

## FIRB UPDATE: OBTAINING GOVERNMENT APPROVAL TO BUY AUSTRALIAN LAND

Foreign investors looking to acquire an interest in Australian land face a regime of new screening thresholds and fees, tougher penalties and the establishment of an agricultural land register following recent reforms to the foreign investment review framework.

Failure by a foreign investor to comply with the strict obligations of the Australian Government's foreign investment review framework may result in:

- compulsory divestment of the acquired interest and forfeiture of any resulting capital gain; and/or
- civil penalties of up to \$45,000 for individuals and \$225,000 for corporations or up to 25 per cent of the consideration or market value of the acquired interest; and/or
- criminal penalties of up to \$135,000 or 3 years' imprisonment for individuals or \$675,000 for corporations.<sup>1</sup>

Third parties who knowingly assist another person to breach provisions of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**) are liable for the same penalties.

It is, therefore, critical that lawyers, conveyancers and real estate agents who regularly provide advice and support in relation to such transactions familiarise themselves with the requirements of the new regime, which came into force on 1 December 2015.

### Background

The foreign investment review framework is designed to encourage foreign investment where it promotes and enhances the Australian economy and to prevent or control investments that may be against the national interest.<sup>2</sup>

The framework comprises:

- the Act, the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and their associated regulations;
- Australia's Foreign Investment Policy (**Policy**), which provides an overview of the framework; and
- Guidance Notes, which set out in detail the application of the framework to proposed foreign acquisitions.

The Act gives the Treasurer the power to examine proposed foreign acquisitions of interests in Australian business and real estate and to prohibit those the Treasurer determines to be contrary to the national interest or to impose conditions necessary to remove national interest concerns.<sup>3</sup>

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<sup>1</sup> See *Foreign Acquisitions and Takeovers Act 1975* (Cth) Part 5

<sup>2</sup> In applying the national interest test, the Government will consider factors including national security, competition, other Government policies such as taxation, the impact of the proposal on the economy and community, and the character of the investor: Australian Government Foreign Investment Review Board, *Guidance Note 23* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn23/>>.

<sup>3</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 67 and 74.

In practice, the Treasurer has authorised the Executive Member of the Foreign Investment Review Board (**FIRB**) and other senior Treasury staff to make decisions on foreign investment proposals that are consistent with the Policy.

For the purposes of this article, the issue by the FIRB of a 'no objection' notice or an approval subject to conditions will be referred to as an approval.

Foreign government investors must obtain approval before acquiring any interest in Australian land, regardless of its type or value, unless the purchase is for diplomatic or consular requirements.<sup>4</sup>

A private foreign investor must notify FIRB and obtain approval before taking a 'significant and notifiable action',<sup>5</sup> meaning the acquisition of interests that meet certain value thresholds, depending on the type of land and interest acquired.

The Treasurer (FIRB) must:

- make a decision on an application for foreign investment approval and publish that decision in the Government Gazette within 30 days of notification by the applicant (not including the applicant's response time where additional information is requested); or
- make an order before the end of the decision period extending the period for consideration by up to 90 days.<sup>6</sup>

The applicant may voluntarily extend the decision period in writing prior to the completion of the 30-day period. There is no limit to the number of times the decision period can be extended in this way.<sup>7</sup>

If the Treasurer (FIRB) does not make a decision or extend the decision period before the end of the decision period and the decision period is not voluntarily extended by the applicant, the Treasurer no longer has power to make any orders in relation to the proposed transaction under the Act.<sup>8</sup> The result then is that the proposed acquisition may proceed.

### What is a foreign person?

For the purposes of the Act and Policy, a 'foreign person' is:

- a natural person who is not ordinarily resident<sup>9</sup> in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest<sup>10</sup>;

<sup>4</sup> *Foreign Acquisitions and Takeovers Regulations 2015* (Cth) s 56.

<sup>5</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 43, 47 and 52.

<sup>6</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) ss 68 and 77.

<sup>7</sup> Australian Government Foreign Investment Review Board, *Guidance Note 41* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn41/>>

<sup>8</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 77(2).

<sup>9</sup> A person is ordinarily resident if their continued presence in Australia is not subject to any time limitations imposed by the law and the person has actually been in Australia for 200 or more days in the previous 12 months: *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 5.

<sup>10</sup> A 'controlling interest' is a substantial interest (at least 20 per cent held by a person alone or with associates) or an aggregate substantial interest (at least 40 per cent held by two or more persons and any associates) in a corporation or trust by reference to voting power or percentage of issued securities held or that would be held if any future rights were

- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest (of at least 40 per cent)<sup>11</sup>;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest (of at least 20 per cent)<sup>12</sup>; or
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest (of at least 40 per cent)<sup>13</sup>.

A 'foreign government investor' includes<sup>14</sup>:

- a foreign government<sup>15</sup> or separate government entity<sup>16</sup>;
- a corporation, trustee of a trust or a general partner in a limited partnership in which:
  - a foreign government or separate foreign entity alone or with one or more associates<sup>17</sup> holds a substantial interest (of at least 20 per cent); or
  - foreign governments or separate government entities of more than one foreign country with one or more associates hold an aggregate substantial interest (of at least 40 per cent); or
- a corporation, trustee of a trust or a general partner in a limited partnership in the dot point above where the reference to 'foreign government' includes a foreign government investor as defined.

### Screening thresholds

The schedule of value thresholds<sup>18</sup> triggering the requirement for FIRB notification and review addresses three categories of foreign persons:

- foreign government investors;
- private investors from countries without Free Trade Agreements (FTA) with Australia; and
- private investors from FTA partner countries, currently Chile, Japan, New Zealand, South Korea, Malaysia, Singapore, Thailand, the United States and China.

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exercised: *Foreign Acquisitions and Takeovers Act 1975* (Cth), ss 17-18, 54(4) and 54(5); see s 6 for the definition of 'associate'.

<sup>11</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

<sup>12</sup> In the case of a discretionary trust, each beneficiary of the trust is deemed to have the maximum percentage interest that the trustee has the discretion to distribute to that beneficiary under the terms of the trust: *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 18(3).

<sup>13</sup> See above n 12.

<sup>14</sup> *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 17.

<sup>15</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 6(1)(l).

<sup>18</sup> See Australian Government Foreign Investment Review Board, *Monetary Thresholds* (accessed 2 February 2016) <<http://firb.gov.au/exemption-thresholds/monetary-thresholds/>>.

The thresholds vary between the categories and are calculated according to the amount paid for or the value of the interest, except in the case of agricultural land, where the screening threshold applies to the cumulative value of the applicant's acquisitions.

Private investors from non-FTA countries must seek FIRB approval before acquiring:

- agricultural land valued at \$15 million or more, unless the investor is from Singapore or Thailand, when the threshold rises to \$50 million;
- vacant commercial land or mining and production tenements of any value; and
- developed commercial land valued at \$252 million or more, unless the land is considered 'sensitive' land, in which case the threshold falls to \$55 million. Sensitive land includes mines and critical infrastructure such as airports or ports or land leased to the Commonwealth, a State or Territory or one of their bodies.<sup>19</sup>

The monetary thresholds for private investors from FTA countries are:

- for agricultural land:
  - \$1094 million for investors from Chile, New Zealand and the United States; and
  - \$15 million for investors from China, Japan and Korea;
- for vacant commercial land - \$0;
- for developed commercial land - \$1094 million; and
- for mining and production tenements:
  - \$1094 million for investors from Chile, New Zealand and the United States; and
  - \$0 for all other investors.

Subject to the exemptions described below, all foreign investors must obtain FIRB approval before acquiring an interest in residential land, regardless of value.

### **Agricultural land**

Agricultural land is land all or part of which is used or could reasonably be used<sup>20</sup> for a primary production business<sup>21</sup>. This does not include land where the only primary production business the land could reasonably be used for relates to plants and animals submerged in water, such as fish or oyster farming.<sup>22</sup>

Given the national significance of agricultural production, the Government takes a close interest in foreign acquisition of agricultural interests. Consistent with this focus, it has established a Register of Foreign Ownership maintained by the Australian Taxation Office (**ATO**) and lowered the screening threshold for FIRB review to \$15 million, subject to the FTA

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<sup>19</sup> Australian Government Foreign Investment Review Board, *Guidance Note 14* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn14/>>.

<sup>20</sup> Whether land could reasonably be used for a primary production business depends on factors including the land's zoning, history of use, characteristics such as size, climate and soil quality, and lease or licence conditions: Australian Government Foreign Investment Review Board, *Guidance Note 17* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn17/>>.

<sup>21</sup> As defined in the *Income Tax Assessment Act 1997* (Cth), s 995.1, 'primary production business' includes cultivating or propagating plants; maintaining animals for the purpose of selling them or their bodily produce; conducting operations relating directly to taking or catching fish and certain other marine animals; planting or tending trees in a plantation or forest that are intended to be felled; or felling trees in a plantation or forest.

<sup>22</sup> *Foreign Acquisitions and Takeovers Regulation* (Cth) s 44.

agreements referred to above. The review threshold includes the total value of current and proposed interests in agricultural land held by the applicant and their associates.<sup>23</sup>

Under the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth), foreign persons were required to report all of their agricultural holdings to the ATO by 31 December 2015. Notwithstanding that, the ATO website specifies that interest must be notified by 29 February 2016. Any new acquisitions of agricultural land must be registered within 30 days of acquisition by a foreign person. This obligation applies regardless of whether the value of the land meets the threshold for FIRB notification or its purchase is covered by an exemption certificate.

In assessing foreign acquisition of agricultural interests, in addition to the broader national interest factors, the Government considers the effect of the proposed transaction on the quality and availability of agricultural resources, including water; land access and use; Australia's agricultural productivity and capacity to remain a reliable supplier of agricultural production, both domestically and to our trading partners; biodiversity; and employment and prosperity in regional communities.<sup>24</sup>

Foreign persons, including foreign government investors, can apply for an exemption certificate to cover a program of acquisitions of interests in agricultural land.

Exemption certificate applications will generally be:

- considered where the total value of the proposed acquisitions over a three year period does not exceed \$100 million (or purchased for an activity other than agriculture, \$30 million) and the regions or localities of the proposed acquisitions are clearly defined; and
- issued subject to conditions limiting the maximum value of any single acquisition to \$10 million and periodic reporting of all acquisitions during the approved period.<sup>25</sup>

### Commercial land

Commercial land means land other than land:

- used wholly and exclusively for a primary production business; or
- on which there is at least one dwelling (except commercial residential premises); or
- on which the number of dwellings (except commercial residential premises) that could reasonably be built is less than 10.<sup>26</sup>

Commercial land is vacant if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock.<sup>27</sup>

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<sup>23</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 52(2). There is an exception for interests arising from security interests: Treasurer, *Register of Foreign Ownership of Agricultural Land Rule 2015* (Cth) s 6 (23 November 2015) <<https://www.comlaw.gov.au/Series/F2015L01849>> .

<sup>24</sup> Treasurer, *Australia's Foreign Investment Policy* (December 2015) < <http://firb.gov.au/resources/policy-documents/>>.

<sup>25</sup> Australian Government Foreign Investment Review Board, *Guidance Note 17* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn17>> .

<sup>26</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

<sup>27</sup> *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 5.

FIRB will generally approve an acquisition of vacant commercial land subject to the applicant commencing construction of the proposed development on the land within five years of approval and not selling the land until construction is complete.

Foreign persons can apply for an exemption certificate to cover a program of acquisitions of interests in commercial land. However, exemption certificates do not cover the purchase of sensitive land for which the \$55 million screen threshold applies.<sup>28</sup>

### Residential land

Residential land is land on which there is at least one non-commercial dwelling or the number of non-commercial dwellings that could reasonably be built is less than 10.<sup>29</sup> It does not include land used wholly and exclusively for a primary production business.

The Australian Government's approach to foreign investment in residential land is to promote an overall increase in Australia's housing stock and the consequent boost to construction and economic growth.

Accordingly, applications to purchase:

- new dwellings are usually approved without conditions; and
- vacant land are usually approved subject to construction of a dwelling being completed within four years and evidence of completion submitted within 30 days of receipt by the applicant. In exceptional circumstances where the construction cannot be completed within four years, an application to vary the condition may be made at least two months before the end of the four-year period.

Non-resident foreign persons are generally not permitted to buy established dwellings. However:

- temporary residents<sup>30</sup> are usually permitted to purchase one established dwelling to use as their own residence while they live in Australia, but not to rent out or use as a holiday home.<sup>31</sup> Approval of such a purchase is usually subject to the foreign person selling the property when they leave Australia; and
- foreign companies with a substantial Australian business may be permitted to buy established housing for their staff based in Australia subject to establishing a genuine need. In considering such an application, FIRB will take into account factors such as the type, scale, location and duration of the business, the availability of other accommodation options and the applicant's operational history in Australia.<sup>32</sup>

If a foreign person proposes to buy an established dwelling or dwellings for redevelopment, FIRB approval will usually be given subject to the construction of more dwellings than are demolished, to be completed within four years of the date of approval.

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<sup>28</sup> Australian Government Foreign Investment Review Board, *Guidance Note 14* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn14/>>.

<sup>29</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

<sup>30</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth) s 4.

<sup>31</sup> Australian Government Foreign Investment Review Board, *Guidance Note 2* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn02/>>.

<sup>32</sup> Australian Government Foreign Investment Review Board, *Guidance Note 7* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn07/>>.

An application to purchase an existing dwelling to replace it with a single new dwelling will generally not be approved, regardless of the condition of the existing dwelling.

### Mixed used land

Where land meets more than one of the land type descriptions above, foreign buyers may be subject to multiple notification obligations.

When considering an application to acquire mixed use land, FIRB will consider factors including the current and intended use of the land and the nature and proportions of use.<sup>33</sup> For example, residential land may be considered:

- commercial land where the area or value of the residential portion is less than 10 per cent of the total area or value of land otherwise used for commercial purposes<sup>34</sup>; or
- agricultural land where a single dwelling is a farmer's house taking up a small proportion of land that is otherwise used wholly and exclusively for a primary production business<sup>35</sup>; or
- residential land where a dwelling is located within property that is commercial residential premises but is not part of the business operation and is for private use.<sup>36</sup>

Where an acquisition involves multiple titles with different uses, notification requirements and approvals will be determined on a title by title basis.<sup>37</sup>

### Leases

There is a common perception that leases do not require FIRB approval. This is not always correct.

Section 12(1)(c) of the Act provides that an interest in Australian land includes an interest as lessee or licensee in a lease or licence giving rights to occupy Australian land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed five years.

Foreign investors should also consider carefully when they enter into lease agreements. Under s 15(1) of the Act, where a person enters into an agreement or acquires an option to acquire an interest in Australian urban land, they are taken to have acquired that interest immediately.

This represents a potential pitfall for foreign investors entering into lease agreements for new premises that are yet to be constructed, on land that is vacant or not able to be used immediately for industrial or non-residential purposes. In such circumstances, FIRB must be notified of the proposed acquisition of leasehold interest.

### Exemptions

FIRB approval is not required for acquisition of residential land by<sup>38</sup>:

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<sup>33</sup> Australian Government Foreign Investment Review Board, *Guidance Note 20* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn20/>>.

<sup>34</sup> Ibid.

<sup>35</sup> Above n 33.

<sup>36</sup> Australian Government Foreign Investment Review Board, *Guidance Note 15* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn15/>>.

<sup>37</sup> Above, n 33.

- Australian citizens (whether or not they ordinarily reside in Australia);
- New Zealand citizens;
- holders of Australian permanent visas; or
- foreign persons buying property as joint tenants with an Australian citizen spouse, New Zealand spouse or Australian permanent resident spouse. (To be clear, this exemption does not apply to the purchase of property as tenants in common).

Foreign buyers do not require FIRB approval to acquire an interest:

- in a new dwelling purchased from a developer with a new dwelling exemption certificate;
- in a time share scheme where the foreign person's entitlement (including any associates) to access the land is no more than four weeks per year;
- by will or devolution of law;
- directly from a Commonwealth, State, Territory or local government or entity wholly owned by such a government;
- in designated Integrated Tourism Resorts<sup>39</sup>; or
- if:
  - the foreign person is a corporation who acquires the land in the course of its business of providing custodian services to other persons in relation to Australian land or tenements; and
  - the interest is a legal interest and the equitable interest is not held by the foreign person; and
  - the foreign person exercises voting rights in relation to its interest at, or in accordance with, the direction of another person providing custodian services to a person in relation to the holding of the legal interest or the holder of the equitable interest.

Australian or foreign developers may apply for a new dwelling certificate for a development comprising 50 or more dwellings, which has development approval from the relevant government authority and, if applicable, for which foreign investment approval was given for purchase of the land and any subsequent conditions met.

Foreign persons may purchase interests in dwellings up to a value of \$3 million in a development subject to a new dwelling exemption certificate without having to make a separate application for foreign investment approval. However, the developer must pay a fee for each dwelling in that development purchased by a foreign person.

### Fees

The recent reforms included introduction of application fees to fund the cost of administering foreign investment applications.<sup>40</sup>

<sup>38</sup> See *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) s 38 and Australian Government Foreign Investment Review Board, *Guidance Note 4* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn04/>>.

<sup>39</sup> See Australian Government Foreign Investment Review Board, *Guidance Note 16* (1 November 2015) <<http://firb.gov.au/resources/guidance/gn16/>>.

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Fees currently start at:

- \$5000 for residential properties valued at \$1 million or less and \$10,000 for property valued between \$1 million and \$2 million, then rising \$10,000 for each additional \$1 million in value;
- equivalent fees, capped at \$100,000, for agricultural land;
- \$10,000 for vacant commercial land and \$25,000 for developed commercial land; and
- \$25,000 for mining or production tenements (except where the interest is acquired from an Australian Government body or entity).

Costs for applications for exemption certificates are as follows:

- to sell new dwellings in a development to foreign persons, \$25,000 plus regular reconciliation based on the number and value of dwellings acquired by foreign persons;
- for a program to acquire interests in Australian land, \$25,000 for acquisitions of \$1 billion and less, otherwise \$100,000;
- to acquire interests in mining or production tenements, \$25,000 (or nil if the applicant pays a fee for an application for an exemption certificate to acquire interests in Australian land and the applications are made within 7 days of each other).

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<sup>40</sup> See Australian Government Foreign Investment Review Board, *Fees* (2 February 2016) <<http://firb.gov.au/applications/fees/>> for more details.