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## PROPERTY INSIGHTS

# FOREIGN PURCHASER ADDITIONAL DUTY – UPDATES AND EXEMPTIONS



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Section 28A of the *Duties Act 2000* (Vic) provides that additional duty is payable when a foreign purchaser acquires residential property in Victoria.

As of 1 July 2019, the rate of additional duty increased to 8%. This is payable in addition to the regular rate of duty that is otherwise payable on the transaction. As such, in circumstances where the price of the transaction attracts regular duty at 5.5%, the total amount of duty that a foreign purchaser will now need to pay on that transaction, is 13.5% of the purchase price.

Developers are of course largely impacted by these provisions, given that the definition of residential land includes, “land on which a purchaser intends to affix a building that is designed ... solely or primarily for residential purposes”. In other words, land that may not ordinarily appear to be a residence, will be caught by the provisions.

### Exemptions for foreign purchasers

There has always been the possibility for a foreign purchaser to seek an exemption from the additional duty pursuant to section 3E(2) of the *Duties Act*, by seeking the exercise of the Treasurer’s discretion (delegated to the Commissioner) to grant a written exemption.

Section 3E provides a number of grounds pursuant to which an exemption may be granted. Further, section 3E(4) provides that the Treasurer must issue guidelines for the exercise of the power of exemption (and which have been issued).

*South Wharf Towers Pty Ltd v Commissioner of State Revenue (Review and Regulations)[2019] VCAT 64* is the first decision of the Tribunal (and of any Court) to consider the application of the exemption and the guidelines issued by the Treasurer.

This was a favourable decision for the foreign purchaser (who was a developer), as the Tribunal found that it was appropriate for the discretion under section 3E to be exercised to exempt the purchaser from the additional duty (netting in a significant saving to the foreign purchaser).

The case considers a number of factors, including the Treasurer’s guidelines, which stated that it would be a relevant consideration where the foreign purchaser can demonstrate that it is actively investing in and significantly adding to the supply of housing stock in Victoria, or that its main commercial activity is in purchasing existing property for redevelopment where the primary use of the redevelopment is for residential purposes.

For further information about the foreign purchaser additional duty and the possibility of seeking an exemption, please contact our Property and Development team.



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## HOME IS WHERE THE HEART IS: ADVERSE POSSESSION IN URBAN MELBOURNE



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A property developer in Sydney has succeeded against the relatives of a deceased property owner in his right to the title deed of a home in the inner Western Sydney suburb of Ashbury.

This case has captured media attention throughout its journey in the courts, as many people watch in disbelief that a person in this modern age can lay claim to another's person title simply by "squatting" for long enough.

The legal principle of adverse possession makes it possible for a person to claim land that is titled to someone else. That land claimed may be just a sliver or, as in the abovementioned case of *McFarland v Gertos* [2018] NSWSC 1629, something more substantial, like someone else's home.

The *McFarland* case is of course a rare and extreme example of the failure of a landowner to exercise and defend their property rights from a squatter however the legal doctrine of adverse possession is still very much applicable today and arises more than you may think in everyday property transactions and projects.



### Adverse possession in Victoria

Adverse possession varies from state to state. In Victoria, put very simply, adverse possession occurs when another person's land is intentionally used, and all others excluded from its use, for more than 15 years. At the end of that 15-year period, the adverse possessor acquires legal title to the land while the person's title is extinguished. It can be said that adverse possession rewards productive use of land.

In an urban context, more common adverse possession matters often involve a fence or dividing structure that is off-boundary or a protruding structure such as a column, downpipe or stone foundation. In the older, inner-city suburbs of Melbourne, it is not uncommon to discover (often as a revelation to the owner) that their property occupies part of an old laneway or discontinued road. Potential claims can become apparent in the course of an ordinary sale or purchase and the assignment or the legal recognition of such an interest may be significant in monetary value or otherwise vital to how a property may be approved by council for subdivision or redevelopment.

### How do I make an adverse possession claim?

While the elements required to establish adverse possession are well settled in Victoria, the nature of the evidence that is needed to satisfy each element, particularly with respect to applications made to Land Use Victoria, has become noticeably more sophisticated in recent years. It is important therefore to ensure that you have the appropriate evidence at the outset to support your application for adverse possession before making a claim. Failure to properly prepare an application or prematurely asserting a claim can result in lengthy delays and additional costs or even in having a claim defeated or forever lost. In the same way, the timely intervention by a landowner, having received sound legal advice, can avoid or defeat a claim.

If you have any questions or queries regarding adverse possession, the Madgwicks Property team can assist.

## LENDERS, DON'T GET COMPLACENT ABOUT YOUR NATIONAL CREDIT CODE OBLIGATIONS



By Luke Udvardi  
Lawyer

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### In brief

The National Credit Code (Code) imposes a number of onerous obligations on lenders and serious penalties for non-compliance. As a result, lenders need to ensure that they undertake necessary due diligence in order satisfy themselves as to the application and use of credit being advanced to borrowers, particularly in the case of natural persons.

### What you need to know

The National Credit Code (Code) is contained in Schedule 1 of the National Consumer Credit Protection Act 2009 (Cth) and regulates the provision of credit to consumers. The Code came into operation on 1 July 2010 as part of a broad range of reforms to consumer credit laws. Lenders need to be aware of the potential application of the Code and ensure they comply with their obligations.

Broadly speaking, the Code imposes a number of obligations and requirements on lenders in relation to credit contracts, related mortgages and guarantees which are intended to increase the protections afforded to consumers.

Failure to comply with the credit obligations can result in significant civil and criminal penalties.

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Application of the Code

Subject to certain exceptions<sup>1</sup>, the Code applies to the provision of credit if<sup>2</sup>:

- (a) the borrower is a natural person or strata corporation; and
- (b) the credit is provided or intended to be provided wholly or predominantly:
  - i. for personal, domestic or household purposes; or
  - ii. to purchase, renovate or improve residential property for investment purposes or to refinance credit that has been provided for this purpose; and
- (c) a charge is or may be made for providing the credit; and
- (d) the lender is in the business of providing credit or the credit is provided as part of, or incidentally to, any other business of the lender.

A. 'Wholly or Predominately'

Wholly or predominantly means the purpose for which more than half of the credit is intended to be used, for example:

*"A person obtains a personal loan of \$20,000. They intend to use \$15,000 to purchase household goods, and \$5,000 to purchase shares as an investment. As more than 50% of the credit is intended to be used for a personal, domestic or household purpose, the Code will apply to the provision of the credit"<sup>3</sup>,*

or the predominant use of the goods or services purchased with the credit, for example:

*"A person who has a small courier business obtains credit for the purpose of purchasing a car that is to be used both in the person's business and for their own personal use. The person intends to use the car mostly (more than 50% of the time) for the courier business. The Code will not apply to the provision of this credit"<sup>4</sup>.*

B. Business Purposes Declaration

Where a borrower claims that the Code applies to the provision of credit, there is a presumption in favour of its application and the onus is on the lender to prove otherwise. The presumption is reversed where the borrower, prior to entering into the credit contract, declares that the credit is to be provided wholly or predominantly for business or investment purposes (Business Purposes Declaration). A Business Purposes Declaration may be of use to lenders in circumstances where there is a degree of uncertainty as to a borrower's intended use or application of credit being advanced. The declaration will however be ineffective if the lender knew or ought to have known that the credit was to be applied for a Code purpose.

Conclusion

As the Code nears a decade of operation, it is important lenders do not become complacent with regards to its application. Serious penalties apply for non-compliance and lenders need to ensure that they undertake necessary due diligence in order satisfy themselves as to the application and use of credit being advanced to borrowers, particularly in the case of natural persons.

<sup>1</sup> Section 6, National Credit Code.

<sup>2</sup> Section 5, National Credit Code.

<sup>3</sup> Regulatory Guide 203, Australian Securities and Investments Commission.

<sup>4</sup> Regulatory Guide 203, Australian Securities and Investments Commission.



## HOW IS TELECOMMUNICATIONS LEASING DIFFERENT TO ANY OTHER TYPE OF COMMERCIAL LEASING? PART 3: VARIATIONS TO THE USUAL COMMERCIAL LEASING POSITIONS



By Lauren Milne  
Legal Executive

PROPERTY

Following on from Parts 1 and 2 of my article titled: How is telecommunications leasing different to any other type of commercial leasing? I will conclude the series by highlighting some of the interesting variations to usual commercial leasing positions.

No Interference!

Often a carrier might seek to limit what a landlord can erect on its land. Landlords often take offence to being told what they can and cannot do on their own land.

Remember the spider web analogy that I used in part one? This is where it becomes relevant. Each strand of web (transmission signal) from one facility must have an uninterrupted line of sight to the next facility to enable the signal to be cast out and overlap with the next facility it transmits to.

It has been explained to me by those with the knowledge of how this type of technology functions that ideally the signal from one facility overlaps on the edge of the next facility and the call or data is handed over to the next facility without too much cross over. This cuts down on interference and poor signal. So if a landlord erects a structure on its land tall enough to cut through this "web", the transmission signal will be blocked and the network compromised due to a break in the "webbing".

Carriers are not seeking to completely control what occurs on the land. They are simply seeking to manage anything that would compromise their network, such as a multi-story building being constructed right next to their tower or rooftop panel antennae.

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### Termination Extermination!

The spider web continues to spin as we discuss the fact that carriers will often want to have the ability to terminate their lease at any time, however do not want to afford the landlord the same right.

I can feel the eyebrows raising at this point and the question of what is she going to come up with to justify this? This surely is not fair, both parties should have a mutual right to terminate...right?

The first thing to understand is the cost of installing and maintaining a telecommunications facility. The cost of just the construction of a base station compound (monopole with equipment cabin) facility could be anywhere between \$100,000 and \$500,000. Construction of a rooftop facility could be anywhere between \$50,000 and \$200,000. The prices vary depending on the amount of materials and equipment required for the particular facility, the complexity of the facility build and accessibility to the location.

This is clearly a significant investment and due to the amount of money being invested, the carrier seeks the longest period of secure tenure as possible. It is not financially viable to expend that sort of money, then have a casual change of heart and decide to move the facility 100 m down the street because the view is better. There are a lot of technical points that are considered prior to installing a facility. The design and consideration in the facility's location is intended to give the carrier security in its network in that area for as long as possible.

This is where the carrier wants to ensure that the landlord cannot just terminate the lease should they change their mind about having them on their land / building during the term. As long as the carrier does the right thing by the landlord and does not breach the lease, the carrier wants to know that the facility, being one of the many thousands of working parts within their network, is secure. At the very least, for the duration of the lease.

On the flipside, the carrier often wants the ability to terminate the lease at any time. As mentioned earlier, it is unlikely for termination by a carrier to occur due to a change of heart. This is clear from the costs involved in establishing the facility. The most likely reason a carrier would want to terminate its lease during the term will be due to the facility no longer servicing the network as it should.

This could be caused by many things. The carrier cannot control what land owners do between the points at which their "web" transmission signals come together and meet.

If a land owner between the two transmission points erects a multi-story building or some other structure which obscures the line of sight required to ensure continuous transmission, the facility sitting on the landlord's land may become a pointless piece of equipment. If it cannot be utilised in another way (such as re-aligning it to transmit to another site close by), then it is no longer viable to the carrier's business. It needs to be removed and possibly a new location identified to get the network functioning again.

The cost of erecting these facilities can be extremely high. Replacing existing facilities is not something a carrier wants to do often, so the likelihood of a carrier terminating a lease without a valid reason is extremely minimal.

### Location! Location! Relocation!

Reconfiguration and demolition clauses are often sought by a landlord when negotiating a lease with a carrier.

With telecommunications lease terms often stretching out to 20 years or more, the owner of a building wants to know that it will be able to deal with its building as it sees fit. Especially in circumstances when you are dealing with a shopping centre, the owner will want to know that it has

the ability to update the centre and expand or demolish and rebuild if desirable.

The carriers understand this flexibility being requested by the landlord. The carrier will however often request that the landlord be unable to exercise such a right for a set period of time. This again comes down to the cost of installing telecommunications facilities and the security of a functioning network.

A carrier does not want to outlay anywhere between \$50,000 - \$500,000+ installing a facility only for the landlord to turn around six to 12 months into a 20-year term requesting that the carrier relocate or completely remove their facility from the land / building. The waste of money and interruption to their network functioning securely would be a big hit to the carrier in such a situation.

To minimise the possibility of being in such a situation while still understanding the business requirements of the landlord, a carrier may request that for at least a 10-year period within a 20 year term, the landlord be unable to exercise such a provision.

Such a restriction should not cause too many concerns for a building owner as they will usually have plans for any redevelopment or demolition forecasted well in advance.

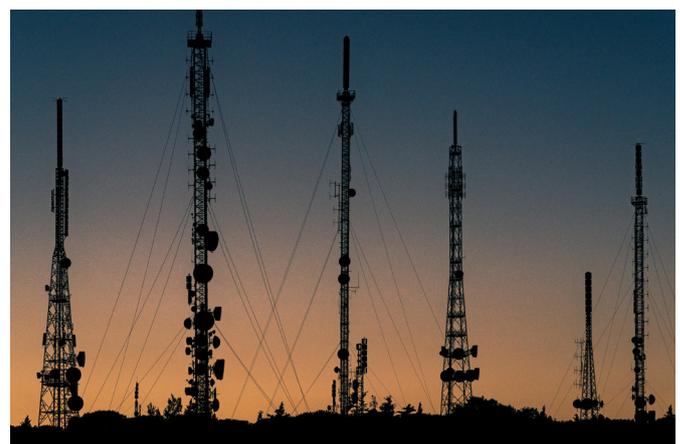
### Finale

Telecommunications carriers manage a portfolio of assets that, whether we like it or not, we rely upon significantly in today's day and age. A large population of humans and businesses rely on the uninterrupted functioning of a network in the areas surrounding a telecommunications facility.

Land and building owners have every right to ensure that they protect their rights and ensure that they are getting compensated appropriately for the use of their land for these important pieces of infrastructure. However, they and their lawyers should also keep in mind that there is more to what motivates carriers than what may appear on the surface of a telecommunications lease. Yes, a carrier runs a business and wants to strike a financially viable deal, however there are so many factors that have to be considered due to the technology being used, that what may seem a ridiculous requirement or obligation within a retail lease, should be seen as quite reasonable in a telecommunications lease.

Mobile phone connectivity is 100% necessary in today's day in age. We rely on it personally, professionally and as a necessity to live in the world we have grown accustomed to today. With the implementation of the Internet of Things and 5G technology on the horizon, our reliance on it is only going to become greater.

I hope that if you do come in contact with a carrier at this level, possibly as a landlord or the lawyer of a landlord seeking to enter into a lease for a telecommunications facility, that my articles have assisted you to be more prepared for such an interaction.



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