AUSTRALIA'S FOREIGN INVESTMENT REGIME RELOADED AND RECENT DEVELOPMENTS

MARCH 2016

1. INTRODUCTION

On 22 February 2016, the Australian Federal Government announced the introduction of various tax compliance obligations that are to be included as conditions of future Foreign Investment Review Board (**FIRB**) approvals.

The announcement follows the rapid succession of changes, public consultation and amendments to the legislative and policy regime regulating foreign investment in Australia that were introduced in 2015. Collectively the changes represent the most significant changes to Australia's foreign investment framework in over 40 years, and should be of particular interest to:

- foreign investors currently contemplating an investment in Australia (given the significant application fees which apply from 1 December 2015);
- foreign investors with an existing interest in Australian agricultural land or agribusiness (who are required to register their interest on a new statutory register, or refer acquisitions above a certain value threshold to the FIRB); and
- developers or investors in Australian real estate.

In the following article, we provide a high-level overview of:

- amendments to the Foreign Acquisitions & Takeovers Act (the Act), implemented through a package of legislative reforms and which came into effect from 1 December 2015;
- other recent amendments that were implemented through changes to the Act and Australia's Foreign Investment Policy (the Policy) over the past 12 months;
- the consequences of some of the more significant changes which have occurred; and
- the recent Federal Government announcements concerning tax compliance obligations as part of FIRB approvals.

2. OVERVIEW OF KEY AMENDMENTS TO THE ACT FROM 1 DECEMBER 2015

The key amendments which took effect from 1 December 2015 are as follows:

#	Summary of Amendment
2.1	The requirement to pay application fees
2.2	Imposition of civil penalties and the issue of infringement notices for non-compliance
2.3	Introduction of a requirement to obtain approval to acquire an interest in an "agribusiness" valued above $55 million
2.4	Introduction of an Agricultural Land Register
2.5	An increase in the percentage stake a single foreign investor and its associates may acquire before being required to apply to FIRB for approval from 15% to 20%
2.6	An increase in the threshold for referral to FIRB of an acquisition of an interest in non-sensitive developed commercial real estate
2.7	Introduction of lower thresholds applicable to the acquisition of sensitive developed commercial land
2.8	Changes to the issue of exemption' certificates in respect of real estate acquisitions

2.1 - Introduction of application fees

Significant application fees now apply from 1 December 2015 to all foreign investment proposals, with the fee to be paid based on the type and value of the proposed investment. The fee applies per application, the statutory time period only commences once the fee has been paid and if an application falls into a number of categories, the highest fee will apply.

The following fees apply:

Type of investment	Fee
Applications to acquire an interest in residential property if the price is $1 million or less	$5,000
Applications to acquire an interest in residential property if the price is more than $1 million and less than $2 million	$10,000
Applications to acquire an interest in residential property if the price is between $2 million and less than $3 million ($10,000 will then be levied per each $1 million increase in value)*	$20,000
Vacant commercial land	$10,000
Commercial real estate	$25,000
Rural land (valued at $1 million or less)	$5,000
Rural land (valued at greater than $1 million)	$10,000**
New business proposals or internal reorganisations	$10,000
Business acquisitions where the value of the investment is $1 billion or less	$25,000
Business acquisitions where the value of the investment is greater than $1 billion	$100,000

**This is not capped.*
***Then $10,000 per $1 million rural land value (capped at $100,000)*

2.2 - Penalty regime and Infringement Notices

Previously, while criminal penalties could be imposed under the Act, the high burden of proof (beyond reasonable doubt, rather than balance of probabilities) made prosecutions difficult. As a consequence of the changes, the criminal penalties for existing offences have increased, and Australian courts can make civil penalty orders for contraventions of the Act.

The penalties vary depending upon the nature of the breach of the Act as well as the identity of the party who is in breach. The maximum criminal penalty for an individual is $135,000 or three years imprisonment or both.

In respect of an applicant which is a company, the maximum criminal penalty is $675,000.

In relation to civil penalties (involving land which is not residential), the maximum civil penalty for an individual is $45,000 and for a company $225,000. Generally, the civil penalty for a company is five times that applicable to an individual.

In relation to residential land, although the criminal penalties for breach are the same as above, in relation to civil penalties, these may be determined by reference to the market value or consideration for the land or interest in the land acquired or the capital gain arising on disposal of the land or the relevant interest.

In addition to the applicants:

- third parties who knowingly assist a foreign investor to breach the Act will be subject to the same fine as the foreign investor. This can, for example, include developers who have knowledge of a foreign investor breaching the Act. Developers should ensure that where they enter into a joint venture with a party who is a foreign person (or where any special purpose vehicle that is established is a foreign person), the acquisition is made subject to FIRB approval and that the joint venture party or the special purpose vehicle obtains the required approval;
- those in breach of certain parts of the Act or the Policy relating to residential land will be required to forfeit any capital gain obtained through being forced to sell a property;
- the Act incorporates an infringement notice regime for minor breaches (primarily acquisitions undertaken without approval where approval would have been granted in the normal course). In particular, if a company makes such an acquisition and voluntarily

reports the breach, the proposed infringement notice fine is $10,800, plus the relevant application fee. If the breach is identified through compliance monitoring (as opposed to having been voluntarily reported), the proposed fine is $54,000, plus the relevant application fee;

- if a person is an officer of a corporation and the corporation is convicted of an offence against the Act and the person authorised or permitted the commission of the offence then the officer (him or herself) will also be liable for the same penalty as applicable to the applicant.

  In addition, if an officer fails to prevent a contravention by a corporation of any civil penalty provisions of the Act and:

  - the officer knew that or was reckless or negligent as to whether the contravention would occur; and

  - was in a position to influence the conduct of the corporation in relation to the contravention; and

  - failed to take all reasonable steps to prevent the contravention,

the officer would also be liable for the relevant civil penalty.

The above penalties are in addition to divestment orders and the ability of the Treasurer to require the registration of a charge over the land in respect of which the contravention has occurred. The charge is used as security for the recovery of any unpaid penalties. Such charge will run with the land and if the penalty is not paid within three months after the Court finds that the person has contravened the Act , the interest in the land will vest in the Commonwealth. The charge referred to has priority over all other charges. This has serious consequences to any financier to the owner of the land. As a result it is likely that, financiers will (consistent with market practice) impose strict requirements to ensure that any required FIRB approval is obtained and that no offence was committed by either the borrower or, if the borrower is a company, any of its officers which may trigger the above provisions.

Should any land vest in the Commonwealth, the Commonwealth must dispose of the land as soon as practicable after expiry of the period in which the owner of the land (which has breached the Act) may lodge an appeal against the finding of the breach (with such appeal not having been lodged) or if an appeal has been lodged, the appeal lapses or is finally determined. The Treasurer must account to the owner of the land for the proceeds of the disposal after having deducted the amounts owing to the Commonwealth under the Act. If a mortgage exists on the property, the mortgagee is to be paid first.

2.3 - Requirement to obtain approval for the acquisition of an "Agribusiness"

Another key amendment is the introduction of a new $55 million threshold for investments in "Agribusinesses" (although in the case of non-government investors from the United States, New Zealand and Chile, the limit is $1,094 million). The term "Agribusiness" is defined by reference to the Australian and New Zealand Standard Industrial Classification codes, and will include both primary production businesses and first stage 'downstream' manufacturing businesses (i.e. activities with links to primary production) including the processing of meat, poultry, seafood, dairy, fruit and vegetables, and the manufacture of products derived from sugar, grains and oils & fats. Downstream activities with links to primary production will be monitored.

In the case of the acquisition of agricultural land (either directly or through an Australian agricultural land corporation or Australian agricultural land trust), the general threshold is $15 million although in the case of the United States, New Zealand and Chile, the threshold is $1,094 million and in the case of Singapore and Thailand, the threshold is $50 million (but only where the land is wholly and exclusively used for primary production business).

The $15 million threshold is an aggregate threshold which includes the total consideration for the acquisition and the total value of all interests in agricultural land already held by the investor.

A foreign government investor seeking to invest in either an agribusiness or agricultural land will

require FIRB approval (regardless of the value) prior to making the investment.

2.4 - Introduction of an Agricultural Land Register

The Policy now requires that all foreign persons that hold an interest in agricultural land, regardless of the value, register the interest with the Australian Tax Office (ATO). Agricultural land is defined as: "*all land in Australia that is used, or could reasonably be used for a primary production business*". The definition is therefore wider than that of 'rural land' as it includes land that could be used for primary production, not just land that is currently being used for primary production. The obligation to register with the ATO applies to foreign persons that currently hold interests in agricultural land (with existing holdings to be registered before 29 February 2016) and future acquisitions (with the registration to occur within 30 days of the acquisition).

The register will be expanded to include residential real estate from 1 July 2016, and the Commonwealth is working with the States and Territories to implement this reform.

2.5 - Increase in control threshold from 15% to 20%

The changes increase the 'control' threshold for Australian businesses from 15% to 20% (in line with the general takeover threshold under the Corporations Act). This control threshold is important as it determines the level of control a single foreign person (including a foreign person that is a corporation) may have in an Australian corporation for that corporation to be considered controlled by the foreign person.

There is still an aggregate substantial interest test which provides that where foreign persons hold an aggregate interest of at least 40% in an entity, or hold, in the aggregate, beneficial interests in at least 40% of the income or property of a trust notification to FIRB will be required.

2.6 - Increase in real estate investment thresholds

Subject to some exceptions, the monetary thresholds for land proposals are as follows:

Investor	Action	Threshold - more than:
All investors	Residential land	$0
Privately owned investors from FTA partner countries that have the higher threshold (see section 3.1 & 3.2)	Agricultural land	For Chile, New Zealand and United States $1,094 million*
		For China, Japan, Korea, $15 million (cumulative)
	Vacant commercial land	$0
	Developed commercial land (whether this is sensitive or non-sensitive)	$1,094 million*
	Mining and production tenements	For Chile, New Zealand and United States, $1,094 million*
		Others, $0
Privately owned investors from non-FTA countries and FTA countries that do not have the higher threshold	Agricultural land	For Singapore and Thailand, where land is used wholly and exclusively for a primary production business $50 million (otherwise the land is not agricultural land)
		Others, $15 million (cumulative)
	Vacant commercial land	$0
	Developed commercial land	$252 million
		Low threshold land (sensitive land), $55 million
	Mining and production tenements	$0
Foreign government investors	Any interest in land	$0

** Note that this does not apply where the acquisition is implemented through a special purpose vehicle into which the investor has invested.*

Separately, the previous requirement for FIRB approval to the acquisition of an interest in a heritage listed property valued above $5 million, no longer applies.

2.7- Lower thresholds for acquisitions of sensitive developed commercial land

As shown in the table above, the acquisition of certain "sensitive" developed commercial land by foreign persons is subject to a lower $55 million threshold. The lower threshold also applies if any of a number of factors apply at the time the interest in commercial land is acquired, including (but not limited to):

- the land will be leased to the Commonwealth, a State, a Territory or a Commonwealth, State or Territory body;
- land that will be fitted out specifically for a business of certain kinds, including the storage of bulk data, the supply of training or human resources to the Australian Defence Force or other defence forces, the manufacture or supply of military goods, equipment or technology to the Australian Defence Force or other defence forces, etc.
- land that will be fitted out to store, handle or dispose of biological agents on the List of Security-sensitive Biological Agents (within the meaning of the National Health Security Act 2007);
- the land will be under prescribed airspace (within the meaning of section 81 of the Airports Act 1996);
- a mine, oil, gas well, quarry or similar operation will operate on the land; and
- public infrastructure will be located on the land.

Note that the lower threshold for sensitive developed commercial land does not apply where the foreign persons are from FTA partner countries as noted in the table above.

2.8 - Changes relating to the issue of exemption certificates

Foreign persons (including foreign government investors) are able to apply for an exemption certificate to cover a program of land acquisitions. Exemption certificates can be obtained in respect of the proposed acquisition of different kinds of land, including residential, commercial, agricultural, mining tenements and can be sought by Foreign Government investors.

Various conditions may be imposed on the grant of exemption certificates, however a periodic reporting requirement will apply to all such certificates. The nature of the reporting will depend on the type of property/project the certificate relates to but in all cases the applicant will need to confirm that all persons covered by the certificate are complying with the ongoing obligations imposed by FIRB when granting the certificate.

Exemption certificates for commercial land will not be granted for interests in sensitive commercial land that is subject to the lower $55 million threshold.

Developers of a residential development seeking a new dwelling exemption certificate will have to pay a fee based on the number of units sold to foreign investors, with an upfront fee of $25,000 to be paid by the developer on application for the certificate, and a subsequent fee (based on the number of properties sold by the developer within the period) payable every six months thereafter.

The developer will be required to report every six months and make payments in relation to properties sold during that period. In relation to developed lots with a purchase price of $3 million or more, the exemption certificate will not be sufficient and the actual purchaser of that lot will need to seek their own FIRB approval to the acquisition and pay the appropriate application fee.

Developers (either Australian or foreign) can apply for a new dwelling exemption certificate for a specified development, provided that the development:

- will consist of 50 or more dwellings;
- has development approval from the relevant government authority; and
- if applicable, foreign investment approval was sought to purchase the land and that any conditions of such approval are being met.

The certificate will be granted for a specified development on condition that the dwellings for sale in the development are marketed in Australia.

There is no obligation on developers to obtain a new dwelling exemption certificate however obtaining a certificate enables the developer to sell the new dwellings to foreign investors without the foreign investors themselves having to obtain separate approval (subject to the $3 million threshold mentioned above). In the absence of such certificate, each purchaser would need to obtain its own FIRB approval to the acquisition and pay the appropriate application fee.

3. TAX COMPLIANCE TO BE IMPOSED AS PART OF FIRB APPROVAL

On 22 February 2016 the Australian Federal Government announced that it would incorporate a number of tax compliance obligations as conditions of its approval to applications by foreign interests in relation to investment in Australian businesses or real estate.

In a move intended to ensure *"companies operating in Australia pay tax on their Australian earnings"*, the government announced a range of standard conditions relating to tax compliance which will need to be met in order for an application to FIRB not to be regarded as being against the national interest.

Failure to comply with these additional conditions will potentially have serious consequences as a breach of the conditions will entitle the Government to impose the penalties, fines and other remedies available to it under the Act for breaches of the Act. One of these remedies includes divestment of the relevant property.

The conditions include an obligation on the applicant to pay any outstanding taxation debt, and use its best endeavours to ensure that any of its associates pay any outstanding taxation debt, which is due and payable at the time of the proposed action. In order to monitor compliance with these conditions, applicants will be required to provide an annual report to FIRB as to compliance with the conditions, with the first report to cover the 12 month period commencing on the date of the notice of determination by FIRB. These reports must be provided within 30 days after the end of the relevant 12 month period.

4. SOME CONSEQUENCES

Some of the consequences flowing from the changes mentioned above are:

- It will be necessary to ensure that the relevant application fee is paid to FIRB in a timely manner so as to not lead to delays in the processing of applications.
- Developers of residential real estate may be liable for multiple application fees and therefore may seek to change their standard land sale contracts so as to impose obligations on foreign purchasers to pay or reimburse the developer for any FIRB application fees payable by the developer in respect of the sale of the lot to the purchaser.
- To the extent that an Australian developer or purchaser enters into a joint venture with a foreign person , for the purposes of acquiring land in Australia, the joint venture vehicle may itself be treated as a foreign person, resulting in the need for multiple approvals to be sought from FIRB.
- Given the potentially serious consequences of breach of the Act to parties involved in transactions concerning the acquisition (directly or indirectly) of Australian real estate by foreign persons, vendors, purchasers and their financiers are likely to increase their scrutiny of the FIRB aspects of the matter to minimise the risk of being subject to the penalties and other remedies available to the Treasurer in case of breaches of the Act.
- There is to be greater regulation of acquisitions (directly or indirectly) of agribusinesses and agricultural land.
- Due to the changes in procedure relating to FIRB approvals, there may be delays in having applications finally resolved beyond the 30 day statutory timeframe. We have experienced some significant delays in recent matters, and accordingly careful consideration should be given to the drafting of sunset clauses in agreements where counterparties have the right

to terminate in the event FIRB approvals are not provided within the stipulated timeframe.

- Acquisitions that have approval will require on-going compliance with the terms of the approval which will extend to taxation obligations. Purchasers will need to ensure that as part of their corporate governance procedures, they monitor compliance with all reporting and taxation obligations that are part of any approval.

5. CONCLUSION

While the changes and changes outlined above are significant, they should not be construed as an attempt to restrict foreign investment in Australia. The reality is that rejection of foreign investment applications have been extremely rare. The reforms seek to strike a balance between the policy aims of:

- protecting the national interest;
- providing compliant foreign investors with greater certainty and improved service delivery;
- deterring non-compliant foreign investors through the imposition of stronger compliance and enforcement mechanisms; and
- providing the Australian public with greater confidence in the foreign investment framework.

Readers should note that this article does not provide a comprehensive overview of the recent amendments to Australia's foreign investment regime, and it is not intended as a substitute for legal advice. Prospective investors in Australian companies, businesses and real estate should contact DLA Piper Australia if any of the matters noted above could potentially impact on their personal circumstances.

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