

Recent changes to Foreign Investment Policy

"There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know."

Donald Rumsfeld former Defense Secretary

When Donald Rumsfeld uttered these words on February 12 2002, he had no way of knowing just how succinctly they would summarise Australia's current policy on the right of foreign nationals to invest in residential real estate.

In what can only be described as a knee jerk reaction to growing public criticism of foreign investment in Australia, on 24 April, the Assistant Treasurer, Nick Sherry, announced, by press release, significant legislative changes to the Foreign Acquisitions and Takeovers Act, designed to tighten foreign investment rules relating to residential real estate. The announcement also foreshadowed tough new civil penalties for non compliance, including sanctions for purchasers, sellers and agents involved in breaches of the Act.

These changes, once codified, will have come into effect on the date of Mr Sherry's press release and are likely to have a dramatic effect on how agents and vendors will deal with foreign investors from now on.

Understanding Australia's attitude towards foreign investment has always been a challenge due to the fact that it is wrapped up in a combination of legislation, regulation and policy. Legislation and regulations are seen to be inflexible and take time to change, whereas policy is the complete reverse and will generally only be overturned by the Courts if it can be demonstrated to have gone beyond the legislation that it is based upon - usually a fairly difficult task. For this reason, governments love policy, and in some areas - such as Immigration Law, published policy documents far exceed the size of the Act and Regulations.

In a unique twist to the policy theme, Mr Sherry has on this occasion, provided policy by press release. He had announced significant changes and foreshadowed a range of penalties that may apply to vendors, purchasers and real estate agents for actions taken by them from 24 April onwards, but has provided no real detail to assist people in determining exactly what their obligations are. If we don't know our obligations, how can we ensure that we comply with them - for example, will it be necessary for agents and vendors to require proof of prospective purchasers' permanent residence or citizenship prior to entering into negotiations with them and if so, what affect will that have on how auctions are to be conducted from now on.

The desire of government to quickly appease public sentiment with announcements by press release needs to be balanced by an appreciation of the ramifications on a broad range of people. The haste of Mr Sherry's pre election announcement is evident when one considers that it took a number of days following the announcement for the release to find its way to the Foreign Investment Review Board ("FIRB") website - a logical starting place for prospective overseas investors and/or their advisors wanting to determine what their rights and obligations might be. If you didn't happen to be reading the newspapers on around 24 April, that's just too bad - the new rules operate regardless.

During the time it took for the changes to appear on the web page there were doubtless many people who purchased properties in ignorance. As each of the vendor, agent and purchaser will be facing potential liabilities for a breach, these transactions can presumably be unwound prior to settlement, assuming of course that someone within that triumvirate becomes aware of the changes in time. Once a settlement has occurred, this will become a lot more difficult.

So, what is it that we know; from 24 April this year all temporary residents will now need to seek FIRB approval to acquire real estate in Australia, and will have to sell that property when they depart. If undeveloped real estate is purchased, it will be necessary to commence construction on that land within 24 months, or have it compulsorily sold. It is not clear if this property must be sold on departure - the press release doesn't say - however the assumption, based on previous policy, is that this can continue to be held. We also know that a civil penalties regime will be implemented for breaches and this will include a special penalty to recapture any capital gain made through an illegal purchase and sale of a property.

Included in these civil penalties are sanctions for purchasers, sellers and agents involved in illegal transactions, compulsory divestment requirements, and monetary penalties equivalent to any capital gain made by the breaching purchaser at the time of the forced sale.

Included in what we don't know is the level of detail underlying these changes. Only with an appreciation of such detail can agents, vendors and purchaser have a proper and appropriate understanding of their obligations.

It is totally inappropriate for the Government to make people liable for offences that can only be defined in very broad terms. However, at this stage, it seems that the Government is more intent on letting the public know that it is responding to their concerns. The important issues of substance will clearly need to be addressed at some later date.

Please contact David Stratton, Ryan Curtis-Griffiths or Helen Zheng, Lawyers in our Migration Law Work Group, if you require further information in relation to this issue, or if you require legal advice regarding any other migration law matter.

Contact:

David Stratton Director T: 03 9614 7111	Helen Zheng Lawyer T: 03 9615 4325	Ryan Curtis-Griffiths Lawyer T: 03 9615 4309
email: dstratton@nevetford.com.au	email: hzheng@nevetford.com.au	email: rcurtisgriffiths@nevetford.com.au
Registered Migration Agent 58007	Registered Migration Agent 3327	Registered Migration Agent 741735

Melbourne office

Level 42 South Tower Rialto
525 Collins Street
Melbourne Victoria 3000

T 03 9614 7111

F 03 9614 3192

email:

melbourne@nevetford.com.au

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