PROPERTY ACQUISITIONS IN AUSTRALIA BY FOREIGN PERSONS

Property investment in Australia by foreign persons became more protracted and expensive during 2017 and 2018. In recent years, both the Australian Federal Government and various State Governments have imposed a number of additional or increased fees and taxes on foreign persons (including companies) who or which acquire real property in Australia.

Although this article primarily deals with the position in New South Wales and Queensland (as well as at the Federal level), similar taxes, duties and surcharges have been imposed by the other States and Territories in Australia.

<u>Who is a Foreign Person</u>

For the purposes of the various taxes and duties, a foreign person is defined in the relevant legislation as:

(a) an individual not ordinarily resident in Australia;

(b) a foreign government; or

(c) a corporation (even if the corporation is registered in Australia or carries on business in Australia) in which an individual who is not ordinarily resident in Australia or a foreign corporation (with associates) holds an interest of at least 20% or in which two or more such parties hold an interest of at least 40%.

New Taxes and Charges

In summary, the new and increased taxes and charges are:

Federal Charges and Tax

<u>Foreign Investment Review Board (FIRB)</u>

Foreign persons, including foreign companies, generally need to apply to the Foreign Investments Review Board (FIRB) for foreign investment approval before purchasing new dwellings and vacant residential real estate for development in Australia. According to the Federal Government, the primary purpose of its policy is to channel foreign investment into new dwellings because this creates additional jobs in the construction industry and helps support economic growth.

According to FIRB, applications to purchase new dwellings are usually approved without conditions. However, applications to purchase vacant land are normally approved subject to a condition that construction of a new dwelling or dwellings must be finished within 4 years of completion of the purchase. Once the new dwellings have been built or purchased, they may be rented out, sold or retained for the foreign investor's own use.

Land that has previously had an established dwelling on it would generally not be treated as vacant land for the purposes of Australia's foreign investment policy and procedure.

It should also be noted that foreign persons must have received foreign investment approval before they acquire an interest in residential real estate in Australia. This means that applicants must wait until approval has been received before entering into or exchanging contracts to purchase residential real estate. Alternatively, the purchase must be made conditional on the requisite approval being obtained.

FIRB Application Fees

Since 2015, significant fees have also been charged on foreign investment applications. Foreign persons are now required to pay a fee for each application that they make. The amount of the fee depends on the purchase price for the land. The fee is payable when the application is lodged, and must be paid in full before the application can be processed.

The current FIRB application fees are:

Purchase Price (AUD)	**Fee Payable (AUD)**
($0 – $1,000,000)	$5,500
($1,000,001 – $1,999,999)	$11,100
($2,000,000 – $2,999,999)	$22,300
($3,000,000 – $3,999,999)	$33,400
($4,000,000 – $4,999,999)	$44,600
($5,000,000 – $5,999,999)	$55,700

FIRB [or in some cases the Australian Taxation Office (ATO)] has 30 days from the date of payment of the whole of the fee in which to make a decision about the application.

Where a foreign company acquires two or more interests in residential land under one agreement, a lower fee may apply.

Foreign Person Vacancy Charge

In 2017, the Federal Government introduced a foreign investor tax levy. The levy, which is at least $5,000.00 per year, applies to any foreign-owned house or apartment which is left vacant and not rented out or occupied for more than six months in a year.

Capital Gains Tax

In the 2017 Federal Budget, the capital gains tax (CGT) withholding rate on the sale of real properties owned by foreign persons was increased from 10% to 12.5%.

In addition to the increase in the CGT rate for foreign persons who sell real estate in Australia, the mechanism for recovering the capital gains tax potentially payable by foreign persons on the sale of real properties in Australia has also been strengthened. The new regime applies to every sale of $750,000.00 or more by a foreign person. Under the new measures, the buyer of any real property from a foreign person will be required to retain 12.5% of the purchase price on completion of the purchase and to remit the money retained to the ATO. However, the new procedure does not apply if the seller obtains a clearance certificate from the ATO.

If the above procedure applies then the amount remitted is applied by the ATO in reduction of the foreign investor's CGT liability, if any, arising out of the sale of the property. If the seller's CGT liability is below the amount withheld then the excess will be refunded to the seller by the ATO.

No CGT Exemption for Principal Place of Residence

Under Australian tax law, if an Australian citizen uses a property as their principal place of residence then there will be no CGT payable on the sale of the property. However, under measures introduced by the Federal authorities in 2017, this exemption will no longer apply to foreign property owners. As a result, foreign property owners will no longer receive a CGT exemption on the sale of their property in Australia even if they do in fact reside in the property or use it as their principal place of residence.

State Charges and Taxes

Transfer Duty (previously called Stamp Duty)

In its 2016 Budget, the New South Wales Government announced a 4% transfer duty surcharge for all purchases in NSW of residential land by foreign persons. The rate was doubled to 8% in the State's 2017 Budget. So, for example, while local residents pay $40,490.00 transfer duty on the purchase of a residential property for $1 million, a foreign investor will pay a surcharge of $80,000.00 (making a total of $120,490.00 for transfer duty) on the same purchase.

In Queensland, the additional transfer duty for foreign persons is calculated at the rate of 3% of the dutiable value of the land.

In both New South Wales and Queensland, the dutiable value of the land is based on the GST inclusive purchase price of the land.

Land Tax

In the 2016 NSW State Budget, the State Government announced a land tax surcharge of 0.75% on residential land owned by foreign persons.

In NSW, land tax is paid on the land tax value of the relevant property or the aggregated land values of the relevant properties as at midnight on 31 December in the applicable year. The land value (which is a notional value) is assessed by the State's Valuer General every year. For 2018 (i.e. for land owned at midnight on 31 December 2017), the land tax threshold in NSW is $629,000.00. The land tax threshold for 2019 has not yet been announced.

In NSW, for people and companies who or which are not foreign persons, the amount of land tax is $100.00 plus:

1. 1.6% of the land value of the relevant property or aggregated land values of the relevant properties between the threshold ($629,000.00) and $3.846 million; plus

2. 2% of the land value of the relevant property or aggregated land values of the relevant properties which exceeds $3.846 million.

For foreign persons, the 2018 land tax surcharge is 0.75% of the land tax value of the relevant property or aggregate land tax values of the relevant properties in New South Wales. The surcharge rate for 2019 is not yet known.

In Queensland, land tax is paid on the land tax value of the relevant property or aggregate land tax values of the relevant properties in Queensland above $350,000.00 as at midnight on 30 June in the applicable year. For 2018 (i.e. for land owned at midnight on 30 June 2018), the land tax threshold in Queensland for an "absentee" owner (being someone who does not live in Australia), is $350,000.00.

The ordinary land tax rate for Australian citizens in Queensland is $1,450.00 plus 1.7 cents for each $1 above $350,000.00. The rates increase above $2.25 million and again above $5 million. For local residents, the land tax rates are:

Total taxable value (AUD)	**Rate of tax (AUD)**
$0-$349,999.99	$0
$350,000.00 - $2,249,999.99	$1,450.00 plus 1.7 cents for each $1.00 more than $350,000.00
$2,250,000.00 - $4,999,999.99	$33,750.00 plus 1.5 cents for each $1 more than $2,250,000.00
$5,000,000.00 and over	$75,000.00 plus 2.0 cents for each $1 more than $5,000,000.00

However, for foreign persons, a land tax surcharge of 1.5% applies in Queensland. This rate will increase in 2018/2019 where the taxable value of the foreign person's land is over $10 million. The increased rate is not yet available.

Exemptions from Land Tax

Certain properties are exempt from land tax, depending on the nature of the property that is proposed to be purchased.

Concessions

Some concessions to the transfer duty and land tax surcharges have been introduced in New South Wales this year. These concessions apply if, among other things, the foreign person will use the land for either of the following purposes:

3. construction and sale of new homes; or

4. subdivision and sale for new home construction.

A special application must be made to Revenue NSW (formerly the Stamp Duties Office) for these concessions to apply.

Conclusion

Overall, property investment in Australia by foreign persons has become more complicated and expensive in recent years. If further information regarding foreign investment is required, please do not hesitate to contact us.

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Disclaimer

Further Information

For further information please contact:

Norbert Schweizer OAM
Partner

Schweizer Kobras
Lawyers & Notaries
Level 5, 23 - 25 O'Connell Street
Sydney NSW 2000
Telephone: +61 (0) 2 9223 9399
Facsimile: +61 (0) 2 9223 4729
Email: nschweizer@schweizer.com.au
Website: www.schweizer.com.au