is usually responsible for insuring the leased premises?

Generally, a tenant must maintain public risk insurance, other insurances required by law and such other insurances 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.

37. On what grounds can the landlord usually terminate the lease? Please briefly outline any restrictions or procedure that applies. Can the tenant terminate the lease in certain circumstances?

The rights of a landlord and tenant to terminate a lease are governed by the terms of the lease. In circumstances of default by a tenant, such as non-payment of rent, using the premises for a non-permitted use or insolvency, generally the tenant will be liable for damages in addition to a landlord being entitled to exercise its right to terminate the lease. Generally a lease will prohibit the landlord from terminating a lease until it has given the tenant notice of the default and an opportunity to rectify that default.

Under the retail tenancy legislation in some jurisdictions landlords are permitted to terminate a lease if the landlord intends to demolish the premises for redevelopment. This may be subject to the specific notice provisions contained in a lease.

38. What is the effect of the tenant's insolvency (under general contract terms and insolvency legislation)?

When the tenant is a corporation, which has been placed in liquidation, the liquidator may disclaim the lease. Generally, when the company is insolvent, leave would be granted and the landlord can claim for any loss, as an unsecured creditor, in the winding up.

Insolvency is also commonly included as an event of default in leases. In these circumstances a tenant's insolvency will entitle a landlord to terminate a lease.

PLANNING LAW/ZONING

39. What authorities regulate planning control and which legislation applies?

Governing bodies

Local councils generally govern land development and related matters in their areas. However, some states provide mechanisms for state involvement. For example, in NSW the Minister for Planning has power under the Environmental Planning and Assessment Act 1979 (NSW) (Planning Act) to assume the role of approval authority for particular developments, such as major infrastructure projects and other state significant development. In addition, the Commonwealth Minister for the Environment controls the operation of Commonwealth legislation, and may have approval or assessment functions in some cases.

Environment protection laws in each state are primarily governed 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. 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.

Planning and zoning

The development (including use) of land is often affected by state planning legislation. The form and detail of the assessment and approval process for a particular development varies greatly between jurisdictions. Depending on the type of development, assessment may be undertaken at local government level, state government level, or by a specific authority. In certain circumstances assessment at a Commonwealth level may also be required. Statutes such as the 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 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 is usually the relevant local council or in certain cases the NSW Minister for Planning.

Commonwealth involvement in environmental and planning law is limited. However, there is some Commonwealth development control legislation, which focuses on matters of national environmental significance and Commonwealth controlled land or entities. The primary piece of Commonwealth legislation is the Environment Protection and Biodiversity Conservation Act 2000 (Cth). This piece of legislation imposes development approval obligations in some cases, for example, where a proposed development is likely to have a significant impact on an item of national environmental significance. Furthermore, to the extent that Commonwealth environmental and planning law may apply to a particular undertaking, this will invariably be in addition to any obligations under state legislation.

Additionally, public participation in the development assessment process is generally provided for in planning legislation, although the rights of third parties to appeal to the courts against a particular determination of a development application may be limited. Inquiries and public hearings may also form part of the assessment process.

Environmental protection

Australia has an extensive array of environmental protection laws, at Commonwealth and state levels. 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 and the marine environment.

REAL ESTATE ORGANISATIONS

Property Council of Australia

Main activities. The Property Council's principal service to members is to champion their interests in the political arena. The major areas of focus are Tax, Planning strategy, development and building controls, urban policy and economic growth, environment, lease legislation and trading hours.

W www.propertyoz.com.au/

Land and Property Management Authority (LPMA) (NSW)

Main activities. The LPMA documents all State land records and releases publications including brochures, fact sheets, bulletins, circulars and advisories. The Land and Property Information (LPI) Division provides land administration services including land title registration, property information, valuation, surveying and mapping.

W www.lands.nsw.gov.au/

Department of Planning (NSW)

Main activities. Responsibility for the administration of the state's planning system and the assessment of major development applications. The Department is also responsible for the co-ordination of land releases for new housing stock and local government adherence to state planning law in determining development and rezoning applications.

W www.planning.nsw.gov.au/

- The states enact laws to provide a full suite of environmental protection measures, including environmental management and remediation work in the case of contaminated land.

Depending on the nature of the activity or its impact on the environment, licences or approvals may be required to be obtained from Commonwealth and state bodies or authorities, which permit the activity. The licences or approvals may contain conditions regulating the manner in which the activity can be undertaken.

40. What planning consents (for example, planning permission or building permits) are required and for which types of development?

Generally, under state 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 they vary between jurisdictions) and penalties 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 Minister or agency.

In some cases, Commonwealth approval from the Commonwealth Minister for the Environment is required in addition to relevant state 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 premises, an occupation certificate may be required from an authorised certifying authority.
- Certification in relation to environmental sustainability may be required in certain cases in some states and territories.
- Specific licensing requirements enforced by environmental regulatory authorities, such as environment protection licences, may be required.

Such requirements vary between jurisdictions.

41. In relation to planning consents:

- **Which body grants initial planning consents?**
- **Do third parties have the right to object? If yes, please give brief details.**
- **In what circumstances is there a public inquiry?**
- **How long does an initial decision take after receipt of the application?**
- **Is there a right of appeal against a planning decision? If yes, please give brief details.**

Generally, development may not be carried out without approval from the appropriate consent authority. For the allocation of responsibility for granting planning approvals, see *Question 39*.

In NSW, certain features of the planning approval process may be delegated to the Planning Assessment Commission such as the determination of applications under Part 3A of the Planning Act with respect to developments deemed to be of state significance. Proceedings of the Planning Assessment Commission may be held in public, if requested by the Minister or if the development or activity under review may require the need for an approval under water legislation.

Some (but not all) forms of development approval (such as development consent in NSW) effectively attach to the site, and if the property is sold the consent will remain available for use by the purchaser or subsequent occupier. 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 but there may be limits on the ability to expand that use. For example, a property may have been lawfully used as a service station. After the commencement of that use an environmental planning instrument may have been made which prohibits the use of a service station on that land. In such circumstances, the service station use may be considered to be an “existing use” which is permitted to be continued.

The cost and time of obtaining building permits/consents vary depending on the type of application. Similarly, the fees payable in order to lodge a development application vary between each jurisdiction.

Generally, on lodgement of a development application, a local council, or relevant consent authority, should make a determination within a specified period (at present 40 to 60 days, depending on the nature of the development). In reality determinations often take longer. However, in NSW for example, if the application has not been granted within this time, parties may appeal to the Land and Environment Court as the application is deemed to be refused.

An applicant who is dissatisfied with the determination of its application for approval usually has the right to appeal the determination. In NSW the appellate body is the Land and Environment Court. Such an appeal is on the merits, and the court will stand in the shoes of the consent authority to re-determine the application.

With respect to an application that is to be determined at a state government level (usually for a major project), approvals may take more than a year to be determined. However, in NSW, the state government is developing a policy to reduce determination time frames to less than nine months for almost all proposals.

In most cases, an application for approval will be notified publicly, and any person may make submissions in relation to it. Third parties merely have limited “rights of merit” appeal in relation to a determination. However, in NSW, any person may commence proceedings to remedy or restrain a breach of planning laws.

REFORM

42. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

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 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 Australian jurisdictions adopt the model Real Property Act. However, such significant law reform will take some years to implement.

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