RESIDENTIAL LAND

Last updated: 9 July 2021.

- Foreign persons generally require foreign investment approval before acquiring an interest in residential land, regardless of its value.
  - The Government's policy is to channel foreign investment into new dwellings, as opposed to established dwellings, as this creates additional jobs in the construction industry and helps support economic growth. It can also increase government revenues, in the form of stamp duties and other taxes, and from the overall higher economic growth that flows from the additional investment. Foreign investment applications are therefore generally considered in light of the overarching principle that the proposed investment should increase Australia's housing stock.
- Approval for an acquisition of vacant land for residential development will generally be conditional on the construction being completed within four years and the land not being sold until the construction is complete.
- Approval for an acquisition of a new (or near-new) dwelling is not usually subject to any conditions concerning its usage.
  - Property developers looking to sell their newly developed dwellings to foreign persons can also apply for foreign investment approval on behalf of their foreign customers. Where a developer holds such an approval, the foreign person will generally not need to seek their own foreign investment approval.
- Foreign persons are generally prohibited from purchasing established dwellings. However:
  - temporary residents can apply to purchase one established dwelling to use as their place of residence while they live in Australia.
  - foreign persons can apply to purchase an established dwelling for redevelopment, if the redevelopment will genuinely increase Australia's housing stock.
  - foreign controlled companies can apply, in limited circumstances, to purchase an established dwelling to house their Australian based staff.
- All acquisitions (and sales) of residential land by foreign persons must be notified to the Register of Foreign Ownership of Residential Land.
- Foreign persons who own residential property will be required to pay an annual vacancy fee if their property is not residentially occupied or genuinely available for rent for more than 183 days (approximately six months) during a year.

- Approval for an acquisition of residential land to be used for a non-residential purpose (e.g. redevelopment for commercial use) will generally be subject to development conditions, as assessed on a case-by-case basis.
- Foreign persons must keep records relating to certain actions concerning their foreign investment for up to five years.

Looking for more?

A: WHEN DOES A PROPOSED INVESTMENT IN RESIDENTIAL 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, 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 residential land[1], this will be a notifiable and significant action, regardless of the value.

- Where a foreign person acquires an interest in residential 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 residential land that meets one of these conditions must apply for foreign investment approval before taking the action[3]. Applications are submitted electronically on the Australian Taxation Office (ATO) website[4], and are supported by further guidance. A fee is payable for all foreign investment applications.

If the proposed investment is a notifiable and significant action, it will be screened for foreign investment approval under the national interest test. If the 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, the 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 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 residential 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 residential land (see, for example, section 12 of the Foreign Acquisitions and Takeovers Act 1975 (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 residential 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.

4 Applications for foreign investment approval relating to residential land are generally processed by the ATO.

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.

B: Acquisitions of vacant residential land

Definition of vacant residential land

Vacant land in Australia is considered to be vacant residential land if it is land on which the number of dwellings that could reasonably be built is less than 10, and the land is not being used wholly and exclusively for a primary production business.

Land that previously had a residential dwelling built on it would generally not be treated as vacant residential land. This is because a new dwelling built on the land would not genuinely increase the housing stock (as a dwelling already existed before its demolition). The land is therefore subject to the eligibility and conditions applicable for established dwellings.

Approval conditions[5]

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

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

- the purchase price being no greater than the value specified in the approval;
- the acquisition of the land being registered on the Register of Foreign Ownership of Residential Land within 30 days of settlement;
- at least one residential dwelling being built on the land;
- construction of all dwelling(s) being completed within four years from the date of notice of approval;
- evidence of the completion of the dwelling(s) being submitted to the Government within 30 days of being received[6]; and
- the foreign person not selling, transferring, or otherwise disposing of their interest in the land prior to construction of all dwelling(s) being completed.

5 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.

6 Evidence could include a certificate of fitness for occupancy or use, or final occupancy or builder's completion certificate.

Once developed, there are generally no ongoing conditions on the foreign person's use of the property – for example, they may residentially occupy the property, or rent it out.

There is no limit on the number of vacant land parcels that a foreign person can acquire for residential development.

Exemption certificates

See also the *Overview* and *Exemption Certificates* Guidance Notes.

Foreign persons may apply for approval to purchase vacant residential land through either a no objection notification (when seeking approval for a specified title of land), or through an exemption certificate under section 43B of the Regulation (when an exact title of land has not yet been identified).

A *Residential Land (other than Established Dwelling) Exemption Certificate* will allow a foreign person to acquire any vacant title of residential land, within the parameters of the certificate, without having to apply for individual approval for each title of land they attempt to purchase. It can significantly streamline the approval process for those foreign persons that may have several unsuccessful attempts at purchasing a title of land (e.g. being outbid at auction) before finally securing one.

If an application for a *Residential Land (other than Established Dwelling) Exemption Certificate* is approved, it will generally be approved subject to:

- the foreign person purchasing only one title of vacant residential land;
- the land being located in the state or territory specified in the certificate; and
- the purchase price being no greater than the value specified in the certificate.

The certificate will generally be valid for 12 months from the date of approval.

The standard conditions applying to acquisitions of vacant residential land (such as completing construction within four years) will also still continue to apply, regardless of whether the land was acquired through a no objection notification or exemption certificate.

Example 1

A foreign person wants to purchase a vacant residential land title up to the value of $2 million in Sydney to develop a house on. They apply for a *Residential Land (other than Established Dwelling) Exemption Certificate* to allow them to purchase any parcel of vacant residential land valued at $2 million or less. The foreign person is granted an exemption certificate that is valid for 12 months, for a single purchase up to $2 million.

The foreign person attends multiple auctions, and is unsuccessful. They then make a private offer on a title of vacant residential land for $1.5 million, and the offer is accepted. When the foreign person uses the exemption certificate to purchase one title of vacant residential land they are no longer able to use that exemption certificate to acquire any other vacant residential land titles.

C: ACQUISITIONS OF NEW (AND NEAR-NEW) DWELLINGS

Definition of new (and near-new) residential dwellings

A new residential dwelling is a dwelling that:

- will be, is being, or has been, built on residential land;
- has not been previously sold as a dwelling; and
- has not been previously occupied.

A near-new dwelling is a dwelling that:

- will be, is being, or has been, built on residential land;
- is part of a residential development[7];
- was previously sold[8] by the developer of that development, but the transaction failed to settle; and
- has not been previously occupied for more than 12 months in total.

For the avoidance of doubt, new (and near-new) dwellings do not include established residential dwellings that have been refurbished or renovated, or a single dwelling that has been built to replace one or more demolished established dwellings. This is because the refurbished or renovated dwelling, or a new dwelling built on the land, does not genuinely increase the housing stock (as a dwelling already existed before its refurbishment/demolition). The land in these situations is therefore subject to the eligibility and conditions applicable for established dwellings.

Example 2

Bruce decided to demolish the existing dwelling on his property and rebuild a new single dwelling. When construction was completed, Bruce decided that he wanted to sell the property. Bruce has not occupied the dwelling or rented it out.

In this case, the rebuilt dwelling does not represent a genuine increase in Australia's housing supply (even if it is larger or of higher quality than the original dwelling), and so will be treated as an established dwelling, and not a new dwelling, under Australia's foreign investment framework.

7 Section 4 of the Act defines a residential development as a development that has one or more multi-story buildings and at least 50 independent self-contained dwellings.

8 A property is considered "sold" once a binding purchase agreement has been entered into, regardless of whether the sale is completed (or settled).

Approval conditions[9]

If an application for a new (or near-new) residential dwelling is approved, it will generally be approved subject to:

- the purchase price being no greater than the value specified in the approval; and
- the acquisition of the property being registered on the Register of Foreign Ownership of Residential Land within 30 days of settlement.

Once acquired, there are generally no ongoing conditions on the foreign person's use of the property – for example, they may residentially occupy the property, or rent it out.

There is no limit on the number of new (or near-new) dwellings that a foreign person can acquire.

Exemption certificates

See also the *Overview* and *Exemption Certificates* Guidance Notes.

Foreign persons may apply for approval to purchase new (or near-new) residential dwellings through either a no objection notification (when seeking approval for a specified property), or through an exemption certificate under section 43B of the Regulation (when an exact property has not yet been identified).

A *Residential Land (other than Established Dwelling) Exemption Certificate* will allow a foreign person to acquire any new (or near-new) residential dwelling, within the parameters of the certificate, without having to apply for individual approval for each property they attempt to purchase. It can significantly streamline the approval process for those foreign persons that may have several unsuccessful attempts at purchasing a property (e.g. being outbid at auction) before finally securing one.

If an application for a *Residential Land (other than Established Dwelling) Exemption Certificate* is approved, it will generally be approved subject to:

- the foreign person purchasing only one new (or near-new) residential dwelling;
- the property being located in the state or territory specified in the certificate; and
- the purchase price being no greater than the value specified in the certificate.

The certificate will generally be valid for 12 months from the date of approval.

The standard conditions applying to acquisitions of new (or near-new) residential dwellings (such as registration on the foreign ownership register) will also still continue to apply, regardless of whether the property was acquired through a no objection notification or exemption certificate.

---

9 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.

Example 3

A foreign person wants to purchase a new dwelling in Queensland to rent out. They apply for a *Residential Land (other than Established Dwelling) Exemption Certificate* to allow them to purchase one unspecified new dwelling for $1 million or less, and is granted an exemption certificate that is valid for 12 months.

The foreign person attends an auction where the bidding reaches $1.2 million and continues to bid on the property, despite reaching the value limit specified on the exemption certificate, and is the highest bidder for the property with a bid of $1.3 million.

Where the purchase price for a new dwelling is higher than the amount specified in the exemption certificate, the certificate will not be valid for the property purchase. Therefore, the foreign person did not have foreign investment approval to purchase a property over $1 million. The foreign person has breached the law and may be subject to significant penalties.

D: Property developers, and acquisitions of new (and near-new) dwellings

See also the *Exemption Certificates* Guidance Note.

Property developers (and other vendors) can apply for a *New (or Near-New) Dwelling Exemption Certificate*. Where a developer holds such a certificate, a foreign person purchasing a new (or near-new) dwelling in that development will not generally be required to seek their own individual foreign investment approval. This can significantly streamline the sale process of dwellings in a new development.

Foreign persons who seek to rely on the developer holding such a certificate when purchasing residential land should check the certificate to ensure that it covers their intended action(s).

A *New (or Near-New) Dwelling Exemption Certificate* will generally only provide approval for a foreign person to purchase up to $3 million worth of dwellings in a single development[10]. Should the foreign person wish to acquire interests with a cumulative value greater than $3 million in a development, the foreign person will be required to seek their own individual foreign investment approval.

Example 4

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 (or Near-New) Dwelling Exemption Certificate*. If the developer provides Lauren with a copy of the certificate, then she does not need to seek separate foreign investment approval for the proposed acquisition.

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

10 In working out if this threshold is met; sum up the consideration for the current proposed investment, along with the considerations paid for any other interests acquired in the development under the same certificate.

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 (including paying the relevant application fee), to acquire the $1.3 million dwelling.

Example 5

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 (or Near-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.

Developer eligibility

Developers (either Australian or foreign) can apply for a *New (or Near-New) Dwelling Exemption Certificate* for a specified development, if the development[11]:

- 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 any conditions are being met.

A project meeting the above definition will be considered to be a 'development' where it comprises one or more multi-storey buildings that will be, are being, or have been, built under one development approval. For the purposes of a *New (or Near-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 (or Near-New) Dwelling Exemption Certificate*.

Applications for a *New (or Near-New) Dwelling Exemption Certificate* will be considered on a case-by-case basis. Consideration will be given to a number of factors, including:

- 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. *New (or Near-New) Dwelling Exemption Certificate* 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;

11 A development is defined in section 4 of the Act.

- 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 previously 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.

Approval conditions[12]

If an application for a *New (or Near-New) Dwelling Exemption Certificate* is approved, it will generally be approved subject to the developer:

- marketing the dwellings for sale in Australia;
- selling no more than 50 per cent of the total number of dwellings in the development to foreign persons under the certificate;
- selling no more than $3 million worth of dwellings in the development to a single foreign person under the certificate;
- providing a copy of the certificate to each foreign purchaser;
- reporting to the Government, every six months (until all dwellings in the development are sold), on the dwellings sold to foreign persons under the certificate, including the purchaser details and the value of the sales;
- notifying the Government, within 30 days, if the number of dwellings in the development is reduced to less than 50; and
- paying a fee for each dwelling sold under the certificate.

Example 6

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 (or Near-New) Dwelling Exemption Certificate* prior to receiving the development approval which will enable City Builder Co. to commence development.

12 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.

Example 7

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 (or Near-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 (or Near-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.

Fees per sale

See also the *Fees* Guidance Note.

Consistent with all other applications for foreign investment approval, developers will need to pay a fee when applying for a *New (or Near-New) Dwelling Exemption Certificate.*

If the certificate is granted, a separate fee will also be payable for each dwelling sold to a foreign person under the certificate. These fees must be paid within 30 days of the end of each six month period (until all dwellings in the development are sold), covering all of the dwellings sold under the certificate during that period (referred to as the reconciliation period).

While developers are nominally liable to pay these fees, it is possible for the developer and the foreign person to reach an agreement about who will pay the fee. Where a foreign person agrees to pay the fee directly to the ATO, they can do so using the payment reference number listed on the certificate.

Alternative approval – streamlined bulk approval for a development without an exemption certificate

Developers who do not wish to apply for a *New (or Near-New) Dwelling Exemption Certificate* may instead apply for a streamlined bulk approval process[13].

Under a streamlined bulk approval process, the developer can apply for foreign investment approval as an agent on behalf of the foreign purchaser, and the ATO will streamline its assessment of the application[14].

A separate application must be submitted for each foreign investor purchasing a dwelling in the development, and the foreign investor may be liable to pay a fee.

The streamlined bulk approval process may be appropriate for properties valued under $3 million in a development where the developer:

- meets the requirements for a *New (or Near-New) Dwelling Exemption Certificate*;

13 Applications to use the 'streamlined bulk approval' process should be emailed to: firbresidential@ato.gov.au.

14 The ATO will undertake to provide decision outcomes to the developer within 10 business days of the correct fee being paid.

- has a strong compliance history; and
- has already marketed, and will continue to market, the development in Australia.

E: Established dwelling as residence for temporary residents

Foreign persons are generally prohibited from purchasing established dwellings in Australia. However, in recognition that temporary residents need a place to live while in Australia, temporary residents are generally allowed to purchase one established dwelling to use as their place of residence.

Temporary residents are not permitted to purchase established dwellings to use for other purposes, such as for investment properties, to rent out, or to use as holiday homes.

Approval conditions[15]

If an application for an established residential dwelling is approved, it will generally be approved subject to:

- the purchase price being no greater than the value specified in the approval;
- the property being vacant at settlement;
- the acquisition of the property being registered on the Register of Foreign Ownership of Residential Land within 30 days of settlement;
- the temporary resident using the property as their principal place of residence[16].
- the property, or any part of the property, not being rented out; and
- the temporary resident selling, transferring or otherwise disposing of their interest in the property within six months from when it ceases to be their principal place of residence, or they cease to be a temporary resident (other than by becoming a permanent resident), whichever occurs first.

Example 8

Phillip is a temporary resident and wants to purchase an established dwelling to live in while he is in Australia. He applies for approval to purchase an established dwelling and pays the relevant fee. He is approved to go ahead with the purchase subject to the normal conditions for temporary residents purchasing an established dwelling.

Two years later, Phillip leaves Australia to return to his home country. To comply with the conditions of his approval, Phillip sells the dwelling within six months of departing Australia.

15 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.

16 If the property is to undergo renovations, those renovations must not be so substantial that the foreign person cannot continue to reside in the property while the renovations are undertaken.

In addition to purchasing one established dwelling to use as their primary residence, temporary residents may also purchase new dwellings, vacant land, and/or established dwellings for redevelopment. There is no limit on the number of these other dwellings that a temporary resident may purchase, but approval is generally required prior to each acquisition.

The acquisition of additional properties does not affect the requirement that approval to purchase an established dwelling is conditional on this becoming the temporary resident's primary place of residence.

Exemption certificates

See also the *Overview* and *Exemption Certificates* Guidance Notes.

Temporary residents may apply for approval to purchase an established dwelling through either a no objection notification (when seeking approval for a specified property), or through an exemption certificate under section 59 of the Act (when an exact property has not yet been identified).

An *Established Dwelling Exemption Certificate* will allow a temporary resident to acquire any established dwelling, within the parameters of the certificate, without having to apply for individual approval for each property they attempt to purchase. It can significantly streamline the approval process for those temporary residents that may have several unsuccessful attempts at purchasing a property (e.g. being outbid at auction) before finally securing one.

If an application for an *Established Dwelling Exemption Certificate* is approved, it will generally be approved subject to:

- the temporary resident purchasing only one established dwelling;
- the dwelling being located in the state or territory specified in the certificate; and
- the purchase price being no greater than the value specified in the certificate.

The certificate will generally be valid for 12 months from the date of approval.

The standard conditions applying to temporary residents acquiring established residential dwellings (such as using it as their principal place of residence) will also still continue to apply, regardless of whether the property was acquired through a no objection notification or exemption certificate.

Example 9

Zhong is a temporary resident and wants to purchase an established dwelling in Hobart to live in while she is in Australia. She applies for an established dwelling exemption certificate that will allow her to purchase one unspecified established dwelling for less than $2 million, and is granted an exemption certificate that is valid for 12 months.

Zhong attends multiple auctions, and is unsuccessful. She then makes a private offer on a dwelling for $1.5 million, and her offer is accepted. As Zhong has used the exemption certificate to purchase an established dwelling she is no longer able to use that exemption certificate to acquire any other established dwellings.

Example 10

Jaymie is a temporary resident and wants to purchase an established dwelling in Queensland to live in while he is in Australia. He applies for an established dwelling exemption certificate that will allow him to purchase one unspecified established dwelling for $1 million or less, and is granted an exemption certificate that is valid for 12 months.

Jaymie attends an auction where the bidding reaches $1.2 million. Jaymie continues to bid on the property, despite reaching the value limit specified on his exemption certificate, and is the highest bidder for the property with a bid of $1.3 million.

Where the purchase price for an established dwelling is higher than the amount specified in the exemption certificate, the certificate will not be valid for the property purchase. Therefore, Jaymie did not have foreign investment approval to purchase a property over $1 million. Jaymie has breached the law and may be subject to strict penalties.

F: Established dwelling for redevelopment

Foreign persons are generally prohibited from purchasing established dwellings in Australia. However, approval may be granted if a proposal to redevelop an established dwelling will genuinely increase Australia's housing stock.

An increase in Australia's housing stock is generally taken to mean that at least one additional dwelling is created on the land. This could include proposals to:

- Retain an established dwelling and build one (or more) new dwellings on the land alongside the established dwelling.
  - However, approval will not generally be granted for proposals that are just expansions of, or closely linked to, an existing dwelling, such as an entertainment space or granny flat or other private guest accommodation, as these are not considered to represent a genuine increase in Australia's housing stock.
- Demolish an established dwelling and build multiple new dwellings in place of it; or
- Build multiple dwellings on land that is currently vacant but that previously had a dwelling on it.
  - Approval will not generally be granted to replace one existing dwelling (even if now demolished) with only one new dwelling, even if that new dwelling is of a larger size or higher quality than the existing dwelling. It is generally expected that for each dwelling demolished, at least two new dwellings are built in replacement of it.

Approval conditions[17]

If an application for redevelopment – involving an established dwelling being retained – is approved, it will generally be approved subject to:

- the purchase price being no greater than the value specified in the approval;
- the acquisition of the property being registered on the Register of Foreign Ownership of Residential Land within 30 days of settlement;
- the property being vacant at settlement;
- at least one additional dwelling, of a comparable size to the existing dwelling, being built on the land;
- no part of the existing dwelling being occupied from the date of settlement until construction of the additional dwelling(s) is complete;
- construction of all additional dwelling(s) being completed within four years from the date of notice of approval;
- evidence of completion of the dwelling(s) being submitted to the Government within 30 days of it being received[18];
- the foreign person not selling, transferring, or otherwise disposing of their interest in the land prior to construction of all dwelling(s) being completed; and
- once construction of the new dwelling(s) is complete, one or more of the dwellings on the land being made available for use by independent third parties (e.g. by renting out or selling the dwelling(s)).

If an application for redevelopment – involving an established dwelling being demolished – is approved, it will generally be approved subject to:

- the purchase price being no greater than the value specified in the approval;
- the acquisition of the property being registered on the Register of Foreign Ownership of Residential Land within 30 days of settlement;
- the property being vacant at settlement, and no part of the existing dwelling being occupied from the date of settlement to the commencement of demolition;
- the demolished dwelling being replaced with multiple dwellings, each of a comparable size and value to each other;

17 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.

18 Evidence could include a certificate of fitness for occupancy or use, or final occupancy or builder's completion certificate.

- construction of all new dwellings being completed within four years from the date of notice of approval;
- evidence of completion of the dwellings being submitted to the Government within 30 days of it being received[19]; and
- the foreign person not selling, transferring or otherwise disposing of their interest in the land prior to construction of all dwelling(s) being completed.

If an application for development – <u>involving a parcel of vacant land that previously had a dwelling on it</u> – is approved, it will generally be approved subject to:

- the purchase price being no greater than the value specified in the approval;
- the acquisition of the property being registered on the Register of Foreign Ownership of Residential Land within 30 days of settlement;
- multiple dwellings, each of a comparable size and value to each other, being built on the land;
- construction of all the dwellings being completed within four years from the date of notice of approval;
- evidence of completion of the dwellings being submitted to the Government within 30 days of it being received[20]; and
- the foreign person not selling, transferring or otherwise disposing of their interest in the land prior to construction of all dwelling(s) being completed.

Example 11

Brendan wants to purchase one established dwelling to demolish and redevelop into four dwellings. He applies for approval to purchase the property and redevelop it, and pays the relevant application fee. As the redevelopment will genuinely increase the housing stock in Australia, Brendan is given approval to go ahead with the purchase subject to the standard conditions for demolition and redevelopment into multiple dwellings.

To comply with the conditions of the approval, Brendan cannot occupy the dwelling, or allow it to be occupied (for example, rented to tenants), from the time of settlement to demolition of the dwelling. Brendan must complete the redevelopment within four years of the date of foreign investment approval.

Example 12

Gina wants to purchase three established dwellings on adjacent blocks to demolish and redevelop into a twenty dwelling complex. She applies for approval to purchase each property and redevelop them, and pays the relevant application fee. As the redevelopment will genuinely increase the housing stock

19 Evidence could include a certificate of fitness for occupancy or use, or final occupancy or builder's completion certificate.

20 Evidence could include a certificate of fitness for occupancy or use, or final occupancy or builder's completion certificate.

in Australia, Gina is given approval to go ahead with the purchase subject to the general conditions for redevelopment into multiple dwellings.

Example 13

James wants to purchase one established dwelling to retain and build an additional dwelling on the property. The additional dwelling is planned to be a separate, standalone house located on the back of the block and be similar in size to the existing dwelling. James plans to make both dwellings available for rent when the redevelopment is complete.

James applies for approval to purchase the property and pays the relevant application fee. The proposed redevelopment will genuinely increase the housing stock in Australia and James is given approval to go ahead with the purchase subject to the general conditions including that one of the dwellings will be rented or sold to independent third parties.

Example 14

Celina wants to purchase one established dwelling to retain and build a granny flat on the property. While the granny flat will be a separate, standalone dwelling on the property, it will be substantially smaller than the established dwelling. Celina plans on using the granny flat primarily as holiday accommodation to house family members and friends.

This type of proposal would not normally be considered as a genuine increase in Australia’s housing stock, and would not normally be approved under the foreign investment framework.

Example 15

TPR Developments seeks to acquire an established dwelling to demolish and rebuild into a local convenience store. Where residential land is proposed to be redeveloped for non-residential use, and this is not considered contrary to the national interest, it will generally be approved subject to development conditions.

In this case, TPR Developments is approved to acquire the established dwelling, subject to the construction of the replacement commercial building being completed within five years.

As the initial acquisition still represents a purchase of residential land, TPR Developments may be subject to a number of other conditions, as assessed on a case-by-case basis, including for example, registering their ownership of the land on the Register of Foreign Ownership of Residential Land.

G: ESTABLISHED DWELLINGS FOR AUSTRALIAN BASED EMPLOYEES

Foreign persons are generally prohibited from purchasing established dwellings in Australia. However, in recognition that Australian based employees of foreign companies need a place to live while working in Australia, foreign companies may be permitted to buy established dwellings, in limited circumstances, to house their Australian based staff.

Eligibility

Foreign persons will be required to show that they are operating a substantial Australian business to be eligible for approval to purchase one or more established dwellings under this category.

To determine whether a business is substantial, consideration will be given to the turnover, profit and asset base of the business, as well as the number of Australian based employees (both Australian and foreign) employed by the business.

Foreign persons would not be eligible to purchase an established dwelling under this category where the dwelling would represent a significant proportion of its Australian assets.

In making an application, foreign persons that operate a substantial Australian business will be required to demonstrate a genuine need to purchase one or more established dwellings to house Australian based employees. Consideration will be given to a number of factors, including:

- The type of business being operated.
- The location of the business operations. For example, businesses operating in rural and remote areas are more likely to demonstrate a genuine need for established dwellings to house employees.
- Difficulty in obtaining suitable rental accommodation on an ongoing basis.
- Difficulty in obtaining new dwellings or vacant land, or securing builders to build new dwellings.
- Difficulty in attracting and retaining suitable employees in the absence of suitable rental accommodation on an ongoing basis.
- The location of the dwelling, including its proximity to the business operation.
- The scale of the business operations. Larger operations requiring a substantial number of employees are more likely to demonstrate a genuine need for established dwellings for housing.
- The duration of the need for housing for Australian based employees. Businesses will generally need to demonstrate a longer-term operational plan requiring employees and employee housing on an ongoing basis.
- The foreign person's operating history in Australia and compliance standing.

Approval conditions[21]

If an application for an established dwelling for Australian based staff is approved, it will generally be approved subject to:

- the property being used solely to accommodate Australian based employees of the business; and

21 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 foreign person selling, transferring or otherwise disposing of the property within six months from when it is first expected to remain vacant for six months or more, or has remained vacant for six months or more, whichever occurs first.

Example 16

A foreign-owned, Queensland based coal mining company is expanding its operations in a remote Queensland location and will be increasing the number of employees working on the site. The supply of rental accommodation is already tight and there are limited opportunities to purchase new dwellings or vacant land for development in the area. The company applies for foreign investment approval to purchase an established dwelling to house a number of its Australian based employees and pays the relevant application fee. The company is able to demonstrate a genuine need to purchase the established dwelling in order to provide suitable accommodation for its employees. In assessing the application, the decision maker considers the scale and remote location of the company's operation and the number of staff to be employed in the operation. The decision made is to allow the purchase of the dwelling subject to the standard approval conditions.

Example 17

A foreign owned company owns and operates a factory and showroom business in western Sydney. The company applies for foreign investment approval to purchase an established dwelling in a nearby suburb to house Australian based employees. It is unlikely that the company would be able to demonstrate a genuine need to purchase an established dwelling for Australian based employees, as the location of the business operations is not remote, there is likely to be appropriate rental accommodation available nearby, and there is a supply of new dwellings and vacant land for development in the area. This proposal would not normally receive foreign investment approval. The company would however be eligible to apply for foreign investment approval to purchase new dwellings or vacant land for development.

H: Vacancy fee

See also the *Fees* Guidance Note.

In accordance with Part 6A of the Act, an annual vacancy fee is levied on foreign owners of residential property if their property is not residentially occupied or genuinely available on the rental market for at least 183 days (approximately six months) in a 12 month period.

The fee is intended to encourage foreign owners of residential property to make their properties available for rent when they are not occupied as a residence, and so increase the number of properties available for Australians to live in.

The vacancy fee applies to:

- foreign persons who made a foreign investment application for residential land on or after 7:30PM (AEST) on 9 May 2017; and

- foreign persons who purchased a dwelling in a development under a *New (or Near-New) Dwelling Exemption Certificate* that was applied for by the developer on or after 7:30PM (AEST) on 9 May 2017.

Foreign owners of residential property that meet the above criteria must lodge an annual vacancy fee return.

What does residentially occupied or genuinely available for rent mean?

For the purpose of the vacancy fee, foreign owned residential property is considered residentially occupied, or genuinely available on the rental market, if it can be proven[22] that:

- the property owner, or a relative of the owner, genuinely occupied the property as a place of residence; or
- the property was genuinely occupied as a place of residence subject to a lease or licence with a term of at least 30 days; or
- the property was made genuinely available as a place of residence on the rental market, with a contract term of at least 30 days.

Properties made available for short-term leases of less than 30 days (including via web-based vacation rental sites) are not considered residentially occupied or genuinely available on the rental market.

> **Example 18**
>
> Maria purchases a new apartment in St Kilda. She intends to spend significant time there for work and her family enjoy coming to Australia to holiday from overseas.
>
> Maria finds herself spending more and more time away from Australia and decides to place the apartment on an online short-stay accommodation rental site. She feels that this will provide the flexibility to use the property through the year as the apartment is generally rented via an online rental site for less than one week at a time. Maria ends up spending only six weeks in Australia over the 12 month period after the purchase of the apartment settled. She lodges her vacancy fee return with the ATO and is advised that she is liable to pay the vacancy fee.
>
> In this situation, Maria is liable for the vacancy fee as this type of rental has not made the apartment genuinely available as a rental property for a continuous period of 30 days or more throughout the vacancy year. While the total number of days that the property was occupied is over 183 days, the holiday rentals were not for a continuous period of 30 days or more.

The vacancy fee year, and lodging on-time

A foreign person’s liability for the vacancy fee is reassessed annually, based on the use of the property over the preceding 12 months (the vacancy year). The first assessable vacancy year

22 Examples of supporting evidence may include: tenancy agreement(s); income tax returns or notices of assessment; title search or certificate of title showing the date that title was transferred; bank statements; insurance certificates for tenant’s or landlord’s insurance; and/or evidence of the property being genuinely available for rent.

starts on the first day that the person acquires the right to occupy the property (for example, the date of settlement or receipt of an occupancy certificate).

Foreign owners need to lodge their vacancy fee return – outlining the use of their property in the previous 12 months – within 30 days of the end of each vacancy year.

Example 19

André and Marc purchase a new apartment in Sydney. They will be entitled to occupy the apartment on 23 September 2018. In this case, the first occupation day is 23 September 2018, and their vacancy fee year will end on 22 September 2019. They have 30 days from the end of the vacancy fee year to submit their first vacancy fee return.

Example 20

Mateo is a temporary resident and seeks approval to purchase an established dwelling for redevelopment in Northern Sydney. Foreign investment approval is granted subject to standard conditions.

Mateo settles on the property on 1 June 2017 and completes the construction of two new dwellings 17 months later. Occupancy certificates are issued on 1 November 2018. Mateo then sells one dwelling and uses the other as his residence.

On 1 June 2018, Mateo is not liable for the vacancy fee because the new dwelling has not been completed. Mateo's use of the dwelling he owns will be assessed, for the purpose of the vacancy fee, on 1 November each year, as this is the date which Mateo was first able to occupy the property. The first year he must submit a return will be for the vacancy fee year 1 November 2018 to 31 October 2019.

Example 21

Sophia and Frederick decide to buy a new house close to their Australian relatives in Brisbane to use when they visit each year. Prior to purchasing, Sophia and Frederick submit a foreign investment application on 30 May 2017. An approval is granted and the purchase of the property is settled on 22 August 2017.

In the year following settlement, Sophia and Frederick live in their Brisbane property for three months over the summer. At the end of summer, Sophia and Frederick leave Australia and do not return until August 2018. Their Brisbane property is not lived in or made available for rent while Sophia and Frederick are not in Australia.

Sophia and Frederick's vacancy year is the 12 month period following the occupation date (settlement date) which is the period 22 August 2017 to 21 August 2018.

Within 30 days from 21 August 2018, Sophia and Frederick must lodge a vacancy fee return advising whether the property was residentially occupied, or genuinely available for rent, for at least 183 days in the past 12 months. Following lodgement of the vacancy fee return, Sophia and Frederick are advised that they are liable to pay the vacancy fee.

Vacancy fee returns are lodged electronically on the ATO website[23].

Where a property is jointly owned:

- In the case of joint tenants; only one return needs to be lodged, and if liable, only one fee will be payable.
- For tenants in common; each tenant will need to lodge a return, and if liable, the fee payable will be equal to the foreign investment application fee that was payable by each individual tenant.
- Where a property is co-owned by a foreign person and non-foreign person; the non-foreign person will have no liability to pay a vacancy fee.

After completing the lodgement, the confirmation page will indicate any liability for a vacancy fee and the amount payable. A notice of liability of the vacancy fee payable will also be provided to the foreign owner via email after lodgement. The notice will provide information on the reason the fee is being charged, the fee payable, payment details, and the due date.

Where a vacancy fee return is not lodged on time (i.e. within 30 days of the end of the vacancy year), the foreign owner of the property may be deemed to be liable to pay the vacancy fee, regardless of the number of days during the vacancy year in which the dwelling was residentially occupied or genuinely available for rent.

Example 22

Nikolai is an Estonian national who has received foreign investment approval to acquire a new dwelling in Perth. Nikolai residentially occupies the property for 250 days during his vacancy year whilst he is in Australia. However, Nikolai does not lodge his vacancy fee return on the ATO website within 30 days of the end of his vacancy year. As such, despite the property being adequately occupied during the vacancy year, Nikolai may still be liable to pay a vacancy fee for that year.

Exemptions from paying the vacancy fee

There are a number of situations where a foreign person may be exempt from being liable for a vacancy fee. Some of these situations are listed in the table below.

Where a foreign person meets one of the exemptions, they will still be required to lodge an annual vacancy fee return and make a declaration specifying the exemption that applies. In order to benefit from an exemption, foreign investors may be required to provide acceptable supporting evidence that they were unable to occupy the dwelling for one of the following reasons.

23 To lodge a vacancy fee return, the foreign ownership of the property needs to have been registered on the Register of Foreign Ownership of Residential Land. This registration is a requirement of purchasing residential land in Australia. The registration will create a Register reference number, which is then needed to complete the vacancy fee return.

Exemption	Examples of acceptable evidence
Legal ownership of the property changed during the year.	• Title search or certificate of title showing the date that title was transferred
The property is undergoing substantial repair, for example, due to fire, malicious damage or natural disaster.	• Evidence of the reason for repairs, such as an insurance claim or police report
The property is undergoing substantial renovations or is deemed to be too unsafe to occupy.	• Building permit details • Building certificate or other third party report evidencing a safety issue
The resident of the property is receiving long-term, in-patient, medical or residential care.	• Contact information for care facility • Letter from care facility confirming you or your tenant is under medical/residential care away from the property
Legal restrictions by an order of a court or tribunal, or a law of the Commonwealth, a state or a territory.	• Court orders or documents outlining the legal restrictions
The registered owner is deceased and administration of the estate is pending.	• Death certificate of registered owner

Should a foreign owner of residential property cease to be a foreign person during a vacancy year, the vacancy fee obligations will cease to apply, and the person does not need to lodge a vacancy fee return.

How much is the fee?

If liable to pay the vacancy fee, the fee payable will generally be equivalent to the residential land application fee that was paid by the foreign person at the time the application for foreign investment approval to purchase the property was made.

In circumstances where the application fee was waived, the vacancy fee payable will be equal to the lowest tier foreign investment application fee that would have been payable.

Where the property was acquired under a *New (or Near-New) Dwelling Exemption Certificate*, the vacancy fee payable will be equal to the foreign investment application fee that would have been payable for the property, had the exemption certificate not been in place.

I: Integrated Tourism Resorts – grandfathered treatment of residential land

Foreign persons seeking to purchase vacant residential land, a new dwelling, or an established residential dwelling, within a resort that was designated as an Integrated Tourism Resort (ITR)[24]

24 An integrated tourism resort was a development that held a mix of accommodation, recreation and commercial facilities that was planned and constructed by a single developer on single or adjoining sites within a well-defined area. The development normally included a hotel or hotels that supplied a substantial amount of the total accommodation, as well as recreational facilities such as swimming pools, gyms and/or sporting facilities within the boundaries of the resort. Integrated developments might also host commercial zones for retail, restaurants and entertainment facilities.

prior to September 1999 are exempt from the need to apply and receive foreign investment approval.

For resorts designated as ITRs on or after September 1999, foreign persons are exempt from the need to receive foreign investment approval for purchases of developed residential property in the resort that is:

- subject to a lease of 10 years or more to the resort operator;
- available as tourist accommodation when it is not occupied by the owner; and
- the acquisition is consistent with any conditions imposed on the ITR at that time.

These exemptions from needing foreign investment approval only apply to residential land located within the original designated boundaries of the ITR.

List of Integrated Tourism Resorts

The following resorts were designated as integrated tourism resorts before September 1999:

- Hamilton Island Resort, Whitsunday Passage, Queensland
- Hope Island Resort, Hope Island, Queensland
- Hyatt Regency Resort, Coolum, Queensland
- Kooralbyn Valley Resort, Queensland
- Laguna Quays Resort — Stage 1, Repulse Bay, Queensland
- Mirage Port Douglas Resort, Port Douglas, Queensland
- Palm Cove Travelodge Resort, Queensland
- Royal Pines Resort, Ashmore, Queensland
- Sanctuary Cove, Hope Island, Queensland
- Joondalup Resort, Western Australia
- Wirrina Cove Resort, South Australia

The following resorts were designated as integrated tourism resorts on or after September 1999:

- Heritage Golf and Country Club, Chirnside Park, Victoria
- Hunter Valley Golf and Country Club Resort, New South Wales
- Kingfisher Bay Resort Village, Fraser Island, Queensland

In 2015 the Act was amended, and no longer includes a mechanism to approve new integrated developments as ITRs. The treatment of existing ITRs has been grandfathered to minimise adverse impacts on current foreign investors.

Further information

Further information is available on the FIRB website 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.