



GUIDANCE NOTE 14

On 29 March 2020, the Treasurer announced that due to the impacts of the coronavirus outbreak, all monetary thresholds will be temporarily reduced to \$0, and that the FIRB will work with applicants to extend the timeframes for decision making to up to six months. Further information on these temporary changes can be found in 'Guidance Note 53: Temporary measures in response to the coronavirus', available on the FIRB website at www.firb.gov.au.

All other guidance material, including this note on commercial land, should be read in light of those temporary changes. Within this note, the temporary changes may have particular impact on matters related to, but not exclusively including:

- the monetary thresholds for determining if the threshold test is met;
- the definition of low threshold (sensitive) developed commercial land for the purpose of actions covered by an exemption certificate;
- the leasing of commercial land, including the renegotiation of existing leases; and
- the application fees for developed commercial land.

Where there is any inconsistency between this note and Guidance Note 53, the information in Guidance Note 53 takes precedence.

COMMERCIAL LAND

Last updated: 6 February 2020

Foreign persons may be required to notify and receive a no objection notification before acquiring an interest in commercial land in Australia. Different rules apply depending on whether the land is vacant or not, whether the proposed acquisition meets the conditions for lower threshold land¹, and the value of the proposed acquisition.

This Guidance Note sets out commercial land acquisitions that are notifiable actions and outlines the conditions that will normally apply to a no objection notification.

COMMERCIAL LAND DEFINITION

Commercial land means 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;
- on which the number of dwellings that could reasonably be built is less than 10; or
- on which there is at least one dwelling (except commercial residential premises).

'Commercial residential premises' has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* and includes:

¹ Low threshold commercial land includes mines and critical infrastructure (for example, an airport or port).

- a hotel, motel, inn, hostel or boarding house;
- premises used to provide accommodation in connection with a school;
- a marina with berths occupied by ships used as residences;
- a caravan park or camping ground; or
- any other premises similar to those outlined under *A New Tax System (Goods and Services Tax) Act 1999*, other than premises used to provide accommodation to students in connection with an education institution that is not a school.

On 1 July 2017, amendments to the Regulation included changes to the treatment of other residential premises used for commercial purposes, namely aged care, retirement villages and certain forms of student accommodation.

For more information on commercial residential premises and the treatment of aged care facilities, retirement villages and certain forms of student accommodation, see [Guidance Note 15](#).

VACANT COMMERCIAL LAND

Commercial land is vacant if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock. From 1 July 2017, land is not considered vacant if a wind or solar power station is located on the surface of the land. For information on the treatment of wind or solar power stations see [Guidance Note 50](#).

Foreign persons generally need to notify before acquiring an interest in any vacant commercial land, regardless of the value of the proposed acquisition (\$0 threshold). No objection notifications will normally be subject to conditions that the foreign person:

- commences continuous construction of the proposed development on the land within five years of the date of approval; and
- does not sell the land until construction is complete.

Example 1

A property developer is seeking to purchase vacant land to develop into an apartment complex. The developer wishes to sell the apartments off the plan. The approval to purchase the land would normally be subject to a condition that the land not be sold until construction is complete. The developer would not breach this condition by selling the apartments off the plan as apartments sold off the plan are not considered sold until the development is complete and settlement takes place.

DEVELOPED COMMERCIAL LAND

Foreign government investors are required to notify before acquiring any interest in developed commercial land, regardless of the value (\$0 threshold) and their country of origin.

Other foreign persons need to notify before acquiring an interest in developed commercial land only if the consideration for the interest is more than the relevant notification threshold. Where the developed commercial land is considered to be sensitive the acquisition will be subject to a lower threshold (\$60 million). Low threshold land includes mines and public infrastructure. Otherwise, the notification threshold is \$275 million.

If the foreign person is from an agreement investor country or region, the threshold is \$1,192 million regardless of whether the land is low threshold land.

Threshold values are indexed annually on 1 January.

Commercial land thresholds – summary

Action	Notification threshold
An interest in commercial land that is vacant	\$0
An interest in commercial land by a foreign government investor	\$0
An interest in low threshold commercial land that is not vacant (except certain agreement country or region investors ²)	\$60 million
An interest in non-low threshold commercial land that is not vacant (except an agreement country or region investor ²)	\$275 million
An interest in low threshold or non-low threshold commercial land that is not vacant by an agreement country or region investor ²	\$1,192 million

Example 2

A French foreign non-government investor is seeking to acquire a 20 per cent interest in a shopping mall complex. The total value of the shopping mall complex is \$850 million. As the value of the foreign investors' proposed interest (\$170 million) is less than the \$275 million threshold and this shopping mall is not low threshold land, the foreign investor does not need to notify. However, if the mall included a lease to a Commonwealth, State or Territory agency (e.g. Centrelink), the investor would need to apply if the interest to be acquired gives a right to be involved in the central management and control of the entity that holds the land (unless they are an agreement country or region investor with access to the \$1,192 million threshold).

Low threshold developed commercial land

² Agreement country or region investors not subject to the low threshold are those from: the United States of America, New Zealand, Chile, Japan, the Republic of Korea, China, Singapore, a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force (CPTPP) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam).

The acquisition of certain interests by foreign persons (other than by certain agreement country or region investors and foreign government investors) in developed commercial land that gives a right to occupy the land or be involved in the central management and control of the entity that holds the land are subject to a lower threshold³ if any one or more of the following apply at the time the interest in commercial land is acquired:

- the land will be leased to the Commonwealth, a State, a Territory, or a Commonwealth, State or Territory body, except land leased to corporate Commonwealth entities with the exception of:
 - the Australian Nuclear Science and Technology Organisation;
 - Comcare (the body corporate established under section 68 of the Safety, Rehabilitation and Compensation Act 1988);
 - the CSC (short for Commonwealth Superannuation Corporation) within the meaning of the Governance of Australian Government Superannuation Schemes Act 2011;
 - the Commonwealth Scientific and Industrial Research Organisation; and
 - the Reserve Bank of Australia.
- the land will be fitted out specifically for a business of the following kinds:
 - the storage of bulk data;
 - the supply of training or human resources to the Australian Defence Force or other defence forces;
 - the manufacture or supply of military goods, equipment or technology to the Australian Defence Force or other defence forces;
 - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
 - the development, manufacture or supply of, or the provision of services to, encryption and security technologies and communications systems; or
 - the extraction of, or the holding of rights to extract, uranium or plutonium or the operation of nuclear facilities.
- land that will be fitted out to store, handle or dispose of biological agents on the List of Security-sensitive Biological Agents (within the meaning of the *National Health Security Act 2007*);
- where an authorisation under law of the Commonwealth, a State or a Territory will allow materials that are regulated under that law to be produced or stored on the land;
- a mine, oil, gas well, quarry or similar operation will operate on the land;
- a stored communication (within the meaning of the *Telecommunications (Interception and Access) Act 1979*) will be stored on the land;
- the failure of part of a telecommunications network unit (within the meaning of the *Telecommunications Act 1997*) on the land would result in telephone or internet services not being provided on other land;
- servers critical to an Authorised Deposit-taking Institution (within the meaning of the *Banking Act 1959*) or a stock exchange in Australia will be stored on the land; or
- public infrastructure will be located on the land.
- 'Public infrastructure' refers to an airport or airport site; a port; infrastructure for public transport (whether or not the infrastructure is operated or owned by a Commonwealth,

State or Territory body); and a system or facility that is used to provide various services to the public, including the generation, transmission distribution or supply of electricity; the supply of gas; the storage, treatment or distribution of water; or the treatment of sewage.

As of 1 July 2017, land falling under prescribed airspace is no longer subject to the low threshold, unless it meets one or more of the kinds of land listed above.

Example 3

A German foreign non-government investor is seeking to wholly acquire an office building for \$75 million. As three floors of the building are currently leased to a State Government Agency, the foreign investor's proposed acquisition would be subject to the lower developed commercial threshold. The foreign investor is required to notify and receive a no objection notification before acquiring the office building.

EXEMPTION CERTIFICATES

Foreign persons (including foreign government investors) are able to apply for an exemption certificate to cover a program of acquisitions in commercial land. Exemption certificates for commercial land will generally not be granted for interests in low threshold commercial land.

Conditions imposed on exemption certificates for interests in commercial land will apply in the same way as if the land was being acquired individually.

For more information, see [Guidance Note 21](#).

OTHER EXEMPTIONS – COMMERCIAL LAND

Australian citizens who live abroad do not need to apply for foreign investment approval to purchase commercial real estate in Australia (see [Guidance Note 22](#)). Other foreign persons with a close connection to Australia as defined under subsection 35(1) of the Regulation are also exempt from applying for foreign investment approval.

Foreign persons do not require foreign investment approval to acquire an interest in commercial land that is:

- an interest acquired directly from the Commonwealth, a State, a Territory, or local governing body, or an entity wholly owned by the Commonwealth, a State, a Territory or a local governing body except for infrastructure as defined under subsection 31(2) of the Regulation; or
- an interest acquired by will or devolution of law; or
- an interest where a foreign person and any associates will hold less than 10 per cent of interests in shares or units in a listed land entity, or less than 5 per cent of interest in shares or units in an unlisted land entity, as long as the foreign person is not in a position to influence or participate in the central management of the land entity, or influence, participate in or determine the policy of the land entity (see section 37 of the Regulation).

The foreign investment review framework provides for some other exemptions, however, these are not outlined in this Guidance Note. Not all exemptions are available to foreign government investors.

FEES

The fee is payable at the time of application. Processing commences when the correct fee is paid.

Acquisitions of interests in multiple titles of commercial land from the same vendor under the same agreement will be charged a single fee. The fee will be calculated based on the title of commercial land with the highest fee payable.

For more information on the fees applying to foreign investment applications, see [Guidance Note 30](#).

PENALTIES

Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment rules.

FURTHER INFORMATION

Further information is available on the [FIRB website](#) or by contacting +61 2 6263 3795.

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.