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## ***Stamp Duty Surcharge - Foreign purchasers of residential property may pay 8.75% duty in Queensland***

27 June 2016

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### ***In brief***

- From 1 October 2016, 'foreign purchasers' of a direct or indirect interest in residential property in Queensland will be subject to a 3 per cent surcharge in addition to the standard duty rates. This will result in a combined rate of duty of up to 8.75 per cent on relevant transactions.
  - The surcharge will apply to agreements where the technical liability for duty arises on or after 1 October 2016.
  - The new rules have a special feature that require a reassessment to impose the surcharge duty in circumstances where the purchaser becomes foreign within 3 years after the original liability date. This may have interest and penalty tax consequences.
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### ***In detail***

The Queensland Treasurer, as part of the 2016-17 Queensland Budget, has announced that a 3 per cent stamp duty surcharge will apply to acquisitions of residential property by 'foreign purchasers'. The *Duties and Other Legislation Amendment Bill 2016* (the Bill), which is now awaiting royal assent, contains the proposed legislative amendments to implement the 'foreign purchaser' stamp duty surcharge, referred to as 'additional foreign acquirer duty' (AFAD).

These changes follow the introduction of a similar surcharge for both stamp duty and land tax purposes in Victoria and New South Wales. Victoria introduced a foreign purchaser additional stamp duty surcharge of 3 per cent from 1 July 2015, which is set to increase to 7 per cent on 1 July 2016. Similarly, the New South Wales Treasurer confirmed in their 2016-17 budget that a 4 per cent stamp duty surcharge and a 0.75 per cent land tax surcharge will be imposed from 21 June 2016.

Should the new surcharge apply to a transaction, the resultant duty payable in Queensland could be up to a combined 8.75 per cent. The AFAD can apply to direct acquisitions of 'residential property' and indirect acquisitions (i.e. landholder duty and corporate trustee duty for discretionary trusts) by way of entity acquisitions of 'residential property' by a foreign person. Additional guidelines regarding the operation and administration of the surcharge will be issued by the Queensland Office of State Revenue once the Bill has received royal assent.

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### ***Am I a 'foreign person'?***

The Bill introduces the concept of 'foreign person' which includes a foreign corporation, the trustee of a foreign trust and individuals who are not Australian citizens or Australian permanent residents.

The proposed definition of 'foreign corporation' looks beyond whether the entity is an Australian incorporated entity to consider whether foreign persons have a controlling interest in the corporation. Broadly, a 'controlling interest' is an interest of at least 50 per cent in the issued shares of the corporation or the ability to control 50 per cent of the voting power or the potential voting power of the corporation. On this basis, AFAD may apply to an Australian incorporated company that acquires residential property where there is a foreign controlling interest higher up in the corporate chain.

The proposed definition of 'foreign trust' considers whether at least 50 per cent of the trust interests (that is, the beneficiaries of the trust) are foreign interests. Broadly, 'foreign interest' refers to beneficiaries who are either foreign individuals, foreign trustees, foreign corporations or related parties.

### ***Is it 'residential property'?***

The proposed definition of 'AFAD residential land' is expressed broadly to mean land in Queensland that is or will be solely or primarily used for residential purposes and on which there is or will be a building designed or approved for human habitation for a single family unit.

At this stage, the scope of 'human habitation by a single family unit' remains unclear. The Explanatory Memorandum that accompanied the Bill indicates that AFAD is intended to cover a broad range of circumstances including established homes and apartments, land on which a home or apartment will be built and land and buildings acquired for re-development or refurbishment for residential use.

It is unclear whether the definition extends to include commercial residential premises such as hotels, motels, serviced apartments, student accommodation and retirement villages. If this is intended it is not apparent on the existing drafting of the Bill and should be clarified similarly to recent amendments in Victoria.

### ***Start date and transitional provisions***

The AFAD amendments apply if liability for transfer duty, landholder duty or corporate trustee duty arises on or after 1 October 2016. Foreign purchasers who enter into a purchase contract of any relevant kind prior to 1 October 2016 will need to determine if AFAD will be payable should the contract complete on or after 1 October 2016. There may be different outcomes for foreign purchasers depending on the type of transaction and type of duty involved.

Further consideration should be given to a potential timing issues which may arise for current option agreements to acquire residential land (directly or indirectly) where the exercise period commences on or after 1 October 2016.

### ***Obligation to notify***

Foreign purchasers which acquire AFAD residential land are required to lodge an AFAD statement in the approved form within 30 days of the relevant liability date for the transaction. It remains to be seen if deferred lodgement arrangements such as for conditional contracts for the sale of land will apply in respect of AFAD statements.

### ***Liability for duty***

The AFAD rules adopt the position that generally the parties to a transfer duty transaction will be jointly and severally liable to pay duty, AFAD and any penalties and interest.

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However, in the event that the Commissioner looks to recover any unpaid AFAD (including penalties and interest) from the seller who is not a foreign purchaser, the seller may be statutorily entitled to recover this amount from the foreign purchaser as a debt.

### ***Eligibility for ex gratia relief and other concessions***

The Victorian rules include a discretionary exemption to exempt foreign investors in certain circumstances. The AFAD rules do not provide a similar special exempting provision for foreign purchasers.

During the Second Reading Speech (the Speech) before Parliament on 17 June 2016, the Treasurer, Mr Curtis Pitt MP, noted that such a power would be inappropriate as it would result in the delegation of a legislative power to a minister. However, the Treasurer stated that ex gratia relief supported by yet to be published guidelines may be available to foreign purchasers. During the Speech, the Treasurer indicated that ex gratia relief may be available for priority development areas which significantly contribute to Queensland's economic activity and where accompanying developer contributions are significant. Additionally, the Treasurer indicated that it was the intention of the Queensland State Government to review the relevant Victorian and New South Wales legislation and guidelines and undertake a consultation prior to the commencement of the surcharge on 1 October 2016.

Additionally, general concessions from duty will apply in respect of the AFAD such as the change in trustee exemption and corporate reconstruction relief. However, certain concessions will not extend to AFAD such as the concessions for homes and first homes, and family businesses.

### ***Reassessment***

Uniquely, the proposed rules include a mandatory reassessment of AFAD duty in circumstances where the purchaser becomes a foreign person within 3 years after the original duty liability date. This raises issues of whether late interest or penalty tax also may be imposed.

A purchaser may become a foreign purchaser as a result of changes to its shareholders or its unitholders or other upstream ownership changes. This means the purchaser itself may not be able to control the circumstances that cause the change so as to protect against a reassessment within 3 years.

The reassessment rule will need to be taken into consideration as part of due diligence enquiries for merger and acquisition transactions on or after 1 October 2016.

### ***The takeaway***

Foreign purchasers that are considering directly or indirectly purchasing Queensland residential property need to be aware of the AFAD changes and seek advice on transactions currently signed or proposed to be signed. The delayed start date of 1 October 2016 provides a window for relevant foreign purchasers to be appropriately advised on any potential AFAD exposure and the availability of ex gratia relief. Selling parties will also need to seek advice on the basis that they may have a joint and several liability with the foreign purchaser and may be required to exercise a special statutory right to reimbursements from the foreign purchaser.

Importantly, the Bill does not propose to apply a foreign purchaser surcharge to land tax. It remains to be seen if Queensland will subsequently do so and bring it in line with Victoria and New South Wales.

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### ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

Stefan DeBellis, Brisbane  
+61 (7) 3257 8781  
[stefan.debellis@au.pwc.com](mailto:stefan.debellis@au.pwc.com)

Barry Diamond, Melbourne  
+61 (3) 8603 1118  
[barry.diamond@au.pwc.com](mailto:barry.diamond@au.pwc.com)

Costa Koutsis, Sydney  
+61 (2) 8266 3981  
[costa.koutsis@au.pwc.com](mailto:costa.koutsis@au.pwc.com)

Matt Budge, Perth  
+61 (8) 9238 3382  
[matthew.budge@au.pwc.com](mailto:matthew.budge@au.pwc.com)

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