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REAL ESTATE

Corporate Counsel's Guide to Doing Business in Australia



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AUSTRALIAN PROPERTY LAW

1 Torrens System

Property law is principally regulated by the law of each State and Territory under the Australian federal system. Generally, these laws are substantially the same. Australian land is governed by the Torrens system which creates title to land by registration.¹ Interests in land pass upon registration of a transfer document.² The Registry records the nature of interests in land and the identity of interest holders.

Registration of title provides 'indefeasibility' which means that a registered proprietor inherits, upon registration, an interest free from all unregistered interests.³ There are some exceptions to indefeasibility, such as fraud,⁴ easements⁵ and interests of tenants.⁶

Unregistered interest holders can lodge a caveat to temporarily protect their legal or equitable interest in land.⁷ Caveats notify persons dealing with the registered proprietor of unregistered interests in the property. Caveats also notify the person who lodged the caveat (the caveator) of any dealings lodged for registration that might affect their caveated interest.⁸ Caveats lapse if the caveator fails to demonstrate the validity of their interest. Property investors should exercise due diligence to ensure their proposed acquisition has not been caveated.

2 Ownership of Australian Real Estate

2.1 Freehold and Leasehold

There are two different types of ownership in Australian real estate: freehold estate and leasehold estate.⁹ The most common form of ownership is freehold ownership, which is inheritable and of unlimited duration.¹⁰ A freehold estate owner is entitled to lease the property. Leasehold ownership entitles the tenant to exclusive possession of the land for a fixed time period.¹¹ Ownership reverts to the freehold owner at the end of the fixed time period.

2.2 Co-ownership

Two or more persons can concurrently hold interest in land by way of 'joint tenancy' or 'tenancy in common' co-ownership.¹² Co-ownership can exist under freehold or leasehold ownership.¹³

Joint tenancies are characterised by the 'four unities' and the 'right of survivorship'.¹⁴ The four unities are possession, interest, title and time.¹⁵ 'Possession' requires each joint tenant

¹ Bradbrook et al, *Australian Real Property Law* (Thomson Reuters, 5th ed, 2011) 184.

² Ibid 184-185.

³ Ibid 202.

⁴ *Transfer of Land Act 1958* (Vic) s 42(1); *Assets Co Ltd v Mere Roihi* [1905] AC 176.

⁵ *Transfer of Land Act 1958* (Vic) s 42(2)(d).

⁶ *Transfer of Land Act 1958* (Vic) s 42(2)(e).

⁷ Les A McCrimmon, 'Protection of Equitable Interests Under the Torrens System: Polishing the Mirror of Title' (1994) 20 *Monash University Law Review* 300, 304.

⁸ Ibid 304-305.

⁹ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 256) [28.1.10].

¹⁰ Ibid 57.

¹¹ *Radaich v Smith* (1959) 101 CLR 209.

¹² Thomson Reuters, *Laws of Australia*, vol 28 (at Update 255) [28.1.1960].

¹³ Bradbrook et al, above n 1, 547.

¹⁴ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 255) [28.1.2050].

¹⁵ Bradbrook et al, above n 1, 550-552.

to possess the whole property with other joint tenants.¹⁶ 'Interest' requires joint tenants' interests to be identical in nature, extent and duration.¹⁷ 'Title' requires each joint tenants' interest to be derived from the same instrument.¹⁸ 'Time' requires the interest of each joint tenant to have been vested at the same time.¹⁹

When a joint tenant passes away, the remaining joint tenants automatically assume the interest of that joint tenant by way of the right of survivorship.²⁰ The last surviving joint tenant assumes the entire interest to the property.²¹ The right of survivorship cannot be defeated by a will.²²

If one of the four unities is not present but two or more persons concurrently possess an interest in land, it is assumed the persons hold the land as tenants in common.²³

Tenants in common have an 'undivided' share in the property²⁴ and may deal with their property share as they wish.²⁵ The right of survivorship does not apply to tenants in common.²⁶

2.3 Airspace and Minerals

An owner of Australian property also owns the airspace above their land.²⁷ The extent of this proprietary interest is uncertain.²⁸ However, recent case law suggests that ownership of airspace extends to the height at which an owner of land may ordinarily use their land.²⁹ Under common law, airspace is considered a proprietary interest that can be conveyed.³⁰ While there is no definitive answer, relevant State and Territory legislation suggests that airspace is a registrable proprietary interest under the Torrens system.³¹

Due to statutory reservations, generally, owners of land do not own the minerals beneath the land.³² Ownership of land is subject to State and Territory legislation which favour the Crown's reservation of all minerals.³³

Foreign persons can seek approval from the Australian Government to undertake exploration of mining tenements where they have a right to occupy urban land and the lease or license may exceed five years.³⁴ If a foreign person is undertaking these activities on rural land, then the rules pursuant to rural land apply.³⁵ Other rules apply to developed commercial property if the mining tenement develops into an operational mine.³⁶

¹⁶ Ibid 551.

¹⁷ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 255) [28.1.2080].

¹⁸ Bradbrook et al, above n 1, 552.

¹⁹ Ibid 551-522.

²⁰ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 255) [28.1.2080].

²¹ Ibid.

²² Bradbrook et al, above n 1, 552-553.

²³ Ibid 555.

²⁴ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 255) [28.1.2010].

²⁵ Ibid.

²⁶ Bradbrook et al, above n 1, 556.

²⁷ Ibid 792.

²⁸ Ibid.

²⁹ *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490.

³⁰ *Re Lehrer and the Real Property Act* (1961) 61 SR (NSW) 265, 369.

³¹ Bradbrook et al, above n 1, 791-792.

³² Ibid 794-800.

³³ *Crown Lands Act 1989* (NSW) ss 76(4), 83; *Mines Resources (Sustainable Development) Act 1990* (Vic) s 9; *Mineral Resources Act 1989* (Qld) s 8(3); *Mining Act 1971* (SA) s 16; *Mining Act 1978* (WA) s 9(1); *Mineral Resources Development Act 1995* (Tas) s 6; *Minerals (Acquisition) Act 2011* (NT) s 3.

³⁴ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 12.

³⁵ Ibid 12.

³⁶ Ibid 12.

3 Native Title

'Native title' is a communal, group or individual right or interest in relation to land or waters, deriving from traditional laws acknowledged and customs observed by Indigenous peoples by which they have a connection with the land or waters. These rights are protected by common law³⁷ and legislation.³⁸ Native title claims are resolved by the Native Title Tribunal and the Federal Court of Australia.³⁹

Native title is extinguished, in whole or in part, by an interruption to Indigenous laws and customs.⁴⁰ This interruption can include a grant in the land inconsistent with the existence of native title.⁴¹ Inconsistent grants include freehold estates and some leasehold estates including pastoral or mining leases.⁴²

Native title infrequently interferes with the foreign acquisition of real estate in Australia. However, it is more likely to arise in the acquisition of rural property and undeveloped land rather than acquisition of developed residential property.

4 Due Diligence

A prospective purchaser is responsible for ensuring the property meets their approval prior to purchase. Despite some consumer protection laws which require that certain information be provided to the purchaser before the sale of land,⁴³ the principle of 'buyer beware' demands persons acquiring land undertake due diligence⁴⁴ the extent of which will vary depending on the type of property.⁴⁵ It is therefore advisable that a purchaser make their own inquiries.

A title search can be completed either online or in person at the Registry.⁴⁶ This reveals any easements, caveats, encumbrances⁴⁷ or restrictive covenants⁴⁸ relating to the land which may otherwise deprive the purchaser of the full benefit of the transaction. Other types of due diligence measures include: planning reviews to ascertain any planning controls which may pertain to the property,⁴⁹ survey reviews to detail any encroachments on the property or whether the property encroaches upon neighbouring properties;⁵⁰ and reviews of service, supply or maintenance contracts to understand contractual arrangements with service providers.⁵¹

Prospective purchasers may wish to engage a consultant to determine compliance with the Building Code of Australia⁵² or to consult local council for any potential surrounding developments (e.g. roads infrastructure).⁵³

³⁷ Bradbrook et al, above n 1, 368-374.

³⁸ *Native Title Act 1993* (Cth).

³⁹ *Ibid* ss 61, 190A-190C.

⁴⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 453-455. It is important to note that the High Court in *Yorta* departed from the common law approach in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Western Australia v Ward* (2002) 213 CLR 1 but referred to s 223(1) of the *Native Title Act 1993* (Cth) when determining the existence of Native Title.

⁴¹ *Western Australia v Ward* (2002) 213 CLR 1, 95

⁴² *Ibid*.

⁴³ *Transfer of Land Act 1958* (Vic) s 32.

⁴⁴ Bradbrook et al, above n 1, 446.

⁴⁵ David Cohen, 'Due Diligence: Why Undertake it and Some Aspects of its Implementation' (1996) 34 *Value and Land Economist* 280, 284.

⁴⁶ *Ibid* 283.

⁴⁷ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 247) [28.18.2230].

⁴⁸ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 280) [28.14.10]; Cohen, above n 45, 283.

⁴⁹ Simon Libbis, *Conveyancing Victoria – The Ultimate Guide* (Hybrid Publishers, 2012) 60-1.

⁵⁰ Cohen, above n 45, 283.

⁵¹ *Ibid* 284.

⁵² *Ibid* 283.

⁵³ *Ibid* 284.

5 Governing Law

Property transactions are governed by State laws in the location of the property, which means a conflict of laws issue should not arise.⁵⁴

ACQUISITION OF PROPERTY

6 Contract of Sale

Vendors generally prepare the contract of sale, which sets out the parties' obligations. The contract of sale must be in writing.⁵⁵ An oral contract for the sale of property is therefore unenforceable.⁵⁶ Parties must have capacity to enter into the contract⁵⁷ and also intend to enter into the contract.⁵⁸ The contract becomes binding upon being signed and exchanged between the parties.⁵⁹

Vendors are also required to provide 'good title' to the property.⁶⁰ Purchasers should raise their concerns about the title before settlement and should not sign the contract of sale until satisfied with the title.⁶¹ Once 'good title' has been proved, purchasers have a duty to accept, pay and take a transfer of the property.⁶²

Each State and Territory has a standard Contract of Sale Real Estate document which is used to transfer an interest in Australian property.

Foreign investors should make their contract of sale subject to foreign investment approval, unless approval has already been granted or the investor is exempt under the *Foreign Acquisitions and Takeover Act 1975* (Cth) (the Act) and the *Australian Foreign Investment Policy* (the Policy).⁶³ For other issues specifically affecting foreign investors, see parts 2.3, 3, 9.1 and 15.

7 Sale of Land

7.1 Deposits

A purchaser will be required to pay a deposit, up to ten percent of the purchase price, at the time of signing the contract.⁶⁴ The deposit is forfeited when a purchaser fails to complete the contract of sale,⁶⁵ although the deposit will be refunded to the purchaser if the vendor fails to complete the sale.⁶⁶

The deposit money is paid to either the vendor's estate agent, or if there is no estate agent, to the vendor's conveyancer or legal practitioner. The agent holds the money as a

⁵⁴ *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

⁵⁵ *Ibid* 444, 455.

⁵⁶ *Ibid* 444; See *Conveyancing Act 1919* (NSW), s 54A; *Instruments Act 1958* (Vic), s 126; *Property Law Act 1974* (Qld), s 59; *Law of Property Act 1936* (SA), s 26; *Conveyancing and Law of Property Act 1884* (Tas), s 36; *Civil Law (Property Act 2006)* (ACT), s 204; *Law of Property Act* (NT), s 62. In Western Australia, the original statute remains in force and was held to apply to Torrens land in *Wallis v Moreton* (1932) 32 SR (NSW) 659.

⁵⁷ Bradbrook et al, above n1, 444.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* 445. It is important to note that in the Victoria, the contract is usually finalised by the parties executing the Real Estate Institute of Victoria Common Form Contract.

⁶⁰ *Bell v Scott* (1922) 149 CLR 387, 394.

⁶¹ Bradbrook et al, above n 1, 445.

⁶² Thomson Reuters, *Laws of Australia*, vol 28 (at Update 247) [28.18.1730].

⁶³ LexisNexis, *Foreign Investment Regulation in Australia* (at 28 November 2013) [4074].

⁶⁴ Libbis, above n 49, 146.

⁶⁵ *Sale of Land Act 1962* (Vic) s 26(1)(a).

⁶⁶ *Ibid* s 26(1)(b).

'stakeholder' until the purchaser is entitled to the transfer of the land. At this time, the deposit may then be paid to the vendor.⁶⁷ There is an alternative procedure for the early release of the deposit in certain circumstances.

7.2 Issues Regarding Subdivision of Land

A plan of subdivision allows land to be divided into two or more new portions. These portions of land can then be dealt with separately. If the purchased land is not already a registered lot on a plan of subdivision, then certain consumer protection and other laws will apply.

Registration of the Plan of Subdivision

A lot in a plan of subdivision must be registered prior to being purchased,⁶⁸ unless the contract stipulates that deposit moneys cannot be released until the plan is registered.⁶⁹

The purchaser is not entitled to obtain possession of the lot prior to the registration of the plan of subdivision,⁷⁰ and only has reasonable access to the lot if it is connected with the proposed development or use of the land.⁷¹

The vendor has an eighteen month period after the date of the contract in which to register the plan of subdivision, otherwise the purchaser is entitled to rescind the contract.⁷²

Disclosure of Works

Either before or after the contract has been signed, the purchaser is entitled to receive information from the vendor regarding any work which has been undertaken that has affected the natural surface level of the land in the lot or adjoining it.⁷³

The purchaser is able to rescind the contract of sale if the vendor fails to comply with the above obligations prior to the plan being registered.⁷⁴

7.3 The Vendor's Statement

An example of the consumer protection mechanisms that apply in the contract of sale is the vendor's statement in Victoria. The vendor is required to provide a vendor's statement prior to the purchaser signing the contract. This includes information of any registered or unregistered mortgage,⁷⁵ easements and covenants affecting the land,⁷⁶ the planning instrument,⁷⁷ rates and taxes affecting the land⁷⁸ and an owners corporation certificate if applicable.⁷⁹

If the vendor fails to disclose the above items, the purchaser will be entitled to rescind the contract prior to possession or acceptance of title,⁸⁰ unless the purchaser is in substantially the same position as if the relevant information had been provided.⁸¹

⁶⁷ Ibid s 24(1).

⁶⁸ Ibid s 9AA(1).

⁶⁹ Ibid s 9AA(1)(a)(i).

⁷⁰ Ibid s 9AD(1).

⁷¹ Ibid s 9AD(3).

⁷² Ibid s 9AE(2).

⁷³ Ibid ss 9AB(1), 9AB(2).

⁷⁴ Ibid s 9AE(1).

⁷⁵ Ibid ss 32(2)(a), (aa).

⁷⁶ Ibid s 32(2)(b).

⁷⁷ Ibid s 32(2)(c).

⁷⁸ Ibid s 32(2)(e).

⁷⁹ Ibid s 32(3A).

⁸⁰ Ibid s 32(5).

⁸¹ Ibid s 32(7).

8 Foreign Ownership

8.1 Applicable Law and Policy

Foreign investment in Australia is regulated by legislation, regulations and the Policy.⁸² On the advice of FIRB, the Treasurer reviews investment proposals and either prohibits or permits a proposed investment if it satisfies the national interest test.⁸³ A proposed investment found to be contrary to the national interest will be refused.⁸⁴ Considerations including the economic benefits of foreign investment will be weighed up against concerns surrounding foreign ownership of Australian assets, in addition to issues surrounding Australian Government Policies, national security, competition and the character of the investor.⁸⁵

The foreign investment scheme applies to ‘foreign persons’, meaning:

- (a) a natural person who is not ordinarily resident in Australia;
- (b) a corporation in which a natural person not ordinarily resident in Australia, or a corporation incorporated overseas, holds 15% or more of the corporation;
- (c) a corporation in which two or more of those persons, or corporations, hold 40% or more of the corporation;
- (d) the trustee of a trust in which a natural person not ordinarily resident in Australia, or a corporation incorporated overseas, holds a beneficial interest of 15% or more of the assets or income of the trust; or
- (e) the trustee of a trust in which two or more of those persons, or corporations, hold a beneficial interest of 40% or more of the assets or income of the trust.

Foreign investors may need to notify the Government of the proposed acquisition and seek approval from the Treasurer.⁸⁶ Failure to comply with notification requirements can result in a fine or imprisonment.⁸⁷ Further, the Treasurer may prohibit or order the divestment of an investment if the acquisition is subsequently found to be contrary to the national interest.⁸⁸

8.2 Foreign Investors

Legal entities in Australia are limited to individuals and bodies corporate.⁸⁹ Legal entities established in foreign jurisdictions are recognised in Australia,⁹⁰ however, they are not permitted to carry out business unless they have satisfied the relevant registration requirements or are trading through an Australian subsidiary.⁹¹

Foreign investors may wish to directly acquire Australian real estate or indirectly invest by acquiring ownership of property trusts such as private unit trusts and real estate investment

⁸² LexisNexis, *Foreign Investment Regulation in Australia*, vol 1 (at Service 66) [4015]; See Paul Prindable, ‘Is Australia’s Foreign Investment Law Enforceable?’ (1995) 3 *Australian Property Law Journal* 196, 197.

⁸³ LexisNexis, *Foreign Investment Regulation in Australia*, vol 1 (at Service 66) [4015].

⁸⁴ *Ibid* [4017].

⁸⁵ *Ibid* [4019].

⁸⁶ The Act s 26A(2); *Ibid* [4056].

⁸⁷ The Act s 26A(2).

⁸⁸ The Act s 21A.

⁸⁹ *Corporations Act 2001* (Cth). See Justice Paul Brereton, ‘A Trustee’s Lot is not a Happy One: Discretionary Trusts and Self-Managed Superannuation Funds (2010) 32 *Australian Bar Review* 25, 26.

⁹⁰ *Chaff and Hay Acquisition Committee v J A Hemphill & Sons Pty Ltd* (1947) 74 CLR 375.

⁹¹ *Corporations Act 2001* (Cth) s 601CD.

trusts.⁹² Such acquisitions may be pursued via an Australian subsidiary company, trust, partnership or joint venture. The mechanism through which a foreign investor acquires Australian real property is often determined by the nature of the investment and the consequential tax benefits associated with certain entities.⁹³

Certain formalities must be satisfied to create these mechanisms facilitating investment, such as a company constitution, trust deed, partnership agreement or joint venture agreement. Entities will also need to satisfy registration requirements.

8.3 Exchange Control

Australian exchange controls have almost been abolished since the Australian Government deregulated the foreign exchange sector of the Australian economy and floated the Australian dollar in 1984.⁹⁴ Foreign exchange controls may still apply in the countries of foreign investors.

9 Types of Properties

Foreign investors acquiring Australian real estate need to consider the prohibitions and requirements under the Policy.⁹⁵ Government approval may be required for certain acquisitions and some investments are considered contrary to the national interest.⁹⁶

9.1 Residential Real Estate

Residential real estate means all housing and land that is not commercial property or rural land.⁹⁷ Foreign acquisition in residential real estate is governed in the following manner.

Established Dwellings

Temporary residents⁹⁸ must apply to the Foreign Investment Review Board (FIRB) if they wish to acquire an established dwelling. Temporary residents may only purchase one established dwelling if it is used as their residence in Australia.⁹⁹ These acquisitions are generally approved subject to conditions, such as the need to sell the property when it is no longer their residence.¹⁰⁰ Temporary residents cannot acquire established dwellings as investment properties.¹⁰¹

Non-resident foreign investors¹⁰² cannot acquire established dwellings as homes or investment properties,¹⁰³ although foreign companies conducting a substantial Australian

⁹² John Williams and John McLaren, *Law of Investments* (Lawbook 2004) 116. It is important to note that real estate investment trust any some private units trusts are regulated by Chapter 5C of the *Corporations Act 2001* (Cth) which contains requirements including, but not limited to, registration.

⁹³ *Ibid.*

⁹⁴ LexisNexis, Australian Encyclopaedia of Forms & Precedents (at 21 November 2013) 'Loans and Finance Documentation' [20110-20115].

⁹⁵ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 9-13.

⁹⁶ LexisNexis, *Foreign Investment Regulation in Australia* (at 28 November 2013) [4074].

⁹⁷ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 9.

⁹⁸ A temporary resident refers to a person residing in Australia who holds a temporary residency visa permitting them to stay in Australia for more than twelve months, continuously, or a person who is issued a bridging visa having applied for permanent residency. See Foreign Investment Review Board, *Guidance Note 2* (21 November 2013) < <http://www.firb.gov.au/content/guidance.asp?NavID=85>>.

⁹⁹ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 9.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Non-resident foreign investors also include short-term visa holders. See Foreign Investment Review Board, *Guidance Note 3* (21 November 2013) < <http://www.firb.gov.au/content/guidance.asp?NavID=85>>.

¹⁰³ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 9.

business can acquire established dwellings as housing for their Australian-based staff.¹⁰⁴ Approval is generally granted subject to the company undertaking to sell the property if it is anticipated the property will be vacant for at least six months.¹⁰⁵

Non-resident foreign investors can also make applications to acquire established dwellings for redevelopment, subject to certain conditions. Applications for redevelopment are generally approved if the redevelopment increases Australia's housing stock or if the existing dwelling is derelict or uninhabitable.¹⁰⁶

New Dwellings

Temporary residents and non-resident foreign investors must apply to FIRB to acquire new dwellings in Australia.¹⁰⁷ Acquisitions are generally approved without conditions,¹⁰⁸ either 'off the plan' or when the dwelling is complete.

Developers constructing high-rise residential buildings can obtain FIRB pre-approval to sell 50 percent of the dwellings to foreign investors without conditions. This is a common form of acquisition of residential real estate in Australia.

Vacant Land

Temporary residents and non-resident foreign investors must apply to acquire vacant land for residential redevelopment.¹⁰⁹ Acquisition is generally approved subject to conditions, such as the requirement that continuous construction commences within 24 months¹¹⁰ and that at least 50 percent of the acquisition cost is expended on redeveloping the site if the investor acquires more than a single block of land.

Exemptions from Government approval to acquire residential real estate

Certain persons do not need Government approval to buy residential real estate, including Australian citizens living at home or abroad, persons ordinarily resident in Australia,¹¹¹ New Zealand citizens, foreign nationals that hold Australian permanent resident visas and foreign nationals acquiring property as joint tenants with a spouse who is an Australian citizen.¹¹²

Regardless of citizenship or residency, Government approval is not required for an interest in a time share scheme that allows the foreign investor (and any associates) to use the time share residence for up to four weeks per year.¹¹³

Foreign investors also do not need Government approval to acquire residential property within the bounds of a resort, if the resort has been designated as an Integrated Tourism Resort before September 1999.¹¹⁴

¹⁰⁴ Ibid.

¹⁰⁵ Foreign Investment Review Board, *Guidance Note 3* (21 November 2013) <<http://www.firb.gov.au/content/guidance.asp?NavID=85>>.

¹⁰⁶ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 10.

¹⁰⁷ New dwellings are dwellings which have not been previously occupied for more than twelve months and are purchased from the developer. See Foreign Investment Review Board, *Guidance Note 2* (21 November 2013) <<http://www.firb.gov.au/content/guidance.asp?NavID=85>>; Foreign Investment Review Board *Guidance Note 3* (21 November 2013) <http://www.firb.gov.au/content/guidance/downloads/gn3_jan2012.pdf>.

¹⁰⁸ Ibid.

¹⁰⁹ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 9.

¹¹⁰ Foreign Investment Review Board, *Guidance Note 2* (21 November 2013) <<http://www.firb.gov.au/content/guidance.asp?NavID=85>>; Foreign Investment Review Board *Guidance Note 3* (21 November 2013) <http://www.firb.gov.au/content/guidance/downloads/gn3_jan2012.pdf>.

¹¹¹ See Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 17.

¹¹² Ibid 10.

¹¹³ Foreign Investment Review Board, *Real Estate* (21 November 2013) <http://www.firb.gov.au/content/real_estate/other/timeshare.asp>.

A foreign investor need not apply for Government approval if they are purchasing from developers or vendors who have sought prior approval to sell new dwellings or dwellings which have been redeveloped into residential properties.¹¹⁵

9.2 Commercial Real Estate

Commercial real estate means vacant and developed property that has not been acquired for residential purposes. Foreign acquisition in commercial real estate is governed in the following manner.

Established Commercial Real Estate

Established commercial real estate generally includes offices, factories, warehouses, hotels, restaurants and retail outlets.¹¹⁶ Foreign investors must apply if they wish to acquire an interest in developed commercial real estate valued at \$54 million or more.¹¹⁷ A \$5 million threshold is applied if the commercial real estate is heritage listed.¹¹⁸ New Zealand and United States investors are subject to a \$1,078 million threshold.¹¹⁹

Vacant Land for Commercial Redevelopment

Foreign investors must apply to acquire an interest in land for commercial development, irrespective of the land value.¹²⁰ Proposals are generally permitted subject to development conditions.¹²¹

Exemptions from Government approval to acquire commercial real estate

Australian citizens living at home or abroad and persons ordinarily resident in Australia do not need to apply for Government approval to acquire commercial real estate.¹²²

Other exemptions apply to interests acquired such as developed commercial property (regardless of value) where the property is to be used immediately in its present state for industrial or a non-residential commercial purpose.¹²³

9.3 Rural Land

Rural land means land used wholly and exclusively for carrying on a business of primary production.¹²⁴ The business must have a commercial purpose.¹²⁵ Residential rural blocks and hobby farms are not rural land, and are instead treated as residential real estate.¹²⁶ A foreign investor requires approval to acquire an interest in a primary production business where the

¹¹⁴ For a list of the resorts which have been designated as Integrated Tourism Resorts before September 1999, see Foreign Investment Review Board, *Real Estate* (21 November 2013) <http://www.firb.gov.au/content/real_estate/other/resorts.asp>.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 12.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.* A foreign person wishing to start a forestry business is captured under the requirements for vacant land in commercial real estate.

¹²¹ *Ibid.*

¹²² *Ibid.* 13.

¹²³ *Ibid.*

¹²⁴ *Ibid.* Established forestry businesses are treated as rural land.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* 9.

total business assets exceed \$248 million.¹²⁷ The threshold is \$1,078 million for United States and New Zealand non-government investors.¹²⁸

9.4 Accommodation Facilities

Acquisitions of dwellings within accommodation facilities which typically include hotels, motels, hostels and guesthouses are considered developed commercial property.¹²⁹ The developed commercial property guidelines apply. A dwelling not under a management agreement is considered residential property.¹³⁰

9.5 Urban Land Corporations or Trusts

Urban land corporations or trusts are corporations or trusts whose interests in Australian urban land make up more than 50 percent of the value of its total assets.¹³¹ Generally, foreign persons must seek prior approval to purchase shares in urban land corporations or trusts. A foreign investor must provide statutory notice pursuant to s 26A of the Act.¹³²

9.6 General Exemption for Annual Programs

Foreign investors may apply for an exemption certificate for an annual program arrangement. There are no restrictions based on the monetary value of the program, however, the application must state the potential acquirer, the properties proposed to be acquired, the types of properties and the estimate dollar amount of the acquisitions, the location of the proposed acquisition and any reports on previous annual programs.¹³³

LAND USE

10 Planning Regulation

10.1 Local Government Planning Schemes

Planning schemes provide a 'system of control' to ensure the development of areas and the use of land is subject to restraint and appropriate direction from the local authority.¹³⁴ Planning schemes generally encompass a development plan for the locality.¹³⁵ Planning schemes may deal with matters differently in different jurisdictions.

Planning schemes generally stipulate 'zones' related to land use, the process for acquiring land for public purposes and the process for dealing with heritage issues.

Vendors are generally required to disclose certain documents in property transactions, including a planning instrument,¹³⁶ which stipulates the applicable planning controls.¹³⁷

¹²⁷ Ibid 13.

¹²⁸ Ibid 13.

¹²⁹ Foreign Investment Review Board, *Real Estate* (21 November 2013) <http://www.firb.gov.au/content/real_estate/other/accommodation.asp>.

¹³⁰ Ibid.

¹³¹ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 11, 13.

¹³² Foreign Investment Review Board, *Real Estate* (21 November 2013) <http://www.firb.gov.au/content/real_estate/other/corporations.asp>.

¹³³ Ibid.

¹³⁴ *Tooth & Co Ltd v Council of the City of Parramatta* (1955) 97 CLR 492, 497.

¹³⁵ *R v City of Camberwell; Ex parte Heller & Grocs* [1966] VR 135, 143 (O'Bryan J).

¹³⁶ *Sale of Land Act 1962* (Vic) s 32(2)(c).

¹³⁷ Libbis, above n 49, 60-1.

Property owners who fail to comply with planning scheme and obtain the relevant approvals risk committing an offence.¹³⁸

10.2 Zones

Planning schemes generally adopt the identification and classification of uses for particular areas of land known as zones.¹³⁹ Every zone has a zoning scheme that defines the use and development of land, which is permitted, discretionary or prohibited in the area. Types of zones include residential, commercial, industrial, public land and rural.¹⁴⁰ Zones determine the types of activities permitted or prohibited and whether a permit is required to undertake the activity.

10.3 Developer Contribution Costs

In Australia, developers may be required to contribute additional public amenities and infrastructure as a consequence of the development. The nature and extent of the contribution depends upon the jurisdiction of the development. Contributions can be by way of monetary payment, levy or charge for works, services or facilities,¹⁴¹ undertaking of works or other developments,¹⁴² or the dedication of land free of cost.¹⁴³ Contributions can also be directed towards infrastructure such as a public car parking¹⁴⁴ and urban trees.¹⁴⁵

10.4 Heritage Issues

Heritage protection legislation preserves Australia's cultural resources across State and Commonwealth jurisdictions.¹⁴⁶ Properties placed on a heritage list or register,¹⁴⁷ trigger heritage assessment and protective measures. Properties listed under heritage protection are subject to severe restrictions affecting the right to develop the property or alter the building,¹⁴⁸ such as not being able to demolish buildings,¹⁴⁹ carry out development on the

¹³⁸ *Planning and Development Act 2007* (ACT) ss 199, 202; *Environmental Planning and Assessment Act 1979* (NSW) s 125; *Planning Act 2013* (NT) s 75(1); *Sustainable Planning Act 2009* (Qld) s 581-2; *Development Act 1993* (SA) s 44; *Land Use Planning and Approvals Act 1993* (Tas) s 63(2); *Planning and Environment Act 1987* (Vic) s 126; *Planning and Development Act 2005* (WA) s 218.

¹³⁹ *Planning and Development Act 2007* (ACT) s 51; *Environmental Planning and Assessment Act 1979* (NSW) s 26; *Planning Act 2013* (NT) s 9; *Sustainable Planning Act 2009* (Qld) s 89; *Development Act 1993* (SA) s 23; *Land Use Planning and Approvals Act 1993* (Tas) s 20; *Planning and Environment Act 1987* (Vic) s 6; *Planning and Development Act 2005* (WA) s 69.

¹⁴⁰ Department of Transport, Planning and Local Infrastructure, *Reformed Zones for Victoria* (9 September 2013) The Planning System < <http://www.dpcd.vic.gov.au/planning/theplanningsystem/improving-the-system/new-zones-for-victoria> >. See, eg, Melbourne (Vic) Planning Scheme ch 30.

¹⁴¹ *Planning and Development Act 2007* (ACT) s 165(3)(n); *Environmental Planning and Assessment Act 1979* (NSW) s 94(1)(b); *Planning Act 2013* (NT) s 69(1); *Sustainable Planning Act 2009* (Qld) s 629(1); *Development Act 1993* (SA) s 50(1)(d); *Land Use Planning and Approvals Act 1993* (Tas) s 73A(2)(a); *Planning and Environment Act 1987* (Vic) s 46J.

¹⁴² *Land Use Planning and Approvals Act 1993* (Tas) s 73A(2)(b).

¹⁴³ *Environmental Planning and Assessment Act 1979* (NSW) s 94(1)(a); *Planning and Development Act 2005* (WA) s 152(1).

¹⁴⁴ *Planning Act 2013* (NT) ss 69(1), 70(2); *Development Act 1993* (SA) s 50A(5).

¹⁴⁵ *Development Act 1993* (SA) s 50B.

¹⁴⁶ *Heritage Act 2004* (ACT); *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Heritage Act 1977* (NSW); *Heritage Conservation Act 1991* (NT); *Queensland Heritage Act 1992* (Qld); *Heritage Places Act 1993* (SA); *Historic Cultural Heritage Act 1995* (Tas); *Heritage Act 1995* (Vic); *Heritage of Western Australia Act 1990* (WA).

¹⁴⁷ *Heritage Act 2004* (ACT) s 20(1); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324C(1); *Heritage Act 2011* (NT) s 139(1); *Heritage Act 1977* (NSW) s 31(1); *Queensland Heritage Act 1992* (Qld) s 31(1); *Heritage Places Act 1993* (SA) s 13; *Historic Cultural Heritage Act 1995* (Tas) s 15; *Heritage Act 1995* (Vic) s 18; *Heritage of Western Australia Act 1990* (WA) s 46(1).

¹⁴⁸ Libbis, above n 49, 66.

¹⁴⁹ *Heritage Act 1977* (NSW) s 57(1)(a); *Development Act 1977* (SA) s 4; *Heritage Act 1995* (Vic) s 64(1)(a).

land,¹⁵⁰ alter the building¹⁵¹ or excavate the land.¹⁵² An owner must obtain approval from the relevant authority or minister first before undertaking these types of works,¹⁵³ unless the Heritage Council grants an exemption.¹⁵⁴

11 Environmental Matters

11.1 Environmental Laws

States and Territories regulate the management and protection of the environment.¹⁵⁵ Activities which might harm the environment are generally prohibited, such as activities that cause pollution or controlling the clearance of vegetation and native fauna.¹⁵⁶ Failing to comply with environmental policy generally constitutes an offence.¹⁵⁷ Any proposal to FIRB for acquisition by a foreign investor should have regard to environmental laws.¹⁵⁸

In Victoria, land owners can undertake works it approved by the Environment Protection Authority (EPA), which would otherwise potentially breach their environmental obligations.¹⁵⁹

11.2 Environmental Clean-up

In Victoria, a clean-up order may be issued for non-compliance with any environmental duties or where the occupier or land owner has caused environmental damage.¹⁶⁰ The EPA may recover 'reasonable costs' in some circumstances, if it is required to conduct the clean up.¹⁶¹

11.3 Environment Compliance

Environmental audits can be obtained to ensure land is suitable for the intended use and to identify contaminated land.¹⁶² An audit may also assist in determining whether the site presents a high risk of pollution or harm to the environment and can suggest measures to reduce these risks.¹⁶³ In most jurisdictions, audits may be compulsorily required by the

¹⁵⁰ *Heritage Act 1977* (NSW) s 57(1)(e); *Queensland Heritage Act 1992* (Qld) s 68; *Heritage Act 1995* (Vic) s 64(1)(c).

¹⁵¹ *Heritage Act 1977* (NSW) s 57(1)(f); *Heritage Act 1995* (Vic) s 64(1)(c).

¹⁵² *Heritage Act 1995* (Vic) s 64(1)(d).

¹⁵³ *Heritage Act 1977* (NSW) s 58(1); *Queensland Heritage Act 1992* (Qld) s 68; *Development Act 1977* (SA) s 32; *Historic Cultural Heritage Act 1995* (Tas) s 32(1); *Heritage Act 1995* (Vic) s 67(1); *Heritage of Western Australia Act 1990* (WA) s 79(2).

¹⁵⁴ *Heritage Act 1995* (Vic) s 66(1).

¹⁵⁵ *Environment Protection Act 1997* (ACT); *Protection of the Environment Operations Act 1997* (NSW); *Waste Management and Pollution Control Act 1998* (NT); *Environmental Protection Act 1994* (Qld); *Environment Protection Act 1993* (SA); *Environmental Management and Pollution Control Act 1994* (Tas); *Environment Protection Act 1970* (Vic); *Environmental Protection Act 1986* (WA).

¹⁵⁶ *Environment Protection Act 1997* (ACT) s 22; *Protection of the Environment Operations Act 1997* (NSW) Ch 5; *Waste Management and Pollution Control Act* (NT) s 12; *Environmental Protection Act 1994* (Qld) s 28; *Environment Protection Act 1993* (SA) s 27; *Environmental Management and Pollution Control Act 1994* (Tas) s 23A; *Environment Protection Act 1970* (Vic) s 18; *Environmental Protection Act 1986* (WA) s 35.

¹⁵⁷ *Environment Protection Act 1997* (ACT) Pt 15; *Protection of the Environment Operations Act 1997* (NSW) Ch 5; *Waste Management and Pollution Control Act* (NT) s 83; *Environmental Protection Act 1994* (Qld) Ch 8; *Environment Protection Act 1993* (SA) s 34; *Environmental Management and Pollution Control Act 1994* (Tas) Pt 4 Div 4; *Environment Protection Act 1970* (Vic) s 27; *Environmental Protection Act 1986* (WA) Pt V Div 1.

¹⁵⁸ Treasurer, *Australia's Foreign Investment Policy* (Foreign Investment Review Board, 2013) 7.

¹⁵⁹ *Environment Protection Act 1970* (Vic) s 19A(4) – (7).

¹⁶⁰ *Environment Protection Act 1997* (ACT) s 160; *Protection of the Environment Operations Act 1997* (NSW) s 91; *Environmental Protection Act 1994* (Qld) s 363G; *Environment Protection Act 1993* (SA) ss 99, 103; *Environment Protection Act 1993* (SA) s 25(4)(b); *Environment Protection Act 1970* (Vic) s 62A.

¹⁶¹ *Environment Protection Act 1970* s 62(2).

¹⁶² EPA Victoria, *Environmental Auditing* (12 November 2012) Our Work <<http://www.epa.vic.gov.au/our-work/environmental-auditing>>.

¹⁶³ *Ibid.* See also *Environmental Management and Pollution Control Act 1994* (Tas) s 5B.

Authority or undertaken voluntarily.¹⁶⁴ Except in Victoria, land owners who undertake an audit voluntarily can apply for privilege over the information discovered.¹⁶⁵

LEASING

12 Types of Leases

Leases govern the contractual arrangements between landlords and tenants.¹⁶⁶ Leases provide tenants with the right to exclusive possession of the land for a determinate term.¹⁶⁷ The duration of the lease must be ascertainable.¹⁶⁸ The types of terms of leases include fixed-term leases, periodic leases, tenancies at will and tenancies at sufferance.¹⁶⁹

The type of lease depends on the nature of the property. Residential leases are governed by State and Territory residential tenancy legislation.¹⁷⁰ They typically contain covenants relating to dispute resolution, bonds, rent, obligations for repairs, tenant's right to enjoy the land and termination rules.

Commercial leases typically include covenants relating to rent, outgoing, repairs, insurance, permitted use, insurance, subletting, assignment and terms governing the termination of a lease.¹⁷¹

Retail leases are governed by State and Territory retail tenancy legislation.¹⁷² Persons who require a lease to engage in retail activities should ensure their business falls within the ambit of the governing legislation.¹⁷³ Landlords must provide disclosure statements to tenants about rent, outgoing, the parties, size, location and permitted use of the premises.¹⁷⁴ A landlord is also required to provide a copy of the lease to the tenant.¹⁷⁵

13 Rights and Duties

Covenants may be expressly stated or implied into the lease.¹⁷⁶ They apply both to the landlord and the tenant.¹⁷⁷ Covenants may differ depending on the type of lease but generally,¹⁷⁸ a tenant will be obliged to: pay rent,¹⁷⁹ rates and taxes,¹⁸⁰ ensure that the

¹⁶⁴ *Environment Protection Act 1997* (ACT) s 76; *Protection of the Environment Operations Act 1997* (NSW) s 175; *Environmental Protection Act 1994* (Qld) s 323(2); *Environment Protection Act 1993* (SA) s 52(1)(b); *Environmental Management and Pollution Control Act 1994* (Tas) s 30; *Environment Protection Act 1970* (Vic) s 31C(4).

¹⁶⁵ *Environment Protection Act 1997* (ACT) s 78; *Protection of the Environment Operations Act 1997* (NSW) s 181; *Waste Management and Pollution Control Act* (NT) s 54; *Environment Protection Act 1993* (SA) s 58(4); *Environmental Management and Pollution Control Act 1994* (Tas) s 31.

¹⁶⁶ Bradbrook et al, above n 1, 643.

¹⁶⁷ *Radaich v Smith* (1959) 101 CLR 209.

¹⁶⁸ *Lace v Chantler* [1944] KB 368.

¹⁶⁹ Bradbrook et al, above n 1, 650-655.

¹⁷⁰ *Residential Tenancies Act 1997* (ACT); *Residential Tenancies Act 1987* (NSW); *Residential Parks Act 1998* (NSW); *Residential Tenancies Act 1999* (NT); *Residential Tenancies Act 1994* (Qld); *Manufactured Homes (Residential Parks) Act 2003* (Qld); *Residential Tenancies Act 1995* (SA); *Residential Parks Act 2007* (SA); *Residential Tenancies Act 1997* (Tas); *Residential Tenancies Act 1997* (Vic); *Residential Tenancies Act 1987* (WA); *Residential Parks (Long-stay Tenants) Act 2006* (WA).

¹⁷¹ See W.D Duncan, *Commercial Leases in Australia* (Thompson Reuters, 2nd ed, 2011).

¹⁷² *Leases (Commercial and Retail) Act 2001* (ACT); *Retail Leases Act 1994* (NSW); *Business Tenancies (Fair Dealings) Act 2003* (NT); *Retail Shop Leases Act 1994* (Qld); *Retail and Commercial Leases Act 1995* (SA); *Retail Leases Act 2003* (Vic); *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA).

¹⁷³ See Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.8.150].

¹⁷⁴ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.8.300].

¹⁷⁵ With the exception of Western Australia. See Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.8.310]. [28.8.310].

¹⁷⁶ LexisNexis, *Halsbury's Laws of Australia* (at 2 November 2010) [245-3000].

¹⁷⁷ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.7.930].

¹⁷⁸ Bradbrook et al, above n 1, 663.

property remains free from damage,¹⁸¹ repair the premises,¹⁸² not assign the premises without the landlord's consent¹⁸³ and yield possession at the end of the lease.¹⁸⁴

A landlord will generally be obliged to repair the premises,¹⁸⁵ allow the tenant to enjoy possession of the premises free from interruption¹⁸⁶ and not derogate from the lease.¹⁸⁷ The landlord is also permitted to enter and inspect the condition of the premises.¹⁸⁸

14 Interaction with Mortgages

A lease is subordinate to a prior mortgage¹⁸⁹ but takes priority against a later mortgage.¹⁹⁰ Generally, the mortgagee will consent to a lease where the lease takes priority to ensure that the land is subject to the lease. The protection offered to tenants in possession differs across States and Territories.¹⁹¹

15 Security Deposits

Security deposits are regulated by State and Territory legislation¹⁹² which set different standards and limitations relating to the amount of security a landlord can demand.¹⁹³ Residential tenancies security deposits are generally deposited with a government agency.¹⁹⁴

Security can also be provided through a bank guarantee where the bank promises to compensate the landlord upon the occurrence of certain events.¹⁹⁵ Bank guarantees are more commonly used in commercial leases.¹⁹⁶

¹⁷⁹ *Conveyancing Act 1919* (NSW) s 84(1)(a); *Transfer of Land Act* (Vic) s 67(1)(a); *Property Law Act 1974* (Qld) s 105(1)(a); *Real Property Act 1886* (SA) s 124(1); *Transfer of Land Act 1893* (WA) s 92(i); *Land Titles Act 1980* (Tas) s 66; *Land Titles Act 1925* (ACT) s 119(a); *Law of Property Act* (NT) s 117(1).

¹⁸⁰ Bradbrook et al, above n 1, 667.

¹⁸¹ *Conveyancing Act 1919* (NSW) s 84(1)(b); *Transfer of Land Act* (Vic) s 67(1)(b); *Property Law Act 1974* (Qld) ss 105(1)(b) and 106(1); *Real Property Act 1886* (SA) s 124(b); *Transfer of Land Act 1893* (WA) s 92(ii); *Land Titles Act 1980* (Tas) s 66(b); *Land Titles Act 1925* (ACT) s 119(b); *Law of Property Act* (NT) ss 117(1)(c), 117(2).

¹⁸² See Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.7.1070].

¹⁸³ Bradbrook et al, above n 1, 663.

¹⁸⁴ *Ibid* 677.

¹⁸⁵ See Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.7.1070].

¹⁸⁶ *A F Textile Printers Pty Ltd v Thalut Nominees Pty Ltd* [2007] VSC 73.

¹⁸⁷ Thomson Reuters, *Laws of Australia*, vol 28 (at Update 228) [28.7.940].

¹⁸⁸ Bradbrook et al, above n 1, 669.

¹⁸⁹ *Transfer of Land Act 1958* (Vic) s 66(2).

¹⁹⁰ *Ibid* s 42(2)(e).

¹⁹¹ *Real Property Act 1900* (NSW) s 42(1)(D); *Transfer of Land Act 1958* (Vic) s 42(2)(e); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA) s 69(h); *Transfer of Land Act 1893* (WA) s 68(3)(f); *Land Titles Act 1980* (Tas) s 40(3)(d); *Land Titles Act 1925* (ACT) s 58(1)(d)(e); *Land Title Act* (NT) s 189(1)(b).

¹⁹² *The Laws of Australia*, 28 Real Property, '7 Landlord and Tenant' [28.7.650]; *The Laws of Australia*, 28 Real Property, '8 Retail Tenancies' [28.8.660].

¹⁹³ For example, in South Australia a landlord is not permitted to demand more than the equivalent of four weeks rent. (*Retail and Commercial Leases Act 1995* (SA) s 19(1)). For limitations placed on security deposits with respect to residential leases, see *Residential Tenancies Act 1997* (ACT) s 20; *Landlord and Tenant (Rental Bonds) Act 1977* (NSW) s 9; *Residential Tenancies Act 1999* (NT) s 29; *Residential Tenancies Act 1994* (Qld) s 77; *Residential Tenancies Act 1995* (SA) s 61; *Residential Tenancy Act 1997* (Tas) s 25; *Residential Tenancies Act 1996* (Vic) s 31; *Residential Tenancies Act 1987* (WA) s 29(1).

¹⁹⁴ *Residential Tenancies Act 1997* (ACT) ss 23-24; *Landlord and Tenant (Rental Bonds) Act 1977* (NSW) s 8; *Residential Tenancies Act 1994* (Qld) s 59; *Residential Tenancies Act 1995* (SA) s 62; *Residential Tenancies Act 1997* (Vic) s 406; *Residential Tenancies Act 1987* (WA) s 29(4), Schedule cl 2. The depositing of security in government deposits is not codified in state in the Northern Territory or Tasmania.

¹⁹⁵ CCH Australia Limited, *Lang's Commercial Leasing in Australia* (at 21 November 2013) [2-600].

¹⁹⁶ *Ibid*.

16 Review of Leases

There is no prescribed form for a lease, rather it is a result of commercial bargaining. Any prospective lessee or purchaser buying land subject to a lease needs to engage a lawyer to review the lease before it is finalised. Some of the matters that can be reviewed include the parties' rights and obligations, whether the mortgagee has provided written consent to the terms of the lease in the event that the property has been mortgaged, whether the terms upon which the mortgagee has consented are acceptable to the tenant, ensuring that the requirements for assigning the lease have been satisfied in the event the lease has been assigned, security deposits, or, in the event that the tenant is a company, director's guarantees, and reviewing the fairness of any amendments to the initial lease during the negotiation stage.

FINANCING

17 Form of Lien

Registered proprietors can finance their property acquisitions by creating a mortgage over the land.¹⁹⁷ Mortgages are a registrable interest under the Torrens system and confer an interest instead of an estate in the property to the mortgagee.¹⁹⁸ The mortgagor retains the legal title as beneficial owner of the land.¹⁹⁹ Mortgagors must comply with the obligations under the mortgage, such as making payments as required,²⁰⁰ maintaining and repairing the buildings upon mortgaged land,²⁰¹ allowing the mortgagee to inspect the property at all reasonable times,²⁰² and having insurance.²⁰³

If the mortgagor fails to comply with its payment obligations, the mortgagee may obtain a power of sale to be exercised in good faith having regard to the interests of the mortgagor.²⁰⁴ Legislation stipulates how money received from the sale shall be applied.²⁰⁵ The mortgagee may also obtain possession over the land by receiving the rents and profits flowing from it, or is able to bring an action of ejectment to recover the land.²⁰⁶

18 Legal Requirements

18.1 Foreign investor obtaining a mortgage from a local institution

Some financial institutions may decline providing a mortgage to foreign investors as they may to local investors. Others will permit lending but may impose restrictions on the borrowing amount or alternatively, offer similar features and interest rates as with Australian residents and citizens.²⁰⁷

The issuing institution will generally require proof of FIRB approval for the acquisition of property prior to engaging in a loan agreement. FIRB can provide a letter of approval to the financial institution.

¹⁹⁷ *Transfer of Land Act 1958* (Vic) s 74(1)(a); see also Libbis, above n 49, 12.

¹⁹⁸ *Transfer of Land Act 1958* (Vic) s 74(2).

¹⁹⁹ Bradbrook et al, above n 1, 395.

²⁰⁰ *Transfer of Land Act 1958* (Vic) s 75(a).

²⁰¹ *Ibid* s 75(b).

²⁰² *Ibid* s 75(c).

²⁰³ *Ibid* s 75(d).

²⁰⁴ *Ibid* s 77(1).

²⁰⁵ *Ibid* s 77(3).

²⁰⁶ *Ibid* s 78(1).

²⁰⁷ For example St George Bank permits foreign investors to borrow up to eighty percent of the value of the property, provided that FIRB approval has been granted. See St George Bank, *Non-Resident Lending* <<http://www.stgeorge.com.au/personal/home-loans/our-home-loans/specialist/foreign-currency-loan>>.

18.2 Foreign investor obtaining a mortgage from a foreign institution

Foreign investors may wish to obtain finance from a foreign institution. Foreign institutions that lend money for the purchase of a property will obtain an interest in that property by virtue of the mortgage,²⁰⁸ which ordinarily would require FIRB approval.²⁰⁹ Foreign institutions are exempt from obtaining approval if the type of land acquisition is done solely as security for the purposes of a 'moneylending agreement'.²¹⁰ The 'moneylending agreement' between the foreign investor and institution must have been entered into in good faith and in the ordinary course of carrying on a business of lending money.²¹¹ The foreign lender will therefore not be classified as acquiring an interest in Australian urban land and will not require approval from FIRB.²¹²

19 Interest

The Australian benchmark for interest rates is called the bank bill swap rate (BBSW), which is a reference for many financial transactions, including lending and borrowing transactions. This is calculated every business day by the Australian Financial Markets Association (AFMA) by obtaining 'buy' and 'sell' rates from a panel of banks. These rates are provided in reference to periods of one, two, three, four, five and six months and are sourced from the 'prime banks' (i.e. four major Australian banks).²¹³ From this data, the AFMA then represents the mid-rate or average for each period, which is characterised as a base interest.²¹⁴ The interest rate used by the mortgage provider will then contain a margin upon this base rate.

When entering into a loan agreement to purchase a property, the contract will usually contain an express provision determining the interest rate payable on the loan. This interest rate can either be fixed or floating for the duration of the contract.²¹⁵

ELECTRONIC CONVEYANCING

For a number of years, Australia has been working towards a national e-conveyancing solution. Although national e-conveyancing has been introduced at the present time in a limited way, the system should be fully operational in 2 to 3 years.

E-conveyancing facilitates online property settlements, including lodging and exchanging documents and transferring settlement funds electronically. E-conveyancing is not currently available Australia-wide and is an optional process for property transactions.²¹⁶

Not every aspect of a property settlement is covered by e-conveyancing, such as the preparation and exchange of contracts, procurement of insurance and creation of loan documentation.²¹⁷

20 The Federal initiative

Legislation enables the register of titles to be maintained in a number of mediums, including electronically.²¹⁸ The Federal government initiated a national e-conveyancing scheme in 2005

²⁰⁸ *Transfer of Land Act 1958* (Vic) s 74(2).

²⁰⁹ *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 26A(2).

²¹⁰ *Ibid* s 12A(5).

²¹¹ *Ibid* s 5 (definition of 'moneylending agreement').

²¹² *Ibid* s 12A(5).

²¹³ Angela Flannery and Nelda Turnbull, 'LIBOR and a Comparison to the Australian Position' (2012) 28 *Australian Banking and Finance Law Bulletin* 34, 36-7.

²¹⁴ AFMA, *Bank Bill Swap (BBSW) Benchmark Rate – General Conventions* (October 2013) cl 11.

²¹⁵ Gregory K Burton, Thomson Reuters, *Laws of Australia* (at 1 November 2010) [18.8.170].

²¹⁶ Bradbrook et al, above n 1, 190.

²¹⁷ Sharon Christensen, 'National Electronic Conveyancing – Outline of the National Laws and Rules' (2012) 27 *Australian Property Law Journal* 37.

and the National E-Conveyancing Development Ltd (NECDL) was established in New South Wales, Queensland, and Victoria to facilitate e-conveyancing transactions.²¹⁹ E-conveyancing is conducted through the Property Exchange Australia (PEXA) and regulated by the Australian Registrars' National Electronic Conveyancing Council (ARNECC).

21 E-conveyancing in State jurisdictions

At the present time, the location of the property will dictate whether, and to what extent, e-conveyancing can be utilised. In Victoria,²²⁰ a wide range of instruments can be processed through the e-conveyancing system, such as the discharge of mortgages, transfers, establishing or withdrawal of caveats and applications by surviving proprietors.²²¹ In New South Wales,²²² only single party transactions, such as standalone discharges, mortgages and refinances can be conducted. A second stage in 2014 will provide for multi-party transactions to be conducted.²²³ Although Queensland and South Australia have passed legislation enabling e-conveyancing,²²⁴ currently no transactions can be facilitated.²²⁵

22 New obligations for subscribers

The Victorian legislation contains 'Participation Rules' which subscribers must consent to prior to engaging in the e-conveyancing system.²²⁶ New obligations include keeping all information in the system up-to-date and complete,²²⁷ taking all reasonable steps to verify the identity of each client or mortgagor,²²⁸ retaining all supporting documents and evidence for at least seven years after the date of lodgement,²²⁹ and providing reasonable assistance to the registrar and other subscribers for all parties to comply with the e-conveyancing system.²³⁰

ACKNOWLEDGMENTS

The author thanks Ashton Broadhurst, Luisa Consiglio and Cassie Lee for their assistance in drafting the chapter.

²¹⁸ *Land Titles Act 1925* (ACT), s 43(2), (3); *Real Property Act 1900* (NSW), s 31B(3), (4); *Land Title Act 2000* (NT), s 6(3), (4); *Land Title Act 1994* (Qld), s 8; *Real Property Act 1886* (SA), s 51B; *Land Titles Act 1980* (Tas), s 33(3); *Transfer of Land Act 1958* (Vic), s 27(2), (3); *Transfer of Land Act 1893* (WA), s 48(2).

²¹⁹ Bradbrook et al, above n 1, 191.

²²⁰ *Electronic Conveyancing (Adoption of National Law) Act 2013* (Vic).

²²¹ State Government of Victoria, *About Electronic Conveyancing* (2010) Electronic Conveyancing <http://www.ec.land.vic.gov.au/ec/a_about.html>.

²²² *Electronic Conveyancing (Adoption of National Law) Act 2012* (NSW).

²²³ Department of Finance and Services, *National Electronic Conveyancing in NSW* (2012) Land and Property Information <<http://necnsw.lpi.nsw.gov.au/>>.

²²⁴ *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld); *Electronic Conveyancing National Law (South Australia) Act 2013* (SA).

²²⁵ Queensland Government, *National Electronic Conveyancing* (5 November 2013) Online Products and Services <<http://www.dnrm.qld.gov.au/land/titles-valuations/titles-professionals/online-products-services/national-electronic-conveyancing>>; Government of South Australia, *National Electronic Conveyancing* (5 December 2013) Land Services Publications and Guidance Notes <[http://www.sa.gov.au/subject/Housing,+property+and+land/Customer+entry+points+and+contacts/Land+service+s+industry+entry+point/Land+services+publications+and+guidance+notes/National+electronic+conveyancing+\(NEC\)#Implementation](http://www.sa.gov.au/subject/Housing,+property+and+land/Customer+entry+points+and+contacts/Land+service+s+industry+entry+point/Land+services+publications+and+guidance+notes/National+electronic+conveyancing+(NEC)#Implementation)>.

²²⁶ *Electronic Conveyancing (Adoption of National Law) Act 2013* (Vic) annex I pt 3 div 3.

²²⁷ Department of Sustainability and Environment, 'Participation Rules – Determined by the Registrar of Titles' (Government Publication, Victorian Government, April 2013) cl 6.2.

²²⁸ *Ibid* cl 6.5.

²²⁹ *Ibid* cl 6.6.

²³⁰ *Ibid* cl 6.9.