



RESIDENTIAL REAL ESTATE — NEW (AND NEAR-NEW) DWELLING EXEMPTION CERTIFICATE

Property developers and other vendors can apply for an exemption certificate to sell new dwellings and near-new dwellings in a development to foreign persons – a New Dwelling Exemption Certificate and a Near-New Dwelling Exemption Certificate.

Where the developer holds an exemption certificate, the individual foreign investor will not be required to seek their own foreign investment approval to purchase a new dwelling or near-new dwelling in that development. A near-new dwelling means a dwelling that has never been lived in, was sold but failed to settle.

Applications for New Dwelling Exemption Certificates that are received from 7:30pm (AEST) 9 May 2017 which are approved will be subject to a condition that the developer may only sell a maximum of 50 per cent of the total dwellings in the development to foreign persons. This condition will not apply to existing approvals, or applications.

This Guidance Note sets out the factors that will be considered when assessing an application for a New Dwelling Exemption Certificate and a Near-New Dwelling Exemption Certificate and the conditions that will normally apply to such certificates.

NEW DWELLING EXEMPTION CERTIFICATE REQUIREMENTS

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);
- has development approval from the relevant government authority; and
- if applicable, foreign investment approval was given to purchase the land and that conditions are being met.

A project will be considered to be a ‘development’ where it comprises one or more multi-storey buildings that will, or have been built under one development approval. For the purposes of a New Dwelling Exemption Certificate, a ‘development’ does not include house and land packages.

If the developer does not have unconditional approval to commence development from the relevant government authority, for example because further approval or action is required, the developer may not be eligible for a New Dwelling Exemption Certificate.

Applications for a certificate will be considered on a case-by-case basis to ensure they are not contrary to the national interest.

Factors that will be considered as part of the decision making process include:

- a marketing or advertising schedule that outlines when, where and how the development will be marketed in Australia, including dates and budgeted expenditure;
- a schedule of the number of dwellings to be built in the development, or stage of the development.
NOTE: New Dwelling Exemption Certificates for developments with multiple stages may not be approved for all stages of the development in the first instance, even if development approval has been granted for the entire development;
- information on the specific units to be built in the development or stage of the development, such as the unit number, number of bedrooms in each unit, allocated car spaces and the expected sale price of each unit;
- ownership information of the development, including shareholders and beneficiaries as applicable;
- architectural plans and artists impressions of the proposed development; and
- compliance standing—If an applicant, or any related person or entity, has held an exemption certificate previously (such as those known as an ‘advanced off-the-plan’ certificate) and has not complied with its conditions, this compliance history will be taken into account when assessing the application (for example, meeting reporting requirements and any existing conditions).

Example 1

City Builder Co. is a developer who wants to construct a 100 dwelling apartment complex. The local government authority has issued City Builder Co. with a permit for the development subject to the condition that the developer receives approval from the State transit authority. The developer may not commence development until the approval from the State transit authority has been submitted to the local government authority, and the local government authority has issued a development approval. City Builder Co. may not meet the eligibility criteria for a New Dwelling Exemption Certificate prior to receiving the development approval which will enable City Builder Co. to commence development.

Example 2

Sam’s Building Co. is a developer who wants to construct a 200 dwelling apartment complex in two stages. Sales for the first stage, which will consist of 90 dwellings, are likely to commence in the next six months, and Sam’s Building Co. wants to obtain a New Dwelling Exemption Certificate to be able to sell new dwellings in the development to foreign persons. Sam’s Building Co. applies for a New Dwelling Exemption Certificate and supplies detailed plans for the first stage, however, is unable to provide details for the second stage, which is still waiting on local government approval. Sam’s Building Co. is granted an exemption certificate for stage one of the development and can apply for an exemption certificate for stage two in the future.

Approvals

Applications for a New Dwelling Exemption Certificate will normally be approved subject to conditions that the developer:

- provide a copy of the New Dwelling Exemption Certificate to each foreign purchaser;
- market dwellings for sale in Australia;
- report in accordance with the conditions of their certificate on dwellings acquired by foreign persons covered by the certificate, including purchaser details and the value of dwellings (until all dwellings in the development have been sold); and
- pays the applicable fees for dwellings sold within each reporting period.

In addition, applications for New Dwelling Exemption Certificates that are received from 7:30pm (AEST) 9 May 2017 which receive approval will be subject to the condition that the developer may only sell a maximum of 50 per cent of the total dwellings in the specified development to foreign persons.

Reports should be submitted to firbresidential@ato.gov.au using the New Dwelling Exemption Certificate Report form available at www.firb.gov.au/real-estate/developers.

New Dwelling Exemption Certificates will normally exempt prospective foreign persons from individually seeking foreign investment approval to purchase interests in new dwellings up to a cumulative total of \$3 million in the specified development. If they wish to purchase further interests in new dwellings in the development, the certificate will not cover these purchases and the foreign person will individually need to seek foreign investment approval.

Applications to vary an approved New Dwelling Exemption Certificate will be considered on a case-by-case basis. A fee will apply for this. As part of granting a variation, generally the conditions of the exemption certificate will be updated to reflect the conditions that certificates are normally subject to at the current time.

Example 3

Lauren is a foreign person who wants to acquire a new dwelling off-the-plan worth \$2 million from a developer that holds a New Dwelling Exemption Certificate which allows the developer to sell dwellings in an off-the-plan development to foreign persons up to the value of \$3 million. If the developer provides Lauren with a copy of the New Dwelling Exemption Certificate then she does not need to seek separate foreign investment approval for the proposed acquisition. The developer would be required to pay the relevant fee for the dwelling in the reconciliation period that Lauren acquires an interest in the dwelling.

Lauren then decides she would like to acquire another dwelling worth \$1.3 million off-the-plan in the same development. This would bring the total value of dwellings acquired by Lauren to \$3.3 million. As this would take her total interest in the development above the \$3 million threshold for purchases in the same development, Lauren would be required to seek separate foreign investment approval to acquire the dwelling and pay the relevant application fee on the \$1.3 million dwelling.

Example 4

Mitchell is a foreign person who wants to acquire a new dwelling worth \$3.5 million off-the-plan from a developer that holds a New Dwelling Exemption Certificate. As the value of the single dwelling is above the \$3 million threshold for acquisitions in the specified development, Mitchell would be required to seek separate foreign investment approval to purchase the dwelling and pay the relevant application fee.

NEAR-NEW DWELLING EXEMPTION CERTIFICATE

A Near-New Dwelling Exemption Certificate has been introduced for failed off-the-plan purchases in a development, which allows for developers to sell near-new dwellings in a similar way to new dwellings.

This fix is necessary because the *Foreign Acquisitions and Takeovers Act 1975* defines a new dwelling as a property that has not been previously “sold”. A property is considered “sold” once a binding purchase agreement has been entered into regardless of whether the sale is completed (or settled). If a purchase is not completed the dwelling would no longer be covered by the New Dwelling Exemption Certificate as it is not a new dwelling.

A near-new dwelling is a dwelling in a development that has previously been “sold” although the sale was not completed and the developer is entering a new agreement to sell the dwelling.

A person may apply for a Near-New Dwelling Exemption Certificate if some or all of the dwellings in the development are or may be near-new dwellings.

PURCHASING PROPERTY UNDER A NEW DWELLING OR NEAR-NEW DWELLING EXEMPTION CERTIFICATE

When a developer holds a New Dwelling or Near-New Dwelling Exemption Certificate, foreign persons will normally not require separate foreign investment approval before acquiring a new or near-new dwelling in the development specified in the certificate. Foreign persons should ask for a copy of the New Dwelling or Near-New Dwelling Exemption Certificate for the development where they intend to purchase the dwelling and ensure that it covers their intended purchase.

Foreign persons who purchase residential real estate may be subject to an annual charge where the property is not rented out or occupied for more than six months each year. Foreign persons whose purchases are covered by a New Dwelling Exemption Certificate will be subject to the annual charge where the acquisition was made after 7.30pm (AEST) on 9 May 2017. For more information, see Guidance Note 48.

FEES

An application for a new (or near-new) dwelling exemption certificate will not be considered until the relevant initial application fee has been paid.

Developers are also liable to pay a fee for each interest in a dwelling that is acquired in the development by a foreign person.

- However, in practice, it is possible for the developer and the foreign person to reach a separate agreement about who will pay the fee to the ATO. Where a foreign person agrees with the developer to pay the application fee directly to the ATO, they can do so using the payment reference number (PRN) listed on the Exemption Certificate.

For more information, see Guidance Note 30.

PURCHASING A NEW DWELLING IN A DEVELOPMENT THAT DOES NOT HAVE A NEW OR NEAR-NEW DWELLING EXEMPTION CERTIFICATE

Developers who do not wish to apply for a New Dwelling Exemption Certificate, may apply for a streamlined bulk approval process by sending an email to firbresidential@ato.gov.au. The developer will not be charged a fee for this process.

The ATO can streamline approvals for properties valued under \$3 million in the development where the developer:

- meets the New Dwelling Exemption Certificate requirements;
- has a strong compliance history; and
- has already marketed, and will continue to market, the development in Australia.

Where the ATO has agreed to streamline approvals for a developer, the developer can apply as an agent on behalf of the purchaser using the ATO's residential real estate application form. A separate application must be submitted for each foreign investor purchasing a dwelling in the development. The foreign investor must pay the relevant fee when the application is submitted because if the developer does not have an exemption certificate, liability for the payment of fees rests with the foreign investor. The ATO will then undertake streamlined processing of each individual application, with approval contingent on the payment of the correct fee. The ATO will undertake to provide decision outcomes to the developer within 10 working days of payment of the correct fee.

HOW TO APPLY

If you would like to apply for a New Dwelling Exemption Certificate or a Near-New Dwelling Exemption Certificate please use the Australian Taxation Office's foreign investment application form.

Applicants should take care to ensure they supply the correct details and all required information as part of their application, as changes to details such as name or property address after an approval has been granted may require applicants to seek a new approval and be subject to further fees.

PENALTIES

Developers who fail to comply with the conditions of either a New Dwelling Exemption Certificate or a Near-New Dwelling Exemption Certificate may be subject to strict penalties (including civil and criminal penalties).

For example, if a developer that holds a New Dwelling Exemption Certificate fails to market dwellings in the specified development in Australia, they may have committed an offence or breached a civil penalty provision under the legislation. The maximum penalty that may be

imposed on an individual found guilty of this offence is three years imprisonment, a fine equivalent to 750 penalty units (currently \$157,500) or both. A company who is found guilty of this offence may face a fine equivalent to 3,750 penalty units (currently \$787,500). Civil penalties include a fine of up to 250 penalty units (\$52,500) for individuals, or 1,250 penalty units (\$262,500) for companies.

Civil penalties and infringement notices also apply to developers who fail to meet reporting requirements associated with a New Dwelling Exemption Certificate or Near-New Dwelling Exemption Certificate.

For more information, see Guidance Note 11.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.