Foreign Investors Guide

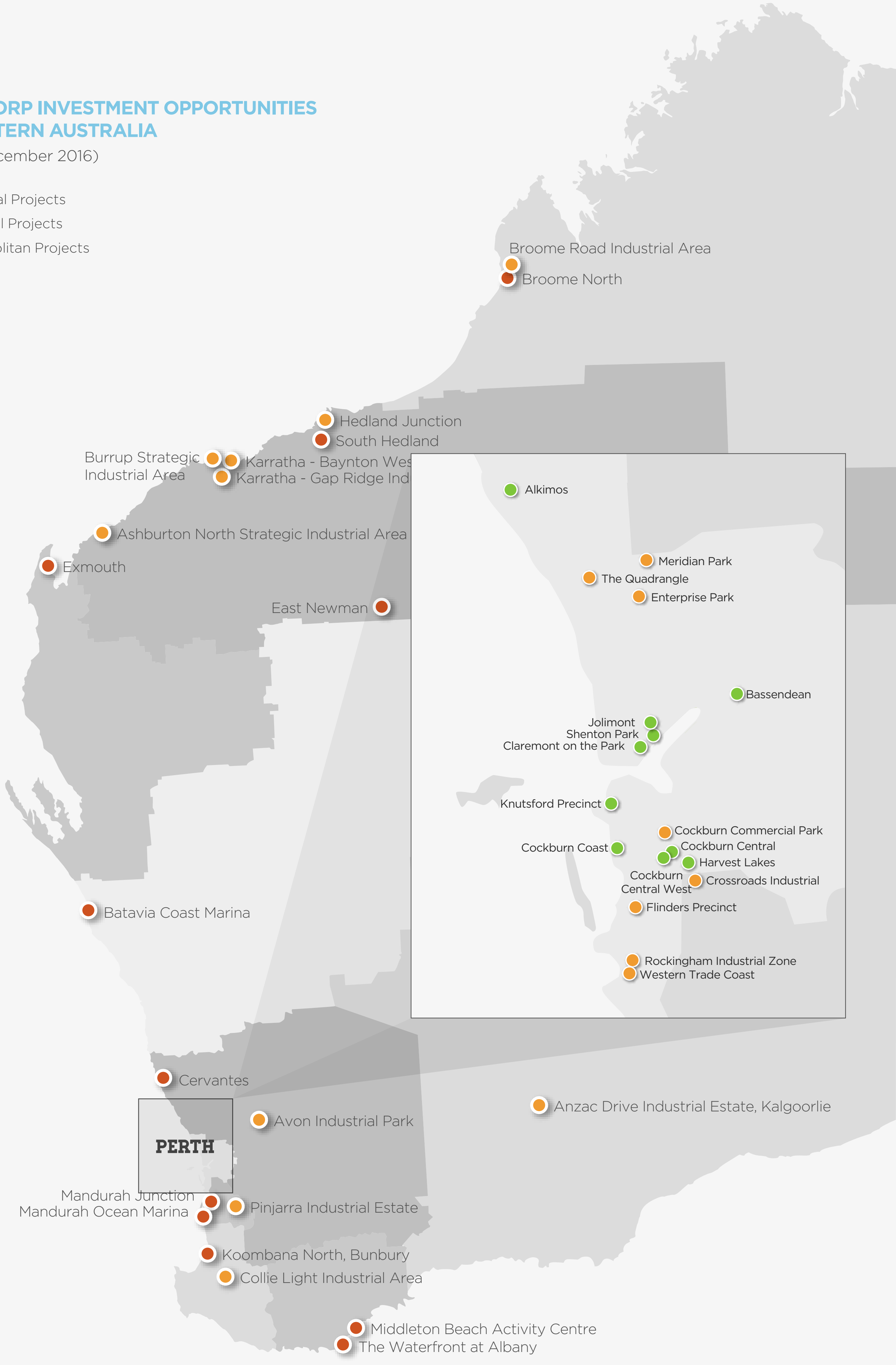
Land development in Western Australia
December 2016

Realising WA's Potential.

LANDCORP

LANDCORP INVESTMENT OPPORTUNITIES IN WESTERN AUSTRALIA

(As at December 2016)



Contents

INTRODUCTION	**4**
FOREIGN INVESTMENT REVIEW BOARD APPROVAL	**5**
FIRB Approval	5
Exemption from Approval	5
Exclusion from Exemption	5
Further Information	5
CONTRACTS TO ACQUIRE LAND	**6**
General Conditions	6
Form of Contract	6
FIRB Approval Condition	7
PLANNING AND ENVIRONMENT	**8**
Control of development	8
Planning approvals process	8
Other planning decision-makers	9
Subdivision approval	9
Environmental protection	10
TAX	**11**
Duty	11
Corporate Tax	12
Goods and Services Tax (GST)	14
FINANCING ISSUES	**18**
Pricing	19
Covenants	19
Other covenants	21
Security	21
Mortgage	21
Guarantees	22
General Security Agreement - GSA	22
Works tripartite agreement or side deed	22
Flawed asset arrangements	23
Other issues	23
SIGNIFICANT INVESTMENT VISAS	**24**

Introduction

This guide provides foreign investors with general guidance on some of the matters to be considered when undertaking land development projects in Western Australia.

This guide summarises some of the relevant legal framework, however, it contains general information only and should not be considered a replacement for obtaining legal, tax, accounting or other advice.

Foreign Investment Review Board Approval

Foreign persons are generally required to obtain the approval of the Foreign Investment Review Board (FIRB) before acquiring land in Australia.

A major advantage in acquiring land from LandCorp is that FIRB approval is not generally required unless the purchaser is a Foreign Government Investor or where the land includes critical infrastructure.

FIRB APPROVAL

The Foreign Acquisitions and Takeovers Act 1975 Cth (Act) governs the acquisition of land in Australia by foreign persons (both natural persons and a company or trust).

Usually the Foreign Investment Review Board (FIRB) examines applications to acquire Australian property on a case by case basis and makes recommendations to the Federal Treasurer on whether an application should be approved.

EXEMPTION FROM APPROVAL

Under regulation 31(I) of the Foreign Acquisitions and Takeovers Regulations, an acquisition of an interest in Australian land from an enity wholly owned by a State is exempt from approval.

LandCorp is an entity wholly owned by a State and FIRB has confirmed that the exemption applies.

EXCLUSION FROM EXEMPTION

The only exclusions from the above exemption is where land is acquired by a foreign government investor (either directly or through a company trust or other structure controlled by a foreign government investor) or the land includes critical infrastructure (see regulation 31(2)(b).

Information about what is a foreign government investor is provided in the Act and regulations made under the Act.

FURTHER INFORMATION

Further information on Australia's foreign investment rules can be obtained from the FIRB website www.FIRB.gov.au

Contracts to acquire land

This section of the guide provides a high level summary of form and type of contracts commonly used to acquire land in Western Australia and the different forms of acquisition contract commonly adopted by land developers.

GENERAL CONDITIONS

The terms and conditions of the majority of contracts to acquire land in Western Australia incorporate the Joint Form of General Conditions for the Sale of Land (General Conditions).

The General Conditions were jointly developed by the Law Society of Western Australia and the Real Estate Institute of Western Australia. Selling agents in Western Australia are very familiar with the General Conditions. The General Conditions are considered to contain relatively balanced terms that are not weighted strongly in favour of the buyer or the seller.

The incorporation of the General Conditions in a contract is optional. The parties to a contract can elect to incorporate none, some or all of the General Conditions in their contract. It is common for "special conditions" to be drafted in a contract that will override the General Conditions to the extent of any inconsistency.

Although the General Conditions were prepared for use in residential sales contracts they are also commonly used for sales of other types of property. When dealing with commercial, industrial or untitled property (ie "off the plan" contracts) you should obtain legal advice before agreeing to incorporate the General Conditions in the contract as this may not be appropriate in the circumstances.

Where land is purchased from LandCorp the General Conditions mentioned above do not apply. However, other specific general conditions applicable to LandCorp do apply. Copies are available from LandCorp.

FORM OF CONTRACT

In Western Australia, it is common for land acquisition contracts to take three different forms, being an unconditional contract, a conditional contract or a call option.

Option

A call option gives a party flexibility to change the buyer entity (or the investors in the buyer entity) during the option period without triggering a significant duty liability. This is achieved by assigning the benefit of the option to your preferred buyer entity before exercising the option to acquire the land.

This flexibility cannot be achieved if a conventional form of contract (even a conditional contract) is entered into. With limited exceptions, duty on the full purchase price will be paid when a buyer assigns its rights under a contract. This is often referred to as "double duty".

It is customary for a call option deed to annex the full terms of the contract that will come into force if the option is exercised.

Options are sometimes used in Western Australia for acquisitions of development sites.

Conditional Contracts

Contracts that are conditional upon the satisfaction of conditions for the benefit of the buyer are common.

The most common conditions are due diligence conditions, finance approval conditions, and development/subdivision approval conditions.

There are concessional duty payment deadlines for many conditional contracts. For instance, the duty assessment on a contract that is conditional upon the buyer obtaining a development approval does not need to be paid for 12 months after the date of the contract.

Unconditional Contracts

Unconditional contracts are common. Some sellers prefer for an interested party to undertake due diligence inquiries before a contract is entered into so that the contract is unconditional.

Duty is payable on an unconditional contract within one month of a duty assessment issuing. The contract must be lodged for duty assessment within two months of the contract date and duty assessments generally issue promptly after lodgment.

FIRB APPROVAL CONDITION

Contracts (including call options) entered into by a foreign person must be conditional upon FIRB approval being obtained, unless the foreign person has already obtained FIRB approval or the acquisition is exempt from the requirement to obtain FIRB approval. This includes an acquisition from LandCorp subject to certain exceptions (see previous section).

Where approval is required, it is common for contracts to be conditional upon the buyer obtaining FIRB approval within 30 – 45 days. FIRB approval will generally be obtained within 30 – 45 days of lodging an application.

Planning and environment

The development and use of land in Western Australia will in most cases require planning approval to be obtained, and in many cases, will require environmental approval to be obtained.

The key planning statute in Western Australia is the Planning and Development Act 2005 (WA) (PD Act). Environmental law in Western Australia is primarily governed by the Environmental Protection Act 1986 (WA) (EP Act) at a state level and by the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) at a Federal level.

CONTROL OF DEVELOPMENT

The PD Act provides for the regulation of development in the form of:

- Region planning schemes, which are created by the Western Australian Planning Commission (WAPC) for the purpose of controlling development at a broad strategic level; and
- Local planning schemes, which are created by local governments for the purpose of establishing specific development controls for a particular area.

Land in an urban area of Western Australia will most likely be subject to both a region planning scheme and a local planning scheme. For example, a property in central Perth will likely be subject to both the City of Perth City Planning Scheme No 2 (local planning scheme) and the Metropolitan Region Scheme (region planning scheme). Land in a rural area will most likely be subject to only a local planning scheme.

A region planning scheme (such as the Metropolitan Region Scheme) will designate land in the region into particular broad zones. Such zones may include urban, industrial or central city. The PD Act provides that any planning controls in place under a local planning scheme must be consistent with the zoning of the relevant land under a region planning scheme.

Local planning schemes operate at a more specific level and will specify what land uses and forms of development are permitted in a particular area. A local planning scheme may also contain general planning controls regarding matters such as the need for structure planning, building heights, car parking requirements and heritage protection.

If a development is likely to involve the sale of liquor, such as a shopping centre with a liquor store, or a hotel or a mixed used precinct with bars and restaurants, then the appropriate liquor licensing approval will be required. This will need to be considered at the outset, as part of the initial development of the project concept and also the planning process.

PLANNING APPROVALS PROCESS

Prior to carrying out development, a landowner in Western Australia ordinarily must obtain planning approval under the relevant local planning scheme and region planning scheme. This is ordinarily made via a single application to the relevant local government.

Upon receiving an application for planning approval, the local government will assess the proposal against the local planning scheme and then decide whether to grant approval.

Obtaining planning approval is of fundamental importance, because under the PD Act, it is an offence to carry out development without planning approval.

If there is a liquor sales element to the planning proposal, liquor licensing should be incorporated into the planning approval process.

If a local government refuses to grant planning approval, or grants planning approval subject to unacceptable conditions, the applicant has a right to seek a review of that decision in the State Administrative Tribunal (SAT), an independent statutory body. The purpose of the SAT is to resolve disputes in an informal manner and with maximum efficiency. The SAT readily utilises mediation and alternative dispute resolution, which allows a degree of flexibility in the resolution of planning disputes.

OTHER PLANNING DECISION-MAKERS

Although the majority of planning approvals in Western Australia are granted at local government level, there are a number of other bodies with decision-making powers in the planning context.

In some limited circumstances, the WAPC will assess applications for planning approval under region planning schemes in the place of the relevant local government. Such circumstances may arise where an application for planning approval is potentially contentious in the context of strategic development.

For example, in the Perth metropolitan region, the WAPC will generally decide applications for planning approval on land that abuts the Swan River.

Another class of decision-maker in the Western Australian planning system is Development Assessment Panels (DAP). A DAP is a panel made up of both local government officers and independent town planning professionals. A key purpose of DAPs is to remove the risk of political influence from high-value applications for planning approval. The DAP will assess any development in the City of Perth valued at $15 million or more and any development in other areas valued at $7 million or more.

A number of urban redevelopment areas in Western Australia are controlled by the Metropolitan Redevelopment Authority (MRA), a statutory body. The purpose of the MRA is to facilitate the orderly redevelopment of particular areas that are earmarked as requiring redevelopment. The MRA will determine applications for planning approval for land within one of its redevelopment areas, in place of the relevant local government.

SUBDIVISION APPROVAL

In addition to development control, the PD Act also regulates the subdivision of land in Western Australia.

In Western Australia, land may only be sold as an entire defined lot, that is, a single parcel with its own certificate of title. If a person intends to subdivide a parcel of land into several smaller lots, they will require subdivision approval from the WAPC. By the same token, if a person intends to acquire only part of a lot from a seller, subdivision approval from the WAPC must be obtained before that sale can be completed.

Once an application for subdivision approval has been submitted to and considered by the WAPC, the WAPC may either refuse the subdivision or approve the subdivision subject to appropriate conditions. It is often the case that conditions of subdivision approval will need to be satisfied by the developer prior to the new subdivided lots being formally created.

A refusal by the WAPC to grant subdivision approval may be challenged in the SAT. By the same token, an unreasonable condition of subdivision approval imposed by the WAPC may be challenged in the SAT.

ENVIRONMENTAL PROTECTION

Whereas planning law in Western Australia is controlled almost exclusively at a state level, environmental law in Western Australia derives from both state and Federal statues.

The EP Act is state legislation and applies generally to all aspects of the environment. The EP Act sets a procedure whereby a development proposal with the potential to impact on the environment may need to be referred for environmental impact assessment by the Environmental Protection Authority (EPA). If a proposal is assessed by the EPA, then the Minister for Environment will need to determine whether the proposed is environmentally acceptable and allowed to proceed.

The EPBC Act on the other hand applies only to those aspects of the environment for which the Federal Government has legislative power. The key provision of the EPBC Act is that a person may not, without approval, undertake a development that may potentially have a significant impact on a "matter of national environmental significance". The defined matters of national environmental significance are detailed within the EPBC Act.

If land has environmental constraints, then the requirement to refer a proposed development for assessment under the EP Act or the EPBC Act may cause significant delays in the completion of a project. It is, therefore, important to understand the environmental parameters relevant to a development at "the initial" project stages.

The EP Act and the EPBC Act will be of fundamental importance for any proposal on undeveloped land, especially where flora and fauna may still be prevalent. The EP Act and the EPBC Act may not however be relevant in the development of an established urban property, where there is unlikely to be any environmental impact.

Another important item of environmental legislation in Western Australia is the Contaminated Sites Act 2003 (WA) (CS Act). The CS Act covers the identification, reporting and remediation of contaminated land, that is, land containing a substance that may represent a risk to human health or the environment. Prior to acquiring land in Western Australia, enquiries should be made to determine whether the land is contaminated or potentially contaminated. If a contamination risk is identified, this should be adequately addressed in the sale contracts.

Taxation

There are a number of taxes that may be relevant to land development by a foreign person in Western Australia.

This section provides a summary of those taxes.

DUTY

Duty is a State based transaction tax that applies to many transactions relating to land including acquisitions of land or interests in company or trust structures that own a significant amount of land.

Transfer Duty

Transfer duty is payable by a party acquiring land. The rates of transfer duty are up to 5.15 per cent and are generally charged on the higher of the purchase price or unencumbered market value of the land.

Generally, evidence of the transaction (ie the contract) must be lodged at the Office of State Revenue (OSR) for duty assessment within two months of the contract being signed.

It is the contract to acquire the land, and not the ultimate transfer of legal ownership of the land under the contract, that triggers liability to pay duty.

Unless an appropriate exemption is available, any assignment by the buyer of its interest under a contract is also fully dutiable. Therefore, it is important to ensure that the buyer entity that you note on a contract is the entity that you wish for the land to be transferred to under the contract. If you do not know the entity that you wish to become the owner of the land at the date of the contract, an option should be entered into as summarised in the contracts to buy land section.

Duty is generally due for payment within one month of the OSR issuing a duty assessment. However, later payment requirements exist for some conditional contracts. For instance, the duty assessment on a contract that is conditional upon the buyer obtaining a subdivision approval is not payable until three years after the date of contract.

Landholder Duty

It is important to know that duty may be payable on an agreement to transfer an interest – for instance, a share in a company, or a unit in a unit trust – in a “landholder entity”.

A “landholder entity” is an entity that directly or indirectly (ie through related companies) has an entitlement to Western Australian land valued at $2,000,000 or more.

For instance, a company or unit trust that has entered into a contract to acquire land for $5,000,000 will be considered a landholder entity (despite the fact that it is yet to become registered as the owner of that land).

The laws relating to a landholder duty are complex.

However, in general terms, if a party acquires an interest in a landholder entity that causes it (or related parties) to hold an interest of 50 per cent or more in the landholder entity, duty will be payable on that transaction. In effect, the transaction is treated similarly to a transfer of land.

For example, consider a person that holds a 49 per cent interest in a company (ie 49 out of 100 ordinary shares). The company is entitled to land in Western Australia valued at $5,000,000. If the person acquires one more share, such that he now has a 50 per cent interest in the company, liability for landholder duty is triggered. Duty will be payable on $2,500,000 – this is the percentage interest that the person holds in the company (ie 50 per cent) multiplied by the value of the company's Western Australian landholding ($5,000,000). That is duty of approximately $125,000.

Therefore, if you intend to acquire land for more than $2,000,000, it is important to ensure that no investor will obtain an interest in the landholder that is greater than 50 per cent after the date of the contract. In this situation, a call option should be entered into as summarised in the contracts to buy land section.

Exemptions

There are a number of circumstances in which land transfers may be exempt from the requirement to pay duty. These include a transfer of land from a retiring trustee to an incoming trustee and a transfer between corporate entities that are part of a corporate group (in certain circumstances).

It is also possible to substitute the buyer named in a contract to acquire land with a related party in certain circumstances without paying duty for this substitution. For instance, a husband can enter into a contract to acquire land and his wife can be conveyed legal title to the land under that contract without triggering "double duty". This is referred to as the "substituted purchaser exemption".

For further information on duty, please visit the following website: finance.wa.gov.au/cms/State_Revenue/Duties/Duties.aspx

CORPORATE TAX

There are many tax issues for foreign investors that undertake land developments (either directly or through an Australian interposed entity) in Australia. There are advantages and disadvantages for doing so through different investment structures. The optimal structure will depend on the particular circumstances of the taxpayer.

Australia has a self-assessment taxation regime. The Australian Taxation Office (ATO) does not review tax returns upon lodgement but has broad powers to monitor compliance. It conducts taxpayer audits randomly or in circumstances where it believes that taxpayers are not complying with their tax obligations.

Income Tax

Non-residents of Australia are generally liable for Australian income tax on their Australian sourced income. Tax residents of Australia are liable for income tax on Australian sourced income and on foreign sourced income. Those that qualify as "temporary residents" are generally liable for tax on their Australian sourced income only (as is the case with non-residents) subject to certain exemptions.

Income from real property situated in Australia is sourced in Australia.

Taxable income is determined by subtracting allowable deductions from assessable income for the income year (general 1 July to the following 30 June) and multiplying this amount by the relevant rate of tax. The current company tax rate is a flat 30 per cent of its taxable income.

Capital Gains Tax

Non-residents of Australia are taxed on capital gains if disposing of Australian real property or non-portfolio interests in a company which principally holds Australian real property assets.

Non-residents are also taxed on capital gains if they carry on business in Australia through a branch.

Withholding Tax

Subject to limited exceptions, dividends paid by an Australian company to its foreign shareholders (to the extent they are unfranked dividends) are subject to dividend withholding tax. The general rate is 30 per cent. The rate may be affected by applicable international tax treaties.

Interest withholding tax is imposed on interest paid by an Australian company to its foreign non-resident lender. Generally, the rate is 10 per cent. Again, the rate may be affected by applicable international tax treaties.

It is necessary for the foreign resident to advise the financial institution of their foreign residency status. The financial institution will withhold tax in Australia at the time of payment. If this is the foreign resident's only Australian-sourced income, it will not need to be declared in an Australian tax return because the correct amount of tax would already have been paid.

Australia has approximately 44 tax treaties with foreign nations that specifically deal with income taxes. The general rates of withholding tax rates may be impacted by any international tax treaty in force with the relevant overseas country. In some cases, the treaties may reduce the relevant withholding tax to nil.

Managed Investment Trusts

In determining an appropriate structure for investment in Australia, consideration should be given to whether it is appropriate to establish a managed investment trust (MIT) from a tax perspective (as opposed to a corporate structure). The MIT regime may provide for a concessional withholding tax rate of 15 per cent (or 10 per cent for eligible clean building MITs), for certain distributions such as rental income from the trust, as compared with the general rate of 30 per cent applicable to dividend distributions from companies.

In general terms, MIT's are appropriate for passive investments as they cannot carry on or control a business. There are licensing and membership requirements for a trust to qualify as a managed investment trust which are outside the scope of this guide. Further, there are different commercial and regulatory outcomes in respect of trusts as compared with companies in Australian law, which will also need to be considered before deciding whether the trust is an appropriate vehicle.

Thin Capitalisation

The thin capitalisation rules are broadly designed to limit the amount of debt used to fund Australian operations or investments. Generally, interest paid on funds borrowed by an Australian entity for business purposes is deductible. However, the thin capitalisation rules effect a foreign controlled Australian entity's ability to deduct interest where its debt exceeds a certain level. When this occurs, the entity is "thinly capitalised" as its debt-to-equity ratio is too high.

Any Australian subsidiary or branch of a foreign investor that is borrowing funds will need to have regard to the thin capitalisation rules. Companies, partnerships and trusts subject to the thin capitalisation rules must complete an International Dealings Schedule (IDS) as part of their tax self-assessment obligations.

The maximum allowable debt before the thin capitalisation rules apply is determined by the current assets and liabilities of the foreign controlled Australian entity. There are two tests applicable to foreign controlled Australian entities. They are the safe harbor test and the arm's length debt test. Under the safe harbor test, the prescribed debt to equity ratio is generally a maximum of 60 per cent of the total asset basis. Under the arms length debt test, the prescribed level of debt is the maximum amount of debt that the entity could reasonably have borrowed from commercial lending institutions and the amount of debt that the entity would have reasonably been expected to have throughout the income year.

The rules apply to total debt and not just related party foreign debt. Taxpayers with interest deductions of $250,000 or less are exempt from the thin capitalisation rules.

Transfer Pricing

Australian transfer pricing rules enforce an arms length approach to cross border dealings between related entities. Details of any cross border related party dealing amounting to more than $2 million must be disclosed to the ATO in a schedule to the tax return (known as Schedule 25A).

Any transaction between a foreign entity and an Australian subsidiary or branch could potentially be subject to these transfer pricing rules.

All taxpayers in Australia are required to maintain adequate records and support their tax filing positions, including those relating to transfer pricing. The schedule also requires the taxpayer to disclose the percentage of transactions covered by its transfer pricing documentation.

GOODS AND SERVICES TAX (GST)

GST has been in force in Australia since 1 July 2000. It is based on the value added tax (VAT) adopted in many other jurisdictions and is a broad based consumption tax, taxing most goods, services and real property in Australia at a rate of 10 per cent as at the date of this guide.

Generally, businesses and other organisations registered for GST will:

- Include GST in the price they charge for their goods and services (including real property); and
- Claim GST credits for the GST included in the price of goods and services they buy for their business.

GST is paid at each step in the supply chain. It flows through your business but is not borne by your business (subject to certain exceptions). In most cases, the tax is borne by the end consumer, who can't claim GST credits.

Australian real property can be acquired and sold GST-free as the supply of a going concern in certain circumstances.

GST Registration

An entity is required to be registered for GST if it carries on an enterprise and its GST turnover threshold equals or exceeds the annual GST turnover threshold. This threshold is currently $75,000 ($150,000 for non-profit bodies).

Your GST turnover is the gross income from the business (not profit) for either the 12 months leading up to the current month or the 12 months starting with the current month. However, this does not include sales that are not connected with Australia.

If you have just commenced a land development in Australia and expect it to earn $75,000 or more gross income in its first year of operation, you are required to register for GST.

Entities that are registered for GST are generally entitled to claim a credit for GST paid on things acquired in carrying on their enterprise. If you are incurring expenditure in carrying on a business in Australia but are not required to be registered for GST, you may wish to register voluntarily so that you can claim these credits. There is a four year time limit imposed on GST credit claims.

You can register for GST online, using a form, by phone, or through your Australian registered tax agent. You will need an Australian business number (ABN) in order to register for GST. If you don't already have an ABN you can register for that and the GST in the same application (if you register online, you will receive your ABN immediately).

Business Activity Statements

If you are registering for GST, you are required to prepare and lodge business activity statements (also known as BAS or GST returns) to report your GST obligations as well as other tax obligations such as pay as you go (PAYG) instalments, PAYG withholding and FBT.

If you have a GST turnover of $20 million or more, you must report and pay GST monthly and lodge your activity statement electronically through the Business Portal. Activity statements must be lodged quarterly for entities with a turnover of less than $20 million unless they elect to lodge monthly. Taxpayers that are not required to be registered can elect to lodge annual GST returns. You must lodge on time to avoid interest and penalties.

GST treatment generally

If you are registered (or required to be registered) for GST in Australia, the goods and services you sell in Australia are taxable unless they are GST-free or input taxed.

GST is payable on taxable supplies made. You can claim GST credits in your BAS for the GST included in the price of purchases relating to the making of the taxable supply.

GST-free supplies (sometimes called "zero rated" in other GST and VAT regimes) do not attract GST and the supplier is not liable to pay tax on the supply, however there is no restriction on claiming GST credits for the GST included in the price of purchases relating to the making of the GST-free supply.

Input taxed supplies (sometimes called "exempt" in other GST and VAT regimes) do not attract GST. The supplier is not liable to pay GST on the supply, but it is also not generally entitled to claim GST credits for the GST included in the price of purchases relating to the making of the input taxed supply.

GST treatment of Australian real property

If a supplier is registered or required to be registered for GST, then generally:

- Leasing residential property is an input taxed supply;
- Selling residential property that has previously been sold or rented continuously for five years, and has not been substantially renovated (existing residential property) is an input taxed supply;
- Selling newly constructed residential property is a taxable supply; and
- Selling or leasing commercial property on vacant land is a taxable supply.

In addition to the above general rules, there are a number of specific treatments and special rules that affect how GST applies to a transaction involving Australian real property. Amongst others, there are special rules for retirement villages, farmland and going concerns (businesses).

There is also a special regime for supplies of taxable Australian real property called the margin scheme. The going concern and margin scheme provisions are particularly relevant in the context of land developments and are discussed in further detail below.

Going Concern exemption

Australian real property can be acquired and sold GST-free as the supply of a going concern in certain circumstances. It requires that the seller is carrying on an enterprise in relation to the property and that the buyer is put in the position to continue carrying on the enterprise on the day of supply.

This can be beneficial for cash flow purposes. The buyer has no need to fund the GST on the land acquisition (Australian banks generally will not lend funds to pay GST). It can also mean that less duty is payable, as duty is calculated on the GST inclusive price of property.

The definition of enterprise is very broad. The sale of real property that is subject to an existing lease is capable of being supplied as a GST-free going concern. The sale of an existing land development is also capable of being treated as a supply of a GST-free going concern in some circumstances.

Margin Scheme

Australian real property can be acquired and sold under the margin scheme rules. The margin scheme is an alternative way of working out the GST you must pay when you buy or sell Australian land as part of your business. In some circumstances, it can result in less GST payable overall.

The amount of GST you must normally pay to the ATO on a property sale is equal to one-eleventh of the total sale price. If you apply the margin scheme, the amount of GST you pay on a property sale is equal to one-eleventh of the margin. The margin is generally the difference between the amount you paid for the property or in some cases, the value of the property as at 1 July 2000.

The margin scheme cannot be used on your property sales if you, or anyone else who has purchased the property after 1 July 2000, purchased it as a taxable supply and the margin scheme was not used. Therefore, it is necessary to consider the transaction history of the land and determining whether you will want to apply the margin scheme in the future at the time the property is acquired.

You can only apply the margin scheme if the sale of the property is taxable. There is generally no benefit in applying the margin scheme to a sale of commercial property, as in most cases the purchaser will be able to claim a GST credit on any GST charged.

The margin scheme rules are most beneficial and therefore almost exclusively utilised for land developments of new residential premises where the purchasers of the end development product are consumers that are not registered for GST. In these circumstances the GST is embedded in the sale price to the consumer and the developer bears the GST cost. The developer therefore benefits from any reduction in GST payable by applying the margin scheme rules.

Tax Invoices

When you make a taxable sale of more than $82.50 (including GST), your GST-registered customers need a tax invoice from you to be able to claim a credit for the GST in the purchase price. Tax invoices must include certain information in order to be compliant with the GST regime. If a customer asks you for a tax invoice, you must provide one within 28 days of their request.

There is no need to issue a tax invoices where real property is sold under the margin scheme.

The margin scheme is an alternative way of working out the GST you must pay when you buy or sell Australian land as part of your business. In some circumstances, it can result in less GST payable overall.

Financing issues

Foreign investors in Australian property may obtain financing from financiers located in Australia or overseas. Except in very limited circumstances, Australia generally does not restrict where financing for the acquisition or development of land may be sourced.

The comments set out in this guide, however, relate to our experiences with major Australian lenders.

PRICING

Interest

Australian financiers typically charge interest on a floating rate calculated with reference to a benchmark bank bill swap rate, plus a margin.

Commonly a benchmark rate referring to "BBSY" will be used. BBSY refers to a screen page published by Thompson Reuters Information Service, which displays the relevant rates. At the time of publication of this guide, rates for 90-day bills are approximately 2.17 per cent pa. In comparison, the official Federal cash rate as published by the Reserve Bank of Australia is 2.00 per cent pa.

Margins will fluctuate between financiers. Margins will be influenced by the assessed risk factors of the borrower and investment or project, but in the current market, will be very competitive.

Fees

Specific fees will vary from financier to financier. A developer may expect that a financier is likely to charge the following common fees:

Establishment fee – this is a fee for the establishment of a facility or loan. It will usually be a once-off fee calculated with reference to a percentage of the total amount to be borrowed. Establishment fees are usually paid in a lump sum at or before the first draw of the loan.

Line fee – in addition to interest, a line fee may be charged for the continued provision of a facility. The line fee is charged at regular intervals (monthly or quarterly is typical) as a percentage of the facility limit. Whereas interest is charged against the amount outstanding (that is, the amount drawn and not yet repaid), a line fee is charged against the facility limit (whether or not that limit is actually drawn). A typical line fee in the current market will be in the range of 0.75 per cent pa to 1.5 per cent pa.

A financier will typically charge a range of fees for services it provides or actions it takes. The amount and nature of miscellaneous fees will vary, but may include discharge fees, valuation fees, variation fees and so on.

Financiers will generally also require that the borrower is responsible for and will indemnify the financier for all costs that the financier incurs in connection with providing the funding.

The indemnity will usually extend to include the fees of the financier's advisers – including lawyer's fees for document review and preparation, and the fees for the financier's quantity surveyor, valuer and other consultants.

Please be aware that such costs are required to be paid upfront, usually as a condition precedent to drawing - so a developer will need to take these costs into consideration in determining the required amount to be drawn. A foreign borrower should get a full breakdown of these fees as it is possible to negotiate on these fees.

COVENANTS

An Australian financier will generally require extensive undertakings from an investor acquiring and developing land.

An investor should expect that prior to any formal offers for financing, a financier will usually need to conduct an internal review of the borrower and proposed project. A credit committee will often oversee and consider the application.

The duration for credit review varies between financiers and is greatly affected by the complexity of a project. Typically, a foreign investor should allow between two to four weeks in the current market for a relatively standard development project.

Investors can help reduce delays in credit review by ensuring that:

- The proposed development is clearly explained and described – ideally without details that are yet to be determined or are contingent on other things or events.
- All relevant approvals (including FIRB) have been obtained or are at least in the process of being obtained.
- The borrower can provide independent reports from reputable consultants, demonstrating that the site is free from environmental, hazardous or contamination issues, and does not involve complex title or other issues.
- The borrower can demonstrate the ability for repaying

the loan. For example, if accommodation units are to be built as part of the project, demonstrated presales will generally be required.

- If the borrower is a company, the borrower can describe its (and its group) structure clearly – including a firm decision regarding the identity of the borrowing entity.
- The borrower is clear about what other property and assets it is capable (and willing) to offer as security.
- The borrower assists the financier in making available as much information and access to the borrower's relevant personnel as may be required from time to time.

This list should not be taken to be the only things that an investor should consider, as there are many other things the borrower can do to assist credit's review.

Australian financiers will also require borrowers to meet various financial covenants. Specific covenants may be required for particular projects, however, generally, the following are minimum requirements. The tests may be measured in a number of ways and will be clearly defined in the borrower's documentation; however, the basic concepts are set out below:

Loan to value ratio (LVR)
Basically, this is the ratio of the amount of the loan provided by the financier as compared to the value of the secured property.

The ratio is usually expressed as a percentage. The financier will require that the LVR does not exceed a specified threshold. In the current market, investment financing will typically require an LVR threshold of between 55 per cent to 70 per cent. The LVR may be affected by the financier's perceived risk of the borrower and the project.

Interest cover ratio (ICR)
This is generally the ratio of available cashflow to repay the loan as compared to the interest expenses of the borrower. Usually this is expressed in 'times' – that is how many times the cashflow is greater than interest expense. Typically, in the current market, financiers will require borrowers to maintain an ICR of at least two times, but more commonly around three times or more. ICR will also be influenced by financier's perceived risk of the borrower and the project.

Loan to cost ratio (LCR)
This is the ratio of the amount of the loan provided by the financier compared to all associated development costs for the project. LCR is usually expressed as a percentage. The financier will require that LCR does not exceed a stated threshold. In the current market, that threshold is generally between 55 to 70 per cent, and will be influenced by risk factors.

Non-recourse or limited recourse financing may significantly affect the perceived risk profile of a project, and may result in more stringent financial covenants.

OTHER COVENANTS

Reporting – Financiers will generally require frequent reporting by the borrower regarding the project's progress and the borrower's and guarantors' financial position.

Project milestones and completion – Financiers will often require projects to meet milestones and be completed within an agreed time frame as a condition for continued the provision of financing. The reasonableness of the project completion date will be assessed by consultants that the financiers appoint.

Presales – Where a project involves the construction of dwellings or units for sale, financiers will require stated levels of sales to be met, as a condition of the continued provision of funding.

A facility or tranche specifically for the funding of the construction of the relevant units might not be provided unless and until the developer can provided signed, binding contracts for the purchase of those units by third party purchasers. In the current market, it is not unusual for financiers to require that the total value of all pre-sale contracts are at least 100 per cent of the construction loan to be provided to the developer. The level of required presales will depend on a number of factors including the assessed risk of the project by the financier.

Generally, financiers will only accept 10 per cent of the pre-sales contracts to be entered into with foreign buyers.

Review by advisers – Financiers will require as a condition to funding that all funding documentation and security, relevant presales, building contracts, development approvals, governmental authorisations and other formal documentation be reviewed by its legal counsel.

As a result of internal and external reviews, a developer should allow sufficient time in its timetable for applying and obtaining financing.

We recommend that prospective developers commence discussions with their respective advisers at the outset of a proposed acquisition, so as to commence preliminary due diligence. Detailed and reliable due diligence information will greatly assist financiers' consideration of your proposed project.

It may be useful, particularly for preliminary expressions of interest, for investors to request that their advisers and consultants permit the project's financiers be entitled to rely on the respective reports and advice provided. However, typically a financier will engage its own consultants to investigate and opine on material issues and elements relating to the project.

SECURITY

Typically, the security package sought by a financier for financing the acquisition and development of land in Australia will include the following arrangements and documents. Specific projects may have particular issues which require additional documentation. The list below is, therefore, an example of the minimum level of security that an investor may expect to provide.

MORTGAGE

A registered mortgage granted by the land holder in favour of the financier. The land holder need not be the borrower. If the land holder is not the borrower, a guarantee from the land holder in favour of the financier will also be sought.

The mortgage must be in a form as prescribed under legislation and land titles office practice and requirements. The mortgage will also incorporate a set of terms and conditions.

Those terms and conditions will contain very detailed provisions about what the person granting the mortgage (the mortgagor) must do.

If the mortgagor defaults on any of those terms and conditions, the financier will be permitted to enforce its rights under the mortgage. Typically this will allow the financier to make immediate demand of all monies outstanding (whether or not those monies

As a result of internal and external reviews, a developer should allow sufficient time in its timetable for applying and obtaining financing.

are due for payment). Failing the repayment of those monies, the financier may take possession of the property or appoint a receiver to the property.

A financier in possession of the property or a receiver appointed to the property has broad powers in relation to what it may do to the property. These powers include the power to sell the property to recover the amount owing to the financier.

In Australia, it is common for the developer to be a special purpose vehicle created for the sole purpose of undertaking the development.

GUARANTEES

Guarantees from related entities may also be sought, depending on the value of the secured property. Typically guarantees will provide that the financier is entitled to make demand on the guarantor for the borrower's debt, whether or not the financier has made demand on the borrower.

Issues may arise if all guarantors are non-Australian residents and do not have property located in Australia. Financiers may address this issue in a number of ways, which can include increasing pricing (raising the margin on interest rates) or reducing the LVR or LCR thresholds (reducing the amount the financier is willing to loan).

GENERAL SECURITY AGREEMENT (GSA)

Where the borrower is a company, a financier will typically seek a 'general security agreement' or 'GSA' from the borrower (and guarantors that are companies). A GSA is a security interest regulated by legislation and is registered on a formal register. Like a mortgage, the GSA will provide terms and conditions. If a default occurs under the GSA, the financier may enforce its rights under the GSA, including rights to seize and sell the grantor's property that is the subject of the GSA.

The collateral the subject of a GSA is typically all present and future tangible and intangible property of the grantor, which therefore may include ancillary materials to the project such as plans, contracts, accounts and money relating to the project. GSAs do not apply directly to the land itself.

WORKS TRIPARTITE AGREEMENT OR SIDE DEED

If the project involves the construction of buildings, financiers will generally want to approve the proposed builder and will require their own detailed review of the building contract. Financiers will often require that an additional document (sometimes called a tripartite agreement or side deed) be entered between the builder, the borrower and the financier. The purpose of the side deed is to grant the financier certain direct rights with respect to the building contract.

These rights may include:

- The right (but not the obligation) of the financier to take over the project from the borrower if the borrower becomes insolvent or not able to complete the project.
- Amendments to certain terms and conditions in the building contract that are not acceptable to the financier. Typically these will relate to reporting and payment obligations.
- An acknowledgement from the builder that the financier has security over the site and building.
- An agreement from the builder to provide security for the performance of the construction contract in favour of the principal or the financier.
- An agreement by the principal and builder that no material variations will be made to the building contract without the prior approval of the financier.

FLAWED ASSET ARRANGEMENTS

Where the project will result in cashflow – for example, cash from sales of units or ongoing rental receipts – the financier will usually require that that cash is deposited into a specified account.

The account will usually be an account held with the financier. The financier will also generally require that the account holder is not permitted to use the funds to the balance of that account except with the prior consent of the financier, or in very limited agreed circumstances.

The financier will also require the borrower to agree that the financier may use the balance of the account to be applied to pay any amount owed by the borrower to the financier – at the discretion of the financier.

These sorts of arrangements are commonly called 'flawed asset arrangements' and are created under a document entered between the financier and the account holder.

Flawed asset arrangements are also usually registered on the same register as GSAs, as a security interest in favour of the financier.

OTHER ISSUES

Thin capitalisation – Australia has extensive thin capitalisation rules.

Resident investors (such as an Australian subsidiary or special purpose vehicle) who fund an Australian project in whole or in part with debt sourced from outside of Australia will need to consider whether Australia's thin capitalisation rules apply.

As noted on page 17 of this report, the thin capitalisation rules apply where Australian entities borrow foreign funds beyond a certain limit.

The amount of debt above the prescribed limit may be subject to the thin capitalisation rules - which may reduce the amount the borrower may claim as a deduction from Australian tax in respect of interest expense incurred in respect of the foreign debt.

Deposits from sales may not be used to fund construction – In Western Australia it is not possible for the seller to apply any deposit or other funds paid by buyers of strata titled apartments (whether residential, commercial or otherwise) towards the cost of construction of the development.

Significant investment visas

The Significant Investment Visa was introduced by the Australia Government in November 2012 as a measure to boost investment in the Australian economy by high net worth foreign individuals.

In order to be eligible for the visa, you must demonstrate that:

- you have business and/or personal assets of at least $5,000,000 available to be invested in complying investments; and
- you have an additional $50,000 which is available for domestic and/or settlement purposes.

Relevantly, an investment in an Australian Proprietary Limited Company, including one that is undertaking a land development is a complying investment.

The holder of a Significant Investment Visa will become eligible to apply for a Permanent Residence Visa, once they have held their complying investment in Australia for four consecutive years and have met the residency criteria, spending 160 days in Australia over the four year period.

For further information, please visit the following websites:

Australian Department of Immigration
immi.gov.au/Pages/Welcome.aspx

Western Australian Small Business Development Corporation
businessmigration.wa.gov.au/

Western Australian Land Authority

Level 6
40 The Esplanade Perth
Western Australia 6000
Australia

T +61 (08) 9482 7499
F +61 (08) 9481 0861

landcorp.com.au

POSTAL ADDRESS
Locked Bag 5
Perth Business Centre
Western Australia 6849

EcoStar is an environmentally responsible 100% recycled paper made from 100% postconsumer waste that is FSC CoC certified and bleached chlorine free (PCF).

Realising WA's Potential.

LANDCORP