

Australia

→ Overview

Economic recovery in the United States has continued as has the recovery in Europe albeit with greater levels of economic stimulus. Economic growth in Asia has fallen as China continues its transition from fixed asset investment to consumption as the main driver of economic growth. This transition has had an impact on economies that had enjoyed the benefit of an expanding Chinese economy including Australia. Over the last decade Australia enjoyed an almost unprecedented growth in mining investment and high commodity prices. This drove the terms of trade to historical highs. Expanded production capacity has coincided with a slowdown in China and a fall in commodity prices which has, in turn, led to a fall in the terms of trade.

Australia has employed a number of counter measures to offset the impact of a fall in the terms of trade. The floating currency has played a significant role in buffering the economy as it moved from a high of around AU\$1.10 against the US dollar to around AU\$0.70 currently. At the same time, the Reserve Bank of Australia lowered the official cash rate to an historic low of 2.00%. Finally, the Federal Government continues to support historically high levels of skilled immigration.

The effect of these three strategies has been to assist the transition of economic growth in the Australian economy from mining to non-mining activities. Housing construction, consumption, tourism and education are now contributing to GDP growth albeit at a below trend rate. These engines of economic growth can be expected to continue into 2016 generating somewhat stronger GDP growth, although again slightly below trend. This may afford room for the Reserve Bank to lower interest rates further providing more stimulus to economic growth.

TABLE 1
Key statistics

Official name	Australia
Currency	Australian dollar (100 cents), floating currency US\$1 = AU\$0.70 (8 January 2016)
Population	23.9 million
Land area	7.69 million sq km
Gross domestic product (GDP) per capita	AU\$86,074; US\$61,036
GDP growth	2.8% per annum (financial year [FY] 2014) 2.0% per annum (FY 2015) 2.5% per annum (FY 2016E)
Principal business centres	Canberra, Sydney, Melbourne, Brisbane, Perth, Adelaide

Source: Australian Bureau of Statistics

Types of property ownership

Most Australian land is held under the Torrens title system, through land registries established in each state and territory. While the system is essentially the same in each Australian state and territory, the registration requirements vary. Under the Torrens title system, the relevant state or territory guarantees title to the person who is recorded on the register as the owner of the land (the exception being in the case of fraud). A transfer of ownership of Torrens title land is effected through a change of the record on the register. The registered owner holds their ownership interest subject to prior registered interests and, subject to the relevant legislation in each state and territory, free from most interests which are not registered. In other words, priority between interests is established by the order in which they are registered, not by the order in which they are executed (or signed).

As the state or territory guarantees the accuracy of the register, prospective purchasers can rely on the information on the register and act on the basis of it.

The most commonly recognised interests in Australian land are detailed as follows.

Freehold estate in fee simple

This is the most common form of land ownership in Australia, and represents the most complete ownership interest available to persons other than the Crown. A fee simple estate is of unlimited duration.

Leasehold interest

Leasehold interest is the interest which a tenant or lessee acquires from the owner of the land to use and occupy the land for a limited period. Most commercial leases are for a fixed period of time. Generally, where the land is owned by the Crown, a person may take a long-term (often 99 years) leasehold interest from the Crown. Leasehold interests are generally required to be registered. Options to extend the term of the lease may also be negotiated.

Other interests

Other types of interest in land which may be registered include:

- mortgage interests – which generally secure repayment of a loan or other financing arrangements; →

➔ ■ options to acquire land;

■ easements – which generally convey a right to use a particular part of someone else's land for a specific purpose, but not to occupy the land;

■ restrictive covenants – a covenant given by the owner of one parcel of land to the owner of another parcel of land, by which the first owner agrees not to use their land in a particular way, for the benefit of the second owner; for example, an agreement by one owner not to build any structures which would impede the neighbouring owner's views.

Non-Torrens title land

While most Australian property is now registered under the Torrens title system (including all land in Queensland and the Northern Territory), some areas of land have not been converted. Unconverted parcels of land typically fall into one of the following categories:

■ Crown land – land owned by a state or territory of Australia or by the Commonwealth of Australia;

■ Old system land – generally rural land. Most states and territories have procedures for converting old system land to Torrens title whenever a new dealing with the land is lodged with the land registry.

Native title

Native title was first recognised in Australia in 1992, when the High Court of Australia found that the traditional Aboriginal owners held native title over certain land. A national scheme, implemented through legislation in each state and territory, governs the validity of land dealings affecting native title and establishes a process to deal with native title claims. Native title rights can be compulsorily acquired or surrendered under law, but cannot be transferred. Although native title is most relevant to non-freehold land and Crown- or Commonwealth-owned land, a prudent buyer will take native title into account in relation to most land dealings.

Overseas ownership restrictions

The Australian government reviews and evaluates certain overseas investment proposals. Investment

proposals by overseas interests are regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA). FATA is administered by the Treasurer, who is assisted by the Foreign Investment Review Board (FIRB), a division of the Commonwealth Government Treasury. The Commonwealth government publishes policy guidelines for the administration of FATA.

Like most countries, Australia has rules and restrictions on the acquisition and ownership of property by foreign interests. The rules, restrictions and exemptions are complicated however foreign persons are normally given approval to buy:

■ Vacant land for development, including house and land packages where construction has not commenced, subject to a condition imposed under the FATA that continuous construction commences within 24 months for residential developments, or five years for commercial developments not to be used for residential purposes; and

■ New dwellings such as house and land packages, home units and townhouses purchased 'off the plan' that is, under construction or newly constructed, but never occupied or previously sold. 'Off the plan' sales to foreigners are only permitted for new development projects or extensively refurbished commercial structures, which have been converted to residential.

■ Certain categories of foreign nationals, who hold a visa that permits them to reside in Australia continuously for at least the next 12 months (such as students), may be given approval to purchase established residential real estate (that is, second hand dwellings) for use as their principal place of residence (that is, not for rental purposes) while in Australia. A condition of such purchases is that the dwelling must be sold when the foreign nationals' temporary resident visas expire, they leave Australia, or the property is no longer used as their principal place of residence.

■ Foreign companies, with an established substantial business in Australia, buying for named senior

executives resident in Australia for periods longer than 12 months, may be eligible for approval provided the accommodation is sold when no longer required for this purpose. Whether a company is eligible, and the number of properties that may be acquired, will depend upon the extent of the foreign company's operations and assets in Australia. Unless there are special circumstances, foreign companies normally will not be permitted to buy more than two houses under this category. Foreign companies would not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

■ From 1 December 2015, applicants will pay a fee before their foreign investment application is processed. For a property valued under AU\$1 million a fee of AU\$5,000 is payable. For properties valued over AU\$1 million a fee of AU\$10,000 is payable then AU\$10,000 incremental fee increase per additional AU\$1 million in property value. Advanced off-the-plan certificates require a fee of AU\$25,000 upfront.

■ Property developers can apply for an advanced off-the-plan certificate to sell new dwellings in a development of 100 or more residences to foreign investors. The Government will tighten the rules around the use of advanced off-the-plan certificates by limiting the value of all apartments that can be bought by a single foreign investor to AU\$3 million in the one development. If foreign investors want to purchase apartments above this value, they will have to seek individual approval.

Proposals by foreign persons to acquire developed residential real estate that does not fall within the above categories are subject to the FATA, but are not normally approved.

Meaning of 'foreign interests'

The expression 'foreign interest' has a very technical meaning under FATA. There are complex tracing provisions, which have a broad reach. However, in general terms, a foreign interest is:

■ a natural person who is not ordinarily resident in Australia;

- an overseas government or its agencies;
- any corporation, business or trust in which there is a 'substantial interest' held by an overseas person or corporation.

A substantial interest exists where there is an interest of 15% or more in ownership, voting power or potential voting power by a single person or corporation (together with associates) or 40% or more in aggregate ownership, voting power or potential voting power by two or more persons or corporations (together with their respective associates). Potential voting power refers in general terms to the number of votes that can be cast in a general meeting of a corporation.

Proposals relating to urban land

Overseas entities wanting to acquire urban land (including interests that arise via leases, financing and profit-sharing arrangements) must make a proposal to FATA. Proposals must be made in regard to the following:

- developed non-residential commercial real estate where the property is subject to heritage listing and valued at AU\$5 million or more (in the case of both US and non-US investors);
- developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at AU\$55 million or more in the case of non-US investors, or AU\$1,094 million or more in the case of US, Chilean, Japanese, Korean and New Zealand investors;
- accommodation facilities, valued at AU\$55 million or more;
- vacant real estate irrespective of value;
- residential real estate irrespective of value (subject to certain exceptions as outlined below);
- shares or units in Australian urban land corporations or trust estates, irrespective of value, must be approved by the Treasurer before they can be implemented and should be presented to FIRB in advance. Failure to notify may result in an order for compulsory divestment.

You do not need prior approval to acquire residential real estate if you are:

- an Australian citizen living abroad;
- an overseas citizen purchasing, as a joint tenant, with your Australian citizen spouse;
- an overseas citizen who holds a permanent resident visa;
- a New Zealand citizen.

Proposals relating to rural land

The definition of rural land includes all land that is used wholly and exclusively for carrying on a substantial business of primary production. A substantial business of primary production must have a commercial purpose or character and be involved in activities relating to the cultivation of land, animal husbandry/farming, horticulture, fishing, forest operations, viticulture or dairy farming, but does not include vacant land, hobby farms, land used for stock agistment or mining.

The Government has passed legislation which requires that, from 1 July 2015, foreign persons and foreign government investors holding interest in agricultural land must register those interests with the Australian Taxation Office (regardless of value).

All existing holdings must be registered by December 31 2015 and any new interests must be registered within 30 days of contract exchange.

Proposed acquisitions of rural land valued at AU\$15 million or more (or the relevant threshold for US, New Zealand, Chilean, Singaporean or Thai investors) must be approved by FIRB¹.

Contracts

All contracts which are being used by overseas investors for the purchase of Australian real estate for which FIRB approval is required must be made conditional upon FIRB approval (unless approval has already been granted). Contracts should provide for a minimum of 40 days from the date of lodgement for a decision from FIRB. For any properties being

purchased at auction, prior FIRB approval must be obtained.

Measurement of areas

Measurements generally used in the property industry are quoted as set out below by the Property Council of Australia:

- gross lettable area – retail: the aggregate floor space contained within a tenancy at each floor and used for calculation in shopping centres, commercial buildings and shops generally.
- gross lettable area: the floor space contained within a tenancy at each floor and used for calculation in warehouses, industrial buildings, freestanding supermarkets and showrooms.
- net lettable area: the sum of the whole-floor lettable areas, used in calculating area in office buildings and office parks.

Lease terms

Lease terms vary, depending on the location and type of the property. The following summary outlines some common terms found in Australian retail and commercial leases:

Lease period²

- Retail: in most Australian states and territories, the relevant retail leasing legislation stipulates a minimum lease term (five years in most jurisdictions) unless this is waived by the tenant. Generally, lease terms from three to five years are the most common, although longer leases may be available.
- Commercial (including office and industrial): subject to any specific requirements under legislation in each state or territory, commercial leases can be for any length of time. In most cases, commercial leases are between five and ten years.

A tenant may also be able to negotiate options to extend the lease for a number of further terms.

Rent reviews³

The rent payable under the lease may be subject to periodic review

² The period or term of the lease.

³ A periodic review of rent under a lease using a predetermined method. For example, an increase in line with CPI, or in accordance with a market valuation.

¹ Information current as of 1 December 2014.

→ using a predetermined method: for example, a fixed review to increase the rent by 5% per annum and/or by reference to the consumer price index (CPI).

Sub-letting/assignment⁴

A tenant might agree to sub-lease or to assign space which they are leasing to a third party. Normally, this cannot be done without the landlord's permission. If the landlord approves the sub-lease or assignment, they may require the sub-lessee or assignee to provide guarantees or other security, depending on the terms of the original lease.

Repairs

The party responsible for making repairs to the premises is generally set out in the lease. It is common for the landlord to be responsible for major structural and capital works, and for the tenant to be responsible for maintaining the premises (subject to fair wear and tear) and for repairing any damage caused by the tenant. Some leases also contain clauses dealing with the fit-out of the premises and "make-good" obligations, where each party is made responsible for specific maintenance/ make-good obligations at the beginning and/or end of the lease.

⁴ A contract whereby the whole or part of the property is let to another person, the party letting being themselves a lessee. The obligations of the lessee to the lessor are not diminished. The length of the sub-lease must not be longer than the unexpired part of the lease.

Security of tenure⁵

Security of tenure only extends for the duration of the lease.

Security of performance

Generally, a landlord will require security for performance by the tenant of the tenant's obligations under a lease. This can be by way of a bank guarantee, cash deposit bond or company/personal guarantees.

Termination of a lease

Leases generally terminate upon their expiry date. Options to renew may be built into the lease by negotiation. Commercial (retail, office and industrial) leases do not normally contain provisions requiring either party to be compensated on termination of the lease, except where the termination is due to default. Retail tenancy legislation in most states and territories may also require compensation to be paid to retail tenants if the landlord exercises a right to terminate the lease pending demolition or redevelopment of the premises.

Transaction costs

Brokerage/agency fees

Leasing fees are typically paid by the landlord and are negotiable prior to appointment and will be dependent on whether it is a conjunctional or

⁵ When the term is used in connection with renting, it means the certain term for which a tenant may remain in occupation.

sole-agent appointment. Typically, leasing fees amount to 15% of the first year's rent.

On transactions, typical fees are in the range of 0.75% to 1.5% of the agreed price for commercial, industrial and retail properties. Fees on residential transactions will be higher.

Legal fees

Transaction and statutory search fees will vary depending on the solicitor instructed, the complexity and size of the transaction, and on the nature and location of the property.

Registration fees and levies

The land registry in the relevant state or territory will charge registration fees for registering a purchaser's interest in the land (and for registering any mortgage or other dealing on the land). In some jurisdictions (for instance New South Wales), a levy is payable in addition to the registration fee prior to the land registry attending to registration of the purchaser's interest in the land. The amount of these levies is dependent on the purchase price of the land.

Tax legislation

In Australia, power to levy tax exists at both commonwealth (i.e., federal) and state levels. The federal government levies taxes such as income tax, and goods and services tax (GST). Taxes levied by state governments include stamp duty, land tax and payroll tax as well as transaction duty, fees and charges on certain kinds of business transactions.

At the federal level, taxation is administered by the Australian Taxation Office (ATO). At the state and territory level, the relevant taxation authority is the State Revenue Office of the applicable state or territory.

Stamp duty

Stamp duty is a tax imposed at the state/territory level. As a result, the stamp duty payable on a purchase of land will depend on where the land is situated. Stamp duty may also be payable on the purchase of shares in a company, particularly where the company is "land rich". Stamp duty is generally charged at an incremental

TABLE 2
Marginal rates of land tax for commercial property*

State/territory	Threshold (AU\$)	Rate	Department
Australian Capital Territory	275,001	1.23% of land value	Revenue Office
New South Wales	2,641,000	AU\$35,444 + 2% of land value above AU\$2,641,000	Office of State Revenue
Northern Territory		Not payable	
Queensland	5,000,000	AU\$62,500 + 1.75¢ for each AU\$1 more than AU\$5,000,000	Office of State Revenue
South Australia	1,052,001	AU\$10,695 + AU\$3.70 for every AU\$100 or fractional part of AU\$100 over AU\$1,052,000	Revenue South Australia
Tasmania	350,000	AU\$1,837.50 + 1.5% of amount above AU\$350,000	State Revenue Office
Victoria	3,000,000	AU\$24,975 + 2.25% of amount above AU\$3,000,000	State Revenue Office
Western Australia	11,000,000	AU\$156,560 + 2.67¢ of each AU\$1 in excess of AU\$11,000,000	Office of State Revenue

Source: ATO / State Revenue Offices

*Information current as of 20 November 2015. Note that different marginal rates may apply, depending on property type and value. Please refer to the applicable State or Territory revenue office website for up-to-date information.

rate, based on the higher of the market value of the property transferred and the GST-inclusive consideration. Certain exemptions and concessions may be available. Stamp duty on land acquisitions in New South Wales is currently charged at a rate of between 1.25% and 7.0%; however, for the latest rates please contact the State Revenue Office in the relevant state or territory. Stamp duty is generally payable by the purchaser, either by law or by commercial agreement, but in some jurisdictions the seller and purchaser are jointly and severally liable. The transfer of title to land cannot be registered until stamp duty has been paid.

Land tax

Land tax is also imposed at the state/territory level. As a result, the rate of land tax, the threshold at which it becomes payable and the date on which it is assessed and paid will depend on where the land is situated. Generally, land tax is payable by the current owner as of 31 December or 30 June of the current year, and is assessed on the unimproved land value. Certain exemptions may be available (for example, land tax is generally not payable on a principal place of residence). The current maximum marginal rates of land tax for commercial property are shown in Table 2.

The State of South Australia is progressively abolishing stamp duty on commercial property transfers. The rate will reduce from 1 July 2016, half that rate again from 1 July 2017 and be zero from 1 July 2018.

Corporation tax

The tax rate for public and private companies, resident and non-resident, is currently 30%.

Income tax

Individuals, trustees, superannuation funds and companies deriving income from an Australian source must apply to the ATO for an Australian tax file number and must lodge an annual tax return with the ATO. Entities which carry on an enterprise in Australia also require an Australian business number.

Income tax is payable by individuals, trustees (in certain circumstances), superannuation funds and companies. Australian income tax is

TABLE 3
Income tax rates for Australian residents

Taxation income (AU\$)	Marginal tax rate (%)	Tax on this income
0–18,200	0	Nil
18,201–37,000	19	19¢ for each AU\$1 over AU\$18,200
37,001–80,000	32.5	AU\$3,572 + 32.5¢ for each AU\$1 over AU\$37,000
80,001–180,000	37	AU\$17,547 + 37¢ for each AU\$1 over AU\$80,000
180,001 +	45	AU\$54,547 + 45¢ for each AU\$1 over AU\$180,000

Source: Savills Research & Consultancy

TABLE 4
Income tax rates for non-Australian residents

Taxation income (AU\$)	Marginal tax rate (%)	Tax on this income
0–80,000	32.5	32.5¢ for each AU\$1
80,001–180,000	37	AU\$26,000 + 37¢ for each AU\$1 over AU\$80,000
180,001 +	45	AU\$63,000 + 45¢ for each AU\$1 over AU\$180,000

Source: Savills Research & Consultancy

imposed on a single measurement of taxable income, which is calculated as the sum of assessable income derived by the taxpayer during the relevant year of income, less 'allowable deductions', i.e.,

$$\text{Taxable Income} = \text{Assessable Income} - \text{Allowable Deductions}$$

Australian tax residents are generally liable to pay income tax in respect of their worldwide assessable income, whereas non-Australian tax residents only pay tax on that part of their income which is derived from sources in Australia. However, this principle may be subject to the application of double taxation agreements (DTAs) which Australia has entered into with a number of other countries (please refer to the section 'Withholding tax' overleaf for a list of countries).

Taxation rates for individuals differ, depending on whether the individual is an Australian tax resident or not. The marginal rates of taxation applicable for Australian tax residents

for the financial year from 1 July 2015 to 30 June 2016 are shown in Table 3.

In addition, individual Australian tax residents must pay a Medicare Levy of 2% of taxable income, subject to low-income thresholds, phase-in limits and surcharges for individuals without private health insurance. Further, a levy of 2% for taxpayers on AU\$180,000+ to fund the Temporary Budget Repair Levy is payable from 1 July 2014. The marginal rates of taxation applicable for non-Australian tax residents for the financial year from 1 July 2015 to 30 June 2016 are shown in Table 4.

Non-Australian tax residents are not required to pay a Medicare Levy of 2% of taxable income. However, a levy of 2% for non-Australian taxpayers on AU\$180,000+ to fund the Temporary Budget Repair Levy is payable from 1 July 2014.

Goods and Services Tax (GST)

GST is a broad-based consumption tax levied on the supply of most



→ goods and services in Australia, and on goods imported into Australia. The transfer of real estate located in Australia is generally subject to GST, which is calculated as 10% of the GST-exclusive selling price of the real estate and is payable by the seller. However, in the purchase of non-residential property, the GST liability is generally passed to the buyer as they can claim the GST as an input tax credit, subject to satisfying certain requirements.

There are two methods of calculating GST in respect of the supply of certain types of real estate: 1) the ordinary method, and 2) the margin scheme. The ordinary method calculates GST as 10% of the GST-exclusive sale price of the property. The purchaser of a property under the ordinary method may be entitled to claim the GST paid as an input tax credit, subject to satisfying certain requirements. The margin scheme is generally applied to the sale of newly constructed residential premises. A number of conditions must be satisfied for the margin scheme to apply, including written agreement between the seller and purchaser. The margin scheme calculates GST as 10% of the margin, which is the difference between the GST-exclusive sale price and, generally, the price paid for the acquisition of the real estate (subject to certain exceptions). It is important to note that where the margin scheme is used to calculate GST, a purchaser of real estate is not entitled to claim input tax credit.

The sale of farm land, commercial real estate subject to lease, and grants of vacant land by the federal government may all be GST-free supplies, subject to satisfying a number of requirements.

Managed investment trust (MIT)

Australia has also recently implemented the following major reforms in relation to the taxation of MITs:

- the ability for MITs to make an election to treat gains and losses on the disposal of certain assets, including land, as subject to capital gains tax (CGT) treatment, thereby allowing certain investors in an MIT to access a CGT discount on the disposal of underlying assets;
- the extension of the definition of MIT so that a greater range of funds may take advantage of the 15% withholding tax rate which applies to certain distributions to overseas investors.

Withholding tax and tax treaties

Withholding tax is imposed in certain circumstances on dividends, interest and royalties.

For example, a borrower must withhold 10% of the gross amount of the interest paid to a non-resident creditor. Most of Australia's DTAs do not affect the rate of interest withholding tax imposed, as the DTA allows for a rate of 10% or higher.

Royalties paid by an Australian tax resident to a non-Australian tax resident are also subject to

withholding tax at a rate of 30% of the gross royalty amount, generally reduced to 10% if paid to a resident of a country with which Australia has a DTA.

Dividends paid by an Australian tax resident company to a non-Australian tax resident which are unfranked (ie, no Australian company tax has been paid in respect of the profits from which the dividend has been paid) are generally subject to 30% withholding tax. The rate of dividend withholding tax is generally reduced to 15% if paid to a resident of a country with which Australia has a DTA. Payment of a franked dividend by an Australian tax resident is exempt from withholding tax.

DTAs have been signed by Australia with the following countries:

Argentina, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hungary, India, Indonesia, Ireland, Italy, Japan, Kiribati, Malaysia, Malta, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, People's Republic of China (PRC), Philippines, Poland, Romania, Russia, Singapore, Slovakia, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Taipei, Thailand, Turkey, UK, US and Viet Nam.⁶

⁶ Information current as of 1 December 2014.

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