Australia FIRB commercial land foreign investment guidance 2023

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Overview

In January 2023, the Foreign Investment Review Board issued a series of guidance notes to assist investors and stakeholders in their engagement with foreign investments in Australia. As a foreign investor, it is crucial to understand the intricacies of the Australian Foreign Acquisitions and Takeovers Act 1975, which requires foreign persons seeking to acquire an interest in commercial land to obtain foreign investment approval.

Developed commercial land has a monetary threshold of $310 million, while sensitive commercial land has a threshold of $67 million. However, if the foreign person is from a certain free trade agreement partner, the threshold is $1,339 million, regardless of the land's sensitivity. It is important to note that even if the proposed investment falls below the monetary threshold, foreign investment approval is still required if the land is considered "national security land."

Commercial land is defined as land in Australia, including any building on the land, or the seabed of the offshore area, other than land used wholly and exclusively for a primary production business or land on which the number of dwellings that could reasonably be built is less than 10. For an acquisition of vacant commercial land to be approved, it is generally conditional on the land being put to productive use within a reasonable timeframe. Additionally, an exemption

certificate covering acquisitions of vacant commercial land for the purpose of undertaking a primary production business or residential development is conditional on Australian investors having an equal opportunity to invest in that land through an open and transparent sale process.

Foreign persons must keep records relating to certain actions concerning their foreign investment for up to five years. Applications for foreign investment approval must be submitted electronically on the Foreign Investment Review Board (FIRB) website and are supported by further guidance. A fee is payable for all foreign investment applications.

Breaches of foreign investment law may attract significant penalties, including infringement notices, civil, and criminal penalties. However, Part 3 of the Foreign Acquisitions and Takeovers Regulation 2015 provides a number of exemptions where an acquisition of commercial land may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer.

Foreign persons must not take a notifiable and significant action or a notifiable national security action until they have received foreign investment approval for that proposed action. A proposed investment will be screened for foreign investment approval under the national interest test if it is a notifiable and significant action. If the proposed investment is a notifiable national security action and not also a significant action, it will be screened under the narrower national security test.

The Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken, even if they do not inform the Treasurer about it. Certain foreign investments that are not notifiable actions or notifiable national security actions may be reviewable national security actions. Where a reviewable

national security action is not notified to the Treasurer, the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily notifying reviewable national security actions. The National Security Guidance Note outlines investment areas that may raise national security concerns, where investors are therefore encouraged to voluntarily notify.

Uderstanding these guidance notes is crucial for any foreign investor looking to engage in commercial land investments in Australia. Ensuring that all necessary steps are taken to comply with foreign investment approval requirements will mitigate the risk of incurring penalties or having investments called-in for review.

Thresholds for commercial land investments

When it comes to investing in commercial land in Australia, foreign persons are required to obtain foreign investment approval, and the monetary threshold for such investments is based on the consideration for the investment, not the value of the land. The applicable threshold is dependent on whether the land is vacant or developed, whether it is considered sensitive land, the nationality of the investor, and whether the foreign person is a foreign government investor.

For foreign government investors, there is a $0 threshold for all types of commercial land. Private investors from certain free trade agreement (FTA) partners, except Hong Kong, have a $0 monetary threshold for investment in vacant commercial land and a $1,339 million threshold for investment in developed commercial land. For private investors from Hong Kong, there is a $0 threshold for investment in vacant commercial land, a $67 million threshold for investment in sensitive developed commercial land, and a $1,339 million threshold for investment in developed (non-sensitive) commercial land.

For private investors from India, the threshold is $500 million for investments in developed (non-sensitive) commercial land acquired predominantly for the supply of a service through a commercial presence in Australia. All other private investors have a $0 threshold for investment in vacant commercial land, a $67 million threshold for investment in sensitive developed commercial land, and a $310 million threshold for investment in developed (non-sensitive) commercial land.

For all investments in national security land, the monetary threshold is $0, regardless of the investor. Commercial land is considered vacant commercial land if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods, or livestock.

Vacant commercial land investments

As part of the national interest test, the Treasurer will generally ensure that vacant commercial land is put to productive use within a reasonable timeframe and that 'land banking' does not occur. If an application for vacant commercial land is approved, it will generally be subject to conditions such as the land being developed, continuous construction of the proposed development commencing within five years of completing the purchase of the land, and the land not being sold, transferred, or otherwise disposed of before the development is completed.

Foreign persons must not dispose of the land until construction is complete, but the sale of a completed stage of the development and the sale of blocks within a newly developed subdivision are exceptions. These development conditions ensure that 'land banking' does not occur, and the land will be put to productive use. The conditions imposed will be considered on a case-by-case basis to ensure that they do not unduly hinder the legitimate commercial practices of the proposed investment while still ensuring that the land is

put to productive use.

Developed commercial land investments

Foreign investment in commercial land that is already developed and has a substantive permanent building on it is subject to stricter screening procedures, especially if the land is deemed sensitive or hosts critical infrastructure. In Australia, developed commercial land is defined as any commercial land that is not vacant and is legally fit for occupancy by people, goods, or livestock. Such land is often used for industrial, commercial, or residential purposes.

The screening of foreign acquisitions of developed commercial land depends on various factors, such as the kind of business it is used for, the nationalities of the investors, and whether the land is classified as sensitive or not. If any of the above mentioned factors apply, a lower monetary screening threshold will apply.

For example, if a foreign person intends to acquire commercial land that will be leased to the Commonwealth or any other government body, the screening process will be stricter. Similarly, if the land is going to be used for sensitive purposes such as uranium extraction, nuclear operations, or the storage, handling, or disposal of security-sensitive biological agents, the screening will be more stringent. Other critical infrastructure uses such as public infrastructure, telecommunications networks, and storage of critical servers for financial institutions also attract tighter scrutiny.

The screening process aims to ensure that foreign investments in sensitive or critical commercial land do not pose a risk to Australia’s national interest. This is achieved through various measures such as limiting foreign ownership and control of critical infrastructure, ensuring land is put to productive use within a reasonable time frame, and preventing “land banking” or holding onto land without developing it. The

specific conditions and restrictions will vary based on the circumstances of each investment and the degree of sensitivity of the land.

Exemption certificates for commercial land

Foreign persons seeking to make multiple acquisitions of commercial land in Australia can streamline the approval process and reduce regulatory burden by applying for a Land Exemption Certificate under section 58 of the Foreign Acquisitions and Takeovers Act 1975. This certificate grants up-front approval for a program of acquisitions, eliminating the need to seek separate individual approval for each investment. However, a financial limit will apply to all exemption certificates, which will be determined on a case-by-case basis.

While exemption certificates are a beneficial mechanism for foreign investors, it is important to note that the standard conditions applying to acquisitions of vacant commercial land, such as commencing development within five years, will continue to apply regardless of whether the land was acquired through an individual no objection notification or an exemption certificate.

Exemption certificates are generally issued for 12 months to first-time exemption certificate holders, and longer durations may be considered for investors who have a demonstrated compliance history with the foreign investment framework. However, it is worth noting that exemption certificates are intended for foreign persons proposing to engage in a high volume of acquisitions. As such, a certificate will not usually be granted where the number of likely acquisitions is small and it would be reasonable for the foreign person to notify them separately.

In cases where a program of land acquisitions may include land that is ‘national security land’ or may otherwise give rise to

national security concerns, foreign persons can also apply for a National Security Exemption Certificate under sections 43BA and 43BB of the Foreign Acquisitions and Takeovers Regulation 2015. These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. However, before granting one of these exemption certificates, the Treasurer must be satisfied that the taking of the action or kinds of actions by the foreign person would not be contrary to Australia’s national security.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com