

This article discusses foreign investments in Australia, in particular real estate. In many circumstances, approval needs to be obtained from the Australian Government before a foreign person can acquire real estate in Australia.



A. 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 investment”. 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.

B. 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 natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- 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;

- 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
- 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.

C. 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 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. 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.

D. 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:

- Foreign Person purchasing residential real estate as joint tenants with their Australian citizen spouse;
- an Australian citizen resident abroad; or
- 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 would.



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.

E. 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:

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

F. MONETARY THRESHOLDS

The following acquisitions must be notified to the FIRB, irrespective of the value or the foreign nationality of the investor:

- all vacant non-residential land;
- all residential real estate (some exemptions apply);
- all shares or units in Australian urban land corporations or trust estates (some exemptions apply); iv) all investments of 5 per cent or more in the media sector; and v) all direct investments by foreign government investors, and proposals by them to establish new businesses in Australia or acquire interests in land (if an Authorised Deposit-taking Institution, see footnote 2 of Australia’s Foreign Investment Policy).
- all direct investments by foreign government investors, and proposals by them to establish new businesses in Australia or acquire interests in land (if an Authorised Deposit-taking Institution, see footnote 2 of Australia’s Foreign Investment Policy).

All other acquisitions (including shares or assets of an Australian business) should be notified if the target is valued at or above the applicable monetary threshold set by the Australia’s Foreign Investment Policy or the *Foreign Acquisitions and Takeovers Act 1975*.

All investors other than New Zealand investors and United States investors (2013)	
\$5 million	developed non-residential commercial real
\$54 million*	developed non-residential commercial real
\$248 million*	an interest in an Australian business; or an interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target company are valued

*The threshold is indexed annually on 1 January.

New Zealand investors and United States investors (2013)	
\$248 million*	involving prescribed sensitive sectors: an interest in an Australian business; or an interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target
\$1.078 million*	developed non-residential commercial real estate
\$1,078 million*	not involving prescribed sensitive sectors: an interest in an Australian business; or an interest in an offshore company that holds Australian assets or conducts a business in Australia, and the Australian assets or businesses of the target

*The *Foreign Acquisitions and Takeovers Act 1975* does not apply to investments by New Zealand investors and United States investors in financial sector companies. Financial sector company is defined in Section 3 of the *Financial Sector (Shareholdings) Act 1998*.

*The threshold is indexed annually on 1 January.

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

© Comasters May 2013 **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.

CONTACT US

Jeffrey T Lee Principal Lawyer
Pauline A Beausoleil Senior Associate Lawyer
Valerie Cortes Senior Paralegal
Lauren Choy Paralegal
Carissa Widjaja Paralegal

Comasters Law Firm and Notary Public
Suite 101, Level 1, Capitol Terrace
743-755 George Street
Sydney NSW 2000, Australia

T +612 9288 0300
F +612 9288 0399
E comasters@comasters.com.au
www.comasters.com.au