The Real Estate Law Review

Sixth Edition

Editor
John Nevin

Law Business Research

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EDITOR'S PREFACE

Real estate is a truly global industry. The worldwide impact of events of the preceding 12 months has confirmed that it is no longer possible to look at domestic markets in isolation. It is hoped that *The Real Estate Law Review* reflects this position. An evolving awareness of the global real estate market and an understanding of the practices, requirements and concerns of overseas investors is essential if practitioners and their clients are to take full advantage of investment trends as they develop.

The *Review* seeks to provide an overview of the state of the global real estate market. The theme this year has been one of uncertainty. First we had Brexit, as the UK voted to leave the EU, and then the result of the US election. It is probably fair to say that neither was expected, and while the significance of Brexit diminishes in a global context, the same cannot be said of Donald Trump's victory. It will be very interesting to see how the global real estate market evolves over the coming months. While there will undoubtedly be risks, there will also be opportunities. Investors and their professional advisers will need to develop an appropriate strategy to ensure that risks are assessed and opportunities are taken. By and large, markets do not like uncertainty and some of the positive outlook reflected in last year's edition has undoubtedly diminished.

The continued success of the *Review* is a true testament to its validity in the global real estate market. The sixth edition covers 37 jurisdictions, and we are delighted to welcome new contributions from around the world. Each contributor is a distinguished practitioner in his or her own jurisdiction and has provided invaluable insight into the issues pertinent to that jurisdiction in a global context.

Once again, I wish to express my deep and sincere gratitude to all my distinguished colleagues who have contributed to this edition of the *Review*. I would also like to thank Gideon Roberton and his publishing team for coordinating the contributions and compiling the sixth edition.

John Nevin
Slaughter and May
London
February 2017

Chapter 2

AUSTRALIA

David Jones and Sarah Merrett[1]

I INTRODUCTION TO THE LEGAL FRAMEWORK

Australian real estate law is underpinned by many of the common law principles of the laws of the United Kingdom, such as the doctrine of tenure. As a result, all interests in land derive from the Crown, with most land controlled and administered by the states and territories of Australia, rather than the federal government.

i Ownership of real estate

The most common estates in land in Australia are freehold estate and leasehold estate.

Ownership of a freehold estate in fee simple is the most unrestricted form of land ownership that exists in Australia and comes as close as possible to absolute ownership; that is, the grant of an estate of land in perpetuity, enabling the owner to enjoy possession without interference from others. An owner of an estate in fee simple is free to deal with that land as they choose, subject to complying with relevant legislation as to ownership and use. The owner is also subject to reservations from title, whereby the Crown reserves certain rights to itself (predominantly the right to exploit minerals, petroleum and the like).

Leasehold estate is an interest in land which entitles the holder (known as a tenant or lessee) to exclusive occupation and use of the land for a limited period of time. At the end of the relevant term, the right to occupy and use the leased estate or premises reverts to the owner of the freehold estate. Many leasehold estates in Australia are of partial interests in a building, such as the right to occupy premises in a retail centre, commercial office building or on an industrial estate. However, the states and territories of Australia also have what is known as state or Crown lease land, which are subject to separate title regimes. Often, the land subject to this type of leased estate is considered to be special or strategic in some way

1 David Jones is a partner and Sarah Merrett is a senior associate at Baker McKenzie.

(e.g., defence lands, or the country's airports, harbours and ports), such that from a public policy perspective it is considered appropriate to retain state ownership. Much of Australia's rural land is also subject to such leases, which are typically granted for pastoral purposes.

As a subset of freehold land, a category of legal estate in land has evolved to effectively manage community living issues. Generally known as 'strata title', 'community title' or 'unit title', it is commonly found in apartments, townhouses and other group housing arrangements where individual strata titles can be dealt with as freehold land, while the common property is owned and managed by an owners corporation comprised of the strata title owners.

The system of native title in Australia is also worth noting. Native title is the term used to describe certain rights held by indigenous Australians in respect of traditional land and water. First recognised by Australia's High Court in the 1992 decision of *Mabo v State of Queensland No. 2*,[2] legislation at both the state and federal level now govern the validity of land dealings affecting native title and establish a process for native title claims.

Though still a developing area of law, some recognised principles apply in relation to native title claims. Native title can only exist in relation to land or water where the claimant group has and maintains a traditional connection with the land, and where the government has not granted any inconsistent rights (for example it cannot exist in relation to freehold land). Native title interests are recorded in a separate register from other interests in land. If a native title claim exists or has been registered over land, an investor will have to follow procedural requirements under the native title legislation and negotiate agreements with the claimants or native title holders, such as access sharing arrangements or payment of compensation for impacting those rights.

ii System of registration

Most land in Australia is subject to the Torrens system, a titling system that relies on registration, with each state and territory maintaining a separate, publicly searchable register. The fundamental premise of the Torrens system is a prioritisation of interests in a parcel of land by chronology of registration, not execution, and the ability of any person obtaining an interest in land to be able to rely on the register as its sole source of information about encumbrances affecting that land.

Upon registration, the registered proprietor's interest is 'indefeasible' and it holds its interest subject to prior registered interests, but free from any interest which is not so registered (subject to limited exceptions). Notably, the holder of an unregistered interest has only an equitable interest in land, and will lose priority to subsequently registered interests. Torrens title is guaranteed by the government, so that compensation is available if a person is deprived of an interest in land due to how the system operates (for example, if an innocent purchaser becomes the registered owner, after a person's ownership is transferred by means of fraud).

It is rare to find land that is not recorded in the Torrens title system. However, other than state or Crown lease land discussed above, some land has not been brought under the Torrens title system, and is known as 'old system' land. This land was the subject of a deed of grant under the old English land law and ownership of land is proved by establishing a chain of title based on deeds of transfer. The concept of indefeasibility does not apply to this land, and any 'break' in the chain of title will affect its enforceability. With a few exceptions, the

2 *Mabo v. Queensland (No. 2)* [1992] HCA 23.

majority of remaining old-system land is rural land or land that has been rarely transferred or dealt with and therefore has not undergone the conversion procedure to Torrens land, however, all states and territories are working to complete this process.

iii Choice of law

The law applicable to a transaction involving real estate in Australia will typically be the law of the jurisdiction in which the interest in real estate exists, with some laws being relevant at the federal level (such as native title). While registration and the required instruments of transfer need to be dealt with on a state-by-state basis, the parties to a transaction can elect to have their transaction governed by other states or the laws of another country; however, the greater difficulty of enforcing those laws in the event of a dispute usually mitigates against this.

II OVERVIEW OF REAL ESTATE ACTIVITY

Australian real estate is well regulated and recognised internationally as a stable market for investment, with an economy that has outperformed the economies of many other advanced nations in recent times. Ownership of one's home is a national pastime, but rising housing prices have created concern and much commentary in 2016, especially in relation to some 'overheated' and 'oversupplied' residential markets[3] and mooted changes to tax concessions in respect of real estate investments.[4] In the commercial real estate space, mining investments have been affected by lowered commodity prices in Queensland and Western Australia in recent years;[5] with real estate activity primarily focussed on commercial assets such as office towers, hotels and resorts, and shopping centres, as well as large infrastructure facilities and the acquisition of public assets such as toll roads, ports and electricity distribution systems through state privatisation processes.

Increasingly with more sophisticated investors coming into Australia, including the increase in Asian pension fund investment, joint ventures are being formed in the real estate space to take advantage of local real estate management companies and knowledge to deploy foreign capital. Longer term investors from North America and Europe have for a long time used Australia to launch a broader investment programme into Asia and that trend continues today.

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3 See for example, McCauley, D. (2016) Macquarie Bank blacklists loans for apartments in 'risky' suburbs, available from www.news.com.au/finance/real-estate/buying/macquarie-bank-blacklists-loans-for-apartments-in-risky-suburbs/news-story/95cfa1bb1491eeff59af1d94d485a97d and Taylor, D. (2016) Property ownership out of reach due to high prices, not 'smashed avocado' penchant, millennials argue, available from www.abc.net.au/news/2016-10-17/millennials-weigh-in-on-property-ownership-debate/7940170.

4 See for example, Woodley, N. (2016) Scott Morrison signs off on development of new financing model to encourage housing investment, available from www.abc.net.au/news/2016-12-03/scott-morrison-avoiding-negative-gearing-talk/8088912.

5 See for example, Kent, C. (2016) Speech: After the Boom, available at www.rba.gov.au/speeches/2016/sp-ag-2016-09-13.html.

III FOREIGN INVESTMENT

In the 2015 calendar year, foreign investment in Australia increased by 8 per cent, primarily involving portfolio investment rather than direct investment, and with 38 per cent of foreign investment being debt securities.[6] Australia's main foreign investors in 2015 were (in order) the United States of America, the United Kingdom, Belgium, Japan, Singapore and Hong Kong. While generally a procedural process under which most applications for foreign investment in real estate are granted without conditions, political attention on foreign investment has been strong recently, with some high-profile refusals of applications. For example, a Chinese-led consortium's bid to take over one of Australia's largest cattle empires (known as the Kidman estate) was rejected by the Australian government on national security grounds. Instead, a consortium led by prominent Australian Gina Rinehart (with participation by Chinese investors) ultimately received approval to acquire the estate after the largest property was removed from the sale and proposed to be sold to a local farming family.[7]

The Australian foreign investment regime was recently overhauled, with significant amendments to the governing legislation taking effect on 1 December 2015.[8] These were primarily aimed at streamlining the legislation, but also involved the introduction of fees for applications and imposing greater restrictions and enforcement powers in relation to investments in residential real estate. The approval of the Foreign Investment Review Board is required in all circumstances where a foreign government investor wishes to invest directly or indirectly in Australian real estate. Investments above specified monetary thresholds by other foreign investors require approval depending upon the nature of the investment, the type of real estate involved and whether the investors' country is subject to a free trade agreement with Australia (currently including the United States, New Zealand, Chile, Japan, South Korea and China). Investments in some sectors (such as agricultural land) are considered to be more sensitive from a national interest perspective, and therefore lower monetary thresholds apply before approval is required. If approval is required for an investment and is not sought by the investor, or is refused by the Foreign Investment Review Board and the investment proceeds despite that that refusal, the Australian government has the ability to force the divestment of the interest, and to impose significant penalties.

During 2016, various Australian states and territories introduced additional taxes that apply to investments in certain types of real estate by foreign investors, which are discussed below.[9]

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6 Australian Bureau of Statistics (2016), 5352.0 – International Investment Position, Australia: Supplementary Statistics, 2015, available at www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0.

7 Treasurer of the Commonwealth of Australia (2016), Approval of S. Kidman & Co. Limited sale to increase Australian ownership, available at http://sjm.ministers.treasury.gov.au/media-release/130-2016/, and Treasurer of the Commonwealth of Australia (2015), Statement on decision to prevent sale of S. Kidman & Co. Limited, available at http://sjm.ministers.treasury.gov.au/media-release/011-2015/.

8 For further details regarding Australia's foreign investment regime, see the Foreign Investment Review Board website at https://firb.gov.au/.

9 See for example, Queensland Government (2016) Additional foreign acquirer duty, available at: www.business.qld.gov.au/industry/professional-financial/transfer-duty/

IV STRUCTURING THE INVESTMENT

Investors in Australia often engage in direct investment in real estate, typically through a special purpose vehicle that holds the interest in trust. Many investors choose to invest through a Real Estate Investment Trust (REIT). A REIT is a unit trust that provides investors with the opportunity to buy an interest in commercial real estate under a tax transparent structure. REITs are often listed on a securities exchange, but also can be unlisted. Australia currently has the most highly securitised property market in the world with two thirds of the institutional-grade property being held in the form of a REIT. Australian REITs invest in a variety of commercial real estate sectors, including retail shopping centres, office buildings, industrial estates, hotels, warehouses and car parks.

i Managed investment schemes

REITs are structured as unit trusts with corporate trustees. Such trusts fall within the definition of a managed investment scheme under the Corporations Act 2001 (Cth) (Corporations Act) and are accordingly regulated by the Australian Securities and Investment Commission (ASIC).

The Corporations Act requires that a REIT operated as a scheme must be registered with ASIC in certain circumstances, primarily where it has more than 20 members or is offered to retail clients.

Registration significantly increases a REIT's establishment and ongoing compliance costs due to the statutory obligations imposed on operators of a registered scheme. For example, a regulated form of offer document – a product disclosure statement – is required for any offer of units in the scheme to retail clients. By contrast, an offer of interests in an unregistered scheme will usually involve the preparation of a disclosure document referred to as an information memorandum. This is a largely unregulated form of disclosure provided to 'wholesale clients', being high net worth or institutional investors who are considered capable of making certain enquiries independently.

The trustee of a registered scheme is known as the responsible entity (RE). Both the Corporations Act and the constitution of the REIT regulates the activities of the RE, which must be a public company that holds an Australian financial services licence (AFSL) authorising it to operate the scheme.

The RE will usually appoint a fund manager, usually a related corporate entity, to manage the assets of the REIT. The fund manager selects the investment properties and is generally responsible for all maintenance, administration, leasing and improvement of the underlying real estate investments. Fees may be paid to the RE or to the fund manager out of the assets of the scheme, subject to some Corporations Act restrictions.

ii Investment strategy

Investment strategies are generally described in the REIT's offering documentation or constitution. There is no barrier to a REIT in investing in vacant land, property under

investors-and-transfer-duty/additional-foreign-acquirer-duty and State Revenue Office Victoria (2016) Foreign purchasers of property, available at: www.sro.vic.gov.au/foreignpurchaser.

development or mortgages. However, to maintain a REIT's 'flow-through' tax status so that it is not taxed as a company (the current corporate tax rate is 30 per cent), income earned needs to be 'passive', such as deriving rent, and cannot involve the operation of a trading business.

A REIT will commonly be part of a stapled group, in which a company undertakes the active business activities of the stapled group and the REIT holds the passive property investments to derive the rental income. An investor in a stapled group must deal in units in the REIT at the same time as shares in the operating company.

iii Taxation

As long as a trust is operated to ensure that it is not taxed as a company, the general position is that non-resident unitholders will be subject to Australian taxation on their entitlement to the net income to the extent that the income has an Australian source. The rate of tax applicable to non-resident members will depend on the nature of the relevant income or gain. For example, based on the Commissioner of Taxation's current practice in relation to Australian-source income which consists of dividends, interest or royalties, the income will be subject to Australian withholding tax at the applicable withholding tax rate. Interest income is generally subject to Australian withholding tax at the rate of 10 per cent (although lower rates may be applicable under certain Australian double-taxation agreements).

Special rules apply in respect of the taxation of Australian source income and gains other than dividends, interest and royalties. These rules include provisions requiring tax to be paid or withheld by the responsible entity in certain circumstances. Managed investment trusts and a recently introduced category of 'attributed managed investment trusts' establish complex rules for withholding rates and allocation of taxable and non-taxable income among unitholders, all of which need to be carefully evaluated when establishing and operating real estate investment vehicles in Australia on a case-by-case basis.

V REAL ESTATE OWNERSHIP

i Planning

State governments and local councils primarily control the development and use of land throughout Australia, through a combination of legislation, planning policies and statutory instruments. The regulatory framework differs between jurisdictions, and from council to council. Councils regulate, assess and approve the majority of developments within their local government boundaries, with the following two exceptions:

a Projects of regional or state significance or major developments and infrastructure projects can fall within the jurisdiction of the particular state or territory government. Projects that fall within these categories will be assessed by the relevant planning department within the state government and be approved by the relevant minister for planning or a special panel or commission established to assess and approve such state significant projects.

b Projects that may have an impact on matters of national environmental significance, such as world heritage items, may require referral to the Commonwealth Department of the Environment and Energy as part of the state or territory or regional-based assessment process.

At a local level, planning instruments designate zones for all land under a council's jurisdiction (for example residential, commercial, industrial), and the types of development that will be

permitted or prohibited within each zone. Generally, very little development is permitted without some type of consent. Some councils have also implemented development control plans that contain further guidelines for development in particular zones.

Carrying out any development without first obtaining the required consents is a criminal offence, and can result in the imposition of substantial penalties against not only the companies involved but also individual directors.

As well as obtaining consent to a proposed development, consent must also be obtained before any building works commence. Again, the requirements vary by jurisdiction, but common to all is the requirement for detailed construction plans and specifications to be submitted to council (or a private certifier in some cases) for consideration and approval (which once issued are subject to detailed conditions).

Building works must be completed in accordance with consent documents and the conditions imposed by them. When this has been achieved, the council (or private certifier) will assess the works and issue an occupation certificate (also known as a certificate of classification) which enables the building or areas of new works to be occupied and used.

Depending on the nature of the use of land, various annual licences may be required. For example, if a business uses hazardous materials or stores large quantities of fuel for use in back-up generators and the like, it must obtain and comply with a licence in relation to the storage, use and transportation of those materials. Often, such licences or permits relate to the business operated by a tenant from the building, not the building itself. Accordingly, a building owner generally will, as a condition of the grant of a tenant's lease, oblige the tenant to obtain and comply with all licences required for its use and occupation of the premises.

ii Environment

Whether operating in the utilities, resources, manufacturing or waste management sectors or providing a portfolio of commercial properties for lease, all commercial uses of land in Australia are subject to an extensive body of environmental law, violation of which may attract criminal and civil penalties. Through state and territory-based legislation and environmental protection agencies, each jurisdiction regulates and manages systems for pollution control, contamination, hazardous materials, waste disposal and biodiversity protection.

Environment laws are actively enforced and the penalties imposed are influenced by the circumstances in which a violation occurred, including the intention of the offender and the severity of the harm caused to the environment. These penalties may be significant, especially where the harm is found to have been intentionally caused. Penalties can exceed A$5 million and include imprisonment for individuals. Company directors and managers can be held directly liable for pollution offences, and while to date only imposed in the most severe cases, directors have been gaoled in Australia for corporate offences.

Each jurisdiction has its own different regime regulating the notification, clean-up and remediation of contaminated land, where 'contamination' is broadly defined to capture almost any change in the state of land or water. Usually the person who caused the contamination bears the primary responsibility for cleaning up contaminated land and groundwater. However, if the polluter cannot be found or has become insolvent, then the authorities (usually the local council or environment protection authority) may require the owner or occupier of the land to clean up the contamination. In some jurisdictions, there is a greater risk to owners and occupiers of land, with authorities having the power to require the owner or occupier to clean up the contamination regardless of whether they caused the contamination, and mortgagees in possession can also have liability in some circumstances.

It is not an offence simply to own contaminated land, but it is an offence to fail to comply with a clean-up or remediation order issued by the relevant authority. In a number of jurisdictions, owners have an obligation to inform the relevant authority if they become aware of significant contamination on their land. Significant penalties can apply for failing to report known contamination, or even for failing to report contamination that an owner ought to have investigated and become aware of.

Owing to the potential liability for clean-up that may arise if the polluter cannot be found, it is important that purchasers of land, particularly land that is known to have been occupied by a hazardous industry, carry out environmental due diligence to determine whether the land they are acquiring is contaminated and assess any potential clean-up costs.

iii Tax

Stamp duty is a tax levied on conveyances and dealings in real estate and related transactions (including transfer of business assets) by state and territory governments. The duty applies to transactions evidenced by instruments, as well as transactions effected without a document being brought into existence and the legislation includes sophisticated anti-avoidance provisions. The legislation imposing duty varies between states and territories and different rates of duty apply to the dealings in different types of transactions. As at June 2016, the highest effective rate of duty was 5.75 per cent (although the rate more generally settles at 5.5 per cent depending on the state or territory in which the particular asset is located). In addition, depending on the nature of the asset acquired (in particular residential property), surcharge duty rates of up to an additional 7 per cent can apply where the buyer is a foreign person, entity or trust. Over recent years, there has been a programme of abolition of stamp duty on certain transactions, for instance on some share dealings, loan security arrangements and business asset transfers.

Stamp duty does not apply on the grant of normal leasehold estates (provided they are not granted for a 'premium' or additional consideration other than rent, where duty would apply), except in the Australian Capital Territory where the grant of a lease with a term greater than 30 years (including any renewal options) is liable to duty at conveyance rates.

It is important to note that a party to a transaction subject to duty will usually not be able to enforce its rights under the contract unless the relevant document has been presented at the appropriate revenue office and has been duly stamped. The parties to a transaction subject to duty have a limited period of grace from the date on which the document was first signed to lodge the document for stamping and pay any estimated duty without attracting any penalties. The relevant grace period ranges between 30 days and six months depending on the state or territory involved.

Stamp duty may also be payable on transactions involving a change in ownership of Australian property, even if the change occurs through an acquisition of a non-Australian entity, by a non-Australian from a non-Australian.

Where the transaction subject to duty is between certain related parties (for example, members of the same corporate group) as part of a restructure, stamp duty relief may be available where certain statutory requirements are met.

iv Finance and security

As is common worldwide, a mortgage is typically created in favour of a party (often a financial institution, but also any third-party lender) to secure payment of a loan or other financial arrangement. When land is purchased with funds obtained from an institutional

lender, the lender usually will attend completion and take responsibility for registering the transfer of the land as well as the mortgage granted to them by the buyer, and then (in those jurisdictions that still issue paper titles) will hold the duplicate certificate of title to the land for safe-keeping. This provides the lender with comfort that its consent must always be sought prior to the registration of any other interest in that parcel of land.

VI LEASES OF BUSINESS PREMISES

In Australia, arrangements between landlords and tenants are primarily governed by lease and licence documentation. These documents, especially those used by institutional landlords, contain detailed provisions that regulate the relationship between the landlord and the tenant. There is also an overlay of rights and obligations that are created by statute and common law, of which the following are notable.

Most jurisdictions have enacted retail lease legislation, to enshrine certain statutory protections for retail tenants who are considered to have limited bargaining power against institutional landlords.

Standard common law covenants implied into leases have been enshrined through property or conveyancing legislation in most jurisdictions.

Consumer protection legislation, including protection against misleading conduct or misrepresentations, applies to leases.

Both landlords and tenants are subject to workplace health and safety legislation governing the provision of a safe place of work. Primarily this affects the landlord through its capacity as owner of the building premises, and the tenant through its capacity as employer, or person in 'control' of the workplace.

Leases bestow upon the tenant a legal interest in land, as well as granting contractual rights against the landlord. The grant of a lease gives the tenant the exclusive right to occupy and to use the leased area, which (except to the extent agreed in the lease) overrides the landlord's rights as owner. Being an interest in land, the tenant's redress against a landlord's default includes the right to seek specific performance as well as damages.

There are two primary categories of leasehold estate:

a The most common form of leasehold for commercial leases, a fixed-term lease is for a defined period of time, after which it lapses. For a fixed-term lease to be enforceable, the start date and end date of the lease must be known (or at least able to be determined) before it commences. As with any leasehold estate, the premises or property that is the subject of the leasehold estate should be clearly defined or able to be clearly defined, and there should also be sufficient certainty about the terms of the lease.

b A tenancy known as a periodic tenancy is created when a lease is granted on a weekly, monthly or yearly basis. Generally, such a lease can be ended by either the owner (landlord) or the occupant (tenant) giving the agreed period of notice. Many fixed-term leases are converted to periodic tenancies once they reach their end date, in circumstances where the occupant continues to remain in the premises with the owner's consent.

Commercial leases are commonly net leases; that is, the tenant pays an agreed rent as well as a contribution to the landlord's operating expenses for the building. The proportion of the tenant's contribution to operating expenses generally is calculated by reference to the

proportion (expressed as a percentage) the lettable area of the tenant's premises bears to the total lettable area of the building. Sometimes, the rent agreed with a tenant comprises a notional amount for operating expenses, based on the operating expenses that were payable by the landlord in a given base year. In these cases, the tenant's contribution to a proportion of operating expenses is limited to any increases in actual operating expenses payable in a lease year above those paid in the base year.

The term of a commercial lease for an office premises is usually between three and 10 years, with or without rights to extend. For industrial premises, the term may be longer especially if the industrial premises were purpose-built. For major retail leases, such as those to anchor supermarket or department store tenants, lease terms often exceed 10 years and generally include a series of rights to extend, sometimes to a total of 40 years or more.

In most states it is necessary (or at least prudent) to register leases on the title to the property, to ensure that the tenant who has been granted an interest in the land via the lease also enjoys the protection of indefeasibility of title. The criteria for registration varies between the states, but as a guide to best practice:

a New South Wales, Queensland, Northern Territory, Tasmania and Australian Capital Territory – when the duration of the lease (including any options for renewal) exceeds three years the lease should be registered;

b South Australia – when the duration of the lease (including any options for renewal) exceeds one year the lease should be registered;

c Western Australia – when the duration of the lease (including any options for renewal) exceeds five years the lease should be registered; and

d Victoria – it is not necessary to register leases for any term to a tenant in actual possession given the breadth of the exception to indefeasibility.

Occupancy or other use rights are sometimes granted by licence, rather than lease. A licence is a contractual arrangement between the licensor (the grantor) and the licensee (the person with the benefit of the grant), meaning that remedies for breaches of the licence are limited to damages. Institutional land owners generally prefer that certain rights such as car parking and storage space rights are granted by way of separate licence, rather than in a lease, allowing for greater flexibility (and less formality) in dealing with those interests.

VII DEVELOPMENTS IN PRACTICE

The following recent developments in real estate law and practice may be of interest to the reader.

i Foreign investment approvals

As noted above, a key focus for Australian real estate in 2016 has been the introduction of the revised foreign investment regime. Despite its intent to simplify and streamline the process, uncertainties associated with the drafting and effect of the revised regime have led to a gradual release of further policy information by the Foreign Investment Review Board. Delays much greater than the 30-day statutory period for assessment are being routinely experienced as the scrutiny on applications increases, coupled with an increased demand as parties to transactions apply for approval as a 'just in case' measure, despite the significant application fees that have been introduced under the regime (ranging from A$5,000 to A$100,000).

ii Agricultural land register

Foreign persons who have an interest in agricultural land must now give notice of their interest to the Australian Taxation Office, details of the land usage as well as notice when the person ceases to hold that interest. The Australian Taxation Office then reports on the proportion of such land held by foreign persons and the use of the land.[10]

iii Taxation measures

Generally foreign persons cannot purchase established residential properties, as the intention is for foreign persons to invest in new dwellings and increase the housing stock in Australia.[11] Purchasing established residential properties is usually permitted only in limited circumstances such as where a temporary resident is purchasing a property to use as their residence in Australia.[12] In 2016, Victoria,[13] Queensland[14] and New South Wales[15] introduced stamp duty surcharges for purchases of residential land by foreign persons, ranging from 3 per cent to 7 per cent of the purchase price. Further, Victoria[16] and New South Wales[17] introduced land tax surcharges for foreign persons. Both measures were suggested as being directed at dampening interest from foreign buyers in Australian residential markets and easing housing pricing pressures; however, the full impact is yet to be determined.

iv Withholding certificates

The Australian government is focused on ensuring that foreign residents' Australian tax liabilities are collected before proceeds of the sale of Australian real estate are remitted to foreign jurisdictions.[18] To that end, in 2016, the Australian government introduced a foreign resident capital gains withholding certificate. Broadly speaking, unless an exemption applies

10 See Australian Taxation Office (2016) Land Register – FAQs, available at www.ato.gov.au/General/Foreign-investment-in-Australia/Land-Register---FAQs/.

11 See Parliament of Australia (2014) Report on Foreign Investment in Residential Real Estate, available from State Revenue Office Victoria (2016) Changes to state taxes June 2016, available at www.sro.vic.gov.au/publications/changes-state-taxes-june-2016.

12 See Foreign Investment Review Board (2016) Residential real estate – overview [GN1], available at https://firb.gov.au/resources/guidance/gn01/.

13 See State Revenue Office Victoria (2016) Foreign purchasers of property, available at www.sro.vic.gov.au/foreignpurchaser.

14 See Queensland Government (2016) Additional foreign acquirer duty, available at www.business.qld.gov.au/industry/professional-financial/transfer-duty/investors-and-transfer-duty/additional-foreign-acquirer-duty.

15 See Office of State Revenue (2016), Surcharge purchaser duty, available at www.osr.nsw.gov.au/taxes/spd.

16 See State Revenue Office Victoria (2016) Changes to state taxes June 2016, available at www.sro.vic.gov.au/publications/changes-state-taxes-june-2016.

17 See Office of State Revenue (2016) 2016 State budget, available at www.osr.nsw.gov.au/info/legislation/budget/201606.

18 See Australian Taxation Office (2016) Foreign resident capital gains withholding, available from www.ato.gov.au/general/capital-gains-tax/in-detail/calculating-a-capital-gain-or-loss/foreign-resident-capital-gains-withholding/.

or a declaration of residency can be provided, a seller of land for A$2 million or more (or grantor of an option or a lease involving a lease premium) must obtain this certificate from the Australian Taxation Office and provide it to the buyer before settlement. If this certificate is not provided, the buyer is obliged to withhold and remit to the Australian Taxation Office an amount equal to 10 per cent of the purchase price.

v Energy efficiency of office buildings

In 2011, the Australian government introduced a building energy efficiency disclosure regime, to focus on improving the energy efficiency of Australia's large office buildings. Corporations that wish to sell, lease or sublease office space of 2,000 square metres or more net lettable area are required to disclose an up-to-date building energy efficiency certificate (BEEC). A BEEC must include a star rating under the National Australian Built Environment Rating System (NABERS) (which measures the energy performance of operating buildings and is administered by the NSW government but used nationwide) and also an assessment of tenancy lighting in the area of the building being sold or leased. BEECs are valid for 12 months and subject to limited exceptions, must be made publicly available through an online register.

In June 2016, the Australian government announced a move to lower the mandatory disclosure threshold on commercial office buildings from 2,000 square metres to 1,000 square metres, effective from 1 July 2017.[19] This means that a corporation that wishes to sell, lease or sublease office space of 1,000 square metres or more after 1 July 2017 will need to obtain a BEEC.

The Property Council of Australia (Australia's national organisation of building owners and managers) will only award a new office building 'grade A' or 'premium' status if the building obtains certain ratings under both Green Star (another environmental rating tool used widely in Australia) and NABERS. The grade A or premium grade status is important for encouraging tenants concerned about their own energy consumption to lease space, and government agencies in particular will not lease space in buildings unless they meet minimum performance standards.

vi Retail leasing

The Australian jurisdictions continue to work towards the harmonisation of retail leasing laws, predominantly between Queensland, New South Wales and Victoria. Most recently, changes to the Queensland retail leasing legislation took effect in November 2016, including a widened scope of tenancies that are not protected by the legislation to tenancies involving a net lettable area of more than 1,000m^2, in a move that is consistent with one of the exemptions in the New South Wales legislation.[20] However, many differences remain.

19 See Australian Government (2016) Changes to the Commercial Building Disclosure Program, available at www.cbd.gov.au/.

20 See discussion at Queensland Government (2016), Summary of Key Changes - Retail Shop Leases Amendment Act 2016, available at https://publications.qld.gov.au/dataset/bb28a983-a82c-463d-951e-a20eb4b32e11/resource/41a79828-1521-482d-bb93-a99feda51577/download/key-changes-under-retail-shop-leases-amendment-act-2016.pdf.

vii Verification of identity

With the introduction and gradual progress towards mandatory electronic conveyancing in Australia, the requirements for verifying the identity of signatories to land dealings have been revised and now apply to all registrable dealings in Australian land.[21] For foreign investors, this will often mean that the execution of documents will need to be carried out in front of a notary public, an Australian-qualified lawyer in the overseas jurisdiction or at an Australian consulate or embassy, and careful attention will need to be paid to the identification requirements, which typically require the production of a passport and drivers licence.

VIII OUTLOOK AND CONCLUSIONS

Australia's political landscape continues to focus on the impact of foreign investment in Australian real estate, in the context of a broader discussion regarding the openness of the Australian economy and the role of immigration. In reality, however, the majority of foreign investment into Australian real estate remains procedural in nature and continues to increase across all classes and sectors. One of the main impediments to investment for first-time investors is the seeming complexity that arises from the state-by-state regulation of titling systems, planning and environmental regimes, but again the transparent nature of the Australian regulatory systems and processes means this is generally an obstacle that can be overcome with the right advice or local investment partner. While complete harmonisation of real estate laws on a national basis is unlikely in the near future, continued progress in key areas is being made and will increase with the move towards electronic conveyancing.

With increasing instability in regional and global markets, Australian real estate has seen some of its most diverse and significant investment activity over the last 18 to 24 months and that looks set to continue. Among many other developments, the creation of new stock and the refurbishment or repurposing of older stock to A-grade and premium standards are trends that look set to continue in 2017, particularly in the key markets of Sydney and Melbourne.

21 For further details, see Australian Registrars National Electronic Conveyancing Council (2016) Model Participation Rules, available at www.arnecc.gov.au/publications/model_participation_rules.

Appendix 1

ABOUT THE AUTHORS

DAVID JONES

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David has more than 16 years of specialist experience in the fields of general commercial and structured property, and hotels and resorts. He has regular responsibility for the coordination of multi-practice and multi-jurisdictional teams for major onshore and offshore transactions and restructures in his practice areas.

A partner in the firm's Sydney office, David currently serves as a member of our Asia Pacific Structured Real Estate Steering Committee, and in the Sydney office is a partner with primary responsibility for a number of the Firm's Australian community service and pro bono programs.

David has a primary focus on technical commercial property issues, large-scale property developments and structured transactions in the REIT, pension fund and hotel space.

He provides specialist advice to private, government and quasi-government organisations on a range of associated property and hotel management, development and planning matters at all stages – from vacant land development through to fully operative assets. David's experience also covers the full range of commercial property transactions, including advice on standard sales and purchases, and one-off or portfolio commercial and industrial leasing and agreements for lease.

SARAH MERRETT

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Sarah Merrett is a senior associate in Baker McKenzie's commercial real estate practice group in Brisbane. She has more than eight years' experience advising on real estate transactions, property developments, infrastructure projects and tenure issues.

Sarah's experience has been gained from advising clients in both government and private sectors. She currently teaches property law at the Queensland University of Technology.

Sarah advises on various property and related matters, drawing from her keen interest in the area of property law to align with her clients' commercial drivers where possible.

She provides property advice in respect of large projects, and has brought to settlement both acquisitions and disposals of assets. Sarah also has extensive experience in leasing and licensing transactions, in relation to commercial, retail and industrial assets. She has worked closely with other practitioners in relation to zoning laws, mortgagor default issues and land use arrangements.

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