



FOREIGN INVESTMENT INTO AUSTRALIA: IMPLICATIONS UNDER THE NEW FIRB LEGISLATION FOR INVESTMENT IN DEVELOPED COMMERCIAL LAND

Australia's new foreign investment regime, which came into effect on 1 December 2015¹ tightens up the process for obtaining government approval to invest in some areas, for example residential, agricultural and other sensitive property, and eases it in other areas. This note looks at one specific area where restrictions have eased, namely the purchase of developed commercial land. Here investors can now take advantage of relatively generous exemptions from rules that would otherwise apply.

Duties of Investors

Foreign investors require approval from the Foreign Investment Review Board (FIRB) before they can make certain notifiable investments. Since 1 December 2015 fees are payable upon making an application for approval. The fees vary depending on the type of investment. For example, an acquisition of vacant commercial property carries fees of AUS\$10,000 while the fee for commercial property that is not vacant is AUS\$25,000. Further fees are payable where the investment relates to the acquisition of a business or shares.

¹ Amongst others, the Foreign Acquisition and Takeovers Act 1975 (Act), Foreign Acquisition and Takeovers Imposition Fees Act 2015, Foreign Acquisition and Takeovers Regulations 2015 (Regulations) and Foreign Acquisition and Takeovers Imposition Fees Regulation 2015.



Powers of FIRB

If an investment is notifiable and significant, FIRB may prohibit it if it considers the investment would be contrary to the national interest, for example on grounds of national security, the investor's character, impacts on competition, the economy and the community² Decisions are usually made within 30 days but the period can be extended up to a further 90 days if required.

Investments without the required notice and in contravention of the Act carry civil penalties. Furthermore, FIRB can order that the investor dispose of its investment.³

What investments are notifiable?

Notifiable investments include acquisitions of interests in Australian businesses and land. In relation to land, different notification obligations apply depending on whether land is, at the time of the application, agricultural, commercial or residential.

Generally speaking, all acquisitions of residential land, vacant commercial land, mining production tenements and land acquired by a foreign government investor are notifiable regardless of value.⁴

The purchase of agricultural land is notifiable if the foreign investor's interest in all such land in Australia together with the purchase in question is more than AUS\$15 million.⁵

The threshold for commercial land depends on whether the land is

vacant or not. If the land is vacant, the purchase is notifiable regardless of the value. If the land is not vacant, in that it is developed, it is only notifiable if the purchase price exceeds certain threshold amounts. The main thresholds are as follows:

- There is a general threshold for land valued at less than AUS\$252 million.
- Higher limits of AUS\$1.094 billion apply for agreement country investors. Namely investors from the US, New Zealand, Chile, Japan and South Korea.
- A lower threshold of AUS\$50 million is applied for primary production land, such as farming land, acquired by Singaporean or Thai investors.⁶
- A AUS\$55 million threshold applies for acquisitions by foreign investors (other than investors from the US, New Zealand, Chile, Japan and South Korea) of land on which is located public infrastructure, mining operations, servers critical to banks or a stock exchange and various sensitive and security related activities. Public infrastructure caught by this threshold includes a common scenario of land on which there is an electricity substation servicing other properties.⁷

What is vacant commercial land?

Commercial land covers all land in Australia or the seabed of Australia's offshore area other than land:



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- Used for a primary production business - a business involving plant or animal cultivation, fishing or pearling, tree farming or felling.
- On which there is at least one dwelling, other than a hotel, hostel, caravan park and such.
- On which the number of dwellings that could reasonably be built is less than 10.⁸

2 Matters affecting the question of whether an investment is in the national interest are set out in Australia's Foreign Investment Policy dated December 2015.

3 Section 69 of the Act.

4 See Section 52(1) of the Regulations for further examples and detail.

5 Agricultural land is defined as being land that is or could be used for a primary production business involving plant or animal cultivation, fishing or pearling, tree farming or felling.

6 If the land is used wholly and exclusively for a primary production business (plant or animal cultivation, fishing or pearling, tree farming or felling): Section 52(5) of the Foreign Acquisition and Takeovers Regulations 2015 (Regulation)

7 Further examples include land that will be leased to the Commonwealth, a State or a Territory or fitted out for military, bulk data storage and other sensitive purposes or on which is stored telecommunication or network units: Section 52(5),(6) and (7) of the Regulations.

8 Section 19 of the Regulations.



Commercial land is vacant if there is no substantive permanent building on it that can lawfully be occupied by persons, goods or livestock.⁹

In summary the above threshold amounts apply to commercial land on which there is a substantive permanent building.

At what point does the land need to be vacant?

The relevant point in time at which commercial land must be vacant for the purposes of the thresholds is prior to the date of acquisition. If commercial land is vacant and is then developed in anticipation of the sale, it is no longer vacant. It will be developed commercial land and the above thresholds will apply.

However, if before acquiring the property a foreign investor develops land, perhaps under licence from the owner, with the sole or dominant purpose of ensuring that the property is no longer vacant and thereby taking advantage of the generous thresholds, the investor could fall foul of the anti-avoidance provisions of the Act.¹⁰ If the investor has already purchased the property, FIRB could order the disposal of the interest and may impose civil penalties.

Conclusion

The new FIRB legislation excludes from its scope acquisitions by foreign investors of developed land below generous monetary thresholds. In so doing foreign investors are spared the red tape and fees that would otherwise apply. However, to achieve this result investors are required to navigate a complex new Act and Regulation.

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⁹ Section 5 of the Regulations.

¹⁰ Section 78 of the Act.

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