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CORPORATE UPDATE

AUSTRALIA'S FOREIGN INVESTMENT REGIME RELOADED

1. INTRODUCTION

2015 has seen a rapid succession of changes, public consultation and now proposed amendments to the legislative and policy regime regulating foreign investment in Australia[1]. Collectively they 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 proposed to apply from 1 December 2015);
- foreign investors with an existing interest in Australian agricultural land (who are required to register their interest on a new statutory register); and
- developers or investors in Australian real estate.

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

- proposed amendments to the Foreign Acquisitions & Takeovers Act (the Act), to be implemented through a package of legislative reforms currently before the Senate, and intended to be implemented by 1 December 2015; and
- recent amendments that were implemented through changes to the Act and Australia's Foreign Investment Policy (the Policy) over the past 12 months.

2. OVERVIEW OF KEY PROPOSED AMENDMENTS TO THE ACT

A summary of key proposed amendments is set out below, with more detailed information on each change following.

#	Summary of Proposed Amendment	Proposed date of amendment
2.1	Payment of application fees	1 December 2015
2.2	Implementation of civil penalties and the issue of infringement notices for non-compliance	1 December 2015
2.3	Requirement to obtain approval to acquire an interest in an "agribusiness" valued above $55 million	1 December 2015
2.4	Increasing 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%	1 December 2015
2.5	Increase in the threshold for referral of an acquisition of an interest in non-sensitive developed commercial real estate from $55 to $252 million	1 December 2015
2.6	Removal of the requirement to refer the acquisition of an interest in a heritage listed property valued above $5 million.	1 December 2015
2.7	Issue of 'pre-approval' certificates in respect of real estate developments to be governed by the Act	1 December 2015

[1] In summary, Australia's foreign investment regime comprises the *Foreign Acquisitions and Takeovers Act 1975* (Cth), the regulations made under that Act and Australia's Foreign Investment Policy 2015.

2.1 - Introduction of application fees

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

The following fees are proposed:

Type of investment	Fee
Vacant commercial land	$10,000
Commercial real estate	$25,000
New business proposals or internal reorganisations	$10,000
Business acquisitions where the value of the investment is less than $1 billion	$25,000
Business acquisitions where the value of the investment is greater than $1 billion	$100,000
Applications to acquire an interest in rural land valued up to $1 million ($10,000 will then be levied per each $1 million increase in value)	$5,000

It is also proposed that the developer of a residential development with a 'pre-approval 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.

2.2 - Penalty regime

Currently, while criminal penalties can be imposed under the Act, the high burden of proof (beyond reasonable doubt, rather than balance of probabilities) has made prosecutions difficult. As a consequence of the proposed changes, the criminal penalties for existing offences will increase, and Australian courts will be able to make civil penalty orders for contraventions of the Act.

The following penalties are proposed:

Breach of rule	Proposed new penalty
Foreign person makes an acquisition without approval	▪ Maximum criminal penalty of: ▪ Individual - 750 penalty units ($135,000) or 3 years imprisonment ▪ Company - 3,750 penalty units ($675,000) ▪ Maximum civil penalty of: ○ Individual - 250 penalty units ($45,000) ○ Company - 1,250 penalty units ($225,000)
Foreign person fails to comply with a condition of approval	▪ Maximum criminal penalty of: ▪ Individual - 750 penalty units ($135,000) or 3 years imprisonment ▪ Company - 3,750 penalty units ($675,000) ▪ Maximum civil penalty of: ▪ Individual - 250 penalty units ($45,000) ▪ Company - 1,250 penalty units ($225,000)

It is also noted that:

- third parties who knowingly assist a foreign investor to breach the Act will be subject to the same fine as the foreign investor; and
- the Government is also proposing an infringement notice regime for minor breaches (being 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 $10,200, plus the relevant application fee. If the breach is identified through compliance monitoring (as opposed to having been voluntarily reported), the proposed fine is $51,000, plus the relevant application fee.

2.3 - Requirement to refer the acquisition of an "Agribusiness"

Another key proposed amendment is the introduction of a new $55 million threshold on investments in "Agribusinesses". 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.

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

The proposed changes will 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.

2.5 & 2.6 - Relaxation of real estate investment thresholds

Previously the approval requirement for acquisitions of an interest in:

- developed commercial real estate (including accommodation facilities and office and industrial buildings) was triggered where the value of the property to be acquired was greater than $55 million; and
- heritage listed property was triggered where the value of the property to be acquired was valued above $5 million.

The proposed amendments will increase the threshold for investment in developed commercial real estate to $252 million, and remove the $5 million threshold for heritage listed property. The $252 million threshold for developed commercial real estate will continue to apply to mining infrastructure and other critical infrastructure such as power stations and toll roads.

2.7 - Issue of exemption certificates

As a consequence of the proposed amendments, the issue of 'pre-approval' certificates for residential real estate developments will be regulated under the Act.

3. OVERVIEW OF RECENT CHANGES

A summary of key recent changes is set out below, with more detailed information on each change following.

#	Summary of recent amendment to Australian foreign investment regime	Effective Date of amendment
3.1	Increase of investment thresholds for South Korean and Chilean investors	12 December 2014
3.2	Increase of investment thresholds for Japanese investors	15 January 2015
3.3	Requirement to obtain FIRB approval to acquire an interest in rural land if the value of the investment when combined with the value of interests in rural land already held by the foreign investor, exceeds $15 million	1 March 2015
3.4	Requirement to register an interest in agricultural land with the Australian Tax Office	1 July 2015
3.5	Requirement that an investment in a pre-approved development be referred to FIRB for approval if the value of the investment exceeds $3 million	1 July 2015

3.1 & 3.2 - Increased thresholds for South Korean, Japanese and Chilean Investors

As a consequence of Australia's recently implemented free trade agreements with South Korea[2], Chile[3] and Japan[4], investors from those countries now have the benefit of preferential treatment (as compared to other foreign investors) under Australia's foreign investment regime. Specifically, the thresholds for investments by South Korean, Chilean and Japanese nationals that do not require prior FIRB approval are now:

[2] Korea-Australia Free Trade Agreement

[3] Australia-Chile Free Trade Agreement

[4] Japan-Australia Economic Partnership Agreement

- shares or assets of an Australian business involved in a prescribed sensitive sector (media, telecommunications, transport and defence) -$252 million
- developed non-residential commercial real estate - $1094 million
- shares or assets of an Australian business - $1094 million

3.3 - Lowering of threshold for investments in Rural Land

The Policy was amended on 1 March 2015 to implement stricter controls on the acquisition of interests in 'rural land' (i.e. land is "*land that is wholly or exclusively used for primary production")*. In particular, the acquisition of an interest in rural land now requires referral to FIRB if the cumulative value of the investment when combined with the value of interests in rural land already held by a foreign buyer and its associates exceeds $15 million[5]. The previous threshold was $252 million.

3.4 - 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 31 December 2015) and future acquisitions (with the registration to occur within 30 days of the acquisition).

It is noted that 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.

3.5 - Approval required for investments above $3 million in pre-approved developments

Developers of new residential property developments exceeding 100 dwellings are able to obtain a 'pre-approval' certificate from FIRB, which enables foreign buyers to acquire an interest in the proposed development without applying for prior FIRB approval. A restriction has now been placed on the value of the interests a foreign buyer can purchase in such 'pre-approved' residential property developments without prior FIRB approval. In particular, a foreign buyer must now apply for a separate FIRB approval if, with its associates, it proposes to acquire an interest in a pre-approved development valued at over $3 million.

4. CONCLUSION

While the changes and proposed 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, and 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.

Australia is most definitely 'open for business', and should continue to be an attractive destination for foreign investment. Nevertheless, it will be interesting to see what (if any) changes are made to the draft legislative package through the Senate review process, and the detail to be contained in the

[5] A higher investment threshold applies for Singaporean and Thai Investors ($50 million) and for investors from New Zealand, United States and Chile ($1094 million).

regulations will be important in understanding the full impact of the changes.

Readers should note that this article does not provide a comprehensive overview of the proposed or 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.

MORE INFORMATION

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