

HD Laws on foreign investment in Australian **residential property** may change

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In brief - Foreign real **estate** buyers still welcome but may face tougher penalties for breaches

A federal government report into foreign investment in **residential** real **estate** has recognised the benefits of foreign investment in this market and argued for maintaining the framework, while outlining measures to better enforce compliance and monitor rules. It remains to be seen which, if any, of the report's recommendations will be adopted.

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Foreign investment policy aims to increase new housing supply and benefit the industry

The influence of foreign, particularly Asian, investors on **residential** house prices continues to be a topic of public debate across Australia. Federal parliament's Report on foreign investment in **residential** real **estate**, delivered in late November 2014, is a relevant and timely contribution to that debate.

The overarching principle of Australia's foreign investment policy, as it applies to **residential property**, is that the investment should increase Australia's housing stock. The policy seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (such as new developments of houses and land, home units and townhouses) and brings benefits to the local building industry and its suppliers.

Foreign investors encouraged, with certain restrictions

Consistent with this principle, foreign investors are able to seek approval to **purchase** new dwellings and vacant land for **residential** development. Generally, foreign investors cannot **buy** established dwellings as investment properties or homes. However, temporary residents can apply to **purchase** one established dwelling to use as their residence while in Australia.

Report examines four key foreign investment considerations

The Standing Committee on Economics examined four key foreign investment considerations:

The economic benefits of foreign investment in **residential property**

Whether such foreign investment is directly increasing the supply of new housing and bringing benefits to the local building industry and its suppliers

How Australia's foreign investment framework compares with international experience

Whether the administration of Australia's foreign investment policy relating to **residential property** can be enhanced

Report finds lack of accurate data and enforcement

The report did not recommend any changes to the law, but it did make four key findings:

No accurate data: There is no accurate data that tracks foreign investment in **residential** real **estate** - no-one really knows how much there is or where it comes from. A national register of land title transfers should fix this.

No enforcement: The Foreign Investment Review Board (FIRB) was unable to provide basic compliance information about its investigations and enforcement activity. However, it is clear that no court action in relation to any enforcement has been taken since 2006, although 17 divestment orders were made during the period 2003 to 2007, when foreign investment in residential real estate was at much lower levels.

Potential lack of compliance: A lack of preparedness to enforce the rules means it is more likely that people will not comply with the rules. The committee identified a need to establish a civil penalty regime for breaches, imposing liability not only on foreign investors, but also advisers (such as lawyers and accountants) and related persons.

Administration fee might enable better compliance: As the Australian taxpayer currently foots the bill, this has arguably contributed to underinvestment in compliance and enforcement.

Recommendations to retain framework, improve compliance and impose penalties for breaches

The committee made 12 recommendations, of which seven are considered by me to be key:

Retain the current framework: The existing legislated prohibitions and restrictions on purchasers of established dwellings should be retained. The focus of foreign investment policy should remain on increasing Australia's supply of new housing.

Better audit, compliance and enforcement of the framework: The committee supported a "modest" administration fee of \$1,500 per application, generating \$158.7 million revenue over four years, which is less than 0.30% of the average residential home price in both Melbourne and Sydney.

Civil penalty regime for breaches of the framework: Penalties to be calculated as a percentage of the property value and apply not only to foreign investors, but to any third party who knowingly assists a foreign investor to breach the framework. Currently only criminal penalties apply under the foreign investment framework.

Criminal penalties to apply equally to any third party.

Capital gains forfeited: Where a foreign owner divests an illegally held established property, any capital gain from the sale is to be retained by the government.

Temporary residents explicitly required to divest established property within three months of it ceasing to be their primary residence: Better enforcement will be created by the establishment of an alert system for the expiry of temporary visas by amendments to the Migration Act 1958 and better internal processes at Treasury.

In my view, any requirement to sell quickly is potentially an onerous one, particularly in a falling residential market. This is because many foreign individuals purchase a property in Australia while here on contract but then, with work circumstances changing, are required to return to their native country at short notice and earlier than expected.

National land titles register: The report recommends the establishment of a national register of land title transfers to record the citizenship and residency status of all purchasers.

FIRB prefers consultation over enforcement powers

The law provides a range of powers to enforce decisions made, including the ability to order the sale of a property purchased without prior foreign investment approval, where that purchase is considered contrary to the national interest.

There is also the power to prosecute a foreign person who failed to obtain prior approval for a purchase; comply with an order to sell shares, assets or property; or comply with conditions attached to an approval.

Conviction for a breach by an individual may result in a fine of up to \$85,000 or imprisonment for two years or both. In the case of a corporation, the maximum fine is \$425,000.

FIRB representatives gave evidence to the committee that prosecution activity was very rare, the strong preference being to remedy any non-compliance with "consultation".

China tops our foreign real estate investor rankings

For the year 2012-13, the FIRB Annual Report ranks and quantifies the top five real estate investor countries as follows :

China: \$5,932 million

Canada: \$4,926 million

USA: \$4,406 million

Singapore: \$2,008 million

UK: \$1,671 million

The report does not make it possible to identify what proportion of this investment is allocated to the various real **estate** sectors such as **residential**, **commercial** and rural.

Buying off the plan most likely by domestic investors

Advanced clearance for off-the-plan sales of developments comprising 100 or more dwellings is available. FIRB figures show that 73 approvals were granted in the first nine months of 2013-14.

Treasury data shows that most dwellings in these developments are **purchased** by domestic investors. Evidence given to the committee was that the scheme most benefits developers to bring their projects from concept to realisation.

Foreign buyers impact business confidence, housing affordability and accessibility

Evidence provided to the committee was that although offshore buyers represent only a small percentage of Australia's overall sales, the market is an important factor in maintaining business confidence and giving developers the impetus and security to embark on new projects.

The committee found that foreign investment brings benefits to the housing market and that, in fact, housing supply would be further constrained if foreign investment was curtailed.

Committee's recommendations may or may not be adopted

It remains to be seen which of the committee's recommendations, if any, will be adopted. Perhaps the most sensible recommendation relates to the collection of accurate data to help take some emotion out of the public debate.

The least sensible is making lawyers responsible for the actions of their clients; certainly this is one recommendation which I feel compelled to reject.

This article first appeared in UDIA NSW's Urban Icon magazine.

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