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CHANGES TO FOREIGN INVESTMENT REVIEW BOARD PROCESS

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1. December 2008 Changes to Foreign Investment Review Process

In December 2008, the Honourable Chris Bowen, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs issued a press statement regarding changes to the foreign investment review process, including streamlining and updating foreign investment screening for residential real estate acquisitions and reducing compliance costs for temporary residents and the construction industry.

1.1 December Changes

Under the policy in place in December 2008, all temporary residents and non-residents including businesses had to notify the Government of an intention to acquire residential property and comply with post purchase conditions on its use, development and resale. For example:-

- A temporary resident had to obtain approval to purchase developed residential property and approval was granted subject to a condition requiring the resale of that property when the visa expired.
- A developer had to obtain developers' approval to sell up to 50% of a project to non-residents.
- A developer could only obtain developers' approval for house land packages if there were multiple properties being developed and sold at the same time.

The minister indicated that these arrangements had not been changed since 1989 and were poorly targeted: 7,500 foreign residents and businesses sought approval each year and more than 90% of the applications received by FIRB related to residential real estate.

From 18 December 2008 the policy changed and from 31 March 2009 the regulations were changed, having effect from 18 December 2008. The most important of these changes are:

- "Temporary Resident" is defined to mean a foreign person living in Australia who holds a valid temporary visa which permits them to stay in Australia for a continuous period of more than 12 months or who has submitted an application for permanent residency and holds a bridging visa which permits them to stay in Australia until their permanent residency application has been finalised.

The definition of temporary resident does not include short term visitors such as tourists, short term business visa holders and medical visa holders but it would therefore include long term students and holders of 457 (long term temporary employees).

- Previously, students were only permitted to buy a principal place of residence valued up to \$300,000.00. This restriction has been lifted and there is no monetary limit on the value of a student's principal place of residence.
- Previously, when a foreign resident bought vacant residential land, it had to build the dwelling within 12 months and required FIRB approval. Now, the period has been extended to 24 months.

1.1.1 *Second hand dwellings*

The restrictions regarding second hand (established) dwellings remain. Basically, a foreign person who is not a temporary resident cannot buy a second hand dwelling except:

- ◆ A foreign company may buy established dwellings for use by Australian based staff provided that the dwelling is sold or rented if it is expected to remain vacant for more than six months. There is no limit on the number of established dwellings that can be bought for employee accommodation. It is no longer limited to accommodation for senior executives.
- ◆ An established dwelling can be bought for re-development where there will be an increase in the number of dwellings from the re-development and no rental income can be obtained from existing dwelling prior to demolition. The dwelling must be demolished and construction on the new dwellings commenced within 24 months of acquisition.

1.1.2 *New Dwellings*

For new dwellings, the previous restriction that no more than 50% could be sold to foreign person off the plan has been removed. The developer must still market locally as well as overseas. Similarly, a developer does not have to show that it has concurrently developed a similar dwelling in order to sell a new stand alone dwelling to a foreign person. This relaxation will be reviewed after 2 years.

The definition of "new dwelling" has been changed by policy so that it includes a dwelling that has not been sold but may have been occupied for no more than 12 months. Previously, the sale under a developer's approval was only available for dwellings which have not been used at all and the exemption was not available for dwellings which had been used for any purpose including as a display unit. As the market has become more restricted, more developers are renting apartments after completion and this change allows the developer to sell those rented apartments to a non resident for up to 12 months after completion.

1.1.3 *Accommodation Facility*

Accommodation facilities such as hotels, motels, hostels and guest houses are now treated as commercial real estate rather than residential real estate. Acquisition of such facilities and individual units within them which are valued below the relevant developed

commercial property threshold are exempt from the Act and do not require notification or approval.

1.1.4 *Forms*

New application forms and statutory notices have been introduced and the previous Foreign Investment On Line Application system (FIOLA) is no longer available. The new application forms must be downloaded and printed, then emailed or faxed to FIRB.

1.2 **Notification Not Necessary**

Acquisitions by the following do not require notification to FIRB:

- an Australian citizen living abroad in their own name or through an Australian corporation or trust
- a foreign national who holds a permanent resident visa or is entitled to hold a special category visa, (that is, a New Zealand citizen) purchasing in their own name or through an Australian corporation or trust
- a foreign national as joint tenant with their Australian citizen spouse
- a foreign national temporarily resident in Australia, who is buying:
 - ◆ Single block of vacant land
 - ◆ New dwelling
 - ◆ An established (second hand) dwelling to be used as their principal place of residence or if it is to be demolished first and then re-developed
- any person (whether resident or not) acquiring:
 - A new dwelling (house or apartment) purchased from a developer who has pre-approval to sell dwellings to foreign persons (with no limitation on the percentage to be sold to non-residents)
 - An interest in an time share scheme which does not permit more than four weeks entitlement per year
 - Residential real estate in an Integrated Tourism Resort
 - An interest by will or devolution by operation of law
 - An interest from the government whether Commonwealth, state, territory or local.

1.3 **Notification Required**

Any acquisition of residential property other than as set out in 1.2 by a foreign person is subject to notification to FIRB.

FIRB is unlikely to grant approval except:

- Acquisition of more than a single block of vacant land for the purpose of construction single residential dwellings within 12 months
- Acquisition of other vacant land for building multiple residential dwellings with continuous substantial construction within 24 months and at least 50% of the

acquisition cost or the current market value of the land must be spent on development

- New dwellings bought off the plan where the dwelling has not been previously sold (that is, purchased from developer but not under a developer's approval) and had not been occupied for more than 12 months
- Acquisition of an established dwelling for the purpose of re-development where the re-development will increase housing stock, the existing dwelling is not rented out prior to demolition and re-development, and reconstruction must be commenced within 24 months. A re-development proposal may be approved where the number of dwellings does not increase if it can be shown that the existing dwelling is at the end of its economic life and constructing a new dwelling would effectively increase the housing stock because the existing dwelling cannot be used. An application in these circumstances must include a valuation of the existing structures by a licensed valuer and a builder's report.

The acquisition by a foreign person who is not a temporary resident of an established dwelling for investment purposes will not be granted. In his press release, the Minister indicated that there would be no change to this policy as it is intended to prevent excess demand in the housing market.

1.4 Commercial Real Estate

Approval will not be required for the acquisition of commercial property where the interest is acquired:

- by will or devolution by operation of law
- from the government
- is developed commercial property valued at less than \$50million or \$953million (indexed annually) for US investors or \$5million for a heritage listed property where the acquirer is not an US investor

The acquisition of an interest in an Australia strata titled hotel is considered commercial property unless the unit is owner occupied or rented out privately by the owner.

An acquisition above the threshold would normally be approved unless it is contrary to the national interest.

Acquisition of vacant land for commercial development would normally be approved provided that continuous construction commences within five years of acquisition and an amount equivalent to 50% of the acquisition cost or the current market of the land is spent on development.

1.5 Summary

The current foreign investment policy is set out in the website www.firb.gov.au.

FIRB now concentrates on larger and more sensitive foreign investment proposals to determine whether they are contrary to the "national interest". This term is still not defined but is determined by the government on a case by case basis having regard to widely held community concerns. While the website states that the screening process is "clear and simple", in practice, in larger and more sensitive proposals, the process is often involves significant issues of foreign policy.

2. Property Law (Mortgagor Protection) Amendment Act 2008

The *Property Law (Mortgagor Protection) Amendment Act* was introduced according to the explanatory notes to:

- extend the duty of the mortgagee exercising power of sale to take reasonable care to ensure that the property is sold at market value to situations where property is sold by a receiver under a delegated power or by the mortgagee as attorney for the mortgagor;
- to specify steps which the mortgagee for a "prescribed mortgage" must follow to satisfy that duty; and
- to create an offence if a mortgagee under a "prescribed mortgage" fails to follow the stated steps.

2.1 "Prescribed Mortgage"

The *Property Law Amendment Regulation (No. 1) 2008* defines a prescribed mortgage as a mortgage of land on which the mortgagor's principal place of residence is situated. The residence must be fixed to the land, approved by local government for human habitation by as a single family unit and must be used for residential purposes. Under paragraph 4(2) of the Regulation, it is irrelevant if the residence is also used for business purposes provided that its primary use is as the mortgagor's home.

A residence does not cease being a residence if the mortgagor stopped using the residence as his/her home at the time the default occurred or at any time within six (6) months before the default occurred.

2.2 Exercising Power of Sale under a Prescribed Mortgage

The new section 85(1A) provides that a mortgagee or receiver selling under a prescribed mortgage must:

- (a) adequately advertise the sale;
- (b) obtain reliable evidence of the property's value;
- (c) maintain the property including by undertaking any reasonable repairs;
- (d) sell the property by auction unless it is appropriate to sell it in another way; and
- (e) do anything else prescribed under a Regulation.

Previously, s.85(1) only imposed an obligation on the mortgagee to "take reasonable care to ensure the property is sold at the market value". There is no formal obligation on the mortgagee to sell by auction etc. The explanatory notes state that the reason for the change was that the current economic and financial circumstances raised concerns about the position of mortgagors where mortgagees exercised their power of sale and the change has strengthened the law to assist the mortgagor by minimising residual debt or maximising the return of equity.

The new section does not define what is adequate advertising of the sale or what is reliable evidence of the property's value. A prudent mortgagee would obtain a valuation or at least an agent's indication of value at the time of placing the property on the market and advertising in the press in the locality of the property. It is also likely that advertising on the internet would be required to adequately advertise the property.

Many buyers, particularly of residential property, look at internet advertisements before any other form of advertising.

The requirements in ss. (1A) do not change the position in Queensland greatly from the existing position under ss. (1) – they indicate what was commonly undertaken to satisfy the requirement under ss. (1) to "take reasonable care to ensure that the property is sold at the market value".

2.3 Penalty

A failure to comply with s.85(1A) attracts a penalty of \$20,000.00.

2.4 Sablebrook Pty Ltd –v- The Credit Union Australia Ltd [2008] QSC 242.

The recent decision of Sablebrook considered the obligation on a mortgagee when exercising power of sale.

In that case, the mortgagor was owner of land on which a swimming pool had been constructed. The mortgagee sold the property privately to purchasers associated with a resort adjoining the mortgaged land. The body corporate of the adjoining land had threatened the mortgagor with litigation over the construction and use of the swimming pool. The mortgaged land was not advertised and was not listed for sale with an agent. The mortgagee had obtained a valuation about five months before the sale and did not obtain a further valuation. The property was sold for slightly greater than the five month old valuation.

The court found that the mortgagee had breached its statutory duty and that the mortgagor was entitled to damages for the loss it suffered, being the difference between the sale price and the market value of the land with an adjustment in favour of the mortgagee for sale costs that were saved. In determining the market value, the court looked at comparable sales before and after the sale date, with adjustments made for special circumstances and features relating to the particular land sold. The court held that the mortgagee did not have to prove that there was an actual buyer willing to pay the price.

The court found that the mortgagee had not acted to satisfy itself that the price paid was the best price it could reasonably obtain. The failure to obtain an up to date valuation or opinion of value or an estimate of market value from a real estate agent, was a breach of duty because the mortgagee had no reliable information concerning the current market value of the land.

The mortgagee had argued that it was not appropriate to put the property on the market because of the threatened litigation. The court found that there was only a threat of litigation and that the mortgagee had not taken adequate steps to identify the likely extent of liability and its impact on the value of the land.

3. Residential Tenancies and Rooming Accommodation Act 2008

According to the explanatory memorandum, the purpose of this Act is to consolidate all the provisions dealing with residential tenancies and rooming accommodation into one act. The Act sets out the rights and obligations for tenants and residents and for lessors, agents and accommodation providers renting residential premises in Queensland. It incorporates many aspects of the *Residential Tenancies Act* and deals with issues such as residential tenancies authority.

3.1 Exemptions

The Act does not apply to:

- S.33 – Students at a boarding school and at a university college;
- S.34 – Residential tenancies agreements that are provided as part of a hospital, nursing home or retirement village, unless the person is employed at the location;
- S.35 – Rental purchase plan agreements;
- S.36 – Tenants in temporary refuge accommodation;
- S.37 – Site agreements under the *Manufactured Homes (Residential Parks) Act 2003*, but does apply to subsequent agreements where the home owner rents the premises to a tenant;
- S.37 – A head lease entered into by the Commonwealth, the State, a local government or a corporation to sublet the premises to an employee;
- S.39 – A head lease entered into by the Commonwealth, the State, a local government or a non-profit corporation to sublet the premises to a person under an affordable housing scheme;
- S.42 – Residential tenancy agreement which is subject to an intensive drug rehabilitation order under the *Drug Court Act 2000*.

While the Act does apply to rooming accommodation agreements, under S.44, it does not apply where the provider lives in the premises and rents fewer than three rooms in the premises. Accommodation provided for holiday makers or travellers of less than six weeks is also exempt.

3.2 Residential Tenancy Agreements

The section dealing with residential tenancy agreements reflects the previous Act, however:

- S.57 – Any public advertising or offering of rental premises must state a fixed amount of rent. This is to prevent dutch auction of rental accommodation;
- S.58 – a proposed tenancy agreement must be given to the prospective tenant before there is any commitment by the tenant or a requirement to pay any money under the agreement;
- S.65 – The parties must complete an entry condition report for the premises which must be filled in and signed by the parties. The tenant has three days after occupation to complete and sign the report. The tenant is also required to complete an exit condition report under S.66;

Under S.70, a fixed term tenancy continues as a periodic tenancy with the same terms (apart from terms about the length of the tenancy) after the end date if no notice to terminate the tenancy in accordance with the Act has been given;

Under S.242, a lessor must give written notice to both the purchaser and the tenant if the lessor's interest in the premises is transferred. Any rent owing at the time of the termination notice can be recovered by the former lessor.

With a rooming house, under s.259, a selling agent may enter a residents room to show it to a prospective purchaser upon giving at least 24 hours written notice. The notice can only relate to one entry for a room and cannot be a general notice requiring access whenever the agent has a prospective purchaser.

3.3 Summary

The *Residential Tenancies and Rooming Accommodation Act* consolidates the existing laws. It is important to know there is a change to the legislation and to review particular aspects relating to residential tenancies.