



# Eyeing foreign investment

*CBP Lawyers Partner Brendan Maier explores the recently handed down House of Representatives Standing Committee on Economics report on foreign investment into residential property.*

The influence of foreign investors on residential house prices continues to occupy plenty of dinner conversations across Australia.

Stirring things up a little, the Commonwealth parliament's *Report on Foreign Investment in Residential Real Estate* was delivered in late November.

## *Foreign residential investment – the overarching policy*

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 house and land, home units and townhouses) and brings benefits to the local building industry and its suppliers.

Consistent with this principle, foreign investors are able to seek approval to purchase new dwellings and vacant land for residential development.

Foreign investors cannot generally 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.

### *Key issues examined*

The Committee examined four key issues:

- 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.

### *The key findings*

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

1. There is 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 would fix this.
2. No enforcement: The Foreign Investment Review Board (FIRB) was unable to provide basic compliance information about its investigations and enforcement activity. However, it's clear that no court action in relation to any enforcement has been taken since 2006 – but 17 divestment orders were made during the period 2003 to 2007, when foreign investment in residential real estate

was at much lower levels.

3. 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 bring in a civil penalty regime for breaches, imposing liability – not only on foreign investors – but also advisers (lawyers, accountants, etc) and related persons.
4. An administration fee might enable better compliance: As the Australian taxpayer currently foots the bill, this has arguably contributed to under investment in compliance and enforcement.

### *Key recommendations*

While the Committee made 12 recommendations, the following six are considered to be key:

- The current foreign investment framework should be retained: 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 foreign investment framework: The Committee supported a "modest" administration fee of \$1,500 per application, generating \$158.7 million revenue over four years – being less than 0.30 per cent of



the average residential home price in both Melbourne and Sydney.

- A civil penalty regime for breaches of the foreign investment framework: Penalties to be calculated as a percentage of the property value and apply not only to foreign investors but also to any third party who knowingly assists a foreign investor to breach the framework. Currently only the criminal penalties apply under the foreign investment framework.
- 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.
- Criminal penalties to apply equally to any third party.
- 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.
- National Land Titles register: to record the citizenship and residency status of all purchasers.

#### *Existing 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 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
- 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".

#### *What is the value of foreign investment in real estate?*

For the year 2012-13, the *FIRB Annual Report* ranked the top five real estate investors as China (\$5.9 billion), Canada (\$4.9 billion), the US (\$4.4 billion), Singapore (\$2 billion) and the UK (\$1.6 billion).

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

#### *Off-the-plan sales*

Advanced clearance for off-the-plan sales of developments comprising 100 or more dwellings is available.

Treasury data shows most dwellings in these developments are purchased by domestic investors, and the Committee found evidence the scheme most benefits developers in the initial stages of a project.

#### *Market impacts*

Although offshore buyers represent only a small percentage of Australia's overall sales, the market is an important factor in maintaining business confidence.

#### *Impact on accessibility and affordability of housing*

The Committee found that foreign investment brings benefits to the housing market and housing supply issues would worsen if foreign investment was curtailed.

#### *Conclusion*

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 detail. ■

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