
FIRB – changes to approvals for land acquisitions, exemption certificates and fee regime

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In brief

The Foreign Investment Review Board (FIRB) has recently announced details concerning changes to aspects of Australia's foreign investment screening process. The changes flow from proposals contained in the 2017-18 Federal Budget and include changes to exemptions certificates, streamlining of some foreign investment applications and modifications to the fee regime. Outlined below is a summary of the changes which came into effect from 9 May 2017 and the proposed changes which are expected to take effect from 1 July 2017 subject to the passage of legislation.

In detail

Measures which took effect on and from 9 May 2017

- *New Dwelling Exemption Certificates now subject to 50 per cent foreign ownership cap*

Under the FIRB regime it is possible for property developers to seek a New Dwelling Exemption Certificate (NDEC) to enable the sale of new units in a development to foreign purchasers without those foreign purchasers needing to obtain their own FIRB approval. With an NDEC in place, a developer is likely to achieve pre-sales and lock in the necessary funding for projects more quickly. Developers can apply for NDECs where the development consists of at least 50 dwellings and development approval has been obtained.

FIRB will now impose a new condition on all NDECs limiting the total amount of dwellings a developer can sell to foreign persons to 50 per cent. This new condition applies for all NDEC requests received by FIRB from 7:30pm (AEST) on 9 May 2017.

- *Annual vacancy charge on residential property and CGT exemption*

Foreigner purchasers of residential property will now be subject to an annual charge for any vacant properties they hold in Australia. The charge will only apply to foreigners who have lodged a foreign investment application for residential property from 7.30pm (AEST) on 9 May 2017. The charge will

apply if the property is not occupied or genuinely available on the rental market for at least six months each year. The annual vacancy charge will equal the relevant FIRB application fee that applied when the foreign purchaser applied for FIRB approval for the acquisition.

The annual vacancy charge will be assessed yearly on the date of settlement and foreign investors will be subject to ongoing reporting obligations relating to the use of their property over the course of the previous 12-month period. Foreign and temporary tax residents will also be unable to claim the capital gain tax main residence exemption from 7.30pm (AEST) on 9 May 2017, except for any currently owned properties which will be grandfathered until 30 June 2019.

Measures which will take effect from 1 July 2017

- *Changes to the commercial fee structure and increase in residential investment fees*

As of 1 July 2017, FIRB will introduce a new three-tiered fee framework relating to commercial land, actions relating to entities and businesses and agricultural land. The new framework will, for some acquisitions, result in higher fees and, for other acquisitions, result in lower fees than what is otherwise payable under the current regime. A summary of the proposed new fee regime is as follows:

| Consideration for acquisition: | \$10 million or less | Above \$10 million | Above \$1 billion |
|---|-----------------------------|---------------------------|---------------------------|
| Commercial land (vacant and developed) or actions relating to entities and businesses | \$2,000 | \$25,300 | \$101,500 |
| Consideration for acquisition: | \$2 million or less | Above \$2 million | Above \$10 million |
| Agricultural land | \$2,000 | \$25,300 | \$101,500 |

Exemption certificates will be subject to a flat fee of \$35,000 regardless of the value of the acquisition whilst fees for internal reorganisations will remain at \$10,100. Application fees for foreign purchasers of residential properties valued at less than \$10 million will also be increased by 10 per cent from 1 July 2017.

- *New business exemption certificate*

Foreign investors (including foreign government investors) that wish to acquire securities in an Australian entity will be able to seek an exemption certificate allowing pre-approval for multiple investments in one application rather than applying separately for each investment. We expect this to assist large acquisitive groups and investment companies that are planning a program of acquisitions in different Australian companies and businesses.

- *New residential exemption certificates*

From 1 July 2017, FIRB will introduce two new residential exemption certificates. The first will enable developers to re-sell off-the-plan dwellings that failed to settle without needing to re-apply for FIRB approval. The second will allow a foreigner to obtain one FIRB approval to cover the possible purchase of one new dwelling out of multiple new dwellings that the foreigner is interested in acquiring.

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- *Treatment of residential land used for commercial purposes*

Currently, the FIRB definition of ‘commercial residential premises’ excludes certain properties which, whilst providing a form of domestic private accommodation, are inherently commercial in nature. For example, student accommodation and aged care facilities which are typically managed and operated on a professional basis for commercial gain. The changes will treat such properties as commercial residential premises which means foreign purchasers will benefit from the higher monetary thresholds.

- *‘Low Threshold’ non-vacant commercial land definition*

Presently, the FIRB rules impose a lower screening threshold of \$55 million for acquisitions of ‘sensitive land’. However, the concept of sensitive land covers most land in many major cities as it is partly defined with reference to land below ‘prescribed airspace’ which, for example, covers most of Sydney. It is proposed that amendments will be made to reduce the scope of what is treated as sensitive land meaning foreign investors will potentially have access to a higher monetary threshold before needing to seek FIRB approval.

- *Other changes*

Further minor changes will be introduced so that developed solar and wind farms are treated as commercial non-vacant land rather than vacant land or agricultural land and reducing or removing FIRB notification requirements for companies that have significant foreign custodian holdings, that is, only legal foreign holders rather than equitable interest holders.

The takeaway

Since the wholesale changes made in December 2015, the FIRB regime is continuing to evolve and change so it is critical that foreign investors obtain timely advice before planning or structuring an acquisition in Australia. Foreign investors need to carefully analyse the rules so that the necessary FIRB approvals are sought, application fees are appropriately budgeted for and timing is considered in the context of any transaction or group restructure.

Let’s talk

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

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