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## NEWS

# New FIRB exemptions for new and near-new dwellings

Generally, foreign persons (including temporary residents and foreign non-residents) require Foreign Investment Review Board (FIRB) approval or an exemption certificate to purchase property in Australia. Recent changes mean foreign purchasers can rely on a new or near-new dwelling exemption certificate obtained by developers and other sellers.

In this article, partner Mark Lyons explains eligibility for an exemption certificate and developers' and sellers' obligations to FIRB.

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## EXEMPTION CERTIFICATES

These exemption certificates mean foreign person purchasers do not need to seek their own individual FIRB approval provided the property being purchased is covered by the exemption certificate.

FIRB has recently published guidelines setting out how an exemption certificate can be obtained. Applications are considered on a case-by-case basis to ensure they are not contrary to the national interest. FIRB considers a range of factors when assessing applications, including marketing and advertising schedules, the number of dwellings to be built and the staging of construction, expected sales price of each dwelling, and whether the applicant has held an exemption previously and complied with its obligations.

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## WHAT KEY ITEMS SHOULD BE CONSIDERED?

Consideration needs to be given to whether the dwellings to be sold are new or near new.

New dwellings must, or will, be built on residential land and has not been previously sold or occupied. Near-new dwellings are dwellings built on residential land which—

- is part of a residential development
- was previously sold by the developer of the 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 built to replace one or more demolished established dwellings.

Further, an exemption certificate will only apply to purchases up to AUD \$3 million in a single development. If a foreign person wishes to purchase a single dwelling above AUD \$3 million or multiple dwellings totalling more than AUD \$3 million, then the

purchaser must seek their own individual FIRB approval.

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## **WHAT ARE THE ELIGIBILITY CRITERIA FOR OBTAINING AN EXEMPTION CERTIFICATE?**

Developers (either Australian or foreign) can apply for a new (or near-new) dwelling exemption certificate if the development—

- will consist of 50 or more dwellings (other than townhouses)
  - has development approval from the relevant government authority, and
  - has foreign investment approval (if applicable) for the purchase of the land the development is on, and any conditions of that approval are being met.
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## **WHAT CONDITIONS WILL BE IMPOSED ON AN APPROVAL FOR AN EXEMPTION CERTIFICATE?**

If an application is approved, it will generally be on conditions requiring the developer to:

- Market the dwellings for sale in Australia.
  - Not sell more than more than 50 percent of the total number of dwellings in the development to foreign persons under the exemption certificate. Not sell more than AUD\$3 million worth of dwellings in the development to a single foreign person under the certificate.
  - Provide a copy of the exemption certificate to each foreign purchaser.
  - Report to the Australian Government until all dwellings in the development are sold. Notify the Australian Government, within 30 days, if the number of dwellings in the development is reduced to less than 50.
  - Pay a fee for each dwelling sold under the exemption certificate. While the developer is liable for payment of the fee, agreement can be reached with the foreign buyer about who will pay the fee. The fee payable is the amount that would have been payable if the foreign person sought an approval to purchase from the FIRB themselves.
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## **DO DEVELOPERS AND SELLERS HAVE OBLIGATIONS TO FIRB?**

Yes, they do. FIRB imposes reporting requirements, so if an exemption certificate is granted, sales reports must be provided to FIRB every six months until all properties covered by the exemption certificate are sold.

In addition, the fee for each property sold must be paid to the ATO. The fee must be included in the sales report and payment must be made to the ATO within 30 days of the end of the relevant six-month reporting period.

Strict penalties (including civil and criminal penalties) apply where there is non-compliance with these reporting and payment requirements and where there is non-compliance with the approval conditions of the exemption certificate. FIRB can also revoke the exemption certificate.

Exemption certificates may benefit your development project by streamlining and simplifying sales to foreign buyers. If you are considering making an application for an exemption certificate on your development project, please contact one of our Real Estate lawyers to discuss how we can assist you.

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