
INVESTMENT IN AUSTRALIAN REAL ESTATE BY A FOREIGN INVESTOR

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FOREWORD

The objective of this publication is to provide a brief introduction to the Australian business environment for potential investors in Australian real estate.

As many regulations and laws change at short notice, this document should serve only as a reference source rather than providing comprehensive answers or definitive advice, for which specific consideration and expert advice should always be sought.

The Principals of LWK have been in business for over 30 years and LWK has been a member of the worldwide association of independent accountants, Nexia International.

The firm practises in a wide range of financial services including audit, accountancy, taxation, management, advisory and migration services. We would be pleased to advise on any of these aspects including the technicalities of acquiring Australian real estate.

LWK Pty Limited

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1. STRUCTURING THE ACQUISITION OF REAL ESTATE

The acquisition of Australian real estate may be carried out through various types of business structures in Australia.

1.1 Sole Trader

When a person of full age and capacity commences a business enterprise in Australia, he is commonly known as a sole trader. The acquisition of Australian real estate by a foreign resident individual, the collection of rental income and the payment of related expenses constitutes the carrying on of a business as a sole trader.

Subject only to the satisfaction of the various rules governing foreign investment, and any registration requirements of the states, a foreign resident individual may operate as a sole trader anywhere in Australia.

When acquiring real estate as a sole trader, the legal title of the property will be vested in the sole trader. If a foreign resident individual acquires real estate in Australia, title to that property will be in the name of the foreign resident.

1.2 Partnership

In Australia, a partnership is an arrangement which exists between two or more persons (not exceeding 20 persons) who carry on a common business with a view to deriving a profit.

Each partner is deemed to be an agent of the other partners and on behalf of the partnership as a whole. In this regard each partner may make contracts, undertake obligations and dispose of partnership property in the ordinary course of partnership business.

Partnerships may be created with very little formality. There is no legal requirement for a written partnership agreement to constitute an ordinary partnership, although it is desirable that partners reduce their relationship to a written agreement. State Legislation exists which governs all partnerships formed in Australia and supplements written agreements.

Real estate acquired in a partnership arrangement is held by the partners exclusively for the purpose of the partnership as tenants in common. Any resulting revenue flowing from the property investment is distributed to the partners in accordance with the partnership agreement or their capital interest in the partnership. Legal title to the property is held as tenants in common in most cases.

1.3 Companies

Many business operations in Australia are carried out under the ambit of an incorporated company. Companies are incorporated in Australia under the federally administered Corporations Act. The acquisition of real estate in Australia would normally be undertaken using a private company with the following characteristics:

- a. Restricted rights to transfer shares and prohibition of an invitation to the public to subscribe in the shares of the company;
- b. Membership restricted from 1 to 50 shareholders;

- c. A minimum of one director over the age of 18. At least one of the company's Directors must live in Australia. A company may have one or more Secretaries, one of whom usually lives in Australia;
- d. Shareholders have no personal liability for the debts of the company beyond an obligation to contribute any capital unpaid on the shares which they hold in a company limited by shares.

All Australian companies governed by the Corporations Law have the rights, powers and privileges of natural persons (as well as those peculiar to companies) unless limitations exist or have been adopted in its constitution.

A company incorporated in Australia may carry on business or establish a place of business in any other State or Territory.

A foreign company may not commence to carry on business or establish a place of business in Australia unless it is registered as a foreign company. Registration is achieved by filing a certified copy of its constitution, evidence of its existence in the form of a certificate from the regulatory authority in the place of incorporation, a list of officers and the name of a natural person resident in Australia who has been authorised by the company to accept service of notices on its behalf.

A registered foreign company has the same power to hold land as if it were incorporated in Australia.

Where a company acquires real estate in Australia, legal title to such property is given to the company as a separate legal entity.

2. STATUTORY REQUIREMENTS

2.1 Foreign Investment Review Board

2.1.1 Proposals for the acquisition of domestic real estate by foreign interests are required to be submitted for examination by the Foreign Investment Review Board unless they are specifically exempted (refer 2.1.3). The objectives of the Board are to examine proposals by foreign interests for investment in Australia in order to make recommendations on those proposals and to generally advise the Federal Government of foreign investment matters.

The policies of the Board are derived from the Foreign Acquisitions and Takeovers Act, 1975 and by ministerial statements made by the Treasurer.

Acquisitions of urban real estate that do not involve any new development and that are intended purely to earn investment income or to benefit from capital appreciation will not be approved as they provide little or no benefit to Australia.

Present Government policy dictates that approval be refused for the purchase of developed residential real estate for occupation or investment by foreign interests except in the categories set out below.

2.1.2. The following real estate acquisitions are capable of approval unless they are thought to be contrary to the national interest:

- a. acquisition of second-hand dwellings as their principal place of residence by temporary residents in Australia provided that: i) the property is used as their principal place of residence in Australia, ii) the property is vacant at settlement and no part of the property is rented, and iii) the dwelling is sold within 3 months when it ceases to be their principal residence;
- b. acquisition of established dwellings by foreign companies seeking accommodation for their Australian-based staff provided that the property is solely used to accommodate Australian-based employees of the business, and the company sells the property if it is expected to remain vacant, or has remained vacant, for 6 months or more;
- c. acquisition of vacant land for the purpose of building residential dwellings provided the development is completed within 4 years from the date of approval, and the evidence of completion of the dwellings is submitted within 30 days of being received.
- d. acquisition of new dwelling provided that the dwelling has not been previously occupied; or directly acquisition from the developer provided that the dwelling has not been occupied for more than 12 months in total. However, it does not include established residential real estate that has been refurbished or renovated.
- e. acquisition of established dwellings for the purpose of redevelopment (that is genuinely increase the housing stock) provided that: i) the existing residence cannot be rented out prior to demolition and redevelopment, ii) the existing dwelling is demolished and construction of the new dwellings are completed within 4 years of the date of approval, and iii) the evidence of completion of the dwellings is submitted within 30 days of being received. However neither temporary residents nor foreign non-residents are approved to purchase an established dwelling to redevelop into a single new dwelling.

- f. acquisition of vacant commercial land regardless of the value and provided that continuous construction is commenced within 5 years of the date of approval, and the land is not sold until the construction is complete.
- g. acquisition of developed commercial land by investors from Free Trade Agreements (FTA) partner countries provided that the property value is less than \$1,216 million.
- h. acquisition of developed land by investors from non-agreement countries for low threshold commercial land that value is less than \$61 million, and for non-low threshold commercial land that is no more than \$281 million.

2.1.3 Exemptions are available for the following types of acquisition in Australia:

- a. acquisition of residential real estate by Australian citizen;
- b. acquisition of residential real estate by New Zealand citizen;
- c. acquisition of residential real estate by Australian permanent resident;
- d. acquisition of residential real estate made in joint names by Australian citizen/ New Zealand citizen/ Australian permanent resident and their foreign spouse. However, it does not include purchasing property as tenants in common;
- e. acquisition of residential real estate by an Australian corporation that would not be a foreign person if interests directly held in it by Australian citizens living abroad, Australian permanent visa holders or New Zealand citizens were disregarded;
- f. acquisition of residential real estate by the trustee of a resident trust, if at the time of the acquisition, the trustee would not be a foreign person if interests directly held in it by Australian citizens living abroad, Australian permanent visa holders or New Zealand citizens were disregarded;
- g. acquisition of residential real estate by a charity operating in Australia primarily for the benefit of persons ordinarily resident in Australia
- h. acquisition of new dwellings from the developer, where the developer holds a New Dwelling Exemption Certificate.
- i. acquisition of a time share scheme where the foreign person's total entitlement (including any associates) to access the land is no more than 4 weeks in any year;
- j. acquisition of an interest by will or by devolution of law (such as, a court order regarding the division of property in a divorce settlement, but not if both parties simply agree to transfer property without a court's intervention);
- k. direct acquisition of property from the Government (Commonwealth, State, Territory, or local governing body) or acquisition of an entity wholly owned by the Government;

- l. acquisition of residential real estate within a resort that was designated as an Integrated Tourism Resort by the Government;
- m. a foreign corporation that is providing custodian services; and
- n. acquisition of securities in listed or unlisted Australian land entities below a certain threshold.
- o. acquisition of an aged care facility, retirement village and certain student accommodation, where the interest is below \$60 million or \$275 million.

2.1.4 Agricultural land is land in Australia that is used, or that could reasonably wholly or partly be used for primary production business.

Proposed investments in agricultural land by non-government foreign persons generally require approval where the cumulative value of a foreign person's agricultural land holdings exceeds \$15 million, with exceptions applying to investors from Chile, New Zealand, Thailand and United States. While for foreign government investors, a \$0 (nil) threshold applies.

2.2 Foreign Ownership of Land Register - Queensland

Since 17 April 1989, a Registrar of Foreign Ownership of Land has been established in Queensland. Any person acquiring an interest in land in that State is required to notify the registrar of that acquisition. From this, the registrar will extract a list of foreign persons having an interest in Queensland real estate. For this purpose a foreign person is defined as:

- i. a foreign natural person ie. individuals who are not Australian residents;
- ii. a foreign corporation ie. corporations not resident in Australia;
- iii. a corporation in which, on its last accounting date, a foreign natural person or a foreign corporation holds a controlling interest; and
- iv. a corporation in which, on its last accounting date, 2 or more persons, each of whom is either a foreign natural or a foreign corporation, hold an aggregate controlling interest.

3. FINANCING THE ACQUISITION OF AUSTRALIAN REAL ESTATE

The investor in Australian real estate may wish to obtain finance to fund an Australian acquisition. The structuring of finance arrangements is an important consideration for both Australian taxation and banking requirements.

3.1 Residential Property Finance

Residential property finance may be obtained from Australian Banking Institutions for up to 75% of the valuation of the property being purchased. The interest rate for the borrowing will depend upon prevailing market forces. Security for the borrowing will normally be represented by a registered mortgage over the acquired property. The applicant must illustrate that future cash flow streams will suffice to service the debt. Interest incurred is tax deductible against the income derived from the property, thus making Australian property investment tax effective.

Alternatively, the foreign investor in residential property may decide to finance the acquisition of real estate using foreign currency loans available in their country of residence. Interest expense is deductible against income derived from the Australian real property only if the interest is paid in relation to arm's length overseas borrowings and Australian withholding tax is paid (refer 4.2.2).

3.2 Commercial Property Finance

An investment in Australian commercial real estate may be funded by Australian financial institutions in the same way as above. Many Australian banks also allow for commercial financing in foreign currencies, so that the commercial property investors may structure their borrowings in any currency of their choice and thus reduce exposure to foreign currency fluctuations. These foreign currency loans are normally managed from Australia.

4. TAXATION CONCERNS

4.1 Direct Taxation

The direct taxation consequences of acquiring income producing real estate in Australia will vary according to the type of vehicle by which the property is owned and operated in Australia.

4.1.1 Individuals

4.1.1.1 Income Tax

Foreign resident individuals are subject to Australian taxes on assessable income derived from sources within Australia. For the 2021-22 income year, the income tax rates for foreign resident individuals are as follows:

Income Range	Marginal Rate of Tax
\$0 – \$120,000	32.50%
\$120,001 – \$180,000	37%
\$180,001 and over	45%

4.1.2 Partnerships

A partnership of foreign resident individuals carrying on a business in Australia is not taxable per se. Although a partnership tax return must be lodged in each financial year, each partner must lodge an annual tax return and is separately assessed as an individual foreign resident, taxed on his share of the net taxable income of the partnership.

4.1.3 Companies

Foreign resident companies who derive income in Australia from an Australian enterprise have a liability to tax at normal Australian corporate rates.

For the 2021–22 income year, the base rate entity company tax rate is 25% for companies with a turnover less than \$50 million and 80% or less of assessable income is passive income. The company tax rate will remain at 30% for all other companies that are not base rate entities.

4.2 Other Income Tax Provisions

4.2.1 Capital Gains Tax (CGT)

Where Australian real estate has been sold by a taxpayer, a capital gain arises where the consideration received in respect of the sale is in excess of the amount originally paid to acquire the property.

Such a gain is considered part of the taxpayer's assessable income for Australian tax purposes in the year that it is disposed of. The tax applies on the gains derived after the original cost base of the property is indexed to take into account the effect of inflation on the value of the property (available only for property purchased before 19 September 1999).

A 50% capital gain discount is available for capital gain accrued prior to 8 May 2012 provided the real estate are held for more than 12 months and a written market valuation is obtained from a certified valuer.

If a capital loss has been incurred, it may be used to offset against other capital gains and any excess of losses can be carried forward to offset against capital gains in future years.

Foreign resident capital gains withholding (FRCGW) rate and threshold for contracts entered into on or after 1 July 2017:

- a. for real property disposals where the contract price is \$750,000/00 and above.
- b. the FRCGW withholding tax rate will be 12.5%.

From 9 May 2017, foreign and temporary tax residents will be ineligible to the CGT main residence exemption (with existing holdings being grandfathered until 30 June 2019).

4.2.2 Thin Capitalisation

A deduction for Australian income tax purposes is denied in respect of interest payable on an "excessive" foreign debt which is provided by a foreign controller. The legislation sets out the methodology to calculate the maximum debt allowed.

A foreign controller includes a foreign resident who directly or indirectly has at least 40% of the voting power or other control of the entity which seeks to claim a deduction for the interest. There are extensive anti-avoidance provisions which cover situations of de facto control.

On 25 September 2014, the Tax and Superannuation Laws Amendment (2014 Measures No 4) Bill 2014 had been passed by the parliament and the de minimis threshold has been increased from \$250,000 to \$2,000,000, i.e., the Thin Capitalisation rules do not apply if the total of debt deductions (including interest and associated costs) do not exceed \$2,000,000 for an income year.

4.3 Other Australian Taxes

4.3.1 Transfer Duty

Stamp duty is a tax imposed by every Australian State and Territory on written instruments created to give effect to legal transactions. More recently the scope of stamp duty has been widened to cover situations where transactions are entered into without bringing into existence a written document.

Most legal documentation, including contracts for the purchase and sale of real estate must be submitted to the Office of State Revenue for assessment and subsequent payment of duty.

Stamp duty on the conveyance of property in New South Wales, for example, is as follows:

Range of Consideration	Amount of Duty
\$14,000 or less	\$1.25 for every \$100
\$14,001 to \$32,000	\$175 plus \$1.50 for every \$100 exceeding \$14,000
\$32,001 to \$85,000	\$445 plus \$1.75 for every \$100 exceeding \$32,000
\$85,001 to \$319,000	\$1,372 plus \$3.50 for every \$100 exceeding \$85,000
\$319,001 to \$1,064,000	\$9,562 plus \$4.50 for every \$100 exceeding \$319,000
\$1,064,001 to \$3,194,000	\$43,087 plus \$5.50 for every \$100 exceeding \$319,000
Over \$3,194,001	\$160,237 plus \$7.00 for every \$100 exceeding \$1,064,000

In addition to stamp duty, a stamp duty surcharge is payable by foreign residents or temporary residents purchasing residential properties. The stamp duty surcharges are as follows:

- New South Wales (NSW): 8%
- Victoria (VIC): 8%
- Queensland (QLD): 7%

4.3.2 Land Tax

Land tax is levied by all Australian States and Territories (but not in Northern Territory) upon the owners of real estate in that State. The tax is payable on the aggregate "taxable income" of all real estate owned by a land owner whether an individual, company, trust or partnership.

The tax in New South Wales is levied at \$100 plus 1.6% on the land value in excess of \$755,000. Special trusts and non-concessional companies are taxed at 1.6% of the land value and the normal threshold of \$755,000 does not apply. For the 2021 land tax year, a premium land tax marginal rate of 2 per cent will apply if the total taxable land value is above \$4,616,000

Generally, the principal residence of a land owner is exempt from land tax in New South Wales.

Due to the high value of some Australian real estate the amount of land tax can be a significant factor in considering an investment in real property.

In addition to land tax, a land tax surcharge as levied on foreign persons and permanent residents who own residential land and not ordinarily reside in Australia. The land tax surcharges are as follows:

- New South Wales (NSW): 2%
- Victoria (VIC): 2%
- Queensland (QLD): 2%

This is not Advice. You should not act solely on the basis of the material contained in this publication. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We recommend that our formal advice be sought before acting in any of the areas. This publication is issued as a helpful guide for your private information. Therefore it should be regarded as confidential and not made available to any person without our prior approval.