

This article will discuss the factors foreign purchasers must consider when proposing to buy property in New South Wales, including surcharge duties and exemptions.

NOTE: Australian Permanent Residents are also considered as foreign persons, and the below rules apply to them.



A. IMPORTANT DEFINITIONS

A.1. DEFINITION OF A FOREIGN PERSON

Foreign person means:

- an individual not ordinarily resident in Australia; or
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an aggregate substantial interest; or
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or the trustee of a trust in which two or more persons each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an aggregate substantial interest; or
- a foreign government; or
- a general partner of limited partnerships where:
 - ⇒ an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds at least 20 per cent in the limited partnership; or
 - ⇒ two or more persons who are not ordinarily resident in Australia, a foreign corporation or a foreign government, holds an aggregate interest of 40 per cent in the limited partnership.

A.2. DEFINITION OF RESIDENTIAL LAND

Residential land is:

- A parcel of land on which there are one or more dwellings, or on which there is a building under construction that, when completed, will constitute one or more dwellings; or
- A strata lot if its use is restricted to the owner or occupier of a strata lot; or
- A land use entitlement if it entitles the holder to occupy a building, or part of a building, as a separate dwelling; or
- A parcel of vacant land (including any land that the Chief Commissioner is satisfied is substantially vacant) that is zoned or otherwise designated for use under an environmental planning instrument for residential or principally for residential purposes.

B. FOREIGN PURCHASER SURCHARGE EXEMPTIONS

Many exemptions applicable to ordinary purchaser duties are also applicable to the foreign purchaser surcharge, such as:

- The First Home-New Home Scheme; or
- The New Home Grant Scheme; or
- Transfers of the principal place of residence to joint names for married couples and de-facto partners.

Particular exemptions for foreign purchasers include:

- Ordinarily resident—if you have lived in Australia for at least 200 days in the past 12 months from the purchase date, you may be exempt from the surcharge duty; or
- Permanent resident—you will be exempt if you have continuously lived in Australia for at least 200 days in the past 12 months from the purchase date, and you plan to live in the property as your principal place of residence.

C. 'OFF THE PLAN' PURCHASES

C.1. PAYMENT OF STAMP DUTY

Foreign persons purchasing off-the-plan residential properties must pay stamp duty within the usual three month period after exchange of Contract.

D. FOREIGN INVESTMENT REVIEW BOARD (FIRB) APPROVAL

When purchasing a new residential property as a foreign person, FIRB approval must also be obtained. Generally, a foreign person can only purchase new dwellings or vacant residential land and not 'established dwellings' (second-hand properties). FIRB approval must be obtained before signing a Contract to purchase a residential property.

Temporary residents can purchase one established dwelling by applying to purchase a specific dwelling or applying for an established dwelling exemption certificate, which lasts for a period of six months and allows a temporary resident to make multiple attempts to purchase an unspecified property.

The application fee for FIRB approval depends on the price of the property. For example, the fee is \$5,600 for properties under \$1 million; and \$22,700 for properties between \$2 and \$3 million.

If the residential property is not rented out or occupied for more than six months per year, an annual vacancy charge applies from 9 May 2017 onwards. This charge is assessed by the Australian Tax Office (ATO) and is usually the price of the application fee for FIRB approval.

E. FIRB APPROVAL EXEMPTIONS

A foreign person can purchase residential property without the need for FIRB approval if:

- They are purchasing from a developer who holds a new or near-new dwelling exemption certificate (most common way); or
- They are purchasing property as joint tenants with a spouse who is an Australian citizen, permanent resident, or a New Zealand citizen.

Comasters Law Firm can assist any foreign client in the process of paying surcharge duty, gaining FIRB approval and subsequently the completion of their purchase of the property.

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