

FOREIGN INVESTMENT REVIEW BOARD

The Foreign Investment Review Board ("FIRB") is a Federal Government body which examines proposals by foreign people who undertake direct investment in Australia, and makes recommendations to the Government under this Foreign Investment Policy.

It is unlawful for a foreign person to purchase residential land in Australia without first obtaining Foreign Investment Review Board approval.

The Government's approach to Foreign Investment Policy is to encourage foreign investment consistent with community interests. The Foreign Investment Policy provides for Government scrutiny of many proposed foreign purchasers of Australian businesses and property. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* to block proposals that are required to be notified and which are determined to be contrary to the National interests.

WHO IS REQUIRED TO APPLY TO THE FIRB?

The types of proposals by foreign interests to invest in Australia may be summarised as follows:-

- acquisition of substantial interest in existing Australian businesses, the value of whose assets exceeds \$50,000,000 or where the proposal values the business at over \$50,000,000;
- proposal to establish new businesses involving a total investment of \$10,000,000 or more;
- portfolio investments in the media of more than 5% or more and/or non-portfolio investments irrespective of size;
- takeovers of offshore companies whose Australian subsidiaries or assets exceed \$50,000,000;
- direct investments by foreign Governments and their agencies irrespective of size;
- acquisitions of interest in urban land (including leases, financing and profit sharing arrangements) and the acquisition of interest in urban land corporations and trusts:-
 - developed non-residential commercial real estate (where the property is subject to heritage listing or valued at \$5,000,000 or more) ;
 - developed non-residential commercial real estate (where the property is valued at \$5,000,000 or more);
 - accommodation facilities;
 - vacant real estate;
 - residential real estate;
 - other proposals (where any doubt exists as to whether they are notifiable).

FOREIGN INTEREST

A foreign interest is defined as:-

- a natural person not ordinarily resident in Australia;

- a corporation in which a natural person not 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 or a resident in Australia or a foreign corporation holding an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation which holds a substantial interest; or
- a 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, holding an aggregate substantial interest.

A substantial foreign interest occurs when a single foreigner has 15% or more of the ownership or several foreigners have 40% or more in aggregate of the ownership of any corporation, business or trust.

ENTERING INTO A CONTRACT

All contracts by foreign persons to acquire interests in Australian real estate must be made conditional upon FIRB approval. For properties to be purchased at auction prior FIRB approval must still be obtained.

WHO IS EXEMPT?

Exemptions to the Government's policies include:-

- acquisitions by Australian citizens resident abroad;
- acquisitions of property zoned residential by foreign nationals who hold permanent visas or who hold a special category visa;
- foreign persons purchasing, as joint tenants with their Australian citizen spouse, property that is zoned residential.

SECOND HAND RESIDENTIAL REAL ESTATE

Acquisition of residential real estate that has been previously owned or occupied is not normally approved except for the following 2 categories:-

1. foreign nationals temporarily resident in Australia, holding a current temporary resident visa which permits continuous residence in Australia for a period of more than 12 months from the time of the application.
2. Foreign companies with a substantial Australian business, buying for named senior executives continuously resident in Australia for periods longer than 12 months, provided the dwelling is sold when no longer required for this purpose.

There are other requirements which must be satisfied when making an application to the FIRB for second hand residential real estate.

VACANT LAND

Acquisitions of vacant land for development (including house and land packages where construction has not commenced) by foreign interests are normally approved subject to:-

- continuous substantial construction commencing within 12 months;
- a minimum amount equivalent to 50% of the acquisition cost or current market value of the land (whichever is higher) must be spent on development; and
- once construction is completed, parties notify the completion date and actual development expenditure.

NEW DWELLINGS

Acquisitions of new home units, town houses, house and land packages (where construction has commenced), strata titled hotel/motel units in a new development, are normally approved provided that it has never been occupied or sold and provided no more than 50% of dwellings in any one development are sold to foreign interests.

COMMERCIAL REAL ESTATE

Commercial real estate includes vacant land for commercial development and developed commercial property.

Foreign interests intending to acquire commercial real estate are required to seek approval from the FIRB prior to purchase unless the acquisition is exempt. Exempt acquisitions include:-

- developed commercial property valued at less than \$5,000,000 which includes heritage listed properties; and
- developed commercial property where the property is to be used immediately and in its present state for industrial or non-residential commercial purposes. The acquisition must be wholly incidental to the purchaser's proposed or existing business activities.

BREACHES OF THE ACT

The Government takes seriously breaches of the *Foreign Acquisitions and Takeovers Act 1975*. Persons or corporations who fail to obtain prior approval to buy property (as well as assets and/or shares) are subject to penalties and in some cases imprisonment. There are also provisions under law that make it an offence to provide false or misleading information, or to enter into any schemes for the purpose of avoiding the provisions of the act.

MAKING AN APPLICATION TO THE FIRB

At Ferguson Cannon, we have extensive experience in making applications to the FIRB. Whether you are purchasing residential land, commercial land or acquiring an interest in a business or a corporation, we can assist you in making your application to FIRB and ensuring that all of your interests are protected, the relevant information given to the FIRB and that you satisfy all of the Government's requirements.

Please contact Byron Cannon, Director with any enquiries.