Australian Government

Foreign Investment Review Board

GUIDANCE 4

COMMERCIAL LAND

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- Foreign persons generally require foreign investment approval before acquiring an interest in commercial land, where the value of that investment is above a certain monetary threshold.
  - For vacant commercial land, the monetary threshold is $0 for all investors.
  - For developed commercial land, the monetary threshold is $310 million, unless the land is considered to be sensitive, in which case the threshold is $67 million. If the foreign person is from a certain free trade agreement partner, the threshold is $1,339 million regardless of whether the land is sensitive.
  - Foreign government investors require approval for all acquisitions of commercial land, regardless of whether the land is sensitive or vacant or its value.
- Even if a proposed investment in commercial land does not require approval under any of the thresholds above, it will still require foreign investment approval if the land is 'national security land', regardless of its value or the nature of the investor.
- Approval for an acquisition of vacant commercial land will generally be conditional on the land being put to productive use within a reasonable timeframe.
- Approval for an exemption certificate to cover acquisitions of vacant commercial land for the purpose of undertaking a primary production business or residential development will generally be conditional on Australian investors also 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.

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A: Definition of commercial land

Commercial land is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) 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 (otherwise it is likely to be considered agricultural land);
- on which the number of dwellings, other than commercial residential premises, that could reasonably be built is less than 10 (otherwise it is likely to be considered residential land); or
- on which there is at least one dwelling, except a commercial residential premise (otherwise it is likely to be considered residential land).

Commercial land is then further defined as either vacant commercial land or developed 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.
- Developed commercial land is commercial land that does not meet the definition of vacant commercial land (sometimes also referred to as non-vacant commercial land).

Whether land is considered vacant or developed may depend on the particular facts of the matter, as assessed on a case-by-case basis.

Example 1

An asphalt inner-city carpark with no substantive permanent building located on the land would be considered vacant commercial land. In comparison, a multistorey inner-city carpark is considered to be a substantive permanent building that can be lawfully occupied by goods (e.g. vehicles), and so is considered developed commercial land.

Example 2

Vacant land, which is not being used wholly and exclusively for primary production, on which no dwellings could reasonably be built is considered vacant commercial land. For example, land that is usually under water, land where the zoning does not allow for dwellings, or land on which development is legally prohibited such as a green zone or belt, is considered vacant commercial land.

Example 3

Land that is otherwise vacant, except for a small substation located on the land, may still be considered developed land, if that substation can be lawfully occupied by persons or livestock, or can lawfully house goods (for example, such as machinery or farming equipment).

There are also a number of special rules that can apply to particular circumstances that may affect the classification of land as commercial land. These include:

- where land hosts, or will host, a wind or solar power station; and
- dwellings within certain accommodation facilities.

B: When does a proposed investment in commercial land require approval?

See also the *Overview*, *Key Concepts, National Security* and *Fees* Guidance Notes.

Under Australia's foreign investment framework, foreign persons must notify the Treasurer before taking a notifiable action or a notifiable national security action. Some notifiable actions are also significant actions. A foreign person must not take a notifiable and significant action, and/or a notifiable national security action, until they have received foreign investment approval for that proposed action.

- Where a foreign person acquires an interest in commercial land,[1] this will be a notifiable and significant action if the monetary threshold is met.
- Where a foreign person acquires an interest in commercial land,[2] this will be a notifiable national security action if the land is national security land.

A foreign person seeking to acquire an interest in commercial land that meets one of these conditions must apply for foreign investment approval before taking the action.[3] Applications are submitted electronically on the Foreign Investment Review Board (FIRB) website, and are supported by further guidance (see, for example, the FIRB application checklist). A fee is payable for all foreign investment applications.

If a proposed investment is a notifiable and significant action, it will be screened for foreign investment approval under the national interest test. If a proposed investment is a notifiable national security action, and is not also a significant action, it will be screened under the narrower national security test. Regardless of which test the investment is screened under, a foreign person must not take the action until they have received foreign investment approval.

Significant penalties (including infringement notices, civil and criminal penalties) may apply for breaches of the foreign investment law.

Exemptions from requiring approval

Part 3 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) 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. See the *Key Concepts* Guidance Note.

A foreign person is also not obliged to notify the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action or notifiable national security action. However, under the Act 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).

1 There are a number of ways in which a foreign person may acquire an interest in commercial land (see, for example, section 12 of the Act). Acquisitions of Australian land are considered on a title-by-title basis.

2 There are a number of ways in which a foreign person may acquire an interest in commercial land (see, for example, section 12 of the Act). Acquisitions of Australian land are considered on a title-by-title basis.

3 Foreign persons who want to minimise the risk of an asset they are interested in purchasing being sold to someone else before they receive foreign investment approval can enter into a contract as long as the contract is conditional on receiving foreign investment approval.

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 (including as a result of one of these exemptions), 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 of reviewable national security actions. Guidance on investment areas that may raise national security concerns, and where investors are therefore encouraged to voluntarily notify, are outlined in the *National Security* Guidance Note.

C: THRESHOLDS FOR COMMERCIAL LAND INVESTMENTS

The monetary threshold for an investment into commercial land is based on the consideration for the investment, and not the value of the land itself. The relevant threshold depends on whether the land is vacant or developed; whether it meets the conditions to be sensitive land; the nationality of the investor; and whether or not the foreign person is a foreign government investor.

- For foreign government investors, a $0 threshold applies for all types of commercial land.
- For private investors from certain free trade agreement (FTA) partners[4] (except Hong Kong):
  - The monetary threshold for an investment in vacant commercial land is $0.
  - The monetary threshold for an investment in developed commercial land is $1,339 million.
- For private investors from Hong Kong:[5]
  - The monetary threshold for an investment in vacant commercial land is $0.
  - The monetary threshold for an investment in sensitive developed commercial land is $67 million.
  - The monetary threshold for an investment in developed (non-sensitive) commercial land is $1,339 million.
- For private investors from India, investments in developed (non-sensitive) commercial land acquired predominantly for the supply of a service through a commercial presence in Australia, the threshold is $500 million.

4 The certain FTA partners are the United States, New Zealand, Chile, Japan, the Republic of Korea, China, Peru, Singapore, Hong Kong and the United Kingdom as well as countries (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, Malaysia and Vietnam).
To be eligible for these thresholds, the immediate acquirer must be an enterprise or national of one of these countries (generally, an entity formed in the country or a branch of an entity carrying on substantial business activities in the country). An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.

5 To be eligible for these thresholds, the immediate acquirer must be an enterprise or resident of Hong Kong (generally, an entity formed in Hong Kong or a branch of an entity carrying on substantial business activities in Hong Kong). An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.

- For all other private investors:
  - The monetary threshold for an investment in vacant commercial land is $0.
  - The monetary threshold for an investment in sensitive developed commercial land is $67 million.
  - The monetary threshold for an investment in developed (non-sensitive) commercial land is $310 million.
- For all investments in national security land, the monetary threshold is $0, regardless of the investor.

D: VACANT COMMERCIAL LAND

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.

Approval conditions[6]

As part of the national interest test, the Treasurer will generally seek to ensure that vacant commercial land, once acquired, is put to productive use within a reasonable timeframe and 'land banking' does not occur.

If an application for vacant commercial land is approved, it will generally be approved subject to:

- 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, prior to the development being completed.

As all investment applications are considered on a case-by-case basis, consideration will be given, on a case-by-case basis, to ensuring that any conditions imposed do not unduly hinder the legitimate commercial practices of the proposed investment, while still ensuring that the land is put to productive use.

These development conditions ensure that 'land banking' does not occur, and the land will be put to productive use.

The condition requiring a foreign person not to dispose of the land until construction is complete does not prevent:

- the sale of a completed stage of the development, if a stage-by-stage approach to the development and sale was foreshadowed in the application; and/or

6 The Treasurer has the ability to impose any condition(s) that the Treasurer considers necessary to protect the national interest (or national security, as the case requires). While this section outlines some of the more common conditions applied for these types of investments, all investments are considered on a case-by-case basis, and thus the actual conditions imposed may vary from these. See the *Principles for Developing Conditions* Guidance Note.

- the sale of blocks within a newly developed subdivision, if the development covered by the foreign investment approval is the subdivision.

A foreign person subject to this condition who enters into a sale contract for a block, land or dwelling, does not breach the condition so long as completion or settlement of the sale occurs after construction of the development or stage is completed.

Example 4

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. 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 be taken to breach this condition by selling apartments off the plan to the public at large because this is within the usual approach taken for high density housing developments and other similar developments.

E: DEVELOPED COMMERCIAL LAND

See also the *Overview* and *National Security* Guidance Notes.

Developed commercial land is commercial land that does not meet the definition of vacant commercial land. For example, land with a substantive permanent building on it that can be lawfully occupied by persons, goods or livestock is likely to be considered developed commercial land, if it is not otherwise considered solely residential or agricultural land.

Sensitive developed commercial land

Some developed commercial land can host critical infrastructure, or otherwise be considered sensitive. In these cases, proposed foreign acquisitions of the land are generally subject to tighter foreign investment screening, including a lower monetary screening threshold.

Section 52 of the Regulation defines such land as an interest 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, if any one or more of the following apply at the time the interest 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 a corporate Commonwealth entity other than:
  - 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.

Example 5

A German non-government investor is seeking to 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 meet the definition of sensitive developed commercial land and be subject to the lower monetary threshold. The foreign investor is therefore required to notify the Treasurer and receive foreign investment approval before acquiring the office building.

Example 6

A French non-government investor is seeking to lease a floor of a high-rise office building for 10 years for $80 million. The office building contains a telecommunication tower on the roof of the building. As such, the building will be considered sensitive developed commercial land. And as the investor is acquiring an interest in the land with a right to occupy the land, above the monetary threshold for sensitive developed commercial land, they will be required to apply for foreign investment approval before entering into that lease.

Some types of commercial land will likely satisfy the definitions of both sensitive developed commercial land and national security land. If an investment in such land is a notifiable and significant action, it will be screened under the national interest test. The investment will only be screened under the narrower national security test if it does not constitute a significant action (for example, by being valued below the relevant monetary threshold).

F: Wind and solar farms

See also the *Key Concepts* and *Agriculture* Guidance Notes.

Definition of a wind or solar power station

A 'wind or solar power station' means a wind or solar farm that is recognised as an accredited power station as defined in the *Renewable Energy (Electricity) Act 2000*.

This includes each component that comprises a solar electricity generation system and each component that comprises a wind power station, for example, each wind turbine.

Importantly, the infrastructure must be used for the purpose of generating electricity for a commercial purpose and, therefore, must be operated as a power station rather than for private use.

What type of land is it?

Wind and solar farms are often located on land that would otherwise be considered agricultural land. However, depending on the existing use of that land, and the stage of development of the wind or solar power station, the land may be considered a range of different land types, as outlined in the table below:

	The land is currently used predominantly for primary production	**The land is not currently used predominantly for primary production**
A developed wind or solar farm exists on the surface of the land (e.g. wind turbines):	Mixed use land (agricultural land and developed commercial land)*	Developed commercial land

	The land is currently used predominantly for primary production	The land is not currently used predominantly for primary production
A component of a developed wind or solar farm lies under the land (e.g. an underground cable):	Mixed use land (agricultural land and vacant commercial land)*	Vacant commercial land
No developed wind or solar farm currently exists on, or under, the land, but either: **(a) an application has been made to a government authority for approval to establish a wind or solar farm on the land; or** **(b) approval from a government authority is in place allowing a wind or solar power station to be established or operated on the land; or** **(c) the land was acquired solely, or is used wholly or predominately, to meet a condition of a government approval for a wind or solar power station to be operated on another piece of land.**	Agricultural land	Vacant commercial land

Note: these scenarios deal with situations where there are no dwellings or commercial buildings on the land.

* In accordance with section 40 of the Regulation, where this land is acquired by an owner or operator of a wind or solar farm, and the acquisition is for the sole purpose of operating a wind or solar farm on the land, the relevant monetary threshold is only the commercial land threshold (i.e. the agricultural land threshold does not apply).

Approval conditions[7]

As part of the national interest test, the Treasurer will generally seek to ensure that agricultural land and vacant commercial land, acquired for the purpose of operating a wind or solar farm, is put to productive use within a reasonable timeframe and 'land banking' does not occur.

If an application for such an investment is approved, it will generally be approved subject to:

- a wind or solar farm being developed on the land;

7 The Treasurer has the ability to impose any condition(s) that the Treasurer considers necessary to protect the national interest (or national security, as the case requires). While this section outlines some of the more common conditions applied for these types of investments, all investments are considered on a case-by-case basis, and thus the actual conditions imposed may vary from these. See the Principles for Developing Conditions Guidance Note.

- 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, prior to the development being completed.

As all investment applications are considered on a case-by-case basis, consideration will be given, on a case-by-case basis, to ensuring that any conditions imposed do not unduly hinder the legitimate commercial practices of the proposed investment, while still ensuring that the land is put to productive use.

Example 7

CattleCo is a foreign person and is seeking to purchase land which currently holds a wind power station. The land is currently being used predominantly for a primary production business — cattle grazing.

The land will be treated as agricultural land and developed commercial land. The land remains agricultural land as it is being used predominantly for a primary production business, but will also be treated as developed commercial land as a wind power station is on the land.

CattleCo will require foreign investment approval for the acquisition of the land if the monetary threshold is met. As CattleCo is not the owner or operator of a wind or solar farm, the monetary threshold will be met if either the agricultural land or developed commercial land thresholds are met.

Example 8

FarmCo is a foreign person, and is seeking to purchase land which currently holds a wind power station. The land is not being used predominantly for a primary production business.

The land will be treated as developed commercial land as it contains a wind power station on the land, and will not be considered agricultural land as it falls within the exemption in section 44 of the Regulation.

Example 9

WindCo is a foreign person and is an operator of an existing wind power station in NSW. WindCo is seeking to acquire leasehold interests in land in South Australia that currently contains an operating wind power station.

The current freehold interest holder is a local farming group who is using the land for a beef cattle primary production business and operates alongside the wind farm. The freehold interest holder has leased out a portion of the land to the current wind power station operator.

Consequently, the land is being used for both a primary production business and for an operating wind farm. The predominant use of the land, given the small proportion of the land being used for the operating wind farm, is the primary production business. As such, the land would still be considered both agricultural land and developed commercial land.

However, when WindCo applies for foreign investment approval to acquire the land, because it is an owner/operator of a wind power station and intends to only use the land for this purpose, the only applicable monetary threshold is that for developed commercial land.

Example 10

Start-up company RenewCo is a foreign person seeking to acquire a freehold interest in Tasmania to develop a wind farm. The start-up does not already own or operate a wind power station elsewhere.

The target land has government approval to operate a wind farm, but the current owner is using the land for cattle grazing, a primary production business. As such, the land would be considered agricultural land.

If RenewCo applied and received foreign investment approval to acquire that land for its proposed wind farm, its approval would likely to be subject to conditions requiring it to commence development of the wind farm within five years.

G: Commercial accommodation facilities

See also the *Residential Land* Guidance Note.

Land and dwellings associated with certain accommodation facilities may be considered either residential land or developed commercial land, depending on the specific circumstances. The following table summarises those circumstances, with further details also provided below the table.

Proposed acquisition (commercial residential premises)	**Land type**
Land on which the only dwellings are commercial residential premises (e.g., acquiring an entire caravan park or motel)	Developed commercial land
A dwelling within the property of a commercial residential premise that will be used as part of the business operations of the commercial residential premise (e.g. where the dwelling will be managed by the facility operator and rented out to third parties)	Developed commercial land
A dwelling that is within the property of a commercial residential premise, but will be used for private use	Residential land
Proposed acquisition (retirement village, aged care facility or certain student accommodation)	
A dwelling in a retirement village, aged care facility, or certain student accommodation	Residential land*
A dwelling in a retirement village, where the owner or operator of the retirement village acquires the interest as a result of exercising an option or another right	Acquisition is exempt from needing foreign investment approval
Proposed acquisition (bed and breakfast or guesthouse)	
A dwelling that also operates a bed and breakfast or guesthouse business	Either residential land or developed commercial land (depending on the proportion of the land that is residential)
A dwelling, with the intent of converting the dwelling into a bed and breakfast or guesthouse business	Residential land

* In accordance with section 38 of the Regulation, this land is subject to the developed commercial land monetary screening thresholds (despite being residential land for all other purposes).

Definition of commercial residential premises

'Commercial residential premises' has the same meaning as in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (the **GST Act**) and includes:[8]

- 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 the GST Act, other than premises used to provide accommodation to students in connection with an education institution that is not a school (see 'certain student accommodation').

For the avoidance of doubt, 'commercial residential premises' include serviced apartments, but do not include retirement villages, aged care facilities or certain student accommodation.

Dwellings within commercial residential premises

An acquisition of an interest in a dwelling, that is physically located within the property of a commercial residential premise, will be considered an acquisition of developed commercial land, if:

- the dwelling will be leased back to and/or managed by the facility operator, as part of the business operations of the commercial residential premise, and will be available for rent or use by third parties as part of the business; and
- the management agreement limits the rights of the dwelling owner to receipt of an income stream only, and not occupancy.

Similarly, where the owner of a commercial residential premise is a foreign person, and acquires an interest in a dwelling in the premise through such a leaseback arrangement, this will also be considered to be an acquisition of developed commercial land.

Example 11

Jane is a foreign person proposing to acquire a dwelling in a serviced apartment complex that is used as short-term rental accommodation under agreement with the business operator. Jane intends on continuing the management agreement with the business operator and will not have a right to occupy the dwelling. The proposal is considered to be an acquisition of developed commercial land and will be subject to the relevant commercial land monetary thresholds.

Conversely, an acquisition of an interest in a dwelling, that is physically located within the property of a commercial residential premise, will be considered an acquisition of residential land, if the dwelling will not be used as part of the business operations of the commercial residential premise, but is for private use (for example, either as owner-occupied, or to be offered for private rental by the owner).

8 For more information about the characteristics of commercial residential premises, refer to GSTR 2012/6 Goods and Services Tax: Commercial Residential Premises.

Example 12

Ben is a foreign person proposing to acquire a dwelling in a serviced apartment complex from a private vendor. Ben intends on using the apartment for part of each year and privately leasing the apartment out when he is not using it. The proposal is considered to be an acquisition of an interest in residential land and Ben will be required to notify and receive foreign investment approval before acquiring the dwelling. Ben will also be subject to the eligibility requirements that would normally apply to an acquisition of an established residential dwelling by a foreign person.

Definition of certain student accommodation

'Certain student accommodation' includes premises that provide accommodation to students in connection with an education institution that is not a school.[9]

In these circumstances the term 'in connection with' is to be given its ordinary meaning. In other words, the accommodation provided must be exclusively for students connected with a particular educational institution. For example, the purchase of a house which is then rented out to students is not intended to be captured.

While there is not a set minimum number of students that must be accommodated for, or a set form of accommodation, it is intended to only capture premises where the purpose of that premise is for the sole purpose of providing student accommodation and not for any other accommodation. Generally, there would need to be some form of formal arrangement in place between the accommodation owner and the educational institution for the accommodation to be considered to be connected with the educational institution.

Dwellings within retirement villages, where acquired by the owner or operator of that village

In accordance with section 38 of Regulation, where a foreign person acquires an interest in a dwelling within a retirement village, that acquisition is exempt from needing foreign investment approval, if the foreign person already has an existing interest in the land and they are increasing that interest by acquiring the dwelling.

This covers circumstances where the owner or operator of a retirement village acquires a right to buy back an interest in a residential dwelling within the retirement village, or acquires such an interest when exercising this right. Such acquisitions are common within retirement villages as they ensure that the owner or operator of the retirement village can maintain its operation as a retirement village on an ongoing basis by facilitating transfers between former and new residents. It also allows a former resident to sell back the dwelling to the operator without needing to find a new resident to acquire the dwelling.

Bed and breakfast and guesthouse businesses

Bed and breakfast and guesthouse businesses are often closely linked with a residential property through the shared use of facilities.

Proposals to acquire a dwelling that also operates a bed and breakfast or guesthouse facility will be considered to be an acquisition of developed commercial land if the proportion of the land

9 For other student accommodation, please refer to the definition of 'commercial residential premises' which may apply.

that is used for residential purposes is less than 10 per cent of the total area and less than 10 per cent of the total value of the land.

If the property does not meet this criteria, it will be considered to be an acquisition of residential land.

Example 13

Craig is a foreign person proposing to acquire a dwelling that currently operates as a bed and breakfast business, 'Mount David Hideaway'. Three rooms are available for rent by members of the public and the remainder of the dwelling is currently used by the owners as their private residence. Although Craig intends to continue operating the bed and breakfast business, the proposal is considered to be an acquisition of residential land. Craig is required to notify and receive foreign investment approval before acquiring the dwelling, and is also subject to the eligibility and conditions that would normally apply to an acquisition of an established residential dwelling by a foreign person.

H: EXEMPTION CERTIFICATES FOR COMMERCIAL LAND

See also the *Overview*, *Agriculture*, *National Security* and *Exemption Certificates* Guidance Notes.

Foreign persons (including foreign government investors) seeking to make multiple acquisitions of commercial land can apply for a *Land Exemption Certificate* under section 58 of the Act. An exemption certificate grants up-front approval for a program of acquisitions, without the need to seek separate individual approval (in the form of a no objection notification) for each investment.

When may an exemption certificate be appropriate?

An exemption certificate is a mechanism available to reduce the regulatory burden of foreign investment screening that would otherwise apply to each acquisition covered by a certificate. It can significantly streamline the approval process for those foreign persons seeking to make a number of investments.

A financial limit will apply for all exemption certificates – the amount of which will be determined on a case-by-case basis.

Exemption certificates are generally issued for 12 months for first time exemption certificate holders. Longer durations are considered on a case-by-case basis for investors that have a demonstrated compliance history with the foreign investment framework.

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 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.

Australian opportunities requirement – an open and transparent sale process

Should a foreign person seek to use an exemption certificate to acquire a freehold interest, or a leasehold interest with freehold characteristics,[10] in vacant commercial land for the purpose of undertaking a primary production business or residential development, that land will need to have been offered for sale through an open and transparent sale process.[11] Conditions will generally be imposed on exemption certificates to ensure this requirement is met (including reporting on the sale process for each of the acquisitions).

Applications for a *Land Exemption Certificate* should include all relevant details around the proposed sale processes for the program of acquisitions, and whether or not the investor considers the acquisitions will meet the open and transparent sale process requirement. Investors can request for the open and transparent sale process conditions not to be imposed on their exemption certificate, or for certain acquisitions under the certificate to be excluded from the requirement, if they meet one of the general exceptions from the open and transparent sale process outlined in section F of the *Agriculture* Guidance Note.

Irrespective of these considerations, the Treasurer may still take the circumstances of the sales processes for the proposed acquisitions into account in determining whether the granting of an exemption certificate is contrary to the national interest.

Investors should consider whether it is best for transactions with complex sale processes to be handled as separate applications, rather than as part of an exemption certificate.

National security land

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 Regulation.

These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. In deciding to grant one of these exemption certificates, the Treasurer would need to 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.

A foreign person may apply for multiple exemption certificates (e.g. under sections 58 of the Act and 43BA of the Regulation) in a single application to ensure that they obtain cover across all of their proposed investments.

10 Leasehold interests with freehold characteristics could include where: there are no significant/ market-based periodic payments (the consideration is primarily upfront with a nominal annual lease payment); the term of the lease is indefinite or the lease would be renewed automatically or at the election of the tenant at no extra charge; there is an option to acquire a freehold interest at the end of the lease; and where the lessor is a state/ territory government (for example, perpetual or pastoral leases).

11 Further information about the open and transparent sale process requirement can be found in the *Agriculture* Guidance Note.

FURTHER INFORMATION

Further information is available on the FIRB website or by contacting +61 2 6263 3795 or FIRBenquiries@treasury.gov.au.

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.