

The International Comparative Legal Guide to:

Real Estate 2009

A practical insight to cross-border Real Estate work



Published by Global Legal Group

Australia

Gary Best



Julie Levis



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 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 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); and
- 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).

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 takes 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 grants 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 notified to the Treasurer for approval including:

- some non-residential real estate, irrespective of value, such as vacant land and hotels;
- developed non-residential commercial real estate, if valued at more than \$50m or, if under a heritage listing, 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 non-residential commercial real estate than other nationals - currently \$913m (this threshold is 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):

- **Easement:** 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 carriage way over a neighbouring property.
- **Restrictive covenant:** an agreement between two landowners restricting the use of one property for the benefit of the other.
- **Mortgage:** an interest in land which is 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 old system does not fall under the Torrens register. Crown land (owned by a state, territory or the Commonwealth of Australia) is also often unregistered.

Unregisterable 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 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.

4.3 What rights in land are compulsory 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. For example, in NSW and QLD, leases of terms not exceeding three years (including any option for renewal) need not be registered.

4.5 Where there are 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, an owner of land held under old system title may make a primary application requesting that the Registrar General bring the land under the Torrens system. The Registrar General then carries out an investigation into the land rights before registering the property under the Torrens system.

Where, after investigating a primary application, the Registrar General is not satisfied that a full Torrens title can be issued, the Registrar General has power to create a qualified folio on which is recorded a "caution" to the effect that the land is held subject to subsisting interests whether registered or not. The caution should lapse or be cancelled before the qualified folio becomes an ordinary folio, completing the process of conversion to 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 registration of a document rather than the date of the execution of the document 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 matters 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>;

- VIC: at <http://www.land.vic.gov.au>;
- QLD: through using one of the providers approved by the Department of Natural Resources and Water listed at http://www.nrw.qld.gov.au/services_resources/distributors.php;
- SA: at <http://www.propertyassist.sa.gov.au>;
- WA: at <http://www.landgate.wa.gov.au>;
- TAS: at <http://www.thelist.tas.gov.au>;
- ACT: at <http://www.rgo.act.gov.au/landtitles/index.html>; and
- NT: at <http://www.nt.gov.au/lands/lis/index.shtml>.

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 for a specific purpose, such as development. The responsibilities of real estate agents vary between jurisdictions (in some states real estate agents also prepare the contract documents).

b) Lawyers

Lawyers in real estate transactions are usually closely involved with the preparation and execution of the contract for sale, and the completion of the sale. Most Australian jurisdictions also permit licensed conveyancers to perform conveyancing work.

c) Notaries

Notaries are not required in real estate transactions in Australia.

d) Others

Other parties' involvement in a real estate transaction depends on the transaction. Some examples of other parties who may be involved include:

- building consultant or pest inspector engaged to inspect the condition of the building on the property or compliance with the Building Code of Australia; and
- surveyor engaged to prepare survey plans (which 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 are charged on a time basis (at a predetermined hourly rate) and smaller real estate transactions are charged on a lump sum basis. These fees are in addition to general disbursement costs such as photocopying etc.

Others

Generally, consultants' charges 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 are carried out:

- title searches and other information, including a planning certificate for the property, are obtained;
- 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); and
- for tenanted premises, the leases, service contracts and any other relevant agreements are investigated.

Exchange of contracts

- the parties, the property and the price are agreed (each jurisdiction has their own standard form contract and typically, parties 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 satisfied;
- 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 are resolved.

Settlement

Settlement typically occurs between 28 days (ACT) and 42 days (NSW) after 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 are handed to the purchaser (for example where leases exist over the property, including bank guarantees, these are provided to the purchaser).

Post Settlement

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

- lodges the title document and the transfer of the property for registration in the real estate registry; and then
- notifies 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 real estate registry.

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

In land transactions, the general rule has been *caveat emptor* or “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 vendor must attach documents prescribed by the *Conveyancing Act 1919* (NSW) to the contract for sale. Failure to do so gives the purchaser a right to rescind the contract within 14 days after the making of the contract.

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

Trade Practices Act

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:

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

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

Typically, on settlement, the seller provides the buyer with original title documents which give the buyer legal title. The title documents are then provided to the registry to transfer ownership 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 risks pass on settlement.

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

Settlement adjustments

On settlement, the purchase price needs 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 (by obtaining 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 stamp duty at different rates and against different parties. In all jurisdictions, 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 and 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 \$1m

In NSW, a premium rate applies to residential land with a value of \$3m or more. The rate of duty is \$150,490 plus \$7 for every \$100 or part, by which the dutiable value exceeds \$3m.

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 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 equivalent of VAT is the Goods and Services Tax (GST). The standard rate of GST in Australia is 10%. Different property transactions have different GST implications. For example:

- A sale of vacant land, commercial property or “new” residential premises will generally be 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 upon the contractual arrangement between the parties, the buyer may be required to pay an additional amount to the seller on account of GST.
- A sale of existing residential premises will generally be treated as an input taxed 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. 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.

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 seller 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?

The stamp duty laws of each jurisdiction contain “land rich” provisions which apply to certain acquisitions of shares or units in “land rich” entities. The effect of the provisions is that stamp duty is charged on those acquisitions at the same rate as for a transfer of land.

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 landlord and tenant (such as repair and maintenance liability, assignment, termination and waiver provisions and subleasing rights).

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 impose greater obligations on landlords and accordingly, provide greater protection for tenants.

10.2 What types of business lease exist?

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

10.3 What are the typical provisions for leases of business premises in Australia 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?

a) Length of term

The typical term of a lease of commercial premises is three to five years 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.

b) 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) and 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).

c) **Tenant's right to sell or sub-lease**

This is typically acceptable with the consent of the landlord.

d) **Insurance**

The tenant must maintain 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**

This is typically acceptable with the consent of the landlord.

(ii) **Transfer of lease as a result of a corporate restructuring (e.g. merger)**

This is 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 requires the tenant to redecorate the premises (by 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 NSW, QLD, VIC, SA, WA, TAS or the NT.

In the ACT, the current rate is \$0.50 per \$100 or part thereof of the total consideration. Stamp duty on leases (other than leases for a term of greater than 30 years including any renewal options) will be abolished in the ACT on 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? Please briefly describe them and include environmental laws. Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.

Planning and zoning

The use and particularly the development of land is often affected by state and local government 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 or territory government level, or by a specific authority. In certain circumstances assessment at a Commonwealth level may also be required. 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 or territory.

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 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 or territory 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/territory 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; and
- the states and territories 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, licenses or approvals may be required to be obtained from Commonwealth and state/territory bodies or authorities, which permit the activity. The licenses or approvals may contain conditions regulating the manner in which the activity can be undertaken.

Acquisition of land

The Commonwealth and many state and territory governments have enacted legislation dealing with the acquisition by agreement and compulsory acquisition of land from landowners.

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.

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 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 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. 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 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 or territory Minister or agency.

In some cases, Commonwealth approval from the Commonwealth Minister for the Environment is 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 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; and
- specific licensing requirements enforced by environmental regulatory authorities, such as environment protection licences, may be required.

Such requirements vary between jurisdictions.

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 but there may be limits on the ability to expand that use.

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 vary depending on the type of application.

The fees payable in order to lodge a development application vary between each jurisdiction. The fees are typically based on the value of the development and can generally range from around \$200 to \$16,000.

Generally, upon lodgement of a development application, a local council, or relevant consent authority, should make a determination within 40 to 60, days depending on the nature of the development, 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 the application is deemed to be refused.

With respect to an application that is to be determined at a state or territory government 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 between jurisdictions 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 or occupier of the relevant land, to investigate or remediate that land, if a certain contamination threshold has been reached.

Conditions of approval or licences may also mandate remediation of land at the conclusion of the relevant activity.

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 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 and territories have implemented, or 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 Australian jurisdictions 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

14 November 2008.

**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.

**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.

CLAYTON UTZ

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.