



Foreign Investments in Australia

by **MHL Legal & Notary**

Common Issues with Chinese Investors

- ❖ Due diligence on the investment project & business partner
- ❖ Understanding of the Australian business culture, legal & compliance issues
- ❖ Communication with the professional advisory team
- ❖ Set-up of investment vehicles & management of staff
- ❖ Control of legal liabilities & taxation risks



Examples of Investment Vehicles

- ❖ Australian proprietary company limited by liability with ACN
- ❖ Foreign company registered with ASIC with ARBN
- ❖ Trusts (i.e. Unit Trust, Discretionary Trust, Hybrid Trust)
- ❖ Partnership, Joint Venture etc



Foreign Investment Reviews



- ❖ The screening process is undertaken by the Foreign Investment Review Board (**FIRB**).
- ❖ According to FIRB Annual Report, \$168 billion worth of foreign investments were approved in 2016-17. China continues to grow as a key source of investment with \$23.2 billion worth of approvals.
- ❖ In the majority of industry sectors, smaller proposals are exempt from notification and larger proposals are approved unless assessed as being inconsistent with Australia's national interest.

“Foreign Persons”

“Foreign Person” under the *Foreign Acquisitions and Takeovers Act 1975* includes:

- ❖ an individual not ordinarily resident in Australia;
- ❖ a corporation in which an individual not ordinarily resident in Australia or a foreign corporation holds an interest of **20%** or more;
- ❖ a corporation in which 2 or more foreign persons hold an aggregate interest totaling **40%** or more; or
- ❖ the trustee of a trust in which a foreign person holds **20%** or more of interest, or 2 or more foreign persons hold **40%** or more interest in aggregate

Mandatory Notifications to FIRB

- ❖ all vacant non-residential land
- ❖ all residential real estate (exemptions excepted)
- ❖ all direct investments by foreign governments & their related entities
- ❖ all other acquisitions (incl. shares or assets of an Australian business) if target value is **\$261 million** or more (***\$1134 million** for the agreement country investors)



Vacant Commercial Land

- ❖ no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock
- ❖ notification to FIRB required regardless of value of the proposed acquisition
- ❖ FIRB approval will normally be subject to conditions that the foreign buyer commences continuous construction of the proposed development within 5 years of the date of approval

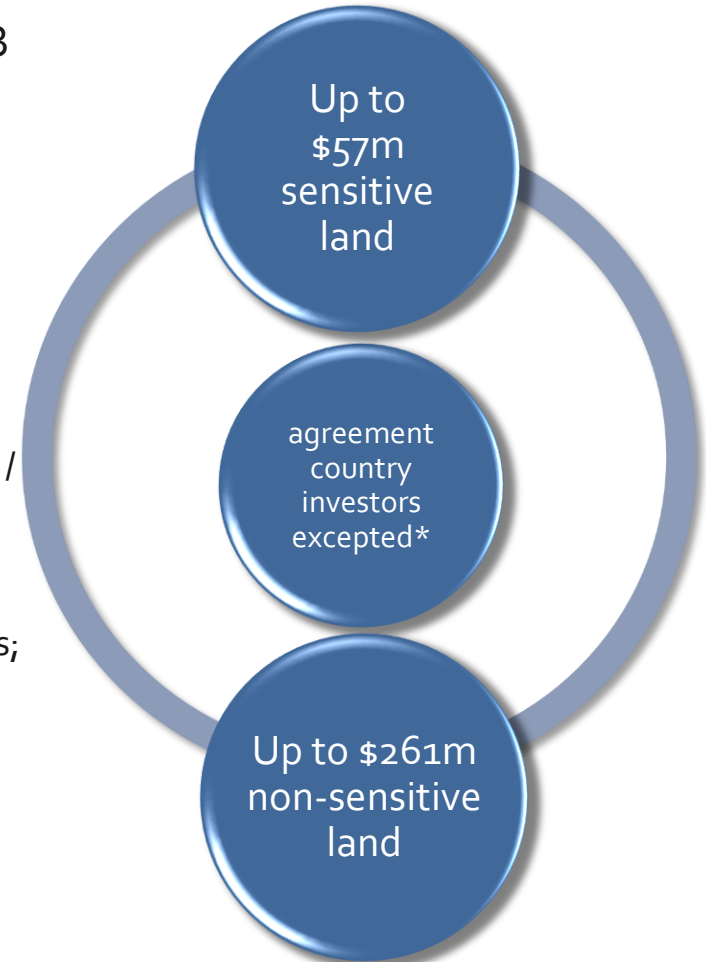
Developed Commercial Land

Foreign persons must apply for FIRB approval, or FIRB exemption certificate if the acquisition is above the thresholds indicated on the right (fees \$2,000 - \$25,700).

Sensitive developed commercial land includes those:

- ❖ leased to the Commonwealth / State / Territory body
- ❖ fitted out specifically for the storage of bulk data; supply of training or HR to defence forces; manufacture of military goods / equipment; development of security technologies & communication systems; extraction of uranium or plutonium or operation of nuclear facilities
- ❖ used for the handling of biological agents; or regulated materials; or prescribed airspace; or operation of mine or telecom network or defined public infrastructure

Agreement country investors (the threshold being **\$1134 million**) which includes China



Exemptions - Residential Real Estate

- ❖ Buyer is an Australian citizen or a New Zealand citizen or holds a current Australian permanent resident visa
- ❖ Foreign person acquires residential property as joint tenants with spouse who is an Australian citizen (*NOT if purchasing as tenants in common*)
- ❖ Acquisition of new dwelling(s) from the developer that holds a New Dwelling Exemption Certificate for sales to foreigners
- ❖ Acquisition of residential property in an Integrated Tourism Resort (ITR) designated before Sept 1999
- ❖ Acquisition of property from the Australian Government (Commonwealth, State or Territory, or local)
- ❖ Acquisition by operation of law, eg succession, matrimonial property settlement



Exemptions - Business Investments

- ❖ Generally, proposed acquisition of an existing business; or establishment of new business valued below **\$261 million** is exempted from notifying FIRB (the threshold is **\$1134 million** for the agreement country investors)
- ❖ A requirement to notify FIRB may still exist, eg investments by foreign government agencies; acquisition of an interest in “sensitive businesses” including media, telecommunications, transport, defence and military related industries, the extraction of uranium or plutonium or the operation of nuclear facilities

FIRB Fees - Residential

Price of Residential Property	Fees Payable
\$0 - \$1,000,000	\$5,600
\$1,000,0001 - \$1,999,999	\$11,300
\$2,000,000 - \$2,999,999	\$22,700
\$3,000,000 - \$3,999,999	\$34,000

- ❖ fees will not be remitted if the purchase is unsuccessful therefore it is vital to make purchase contract subject to FIRB approval
- ❖ \$5,000 to apply for a variation of FIRB approval condition

FIRB Fees – Commercial / Business

Type of Interest	Fees Payable
Commercial land which consideration for the acquisition is \$10 million or less	\$2,000
Commercial land which consideration for the acquisition is above \$10 million and not more than \$1 billion	\$25,700
Interests in assets of an Australian business or direct interest in an Australian agribusiness (\$1 billion or less)	\$25,700
Interests in mining or production tenement	\$25,700
Upfront approval for developer to sell new dwellings (in a development with 50 or more dwellings) to foreign buyers	\$26,100 plus reconciliation based on the number of and consideration payable for dwellings acquired by foreign persons

Annual Vacancy Fee

From 9 May 2017, foreign persons who purchase residential dwellings in Australia will be subject to payment of an annual vacancy fee where the property is not rented out or occupied for over 6 months a year.

Annual Vacancy Fee Returns must be lodged by foreign owners of residential dwellings who:

- ❖ made FIRB application for the purchase of residential property after 7:30pm (AEST) on 9 May 2017; or
- ❖ purchased a residential property under a New Dwelling Exemption Certificate that a developer applied for after 7:30pm (AEST) on 9 May 2017

An Vacancy Fee Return must be lodged with ATO within 30 days after 12 months starting on the settlement date for acquisition of the dwelling.

When is vacancy fee payable?

The vacancy fee is payable annually and will apply where a foreign owned residential property is not:

1. occupied by the foreign owner or a relative of the owner for at least 183 days in a 12-month period;
2. subject to leases or licences (with a minimum duration of 30 days each) which total at least 183 days in a 12 months period; or
3. genuinely made available on the rental market (with a minimum duration of 30 days each) for at least 183 days in a 12 month period.

How much is the vacancy fee?

- ❖ The vacancy fee payable will be equivalent to the FIRB application fee paid for purchasing the property.

For more information, please see the following link:

- ❖ <https://www.ato.gov.au/General/Foreign-investment-in-Australia/Annual-vacancy-fee/>

Additional Foreign Acquirer Duty

- ❖ Additional Foreign Acquirer Duty (AFAD) is a state based duty.
- ❖ After 1 July 2018, AFAD at 7% of purchase price in addition to stamp duty applies to direct or indirect acquisitions of any residential property in Queensland by any foreign person.
- ❖ AFAD applies regardless of whether the residential property is for investment or non-investment purposes.
- ❖ If there are multiple purchasers, AFAD applies only to the foreign purchasers and is calculated on their portion of interest acquired.