



Leaker Partners
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CHANGES TO AUSTRALIA'S FOREIGN INVESTMENT POLICY
ARE YOU AFFECTED?

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- Foreign Acquisitions and Takeovers Act 1975
- Foreign Acquisitions and Takeovers Regulations 2015
 - Allows the Treasurer to review investment proposals to decide if they are contrary to Australia's national interest.
- Foreign Investment Review Board (FIRB)
 - Provides advice to the Treasurer on ensuring investments are not contrary to the national interest.
- Australia's Foreign Investment Policy
 - Produced by the Treasurer as a guide for foreign investors to assist understanding of the Government's approach to administering the Act.
 - Identifies investment categories that require prior approval, even if the Act is silent.



So, what is contrary to Australia’s ‘National Interest’?

- No hard and fast rules
- Case-by-case approach
- Factors Considered:
 - *National Security*
 - Foreign Government Investors
 - Sensitive industries (shipping, media)
 - *Competition*
 - i.e. Does the acquisition encourage healthy competition or does it result in market control?
 - *Other Australian Government Policies*
 - i.e. Tax, Environment
 - *Character of Investor*
 - Does the investor operate on a commercial and transparent basis?
- Ministers Decision

WHAT IS A 'FOREIGN PERSON'?



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The definition of a 'Foreign Person' for the purposes of the Foreign Acquisitions and Takeovers Act 1975 includes any of the following:

- Foreign Natural Person
- Foreign Corporation
- Foreign Trust
- Foreign Government Investor

WHAT IS A 'FOREIGN PERSON'?

"Foreign Natural Person"

- A natural person not ordinarily resident in Australia

'Ordinarily Resident' means:

- a) they are able to stay in Australia indefinitely (i.e. permanent residents); and
- b) the person has actually been in Australia for 200+ days in the previous 12 months.



“Foreign Corporation or Foreign Trust”

A corporation/trust in which:

- (a) a Foreign Natural Person or a Foreign Corporation holds a substantial interest of at least 20%; or
- (b) two or more persons, each of whom is either a Foreign Natural Person or a Foreign Corporation, hold an aggregate substantial interest of at least 40%.

"Foreign Government Investor"

- (a) A foreign government or a company/trust/partnership where a foreign government holds a substantial interest of at least 20%; or
- (b) Separate government entities of more than one foreign country or a company/trust/partnership where separate foreign governments hold an aggregate substantial interest of at least 40%.

Foreign Government Investors must ALWAYS obtain prior approval for any acquisition of Australian Land/Assets/Securities.

IS APPROVAL REQUIRED?



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Unless exempt, all Foreign Persons require prior approval to acquire an *interest* in the following:

1. All Residential Property
2. All Vacant Land for Commercial Development
3. Commercial Property valued at \$55 million* or more
4. Agricultural/Rural Land with a cumulative value of \$15 million* or more (including value of associates interests)
5. “Agri Business” valued at \$55 million (including value of associates interests)
6. Business shares/assets where the value of the business is more than \$252 million*
7. Establishing a new business

An “interest” includes:

- Purchase of real estate
- Leases/Licences greater than 5 years (including options)
- Financing or profit sharing arrangements

*Thresholds are indexed annually on 1 January. Thresholds differ for prescribed investors.

Commercial Real Estate = vacant and developed property that is not for residential purposes.



i.e. offices, warehouses, hotels, shops,
mining operations.

1. Vacant Land for Commercial Development

- Prior approval is always required (including to start a primary production business)
- Applications are usually approved, subject to conditions (i.e. that development commence within 24 months)

2. Developed Commercial Property

- Prior approval required where the value of the property is **\$55 million*** or more.
- If heritage-listed, a \$5 million threshold applies.

**NB: This threshold will increase to \$252 million for accommodation facilities, office and industrial buildings from 1 Dec*

3. Mining Tenements

- Prior approval required to buy or take an interest in prospecting, exploration, production or mining tenements where:
 - They provide the right to occupy Australian urban land and the term of the lease or licence (including extensions) is likely to exceed **5 years**; or
 - They provide an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land.
- NB: operational mines are considered developed commercial property. If the mining tenement applies to rural land, other rules apply (see Rural Land slide).

Prescribed Investors

Different threshold of **\$1,094 million** applies to prescribed investors:

- Chilean
- Japanese
- Korean
- New Zealand
- United States

(Foreign Acquisitions and Takeovers Regulations 1989)

Agricultural Land is land which is used or could reasonably be used for a primary production business.

- The business must be substantial and have a commercial purpose/nature.

A “primary production business” refers to production resulting from:

- ✓ The cultivation of land;
- ✓ Animal husbandry/farming;
- ✓ Horticulture;
- ✓ Fishing;
- ✓ Forestry;
- ✓ Viticulture; or
- ✓ Dairy Farming.

(Income Tax Assessment Act 1997)



NB: Doesn't include hobby farms, rural residential blocks or stock agistment.

Foreign Persons require prior approval to acquire an interest in agricultural land where the cumulative value of agricultural land the foreign person will own immediately after the acquisition will exceed \$15 million.

i.e. If ABC Pty Ltd owns three cropping properties, collectively valued at \$14 million, and then enters into a contract for the purchase of a fourth cropping property for the purchase price of \$3 million, that acquisition will be subject to FIRB approval.



“Associates” include:

- Relatives (as defined in Income Tax Assessment Act)
- Business partners
- Senior officers of the acquiring entity
- Persons holding substantial interest in the acquiring entity (20% or more)
- Persons involved in “avoidance” of FIRB Regime

Free-Trade Agreements

- A different non-cumulative threshold of \$50 million applies to Singaporean and Thai investors.
- A different non-cumulative threshold of \$1,094 million applies to United States, New Zealand and Chilean investors.

From 1 July 2015 all foreign persons holding interests in Australian agricultural land must register those interests with the Australian Tax Office (regardless of value).

All foreign persons must notify the ATO within 30 days if they:

- Have an existing interest
- Have a new interest
- No longer have an interest in agricultural land

Residential real estate includes all land and housing that is not commercial property or rural land.

→ Foreign Persons must get approval to acquire an interest in residential real estate regardless of value.

Approval usually only granted for purchases of:

1. Vacant land for residential development; or
 2. Brand new dwellings.
- Second-hand dwellings only in certain circumstances.



Exemption: The following Foreign Persons do not require approval to purchase Residential Real Estate:

- Persons eligible to hold a Special Category Visa (i.e. NZ citizens)
- Foreign Persons holding an Australian permanent resident visa
- Foreign Persons with an Australian spouse (joint tenants only)

Second-hand Property

General Rule: Foreign Persons cannot buy established residential property

.....unless :

1. To house Australian-based staff of a substantial Australian Business
2. For redevelopment (increase or improve housing stock)
3. Brand new houses.
4. Vacant land for residential development.



Temporary Residents

- Individuals holding a temporary visa permitting them to remain in Australia for a continuous period of more than 12 months (regardless of how long remains on the visa)
- Temporary residents can apply for approval to purchase ONE dwelling to be used as their residence while in Australia
- Must sell within 3 months of it ceasing to be their residence.

NEW DWELLING EXEMPTION CERTIFICATE

Property Developers and other vendors can apply for a 'new dwelling exemption certificate' to sell new dwellings in a specified development to foreign persons, without each foreign purchaser having to seek FIRB approval.

Development MUST:

- Consist of 50 or more dwellings
- Have development approval from relevant government authority; and
- (if a foreign property developer), foreign investment approval was sought to purchase the land and any conditions are being met (i.e. timeline)

CONDITIONS:

- Dwellings must be marketed in Australia (but can be marketed overseas as well)
- Report every 6 months on any foreign purchasers with purchaser details and value
- Each foreign purchaser has a purchase limit of \$3 million within the development



NEW DWELLING EXEMPTION CERTIFICATE

You will need to provide:

- Marketing Schedule
 - Evidence of the number of dwellings to be built
 - Architectural plans and artists impressions
 - Ownership information of the development
 - Payment of the application fee of \$25,000
-
- NB: fees are payable for each dwelling acquired by a foreign person



Foreign Persons must obtain prior approval before acquiring a substantial interest in, or control of, an Australian business that is valued above \$252 million.

Foreign Persons must also obtain prior approval before acquiring a substantial interest in an off-shore company whose Australian subsidiaries or Australian gross assets are valued at above \$252 million.

- **Substantial interest = a single person holding 20% or several foreign persons (and their associates) holding 40%.**
- **Value = higher of value of total issued shares or total gross assets.**



Free Trade Agreements

Prescribed investors (Chilean, Japanese, Korean, NZ, U.S investors) have a threshold of \$1,094 million, unless the business is in a prescribed sensitive sector (i.e. media, telecommunications, transport, military), where a \$252 million threshold applies.

- On 1 December 2015 a new term 'Agribusiness' was introduced to include all primary production businesses and certain first stage downstream businesses beyond the farm gate (i.e. meat processing, grain wholesale/storage/milling)
- A \$55 million screening threshold applies for investments in agribusiness (including value of associates interests)



On 1 December 2015 new legislation came into force which amended the existing legislation. The key changes you need to be aware of:

- **Application Fees**
- **Increased penalties**
- **Third party penalties**





Residential Real Estate

Proposed Acquisition	Application Fee payable
Property valued at \$1 million or less	\$5,000
Property valued at greater than \$1 million	\$10,000 plus an additional \$10,000 per additional million in property value

Business, Commercial Real Estate and Agriculture

Proposed Acquisition	Application Fee payable
Developed commercial property (incl. heritage listed property)	\$25,000
Vacant commercial land	\$10,000
Business acquisitions valued at \$1 billion or less	\$25,000
Business acquisitions valued at greater than \$1 billion	\$100,000
Rural land valued at less than \$1 million	\$5,000
Rural land valued at \$1 million or greater	\$10,000 plus an additional \$10,000 per additional million in property value (capped at \$100,000)
Agribusiness acquisitions valued at \$1 billion or less	\$25,000
Agribusiness acquisitions valued at greater than \$1 billion	\$100,000

Fees are payable before the application is processed. Application fees will be indexed by the CPI on 1 July annually.



Civil Penalties

- Infringement Notice (including a monetary fine)
- Divestment Order (capital gain is retained by Australian Government)
- Monetary fine relative to value of property

Criminal Penalties

- Prosecution for failing to obtain prior approval
- Prosecution for failing to comply with divestment order
- Prosecution for failing to comply with conditions attached to an approval
- Maximum criminal penalty for an individual is imprisonment for 3 years and/or fine of \$135,000
- Maximum criminal penalty for a company is a fine of \$675,000

- Aimed at third party actively assisting their clients to bypass FIRB rules
- Important that lawyers, accountants, real estate agents, mortgage brokers etc familiarise themselves with the FIRB rules.
- Threshold – “*knowingly*”



Civil Penalty

- Knowingly assisting another person to contravene a civil penalty provision is a breach of the *Regulatory Powers (Standard Provisions) Act 2014*.
- The maximum civil penalty is the same as the primary breach.

Criminal Penalty

- Knowingly assisting another person to commit a criminal offence is an offence under section 11.2 of the Criminal Code Act 1995.
- Maximum penalty is the same as the primary offence

1. Conditional Contract

- Make the contract conditional upon the purchaser obtaining approval from the Foreign Investment Review Board.

2. Online application at www.firb.gov.au

- Details of Foreign Person
- Details of proposed acquisition
- Details of existing landholdings
- Supporting documentation (i.e. conditional contract)

3. Pay Application Fee

- FIRB will not process application until fee has been paid

4. FIRB responds within 30 days.

- Note conditions of approval.
- Further information may be requested.

Villa del Mare, Point Piper, Sydney

Villa del Mare is an established residential dwelling located in Point Piper, Sydney.

In 2014 the property was purchased by Golden Fast Foods Pty Ltd (GFF), an Australian Holding company. It was registered days before the purchase.

The directors of GFF were a Sydney accountant and two individuals based in China. The shareholder of GFF was an Australian registered company called Equality Investment Pty Ltd (registered on the same day at the same address).

At the end of the trail, GFF was ultimately controlled by Evergrande Real Estate Group, a Chinese property development group, under Hui Ka Yan.

GFF was found to be a 'Foreign Person' and the Australian Government issued GFF with a divestment order that the company sell the property within 90 days.



Announcement of the Treasurer 22 February 2016

Foreign Investment Applications – Additional Conditions

1. Comply with Australian Taxation Law (and its associates)
2. Comply with ATO directions to provide information
3. Advise ATO of “potential” transfer pricing or avoidance measures
4. Pay any outstanding tax debt
5. Annual reporting of compliance required



Additional Conditions (Possible) (if substantial tax risk)

1. Engage in good faith with ATO to resolve tax issues
2. Provide forecast of tax payable

Tax Conditions – Potential Problems

1. Broad Requirement – but sanctions are significant if deemed non-compliant – e.g. divestment of asset
2. Requirement to notify of “potential” Part IVA issues is unclear
3. Information gathering aspects too broad
4. Requirement to ensure “associates” comply is too broad
5. No real “national interest” reason or imposition of tax conditions
6. Create two classes of tax player i.e. those who are “foreign persons” and those who are not.

Many “Australian” companies qualify as “Foreign Persons”.

The Minister's Discretion

The question of “National Interest” itself is one for the relevant Minister.

“A Court will be slow to interfere with a Minister’s decision as to what is in the national interest on the ground that a matter was not taken into account was relevant to the national interest or a matter was taken into account that was irrelevant to the national interest...”

A Court will also be slow to interfere with a Minister’s decisions as to what is in the national interest under the guise of an argument that it should be inferred from the material before the decision maker that he or she was not in fact satisfied that the acquisition was contrary to the national interest”

Justice Besanko

Wight v. Honourable Chris Pearce MP 2007 FCA 120

(divestment order arising out of divorce proceedings)



National Interest Test

(as stated in the Foreign Investment Policy)

Factors Considered

Policy : Foreign investment must not be contrary to the “National Interest”

Factors include (but not limited to):

- National security;
- Competition
- Government policies (eg. Tax)
- Impact on the economy and the community
- Character of the investor

Agriculture Land Investment Factors

- Quality and availability of agricultural resources
- Land access and use
- Product and productivity
- Australia's capacity to remain reliable regular of agricultural production
- Bio diversity
- Employment and prosperity

Residential Land

- Principle : Foreign investment should increase housing stock of Australia

Recent Decisions

(summary of announcements)

19 March 2015 – Toll Holdings Acquisition by Japan Post

Treasurer Joe Hockey approves \$6.5 billion acquisition of Toll Holdings by Japan Post. Toll is Australia's largest supply chain company.

40,000 employees.

Foreign investment welcomed.



Recent Decisions

(summary of announcements)

08 April 2015 – John Holland Group Acquisition by China Communication Construction Company

Treasurer Joe Hockey approves \$1 billion acquisition of John Holland Group, one of Australia's largest engineering and construction companies.

5,600 employees.

Foreign investment welcomed.



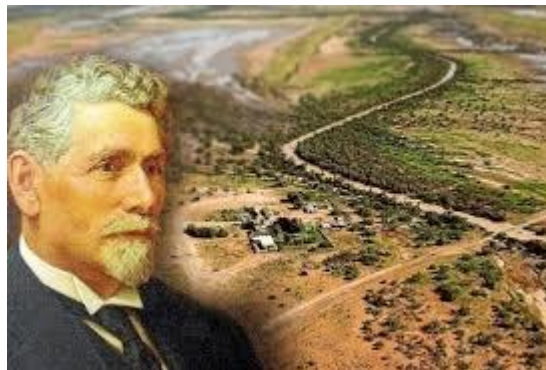
Recent Decisions

(summary of announcements)

19 November 2015 – S Kidman & Co Proposed Sale

Treasurer Scott Morrison determines acquisition of S Kidman & Co land holdings (1.3% of Australia's total land area), largest rural land holdings by a "Foreign Person" contrary to national interest due to proximity of Anna Creek Station partly located in Woomera Prohibited Area.

Note: "Foreign Person" is any corporation with an interest of 20% held by a foreign person. S Kidman & Co is already 34% foreign owned (ABC Report 3 May 2016).



Recent Decisions

(summary of announcements)

23 February 2016 – Tasmanian Land Company Acquisition by Moon Lake Investments

Treasurer Scott Morrison approves \$280 million acquisition of Tasmanian Land Company partly on the basis its already foreign owned, employees guaranteed continued employment and milk will be supplied to current customers.

Tasmanian Land Company is Australia's biggest dairy farming business.



Recent Decisions

(summary of announcements)

29 April 2016 – S Kidman & Co Revisited

Treasurer Scott Morrison rejects acquisition, 80% share (\$370 million) of S Kidman & Co by Dakang Holdings. The size of the holding is stated to make it difficult for any Australian group to acquire the entire operation.

Kidman response

S Kidman argued could not split the land holdings without losing value (ABC 3 May 2016). Further, a breakup of the properties means reduced projection of up to 3,000 tonnes of beef and loss of 50 jobs. 130 bidders approached. No Australian companies in the final bidding process.

Dakang Holdings subsequently withdrew from negotiations.

Note: Queensland Investment Corporation on 7 May 2016 announced \$256 million investment in North Australian Pastoral Company.

Key Points Regarding Approval:

1. Unless exempt, Foreign Persons must obtain prior approval to purchase Australian property or business
2. New Dwelling Exemption Certificates available for property developers
3. Agricultural Land – cumulative \$15 million threshold and ATO land register
4. Substantial Changes effective from 1 Dec 2015:
 - a) Application Fees
 - b) Increased penalties for breaches
 - c) Third party penalties – know the rules and seek legal advice if unsure!

THANK YOU

Disclaimer: Please be aware that the information contained in this presentation is only a broad overview of the foreign investment framework and refers to proposed changes to legislation only. Some proposed changes outlined may differ from those actually applied in the new legislation. This information is not intended to constitute legal advice and we highly recommend specific legal advice is sought for your particular transaction. If we can help in any way please contact Katrina Palmer or Mark Leaker of Leaker Partners on +61 8 9324 8590.