FOREIGN INVESTMENT IN AUSTRALIAN RESIDENTIAL AND AGRICULTURAL REAL ESTATE – NEW FEE REGIME FOR DEVELOPERS AND INVESTORS

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Under Australia's current regime for foreign ownership of Australian real estate, certain foreign investors must obtain permission from the Foreign Investment Review Board (FIRB) before acquiring certain forms of real estate in Australia. Developers of large scale residential developments may elect to obtain approval in advance on behalf of foreign investors, by obtaining a new dwelling exemption certificate from FIRB (Exemption Certificate).

The Australian Government has recently amended its foreign investment framework in line with its public campaign to strengthen compliance and enforcement aspects of the current regime. Important key changes include the imposition of an application fee for all foreign investment approval applications and a lowering of the threshold for Exemption Certificates.

The new regime commenced on 1 December 2015 and is now in effect. This update focuses on the changes to foreign investment in residential and agricultural land.

FEE REGIME FOR FOREIGN INVESTORS

An application fee must be paid by a foreign investor when applying for FIRB approval and is based on a sliding scale, reflective of the value of the foreign investment. In respect of residential and agricultural land, the fees are currently prescribed at:

Property value	Fee
Under AUD1 million	AUD5,000
Over AUD1 million and under AUD2 million	AUD10,000
Over AUD2 million	AUD20,000, plus AUD10,000 for every additional AUD1 million in purchase price

Different fees apply for other investments such as businesses or commercial land.

EXEMPTION CERTIFICATE FEE REGIME

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Where developers elect to obtain an Exemption Certificate, an upfront AUD25,000 application fee payable by the developer and a six monthly reporting regime now apply.

The reporting requirement places an additional onus on developers to collect the application fee payable by a foreign investor on behalf of the government. The developer must pay to FIRB, every six months, an application fee for each residence sold during that six month period. The application fee is the same sliding scale fee as set out above. This increased government intervention, in effect, shifts the onus on developers to ensure foreign investors obtain the necessary FIRB approvals.

DEVELOPMENTS OF 50 OR MORE RESIDENCES

The threshold for Exemption Certificates has been decreased. Developments of 50 or more residences are now eligible for an Exemption Certificate to be obtained for the development, down from the previous threshold of 100 or more residences.

For developers, this change holds both the "good" and the "bad". Smaller residential developments now have the benefit of Exemption Certificates being obtainable for the development. The cost for developers is that, in exchange, they must report to FIRB on all foreign investments in the development and collect and account for the relevant application fees.

THRESHOLD FOR EXEMPTION CERTIFICATE APPLICATION

Previously, there was no limit on the amount of new residences a foreign investor could buy in a single development. Under the new regime, if the cumulative value of a foreign investor's interest exceeds AUD3 million, they must apply to FIRB directly for individual approval, even if an Exemption Certificate has been obtained for the development.

AGRICULTURAL FOREIGN INVESTMENT REGIME

Since 1 March 2015, foreign persons investing in Australian agricultural land have been required to seek FIRB approval where the cumulative value of their agricultural landholding (including any proposed purchase) exceeds AUD15 million. As of 1 December 2015, the above application fees also apply for foreign investment in agricultural land. These application fees are capped at AUD100,000 per application (for agricultural land only).

The Australian Taxation Office (ATO) now maintains a register of all foreign persons holding an interest in agricultural land, irrespective of whether FIRB approval is required for the investment. Any foreign person currently holding agricultural land must have registered with the ATO prior to 31 December 2015. From 1 December 2015, the ATO must also be advised of any new acquisitions within 30 days.

Foreign persons taking a direct interest with a value of AUD55 million or more in an "agribusiness" will also need to apply to FIRB for approval.

FTA PARTNER COUNTRIES WITH HIGHER THRESHOLDS

Exemptions (or higher investment thresholds) exist for foreign investors resident in certain jurisdictions where that jurisdiction is party to a free trade agreement with Australia. The list of agreement countries was expanded with the recent commencement of the China Australia Free Trade Agreement (ChAFTA) on 20 December 2015.

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PENALTY REGIME

The penalties for a person found to be in breach of the new requirements are severe. Both criminal and civil penalties apply, including significant fines and the possibility of a prison term of up to three years. Importantly, it is an offence for a developer to fail to comply with the six monthly reporting requirement for Exemption Certificates. For companies, the maximum criminal penalty is AUD675,000 and the maximum civil penalty is AUD225,000.

Other key breaches attracting penalties are:

- foreign persons acquiring new or existing property without FIRB approval
- non-residents acquiring established property
- developers failing to market apartments in Australia in breach of their Exemption Certificate conditions
- third parties knowingly assisting a person to breach the rules (eg agents, conveyancers or lawyers).

COMPLIANCE CRACKDOWN

As a result of the Australian Government's public campaign to enforce compliance with its foreign investment approval regime, at least five divestment orders have been issued to foreign persons illegally holding Australian residential real estate.

HOW DO THE CHANGES AFFECT ME?

Any new application for FIRB approval is subject to the new fee regime.

We recommend that developers of residential real estate intending to apply for an Exemption Certificate consider their upfront fee liability in development feasibilities and also when drafting master sale documents. In addition, ongoing fee collection and reporting obligation processes may be implemented.

Transitional arrangements also apply under the new regime. If you would like more information on the transitional arrangements or on how the new FIRB regime may affect you, please contact us.

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