

Foreign Investments in Australia

This article is a discussion of foreign investments in Australia, in particular real estate. In many circumstances, approval has to be obtained from the Australian Government before a foreign person can acquire real estate in Australia. In December 2008, significant changes were made to the policies.

Foreign Investment Review Board and Government Policy on Foreign Investments – General Overview

The Foreign Investment Review Board (“FIRB”) is a body which reviews and examines foreign persons’ proposals to undertake direct investment in Australia. The FIRB makes recommendations to the Australian Government on whether proposals made by foreign interests are suitable for approval under the Australian Government’s foreign investment policy.

The Australian Government’s approach to foreign investment is “to encourage foreign investment consistent with community interests and concerns while balancing these concerns against the economic benefits to Australia that arise from such investment¹”. The Australian Government is empowered under the *Foreign Acquisitions and Takeovers Act 1975* (“the Act”) to block proposals that are required to be notified and which are determined to be contrary to national interests. The Act and the *Foreign Acquisitions and Takeovers Regulations 1989* (“the Regulations”) provide monetary thresholds for the notification of individual investment proposals.

2. Foreign Acquisition of Australian Real Estate

Under the Act, Foreign Persons intending to purchase real estate in Australia must obtain **prior approval** from the Australian Government through the FIRB unless specifically exempted by the Regulations.

Section 5 of the Act defines a “Foreign Person” as:

- (a) a natural person not ordinarily resident in Australia;
- (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest (ie a holding of 15 percent or more);
- (c) a corporation in which 2 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 (ie a total holding of 40 percent or more);
- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 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.

3. Could I enter into a Contract to buy real estate before obtaining foreign investment approval?

If you are a Foreign Person (and you are not specifically exempted by the Regulations), you are to obtain prior foreign investment approval **before** entering into a Contract for the purchase of real estate in Australia.

If prior approval is not obtained, then the Contract must be made **conditional** upon foreign investment approval.

¹ Australian Government, The Treasury, *Foreign Investment Policy Urban Land (Real Estate)*, January 2005, p.1 at para. 1

The FIRB generally makes a decision within 30 days of receiving a foreign investment approval application, with another 10 days in which to advise the parties of the decision. As the FIRB cannot give an approval in-principle, it is necessary to supply the address of the property intended to be purchased when you apply for foreign investment approval.

4. Exempt Acquisitions of Residential Real Estate in Australia

The Regulations provide that certain acquisitions of residential real estate are exempt from the foreign investment approval requirements. These include acquisitions by:

- (i) a Foreign Person purchasing residential real estate as joint tenants with their Australian citizen spouse;
- (ii) an Australian citizen resident abroad; or
- (iii) a foreign national who holds a permanent resident visa; or holds, or is eligible for a “special category visa” – for instance, New Zealand citizens are exempt but their foreign spouses do not qualify for this exemption and would require approval the same way as other foreign persons.

Residential real estate is defined under Section 5 of the Act to mean all Australian urban land other than commercial properties such as offices, shops, warehouses, factories and restaurants.

A significant change in policy in December 2008 has been that acquisitions by foreign nationals temporarily resident in Australia on a relevant valid Australian visa (ie non-permanent visa which permits them to stay in Australia for a continuous period of more than 12 months) purchasing residential real estate, including second hand properties, do **not** require notification.

5. Exempt Acquisitions of Commercial Real Estate in Australia

Commercial real estate can take the form of developed commercial property and vacant land for commercial development.

Under the Regulations, acquisitions of commercial real estate by a Foreign Person are **exempt** from foreign investment approval where:

- (i) the acquisition is by an Australian citizen resident abroad;
- (ii) the acquisition is by an Australian incorporated company or an Australian based trust owned by Australian citizens resident abroad; or
- (iii) the acquisition is of a developed commercial property (not heritage listed) valued at less than \$50 million.

Proposals by a Foreign Person to acquire the following will **require** notification to and approval from FIRB:

- (i) vacant land (regardless of value);
- (ii) an accommodation facility (regardless of value);
- (iii) the property is being acquired by a foreign government or its agent (regardless of value);
- (iv) developed commercial property valued at more than \$5 million and is subject to heritage listing (unless the acquirer is a US investor); or
- (v) developed commercial property valued at more than \$50 million (or \$953 million or more for acquisitions by US investors).

© Comasters December 2009.

Comasters is able to advise clients regarding FIRB matters (notification and obtaining approval) and can act for foreign persons wishing to invest in Australia.

Important: This is not advice. Clients should not act solely on the basis of the material contained in this paper. Our formal advice should be sought before acting on any aspect of the above information.

Comasters Law Firm and Notary Public

Suite 101, Level 1, Capitol Terrace
743-755 George Street
Sydney NSW 2000, Australia
Phone: (612) 9288 0300 Fax: (612) 9288 0399
Email: comasters@comasters.com.au
Website: www.comasters.com.au