NORBURY LAWYERS

UPDATE
March 2016

This update outlines changes to Victorian Duty which took effect from 1 July 2015 and a new withholding tax which applies in relation to sales of Australian land with effect from 1 July 2016.

FOREIGNER DUTY

As part of the Victorian government's commitment to increasing revenue by raising taxes, it has targeted "foreigners" for higher (stamp) duty.

On the face of it, the mechanism for achieving this outcome is simple: 3% is added to the duty otherwise chargeable in respect of transfers involving Victorian residential real property.

For example:

DUTIABLE VALUE OF LAND	"Normal" Rate of Duty (s 28 Duties Act)	Foreigner Rate of Duty (s 28A)
NOT MORE THAN $25,000	1.4%	4.4%
MORE THAN $960,000	5.5%	8.5%

WHAT LAND IS AFFECTED?

The extra duty is chargeable in connection with "a dutiable transaction under which a land related interest in residential property is transferred to a foreign purchaser"

So if a foreigner buys a house in Victoria he pays extra duty calculated at 3% of the price of the house.

WHAT IS A RESIDENTIAL PROPERTY?

Land in Victoria

- on which there is a building affixed, or
- on which a foreign purchaser intends to affix a building

in each case that is

- designed and constructed solely or primarily for residential purposes, and
- may be lawfully used as a place of residence.

"intends to affix a building"

What happens where non residential property is transferred to a foreigner and after completion, the foreigner decides to affix a residential building?

The foreign purchaser must within 14 days after deciding to affix a residence tell the Commissioner and pay extra duty.

COMMENT

What if a foreigner buys broad acres with the intention of developing and subdividing into residential allotments?
If the foreigner sells vacant allotments in a housing estate, presumably he is not caught because he never formed the intention to affix a residential building, the subsequent purchaser forms that intent.
What if the foreigner's business is selling house and land packages and he buys the broad acres with that intent?
There is a liability for the extra duty on the whole of the broad acres, including that part which will be used for roads, public open space, etc. because residential property is the primary purpose of the purchase.
Presumably the extra cost will be recovered from the Australian end purchaser of the house and land package.

What if the foreign purchaser purchases or develops a multi story building which has a commercial or industrial use, but there is a caretaker's residence in the development?
No extra duty because the caretaker's residence is not primary purpose.

What of commercial residential developments eg hotels, serviced apartments?
According to the Commissioner, these are residential properties and subject to the additional duty

WHO IS A FOREIGN PURCHASER?

A transferee who is

- a foreign natural person
- a foreign corporation, or
- the trustee of a foreign trust

A foreign natural person is anyone who is not

a) an Australian citizen

b) a New Zealand citizen with the appropriate Australian visa (which is given to any New Zealand citizen provided they are neither sick nor badly behaved), or

c) any other person with an Australian visa allowing them to remain in Australia indefinitely.

A foreign corporation is one:

a) incorporated outside Australia, or

b) controlled by "foreigners"

For these purposes control occurs where a foreigner or a foreigner and his associates control more than 50% of the voting power of the corporation, or potential voting power of the corporation or more than 50% of the issued shares.

A foreign trust is one where a substantial interest in the trust is held by

a) a foreign corporation

b) a foreign natural person

For these purposes, a discretionary trust will be a foreign trust if the trustee of the trust has the discretion to distribute more than 50% of the capital to trust to a beneficiary of the trust who is a foreign person. This will be most discretionary trusts which have a foreigner amongst the class of beneficiaries.

The Treasurer has power to exempt a foreign corporation and a foreign trust from the operation of the foreigner provisions on listed grounds including "any other relevant circumstances"

The Commissioner for State Revenue has the power to deem any company or trust "foreign".

GENERAL EXCEPTIONS:

The following exemptions are of no effect (in relation to the additional foreigner duty) where the transferee is a foreign purchaser:

Those applicable under Part 5 Duties Act which include (without limitation):

Change to trustee
Transfer to or from a trustee or nominee
Property passing to beneficiary of a trust
Transfer to a special disability trust
Transfers to a trustee of a superannuation trust
Property passing to a beneficiary of a superannuation fund
Property passing to a beneficiary under a will in conformity with the terms of the will

This appears to be equivalent to a death or probate duty

Transfers between spouses, same sex couples
Transfers resulting from breakdown of marriage
Transfers resulting from bankruptcy and administration

The “off the plan” duty concession is not available

The “partition of land” concession is not available

LAND HOLDER DUTY

Land Holder Duty has been amended to mirror the transfer provisions described above.

CAPITAL GAINS TAX WITHHOLDING PAYMENT FOR FOREIGNERS

From 1 July 2016, the purchaser of certain types of Australian property will be obliged where the seller is a foreigner to hold back 10% of the purchase price at settlement and remit the 10% to the federal government at settlement.

While foreign residents have for a long time been subject to capital gains tax on any capital gain they make in relation to disposals of certain types of Australian assets, compliance has been low and the ATO struggles to collect.

The change in the law is designed to remedy that situation.

ASSETS CONCERNED

The types of asset which attract the operation of the tax include:

- direct or indirect interests in taxable Australian real property (including leases, mining, quarrying and prospecting rights),
- rights and options with respect to these assets.

EXCLUSIONS

Assets which fall within the following categories are excluded:

- real property transactions valued under $2 million;
- transactions conducted through a stock exchange;
- an arrangement subject to an existing withholding tax obligation;
- the seller is under external administration (eg liquidation) or in bankruptcy.

AVOIDING THE WITHHOLDING TAX

In order for the seller to receive the full purchase price (no withholding) in connection with taxable Australian real property, the seller must provide the purchaser with a clearance certificate from the ATO at or prior to settlement. This applies to all sellers, regardless of whether a seller is a resident or a non resident.

In respect of those classes of assets covered by the law which are not taxable Australian real property, as an alternative to obtaining a clearance certificate, the seller can make a declaration to the effect that the seller is a tax resident of Australia at the time of making the declaration. In these circumstances, the purchaser need not withhold.

Where the foreign seller has tax withheld, it is available to him as a credit against his Australian taxation obligations.

EXAMPLE

Louis purchases real estate in Melbourne from Lucas for $3 million.

Although Louis believes that Lucas is an Australian resident, unless Lucas provides Louis with an ATO clearance certificate, Lucas will be considered a relevant foreign resident. Louis would need to make a withholding payment to the ATO under the new law.

Barry Woods has joined Norbury Lawyers as a consultant.
Barry has many years experience as a commercial lawyer, much of it gained in large and mid tier law firms.