FOREIGN INVESTMENT IN AUSTRALIAN REAL ESTATE

At A Glance

Australia has published several pieces of exposure draft legislation impacting investment in real estate:

Proposed changes to the foreign investment framework include:

- Notification thresholds, reporting obligations and new or increased penalties
- Withholding tax obligation imposed on purchasers of taxable Australian property from non-resident vendors from 1 July 2016
- Tighter foreign investment rules for agricultural and residential real estate

- Draft law for 10% withholding tax on purchases from foreign residents.

Various reforms in Australia to strengthen the foreign investment framework and other initiatives relating to foreign-owned property are significant. The changes may impact:

- foreign investors purchasing agricultural land or real estate in Australia
- existing foreign land owners
- anyone purchasing real estate from a foreign seller and those involved in facilitating these transactions.

Source: Ernst & Young Tax Briefing, July 2015

For details, please find a briefing from Ernst & Young under the following link:
http://www.ey.com/Publication/vwLUAssets/ey-tax-alert-foreign-investment-in-australian-real/$FILE/ey-tax-alert-foreign-investment-in-australian-real-estate-changes-in-july.pdf

AUSTRALIA'S INVESTMENT MANAGER REGIME (IMR) – BILL TO IMPLEMENT ELEMENT 3 IS PASSED

The Tax and Superannuation Laws Amendment (2015 Measures No. 1) Bill 2015 (the Bill), containing the third element of the IMR, has been passed by the Australian Parliament and received Royal Assent on Thursday 25 June 2015. This IMR reform furthers the Australian Government's broader initiatives to remove certain tax impediments for foreign investors investing into Australia in order to attract foreign investment and to promote the use of Australian fund managers.

Source: DLA Piper Tax Alert, June 2015

For details, please find a briefing from DLA Piper under the following link:
https://www.dlapiper.com/en/australia/insights/publications/2015/06/investment-manager-regime-bill/

AUSTRALIA'S UPDATE ON COLLECTIVE INVESTMENT VEHICLES (CIVS) AND ASIAN REGION FUNDS PASSPORT

The Australian Government has for some time now been on a journey to position Australia as a leading regional financial centre. When it comes to the Australian real estate sector, recent evidence of this commitment can be seen in two proposals (see sections A and B below) which when implemented, should strengthen and build on existing rules which have contributed to foreign investors being big buyers of Australian commercial property and agricultural property.

One of these existing rules is the Managed Investment Trust (**MIT**) withholding tax concession which was introduced several years ago for the purpose of attracting capital from overseas investors to invest in Australian real estate. To qualify as an MIT for withholding tax purposes the overseas investor must buy the commercial property through an Australian domiciled unit trust where the trustee is licensed by the ASIC and the unit trust meets a widely held tracing test comprising both direct and indirect investors (most institutional investors, such as overseas pension funds would be treated as widely held). Whilst there has been widespread use of the MIT concession by many overseas investors, some Asian based investors have avoided the concession because they are not in common law jurisdictions and are typically unfamiliar or uncomfortable with trust structures including the concept that the investor does not have legal title over the assets.

A. More Choices for foreign investors wishing to invest into Australian real estate

On 4 June 2015 the Australian Government announced that it plans to introduce a broader range of tax flow through Australian collective investment vehicles (**CIVs**) (such as corporate CIVs and limited partnership CIVs consistent with international norms) to attract increased foreign investment for management in Australia. The details of this announcement will be set out in an options paper to be released by the Government later this year.

This Government announcement follows hot on the heels of the recently released recommendations of the Federal Board of Taxation in its report which seeks to enhance Australia's status as a leading regional financial centre. The recommendations are relevant to the entire Australian funds management sector across all asset classes, not just real estate.

Whilst the precise timing and details of this Government proposal are currently not known, it is likely that the Government will design and implement this proposal consistent with the recommendations of the Federal Board of Taxation.

This Australian Government initiative is good news for global and Asia based property investors because in the future they will be able to choose to invest in Australian property through an Australian unit trust or another CIV vehicle which has a legal structure with which the investor is familiar and that (depending upon the type of CIV) can access concessional withholding tax rates equivalent to those available through Australia's international tax treaties or that align with the existing MIT withholding tax rate on fund payments to a non resident investor (ie rent and gains made on sale of Australian real property).

B. Cross border marketing of investment funds – Asian Region Funds Passport

The other Australian Government proposal is the Asia Region Funds Passport (**Passport**) which is in fact an Asian regional proposal being progressed through the Asia Pacific Economic Cooperation intergovernmental forum (**APEC**).

The Passport proposal is to establish an Asia regional platform where regulated investment funds in one Asian jurisdiction can be more easily sold to retail investors in another Asian jurisdiction with minimal additional regulatory approvals. In its design and purpose it can be seen as a competitor product to the European USCITS product which currently enjoys deep penetration into many Asian markets.

The pilot phase of the Passport is scheduled to commence in Q1 2016 with the current pilot participating APEC economies being Australia, Korea, Singapore, Philippines, Thailand and New Zealand. It is hoped that over time, other APEC economies will join the Passport and that the similar (but separate) ASEAN CIS fund passport initiative and the Hong Kong/China initiatives for mutual recognition arrangements for funds, will converge with the Passport.

Importantly the Passport initiative is a bold shared step by Asia region countries that is good for the Asia region. The Passport rules will (just like what happened with European USCITS rules) evolve and broaden over time once a credible Passport product brand (for transparency and being well regulated) is established with investors.

Of particular interest to the real estate sector is that property securities funds are eligible for Passporting in participating APEC economies, subject to the Passport fund complying with strict portfolio allocation limits. This means property fund managers in those economies will benefit from exposure to a broader pool of investors who in turn will benefit from more investment and portfolio diversification opportunities.

The Passport initiative has the potential to lead to the gradual cross border retailisation of Asian commercial property.

The introduction of a broader range of CIV's (see section A above) better suited for overseas investors will be key for Australian fund managers seeking to maximise their participation in the Passport initiative. If successfully implemented, these proposals will enhance Australia's ability to attract foreign funds under management for investment in the Australia real estate sector.

Source: Norton Rose Fulbright, August 2015

For details, please contact John Moutsopoulos, Partner, Norton Rose Fulbright Australia (john.moutsopoulos@nortonrosefulbright.com).

CHINA VALUE ADDED TAX UPDATE

KPMG understands that the proposals to extend VAT reform to the real estate and construction sectors were submitted to the State Council for approval at the end of July. However, the policies were not approved at that time. Instead, KPMG understands that the release of the policies has been delayed temporarily and the timeframe for VAT reform implementation for the remaining sectors has now changed. As at 14 August, 2015, the officials have been unable to commit to a definitive timetable. KPMG's general understanding is that the new policy timetable the officials from the Ministry of Finance are now working towards is for a release of the VAT reform policies before the end of 2015, with potential implementation in Q2 or Q3 of 2016. However, at this stage, the officials have not committed to a revised implementation date for the remaining sectors, so this is speculative. This revised timetable is still uncertain because of the likely reason for the delay – if KPMG assumes that economic uncertainty and volatility led to the delay in the first place, then clearly a revised timetable is subject to prevailing market conditions. KPMG expects further clarification of the timetable over the coming weeks.

Source: KPMG, August 2015

For details, please contact Lachlan Wolfers , Leader, Centre of Excellence for Indirect Taxes, KPMG China, (lachlan.wolfers@kpmg.com) or Ivor Morris, Director, Tax, KPMG Hong Kong. (ivor.morris@kpmg.com)

CHINA – REPORTING FOREIGN PARTICIPATION AND FOREIGN INCOME BY RESIDENT ENTERPRISES

Following announcement No. 38 on information requirements for foreign income and foreign participation, the State Administration of Taxation (SAT) issued a notice on June 2015 (Shui Zong Han [2015] No. 327) clarifying information requirements for reporting foreign participation and foreign income by resident enterprises.

Resident enterprises are no longer required to report information on foreign participation and foreign income as required in the Annual Disclosure Forms of Transactions between Related Enterprises of the People's Republic of China of Guo Shui Fa [2008] No. 114 if such information had already been provided prior to the implementation of the announcement No. 38 and there have been no changes in reportable foreign investment since then.

Resident enterprises must file annual financial statements under article 2(2) of announcement No. 38; they must include the financial statements, relevant explanatory notes to the financial statements and the auditor's report. All financial statements have to be prepared in accordance with Chinese accounting standards.

In addition, the notice provides instructions on how to complete Item 6 of Profits Distribution by the Controlled Foreign Company (CFC) under "Information Form on CFC".

Source: Mayer Brown JSM, July 2015

For details, please see the Mayer Brown JSM Asia Tax Bulletin under the following link:
https://www.mayerbrown.com/Asia-Tax-Bulletin-Summer-2015/

HONG KONG – INLAND REVENUE (AMENDMENT) (NO. 2) ORDINANCE 2015 TO EXTEND PROFITS TAX EXEMPTION FOR OFFSHORE FUNDS TO PRIVATE EQUITY FUNDS GAZETTED

Hong Kong has passed legislation to grant a tax exemption to offshore private equity funds.

The Inland Revenue (Amendment) (No. 2) Ordinance 2015 (Amendment Ordinance) was gazetted on 17 July 2015 and came into operation on the same day. The tax extended exemption is seen as a positive move by the Hong Kong Government to make it more attractive for PE funds to set up and expand their business operating in Hong Kong.

Offshore funds will be eligible for profits tax exemption in respect of profits derived from specified transactions provided the transactions have been carried out through an SFC-licensed/registered corporation or authorised FI (i.e. a "specified person"), or if the offshore fund is a "qualifying" PE fund. The "qualifying" fund concept is new.

A "**qualifying**" fund means:

(a) at all times after the final closing of sale of interests -

  (i) the number of investors exceeds 4; and

  (ii) the capital commitments made by investors exceed 90% of the aggregate capital commitments; and

(b) the portion of net proceeds arising from the fund's transactions to be received by the originator (and its associates) must not exceed 30 per cent of the net profits.

Clifford Chance Client Briefing, July 2015

For details, please see the Clifford Chance briefing under the following link:
http://www.cliffordchance.com/briefings/2015/07/inland_revenue_amendmentno2ordinance201.html

HONG KONG OTC DERIVATIVES REPORTING CONSULTATION CONCLUSIONS

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) recently published their conclusions following further consultation on the Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules.

With the implementation of the Hong Kong OTC derivatives reporting and record keeping rules due in mid-July, Clifford Chance has prepared a briefing paper setting out key information to help clients to understand their reporting requirements.

Who needs to report?

The following Hong Kong entities are subject to the initial phase of reporting requirements under the Rules (together "Prescribed Entities"):

- Authorised Institutions ("AI") ✓
- Approved Money Brokers ("AMB") ✓
- Licensed Corporations ("LC") ✓
- Central Clearing Counterparty ("CCP") ✓

Certain types of Hong Kong entities have been excluded from the initial phase of reporting requirements:

- Hong Kong Persons ✗
- Fund Managers ✗

NB: It is expected that both Hong Kong Persons and Fund Managers will become subject to the Rules in the future.

Source: Clifford Chance Client Briefing, July 2015

For details, please see the Clifford Chance briefing under the following link:
http://www.cliffordchance.com/briefings/2015/06/hong_kong_otc_derivativesreportingwhatyo.html

MINIMUM ALTERNATIVE TAX – APPLICABILITY TO FOREIGN COMPANIES INVESTING IN INDIA

The concept of Minimum Alternative Tax ('MAT') was intended to allow for the levy of tax on the book profit of certain companies – with high book profit but that were not paying tax due to availability of tax exemptions, deductions, etc.

Traditionally, it has been asserted that MAT does not apply to foreign companies that do not have a place of business or permanent establishment in India because such companies are not required to maintain books of accounts in India, which is a pre-requisite for applicability of MAT. Further, in case such foreign companies are based in Treaty protected jurisdictions (e.g. Mauritius, Singapore, etc.), an additional argument was that Treaty ought to over-ride the provisions of the domestic law.

However, India's Authority for Advance Rulings (AAR) unsettled this position by reaching an opposite conclusion in Castleton Investment Ltd., and instead held that MAT could apply to a foreign company having no presence in India. The matter has been appealed to India's Supreme Court.

Meanwhile, the tax authorities recently made assessments of MAT on income earned by foreign portfolio investors in India.

To avoid uncertainty for the future, the Finance Act, 2015 has amended the provisions of the Income Tax Act, 1961 ('the Act') to provide that income of foreign companies in India from capital gains arising on transactions in securities or interest income, etc. will not be liable for MAT, if income tax rate applicable to such income is less than the MAT rate i.e. 18.5%.

Having said that, the amendments are prospective in nature and thus the issue of applicability of MAT for earlier years remains open. The case pending before the Supreme Court of India may resolve this issue.

Further, the Finance Act seeks to exempt from MAT, any capital gains arising to foreign companies from transactions in 'securities'. The term 'securities' has the meaning assigned to it under Securities Contract (Regulation) Act 1956 which requires the securities to be marketable. A strict reading of this may lead to an ambiguity on whether shares of private limited company are covered under definition of 'securities'. Thus, presently, the applicability of MAT to foreign companies on gain arising from sale of shares of private limited companies is uncertain.

Source: KPMG, May 2015

For details, please contact Samip Barlota, Director, KPMG Tax and Regulatory (Private Equity), Mumbai, India, (samip@kpmg.com) or Tushar Sachade Co-Head – Private Equity, BBSR & Co – an affiliate to KPMG, India, (tushars@bsraffiliates.com).

KOREA – TAX REVISION BILL

Under the current tax law, if a foreign company invests into a domestic real estate-rich company, the invested share by the foreign company is regarded as a real property share. A real estate-rich company is an entity in which real estate consists of 50% or more of its total asset value. Under the 2015 tax revision bill, when calculating the percentage of real estate to determine whether a corporation is a real estate-rich company, the value of shares (corresponding to the percentage of real estate) of a real estate-rich company owned by the corporation will be considered.

This new rule will be applicable to the shares transferred from January 1, 2016.

Source: KPMG, August 2015

For details, please contact Kim Cheol, Tax Partner, KPMG Samjong Accounting Corp. (ckim2@kr.kpmg.com) Ivor Morris, Director, Tax, KPMG Hong Kong. (ivor.morris@kpmg.com).

MONETARY AUTHORITY OF SINGAPORE (AMENDMENT) ACT 2015 (COMMENCEMENT) NOTIFICATION 2015 PUBLISHED

The Monetary Authority of Singapore (MAS) has announced that provisions set out in the Monetary Authority of Singapore (Amendment) Act 2015 (No. 14 of 2015) (MAS Amendment Act) came into operation on 26 June 2015, with the exception of section 6.

The following key amendments came into operation on 26 June 2015:

- The amendment of section 27A(6) to include any designated financial holding company under the Financial Holding Companies Act 2013 and any person licensed under the Banking Act to issue credit or charge cards as financial institutions in the definition of 'financial institution' under that section
- The amendment of section 27B to extend the MAS' powers to issue directions and make regulations to prevent money-laundering and the financing of terrorism
- The insertion of new sections 27C to 27F to grant the MAS further powers to inspect financial institutions for compliance with sections 27A and 27B
- The insertion of a new Part VC to enable the MAS to assist the AML/CFT authorities of a foreign country and domestic authorities in connection with their supervision and other actions relating to money laundering, terrorism financing and other offences

The amendments follow the April 2015 issue of revised MAS Notices on Prevention of Money Laundering and Countering the Financing of Terrorism in Singapore and related guidelines.

Source: Clifford Chance Alerter, Monetary Authority of Singapore, July 2015

For details of the Amendment, please see the following link:
http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:4454539e-0c0d-4f0f-870b-0951b1dcb7a9

TAIWAN CAPITAL GAINS TAX AMENDED

- On 5 June 2015, Taiwan Legislative Yuan (Congress) passed an amendment to the Income Tax Act (ITA) introducing a new capital gains tax on the transfer of buildings and land. The amendment is summarised below. The new capital gains tax applies to (1) buildings and land acquired after 1 January 2015; and (2) buildings and land acquired after 1 January 2014 but held for less than two years. This means that the tax does not apply retrospectively to buildings and land owned before 2014. The taxable base is the total market value of buildings and land less related costs/expenses and the incremental value calculated under Land Incremental Value Tax (LIVT).

New Income Tax Rates

- **Resident Enterprises**

  The capital gains are included in regular income and are subject to 17 percent enterprise income tax.

- **Non-Resident Enterprises**

  Building and land owned by a PE (branch)

TAX RATE (%)	REAL PROPERTY HOLDING PERIOD (YEARS)
45	less than 1
35	more than 1

These rates also apply to gains from the transfer of shares by a non-resident company deriving more than 50 percent of its value directly or indirectly from buildings and land situated in Taiwan.

If buildings and land have been occupied by taxpayers or their spouses and dependants with one household registration for private use (not for business or rental purposes) for more than 6 years, up to an amount of TWD four million for each household will be exempt from tax. Any amount in excess of TWD four million will be subject to 10 percent tax. This private-use exemption can only be applied once every 6 years for each household.

The following are exempt from capital gains tax:

- Land for agricultural use qualified as such under the Agriculture Development Statute;
- Land and land improvement imposed by government; and
- Land used for public facility assigned by the City Planning Rules.

Source: Mayer Brown JSM, July 2015

For details, please see the Mayer Brown JSM Asia Tax Bulletin under the following link:
https://www.mayerbrown.com/Asia-Tax-Bulletin-Summer-2015/

BANK OF THAILAND ANNOUNCES CHANGE TO FOREIGN EXCHANGE REGULATION

The Bank of Thailand (BOT) has announced measures to further relax foreign exchange regulations in response to the strength of the Thai Baht. The measures are intended to facilitate offshore investments by residents and the management of their foreign assets. The regulations include rules to:

- Allow Thai residents to invest in real estate, including leasehold properties and furnishing foreign properties, up to USD 50 million or its equivalent at market rates per year (formerly capped at USD 10 million or its equivalent per year and limited to just acquiring real estate
- Allow Thai residents to purchase foreign currencies for deposit in foreign currency deposit (FCD) accounts with domestic financial institutions without requiring an underlying transaction, up to a limit of USD 5 million or its equivalent market rate deposited at any one time (formerly capped at USD 500,000)
- Broaden the definition of 'institutional investors', who are permitted to purchase foreign currency for investment in offshore securities and derivatives under certain circumstances, to include derivative business operators under the Derivatives Act B.E. 2546 (2003), as amended

The new regulations will come into force after they have been announced in the Royal Gazette.

Source: Clifford Chance Alerter, July 2015

For details of the announcement (in Thai), please see the following link:
https://www.bot.or.th/App/FIPCS/Thai/PFIPCS_summary.aspx?packId=25580139

EUROPEAN UNION (EU) AIFMD: ESMA UPDATES Q&A

The European Securities and Markets Authority (ESMA) has published updates to its questions and answers (Q&As) on the application of the Alternative Investment Fund Managers Directive (AIFMD). ESMA has included new answers on reporting and calculation of leverage in this update.

The Q&A document is intended to promote common supervisory practices in the application of the AIFMD and is aimed at competent authorities under the Directive. Answers are also intended to help AIFMs by clarifying certain aspects of the rules.

Source: Clifford Chance Alerter, ESMA, May 2015

For details, of the announcement, please see the following link:
http://www.esma.europa.eu/news/ESMA-publishes-updates-QAs-AIFMD-application-0?t=326&o=home

ESMA ISSUES ADVICE ON EXTENDING AIFMD MARKETING PASSPORT

The AIFMD marketing passport could be extended to some non-EU managers and funds marketing to professional investors in the EU. Such is the advice from ESMA in relation to the application of the AIFMD (Alternative Investment Fund Managers Directive) passport to non-EU Alternative Investment Fund Managers (AIFMs) and Alternative Investment Funds (AIFs).

Key Points

- ESMA recommends extension of passport to Guernsey, Jersey and potentially Switzerland
- ESMA has delayed its decision on Hong Kong, Singapore and the United States
- ESMA will conduct further assessments of other non-EU countries in the future
- Non-EU countries for future assessment include Australia, Bermuda, BVI, Cayman Islands, Isle of Man and Mauritius
- No timetable is given for future assessments
- The European Commission must adopt a delegated act within 3 months specifying the date when the passporting rules become applicable in all member states
- ESMA suggests the Commission may want to delay extending the passport until it has given a positive recommendation for a 'sufficient number' of non-EU jurisdictions
- Not clear under AIFMD that the passport can be extended country by country
- No further guidance on the definition of marketing or reverse enquiry

Source: Clifford Chance Client Briefing, August 2015

For details, please see the Clifford Chance briefing under the following link:
http://www.cliffordchance.com/briefings/2015/08/esma_issues_adviceonextendingaifmdmarketin.html