

# Property Update

August 2010

## Agents on the hook – implications of FIRB changes on real estate

When considering if the Foreign Investment Review Board (**FIRB**) is relevant to property transactions or acquisitions, it is important that agents in the property industry are aware of their obligations. Under recent proposed changes to FIRB regulations, agents are now obliged to ensure they do not sell residential property to a foreign person without ensuring they obtain FIRB approval.

### Current FIRB policy in real estate

Currently, if a foreign investor intends to purchase Australian residential property, they require FIRB approval regardless of the value of the property. If a foreign person intends to purchase developed commercial real estate, s/he is only required to notify FIRB if the real estate is valued at \$50,000,000 or more, unless the real estate is heritage listed in which case a \$5,000,000 threshold applies.



### About Lavan Legal:

Lavan Legal is the largest independently owned law firm in Western Australia, comprising of over 200 staff which includes 19 partners.

The Property Services Group, a division of Lavan Legal, pride themselves on being the leaders in property and planning law. Advising on all aspects of property acquisition, disposals and developments including syndications, we have one of the few accredited leasing experts available to clients who has significant Australia-wide experience on very large and complicated leasing developments.

At Lavan Legal we believe in building long lasting relationships with our clients. We provide the best legal advice and service and continue to improve our understanding of our clients' needs, staff, history, motivations and directions. We provide clients with regular industry insights, updates on changing technology and business strategies in an effort to take the relationship to a more successful position. We are committed to increased efficiency through continuous innovation and process improvement.

# Property Update

## August 2010

Temporary residents must obtain FIRB approval if they would like to purchase an established dwelling and must use the property as their residential address whilst in Australia. Temporary residents cannot hold investment properties (established dwellings) in Australia.

### The announcement on 24 April 2010

Agents have cause to be concerned following the announcement by the Assistant Treasurer Senator Nick Sherry on 24 April 2010 'If you are... a real estate agent working in the area [foreign investment in Australian real estate], your activities will be proactively monitored with top-of-the-line data-matching and this will be backed up by tough new civil penalties.'

The announcement was intended to highlight the importance for property agents to comply with FIRB policy and the *Foreign Acquisitions and Takeovers Act 1975* (Cth), however the announcement did not provide details as to what agents need to do to satisfy these requirements. The main consequence therefore of the announcement has been to create great uncertainty.

In particular, it is not clear:

- whether agents other than real estate agents, including lawyers, will be subject to the 'tough new civil penalties';
- what the agents need to do to satisfy FIRB requirements and discharge their obligation;
- when the changes come into effect; and

- the extent of potential monetary penalties and other civil penalties referred to in the announcement.

It will be interesting to see whether agents other than real estate agents will be caught by the new civil penalties regime and what the relevant criteria will be for determining whether a party is an 'agent'. The new civil penalties regime will also include a special civil penalty to capture any capital gain made from the illegal sale and purchase of property. The capital gain will be measured in accordance with the relevant taxation legislation.

The announcement appears to create more questions than answers although it does refer to a memorandum of understanding being entered into with each state-level real estate agent regulator and the production of an 'easy-to-read guide for the real estate industry setting out their obligations under the regime'. Almost three months from the announcement however, these documents have not yet been released.

As well as the new data-matching program that will be introduced, it was announced that a community hotline will be available for the community to directly report parties suspected of breaching FIRB policy.

The announcement states that FIRB policy will also change in relation to temporary residents. Temporary residents that are approved will now have to:

- 'compulsorily sell the established

property they have bought when they depart Australia'; and

- 'be required, where undeveloped land has been purchased, to commence construction on that land within 24 months or have the land compulsorily sold'.

The announcement does not stipulate a commencement date for the new measures, however it does state that the data-matching program has already been undertaken through trials in Sydney and Melbourne.

### Lavan comment

Given the incendiary nature of the language used in the announcement, it is disappointing that Assistant Treasurer Senator Nick Sherry has not yet produced the promised 'easy-to-read guide for the real estate industry' almost three months from the announcement. However, we expect that these changes will operate as from the date of the announcement.

Agents in the property industry should watch carefully for developments in this area to ensure that they do not get stung by the regulations, and be on the lookout for the promised 'easy-to-read guide'.

If you have any queries about the new FIRB regulations, please contact Peter Beekink, Partner, on (08) 9288 6751 or [peter.beekink@lavanlegal.com.au](mailto:peter.beekink@lavanlegal.com.au) or Anita Barnes, Solicitor, on (08) 9288 6802 or [anita.barnes@lavanlegal.com.au](mailto:anita.barnes@lavanlegal.com.au).

## Property Update

### August 2010



## Tamara Heng, Associate

### BA, LLB

Tamara is an associate in the property services group at Lavan Legal. She has experience in a wide range of property and general commercial transactions. Tamara acts for major corporations, high net worth individuals and government departments in the acquisition and disposal of assets and has been involved in a number of significant projects for leading property developers.

Her main areas of expertise include acquisition and sale of land and business, subdivision and land development, due

diligence, drafting commercial agreements and property documents, joint ventures and syndicate structuring and providing Contaminated Sites advice.

Tamara also has experience in commercial dispute resolution and has successfully negotiated outcomes in complex contractual and property disputes for key clients.

Contact Tamara Heng, Associate, on (08) 9288 6869 or email her at [tamara.heng@lavanlegal.com.au](mailto:tamara.heng@lavanlegal.com.au).

### Your personal details

Lavan Legal may use personal information we have collected about you to send materials to you about legal and related issues we think will be of interest, as well as news about Lavan Legal and the services we provide.

If you do not want us to use your personal information for that purpose, or would like us to update your contact details, please email [calley.kempson@lavanlegal.com.au](mailto:calley.kempson@lavanlegal.com.au) providing your name, company name, title, email address, postal address and a contact telephone number.