



# 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



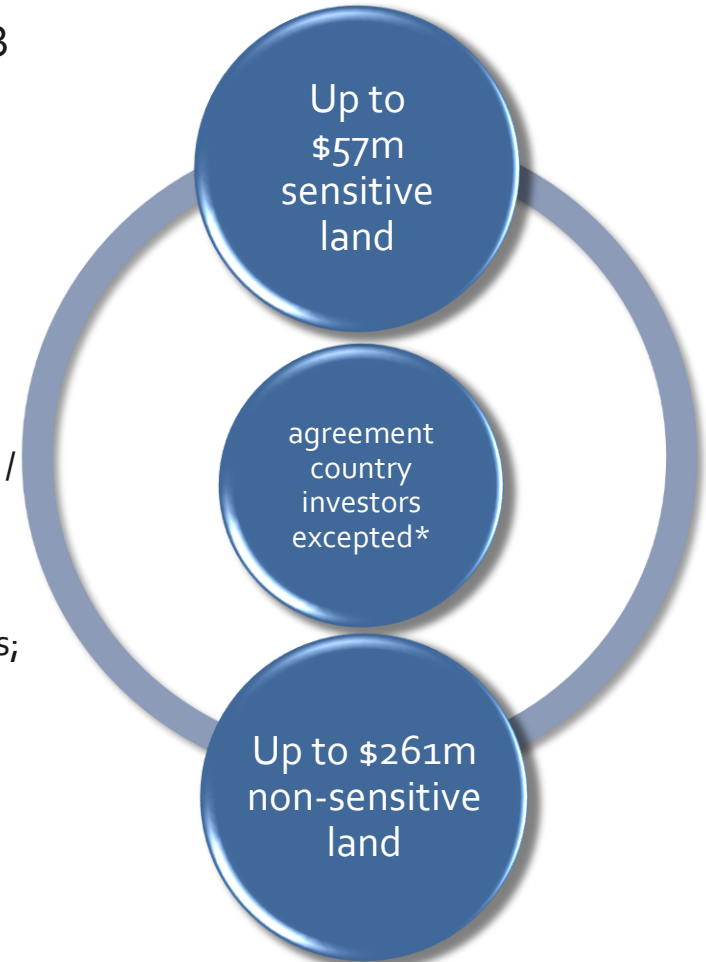
# Developed Commercial Land

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 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.