

Proposed changes to Australia's foreign investment regime

On 8 March 2017 the Australian Government released a *Foreign Investment Framework 2017 Legislative Package Consultation Paper* containing proposed changes to Australia's foreign investment framework. The proposals seek to address some of the unintended consequences of the new foreign investment law introduced at the end of 2015 and are expected to be welcomed by foreign investors.

Background

On 1 December 2015 a new inbound foreign investment regime came into force which repealed and replaced the former Australian regime in its entirety. As well as re-writing, modernising and harmonising the rules, the new regime included a significant number of substantive changes to the previous rules including (among other things) stricter and more flexible penalties, a substantial filing fee regime, tightening of rules relating to certain sectors (such as agriculture and critical infrastructure), the introduction of an exemption certificate scheme for certain investments, giving legislative effect to the more stringent policy relating to foreign government investors and creating a register for foreign held interests in agricultural land (soon to be expanded to include foreign owned water entitlements).

This month, just over a year after the new rules came into force, the Australian Government released a *Foreign Investment Framework 2017 Legislative Package Consultation Paper* (the **Paper**) containing further proposed changes to Australia's foreign investment framework. The Paper follows ongoing feedback from stakeholders in response to the 2015 reforms. The proposals it contains are aimed at addressing certain unintended consequences and regulatory burdens of the new regime that are perceived to be diverting screening resources from more sensitive cases. Given that they would (if implemented) relax certain of the existing rules, the proposals are expected to be welcomed by foreign investors.

Outline of the proposed changes

The key areas identified for proposed reform and the main proposals relating to each are described in the table below. The proposals in the

Key issues

- The Government's new consultation paper proposes changes to the current foreign investment rules which, if implemented, should benefit inbound foreign investors.
- The proposed changes include relaxing certain rules relating to residential land, non-vacant commercial land, low sensitivity business investment, investment by foreign government investors and filing fees.
- The proposals not yet been approved but are a guide to the changes which might come into operation.
- Further clarity is expected following the close of submissions on the Paper, scheduled for 29 March 2017.

paper have not yet been approved and are merely a guide at this stage as to the changes which might come into operation.

Background	Proposal
Residential land – exemption certificate regime	
<p>Foreign persons generally need to apply for foreign investment approval before purchasing residential land in Australia.</p> <p>The current rules generally require foreign persons to apply for and obtain approval for a specific property prior to making the purchase. Broad pre-approval through "exemption certificates" can be granted for eligible foreign persons seeking to acquire an established dwelling or for developers seeking to sell new dwellings to foreign persons.</p> <p>Concerns exist that the current exemption certificate scheme does not operate fairly or consistently in that exemption certificates are not available for new dwellings, vacant residential land and do not cover failed off-the-plan settlements.</p>	<p>The proposals in the Paper include extending the exemption certificate regime to:</p> <ul style="list-style-type: none"> ■ new dwellings and vacant residential land (treating them on par with existing dwellings and off-the-plan developments); and ■ failed off-the-plan acquisitions (which would allow developers to sell dwellings to foreign persons where the dwelling has been the subject of a failed settlement).
Commercial residential premises	
<p>The new rules have been criticised as operating harshly in relation to commercial residential premises, such as aged care, retirement villages and student accommodation.</p> <p>As all acquisitions of residential land require notification, commercial developments in the residential sector attract different treatment from other commercial land.</p> <p>Additionally, foreign owners of commercial residential facilities are also currently required to obtain a new approval each time they use a mandatory buyback mechanism, creating an administrative and fee burden.</p>	<p>Options for reform in the Paper include:</p> <ul style="list-style-type: none"> ■ introducing new monetary thresholds for commercial residential land (in line with the usual non-vacant commercial land thresholds); and/or ■ creating of a new category of exemption certificate for foreign government investor operators of such facilities who use mandatory buy back mechanisms (noting that foreign government investors would otherwise usually be subject to a A\$0 (zero) threshold for investments in Australian land).
Sensitive non-vacant commercial land	
<p>The 2015 reforms relaxed the monetary screening threshold for acquisition by privately owned foreign investors of non-vacant commercial land from A\$55 million to A\$252 million (a A\$1,094 million threshold applies for</p>	<p>The Government is considering relaxing some of the rules which classify commercial land as sensitive, including:</p> <ul style="list-style-type: none"> ■ removal of the "prescribed airspace" category; and/or

Background	Proposal
<p>certain agreement country investors).</p> <p>However, acquisitions by privately owned investors of <u>non</u>-vacant commercial land has a lower, A\$55 million screening threshold if the requirements for the lower threshold are met.</p> <p>Land that is subject to the lower threshold is considered sensitive and includes (among other things) land under prescribed airspace, buildings where all or part of the building will be leased to an Australian government agency or body, or land where critical telecommunications or public infrastructure are located.</p> <p>Concerns have been raised that the definition for sensitive commercial land is too broad. In particular, inclusion of land under prescribed airspace means that most buildings in or around capital cities are subject to the lower threshold.</p>	<ul style="list-style-type: none"> ■ removal of the lower threshold land concept altogether (although this would seem less likely to be implemented, given it would remove all screening of private acquisitions of commercial land under A\$252 million).
Low sensitivity business investment	
<p>Among other things, the 2015 reform package gave legislative effect to the more stringent requirements which were applied as a matter of policy to investments by foreign government investors. Foreign government investors must get approval before acquiring a direct interest in Australia (generally at least 10%, or a less than 10% interest where it carries the ability to influence, participate or control a target), starting a new business or acquiring an interest in Australian land, regardless of the value of the investment.</p> <p>Concerns exist that the new regime is capturing too many acquisitions, especially low value acquisitions by foreign government investors, which is diverting administrative time from more sensitive proposals.</p>	<p>The proposals outlined in the Paper include:</p> <ul style="list-style-type: none"> ■ removing requirements to notify transactions (including by foreign government investors) valued at under A\$100m (these would still remain significant actions susceptible to review but would require mandatory pre-notification); and/or ■ introducing new categories of exemption certificates for acquisitions of securities and/or for acquisitions by foreign government investors (in this regard, exemption certificates are currently only available in relation to interests in land and for underwriting). <p>The government is considering a A\$100m per transaction limit under the proposed new exemption certificates. Other standard conditions (as to time and nature of investment) would continue to apply. Sensitive business applications would not be eligible for an exemption certificate.</p>
Filing fees	
<p>The introduction of fees was a significant aspect of the 2015 reform package. While teething issues are to be expected, experiences with the fee system indicate that the fee settings for commercial transactions are unnecessarily complex. Fee complexity stems from different</p>	<p>Proposals to address these issues include:</p> <ul style="list-style-type: none"> ■ changing the whole fee structure to a flat sliding or tiered fee structure (excludes residential land fees), giving a smaller range of possible fees which could potentially apply; and/or ■ giving legislative effect to a discretionary fee waiver

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<p>fees for different acquisition types, with some fees tiered on a sliding scale based on consideration.</p> <p>In some cases, significant work has to be done by the regulator to identify the actions that are being notified under the framework and then confirm the correct fee. This has added complexity in administering the system and in some cases has adversely impacted timeliness in processing applications.</p>	<p>system for:</p> <ul style="list-style-type: none"> – small non-land acquisitions valued under A\$10 million; – foreign government investor acquisitions of developed commercial land under a specified threshold; – acquisitions of multiple residential titles and acquisitions of Australian land entities which primarily hold residential land; and/or ■ rationalising the definition of internal re-organisation (notifications for which currently attract filing fees of A\$10,000).

Timing and further information

Stakeholders have been invited to provide feedback on the proposed changes contained in the Paper by 29 March 2017. The final legislative package and the approach to its implementation will be determined by the Government following consultation. Further targeted consultation is anticipated to take place following release of exposure drafts of any legislative changes that are agreed by Government.

If you would like to discuss any of the changes, please contact a member of the Clifford Chance Australia team.

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