THE RULES THAT APPLY TO FOREIGN PERSONS PURCHASING ESTABLISHED HOMES IN AUSTRALIA ARE GOING TO CHANGE ON 1 APRIL 2025...SO, YOU MAY NEED TO ACT NOW

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Australia Real Estate and Tax Alert

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The Hon. Jim Chalmers MP, Federal Treasurer and the Hon. Clare O'Neil MP, Minister for Housing, Minister for Homelessness issued a joint media release on 16 February 2025 titled "Albanese Government clamping down on foreign purchase of established homes and land banking".

The media release foreshadows changes to the rules that apply when a foreign person buys an established dwelling or undertakes a land development.

Parts of the media release are extracted below:

> The Albanese Government will ban foreign investors from buying established homes for at least two years and crack down on foreign land banking.
> ……..
> This is all about easing pressure on our housing market at the same time as we build more homes.
> ……
> We're banning foreign purchases of established dwellings from 1 April 2025, until 31 March 2027. A review will be undertaken to determine whether it should be extended beyond this point.
> The ban will mean Australians will be able to buy homes that would have otherwise been bought by foreign investors.
> Until now, foreign investors have generally been barred from buying existing property except in limited circumstances, such as when they come to live here for work or study.
> From 1 April 2025, foreign investors (including temporary residents and foreign owned companies) will no longer be able to purchase an established dwelling in Australia while the ban is in place unless an exception applies.
> ……
> We will also bolster the Australian Taxation Office's (ATO) foreign investment compliance team to enforce the ban and enhance screening of foreign investment proposals relating to residential property by providing $5.7 million over 4 years from 2025–26.
> This will ensure that the ban and exemptions are complied with, and tough enforcement action is taken for any non-compliance.

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> .....
> We're cracking down on land banking by foreign investors to free up land to build more homes more quickly.
> Foreign investors are subject to development conditions when they acquire vacant land in Australia to ensure that it is put to productive use within reasonable timeframes.
> .....

Here are some initial observations:

- The consequences of contravening Australia's foreign investment laws are serious. The media release raises a number of questions, and the full implications will naturally depend upon the precise wording of the changes.
- The media release notes "The ATO and Treasury will publish updated policy guidance prior to the commencement of the changes" (i.e. before 1 April 2025).
- The existing rules already tightly limit the classes of foreign buyer who can acquire established homes. Currently this is essentially limited to:
  - A temporary resident (or their spouse) who is going to use the dwelling as their place of residence while in Australia and who applies for and obtains approval;
  - A buyer who is planning to redevelop the dwelling where the redevelopment will genuinely increase Australia's housing stock and who applies for and obtains approval; and
  - Foreign controlled companies who are planning to purchase an established dwelling to house an Australian based employee and who apply for and obtain approval.
- It seems clear the Government is also removing the ability for foreign companies to buy established dwellings to house their Australian based staff. While the Government may allow exceptions as it has flagged in the media release, this detail is yet to be seen.
- We query whether there are other alternatives to an outright ban, such as only a ban on housing below a prescribed price threshold (area by area).
- It is unclear from the media release if the Government is going to change the rules applicable to holders of an Australian permanent resident visa. But we suspect changes are not proposed for holders of an Australian permanent resident visa.
- The message from the media release is that where a foreign person has already acquired or intends to acquire vacant land or an established dwelling for redevelopment, the foreign person should assume there is going to be:
  - More active monitoring of compliance with conditions (eg vacant residential land approvals require construction of all dwellings to be completed within four years of the date of the notice of approval); and

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    - More rapid application of existing enforcement options.
- If you currently have a Foreign Investment Review Board (FIRB) approval, make sure you are in complying with the conditions and seek advice if you are not.
- We query whether the Government intends to revisit the rules when a foreign person rents a residential dwelling or whether the foreshadowed changes will just apply to purchases.
- If a foreign person is unable to acquire an established dwelling, then that person will need to either acquire a new dwelling or access the rental market. The changes may increase still further the demand for dwellings to rent.
- If a foreign person is planning on acquiring an established dwelling, take advice and seriously consider doing so before 1 April 2025.

FOREIGN INVESTOR SURCHARGES

All six Australian States impose transfer duty surcharges on acquisitions of residential related property acquired by a foreign person (including a foreign company or trust). Typically, the surcharge duty rate is 7% or 8% and applies in addition transfer duty at general rates.

Further, some States and the Australian Capital Territory also impose surcharge land tax on foreign persons that own residential related property.
If foreign buyers are prohibited from acquiring existing homes, this may have some impact on the level of surcharge duty and surcharge land tax revenue that will be collected at a State and Territory level.

CAUTION ON AUSTRALIAN CITIZENS BUYING FOR FOREIGN PERSONS

There are some circumstances in which family members (say, as a spouse or adult child) who are Australian citizens or permanent residents may want to acquire and hold property for family members who are foreign. The intention may be to avoid existing FIRB restrictions as well as the above- mentioned foreign investor surcharges.

Such arrangements are high risk and caution should be exercised.

Typically, such arrangements will create a trust relationship between the "apparent purchaser" (i.e. the Australian citizen) and the "real purchaser" (i.e. the foreign person who provides the money for the purchase).

Most Australian States and Territories now require a purchaser of land to provide a declaration which sets out:

- Whether the purchaser is acquiring the land for their own purposes (or on trust for another person); and
- If the purchaser is acquiring as trustee for another person, whether the beneficiaries of the trust are foreign.

Further, the duties and land tax legislation in most jurisdictions will apply to such arrangements. For example, section 104T in the *Duties Act 1997* (NSW) expressly captures "apparent purchaser arrangements" such as those described above for surcharge purchaser duty purposes.

We note that a written agreement is not required to create a treat relationship. A verbal agreement can suffice.

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A purchaser who provides a false declaration and does not disclose they are acquiring and holding a property on trust for a foreign person may commit an offence.

There are also risks for the foreign person on whose behalf the property has been purchased. If there is a break down in the relationship between the parties, it may be difficult for the foreign person to demonstrate that they are the real owner of the property (and the party entitled to the benefit of any rents or sale proceeds).

All tax and legal risks should be fully considered if any such arrangements are contemplated.

HOW CAN WE HELP?

We will continue to monitor changes to the rules that apply to acquisitions of established dwellings by foreign persons in Australia and will provide a further update when the new policy is released.

K&L Gates advises on all aspects of Australia's foreign investment laws and the required approvals.

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