

Arnold Bloch Leibler


Lawyers and Advisers

Welcome to the session. We'll be starting shortly.


NSW and Vic state tax and FIRB topical issues
Wednesday 30 September, 12pm


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If you experience technical issues, please contact Mariana Olivieri on +61 415 091 316.


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ABL Tax Webinar Series

Session 4: NSW and Vic state tax and topical FIRB issues

Presenters:

Zoe Chung – Special Counsel, Arnold Bloch Leibler

Mark Macrae – Senior Associate, Arnold Bloch Leibler



Introduction

This presentation considers:

a) State taxes:

- Recent changes to the NSW and Victorian foreign duty surcharges
- Victorian COVID-19 related initiatives

b) FIRB

- Background to the regime
- Changes following COVID-19
- Other changes

Foreign surcharges – Discretionary Trusts

Foreign Surcharges – Discretionary Trusts - Victoria

Applicable since July 2015

Foreign person has a **substantial interest** in the trust estate

Person to whom the trustee has a **power or discretion** to distribute capital is taken to have a beneficial interest to the maximum percentage

Effect - any potential foreign beneficiaries will generally mean a discretionary trust is foreign

Practical approach – no previous distributions / unlikely future distributions

Need to have express exclusion in discretionary trust deeds



Foreign Surcharges – Discretionary Trusts – New South Wales

Applicable since June 2016

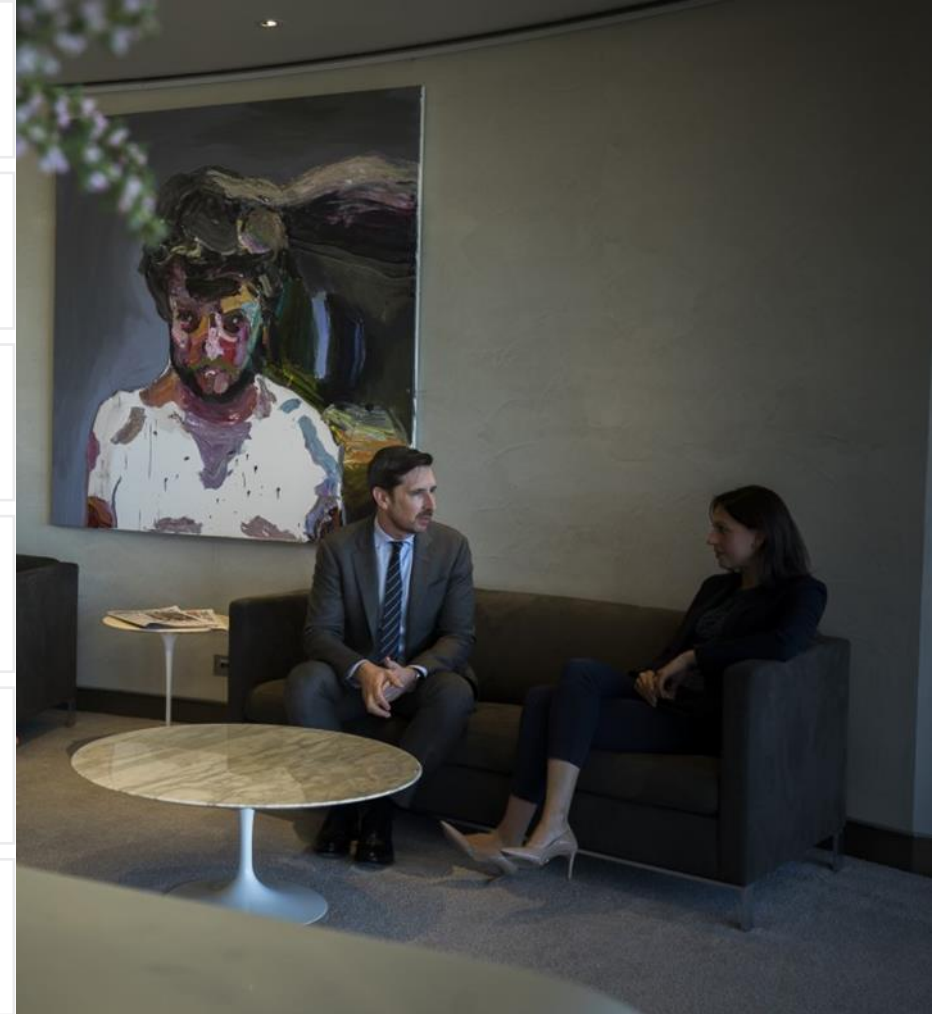
Previously – FIRB definition – substantively similar to Victoria

Prevent foreign potential discretionary beneficiaries from receiving distributions as to income and/or capital under the trust

Cannot be amended to result in foreign potential discretionary beneficiary

'Potential beneficiary' - if the exercise **or failure to exercise** a discretion can result in any property of the trust being distributed to or applied for the benefit of the person.

Need to have express exclusion in discretionary trust deeds by 31 Dec 2020



Foreign Surcharges – Discretionary Trusts

Check your deeds

Is there an exclusion clause?

Is it sufficient?

Consider duty implications of amendments

Changes to default beneficiaries?

Property anywhere else in Australia?

NSW transitional rules

Refunds?

31 December 2020 deadline

Victorian COVID-19 initiatives

Victorian COVID-19 initiatives

Land tax

Deferral

Reduction

Vacant Residential Land
Tax

Payroll Tax

Waiver of 2019/2020 PTX

“Top up” wages exempt

Payment deferral

Regional Victoria 50% stamp duty
discount

HomeBuilder Program

Liquor licence fee waiver for 2020
and 2021

Congestion levy relief - 25%
waiver of 2020 levy

Motor vehicle duty relief

Commercial passenger vehicle
service levy relief

2020 land tax measures

Targeted at Landlords – commercial and residential

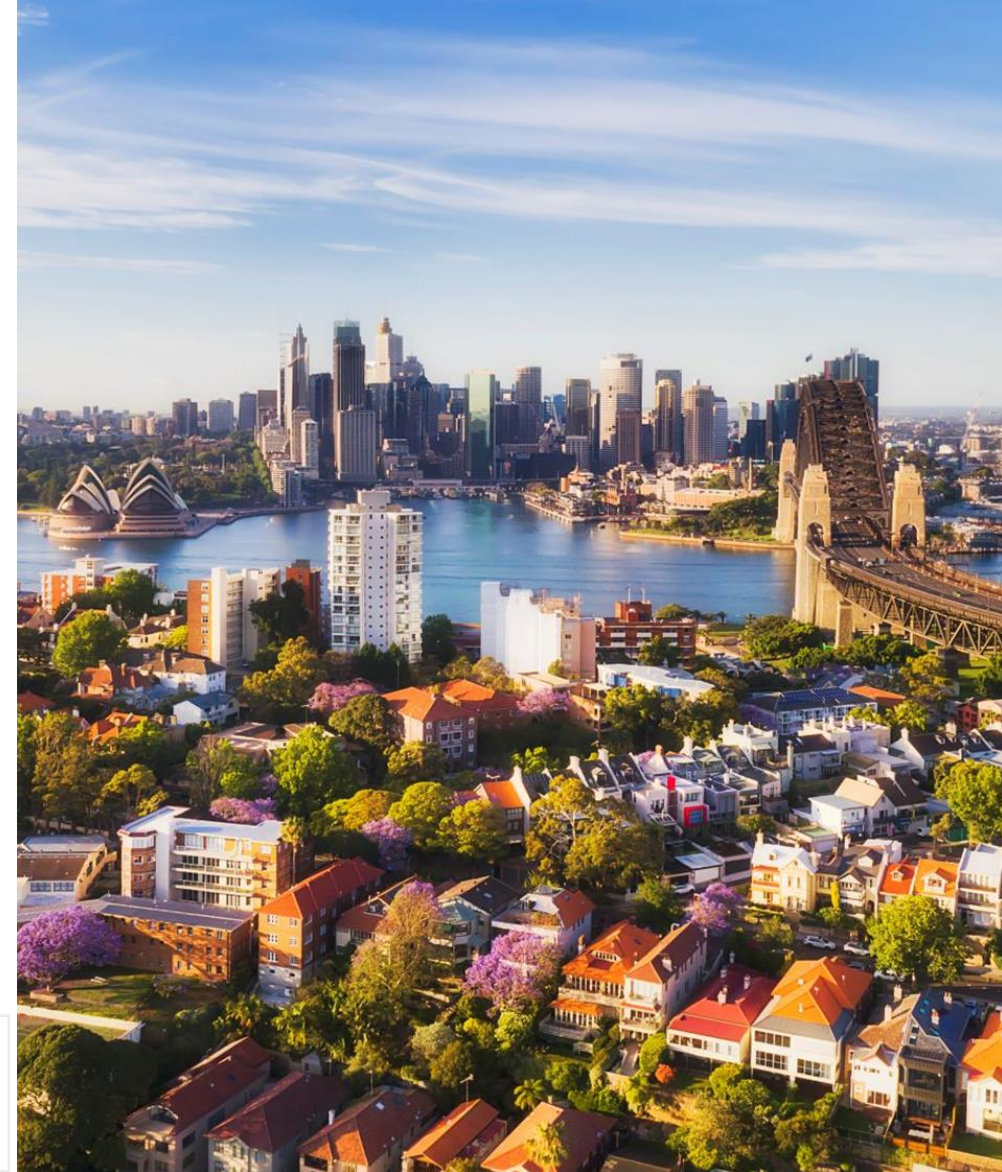
Most of the eligibility requirements mirror “rent relief” codes:
Commercial Tenancy Relief Scheme / Residential Tenancies Dispute
Resolution Scheme

Limited application to vacant / untenanted properties

Initially a 25% reduction – increased to a 50% reduction

Extended to include a 25% reduction for certain “owner occupied”

Deferral of balance of 2020 land tax assessment until 31 March 2021



2021 land tax measures

Residential landlords only

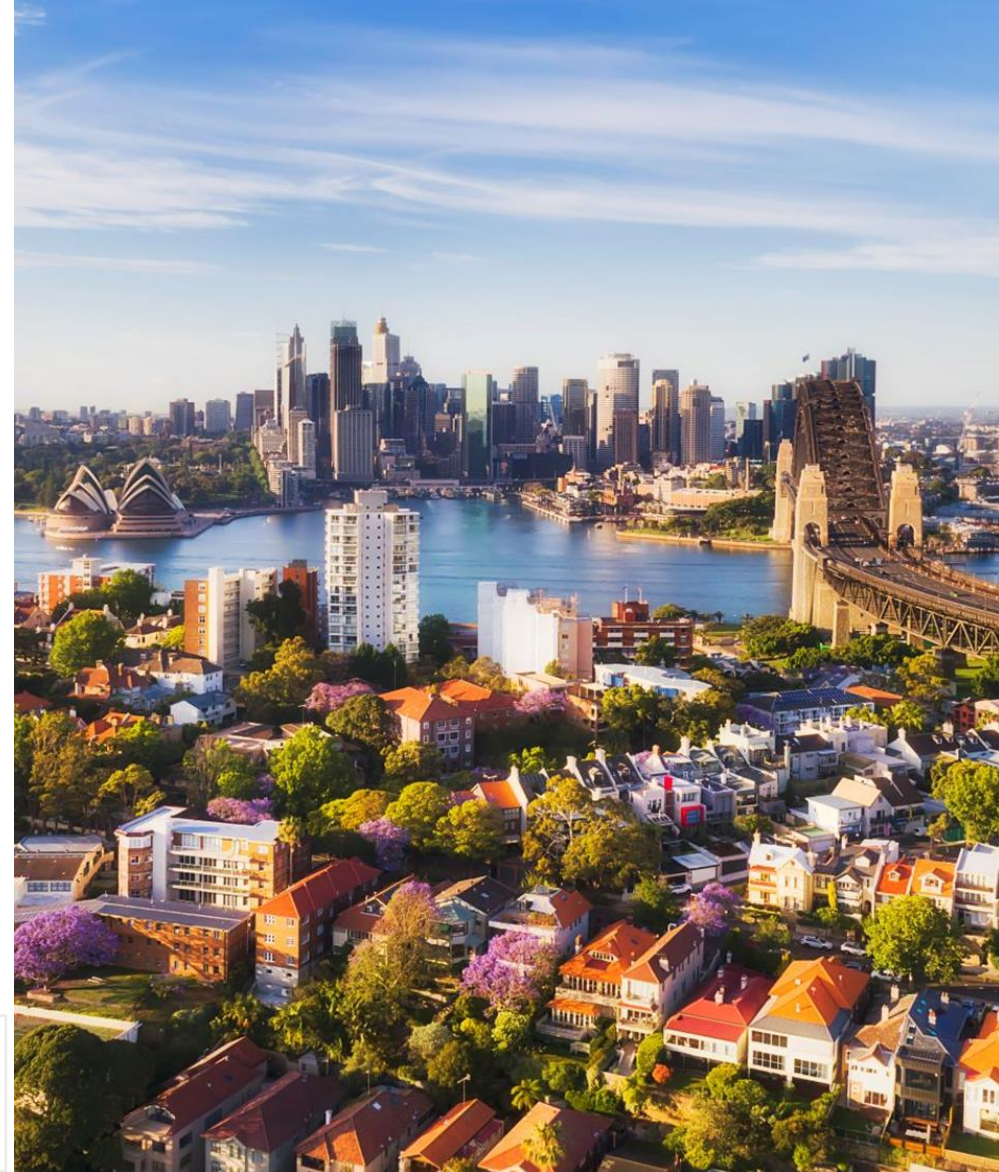
Extension of the residential tenancy relief scheme to 28 March 2021

25% reduction to 2021 land tax / pass-on equivalent rent relief

Application to vacant / untenanted properties?

Deferral of balance of 2020 land tax and 2021 land tax until November 2021

Commercial landlords?





Vacant Residential Land Tax

- VRLT tax applies to homes in inner and middle Melbourne that were vacant for more than six months in the preceding calendar year
- Rate is 1% of the CIV
- The vacant residential land tax is assessed by calendar year (1 January to 31 December) and the six months do not need to be continuous.
- Full waiver of 2021 VRLT that would ordinarily apply if the property was vacant for more than six months in 2020

Payroll tax

Waiver 2019/2020 PTX – less than \$3 m Victorian taxable wages

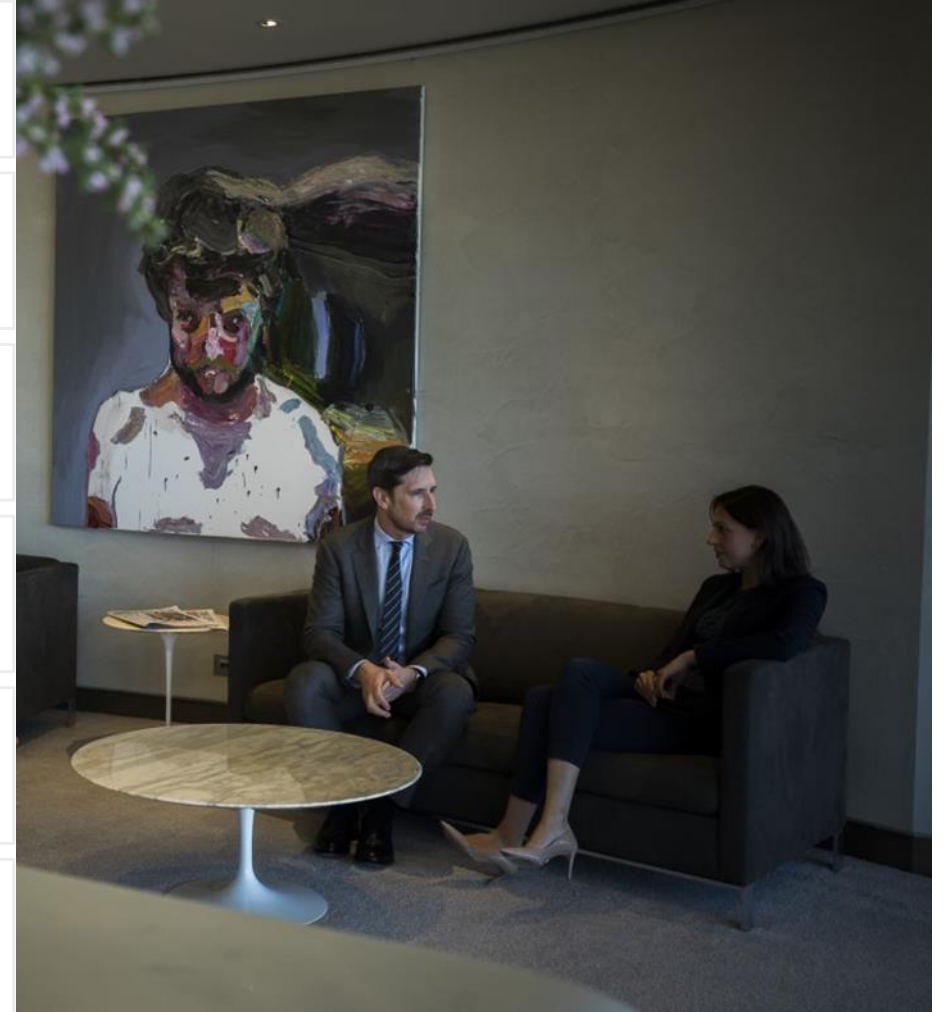
Deferral Q1 2020/2021 PTX – less than \$3 m Victorian taxable wages

Deferral 2020/2021 PTX – up to \$10 m Victorian taxable wages

The eligibility threshold applies to each “employer”

Any member of a group that pays Victorian taxable wages of up to \$10 million per annum is eligible for the relief

Gap payments between an employee’s normal wage and the \$1500 per fortnight required to qualify for JobKeeper payments are exempt from PTX



The background of the slide is a blurred photograph of several people in business attire sitting around a table in a meeting room. The lighting is dim, and the focus is soft, creating a professional and serious atmosphere.

Australia's Foreign Investment Regime

Foreign Investment in Australia

Foreign Investment in Australia

Foreign economies had a total of \$3.8 trillion invested in Australia at the end of 2019 - 14th-highest direct foreign inward investment in the world.

Benefits weighed against risks to 'national interest'.

Administration of Foreign Investment

Treasurer has ultimate authority over the foreign investment regime.

Treasurer is advised by the Foreign Investment Review Board, which examines foreign investment proposals and advises on the national interest implications.

The ATO is responsible for assessing applications in relation to residential real estate, most commercial real estate applications, and agricultural assets.



The National Interest Test

Common considerations include:

- National Security.
- Competition.
- Impact on the economy and community.
- Character of the investor.
- Other Government policies (including taxation).

More stringent in the case of foreign government investors and all investments in agricultural assets.

Identifying Foreign Persons



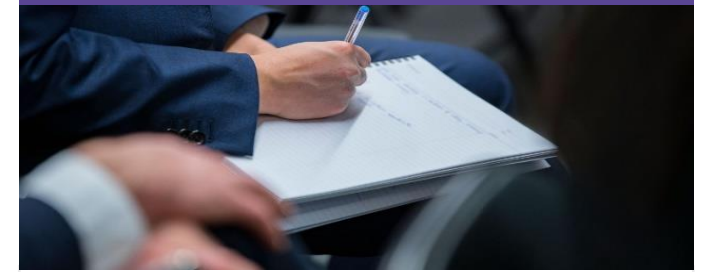
Foreign Governments:

- Defined as a body politic of a foreign country or part thereof
- Includes companies and trusts in with a foreign government holds a substantial interest or an aggregate substantial interest
- Proposed to exclude passive investments by foreign governments



Foreign Inbound Investors:

- Applies both to foreign entities and their Australian subsidiaries
- An Australian company can be 'foreign' if shares held by an offshore entity, but a foreign company may not be 'foreign' if the shareholder is Australian.



Australian Outbound Investors:

- Discretionary trusts often caught unless exclusion clauses in deed
- Dual-listed group's caught



Notifiable transactions

- Monetary thresholds have been key, but following COVID-19 all were reduced to nil.
- Lease thresholds reintroduced from 4 September 2020 for non-sensitive renewals.
- The usual proportionate ownership thresholds dependent on sector, nature of investment, and country of origin, remain in place.
- New category of 'National Security Actions' captures actions that would otherwise escape scrutiny but, by their nature, give rise to national security concerns regardless of size or value.

Where the Foreign Investment Regime Applies



Fee Payable

For creation or variation of an exemption certificate

For significant actions and notifiable actions

To request variation of conditions on approval



No action until approved

Ordinarily 30 day period with optional extensions.

From 29 March 2020 minimum 6 month period unless action previously had a nil threshold.



No-objection without conditions



No-objection with conditions

Treasurer can impose conditions necessary to ensure the investment is not contrary to the national interest.

Conditions on no-objection decisions

Standard Tax Conditions

To comply with tax laws and pay taxation debts.

To provide documents and information requested by the ATO.

Conditions apply to the applicant and entities in the applicant's broader group.

Additional Tax Conditions

Dependant on the particular transaction and circumstances of the applicant.

Could include:

- Requirements for good-faith engagement with ATO.
- Submission of information periodically or as requested.
- Submission of detailed information in relation to cross-border transactions.

Other Conditions

If conditions are imposed, will typically include a condition requiring periodic reporting on compliance with the conditions.

Power unconstrained, but have included conditions requiring:

- That the transaction be registered.
- Head office, particular officers, and particular corporate functions to be located in Australia.
- That development or investment occur within a certain time.

What can go wrong

Taking action without approval

- Where an application decision pending
- Where no application made

Providing 'false or misleading' information.

- Proposed that omissions will be sufficient to render information false or misleading.

Breach of conditions

- Currently punitive action only after a breach has occurred.
- Proposed power to give directions on suspicion a foreign investor has or will breach conditions.



When something goes wrong

Divestiture & Directions

Treasurer can specify a time within which property must be disposed of or must refrain from certain actions.

Directions can include preventing specified persons (e.g. foreigners) from becoming or remaining as senior officers.

Civil Penalties

For failing to give notice of a notifiable action, taking an action before receiving approval, contravening a direction or condition, and making false or misleading statements, was \$55,500 but proposed to be greater of:

- \$1.11 million, or \$11.1 million for corporations; and
- 75% of acquisition value, capped at \$550 million.

Criminal Penalties

For failing to give notice of a notifiable action, taking an action before receiving approval, contravening a direction or condition, proposed to be:

- Imprisonment for 10 years (up from 3); or
- A fine of \$3,330,000 (up from \$166,500); or
- Both.

Infringement Notices

Previously only for residential land, now covers the field.

Unlike criminal and civil penalties, no requirement for court proceedings.

Three tiers of notices, with penalties for the new 'tier 3' set at \$66,600 for individuals and \$333,000 for corporations.

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Q&A





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Thanks for joining us.

To contact our team about the issues discussed today:

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