



Summary of Foreign Investment Review Board Policy Changes

On 24 April, 2010 the Assistant Treasurer Senator Nick Sherry announced that Temporary Residents are now required to seek Foreign Investment Review Board ("FIRB") approval to acquire residential real estate in Australia. The announcement also foreshadowed tough new civil penalties for non compliance, including sanctions for purchasers, sellers and agents involved in breaches of the Act.

The new policy has now been published on the FIRB website while details of the proposed sanctions for purchasers, sellers and agents are yet to be disclosed.

In simple terms, the changes take us back to the policy situation that prevailed up until late 2008 when many of the restrictions on the right of foreign residents to buy Australian real estate were restricted. The most significant of these changes gave Temporary Residents the right to buy established dwellings for use as a principal place of residence. As a result of the 24 April changes, while Temporary Residents can still purchase domestic real estate, they must now first seek FIRB approval. If applicants are eligible for approval under the new policy, the acquisition will be approved subject to legally binding conditions which will differ according to the type of real estate being purchased.

Certain acquisitions do not require FIRB approval. In the case of real estate it is not necessary to submit an application for approval if:

- You are an Australian citizen living abroad.
- Your spouse is an Australian citizen (not a permanent resident) and you are purchasing residential real estate in both names as joint tenants (not as tenants in common).
- You are a New Zealand citizen and you are purchasing residential property.
- You hold a Permanent Resident visa and you are purchasing residential property.
- You are purchasing new dwellings from the developer, where the developer has pre approval to sell those dwellings to foreign persons.
- You are acquiring an interest in a time share scheme which does not permit you (or any of your associates) more than four weeks entitlement per year.
- You are purchasing certain residential real estate in an integrated tourism resort.

- You are acquiring an interest in developed commercial property where the property is to be used immediately and in the present state for industrial or commercial purposes. The acquisition must be wholly incidental to the purchasers proposed or existing business activities.
- You are acquiring an interest by will or by operation of law (such as, a Court order regarding the division of property in a divorce settlement, but not simply an agreement to transfer property without a Court's intervention); or you are purchasing property from the Government (Commonwealth, State or Territory or local).

The purpose of the restrictive policy measures is first, to help reduce the possibility of excess demand in the existing housing market, and second, to encourage the supply of new dwellings, many of which will become available to Australian Permanent Residents or Citizens through purchase or rent. The cumulative affect should be to maintain greater stability of house prices and the affordability of housing for the benefit of Australians.

Second hand (established) dwellings

Under the new policy announcement, it is still possible for foreign persons to acquire established dwellings if they are the holder of a Temporary Residence visa and intend to use the dwelling as their principal place of residence. Approval will usually be granted on the condition that the dwelling is sold when it ceases to be the resident's principal place of residence.

It is not possible for foreign persons to acquire established dwellings for investment purposes - irrespective of whether they are Temporary Residents in Australia or not.

Care needs to be taken when determining whether the visa a person holds is a Temporary Residence visa. For example, the holder of a multiple entry Business Visitor visa who would spend a substantial amount of time in Australia for business reasons would not be classified as a Temporary Resident irrespective of the fact that a significant amount of time is spent in the country. Also, a person who is on a Bridging visa while making the transition from a Working Holiday visa to a Subclass 457 visa would not be a Temporary Resident although he/she would be when the Subclass 457 visa is eventually granted. If in doubt about the visa status of a potential purchaser, it is important that legal advice be obtained.

Vacant land

Acquisitions of single blocks of vacant land for the purpose of building a single residential dwelling on each block are normally approved subject to the condition that continuous substantial construction of the dwelling must commence within twenty four months.

Acquisitions of parcels of land for the purpose of building multiple residential dwellings are also normally approved subject to continuous substantial construction commencing within twenty four months and at least 50% of the acquisition cost or the current market value of the land (which ever is higher) must be spent on development.

Once these conditions have been fulfilled, properties may be rented out, sold to Australian interests, or other eligible purchasers or retained for the foreign investors own use.

New dwellings

Off the plan projects are normally approved if the dwellings:

- have not previously been sold - ie: they are purchased from the developer - and;
- have not been occupied for more than twelve months.

Unlike in the past, where only 50% of a development could be sold to foreign investors, there are now no restrictions on the number of dwellings in a new development which may be sold to foreign persons provided that the developer can demonstrate that the project has been marketed locally as well as overseas.

If buildings have been extensively refurbished or the use has undergone a change from non residential to residential, approval will also normally be granted for sales to foreign investors. This does not include established residential real estate that has been refurbished or renovated. Property purchased under this category may be rented out, sold to Australian interests or other eligible purchasers or retained for the foreign investors own use.

If a developer had previously applied for approval to sell up to 50% of a new project and those approvals are still available, the developer is still required to provide a copy of their approval letter to each perspective purchaser and to report all sales to FIRB on a twelve monthly basis until all the dwellings in the development have been sold or occupied. Apart from these (relatively rare) "old approval" cases, there is no requirement for developers to seek advance approval to sell new dwellings to foreign persons.

Residential real estate for development

Established dwellings may be acquired for the purpose of demolishing the dwelling and constructing a new one, but this does not include refurbishing or renovating the existing dwelling. Proposals for redevelopment are normally approved subject to the following:

- the proposal must provide for an increase in the number of dwellings.
- the existing residence cannot be rented out prior to demolition and redevelopment.
- the existing dwelling must be demolished and continuous substantial construction of the new dwellings must commence within twenty four months.

The requirement to increase the number of dwellings can be waived if it can be shown that the existing dwelling has reached the end of its economic life - ie: it is either derelict or uninhabitable. On this basis it can be said that a new dwelling would increase the available housing stock. Evidence in support of the claims that the property is derelict or uninhabitable must be provided.

Issues

Some of the more common questions that are asked include:

Is it possible for a foreign resident to make a bid at an auction and if successful, then apply for approval?

Generally, the answer is no. The only way this could be done is if the bidder had a private agreement with the agent and vendor that the sale was conditional upon FIRB approval being

obtained. In some cases it may be possible for FIRB to provide the intending purchaser with an approval in advance of the auction. The approval will be only in respect of the nominated property, and the FIRB require at least five working days prior to the auction in order to be able to process the request.

How many properties can foreign residents purchase?

Temporary Residents can acquire one established dwelling to be used as a principal place of residence. Other than this, there are no restrictions on the number of properties foreign purchasers are permitted to purchase.

Can the foreign purchaser substitute another purchaser?

FIRB approval is granted to a specific named purchaser. If the foreign purchaser wished to insert a nominee, such as a company, this will have to be ascertained when the contract is signed so that the correct party can apply for the approval.

Please feel free to contact David Stratton, Ryan Curtis-Griffiths or Helen Zheng, Lawyers in our Migration Law Work Group, if you require further information in relation to this issue, or if you require legal advice regarding any other migration law matter.

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