

TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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The Foreign Investment Review Board is to protect Australia's national interests. To make sure others don't come in and buy the place.

Foreign Investment Review Board

The Foreign Investment Review Board is to protect our national security, competition, government policies, economy and community. But how does this actually work?

In search for an answer, we asked Simon Dorevitch of [A & A Tax Legal Consulting](#) for more details. Here is what we learned but please listen in as Simon Dorevitch explains all this much better than we ever could.

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Foreign Investment Review Board

In its quest to protect Australia's national interests, the Foreign Investment Review Board (FIRB) doesn't operate alone. The Treasurer and the ATO also play a crucial role in the review of foreign investments.

The FIRB reviews the foreign investment application, hence its name. It then advises the Treasurer on the national interest implications of the relevant foreign investment.

The Treasurer makes the ultimate decision. The decision is based on advice the Treasurer receives. This includes advice from the FIRB, but might also include advice from other agencies and departments like the ACCC.

The ATO supports the FIRB by administering foreign investments in residential real estate. The ATO is also responsible for maintaining a register of foreign investment in residential or agricultural land and water entitlements.

Four Questions

When you want to buy an asset, chances are you don't need the FIRB's tick of approval. Chances are that you have an Australian passport or PR and are ordinarily resident in Australia.

But to know for certain, you need to ask 4 questions:

- 1 – Are you a foreign person?
- 2 – Is it a notifiable or significant action?
- 3 – Is it above the threshold?
- 4 – No exemption applies?

If your answer is Yes to all four questions, then you need the Treasurer's approval to buy an asset. And you get the Treasurer's approval by applying to the Foreign Investment Review Board who may or may not reject your application or accept it with conditions.

Question # 1 – Are You a Foreign Person?

Any entity can be a foreign person. Individuals, companies, trusts, foreign governments – you name it.

Individual

An individual as in a natural person is a foreign person if not ordinarily resident in Australia.

If you don't have Australian citizenship, you avoid being a foreign person by having been in Australia for at least 200 days of the 12 months before the purchase and you either

- are in Australia at the time of purchase and your continued presence in Australia is not subject to any limitation as to time imposed by law; or
- are not in Australia at the time of purchase, but when you left Australia last, your continued presence in Australia was not subject to any limitation as to time imposed by law.

If you are an Australian citizen, there are no specific rules around when you are ordinarily resident in Australia. So the answer is probably a question of fact and degree and the courts might put more meaning to this with time.

Companies

A company is a foreign entity, if its shareholders are foreign entities. And this is the case when an individual is not ordinarily resident in Australia. Or a foreign corporation or a foreign government holds a substantial interest in the company. This also applies to two or more foreign entities holding an aggregate substantial interest.

You hold a substantial interest if you (alone or with one or more associates) have an interest of at least 20%. Corporations or trusts may hold a substantial interest. The rules allow for tracing through multiple layers

You have an aggregate substantial interest if you with one or more associates hold an interest of at least 40%.

Discretionary Trust

Generally, the trustee of a discretionary trust where one or more foreign persons hold any beneficial interest is generally considered to be a foreign person in their capacity as trustee of the trust.

So one foreign beneficiary will turn the entire trust into a foreign person. Here is example 3 from the Guidance Note no. 5:

“A discretionary trust is established in Australia and the trustee is an Australian citizen. Four individuals hold a beneficial interest in the trust, as potential beneficiaries of any of the income or property of the trust. One of those individuals is not ordinarily resident in Australia and is not an Australian citizen, and the others are Australian citizens.

The individual who is not ordinarily resident in Australia is a foreign person and taken to have a 100 per cent interest in the trust (irrespective of how the trustee may exercise his or her discretion in practice). The trustee of the trust is a foreign person for the purposes of Australia's foreign investment framework."

Foreign Governments

An entity is a foreign person, if a foreign government or government entities hold a substantial interest or an aggregate substantial interest in the entity. This can include foreign pension funds.

Regardless of value, all foreign government investors must obtain approval before acquiring an interest in Australian land, a direct interest in an Australian entity, starting a new business in Australia or acquiring a legal or equitable interest in a tenement or an interest of at least 10% in securities in a mining, production or exploration entity.

Question # 2 – Is It a Notifiable or Significant Action?

An action can be a notifiable action (higher risk), a significant action (relatively lower risk) or neither. The categories are not mutually exclusive, nor is one a sub-set of the other.

Notifiable Actions

You must notify the Treasurer before undertaking a notifiable action. A notifiable action is a proposed action by a foreign person to acquire a:

- Direct interest (10% or less) in an Australian entity or Australian business that is an agribusiness.
- Substantial interest (20%) in an Australian entity.
- Interest in Australian land subject to some monetary thresholds.
- Interest in sensitive sectors.

Agribusiness

An Australian agribusiness is an Australian entity or business which carries on, or uses its assets fully or partly in, a business in any of the following industries:

- Agriculture, forestry and fishing
- Processing of meat, poultry, seafood, milk and cream or fruit and vegetables
- Manufacturing of cheese and other dairy products, oils and fats or grain mill products.

And either more than 25% of its assets (by value) or more than 25% of its earnings relate to agribusiness.

Australian Land

Australian land includes agricultural land, commercial land, residential land or a mining or production tenement. While all foreign persons must obtain approval from Australia's FIRB before making any investment in Australian residential property (regardless of monetary value), applications to purchase new dwellings are generally approved without conditions and applications to purchase vacant land are normally approved subject to construction being completed within four years.

However, applications to purchase established dwellings are generally prohibited unless the purchase is for redevelopment or if the foreign person is a temporary resident who may apply to purchase one established dwelling to use as a residence while they live in Australia.

Direct Interest

A direct interest is an interest of at least 10% in the entity or business; or an interest of at least 5% in the entity or business if the person who acquires the interest has entered into a legal arrangement relating to the business of the person and the entity or business; or

A direct interest is also an interest of any percentage if the person who acquired the interest is in a position to influence or participate in the entity's central management & control CM&C or to influence, participate in or determine the policy of the entity or business.

Sensitive Sectors

Sensitive sectors include media, telecommunications, transport, military, nuclear as well as encryption, security and communication

Anything else is not a notifiable action.

Significant Actions

Significant actions are actions which generally pose a lower risk to Australia's national interest than notifiable actions. Actions by a foreign person that may be a 'significant action' include the acquisition of

- Australian land,
- Direct interests in Australian agribusiness,
- Interests in Australian business assets changing control in the business.

It also includes:

- entering into a 'significant agreement' with an Australian business resulting in a change of control in the business,
- actions relating to the acquisition of interests in or issue of securities in an entity, and
- certain other actions, such as alterations to constituent documents, that result in the company coming under the control of a foreign person (or a foreign person's associate).

These will only be significant actions where the investment exceeds the prescribed monetary threshold.

Foreign persons are under no obligation to inform the Treasurer if they plan to undertake a significant action (unless the action is also categorised as a notifiable action).

However, the Treasurer has the right to review all investments made in Australia that are significant actions. If a significant action is taken without notifying the Treasurer and the Treasurer later determines that the action is contrary to the national interest, the Treasurer can make a disposal order, unwind the action or otherwise attach conditions. Therefore, to avoid any future complications, it is often recommended that a foreign person notify the Treasurer of any proposal to take a significant action (even if it is not a notifiable action).

Neither

If an action is neither a significant action nor a notifiable action, the Treasurer has no authority to exercise their unwind power.

Question # 3 – Is the Investment Above The Threshold?

If an invest is below a monetary threshold and is not a notifiable or significant investment, then it should be clear of the FIRB review rules. Monetary thresholds are quite confusing and might change with time. So please forgive us for not replicating them here.

Question # 4 – No exemption applies?

There are a number of exemptions. Australian land acquired from government or by a person with a close connection to Australia are good examples. As are acquisitions by will or devolution.

Australian and New Zealand citizens as well as PR holders are usually exempt as well, even if not ordinarily resident in Australia.

The most prominent exemption is the New Dwelling Exemption Certificate that developers can obtain for new or near-new dwellings. This certificate allows the developer to sell dwellings in the specified development to foreign persons.

Developers (either Australian or foreign) can apply for a New Dwelling Exemption Certificate for a specified development if the development will consist of 50 or more dwellings (other than townhouses) and has development approval from the relevant government authority. If applicable, foreign investment approval must have been given to purchase the land and the relevant conditions were met.

Outcome

So now you determined that you need to apply and you lodge your application. You pay your application fee and wait. What happens next?

The FIRB reviews your application and then presents your case to the Treasurer's office. There are 4 possible outcomes. The Treasurer can:

- 1 – approve your proposal unconditionally (issue a no-objection notification)
- 2 – approve it subject to conditions to protect the national interest
- 3 – prohibit your proposal; or
- 4 – order than an action already undertaken be undone.

There is no right to appeal / judicial review. The Treasurer's decision is final. Most proposals are now approved subject to so-called standard tax conditions.

In February 2016, the government introduced tax conditions designed to target those foreign investments that pose a risk to Australia's revenue.

There are eight 'standard' tax conditions. Generally speaking, the effect of the standard conditions is to require compliance with Australia's tax laws, co-operation with the ATO by producing information in a timely and complete manner, payment of outstanding tax debt and reporting on compliance with the conditions and the holding of the asset.

Standard Tax Conditions

Broadly, the 8 standard tax conditions are as follows:

- 1 – The applicant must comply with the taxation laws of the Commonwealth in relation to the action.
- 2 – The applicant must use its best endeavours to ensure, and within its powers must ensure, that entities within its 'control group' comply with the taxation laws of the Commonwealth in relation to the action.

3 – The applicant must provide any document or information that is required to be provided to the ATO in accordance with taxation laws of the Commonwealth in relation to the action.

4 – The applicant must use its best endeavours to ensure, and within its powers must ensure, that entities within its ‘control group’ provide any document or information that is required to be provided to the ATO in accordance with taxation laws of the Commonwealth in relation to the action.

5 – The applicant must pay its outstanding tax debt under the tax laws of the Commonwealth and must use its best endeavours to ensure, and within its powers must ensure, that entities within its ‘control group’ pay their taxation debts.

6 – The applicant must provide an annual report to the FIRB on compliance with these actions.

7 – The applicant must advise the FIRB within 60 days of taking the action that it has done so.

8 – The applicant must advise the FIRB within 60 days of a ‘termination event’ that the event has taken place. Broadly, this is where the applicant ceases to hold the relevant interest, control the relevant entity or carrying on the relevant business.

Rejection

In practice, there are very outright rejections of applications. If the application is doomed to fail, investors usually withdraw their application. They don’t want the details of their application to become public.

Here are some numbers from 2016/17 to illustrate this point:

8,607 unconditional approvals.

5,750 approvals subject to some conditions.

770 withdrawals.

3 rejections.

In case you thought the 3 rejections were an outlier, 2015/16 wasn’t much different with 5 rejections. Here are 3 examples of applications that were blocked over the years:

Royal Dutch Shell’s proposed takeover of Woodside Petroleum in 2001; Singapore Exchange’s proposed merger with the ASX in 2011 and State Grid Corporation of China bidding for a 99-year lease of a majority stake in the NSW electricity distribution network.

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