Ondirei Ngorung Baribun #2 by Brad Turner

INVESTING DOWN UNDER

A GUIDE FOR GLOBAL REAL ESTATE INVESTORS

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KING&WOOD MALLESONS
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IN THIS GUIDE

WELCOME TO OUR GUIDE FOR GLOBAL REAL ESTATE INVESTORS

WHY AUSTRALIA

As real estate markets enter a period of renewal, reset and transition to the new economy, there are clear reasons Australia remains attractive to global real estate investors.

These include strong fundamentals over the long term (including a favourable geographic positioning in the Asia Pacific region), a considered foreign investment regulatory framework, and a continuing focus on structural refinements to the functioning of the market. Collectively, these demonstrate an ongoing commitment to competitiveness.

Renewal, reset and transition

At the time of writing, many economic indicators are suggesting that the demand behind stubbornly high post-pandemic inflation is finally softening.

The Reserve Bank of Australia and a number of other major central banks (including the United States' Federal Reserve) had also recently announced a loosening of monetary policy after an elongated period of rising interest rates that has weighed heavily on the capital intensive, and rate sensitive, real estate sector.

Globally, there are signs of a more optimistic economic outlook emerging from this period of geo-political and macro-economic volatility. In the real estate sector (as with many other sectors of the economy), the shift in sentiment is being led by strategies focussed on the new economy, and seeking exposure to assets and infrastructure that benefit from the thematic tailwinds of artificial intelligence, e-commerce, the life sciences, and living.

Australia's pillars

One of the key pillars underpinning Australia's continuing strong fundamentals has been a sustained commitment by governments (at both Federal and State levels) to the development of world class infrastructure to support the growth of Australia's gateway cities. Key infrastructure policy statements and papers provide policy transparency. Pleasingly, there has been increasingly open dialogue between the governments and the private sector on major infrastructure development and associated housing projects that are designed to meet the demand for affordable and sustainable living solutions within cities.

Another pillar is the highly securitised nature of the market, which over time has resulted in one of the world's most transparent and liquid real estate markets. Real estate investment trusts (or REITs), both listed and unlisted, have been a feature of the Australian market for over 50 years and have been a significant conduit for foreign capital flowing into Australia's real estate market.

Complementing these two pillars is a mature and sophisticated compulsory superannuation regime, with stewards who have become increasingly comfortable with allocations to alternatives. They are complimented by a growing cohort of private capital sponsors and managers who foster and support a culture of entrepreneurialism and value creation within the market.

These conditions, and advances in technology all operate to sustain and grow a world-class real estate sector. There are significant opportunities for investors with foreign sources of capital, including private capital, pension funds and sovereign wealth funds. These opportunities are enhanced by taxation concessions for certain foreign investors under the managed investment trust (or 'MIT') regime, which can offer qualifying foreign investors a concessionary rate of taxation on rental income and capital gains from real estate investments in Australia that is competitive in a global market.

Recent examples of these opportunities include Blackstone's record setting A$24 billion acquisition of the AirTrunk data centre development business, the acquisition by Barings LLC advising Aware Super from GPT of the Austrak Business Park Melbourne for A$600 million, and the acquisition by Stockland and Supalai from Lendlease of more than A$1 billion in landed housing estates.

Other recent transactions that demonstrate the resilience and long term conviction of global investors in the Australian real estate market include Hines acquisition of a 50% interest in Westpoint Shopping Centre, Pacific Alliance Group's acquisition of prime Collins Street, Melbourne and Market Street, Sydney addresses, and CapitaLand's acquisition of specialist real estate private credit platform Wingate.

Expert guidance and highly informed insight

For those considering investing in Australian real estate assets, KWM's Guide, 'Investing Down Under' offers expert guidance on the threshold legal, taxation and structuring issues to consider. It also provides insights drawn from both broad and deep recent experience into the key practical considerations and risk mitigation typically used in the acquisition of direct or indirect interests in Australian real estate assets.

Of course, this guide is not an exhaustive analysis or a replacement for specific professional advice.

If you would like more information or to discuss your investment structuring options, simply contact a member of our team.

KWM real estate sector coverage

Investing Down Under is a product of King & Wood Mallesons' real estate sector coverage, which is consistently rated as one of the best in market (including Chambers & Partners Asia Pacific Band 1 and Legal 500 Asia Pacific Tier 1).

Our coverage comprises over 150 dedicated and specialist real estate sector lawyers with extensive cross-border experience bringing market-leading capability across foreign investment regulatory, private capital (including private credit), funds (transactional and regulatory), mergers and acquisitions, capital markets (equity and debt), financing, development and other capital transactions, planning and environment, and tax and stamp duty.

Our differentiator, and why clients seek our advice on their most strategic and complex transactions, is the breadth and depth of our cohesive 'single desk' delivery that assists to unlock opportunity and execute with the highest level of precision needed to manage risk.

We are proud to have been involved in many of the largest and most complex real estate transactions in the Asia-Pacific region. For more details of our real estate sector coverage, see kwm.com.

King & Wood Mallesons is the top tier international law firm, from Asia, for the world.

REGULATION OF FOREIGN INVESTMENT

WHAT IS FIRB APPROVAL?

If you're classified as a foreign person under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (**FATA**), your Australian real estate transaction may require a no objection notification (commonly referred to as **FIRB approval**) from the Australian Federal Treasurer (**Treasurer**). If FIRB approval is required, it must be obtained prior to the transaction becoming binding.

Foreign investment in Australia is regulated by the FATA, the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (FATR) and the Australian Government's Foreign Investment Policy (collectively, the FIRB regime). The Australian Government minister responsible for making decisions under the FIRB regime is the Treasurer, who is advised and assisted by the Foreign Investment Review Board (FIRB)

Is FIRB approval required for my real estate transaction?

A real estate transaction may require FIRB approval depending on:

- whether the acquirer is a foreign person, and if so, whether they are further classified by the FIRB regime as a foreign government investor;
- the nature of the target asset and the type of acquisition; and
- whether the transaction value meets monetary thresholds (see table below).

The monetary threshold that applies to a transaction will depend on the type of land being acquired.[1]

1 Note that consideration monetary threshold for a lease or licence is calculated generally as the total of the annual payments over the term of the lease or licence. Where the term exceeds 20 years, the consideration is apportioned to 20 years.

LAND TYPE	MONETARY THRESHOLD
Developed commercial land – non-sensitive Commercial land includes vacant and developed land, such as offices, factories, warehouses, shops, and commercial residential premises (for example, hotels, motels and caravan parks). Any land which is not residential or agricultural land is considered to be commercial land.	**A$330 million** A higher threshold of A$1,427 million applies for persons from certain free trade agreement countries and a threshold of A$533 million applies for persons from India where there is a supply of a service.
Developed commercial land – sensitive For example, land used for public infrastructure, storage of biological agents, telecommunications, storage of bulk data, financial institutions or to be leased to a government body.	**A$71 million** A higher threshold of A$1,427 million applies for persons from certain free trade agreement partners.
Vacant commercial land Note that under the FATA land is vacant if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock.	**A$0**
Residential land Land on which there is a dwelling; or Vacant land: (a) on which the number of dwellings that could reasonably be build is less than 10; and (b) is not being used wholly and exclusively for a primary production business. Foreign investors can only purchase residential real estate in Australia in certain circumstances. Different analysis and requirements apply depending on whether the land has an established dwelling, a newly constructed dwelling, or is vacant.	**A$0**
Agricultural land Land that is, or could reasonably be, used for a primary production business.	**A$15 million** This is a cumulative threshold that takes into account the value of all other agricultural land held by the person and its associates. For persons from the United States, New Zealand and Chile, a threshold of A$1,427 million applies. For persons from Thailand, a threshold of A$50 million applies.
Mining and production tenements A right to recover minerals, oil, or gas from Australian land or the seabed or subsoil in Australia's offshore areas (excluding exploration or prospecting rights).	**A$0** For persons from the United States, New Zealand and Chile, a threshold of A$1,427 million applies.
National security land Land owned or occupied by the Department of Defence of Defence Force; or in which an agency in the Commonwealth National Intelligence Community holds an interest.	**A$0**
Any land type where the acquirer is a foreign government investor	**A$0**

An interest in land includes any interest in a land entity (a company or trust where more than 50% of the assets of the target are Australian land). There is an exemption to acquire a passive interest of not more than 10%.

Monetary threshold A$ amounts are indexed annually on 1 January, except for the A$15 million (cumulative) threshold for agricultural land and the A$50 million threshold for agricultural land for Thailand investors, which are not indexed.

Am I a foreign person under the FIRB regime?

The definition of a "foreign person" under the FIRB regime is broad and includes Australian incorporated entities where there is a certain level of offshore ownership.

A foreign person is:

- an individual who is not ordinarily resident in Australia (ordinarily resident, for a person other than an Australian citizen, means that the person has resided in Australia for 200 days or more in the immediately preceding 12 months);
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest of 20% or more;
- a corporation in which 2 or more foreign persons hold an aggregate substantial interest of 40% or more;
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds a substantial interest of 20% or more of the assets or income of the trust;
- the trustee of a trust in which 2 or more foreign persons hold an aggregate substantial interest of 40% or more of the assets or income of the trust; or
- a person prescribed by the FATR to be a foreign government investor.

A foreign government investor is:

- a foreign government or separate government entity; or
- a corporation, trustee of a trust or general partner of a limited partnership in which:
  - one or more foreign governments or separate government entities or foreign government investors from the same country hold an aggregate interest of at least 20%; or
  - foreign governments or separate government entities or foreign government investors of more than one foreign country, together with any one or more associates, hold an aggregate interest of at least 40%.

A fund with passive foreign government entities in its ownership of 40% but no single holding of 20% (including by foreign government investors from a single country) is not a foreign government investor.

A foreign government means an entity that is:

- a body politic of a foreign country;
- a body politic of part of a foreign country; or
- a part of a body politic of a foreign country or a part of a body politic of part of a foreign country.

A separate government entity means an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or a part of a foreign country, but not part of the body politic of a foreign country or of a part of a foreign country.

Foreign government investors can include sovereign wealth funds, state-owned enterprises, statutory authorities, state pension funds, public university endowment funds, government guided investment funds, funds managed by state-owned banks or insurance companies as trustees or custodians, private equity funds with limited partners that are government entities etc.

How will my application be assessed?

The test against which all FIRB applications are assessed is whether the proposal is contrary to Australia's national interest (or, in limited cases, national security only). There is no definition of 'national interest' and applications are assessed on a case-by-case basis. There is no obligation to demonstrate that positive benefits to Australia will flow from the proposal. Rather, the Treasurer may attach conditions to a FIRB approval where compliance with the conditions is necessary to prevent the proposal from being contrary to Australia's national interest.

FIRB will circulate the proposal among relevant Australian and State Government departments and other bodies, such as the Australian Taxation Office, the Australian Competition and Consumer Commission and the Department of Home Affairs, to ascertain their views as to whether the proposal is contrary to the national interest.

Is a 'voluntary' FIRB notification advisable?

Some proposed acquisitions are not compulsorily notifiable but may activate the Treasurer's powers to make adverse orders. If the Treasurer considers a proposal to be contrary to Australia's national interest, the Treasurer can make orders including prohibition or divestment. To remove this risk, a foreign person can obtain prior FIRB approval in circumstances where compulsory FIRB approval is not required.

The Treasurer can 'call in' for review reviewable national security actions which are not otherwise notified if the Treasurer considers that the action may pose national security concerns. The review can occur when the action is still proposed or up to 10 years after the action has been taken.

Are exemptions available under the FATA?

If an acquisition falls within an exemption under the FATA, then FIRB approval will not be required. There are certain exemptions for acquisition of interests in Australian real estate, including:

- acquisitions from government entities (although note that this exemption is not available for foreign government investors or for any investors in relation to public infrastructure (such as for transportation, utilities, telecommunications network or nuclear facility) or national security land);
- compulsory acquisitions or compulsory buy-outs;
- certain interests acquired under a rights issue or dividend reinvestment plan;
- acquisitions by Australian citizens not ordinarily resident in Australia, New Zealand citizens and permanent residents;
- foreign nationals purchasing property as joint tenants with their Australian citizen, New Zealand citizen, or permanent resident spouse (this does not include purchasing property as tenants in common);
- a charity operating in Australia primarily for the benefit of persons ordinarily resident in Australia; and
- acquisitions that occur in the ordinary course of carrying on a business of lending money and the interest is held solely by way of security for the purposes of the money lending agreement.

How long does it take to get FIRB approval?

Once a proposed acquisition is notified to FIRB under the FATA and the relevant fee received by FIRB, the Treasurer has 30 days to decide whether or not to object to the acquisition and a further 10 days to notify the applicant of the decision.

Where the Treasurer considers that further time is required to assess a proposal, the applicant may request a voluntary extension of time or, alternatively, the Treasurer may unilaterally extend the time by up to 90 days or issue an Interim Order, which is made public, and extend the time by up 90 days. Extensions are common.

Exemption certificates

An exemption certificate provides a standing pre-approval enabling the relevant foreign person to undertake acquisitions, including acquisitions of interests in Australian land. Exemption certificates allow acquisitions of specified kinds to be made within a set financial limit for a specified period (1 year to up to 3 years).

Developers can also apply for a "new (or near-new) dwelling exemption certificate" under the FATA and FATR to sell new (or near-new) dwellings in a development to foreign persons, without each foreign person purchaser being required to seek their own approval.

Developers who do not wish to apply for a new (or near-new) dwelling exemption certificate may instead apply for a streamlined bulk approval process. Under a streamlined bulk approval process, the developer can apply for foreign investment approval as an agent on behalf of the foreign purchaser, and the ATO will streamline its assessment of the application. A separate application must be submitted for each foreign investor purchasing a dwelling in the development, and the foreign investor may be liable to pay a fee.

Instead of notification before each separate acquisition, a foreign person holding a valid exemption certificate would notify acquisitions to FIRB after completion.

Register of foreign ownership of Australian assets

On 1 July 2023, the new Register of Foreign Ownership of Australian Assets (Register) commenced operation. The purpose of the Register is to provide the Australian government with visibility of the level of foreign ownership in Australian assets. The registration obligation is a separate and additional obligation to the notification regime. Unlike the pre-transaction notification requirements, the Register registration requirements apply after the relevant transaction or event and may be required even if pre-transaction notification is not required.

All acquisitions of land (regardless of value) requires registration on the Register.

Certain changes to, or disposal of, assets will also need to be registered. A person who becomes or ceases to be a foreign person while holding certain assets will also have to consider their registration obligations, including in respect of their existing assets.

Key points for certain transactions

Residential real estate – established dwellings

Acquisitions of established dwellings which have been previously owned or occupied are not normally approved except in particular, narrowly defined circumstances. This includes interests in time share schemes where the interest of the foreign person and any associates exceeds 4 weeks in aggregate in any year.

Starting from 9 April 2024, the filing fees for established dwellings have tripled, with the potential maximum filing fee exceeding A$3.5 million for acquisitions involving consideration exceeding A$40 million.

Approvals for acquisitions of established dwellings are typically subject to conditions, and are generally limited to the following circumstances:

- foreign persons who are temporary residents can apply to purchase an established dwelling for use as their residence in Australia, but must sell it within six months of it ceasing to be their primary residence;
- foreign persons that operate a substantial Australian business can apply to purchase established dwellings to house their Australian-based staff; and
- foreign persons can purchase established dwellings for redevelopment, provided the redevelopment increases Australia's housing stock.

Residential real estate – newly constructed dwellings and vacant land

Applications from foreign persons seeking to acquire newly constructed dwellings or vacant land will usually be approved with few restrictions as these acquisitions are seen to help support economic growth. For vacant land, proposals are normally approved subject to the condition that development completes within 4 years.

Vacant dwellings

To discourage residential property being kept vacant, the Australian Government has imposed a vacancy fee where a property is not occupied for 6 months or more in each 12-month period beginning after the first day the foreign person acquires the right to occupy the property (for example, the date of settlement or receipt of an occupancy certificate). A vacancy fee return is required to be lodged after the end of that 12-month period each year. Vacancy fees are payable in relation to residential land where an application was made in relation to that land on or after 9 May 2017.

The amount of the vacancy fee is based on the FIRB filing fee that was payable at the time the application for the land was made, or would have been payable but for an Exemption Certificate. For vacancy years starting before 9 April 2024, the annual vacancy fee is equal to the FIRB filing fee. For vacancy years starting on or after 9 April 2024, the vacancy fee is twice this amount.

Build to rent

The announced adjustments to FIRB's policies have meant that "build-to-rent" (BTR) projects may attract lower filing fees. The announced adjustments to FIRB's policies in December 2023 means that land being developed as BTR projects will attract the filing fees that would be applicable to commercial land irrespective of how the project land is otherwise classified.

The specific details of the updated FIRB policies are yet to be finalised.

Agricultural land

Agricultural land is defined as "land in Australia that is used, or could reasonably be used, for a primary production business".

Primary production business includes a business of cultivation of land, animal husbandry/farming, horticulture, fishing, forestry, viticulture, or dairy farming. However, agricultural land does not include certain land used for mining, wind or solar power station, environmental protection or conservation, wildlife sanctuary, industrial estates, tourism and recreation, fishing and aquaculture, or land of less than one hectare.

Foreign persons must get approval for a proposed acquisition of an interest in agricultural land where the cumulative value of agricultural land owned by the foreign person (and any associates), including the proposed purchase, is more than A$15 million.

Certain free trade agreement country investors are only required to seek approval where the value of the agricultural land interest they are acquiring is greater than A$1,427 million, while a A$50 million threshold applies to Thai investors. These thresholds are not cumulative.

FIRB policy requires foreign investors to demonstrate that the agricultural land they are looking to acquire has been offered for sale publicly in an open and transparent sale and process, and 'widely marketed' for a minimum of 30 days. This is required for agricultural land intended to be used for a primary production business or for residential development.

This process will generally require public marketing using channels that Australian bidders can reasonably access, such as real estate listing websites and national or regional newspapers.

National security land

National security land is land:

- owned or occupied by the Commonwealth of Australia for use by the Australian Defence Force or the Department of Defence, including buildings and structures on which defence premises are located; or
- land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that is publicly known, or could be known upon the making of reasonable inquiries.

All acquisitions of interests in national security land require approval (a A$0 monetary threshold applies) and are considered on a title-by-title basis.

Subdivision and amalgamation of titles

If you hold an interest in land which is affected by a title subdivision or amalgamation, current policy under the FIRB regime is to treat this as the acquisition of a new interest in land under the FATA. If you are a foreign person and the relevant threshold test is met (which may be $0 if the land is vacant or if you are a foreign government investor), the subdivision or amalgamation will need to be notified and approved.

If you plan to acquire land and expect that it will be affected by an amalgamation or subdivision after you acquire it, this may be notified in the FIRB application for the initial acquisition. However, FIRB approvals and Exemption Certificates are time-limited, so it is possible that a separate notification will be required if the subdivision or amalgamation occurs after the FIRB approval or Exemption Certificate expires.

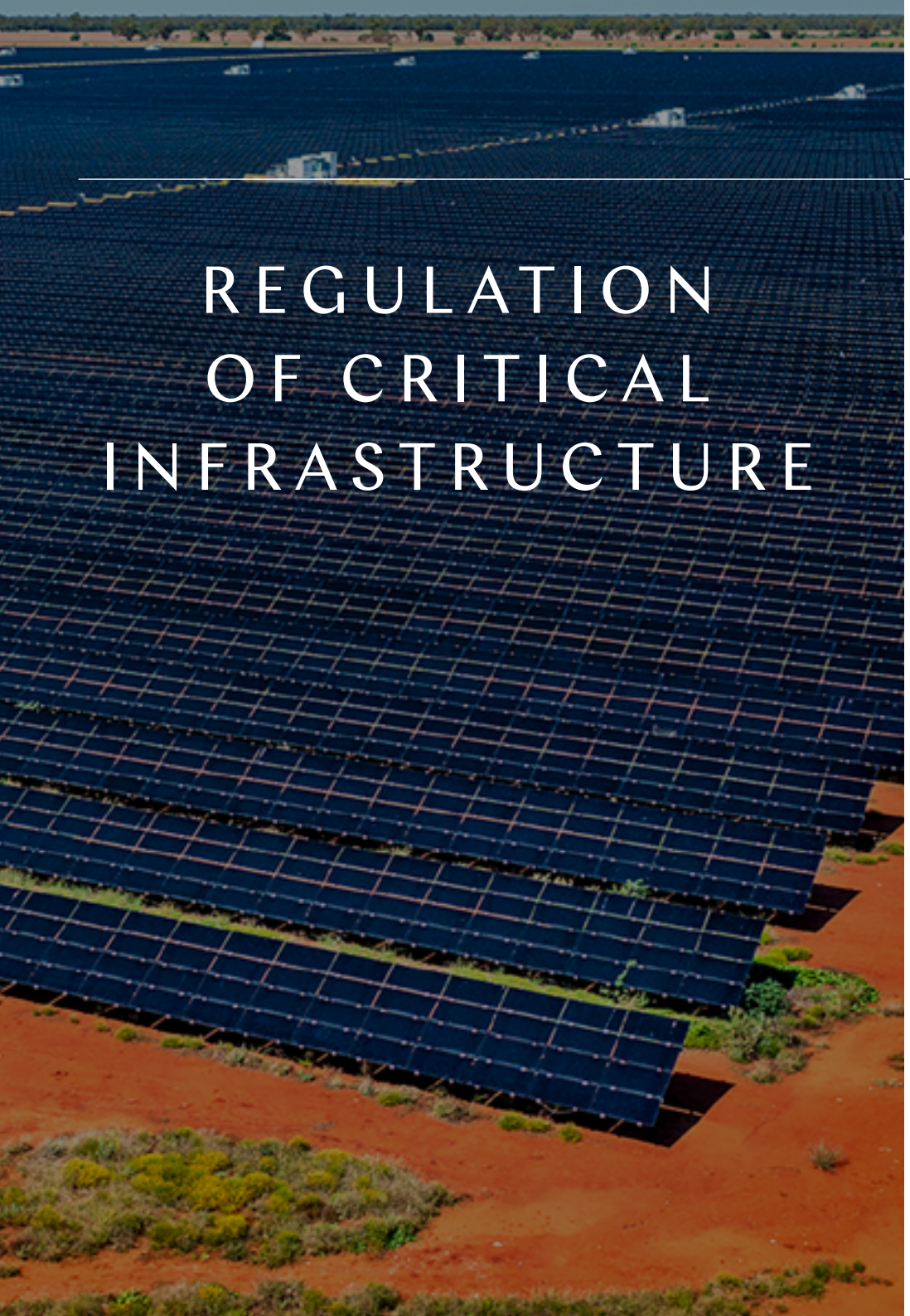
Application fees

Fees apply to FIRB applications. The fee will vary depending on the nature of the interest being acquired and the amount of consideration, and is subject to indexation each financial year.

For the financial year ending 30 June 2025, the general filing fees range from A$4,300 for small transactions to up to A$1,171,600 for the highest-value transactions. For example, the fee for commercial land and business acquisitions valued between A$50 million and A$100 million is A$29,500, increasing in A$29,500 increments with every A$50 million increase in consideration.

Starting from 9 April 2024, the filing fees for established dwellings have tripled, with the potential maximum filing fee exceeding $3.5 million for acquisitions involving consideration exceeding $40 million.

Where a voluntary notification of a reviewable national security action is being made, the fees is only 25% of the corresponding filing fee for a mandatory filing.



REGULATION OF CRITICAL INFRASTRUCTURE

The *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**) imposes obligations and regulations on entities that operate in a critical infrastructure sector or are 'responsible entities' for or 'direct interest holders' in critical infrastructure assets. The SOCI Act is administered by the Cyber and Infrastructure Security Centre (**CISC**), within the Commonwealth's Department of Home Affairs.

The 11 critical infrastructure sectors are communications, data storage or processing, financial services and markets, water and sewerage, energy, healthcare and medical, higher education and research, food and grocery, transport, space technology and the defence industry.

There are currently 22 critical infrastructure asset classes, including data centres, banks, supermarkets, transport infrastructure, ports, airports.

SOCI Act obligations

The four primary obligations imposed by the SOCI Act are:

- **Reporting** – Responsible entities and direct interest holders must provide operational and ownership information respectively to the Register of Critical Infrastructure Assets, as well as notify the Australian Cyber Security Centre of cyber security incidents within certain timeframes.
- **Risk management** – Responsible entities for certain critical infrastructure assets must adopt, maintain, comply with, review and update a critical infrastructure risk management program, identify and minimise or eliminate material risks of hazards that may impact the asset, and mitigate the relevant impact of such a hazard on the asset. This includes providing an annual report from the Board on their risk management program to the relevant Commonwealth regulator or Secretary of Home Affairs.

- **Enhanced security obligations** – Additional obligations apply to responsible entities of a subset of critical infrastructure assets known as 'Systems of National Significance' which are regarded as most important to the nation. These additional obligations include adopting, maintaining and complying with an incident response plan, participating in cyber security exercises, undertaking vulnerability assessments, and providing periodic reports on the operation of the system to the Australian Signals Directorate (ASD).
- **Government assistance** – The Government has wide powers to enable it to act and intervene to respond to cyber security incidents affecting critical infrastructure in Australia. These powers allow it to give directions requiring entities to provide information about a cyber security incident, to take action to respond to a cybersecurity incident, and to authorise the ASD to intervene or 'step in' to a critical infrastructure asset and take action to respond to cyber security incidents.

Further information on the specific obligations can be found in the "Critical Infrastructure" section of our *Guide to Doing Business in Australia 2024*.

Are landlords 'direct interest holders'?

Under the SOCI Act, an entity that holds an interest (together with its associates) of at least 10% in, or that holds an interest that puts that entity in a position to influence or control, an asset is considered a 'direct interest holder'.

On its face, the definition would include landlords of premises on which critical infrastructure assets are situated. This could pose an issue for commercial landlords, where the obligations under SOCI may apply to landlords of shopping centres, bank branches, data centres and industrial assets around ports and airports, despite those landlords having very little involvement in the operation of the critical infrastructure asset itself.

Nonetheless, the CISC indicates in its 'Register of Critical Infrastructure Assets Guidance' that it does not ordinarily expect that the landlord of an asset to register separately as a direct interest holder unless the landlord has influence or control over the asset beyond those that are ordinarily part of commercial leases.

In any event, even if the landlord is not considered to be a direct interest holder, CISC expects that the landlord should be listed as a critical supplier in the operational information provided by the responsible entity.

Interaction with the FIRB regime

A 'national security business' under the FIRB regime includes a business which is a responsible entity or direct interest holder of a critical infrastructure asset. As a consequence of the broad definition of 'critical infrastructure asset' in the SOCI Act, the scope of 'national security business' under the FATA has been significantly expanded by the SOCI Act.

Under the FATA, the acquisition of an interest of 10% or more (or any control or influence) in a national security business is a 'notifiable national security action', requiring investors to first give notice to the Treasurer and receive a no objection notification before being able to proceed.

FIRB is expected to consult with CISC when considering an application which relates to a critical infrastructure asset.

Investors will need to carefully assess the nature of the businesses they are looking to acquire or obtain an investment in, particularly where those businesses are operating in a critical infrastructure sector.

TYPICAL INVESTMENT VEHICLES

Direct and indirect investment

It is crucial when making or realising any investment that the transaction is appropriately structured to ensure that adverse or other unintended legal, accounting or tax consequences do not arise.

Investments in Australian real estate assets can be made either through the direct acquisition of real estate, or indirectly, by acquiring ownership of the structure that holds the real estate.

The choice of investment style (e.g. direct or indirect) and investment vehicle is a key part of structuring a proposed transaction and will be influenced by a number of factors, including legal, accounting and tax considerations.

A summary of the types of structures and vehicles available to investors, together with certain regulatory considerations, is set out over the page.

DIRECT

Acquisition of real estate

INDIRECT

Acquiring ownership of the structure that holds the real estate.

Investment Structure	Key Features	Regulation
Trust/Managed investment schemes (MIS)* (wholesale investors)	• Managed by a trustee and/or investment manager • If investors will all be wholesale, then the trust will not need to be registered as a MIS	• MIS needs to operate under an Australian Financial Services License (AFSL) (the AFSL is usually held by the trustee, although there is flexibility for it to be held by the investment manager or by an external party through representative and/or intermediary arrangements) • Also regulated by the general law of trusts
Trust/MIS* (retail investors)	• Managed by a trustee/responsible entity (RE) which can appoint an investment manager • If there will be retail investors, the trust may need to be registered as a MIS – however, this also allows the fund to raise capital from a larger pool of such potential investors	• Usually needs to be registered as a MIS • If registered, RE must be a public company and hold an AFSL • As result, there is a heavier regulatory and compliance burden (additionally, there are likely to be disclosure compliance obligations if the investors are retail) • Also regulated by the general law of trusts
Company	• Managed by its directors • Members rights are governed by the constitution and/or a shareholders' agreement	• Regulated by the Corporations Act 2001 (Cth) (Corporations Act) • In some cases disclosure to investors may be required for capital raising purposes
Joint Venture	• Rights are governed by joint venture agreement, a unitholders' agreement (where the joint venture vehicle is a trust) or a shareholders' agreement (where the joint venture vehicle is a company) • Can be used in conjunction with all the above structures • Enables co-operation with other market participants – e.g. ability to access other market participants' resources (financial or other expertise)	• Regulation can depend on the type of the joint venture vehicle (e.g. a trust or company) – see above

*A trust needs at least two members to be a managed investment scheme, in addition to satisfying other requirements.

Establishing a private unit trust

Direct investments in Australian real estate assets usually occurs through an existing Australian investment entity, or a new investment entity established for the purpose of acquiring the target asset.

Target assets are usually acquired and held through a trust structure, rather than through a company structure, because a trust that invests in real estate can, subject to certain requirements, be treated as a “flow-through” entity for taxation purposes. Australian tax concessions are also available for certain global investors if the trust through which they hold their interest in Australian real estate qualifies as a Managed Investment Trust (MIT). There is also greater flexibility to return capital to investors under trust structures. Managed Investment Trusts: Tax Concessions of this guide contain more detail on the taxation treatment of Australian trusts.

Acquiring a private unit trust

Investments in real estate assets may be made indirectly by acquiring units in an existing private unit trust which already holds the target asset.

Where a direct acquisition of the target asset held by a trust is available, a buyer will usually prefer this to acquiring the units in the trust that already holds the target asset.

THIS IS BECAUSE:

A

Additional corporate, financial, accounting and taxation due diligence on the trust and the trustee is usually required to be undertaken on an acquisition of units in a unit trust, to assess the extent of the assets and liabilities that are being acquired.

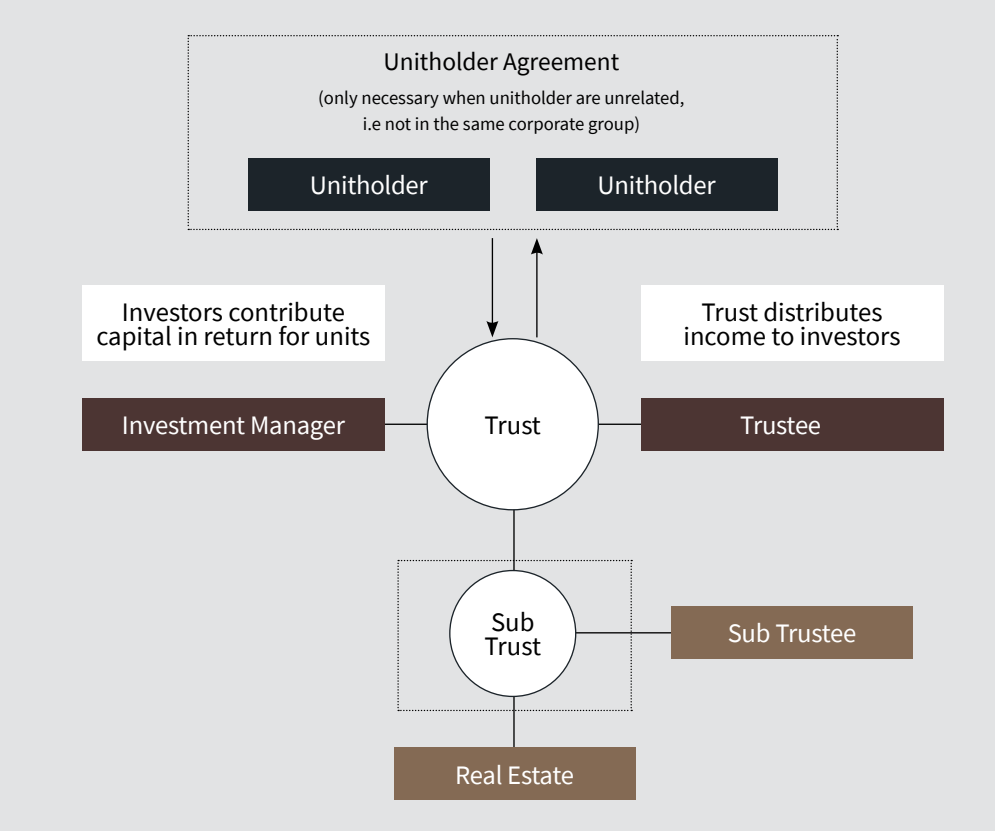
B

On a direct acquisition, the buyer is not exposed to any past liabilities of the previous owner (other than those which travel with the land by law).

BASIC GUIDE TO TRUST LAW IN AUSTRALIA	
Nature of a trust	Under Australian law, a trust is not a separate legal entity. Rather, a trust is a relationship between a trustee and the beneficiaries in respect of certain property. The trustee is appointed by and must act in accordance with the trust deed establishing the trust. Under a unit trust, the relative interests of the beneficiaries (investors) are represented by the number and classes of units held.
Management of the trust	The trust is managed by a trustee, which is a corporate entity, and it is the trustee that holds the legal title to the real estate and any other assets of the trust. The corporate trustee can be a company that is controlled by the investors in the trust (where the trust is a subsidiary or closely held) or, as is increasingly common for global investors, a professional trustee company (a so called "trustee for hire") can be appointed. It is common, particularly where there is a professional trustee appointed, for there to be a separate investment manager appointed to assist the trustee in managing the trust.
Powers, duties and limitations of the trustee	The powers, duties and limitations of the trustee and any restrictions on the creation and transfer of units in the trust are usually set out in the trust deed, which is supplemented by legislation in the various states and territories and equitable principles applicable to trusts
Regulatory	If the unit trust is private, in the sense that all the investors are professional investors or otherwise "wholesale investors", then the trust itself will not generally be regulated by the Corporations Act, although the activities of the corporate trustee and/or the investment manager will be. If the trust is registered as a MIS, the trust will be regulated by the Corporations Act. The legislation governing Australian companies is the Corporations Act, which is a federal Act. This law is administered by the Australian Securities & Investments Commission (ASIC).
Licensing	If the trust is also a managed investment scheme, it must operate under an AFSL. The AFSL may be held by the trustee, or in some circumstances by the investment manager or by a third party (who may authorise the investment manager or trustee to operate the trust under its AFSL) through representative and/or intermediary arrangements.
Rights and obligations of unitholders	If there are a small number of unrelated unitholders, there would usually be a separate unitholders' agreement regulating the rights and obligations of the unitholders as between themselves and the trustee in respect of things such as restrictions on dealings with the units (including change of control), pre-emptive rights, financial management of the trust and dealings with the real estate and other assets of the trust. In some cases, these matters may also be dealt with in the trust deed.
Tax administration requirements	If a foreign investor establishes a trust to invest in Australian real estate, the trustee of the trust will need to comply with the relevant Australian tax administration obligations associated with the establishment and operation of the trust. Although the trust is not a separate legal entity, for Australian tax purposes, a trust is generally treated as a separate taxpayer to the trustee entity. In particular, the trustee of the trust will need to obtain a tax file number (TFN) for the trust and lodge tax returns for the trust each year, in addition to any TFN or lodgement requirements for the trustee entity itself. Further, as trusts generally are "flow-through" entities for tax purposes, the trustee of the trust will need to perform tax calculations each year to determine how much the unitholders or beneficiaries of the trust are taxed on the income of the trust each year. External service providers can be engaged to assist in this process. How these calculations are undertaken, and the information that is required to be provided to unitholders or beneficiaries by a trustee will also depend upon whether or not the trust is eligible to, and has elected to be, an "attribution managed investment trust" (AMIT) for Australian tax purposes. The AMIT regime is a concessional tax regime. The trustee of the trust may also wish to consider whether to register for Goods & Services Tax (GST) in that capacity.

Typical structure

The diagram below illustrates the features of a unit trust/MIS described above and shows a typical structure through which a unit trust/MIS may be used to invest in real estate. This structure shows the use of sub-trusts to hold multiple real estate assets.



Indirect investment through an Australian subsidiary company

In Australia it is possible, although less common (for the reasons outlined in *Establishing a private unit trust* of this guide) to hold a real estate investment through a company structure. It is also relatively common for global investors using a trust structure (where the trust is to be a subsidiary or closely held) to establish their own corporate trustee. This section sets out the regulatory framework that applies to Australian companies.

Companies are generally taxed in Australia on all of their income at a 30% tax rate, and are not 'flow-through' entities. However, tax payable by companies can be attached to dividends paid by the company as a franking credits, which can be used by shareholders to offset against their tax payable, subject to certain restrictions.

The most common form of company in Australia is a company limited by shares, which may be a proprietary company (private) or a public company.

Companies

Proprietary (Pty Ltd)

- must have at least 1 shareholder but no more than 50 non-employee shareholders
- must have at least 1 director who is ordinarily resident in Australia
- can, but need not, have a secretary
- cannot engage in any activity that would require the lodgement of a prospectus (except for an offer of shares to existing shareholders or employees, or where another exemption under Chapter 6D of the Corporations Act applies – e.g. small scale offerings)
- must adhere to the reporting obligations contained in Part 2M.3 of the Corporations Act
- a large proprietary company must appoint an auditor
- must have a public officer for tax purposes
- must have a registered office in Australia

Public (Limited)

- must have at least 1 shareholder
- must have at least 3 directors (2 of whom are ordinarily resident in Australia)
- must have at least 1 secretary who is ordinarily resident in Australia
- subject to securities and other applicable laws, may issue a prospectus for the offer of shares, debentures or other securities
- must appoint an auditor
- must have a public officer for tax purposes
- must have a registered office in Australia
- may, but need not, be listed on ASX

In the context of real estate investments where the number of shareholders is limited, it is more common to use a proprietary company due to the additional disclosure requirements, financial reporting and administrative burden associated with a public company.

Foreign company registration

A foreign company is prohibited from carrying on business in Australia unless it is registered as a foreign company or is conducting business through an Australian subsidiary. This registration requirement is separate from, and in addition to, the AFSL requirements and applies to foreign companies generally which carry out activities with the necessary connection to Australia.

External or internal management

In the traditional structure, unlisted and listed real estate investment trusts (REITs) are typically managed by an "external" responsible entity or "trustee for hire" (i.e. the ownership and control of the responsible entity is separate from ownership of units in the scheme and underlying real estate). More recently, as demand by members of schemes for greater alignment of interests by management of such schemes escalates, many REITs have moved towards internally managed structures to accommodate this rising investor sentiment, as evidenced by the increasing trend towards stapled structures (see Investment in Stapled Securities below).

Indirect investment by acquiring units in a REIT

Another means of indirect investment is to acquire units in a REIT. Australia has a mature and sophisticated REIT market. REITs are structured as trusts and are governed by a well-developed legal and regulatory framework. REITs can be listed on the Australian Securities Exchange (ASX) or remain unlisted. Wholesale property funds are one type of unlisted REIT. REITs which are listed are now known as A-REITs. REITs (and in certain cases private unit trusts) are a form of MIS and are regulated accordingly.

Investment in stapled securities

Stapled structures are common in Australia, particularly for A-REITs (but are also utilised in the unlisted context as well). Stapled securities are securities which comprise, on one side of the staple, a unit in an A-REIT (Passive Trust), and on the other side of the staple, a share in either a company or a unit in a trust (Active Entity) that owns management or development rights for certain real estate. The "staple" refers to the requirement that the unit in the Passive Trust and the security in the Active Entity are traded together as a single security – one cannot be dealt with independently of the other.

Stapled structures are usually developed in a way that provide for the A-REIT part (or REIT, if unlisted) (i.e. the passive side) of the structure to invest in real estate for the purpose of deriving rent, and for the active part of the structure to carry on the other activities, such as property development or property management.

If properly structured, the A-REIT will not be taxed as a company under Australia's "trading trust" rules and may be taxed on a "flow-through" basis. See tax trusts for more details of the trading trust rules.

Accordingly, a stapled structure may allow the "flow-through" rental income from the A-REIT (or REIT, if unlisted) to be coupled with the potential upside of development profits and other non-rental income, through activities carried out via the active side.

The use of stapled structures used to generate additional tax benefits for foreign investors, as if the A-REIT part of the stapled structure qualified as a 'withholding MIT', then distributions of rental and certain other types of income from the A-REIT could be subject to a concessional rate of withholding. However, changes were recently made to the law to limit the ability of A-REITs in stapled structures from being able to obtain this concessional withholding tax rate. See Withholding tax concessions for more details about these amendments.

Regulatory requirements

Most trusts investing in real estate will be "managed investment schemes" under the Corporations Act. This is because they typically involve the contribution and pooling of money or money's worth for investment in a scheme to produce financial benefits (e.g. rental return from real estate) where members receive "interests" (i.e. units) in the scheme, the members are not all related to each other and to the trustee, and the members in the scheme do not have day-to-day control over the operations of the scheme.

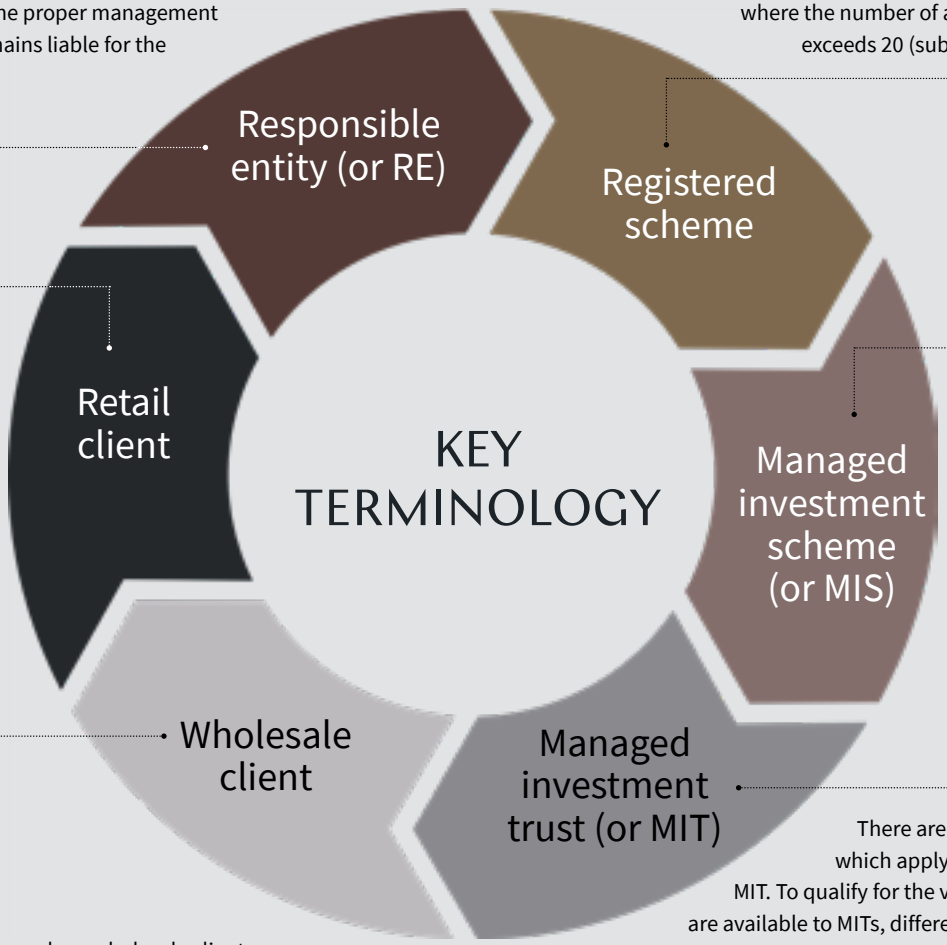
All listed REITs and some unlisted REITs will be required to be registered as a managed investment scheme under the Corporations Act (see the table below). An exception to the requirement for registration is that a scheme will not need to be registered if, under the Corporations Act it would be exempt from the requirement to issue a Product Disclosure Statement.[2] This would be the case if all the investors are "wholesale clients" as defined under the Corporations Act. There are also a variety of other exemptions from registration requirement contained in the Corporations Regulations which may apply; for example, where offers are made to offshore investors.[3]

2 This exception is found in section 601ED(2) of the Corporations Act, which provides that a managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made would not have required the giving of a Product Disclosure Statement under Division 2 of Part 7.9 if the scheme had been registered when the issues were made.

3 Corporations Regulations 2001 7.9.07FB modifying section 1012D(8) of the Corporations Act.

Failure to register the managed investment scheme in breach of the requirement to register may lead to the scheme being wound up by order of the Court.[4] Additionally the Corporations Act imposes criminal penalties.[5]

There are additional compliance and disclosure obligations for a registered scheme, as well as statutory duties and financial requirements imposed upon the responsible entity and its officers in connection with the performance of the functions conferred on it by the Corporations Act and the scheme's constituent documents.



A trustee of a registered scheme must be a responsible entity. This entity has the dual responsibility as trustee and manager of a MIS, and although it may appoint a third party entity to undertake management, the RE bears full responsibility for the proper management of the scheme and remains liable for the agent's acts.

A MIS must be registered if it has more than 20 members, was promoted by a promoter of schemes or ASIC has made a determination that it forms part of a closely related group of schemes where the number of all members in the schemes exceeds 20 (subject to certain exemptions).

The general presumption is that a person is a "retail client" unless they fall within one of the wholesale client categories.

Members contribute and pool money or money's worth to derive financial benefits and in return receive interests in a scheme in which they do not have day-today control over the operations.

Very broadly, a person may be a wholesale client if they meet one of a number of categories. These include contributing at least A$500,000 for the initial investment; or making the investment in connection with a business that is not a small business (ie, has more than a specified number of employees); or the investor having net assets of A$2.5 million or gross income for each of the last 2 years of at least A$250,000 or the investor is a professional investor.

There are favourable tax concessions which apply to trusts which qualify as a MIT. To qualify for the various tax concessions that are available to MITs, different requirements can apply, and the requirements are complex, but there are certain basic requirements that must be satisfied for the MIT concessions to be prima facie available. This includes, for example, requirements that the trust must be Australian, must not be a 'trading trust', must be 'widely held' or have sufficient ownership by particular types of institutional investors, be operated or managed by particular types of licensed entities etc.

4 Section 601EE of the Corporations Act.
5 Item 163 of Schedule 3, and sections 1311B and 1311C of the Corporations Act.

Removal of RE of a registered scheme

If a registered scheme is:

- **unlisted:** removal of the RE requires at least 50% of total votes that may be cast by members entitled to vote (including those members who are not present) (extraordinary resolution);
- **listed:** removal of the RE requires at least 50% of the votes actually cast by members entitled to vote present in person or by proxy (ordinary resolution).

Ordinarily, the RE of a registered scheme and its associates are not entitled to vote on a resolution of the scheme if they have an interest in the resolution other than as a member. However, if the scheme is listed, the RE and its associates are entitled to vote on resolutions to remove the RE and choose a new RE.

Winding up registered scheme

The constitution may include a power for the registered scheme to be wound up at a specified time, in specified circumstances or on the happening of a specified event. Such a specified event may include, for example, the giving of a notice by the RE to members, or a vote (typically by extraordinary resolution) of members. In addition to exercising any power under the constitution, the RE may wind up a registered scheme if its purpose has been accomplished or cannot be accomplished.

Constitutional changes of a registered scheme

The constitution of a registered scheme may be amended by:

- special resolution of members (requiring at least 75% of members present and voting); or
- unilaterally by the RE if the RE reasonably considers the change will not adversely affect members' rights.

Additional regulation applicable to listed A-REITS

Listed A-REITs have additional duties and obligations attached to them by the Corporations Act, including:

- **takeovers prohibition:** broadly, a person and their associates are prohibited from acquiring more than 20% of the interests in a listed A-REIT without being required to make a formal takeover offer or obtain member approval of the target entity to the acquisition; and
- **substantial holder disclosure:** mandatory disclosure requirements which oblige members (including their associates) holding an interest of more than 5% (or a movement of at least 1% in their interests once they have a substantial holding) in a listed A-REIT to disclose their interest (or the change in their substantial holding) to the ASX.

In addition to being subject to the Corporations Act, listed A-REITs are also subject to the ASX Listing Rules and must notify the ASX of information which may have a material effect on the price or value of interests in the scheme. These rules require immediate disclosure of price-sensitive information, subject to limited carve outs.

Disclosure requirements of managed investment schemes

If units in a MIS are not exclusively offered to investors who are "wholesale clients", and those investors are in Australia, the responsible entity of the scheme must issue a product disclosure statement (PDS). The PDS must comply with prescriptive statutory standards and set out certain information about the units as may be required for the purpose of enabling a retail client to make a decision about whether to acquire the units. There are some exemptions for small scale offerings and other prescribed situations. There are also ongoing disclosure requirements, such as continuous reporting obligations, which apply to registered schemes.

Financial services licensing

The RE must be a public company and requires an AFSL authorising it to operate that scheme.

In addition, many trustees of unregistered wholesale or private unit trusts also require an AFSL if they carry on a "financial service" in Australia, unless an applicable exception or exemption applies.

To obtain an AFSL, an applicant must satisfy various financial and non-financial requirements set by ASIC, including:

- **in the case of financial criteria**, a certain amount of net tangible assets and in certain circumstances surplus liquid funds of certain amounts; and
- **in the case of non-financial criteria**, evidence that the trustee has adequate resources available to provide the financial services covered by the licence and to carry out supervisory arrangements and adequate risk management systems.

The process of applying for an AFSL is extensive and requires the applicant to provide detailed information and documentary evidence of its organisational expertise and the qualifications and experience of its key personnel.

AFSL holders will have an extensive range of obligations imposed on them, including the requirement to submit a profit and loss statement audit report to ASIC[6] containing an auditors' report displaying compliance with the financial requirements imposed on the AFS licensee by ASIC.[7] Additionally, REs must submit a more extensive audit report containing greater detail relating to its cashflow projections and financial resources.[8]

As foreign financial services providers cannot normally satisfy the requirements to obtain an AFSL, they generally seek to identify one or more exemptions from the AFSL regime and ensure they comply with the conditions of those exemptions so as not to breach Australian financial services licensing laws. This area of law is in a state of flux.

6 Section 989B of the Corporations Act.
7 ASIC Regulatory Guide 166.64.
8 ASIC Regulatory Guide 166.223.

MANAGED INVESTMENT TRUSTS

TAX CONCESSIONS

A number of tax concessions are available for Australian investment vehicles that qualify as Managed Investment Trusts (MITs) for tax purposes. These concessions are designed to encourage investment into Australia, particularly Australian real estate, by both resident and non-resident investors.

The key benefits of qualifying as a MIT are as follows:

- Access to withholding tax concessions for certain foreign investors;
- Ability to make a capital account election; and
- Ability to elect into the attribution (or AMIT) regime.

A trust must satisfy a number of requirements to qualify as a MIT and access these concessions.

As not all trusts will qualify as MITs, global investors seeking to invest in Australian real estate assets through a MIT should ensure that the relevant trust qualifies as a MIT. Most importantly, the activities of the MIT must be, in simple terms, investing in land for the purpose or primarily for the purpose of deriving rent or undertaking certain other prescribed investments.

Requirements to be a MIT

The relevant requirements that must be satisfied to qualify as a MIT are complex and require careful consideration. Some of the requirements include:

- the trust must be a managed investment scheme (MIS) for Corporations Law purposes (which generally means there needs to be more than one investor);
- the trustee must be an Australian resident, or the central management and control of the trust must be in Australia;
- the trust must satisfy certain “widely held” requirements that require the trust to have a minimum number of members (or must be deemed to have a certain number of members). The requirement varies depending upon whether the trust is registered or unregistered; and
- the trust must not fall within certain “concentration of ownership” exclusions that prevent trusts from qualifying as MITs if a particular number of persons or categories of persons (other than certain qualifying investors) hold specified percentages of the trust.

A trust may also satisfy the requirements to be a MIT where it is itself wholly owned by a MIT.

Where a trust qualifies as a MIT, it will only be eligible to be a "withholding MIT" and therefore make eligible distributions at the concessionary withholding rate of 15% (or in certain circumstances 10%) if a "substantial proportion" of the investment management activities of the trust are carried out in Australia.[9] This may require foreign investors to appoint an Australian manager for trusts established to hold Australian real estate assets. This requirement is however relevant only where the trust is seeking to obtain the benefit of the reduced withholding tax concessions.

The "widely held" requirement and the "concentration of ownership" exclusions operate differently depending on whether the trust is a registered MIS or not, or if the trust is wholesale or retail. Further, if any members of the trust fall within certain categories of institutional investors, the "widely held" requirements and "concentration of ownership" exclusions will be much more easily satisfied. Such investors include, for example, other MITs, certain complying superannuation funds, life insurance companies, certain foreign collective investment vehicles, foreign pension funds and sovereign wealth funds. Accordingly, foreign investors that fall within any of these categories, or who co-invest in a trust with an entity that falls within any of these categories, are likely to find the MIT requirements significantly easier to satisfy.

Withholding tax concessions

General concessions

The MIT withholding tax concessions apply to "fund payments" made by MITs to unitholders that are resident in an exchange of information (**EOI**) jurisdiction.

In broad terms, "fund payment" distributions are distributions made by the MIT of any taxable amounts aside from dividends, interest and royalties (such as rent or capital gains on Australian real estate assets) and certain non-concessional MIT income. The rate of tax is:

- 15% for foreign resident investors that are resident in an EOI jurisdiction; or
- 30% for all other investors.

The list of EOI jurisdictions includes the jurisdictions with which Australia has an "effective exchange of information" agreement. Many of Australia's main trading partners (such as the US, UK, Singapore, Japan, and Hong Kong) are EOI jurisdictions. It also includes other financial services hubs including Luxembourg, Cayman Islands, Bermuda, and Liechtenstein.

The 15% withholding tax rate is not, however, available for distribution of non-concessional MIT income. Instead, a flat 30% rate applies to such income which includes:

- income derived via a stapled structure in circumstances where the income is "cross staple arrangement income" of the passive trust (for example, a MIT);
- income in respect of agricultural land and residential housing (other than affordable housing, commercial residential premises, and build-to-rent developments (discussed below)); or
- distributions received from a trading trust.

Income will not, however, constitute "cross staple arrangement income" if, for example:

- the rental income is derived from a stapled entity that carries on business or trading activities, where the cross-staple rent can be traced to the amount of third party rent from land investment charged by an operating entity (e.g. office or logistics arrangements);
- the rent is attributable to an approved economic infrastructure facility;
- the income is, or is attributable to, a capital gain that arises because an operating entity acquires an asset from the passive trust; or
- the income satisfies the de minimis rule (broadly, 5% of the passive trust's assessable income (disregarding net capital gains) for the previous income year).

Limited transitional relief was made available in relation to certain arrangements in place before 27 March 2018.

Clean building MITs

A concessional 10% withholding tax rate is also available in respect of fund payments made by a "clean building MIT" to unitholders that are a resident in an EOI jurisdiction. A trust will qualify as a cleaning building MIT where, amongst other factors, the trust does not derive assessable income from any taxable Australian property other than from "clean buildings" or assets that are reasonably incidental to those buildings.

A building is a "clean building" if:

- the construction of the building commenced on or after 1 July 2012;
- the building is a commercial building that is an office building, hotel (for use wholly or mainly to provide short-term accommodation for travellers) or shopping centre (or a combination of these); and
- the building has at least a 5 Star Green Star rating as certified by the Green Building Council of Australia or a 5.5 star energy rating as accreted by the National Australian Built Environment Rating System.

In the 2023-24 Budget, the Australian Government announced it will extend the clean building MIT concession to data centres and warehouses that meet the relevant energy efficiency standard, and where construction had started after 7:30 pm AEST on 9 May 2023. The measures were announced to apply from 1 July 2025, but have not yet been enacted into law.

9 The relevant investment management activities are those relating to assets of the trust that are situated in Australia, assets that are "taxable Australian property", or that are shares, units or interests listed for quotation on an Australian stock exchange.

Build-to-rent developments

Reforms are currently proposed to improve the commercial feasibility of foreign investment into Australia's build-to-rent (**BTR**) sector by:

- reducing withholding tax rate to 15% for fund payments in respect of rental income and capital gains from "active BTR investments" to foreign resident investors; and
- increasing the capital works deduction rate from 2.5% to 4% for active BTR developments over 40 years (instead of 25 years) (for buildings where construction commenced after 9 May 2023).

Broadly, "active BTR developments" are buildings with 50 or more dwellings that satisfy the following requirements:

- all of the dwellings are available for rent for a period of 3 years or more;
- all of the dwellings are "residential premises", "taxable Australian real property" and not "commercial residential premises";
- all of the dwellings and common areas are owned by a single entity;
- 10% or more of the dwellings constitute "affordable dwellings", meaning rent is capped at 74.9% of the dwelling's market value;
- Dwellings must be available for lease terms of at least 5 years (although a tenant can request a reduced period); and
- for each type of affordable dwelling (with the same number of rooms and broadly the same floorspace), the "number of comparable non-affordable dwellings" is greater than or equal to "the number of comparable affordable dwellings".

To benefit from the concessions, the BTR development must be an "active BTR development" for 15 years. If new dwellings are added to an existing "active BTR development", the 15-year compliance period restarts for those specific dwellings. Failure to comply with the 15-year compliance period will attract a non-deductible "misuse tax", which is essentially a claw back for all the tax benefits obtained (unless the non-compliance is temporary).

Capital account election

MITs can also make a "capital account election", which allows them to obtain concessional capital gains tax (rather than ordinary income) treatment on gains and losses made on the disposal of certain types of assets (such as land).

Obtaining capital gains tax treatment is valuable for:

- **foreign resident investors** who obtain the benefit of the foreign resident capital gains tax exemption upon distribution of the capital gain if the asset disposed of by the MIT is not "taxable Australian property" (i.e. not Australian real property); and
- **Australian investors** who can offset such capital gains against their capital losses and may claim the capital gains discount to reduce the amount of their taxable capital gain.

Please refer to Taxes that apply to Australian real estate investments – taxation of Australian real estate for information on foreign resident capital gains withholding and proposed reforms.

Attribution regime for eligible MITS

MITs that satisfy the relevant requirements are able to elect into the AMIT regime. The AMIT regime is intended to provide greater certainty regarding the tax consequences of investing in certain MITs and reduce the tax administration associated with operating MITs.

The regime also provides a different basis for the taxation of a MIT and its unitholders (being tax on an attribution rather than on a distribution basis).

Other aspects of the regime, such as the integrity rule which will assess the trustee of a MIT on non-arm's length income (subject to certain exclusions) apply to MITs generally, not just those that elect into the attribution regime.

Structuring MIT investments and exits

As a result of these concessions, there can be significant advantages for global investors to structure their investments in Australian real estate through MITs and, in certain circumstances, to co-invest in such structures with other investors.

It is therefore important when making or realising any investment that the transaction is appropriately structured.

For example, where a MIT with foreign resident investors invests in Australian real estate and one of the investors wishes to exit their investment, it may be preferable for the realisation to occur at the level of the MIT, rather than at the level of the foreign resident investor.

This is because, if a MIT makes a capital gain on the disposal and distributes it to the foreign resident investor, the concessional MIT withholding tax rate of 15% is likely to apply to the capital gain, whereas if the foreign resident investor sold their units in the MIT, they would likely have to pay capital gains tax on the gain at a rate of at least 30% (if the foreign resident investor was a company).

In addition, on any exit, this may result in the trust ceasing to qualify as a MIT (for example, if the qualifying person test is no longer satisfied). This again will need to be managed as part of the exit arrangements.

TAXES

Tax – trusts (other than AMITS)

Generally, trusts are not separately taxed in Australia provided there is at least an amount of trust income and the beneficiaries/ unitholders are presently entitled to all of the trust income in an income year.

Broadly, the trust taxation rules provide that the beneficiaries, rather than the trustee, will be taxed on the share of the taxable income of the trust based on the share of the trust income to which the beneficiary is "presently entitled". To the extent that the trust does not fully distribute all of its trust income, the trustee may be required to (proportionately) pay tax on the taxable income of the trust at the top marginal tax rate (currently 47%).

Where a beneficiary is a resident of Australia, they will generally pay tax on the net income of the trust at their relevant marginal rates. As trusts are flow through entities, income distributed from a trust will generally retain its character (e.g. as a capital gain) which will be relevant to the rate of tax application on such income.

If a beneficiary is a non-resident of Australia, a trustee of a trust may be required to withhold (under the general trust taxation rules and/or the MIT provisions) from distribution payments to that non-resident beneficiary at the required rate.

The exception to this treatment is where the trust is a public trading trust. In these circumstances, the trustee will be liable to taxation as if the trust were a company. Generally speaking, a trust is likely to be treated in this way if it:

- **conducts a "trading business"**. That is, it engages in any activities other than an "eligible investment business", which is defined restrictively as investing or trading in various types of passive investments, such as investing in land for the purpose of deriving rent; and
- **is a "public unit trust"**. That is, it is offered to investors (or owned by certain prescribed categories of investors) and does not have ownership that is sufficiently concentrated.

Due to the broad definition of a "trading business", foreign investors who invest in Australian real estate through a trust should be careful to properly restrict the activities of a trust so that it is not a "public trading trust" and taxed as if it were a company. To manage this, it may be useful to engage external service providers to manage and operate any Australian real estate investment that is made through a trust, or in certain situations it may be appropriate to implement a stapled structure (see Investment in stapled securities).

Please refer to Managed investment trust - tax concessions for information on the taxation concessions available to MITs, including reduced rates of withholding tax for certain assets and investors.

Tax – trusts (AMITs)

Under the AMIT regime, a trustee of an AMIT should not itself be subject to Australian tax in respect of the taxable income of the trust in circumstances where the unitholders of the trust are "attributed" all of the taxable income of the trust.

This attribution will be based on the amount and character of taxable income which the trustee chooses to attribute to the unitholders.

One of the benefits of the AMIT regime is that it provides an opportunity for income to be retained in the trust, but for the tax on the net (taxable) income of the trust to still be passed to the unitholders of the trust.

For the AMIT regime to apply, a non-revocable election must be made by the trustee of the trust. If an election was made and that trust subsequently failed to satisfy the requirements to be an AMIT in the future, unitholders would be taxed pursuant to the non-AMIT regime (as set out above).

Tax – companies

For the reasons set out in Establishing a private unit trust of this guide, it is less common for an Australian real estate investment to be made through a company, rather than a trust. Foreign residents may need to consider the Australian corporate tax regime if they establish an Australian company to act as a trustee of a trust or if they invest in Australian real estate through a company.

As a general rule, a company will be an Australian resident for tax purposes if it is:

- incorporated in Australia;
- not incorporated in Australia but carries on business in Australia and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia.

Australian resident companies are subject to tax in Australia on all of their income, regardless of source, at a rate of 30% (or a rate of 25% applicable to certain 'small or medium business' companies).

Foreign residents – income and disposal of interests

Foreign resident companies can be subject to tax in Australia in circumstances where:

- the income derived has an "Australian source" and the foreign resident is not able to rely upon a double tax agreement; or
- notwithstanding being able to rely upon a double tax agreement, the interest that is being disposed of constitutes "taxable Australian real property" (for example, if units in a trust are disposed of, the value of all of the underlying Australian real property assets of the trust (whether directly or indirectly held) are greater than the trust's other assets.

Non-resident capital gains withholding tax

Where a foreign resident disposes of certain taxable Australian property, the purchaser will be required to withhold a non-final withholding tax at a rate of 12.5% of the purchase price (to be increased to 15% from 1 January 2025 under currently proposed reforms), and remit the amount withheld by the Australian Taxation Office. There are certain exemptions and exclusions from the new regime, which need to be considered having regard to the underlying interest that is being disposed of or acquired.

As part of the 2024–25 Budget, the Australian Government announced a suite of changes for non-resident capital gains tax. In summary, the proposed changes involve:

- an expanded scope of taxable Australian property to 'assets with a close economic connection to land and/or natural resources';
- a requirement for foreign resident vendors to notify the ATO before entering into a transaction to sell shares or units for over $20m irrespective of the underlying assets held in the investment; and
- changing the current 'single point-in-time' principal asset test (which test whether an entity holds an indirect Australian real property interest) to a 365-day testing period.

Importantly, the proposed expansion of the scope of 'taxable Australian property' may cause assets that are not traditionally considered fixtures at common law to be treated as taxable Australian real property – and accordingly – taxable on their disposal. While such a change may affect the tax treatment on the divestiture of assets currently treated as chattels (such as wind turbines and solar farms), these changes were announced to have effect from 1 July 2025 and are therefore not expected to affect divestments before this date. Treasury is currently in the process of seeking public consultation on the proposed changes. The detail of the proposed changes is yet to be released.

Thin capitalisation

Australia's new debt deduction limitation regime recently passed Parliament, effective from 1 July 2023 for the general thin capitalisation rules, and 1 July 2024 for the new 'debt deduction creation' rules. The changes are significant, and the rules are complex. Under the thin capitalisation regime, debt deductions (such as interest) of certain foreign entities investing in Australia, Australian entities that are foreign controlled, and Australian entities investing overseas, are limited (subject to an exception applying).

The new thin capitalisation rules provide a choice of one of three tests for calculating an entity's allowable debt deductions. Broadly, a default fixed ratio test which allows net debt deductions up to 30% of the entity's tax EBITDA, an elective group ratio test which may increase the percentage of allowable deductions up to the group's third party debt leverage ratio, and an elective third-party debt test which only permits debt deductions for arrangements which comply with the third party debt conditions.

Although the third party debt test is intended to apply to investors in the real estate and infrastructure sectors, there is ambiguity and technical issues which may make the third party debt conditions difficult to satisfy. The ATO has strictly interpreted the provisions in its draft guidance which is subject to stakeholder consultation. In summary, the third-party debt conditions require that:

- the borrower is an Australian entity;
- the lender is an unrelated third party, and the debt is not held at any time by an associate;
- disregarding minor or insignificant assets, the lender only has recourse for repayment of the debt to "Australian assets" of the borrower or related party, but is not a credit support right, guarantee, or security other than as expressly permitted; and
- the borrower uses all, or substantially all, of the proceeds to fund its commercial activities in connection with Australia.

The above conditions are modified by the conduit financier conditions which are intended to allow conduit financing arrangements to satisfy the third party debt test.

In many cases, real estate projects including build to rent projects will need to rely on the third party debt test to access debt deductions. Whilst the default fixed ratio test could be an alternative, it would likely apply to deny a significant amount of debt deductions, particularly in the early years of the project prior to income generation (i.e., a denial of debt deductions over 30% of tax EBITDA). Although there is the ability to carry forward denied deductions under the fixed ratio test for up to 15 years, this is subject to the satisfaction of the continuity of ownership or business tests (similar to the rules that apply for tax loss utilisation). It is therefore important to consider the thin capitalisation rules from the outset of a project as it may impact on the financing structure, including the nature of any credit or parent support.

The debt deduction creation rules apply in priority to the thin capitalisation rules (but are switched off for taxpayers electing to apply the third party debt test) to completely deny debt deductions incurred in relation to associate debt used:

- to acquire an asset or obligation directly or indirectly from an associate (excluding the acquisitions of new membership interests in Australian entities or foreign companies, new tangible depreciating assets, and new loans to associates); or
- to fund certain payments or distributions to another associate (including dividends, returns of capital, cancellations or redemptions of membership interests, and royalties).

Stamp duty

In Australia, stamp duty is payable on a number of different transactions, including the purchase of real estate. Each of the states and territories have their own stamp duty regimes and impose duty on a range of different transactions. As such, the same transaction could have different stamp duty implications depending on the jurisdiction in which the subject property is located.

Each Australian State and Territory levies transfer duty on the transfer of land or any interest in land in that State or Territory. A direct acquisition of real estate in Australia will therefore be subject to stamp duty in the particular State or Territory in which the target asset is located.

An indirect acquisition in Australian real estate made by way of an acquisition of shares in a company or units in a unit trust may also give rise to a liability duty known as "landholder duty". For landholder duty to apply:

- the target company or unit trust must have land valued at or above a certain threshold, which differs across the states and territories (e.g. currently A$500,000 in Northern Territory, A$1 million in Victoria or A$2 million in NSW);
- the interest acquired must itself entitle the acquirer to an interest in the "landholder" at or above the acquisition threshold which applies to the specific State or Territory. Broadly speaking, the acquisition thresholds in each Australian State or Territory depend on whether the specific "landholder" is a company or unit trust, whether or not that entity is listed on the ASX or a recognised securities exchange and, if the landholder is a trust, whether it qualifies as a wholesale unit trust (e.g. the acquisition threshold in NSW is 20% for a private unit trust scheme or 50% for a registered wholesale unit trust scheme or private company); or
- the interest acquired does not itself entitle the acquirer to an interest at or above the acquisition threshold but the interest, when aggregated with other interests held by the acquirer or its associates results in an aggregated interest in the "landholder" above the acquisition threshold.

In addition to the duties which apply to direct and indirect acquisitions of land as outlined above, a number of states (currently NSW, Victoria, Queensland, South Australia, Western Australia and Tasmania) have also introduced what is commonly referred to as a "foreign purchaser surcharge" of up to 8%. Broadly speaking, the surcharge applies where a "foreign person" directly or indirectly acquires "residential land". The meaning of "foreign person" and "residential land" varies between the jurisdictions.

The statutory liability to pay transfer duty in Australia is generally borne by the buyer. In Queensland and South Australia, the transacting parties are jointly and severally liable to pay the duty (although the usual commercial practice is for the buyer to pay the duty).

Victoria has recently commenced state tax reform which involves moving from levying transfer duty and landholder duty on commercial and industrial property to an annual property tax known as commercial and industrial property tax (CIPT). The details of this reform are complex but, broadly, commercial and industrial land in Victoria enters the CIPT regime if 50% or more of the land is transacted on or after 1 July 2024. From 1 July 2024, a relevant transaction involving a 50% or greater interest, directly or indirectly, will cause the entire property to be subject to CIPT after 10 years.

The rate of CIPT will be a flat rate of 1% (or 0.5% for eligible 'build to rent' property) of the taxable value of land for land tax purposes (which is usually the site value).

GST

Investment in Australian real estate will generally be subject to Goods and Services Tax (GST). GST is a broad-based tax payable on 'taxable supplies'. It is calculated at the rate of 10% on the value of the supply of a broad range of goods, services, rights and other things acquired in, or in connection with, Australia. It is conceptually similar to the value added taxes operating in many OECD countries.

With the exception of GST payable on the sale of new or potential residential property (which is required to be paid to the ATO by the purchaser), the liability to remit GST is on the supplier of the GST items. On a transfer of real estate, this would be the seller. The seller will usually seek to recover its GST liability from the recipient, namely the buyer, under the contract of sale.

If the buyer is carrying on an enterprise and is registered (or required to be registered) for GST purposes, in most cases it will be able to claim an input tax credit equal to the GST included in the price paid for those acquisitions for which the supplier is liable. Accordingly, it is intended that the GST liability will flow through the supply chain to the end consumers who will ultimately bear the cost of the GST because they are not registered (or required to be registered) and so cannot claim input tax credits.

A transfer of units in a unit trust (which holds an interest in Australian real estate) is not subject to GST, as it is a financial supply. The same result should apply to a transfer of shares in a company which holds an interest in Australian real estate.

An entity must register for GST if it is carrying on an enterprise in Australia and its current or projected annual turnover is equal to or exceeds the relevant threshold, which is generally A$75,000. An entity may also be required to register even if it is not carrying on an enterprise in Australia but is making supplies that are connected with Australia and its annual turnover of supplies connected with Australia exceeds the relevant threshold.

The concept of an entity is very broad for GST purposes; it extends beyond natural persons and companies to include entities which are not legal entities, such as trusts, partnerships and government entities. This is the case even though such entities may not be considered an entity under the general law.

An entity who is carrying on an enterprise in Australia may choose to register even if it does not meet the turnover threshold (discussed above). An entity should consider the benefits of voluntary registration. Benefits include the entitlement to claim input tax credits (which cannot be claimed if the entity is not registered). Input tax credits can offset the GST included in the price paid for GST items acquired and GST on importations if they are for use in carrying on its enterprise.

"Going concern" concession

The "going concern" concession is important for investments in Australian real estate. If the requirements of the going concern concession are met, then the transfer of real estate may be GST-free. If a building is transferred with leases and service contracts in place, then generally the transfer should be treated as a "supply of a going concern" and will be GST-free. The "going concern" concession from GST is particularly useful because stamp duty is imposed by the various states and territories on the purchase price plus any GST.

"Margin scheme" concession

The "margin scheme" is a concessional scheme which allows GST payable on the transfer of certain real estate to be reduced, subject to agreement by the buyer and the seller. If the margin scheme applies, GST is payable on the margin between the sale price and either the amount the seller paid for the property or (if the seller acquired the property before 1 July 2000) the value of the property provided in an approved valuation as at 1 July 2000 (which is when GST was introduced in Australia), rather than on the sale price. The margin scheme can be used by sellers who purchased the sale property before 1 July 2000. If the sale property was purchased after 1 July 2000, the margin scheme can only be used by sellers in certain limited circumstances (for example, if the seller acquired the sale property using the margin scheme).

If the parties apply the margin scheme to a sale of real estate, the buyer will not be able to claim input tax credits for GST paid. This makes the application of the scheme appropriate primarily where the end buyer would not be able to claim input tax credits (and so a reduction in the GST amount is worthwhile); for instance, where the buyer is not registered for GST or is a private individual.

Land tax

Land tax is imposed by each of the states and territories on the ownership of real estate within the State or Territory (but, up until 1 July 2022, only on certain vacant land in the Northern Territory). Land tax is levied annually on the unimproved value of all non-exempt land held by the "owner". In general, land tax is not levied on property if it is a principal place of residence of the owner who is a natural person or is exempt under the relevant land tax legislation. Victoria also has a special regime which imposes a trust surcharge (at rates higher than the ordinary rates) on landholdings held on trust if the total taxable value of the land that the trust owns is more than A$25,000 but less than A$3 million. Technically speaking, if the trust has landholdings with total taxable value of more than A$3 million, the trust surcharge is still levied in place of the ordinary rates (but its rates are the same as the ordinary rates).

In addition, a number of states (currently NSW, Victoria, Queensland and ACT) impose a land tax surcharge (or absentee surcharge) on foreign or absentee holders of residential land (although in Victoria, the absentee surcharge applies in respect of all land). This additional surcharge ranges between 0.75% and 2%.

As outlined above, Victoria has recently commenced state tax reform which involves moving from levying transfer duty and landholder duty on commercial and industrial property to an annual property tax known as commercial and industrial property tax (CIPT). While CIPT is different, and in addition to land tax, it will likely have operational aspects that are similar with land tax once it commences.

Municipal rates

Municipal rates are the most common levy imposed on the value of land serviced by local or municipal governments.

For further information on tax and duty, including table summaries please see Appendix - Tax and Duty Attachments

FINANCING

Standard terms of debt financing

Australian banks typically require certain conditions to be met before financing property acquisitions or developments. At a minimum, these conditions include:

- **Current Valuation:** A current valuation of the target asset (not older than three months).
- **Loan-to-Value Ratio (LVR):** Confirmation that the proposed loan amount aligns with the lender's LVR requirements. LVR measures the loan amount relative to the property's value.
- **Interest Cover Ratio (ICR):** For investment loans, assurance that the borrower can meet the debt service obligations, often measured by an ICR, which compares the property's income to its interest expenses.
- **Loan-to-Cost Ratio (LTC):** For development loans, confirmation that development costs will not exceed the pre-agreed budget and that the proposed loan amount aligns with the lender's LTC criteria. LTC measures the loan amount relative to the total development cost.

The specific LVR, ICR, and LTC requirements depend on the quality of the borrower/sponsor and the type of property involved. For instance, when a real estate Investment Trust (REIT) acquires commercial real estate, LVRs typically range from 40-55%, with ICRs between 1.40-2.0x. Institutional developers generally see LTC ratios between 70-75% for commercial real estate projects. However, some banks are now offering more flexible terms for build-to-rent (BTR) projects, with LTC ratios of up to 80%, provided the developments meet certain sustainability and affordability criteria.

Lender requirements usually encompass:

- **Security:** Typically, a first-ranking mortgage over the relevant real estate, along with asset security from the borrower and security over the shares or units in the borrower. For development financing, this may also involve the provision of collateral for cost overruns.
- **Insurance:** Coverage for the property and its improvements, at no less than the replacement value, with the lender noted as an interested party.

- **Legal Due Diligence:** Satisfactory legal due diligence on the property, including title analysis and review of significant documents, as well as verification of any pre-sales or rental income.
- **KYC and Financial Assessment:** Compliance with Know Your Customer (KYC) processes and a thorough assessment of the sponsor's financial position.

In residential development cases, lenders often require a certain level of pre-sales, ensuring these transactions are at arm's length and comply with consumer protection laws at both federal and state levels. Due to recent challenges in securing pre-sales, the required levels have decreased from historical norms. Some lenders are now offering staged financing, where funding is released in tranches based on the achievement of certain milestones (e.g., completion of foundation work, framing, etc.), reducing the need for high levels of pre-sales upfront.

Additionally, it is common for lenders to limit pre-sales to foreign buyers due to the added costs and procedural risks associated with enforcing sales contracts across jurisdictions.

The rise in mezzanine financing has also led to the rapid evolution and sophistication of intercreditor arrangements within the Australian market, particularly in transactions involving foreign investors or cross-border financing. However, the foundational role of bank debt remains critical.

Personal Property Securities

Security interests in personal property are regulated by the Personal Property Securities Act 2009 (Cth) (PPSA), which applies to personal property security interests and establishes a framework for registration, priority, and enforcement. A security interest's priority can be established by registering it on the PPSA register or, for certain property types, by taking control or possession of the relevant items.

Without a perfected interest, a security holder may face:

- **Priority Risk:** The possibility that another security interest may take precedence over theirs.
- **Taking Free Risk:** The chance that someone else may acquire an interest in the personal property free from the security holder's claims.
- **Vesting Risk:** The risk that the security interest may not survive the grantor's insolvency.

While the PPSA does not govern real property, it significantly impacts real estate financing transactions. For example, while land leases and fixtures are exempt, leases involving goods or unfixed items of equipment must be registered under the PPSA to protect the secured party's interest.

Without this registration, a party with a security interest against the tenant could hold a superior claim over those goods or equipment, despite the landlord's ownership.

PPSA considerations also arise in financing transactions where security is taken over rent accounts, goods on the property, or intellectual property associated with a business operating from real estate. Proposed amendments to the PPSA aim to streamline the registration process and clarify priority rules, particularly for complex financing arrangements involving multiple secured parties. These amendments, once enacted, could reduce legal uncertainties and improve the efficiency of real estate finance transactions.

Thin capitalisation

Australia's new debt deduction limitation regime, which includes significant changes to the thin capitalisation rules, was recently passed and came into effect on 1 July 2023, for general rules and 1 July 2024, for new 'debt deduction creation' rules. These rules impose limits on debt deductions, such as interest, for certain foreign entities investing in Australia, foreign-controlled Australian entities, and Australian entities investing abroad, with some exceptions. The revised thin capitalisation rules offer three tests for determining allowable debt deductions:

- a default fixed ratio test allowing deductions up to 30% of the entity's tax EBITDA;
- an elective group ratio test that can increase allowable deductions based on the group's third-party debt leverage; and
- an elective third-party debt test that restricts deductions to arrangements meeting specific conditions.

The third-party debt test, which primarily targets investors in real estate and infrastructure, has complex conditions that may pose challenges for compliance. These conditions stipulate that the borrower must be an Australian entity, the lender must be an unrelated third party, and repayment must be solely from the borrower's Australian assets. Additionally, proceeds from the debt must primarily fund commercial activities in Australia. While the default fixed ratio test could serve as an alternative, it may deny a substantial amount of deductions, particularly in the early stages of projects.

The newly introduced debt deduction creation rules take precedence over the thin capitalisation rules, denying deductions for associate debt used to acquire assets from an associate or fund certain payments to associates, unless specific exceptions apply. This emphasises the need for careful consideration of thin capitalisation rules during project planning to ensure optimal financing structures.

For more information please see KWM's guide on Australia's new debt deduction limitation regime

REAL ESTATE LAW

Australia is a federation comprised of six states and three mainland territories.

The states are New South Wales (NSW), Victoria (VIC), Queensland (QLD), South Australia (SA), Western Australia (WA) and Tasmania (TAS). The mainland territories are the Australian Capital Territory (ACT), the Northern Territory (NT) and the Jervis Bay Territory.

The laws affecting real estate investments have their source in both government legislation and regulation (at Commonwealth, State or Territory, and local government levels) and the general (or common) law developed by the courts.

COMMONWEALTH/ FEDERAL

The Commonwealth has power derived from the federal Constitution to legislate in relation to specific areas including corporations, trade and commerce, taxation, banking and foreign investment. For example, the *Corporations Act 2001* (Cth) is the federal legislation that governs managed investment schemes, financial services licensing and foreign company registration.

STATE & TERRITORY

Subject to Commonwealth laws, the States and Territories make laws which apply to their own jurisdiction. It is the State-based legislation that covers many general property matters, including land title and environmental matters.

LOCAL GOVERNMENT

Local governments (or councils) provide governance for communities at a more local level, including on environmental aspects, permitted uses of land and building approvals. There are usually many local government areas and bodies within the capital city of each State and Territory.

COURTS

Legislation is supported by case law (known as common law) which is developed through decisions of the courts. The system of binding precedent requires the courts to consider the precedent established in earlier cases, and in this way Australian real estate law is progressively developed and adapted.

HOW AUSTRALIAN REAL ESTATE CAN BE OWNED

FREEHOLD

Freehold ownership (otherwise known as an estate in fee simple) is unlimited in time. This is the most common form of real estate ownership in Australia and is the highest form of ownership, closest to absolute ownership. The freehold owner can grant a lease of its freehold interest for a specified (and limited) period, but possession will ultimately revert to the freehold owner or its successors.

LEASEHOLD

Leasehold ownership has a finite limit in time. The leasehold owner is granted exclusive possession of specific real estate for a specified period. Leasehold interests for commercial real estate are usually granted for fixed periods and may include option rights for further terms. The owner of a leasehold estate is typically required to pay annual rent (in monthly instalments).

Longer leasehold interests are occasionally granted (typically for 99 years or more) and the terms of such leases are less restrictive and more akin to owning the freehold, typically these leases include the payment of an upfront premium instead of an annual rent.

CROWN LAND

Crown land is the term used to describe land which is owned by the Commonwealth, or a State or a Territory of Australia.

The Crown's power to sell, lease or otherwise dispose of Crown land is usually subject to conditions and restrictions contained in State or Territory-based legislation. There are parts of Australia, such as the ACT, where long term leases of Crown land are a common form of ownership.

TITLE ESTABLISHMENT

Registered land

Torrens system of registration

Australia operates a system of land registration known as the Torrens system. Under this system, title to real estate is created by the act of registration. This means that on a sale of Torrens system land, the buyer obtains legal title on registration of the transfer, rather than on execution of the instrument of transfer.

Registration under the Torrens system provides "indefeasibility of title". This means that when a title interest is registered on the relevant land registry, the title is guaranteed to be secure. There are only a small number of exceptions to the principle that the registered title is definitive evidence of ownership (for example, fraud, and other certain statutory exceptions). This provides a significant level of protection for property investors, as it ensures that their ownership rights are upheld by the law. The concept of indefeasibility is further explored in Indefeasibility.

It is due in large part to the transparency and reliability of the Torrens system of registration that Australia holds a top-5 rank in the Jones Lang LaSalle Global real estate Transparency Index 2024 (**Transparency Rankings**). This industry benchmark ranking is useful in assessing market transparency on a global-scale and is an essential guide for cross-border investors, lenders, developers and occupiers of real estate.

The Transparency Rankings are based on a criteria of investment performance, market fundamentals, listed vehicles, regulatory and legal, transaction processes and sustainability.

Australia's position within the top 10 global markets, based on the Transparency Rankings, are below.

RANK	COUNTRY	SCORE
1	United Kingdom	1.24
2	France	1.26
3	United States	1.34
4	Australia	1.37
5	Canada	1.49
6	Netherlands	1.49
7	New Zealand	1.59
8	Ireland	1.72
9	Sweden	1.77
10	Germany	1.79

Source: JLL, Global real estate Transparency Index, 2025

What does this mean for investors?

Australia's position in the Transparency Rankings provides investors with a reputable guidepost when investing in cross-boarder real estate. This is essential from a risk management and strategy standpoint.

RISK MANAGEMENT

Scores of the Transparency Rankings assists investors in assessing risk premiums in international markets. This is essential in determining future investment returns.

STRATEGY

Transparency of information in jurisdictions with a high global position enhances decision making. Markets with a lower ranking may require higher due diligence costs due to the need for knowledgeable advisory and local partners.

State-based public register

Each State or Territory maintains a real estate title register, which is a public repository of information on real estate tenure and interests managed by or on behalf of the State or Territory government.

Although the rules, requirements and forms differ across the jurisdictions, the registers contain title information and details of registered interests affecting the land. Examples of registered interests include easements, restrictive covenants, mortgages and leases.

Title to Torrens system land is recorded on a certificate of title which is issued by and kept at the registry in either electronic or paper form (depending on the State or Territory). For those States and Territories that still issue paper certificates, a duplicate certificate of title is issued to the registered owner.

Electronic conveyancing

Conveyancing is the process of transferring ownership and other interests in real estate from one person to another, and typically involves the preparation, verification and lodgement for registration of a range of legal documents and instruments. The conveyancing industry in Australia has recently undergone a digital transformation with a nation-wide roll-out of an electronic lodgement and settlement system known as PEXA.

The PEXA system provides a secure online portal to an electronic workspace where registered parties (such as legal and conveyancing practitioners, financial institutions, and government bodies) can complete and lodge instruments, verify stamp duty, complete transfer of funds and otherwise settle in real time the transfer of interests in real estate. Depending on the State or Territory, it is mandatory to use PEXA for certain conveyancing transactions.

Overall, this digital transformation translates into lower fees and disbursements for investors, in addition to the breakdown of geographical barriers.

Indefeasibility

In Australia, the Torrens system is underpinned by a principle known as 'indefeasibility'. Registration of title provides indefeasibility – that is, once a transfer or grant of title to the land is registered then, as a general rule, the title cannot be defeated by other unregistered interests. This means that on registration, the registered owner of the land acquires its interest subject to earlier registered interests but free from all unregistered interests (even if the acquirer knew about those unregistered interests).

Indefeasibility ensures ownership rights other than as provided by certain statutory exceptions, and very specific common law exceptions. The exact scope of these exceptions varies between the respective States and Territories, but generally includes fraud, short-term leases, easements, misdescription of boundaries and, sometimes, adverse possession.

Legislation in most States and Territories provides for compensation to be payable to persons who suffer loss as a result of the operation of the system, for instance where fraud occurs or there is an error or omission in the registry.

Practically, the effect of indefeasibility of title is that a buyer of real estate in Australia can generally rely on the certificate of title (whether paper or electronic) as evidence of title. Time and expense do not need to be incurred in investigating title beyond the relevant Torrens register, other than in respect of the specific statutory exceptions.

Given Australia's 'title by registration' system, title insurance is generally not obtained as part of real estate acquisitions in Australia. This is because Torrens system land protects title once registration has occurred.

Unregistered land

Not all land in Australia is registered and so the Torrens system of title by registration does not always apply.

The two main types of unregistered land are unalienated Crown land (that is, land owned by the Commonwealth, a State or a Territory that has not previously been the subject of a grant of title) and land falling under the old pre-registration system (known as 'general law' land).

If land of either type is the subject of an investment, additional due diligence is undertaken as there is no registered title to rely on.

Native title

Australian law recognises Aboriginal and Torres Strait Islander people's traditional rights and interests in land through native title. A native title claimant can make an application to the Federal Court to have native title rights recognised in certain circumstances. Unlike the State-based public registers noted above, there is a separate Commonwealth register specifically for native title claims. Native title rights do co-exist with some forms of title such as pastoral leases and Crown land but are extinguished by others, including freehold title.

Aboriginal freehold land

Aboriginal Freehold Land is a form of interest limited to the Northern Territory under the Aboriginal Land Rights (NT) Act. This refers to former Aboriginal reserves converted into permanent Aboriginal Freehold Land. Although this cannot be sold or gifted, it may be leased by the Aboriginal land trusts which sign agreements on behalf of Traditional Owners.

Exploration activities (such as mining and petroleum activities) on Aboriginal Freehold Land must obtain consent from the Traditional Owners and the relevant federal minister, in addition to reaching an agreement by all parties.

LEASES

Commercial leases are the product of negotiations between a landlord and a tenant

The value of commercial real estate will be affected by leases granted by the owner of that real estate. Commercial leases in Australia are the product of negotiations between a landlord (being the freehold or leasehold owner of the relevant real estate) and a tenant, typically through a real estate leasing agent acting on behalf of the landlord.

Lease terms in Australia are negotiated in the context of market standards and practice, and there are also terms implied by legislation and common law. In particular, there is a large body of retail tenancy legislation (specific to each State or Territory) which has been developed to protect retail tenants, especially smaller specialty tenants. Generally, the parties cannot contract out of that legislation. There is also State and Territory specific legislation in respect of residential leasing.

A summary of the key features and usual terms of office and retail leases (subject to retail lease legislation) in Australia is set out over the page, indicating the key differences between the two types of leases.

Key features and usual terms of office and retail leases

LEASE TERM	OFFICE LEASE	RETAIL LEASE (SUBJECT TO RETAIL LEASE LEGISLATION)
Duration	Freely negotiable. 3 to 5 years common for smaller tenancies 10 years or more not unusual for major tenants	Minimum length 5 years, except in New South Wales and Queensland
Payment of rent	Monthly	Monthly
Rent review	Annual increases, usually by fixed percentage or consumer price index (CPI) Market review common on lease renewal	Similar to office leases. Turnover rent may also be payable
	Upwards-only rent reviews common, although cap and collar provisions not unusual	Upwards-only market rent review clauses generally unenforceable
Outgoings recovery	Recovery of all outgoings ("Triple-net") uncommon – structural and capital costs generally excluded	Often gross rent payable (the rent payable includes an amount for outgoings). Generally, the liability to pay the amount must be disclosed in the landlord's disclosure statement
	Other costs, including insurance, usually recoverable	Certain outgoings not recoverable, e.g. land tax not recoverable and a cap on increases in management fees applies
Repair	Tenant usually responsible for maintenance and repair of interior of premises Landlord responsible for structural and capital costs usually excluded	Landlord's repair obligations wider, e.g. responsible for maintaining structure and fixtures and plant and equipment relating to services; compensation sometimes payable
Insurance	Landlord insures the building and recovers cost as outgoing Tenant insurances generally include public liability and tenant's property	Same as office lease
Assignment/subletting	Usually permitted with landlord's consent and subject to conditions Original tenant usually retains liability following assignment	Grounds upon which landlord may withhold consent generally limited. Original tenant generally released from liability following assignment, on compliance with procedural requirements
Change in control	Landlord consent generally required, unless the tenant is listed	Same as office lease
GST	GST payable on rent. Tenant generally required to gross-up rent payments to include GST – this must be expressed in the lease	Same as office lease
Renewal right	Freely negotiable. No general implied right	No general implied right, but landlord usually has notification obligations
Security	Bank guarantee for 3-12 months' gross rent common, depending on tenant covenant strength Security bond less common	Same as office lease
Dispute Resolution	As agreed in the lease document	As determined by the regime in the specified retail leasing legislation
Obligations on tenant upon expiration	Usual obligations of the tenant include removal of tenant property and returning the premises to a specified degree (i.e., "make good")	Same as office lease
Associated documents prior to commencement	Heads of terms usually signed (not required)	Same as office lease, however tenant disclosure statement in the specified form under state/territory legislation required

INFORMATION THAT A SELLER MUST DISCLOSE TO A BUYER

In real estate transactions, the general rule is caveat emptor or buyer beware

Buyer beware

The buyer must carry out and rely on its own due diligence with regard to the physical condition of the target asset and other matters affecting the value of the buyer's proposed investment.

From a legal perspective, a due diligence would usually involve::

- a title review, to verify good, marketable title
- an occupancy review, to verify net income and assess any impact on the investment value
- a planning review, to confirm the current use of the target asset complies with the planning scheme
- a review of environmental registers maintained in the various jurisdictions, and any environmental reports in respect of the target asset, to ascertain any environmental liabilities relating to the target asset
- a review of service contracts and other arrangements that may affect the target asset after settlement
- a litigation review, to identify any litigation affecting the target asset or the entities in the structure that holds the target asset
- a corporate review of the entities in the structure, including for compliance with Corporations Act requirements, if the acquisition is of an interest in a corporate or trust structure that holds the target asset
- a taxation due diligence on the entities in the structure, if the acquisition is of an interest in a corporate or trust structure that holds the target asset, to identify any taxation liabilities and confirm compliance with taxation reporting and return requirements.

The seller will assist the buyer in its due diligence by making disclosure of relevant documents, including copies of all current leases, service agreements and licences.

Legislative disclosure obligations

Most States and Territories have in place legislative regimes requiring the seller to disclose specified matters to the buyer which might impact on the title to the target asset or its use and enjoyment. The sort of information which a seller is required to disclose usually includes information on the title and other information available from statutory or local authorities showing, for example, information such as land tax, municipal and water rates and planning scheme details.

If the seller supplies false information, or fails to supply all required information, the buyer may be entitled to rescind the contract for the sale and purchaser of the target asset.

If the seller does so knowingly, or recklessly, it may also be exposed to a civil penalty.

Consumer protection premised legislation also makes it an offence for the seller to engage in misleading or deceptive conduct or make a false or misleading misrepresentation in connection with the sale of an interest in land. Silence can be sufficient to establish misrepresentation if it would lead a reasonable person to believe that a particular state of affairs exists when it does not. If the buyer suffers loss arising from the misrepresentation, it is entitled to recover compensation for the amount of the loss.
A pecuniary penalty may also be imposed on the seller.

Other due diligence

Aside from legal due diligence, a buyer will also usually engage:

- a valuer to advise on the valuation of the target asset
- a technical due diligence consultant, to review the physical condition of the target asset and its services and compliance with relevant building regulations and code requirements
- a surveyor, to assess whether the target asset (including any buildings is located within the title boundary)
- an environmental due diligence consultant, to assess whether (including any buildings) are likely to be contaminated or contain hazardous substances
- if the acquisition is of an interest in a corporate or trust structure that holds the target asset, an accountant to review the accounts of the entities in the structure.

LIABILITIES A BUYER ASSUMES ON A DIRECT REAL ESTATE ACQUISITION

General liabilities

Generally, on transfer of ownership, the buyer will assume liability for matters relating to the target asset, such as liabilities under leases.

The contract would often provide for the seller to retain responsibility for pre-completion liabilities, and the buyer to assume responsibility and indemnify the seller for post-completion liabilities. Sometimes a buyer will want to take over the service contracts that relate to the target asset which would usually require a novation of those service contracts.

The buyer would usually seek to protect itself by obtaining contractual warranties from the seller in respect of specific risks that cannot be confirmed or quantified during due diligence.

It is increasingly common for parties to take out warranty and indemnity insurance to protect against the risk of breach of a warranty or claim under an indemnity given by the seller. The effect of such policies is to transfer the risk of loss in connection with the breach of warranty or indemnity from the seller to the insurer.

While the policy can be taken out by the buyer or the seller, the majority of these policies are taken out by the buyer so that it has direct recourse to the insurer in the event of a breach of warranty. The obligation for the payment of premiums in connection with the policy can be a matter for commercial negotiation and is often dealt with in the contract.

Environmental liabilities

Liability for environmental matters, such as contamination and pollution, is important given the potentially significant costs of clean-up and remediation.

All States and Territories in Australia have environmental legislation addressing pollution and contamination. The relevant Environment Protection Authority is generally able to serve clean-up and remediation notices either on the original polluter or the land owner or occupier. At a Commonwealth level, the Commonwealth's Environmental Protection and Biodiversity Conservation Act 1999 focuses on matters of national significance, requiring developers to seek approval for projects that may significantly impact these areas. At a State and Territory level, laws regulate pollution control and environmental management, often necessitating assessments and licenses for developments.

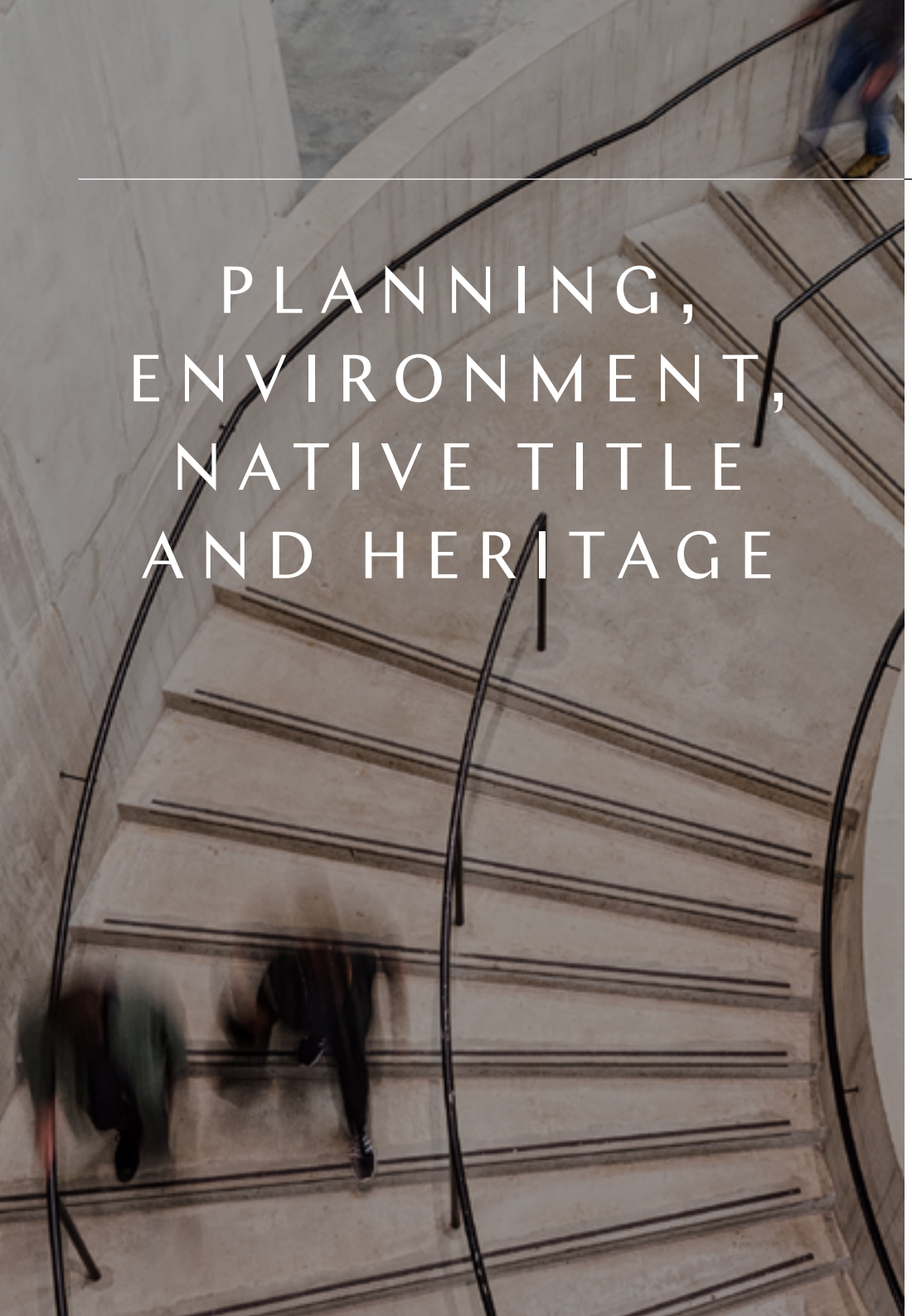
A land owner may also be liable to others including adjacent land owners if contamination migrates from its site to other sites or nearby watercourses. Liability may exist even though at the relevant time the operations were lawful and had the approval of the environmental authorities. This means that a land owner can be liable for contamination that predates its period of ownership. For that reason, it is important to make sure that specific risks and liabilities are assessed during due diligence and a suitable risk allocation is reflected in the contract.

If an investor is aware, or becomes aware, of an indemnity agreement or provision in which the owner or seller accepts responsibility for all costs associated with contamination, this should be considered. Legal advice should be obtained in relation to the enforceability of the agreement or provision.

Although not an exhaustive list, the following table outlines the nature of enquiries to be made when determining contamination risks in Australian real estate investments.

Enquiries to be made when determining contamination risks

CONTAMINATED LAND REGISTER	Is there any reporting available on the property in relation to contaminated land registers? Particular attention is to be had in relation to whether there is any documented asbestos presence, along with an asbestos management plan?
PENDING AUDIT	Is the property subject to an audit on the contaminated land register?
REGULATED ACTIVITIES	Are the activities and operations on the property subject to an environmental licence, regulatory consent or otherwise?
PENDING INVESTIGATIONS	Is the land subject to any pending investigations in relation to contamination issues?
HISTORICAL USE	Is there any evidence of past harmful or potentially contaminating activities on the property?
PLANNING CONTROLS	Does the property have an environmental planning overlay that may limit land use and development or require an environmental audit for development approvals?
BUSHFIRE & FLOOD PRESENCE	Is the property located in a bushfire or flood prone area?
COMPLIANCE WITH RELEVANT STATE/TERRITORY MANAGEMENT FRAMEWORK	Is the property compliant with the relevant legislation and guidelines in relation to contamination management?
ADJOINING LAND	Is there any adjacent land which may be subject to any contamination concern above, whether historical or ongoing? Examples of aspects to consider in relation to adjacent land includes: • inappropriate storage or disposal of hazardous materials; and • presence of operations relating to gas stations, chemical plants, etc. which may involve potential land contamination.



PLANNING, ENVIRONMENT, NATIVE TITLE AND HERITAGE

PLANNING REGULATION

Planning controls

Land use is heavily regulated through statutory planning instruments and development controls. Each State and Territory has its own system of zoning land to assign permissible and prohibited uses, including uses that are only permissible if the developer has obtained planning approval. In addition to land uses, these planning instruments regulate features of the proposed built form like design, maximum height, maximum gross floor area, measures to mitigate impacts on biodiversity, and measures to mitigate the impact of other natural hazards (including bushfire and flooding) and heritage (including Aboriginal cultural heritage).

Planning approvals

A planning approval will generally be required for a change in land use and/or the construction of the associated buildings. Consent authorities empowered to grant an approval range from local Councils to the state government (for major projects and infrastructure). Planning approvals are also conditional.

These conditions may include the time within which the building or parts of the building are to be completed to avoid the approval lapsing, the construction of the built form in accordance with approved plans/documentation, hours of operation, ways to offset amenity impacts, payment to the authorities for development contributions and/or the dedication of land.

In carrying out due diligence in connection with a planning approval, investors should ensure that the land under consideration has the benefit of any necessary planning approvals and that the buildings constructed on the land have been built in accordance with those approvals. This is because the absence of the requisite approvals attracts the risk of orders being made by a consent authority to cease an impermissible use or rectify/demolish works that were constructed without approval. Investors should also check whether the applicable planning controls or conditions on planning approvals may limit future expansion of existing premises (either in whole or in part via the planning controls, such as height and floor space ratio limits) or unusually restrict the current use of the land (for example, restrictive hours of operation).

Approval process

Any proposed new development (including modifications to an approved development) must undergo an assessment process under the planning and/or environmental legislation of the relevant State or Territory. There are generally merits appeal rights to State or Territory courts or tribunals in relation to decisions arising out of the assessment process (i.e., if you are dissatisfied with the consent authority's decision). In some instances, a third-party (such as community objectors or government authorities) may commence merits appeals or judicial review proceedings. Obtaining development approvals can take some time (approximately, 12-18 months if not longer), although States tend to offer a streamlined assessment process for major projects.

Environmental regulation - commonwealth

The *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) is the primary Commonwealth environmental statute, which regulates 'actions' (such as a development) that have, or are likely to have, a significant impact on one or more of the following 'matters of national environmental significance' (**MNES**):

1. world heritage areas
2. national heritage places
3. wetlands of international importance (listed under the Ramsar Convention)
4. listed threatened species and ecological communities
5. listed migratory species protected under international agreements
6. Commonwealth marine areas
7. the Great Barrier Reef Marine Park
8. nuclear actions (including uranium mines), and
9. water resources (in relation to unconventional gas development and large coal mining development).

Proposed actions which may significantly impact on the above matters may be 'controlled actions' under the EPBC Act, which require an additional level of approval from the Commonwealth Government. Sometimes, the assessment is carried out by the State or Territory governments first under bilateral agreements to expedite the Commonwealth's subsequent assessment. Carrying out a controlled action without an approval (or a decision from the Minister that an approval is not required) is a serious offence.

The Commonwealth Government's Nature Positive Plan proposes reforms to the EPBC Act, which have been split into 3 stages. The first stage (which included establishing a world-first Nature Repair Market and expanding the water trigger under the EPBC Act) has become law, while stages 2 and 3 have been shelved pending the outcome of the 2025 Federal election. Among other things, stages 2 and 3 proposed to::

- establish Environment Protection Australia (EPA) as an independent national compliance and enforcement body,
- significantly increase penalties for EPBC Act contraventions and enforcement/audit powers for the EPA,
- introduce legally binding National Environment Standards requiring projects to be 'nature positive' among other things, and
- tighten the approach to environmental offsets (see the "Biodiversity" section below).

As part of the global 'nature positive' movement, voluntary and mandatory climate reporting for corporates is also expanding into nature reporting (e.g. the Taskforce on Nature-related Financial Disclosures marks an important first step towards mandatory nature-related reporting in Australia).

Environmental regulation – state/territories

Overall, environmental regulation in Australia is mostly carried out at the State and Territory government level, as set out below.

Environmental licences

State and Territory-based environmental protection legislation requires licences before certain activities that have adverse environmental impacts are carried out at a site. Those specified activities are often connected with industrial premises (but can be issued for other premises if there is a perceived impact on the environment), including the management of waste.

Specified activities and criteria for environmental licences vary between the States and Territories, as do the various penalties for non-compliance with an environmental licence and its conditions. These licences generally attract annual fees, and confer obligations on the licence holder, such as pollution prevention and monitoring, ongoing monitoring of emissions and annual reporting requirements.

Investors will need to ensure that any necessary licences are obtained, or the premises will not be able to lawfully operate. Existing licences can be transferred to a new holder, in the event of a change in ownership of premises.

Compliance

It is an offence to pollute air, water, or land without a licence. Most of these offences are enforced by the environmental regulators in the States and Territories and are strict liability, meaning that there are very limited defences available. For the most serious environmental offences, the environmental regulator may elect to commence prosecution proceedings in State or Territory criminal courts, which may result in large fines and restitution orders or, more rarely, imprisonment.

Directors and other executive officers can be personally liable in criminal proceedings for certain offences (such as a breach of licence conditions or pollution of the environment). These penalty provisions may not apply if the director or other executive officer can demonstrate that they were not in a position to influence the conduct of the corporation in relation to its contravention of the law, or, if they were in a position of influence, they used all due diligence to prevent the contravention.

Biodiversity

At the national level, the protection of Australia's biodiversity is administered under the EPBC Act. The provisions of the EPBC Act are targeted at ensuring that developers take all reasonable steps to avoid and mitigate the impacts of an action (such as a development) on the environment. If the impact cannot be avoided and fully mitigated, developers are often required to procure offsets to compensate for any adverse residual impacts of the action on the environment.

As noted above, part of the Commonwealth Government's proposed stage 3 reforms to the EPBC Act (which have now been shelved pending the outcome of the 2025 Federal election) relate to the national offset regime. The reforms proposed that developers compensate for all residual significant impacts by, depending on the impacted MNES, either delivering a restoration action, making a restoration contribution, or a combination of both.

States and Territories may shift their offset regimes to a 'nature positive' approach, meaning that developers will need to demonstrate that their proposed development results in an improvement to biodiversity values. For example, amendments were made to the Biodiversity Conservation Act 2016 (NSW) in late 2024 which seek to make offsets a last resort in New South Wales and transition towards delivering overall net positive outcomes.

Contamination

Generally, a polluter remains responsible under each of the State or Territory regimes for the remediation/clean-up of its contamination, including any contamination that the person or company had caused on sites it has now vacated or sold. However, where the polluter is not able to be found or has gone insolvent or it is impossible to attribute liability to a previous landowner, responsibility for any clean-up of contamination may rest with the existing occupier/landowner.

Should the environmental regulator require clean-up of contaminated sites caused by someone else, that owner may then seek to bring court proceedings to recover the clean-up costs against the original polluter (if known). Clean-up of contaminated sites and groundwater can run into millions of dollars.

Contamination can be addressed contractually. It is important to make sure that specific risks and liabilities are assessed during the due diligence phase and a suitable risk allocation is reflected in any contractual arrangement. Contamination risk mitigation options can include:

- having an environmental assessment undertaken by your environmental consultants before exchange or completion of the sale to ascertain the full baseline position as at the sale date
- capping liability for contamination by one party at an agreed amount
- seeking indemnities whereby the vendor indemnifies and releases the purchaser from pre-existing contamination, and
- holding back part of the sale proceeds to fund remediation.

The most suitable option will depend on a range of commercial factors, including whether the purchase price already includes an allowance for any potential unquantifiable clean-up costs, whether the investor can tolerate the risk that the property is contaminated, and whether future redevelopment of or a change in use of the property is proposed.

Water

Ensuring security of water supply can be critical for large water users, particularly in regional and rural Australia. It is unlikely to be an issue in city sites. However, it will be significant in the expanding area of agribusiness. Licences for water supply will be required in some circumstances. These are issued under heavily regulated schemes for water allocation and systems for trading water.

Carbon

Like other countries, Australia has released a long-term emissions reduction plan for achieving net zero emissions by 2050 and enshrined this net zero target into law under the *Climate Change Act 2022* (Cth).

Property developers may be required to register and publicly report under the National Greenhouse and Energy Reporting (**NGER**) Scheme if certain facility based (such as a data centre) or Australian corporate group thresholds are met.

On the planning side, offsetting the carbon emissions arising from the operation and maintenance of assets as well as reducing the carbon emissions embodied in building materials and generated by the construction of buildings may be a consideration when seeking development consent depending on the type of development proposed. For example, in New South Wales development consent cannot be granted for non-residential development unless the consent authority is satisfied that the embodied carbon emissions attributable to the development have been quantified. This is important for investment in Australia because developments will need to comply with the predicted emissions as part of the life of the development.

Waste

Waste is heavily regulated in Australia. State and Territory environmental regulators are placing new and more stringent demands upon businesses to meet enhanced environmental standards. In turn, environmental liabilities (i.e., fines and other penalties) and compliance requirements are featuring more frequently in everyday business transactions as we move to a more circular economy (see the 'environmental licences', 'compliance' and 'contamination' sections above for more information).

Native title and land rights

Existence of native title rights

In Australia, the rights/interests of First Nations peoples in their traditional land and waters, in accordance with their own laws and customs, are protected at common law and under legislation. These rights are referred to as 'native title'.

To date, there have been a significant number of native title claims where the Federal Court has determined that native title exists in specific land or waters. There are also several ongoing native title claims that have been registered by the National Native Title Tribunal and attract native title procedural rights.

Extinguishment of native title rights

Native title is generally extinguished where specific types of interests in the land were granted on or before 23 December 1996 that are inconsistent with native title. Such grants include the grant of freehold land and most forms of leases. It is also possible for native title to be 'suppressed' or even extinguished in certain circumstances after 23 December 1996 if the procedures in the Native Title Act 1993 (Cth) are followed.

This means that native title will not always be an issue on investment in Australian real estate – it will depend upon the real estate in question and title to it. It is relatively unusual for native title to be an issue for city-centre sites, such as office buildings. However, in the expanding area of agribusiness, which involves large tracts of undeveloped land, the potential for native title claims to arise must be considered.

Land rights of First Nations people

Some States and Territories have legislative regimes that allow the recognition of the land rights of First Nations people. These systems differ in their terms, but they generally provide a process for land owned by the government to be claimed by and transferred to Aboriginal ownership as freehold land. This is a separate process to a native title claim.

Aboriginal stakeholder engagement

Engagement with First Nations stakeholders is becoming an increasingly important component of the 'social licence to operate', and proponents seeking to carry out 'biodiversity projects' under Australia's new Nature Repair Market may be subject to additional consent requirements where the land proposed for the project is subject to native title or Indigenous land rights.

One aspect of the (now shelved) stage 3 reforms to the EPBC Act included establishing a legally binding National Environmental Standard for First Nations engagement and participation in decision-making, which would set the bar for how proponents must engage with First Nations people when designing and referring projects.

Heritage

Heritage, including natural, indigenous and historic, needs to be considered during the due diligence phase of a proposed investment in Australian real estate.

There is legislative protection of heritage items. Where real estate is listed on a heritage register or otherwise affected, restrictions may be placed on any development which would affect the heritage items.

European heritage

European heritage laws exist to protect registered heritage items.

At the Commonwealth level, the EPBC Act protects world heritage areas and national heritage places. If a development may significantly impact a world heritage area or national heritage place, it may be a 'controlled action' that requires approval before works can commence.

Generally, at the State and Territory level, legislation and development controls of local government areas guide how development can or cannot be carried out if a development is heritage listed or if there is a heritage item on or in the vicinity of the proposed development. Breaches of heritage laws are an offence and can attract significant penalties including imprisonment.

Aboriginal cultural heritage

In addition, specific cultural heritage legislation exists to protect sites and objects of significance to First Nations peoples. Indigenous heritage sites may exist even on land that is not the subject of native title. Consent of the relevant Minister may be required if use and/or development of the land may disturb or destroy Aboriginal sites. The Commonwealth legislation provides for emergency (and permanent) declarations if state legislation fails to protect a significant Aboriginal site.

DATA CENTRES

DATA CENTRES EVOLVING INTO THEIR OWN ASSET CLASS

With research showing revenue from the Australian cloud-storage sector is now reaching AUD $5.2 billion in value,[26] there is no doubt that Australia has become an attractive investment destination for data centre facilities. Despite the sector's relative infancy, Australia's data centre built-out capacity already ranks top-5 globally and revenue figures are anticipated to double by 2030.[27]

This flows from the strong correlation between data centre growth and the uptake in AI. With the massive amounts of computing power required to develop and deploy AI, the future of the data centre industry is widely regarded as inextricably linked to the 'AI revolution'.

We are seeing the trend of data centres becoming their own asset class, while also being part of every asset class. In recent years, data centres have become increasingly attractive to investors in Australian assets and secondaries markets. Survey results from the CBRE APAC Investor Intentions survey indicate that data centres are the second most preferred alternate asset class for Australian real estate investment in 2024.

Technology-linked infrastructure has become highly sought after in the Australian market, and there has been significant activity in the secondaries market with start-ups and PE sponsors selling to core-plus funds.

26 *'Australia's Data Centres'*, CBRE Research, October 2024.
27 Jeffries, DC Hawk, DC Byte, CBRE Research; *'Cloud Storage Services in Australia'*, IBIS World.

In September 2024, King & Wood Mallesons worked with the world's largest alternative asset manager, Blackstone, on its acquisition of leading hyperscale data centre provider, AirTrunk. At a purchase price of AUD $24 billion, the transaction is the second largest private capital M&A deal in Australian history.

Land ownership structures

Typically, data centre ownership models in Australia have fallen into two categories: owner/operator and the build to suit + lease models. As investment in the asset class becomes more sophisticated, we expect to see more joint ventures between developer/investors and operators.

Still the most common form of data centre structure whereby the data centre operator acquires the land and develops the data centre for its own operations.

Pro: operator retains full control

Con: capital intensive

Land is owned by developer (or investor with an external developer).

Operator leases land from owner on a long-term triple net basis.

Developer may build core and shell (not typical to do the fit out or MEP) or may fund the operator to build the core and shell.

Pro: less upfront capital required

Con: operator loses some control by leasing rather than owning

Developer/investor and operator establish a JV, in which they each contribute their expertise to the development, investment and operation of the data centre.

Pro: alignment of interests and access to increased capital for both parties

Con: reliance on the expertise of the other JV partner

Power, 'net zero' and the clean energy transition

Power is the most significant factor in data centre development. Across APAC, we have seen various moratoriums imposed.

Data centres, known for their energy-intensive operations, are currently estimated to consume approximately 5% of Australia's total power generation.[28] As Australia continues to transition from coal-fired power plants, the progressive uptake of renewable energy sources is critical to ensuring data centres remain a viable investment over the long-term.

Public concerns regarding the urgent demand for substantial electricity by data centres will become more prominent in years to come. While state and regional governments persist in providing tax incentives to draw in new data centres, the industry is facing heightened political and regulatory scrutiny.[29]

Tech giants such as Microsoft and data centre operator, AirTrunk, have announced their intention to reach negative emissions by 2030, signalling a global trend to data centres that employ various sustainability measures, such as developing advanced cooling infrastructure and partnering with sustainable energy providers to deliver the power required.

Investors in battery storage projects are finding themselves well-placed to capitalise on the move away from costly and unsustainable backup diesel generators. US data centre technology company Switch is currently using Tesla 'megapacks' to support its storage capacity in Nevada, while Google is using its own large batteries to replace diesel generators at one of its data centre facilities in Belgium.

Capital intensive / securing finance

Data centres are 'capital hungry' investments and require significant amounts of upfront funding before they become operational. The result of which is more creative solutions for funding, both for equity and debt. On the equity side, careful structuring is being used on staged developments and campus type assets to allow investors to invest into 'develop-to-core' and/or 'core funds' depending on their mandates. On the debt side, we are seeing greater syndication due to the outsize facilities, as well as development of creative solutions for recycling capital on staged developments.

Securing funding in the data centre market is evolving, and we should expect to see more innovative approaches in the market.

Limited stock

Despite strong demand and investment potential, there is relatively limited Australian data centre stock (approximately 1% of total warehouse space in Australia).[30] Investor demand in Australia's data centre industry will likely outstrip supply in the near future, but this creates a great opportunity for those wishing to invest and develop new data centres in Australia.

Maintaining an annual trend, pre-leasing rates are expected to exceed 90% in 2025, indicating that a significant portion of new data centre capacity will be leased prior to the completion of construction. This pattern could result in heightened competition for available space, prompting tenants to initiate the leasing process earlier to ensure they secure the required capacity (and funding).

As a case example, despite the 70% increase in data centre construction that recently occurred in North America, vacancy rates have reached a record low of 2.8%, highlighting ongoing supply constraints.[31] We can expect to see a similar trend occurring in Australia, with limited availability leading to further rental rate increases.

Australia's built-out capacity is set to double in the next decade, according to CBRE.[32] The average size of land being absorbed by data centres has been growing over the past few years and is expected to continue as more land is purchased for AI data centres.[33] Although in theory the exponential growth of data centres and data centre construction in Australia is positive, there is the obvious downside resulting from the lack of available land. Similarly, as investor demand continues to grow, there will likely be a surge in new data centre construction to meet the rising business need. More construction equals less available land.

As demand grows and as the traditional areas for data centre construction becomes more and more limited, we may see a trend toward the development of data centres in less traditional locations, including in regional areas. This may help alleviate some of the constraints posed by limited urban land availability and provide opportunities for lower operational costs.

Limited stock is also driving the trend for leasing and other strategic partnerships as a means for hyperscalers (who previously many have been owner/builders) to secure competitive space for data centres in the Australian market.[34]

With investor appetite in Australia remaining steady, the opportunity for investment is ripe.

28 *'Australia's Data Centres',* CBRE Research, October 2024.
29 *'Data centers 2025 outlook – Developer leverage, regulatory risk to rise as growth surges',* Moody's Investors Service, January 2025.
30 *'Data Centre Insight',* Colliers Research Report, Colliers International (23 June 2023).
31 *'North America see 70% jump in data center supply in construction',* Reuters, August 2024.
32, 33, 34 *'Australia's Data Centres',* CBRE Research, October 2024.

Regulatory impacts

For data centres in Australia, there are three key regulatory impacts to keep in mind for both investors and future data centre operators alike.

US Export Control Rules on AI Diffusion

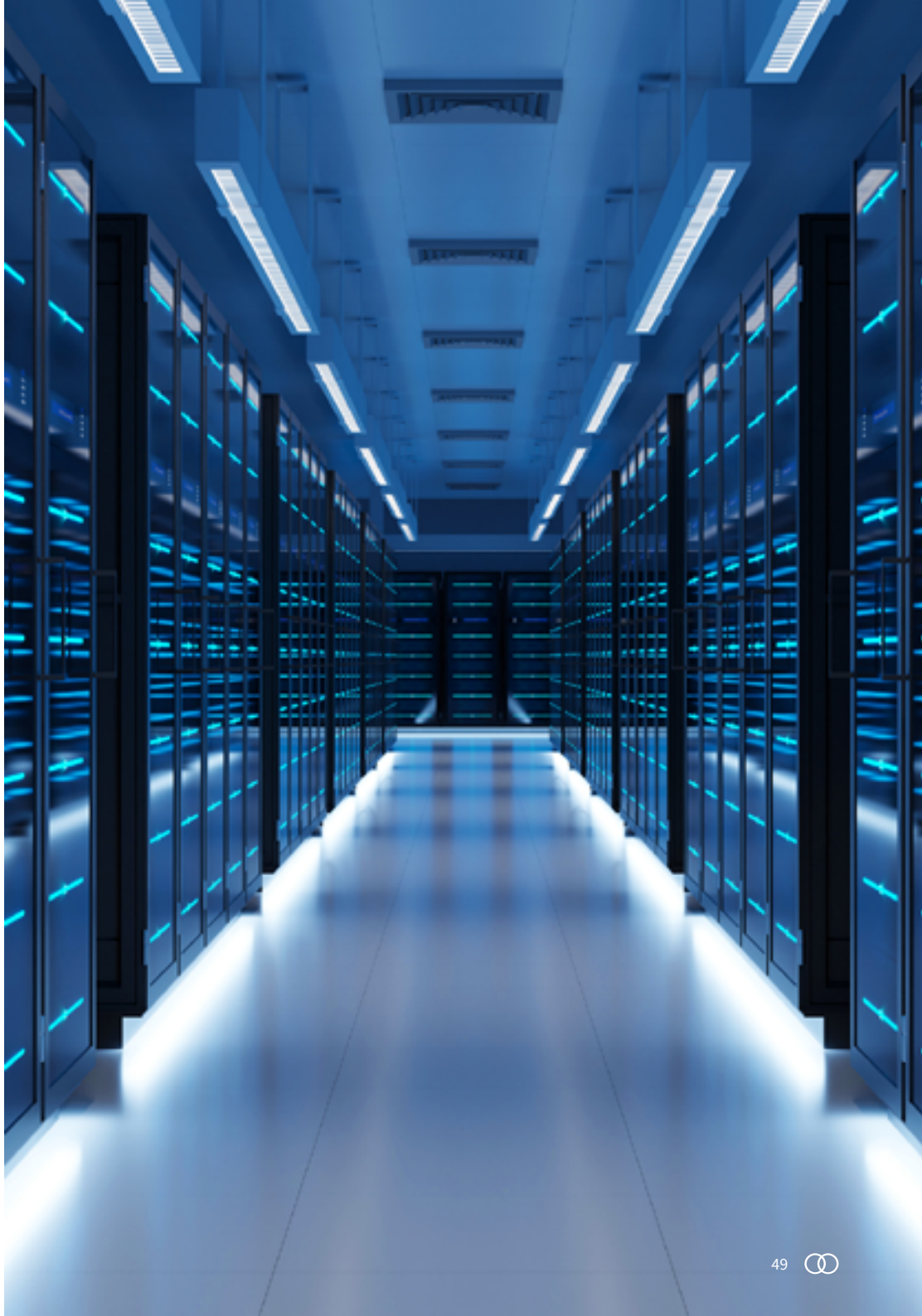
On 13 January 2025, the US Department of Commerce established an export control framework limiting the diffusion of advanced AI and revised existing controls on advanced computing integrated circuits (ICs). It is too early to tell the impact, and the rules are still subject to comment until May, but on the current version of the rules, Australia is a “tier 1” jurisdiction. This means that there are very few restrictions on the export, re-export or transfer of high-end AI chips and weights. With much of the wider APAC region categorised as “tier 2”, and with material restrictions on the export, reexport or transfer of high-end AI chips and weights, this could drive more data centre investment to Australia.

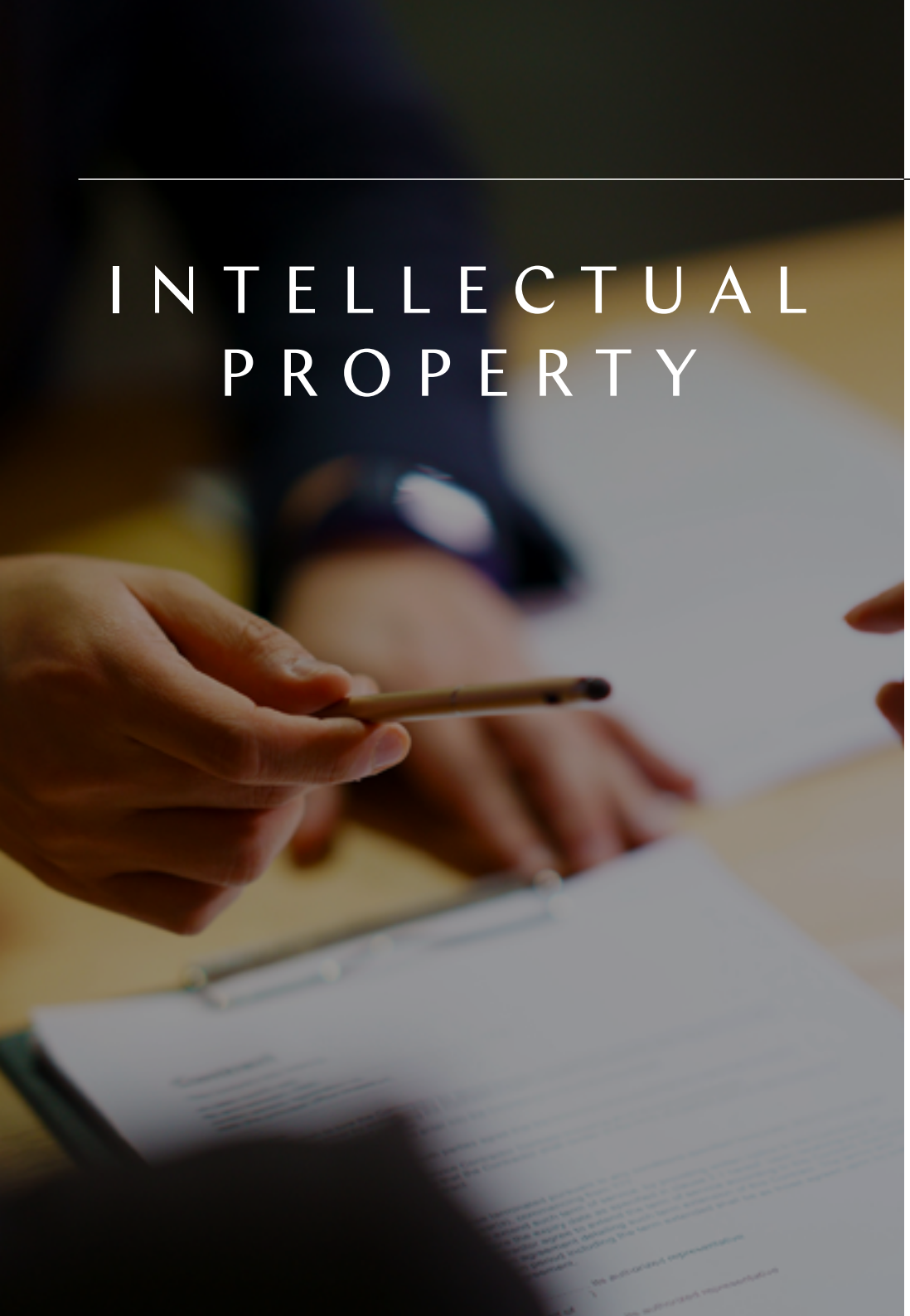
Foreign Investment and National Security

The Foreign Investment Review Board (FIRB) closely scrutinises investments in data centres, including the acquisition of land for data centres. Where government data will be hosted or processed at the data centre, there is even closer scrutiny and the potential investor base narrows significantly to exclude owners who present a national security risk. The FIRB regime interplays with the Federal Government’s Hosting Certification Framework (HCF), overseen by the Department of Home Affairs, which requires data centre owners and service providers to become certified in order to host or process government data.

Security of Critical Infrastructure

This is a significant focus in Australia. The Security of Critical Infrastructure Act 2018 (SOCI Act) establishes a regime for managing risks to Australia’s critical infrastructure through risk management programs, information reporting, mandatory reporting of cyber incidents and in certain cases, Government intervention. A data centre, or elements of it, can be “critical infrastructure assets”, particularly if used to provide services to Government clients. The SOCI Act is linked to the HCF.





INTELLECTUAL PROPERTY

PROTECTING BUILDING AND BUSINESS NAMES

Branding – trade mark rights and property developments

Trade marks can be registered in Australia under the Trade Marks Act 1995 (Cth) ("Trade Marks Act"). Trade marks can be obtained for, among other things, names and logos, which are often used in the promotion of retail shopping centres, hospitality assets and strata-titled buildings (including holiday accommodation).

Registration of a trade mark confers rights on the trade mark owner to prevent others from using the same or similar logo for the products or services for which the trade mark is registered. While geographic names cannot be registered, it is possible to obtain trade mark protection for building names where those names are used in connection with businesses associated with a building.

Australian court cases demonstrate that owners of management and letting rights in a strata-titled building who also own the trademarks containing the building name can enforce those trade marks against offsite accommodation providers, even though the trade marks for the letting business are the same as the name of the building.

Where buildings are co-owned, consideration should also be given to the implications of the ownership structure for branding. Joint ownership of trademarks is permissible under the Trade Marks Act, so one option is for the co-owners of the real estate to also own any registered trade marks rather than having a single owner such as a building manager.

Business names

Business names legislation in Australia requires traders who carry on business under a name that is not the same as the trader's own name to register that name as a business name. This is largely to allow people who deal with that business to find out who is actually carrying on the business in case they need to take action against the business operator. A registered business name is not a form of property that can be bought or sold, but is transferred when the underlying business is sold. In terms of real estate, this means that the business name given to, for instance, a hotel or some retail centres usually needs to be registered.

Copyright in building plans and architectural drawings

Copyright protects building plans and architectural drawings. Reproduction of such plans and drawings without the permission of the copyright owner (either express or implied) will generally infringe copyright law. There will usually be an implied licence to use building plans and architectural drawings for contemplated purposes (such as to obtain planning approval and have the development constructed). However, a developer should always negotiate copyright ownership or at least clear licence rights.

A buyer should always check whether licences to use building plans and architectural drawings are transferable on sale, in case the original building plans or drawings are needed later for refurbishments of the real estate asset. In some cases, the designer's contract will stipulate that licences cannot be transferred without the payment of a fee.

Individual designers of building plans and architectural drawings also have moral rights, which continue to exist as long as the copyright exists. Moral rights include the right to be attributed as the creator of the plans or buildings, the right not to have the plans or buildings falsely attributed to another person or to be attributed to plans or buildings that have been altered without consent, and the right not to have the plans or buildings treated in a derogatory manner.

For example, an architect may sue a building owner if the building owner demolishes or alters any structure of the building arising from his or her plans in such a way that is prejudicial to the designer's "honour or reputation".

Moral rights may be waived, so where it is likely that the plans or buildings may need to be altered in the future, it is prudent to secure a reasonable moral rights waiver from the designer. Where such waiver is not obtained, special exemptions may nonetheless apply in cases where the building owner wishes to demolish or alter a building but cannot discover the identity of the designer after making reasonable inquiries, or, if the designer is known, complies with a prescribed notice and consultation process, or where restoration or preservation of a building is done in good faith.

RESPONSIBLE BUSINESS

Responsible business remains a key priority for global investors as they navigate evolving expectations and regulatory developments. This dynamic landscape also creates opportunities for innovation, sustainability and creating a lasting positive impact.

What is driving responsible business developments in real estate?

Recent developments in responsible business have been shaped by the broader climate litigation landscape, including regulatory action against greenwashing, the mandatory climate-related financial reporting regime, a growing understanding of directors' duties, and increasing pressure from stakeholders and regulators.

However, where there is risk, there is also opportunity. Many are developing innovative projects, financing strategies, and other solutions to strengthen their responsible business credentials.

Greenwashing

Greenwashing is misleading and deceptive conduct in relation to sustainability matters. It includes the practice of companies overstating the 'green credentials' of a product or investment. It also includes companies setting emissions targets when they do not have a reasonable ability to meet them. In Australia it is illegal for a business to engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses.

Key developments

Directors' duties

Leading commentary, including insights from a former Justice of the High Court of Australia, suggests that directors must consider, report on, and respond to relevant climate-related risks. Many directors now view it as necessary or appropriate to set net-zero and/or emissions reduction targets for their companies and to report on their progress.

Climate-related reporting

Climate-related reporting is now mandatory for certain entities in many jurisdictions, including Australia. International real estate investors may also face reporting requirements.

Australia's new mandatory sustainability reporting regime will be phased in from 1 January 2025, depending on an entity's size and, where relevant, its existing obligations under the National Greenhouse and Energy Reporting scheme.

Under this regime, reporting entities must assess and disclose material climate-related risks and opportunities, along with the strategies implemented to monitor and respond to them.

Entities will also be required to publish:

- The results of scenario analyses on potential climate-related financial impacts over the short, medium, and long term
- Data detailing their Scope 1, 2, and 3 greenhouse gas emission.[22]

See our KWM insight on climate-related financial disclosure

Even where mandatory reporting is not required, key stakeholders are increasingly seeking insight into climate-related risks and opportunities tied to their investments and requesting information on how they are being managed.

Human rights and anti-slavery

Global human rights and anti-slavery developments, along with several high-profile governance failures, have driven progress in the social and governance agenda. Recent efforts have been made to strengthen Australia's modern slavery response, with increased focus on accountability and mechanisms to claw back remuneration from senior executives when governance failures occur.

For more information on managing compliance and governance risk see Owl Advisory by KWM

Other regulatory regimes

A number of existing regulatory regimes may also continue to apply including:

The National Greenhouse and Energy Reporting scheme (NGERS): Requires the controlling corporation of a corporate group to register and report on greenhouse gas emissions, energy production, and energy consumption from facilities under its operational control if certain thresholds are met.

The National Australian Built Environment Rating System (NABERS): Assesses a building's operational environmental impact and compares its performance to similar buildings. Ratings range from 0 to 6 stars based on performance in energy, waste, water, and indoor environment. NABERS has also introduced an Embodied Carbon rating tool, enabling new buildings and major refurbishments to measure, verify, and compare their upfront embodied carbon with similar buildings.[23]

The Green Star program: An internationally recognised rating system that certifies building projects based on their sustainability performance. Projects earn points for actions that align with Green Star's overarching environmental objectives.

Disclosure requirements under the *Building Energy Efficiency Act 2010* (Cth): Imposes mandatory disclosure obligations on landlords and sellers regarding the energy efficiency ratings of commercial buildings, where at least 75% of the net lettable area is used for administrative, clerical, professional, or similar activities. Required disclosures, including a NABERS rating, must be provided in a Building Energy Efficiency Certificate (BEEC).

The Global real estate Sustainability Benchmark (GRESB): Evaluates the sustainability performance of real estate and infrastructure assets, providing standardised and validated ESG data for capital markets. Assessments align with international reporting frameworks, industry priorities, and emerging regulations. In 2024, Oceania led both the Standing Investments Benchmark and Development Benchmark, reinforcing Australia's leadership in sustainable real estate.[24]

Product stewardship schemes: Support the environmentally responsible management of products and materials throughout their lifecycle through voluntary, mandatory, or co-regulatory arrangements between industry and government. While no mandatory schemes currently apply directly to the real estate sector, their presence in Australia is increasing. See our KWM alert on product stewardship schemes.

22 Scope 3 emissions must be reported from an entity's second reporting year onwards.
23 NABERS Embodied Carbon | NABERS.
24 2024 GRESB results reaffirm Australia's leadership in sustainable real estate | Green Building Council of Australia.

Opportunities

Sustainable finance

Some investors are shifting their focus beyond financial returns to broader investment considerations, including environmental and societal impacts to create and protect long-term value.

Sustainable investment in Australia has grown substantially in recent years, and this trend is expected to continue. In 2024, sustainable finance flows in Australia are projected to at least match 2023 levels, in line with global trends.[25]

To enhance transparency and credibility in sustainable finance markets, the Australian Government released its Sustainable Finance roadmap in 2024.

See our KWM Alert on the Australian Government's Sustainable Finance Strategy.

See our Financing section in this guide for more information on this area.

Green Leases

In Australia, Green Leases are typically office or retail leases that include a framework where the landlord and tenant work together to achieve key energy efficiency, sustainability and reporting metrics over the relevant lease term and future proofing investments. The key "Green" provisions are generally structured to sit within the operative terms of the lease or as a separate Green Lease schedule and may cover such things as:

- energy efficiency: including through energy efficient installations, measures and energy sourced from alternative/green sources
- water reduction measures: including through the design of fixtures, fittings and the re-use of water
- built environment: with a particular focus on lighting, ventilation, acoustics, temperature and occupant comfort
- metering: including a requirement to have the relevant premises separately metered and/or the ability for tenant to purchase power and achieve energy efficiency, and
- new technology adoption: including through the adoption of new innovative technologies and PropTech installations.

Carbon markets and natural capital

The Australian Government's Emissions Reduction Fund provides incentives for emissions reductions and has been in operation for some time. It offers opportunities for farmers and land managers to participate in emissions reduction efforts, as well as capture and store carbon.

In addition, the Australian Government is developing the Australian Carbon Exchange, a centralised, standardised, and regulated marketplace designed to simplify the trading of Australian carbon credit units.

See our KWM Carbon Markets Regulatory Tracker

The Australian Government's Nature Positive Plan serves as the blueprint for significant federal environmental law reform aimed at better protecting and restoring nature. These reforms have been split into 3 stages (discussed further in our latest *KWM NEXT Publication*). Stage 1 included establishing a world-first Nature Repair Market, while stages 2 and 3 have been shelved pending the outcome of the 2025 Federal election.

25 Australia advances sustainable finance agenda but more work to be done — ASFI.

KWM IS PROUD TO ADVISE ON SOME OF THE LARGEST AND MOST COMPLEX TRANSACTIONS

DATA CENTRES

Blackstone acquisition of AirTrunk

$24b

PUBLIC MARKETS EQUITY RAISE

Goodman Group

up to $4.4b

LIVING

Lendlease sale of communities business

$1.3b

RETAIL

Haben & Hines acquisition of Westpoint Shopping Centre, Sydney

$900m

OFFICE

Mitsubishi Estate on the acquisiton of 60 Margaret Street, Sydney

$779m

INDUSTRIAL & LOGISTICS

A sovereign wealth fund on the successful bid to acquire Blackstone's Milestone Australian logistics portfolio

$3.8b

PRIVATE CREDIT

CapitaLand acquisition of Wingate

$200m

HOTELS

Pontiac Land

Redevelopment of the Sandstones Precinct into Capella Sydney and The Lands by Capella

SELF STORAGE

De-stapling and capital raising for Abacus Storage King

$225m

APPENDIX

TAX & DUTY ATTACHMENTS

Duty and land tax summary

Current rates and thresholds

		NSW	VIC[10]	QLD	WA	SA	TAS	NT	ACT
Transfer Duty	Threshold[11]	$1,212,000	$2,000,000	$1,000,000	$725,000	$500,000[12]	$725,000	$5,000,000	$1,900,000[13]
	Rate	5.50%[14]	6.50%	5.75%	5.15%	5.50%	4.50%	5.95%	5.00%
Landholder Duty	Threshold	$2,000,000	$1,000,000	$2,000,000	$2,000,000	Any3	$500,000	$500,000	$1,900,000
	Rate (Unlisted Company/Unit Trust)	5.50%	6.50%	5.75%	5.15%	5.50%	4.50%	5.95%	5.00%
	Rate (Listed Company/Unit Trust)		0.65%	0.575%		0.55%	0.45%		N/A
Surcharges for foreign acquirers *test to be foreign differs between jurisdictions	Foreign purchaser surcharge on residential property (transfer and unlisted landholder)	8% (9% from 2025)	8%	8%	7%	7%	Residential: 8% Primary production: 1.5%	No surcharge	No surcharge
	Surcharge on listed landholder acquisitions	N/A	8%	0.8%	7%	7%	Residential: 8% Primary production: 1.5%	No surcharge	No surcharge
Land tax *test to be foreign or absentee differs between jurisdictions	General rate[15]	2.00%	2.65%	2.75%	2.67%	2.4%	1.5%	No land tax is levied in NT	No land tax is levied in ACT on commercial properties[16]
	Taxing date	31 December	31 December	30 June	30 June	30 June	1 July		
	Surcharges	Foreign person surcharge of 4% (5% from 2025)	Absentee owner surcharge of 4% Vacant residential land surcharge of 1% - 3%[17]	Absentee and foreign owner surcharge of 3%	Metropolitan area surcharge applies	Trust surcharge applies	Foreign person surcharge of 2%		

10 Victoria also imposes Windfall Gains Tax (imposed at either 62.5% or 50% of an uplift in value following a WGT event) and Commercial & Industrial Property Tax (1% of unimproved land value of commercial and industrial properties and eligible student accommodation 10 years after there has been an entry transaction – subsequent dutiable transactions after the entry transaction involving this land (and some other associated assets) after an entry transaction may be exempt from duty).

11 These are the highest threshold values and rates. For lower dutiable values, duty may be applied at a lower rate.

12 Only applies to "residential" and "primary production" land.

13 From 1 July 2024, commercial properties with a dutiable value of $1,900,000 or less will pay no stamp duty. Different rates apply to non-commercial property (e.g. residential, primary production and home business properties).

14 A premium rate of 7% applies to the transfer of residential property where the value exceeds $3,636,000.

15 This is the highest effective rate and applies to land owned by companies and trusts. Thresholds and lower rates of tax apply for lower value properties.

16 Land tax is imposed at $1,612 fixed charge plus a valuation charge of up to 1.26% on non-exempt residential land.

17 This applies to all residential land in Melbourne's middle and inner suburbs (and, from 1 January 2025, all residential land in Victoria) left vacant for more than 6 months in a calendar year.

Transfer duty – what common assets are dutiable property?

ASSET	NSW	VIC	QLD	WA	SA	TAS	NT	ACT
Land and interests in land (includes fixtures)	Yes	Yes Includes assets fixed to land	Yes	Yes Includes assets fixed to land	Yes (only for residential and primary production land)	Yes	Yes	Yes
Goodwill	No	No	Yes	Yes	No	No	No	No
Goods	Yes (only if transferred with other NSW dutiable property)	Yes (only if transferred with certain interests in land in Victoria)	Yes (only if transferred with another type of Qld dutiable property)	Yes (only if transferred with other WA dutiable property)	No	Yes (only if transferred with other Tasmanian dutiable property)	Yes (if transferred with other dutiable property)	Yes (if transferred with other dutiable property)
Intellectual Property	No	No			No	No	No	No
Trading stock	No	No		No	No	No	No	No
WIP/"supply rights" (i.e. customer contracts)	No	No	Yes (only if substantially all is transferred or transferred with another type of dutiable property)	Yes	No	No	No	No
Debts	No	No		No	No	No	No	No
Information/ know-how	No	No	No	No	No	No	No	No

Landholder duty – consequences of dealing in landholding securities

STATE	LOCAL LAND HOLDINGS VALUE THRESHOLD	ACQUISITION THRESHOLD				DUTY BASE			
		Companies		Trusts		Land and fixtures	Assets fixed to land	Goods	Business assets (e.g., goodwill)
NSW	$2,000,000	90%	50%	90%	20%[18]	Yes	Yes	Yes	No
VIC	$1,000,000	90%	50%	90%	20%[19]	Yes	Yes	No	No
QLD (listed companies and trusts)	$2,000,000	90%	50%	90%	N/A	Yes	Yes	No	No
QLD (unlisted trusts)	N/A	N/A			Any[20]	Yes	Yes	Yes	Yes
WA	$2,000,000	90%	50%	90%	50%	Yes	Yes	Yes	No
SA	Any[21]	90%	50%	90%	50%	Yes	Yes	No	No
TAS	$500,000	90%	50%	90%	50%	Yes	Yes	Yes	No
NT	$500,000	90%	50%	90%	50%	Yes	Yes	No	No
ACT	$1,900,000	N/A	50%	N/A	50%	Yes	No	No	No

18 In NSW, registered wholesale unit trusts and imminent wholesale unit trust schemes have an acquisition threshold of 50%.
19 In Vic, wholesale unit trust schemes and imminent wholesale unit trust schemes have an acquisition threshold of 50%.
20 Certain widely held trusts may have an acquisition threshold of 50%.
21 Only applies to "residential" and "primary production" land.

KEY CONTACTS

MARK BAYLISS
PARTNER & REAL ESTATE SECTOR COVERAGE LEAD

SIMONE MENZ
PARTNER, REAL ESTATE & INFRASTRUCTURE

KEN ASTRIDGE
PARTNER, DEBT

ANDREW BARRETT
PARTNER, REAL ESTATE

DAVID BELL
PARTNER, REAL ESTATE

CARL BLACK
PARTNER, REAL ESTATE

MALCOLM BRENNAN
PARTNER, FIRB

MICHELLE ASTRIDGE
PARTNER, ENVIRONMENT, PLANNING AND NATIVE TITLE

PAUL CRAWFORD
PARTNER, REAL ESTATE

STUART DIXON-SMITH
PARTNER, REAL ESTATE

DAVID ELIAKIM
PARTNER, FUNDS

FRANCESCA GIORLANDO
PARTNER, REAL ESTATE

PATRICK GUNNING
PARTNER, INTELLECTUAL PROPERTY

NATALIE HALPERN
PARTNER, DEBT

SCOTT HEEZEN
PARTNER, TAX

EMILY MASTERS
PARTNER, REAL ESTATE

CHRIS MITCHELL
PARTNER, REAL ESTATE

DANIEL NATALE
PARTNER, FUNDS

CHRIS PITSON
PARTNER, REAL ESTATE

QUINTIN DU PLESSIS
PARTNER, MERGERS AND ACQUISITIONS

LEAH RANIE
PARTNER, TAX

FELICITY SAVAGE
PARTNER, REAL ESTATE

JOHN SULLIVAN
PARTNER, FUNDS

JESSICA WALLIS
PARTNER, REAL ESTATE

For contact details please click on the contact name to be redirected to their website profile.

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