

**Foreign Acquisitions and Takeovers
Regulations 2010 (No. 2) –
Reintroduction of notification
requirement for temporary residents
purchasing residential real estate**

Post Implementation Review

October 2012

Overview

On 24 April 2010, the then Assistant Treasurer, the Hon Senator Nick Sherry MP, announced among other foreign investment residential real estate policy changes, the reintroduction of the notification requirement for temporary residents seeking to acquire residential real estate in Australia. A Regulation Impact Statement was required for this announcement but was not prepared. As a result, a Post Implementation Review is required, in line with the Government's best practice regulation requirements.

This regulatory change removed an exemption which previously existed in the *Foreign Acquisitions and Takeovers Regulations 1989* and required all temporary residents seeking to purchase residential real estate in Australia to notify and obtain foreign investment approval.

The main finding of the Post Implementation Review is that the regulatory change was effective in meeting the policy objective. It facilitated greater transparency around foreign investment in the residential real estate sector and ensured that foreign investment by temporary residents in the residential real estate sector is consistent with the relevant eligibility requirements under Australia's foreign investment policy. Feedback from a consultation survey conducted by Treasury indicates that the compliance costs of this regulatory change on foreign investors are low.

Introduction

The *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) creates a screening framework for certain investments or acquisitions by foreign persons. Foreign investment in Australia is also subject to the Australian Government's foreign investment policy (the **Policy**).

Under the current screening framework for residential real estate acquisitions, all acquisitions of interests in 'Australian urban land' (including acquisitions of residential real estate) by foreign persons must be notified prior to acquisition. All foreign investment proposals are assessed in light of whether they are contrary to the 'national interest'. The 'national interest' is not defined under the Act, which reflects the need for flexibility in applying the test to the diverse range of investments notified, and the industries in which they occur. In relation to foreign investment in residential real estate, the Government's policy is that foreign investment should add to Australia's stock of housing without overheating demand.

Once a foreign investment proposal is received, the decision maker (the Treasurer or his delegate) may raise no objections; raise no objections subject to conditions; or prohibit the transaction. The Foreign Investment Review Board (**FIRB**) was established in 1976 to examine foreign investment proposals and advise the Treasurer on the national interest implications.

Prior to 2008, temporary residents wishing to acquire residential real estate in Australia were required to notify and seek foreign investment approval. In 2008, the then Assistant Treasurer, Chris Bowen MP, announced among other changes to Australia's foreign investment rules, an exemption regime for temporary residents which exempted them from notifying residential real estate acquisitions. These changes were made through amendments to the *Foreign Acquisitions and Takeovers Regulations 1989* (the **Regulations**)

which came into effect in March 2009.¹ Pursuant to these amendments, the following types of acquisitions by temporary residents were exempt from notification:

- vacant residential land on which to build a single house;
- a new house; or
- a single ‘established residence’ or second-hand dwelling to use as their principal place of residence.

In April 2010, the then Assistant Treasurer, the Hon Senator Nick Sherry MP, announced the reintroduction of the notification requirement for temporary residents seeking to acquire residential real estate in Australia.

Problem identification

The housing finance statistics released by the Australian Bureau of Statistics (**ABS**) provide a broad indication of the number and value of transactions in the Australian property market each year.²

According to the ABS in the 2010-11 financial year there were 398,303 owner-occupied dwellings financed (excluding refinancing of existing loans), representing around \$122 billion in aggregate turnover.

In 2010-11, FIRB considered 10,865 foreign investment proposals. Of the applications considered, FIRB approved 9,556 in the residential real estate sector, including new and existing residential dwellings, with a value of \$20.92 billion.³ This reflects the acquisitions which foreign persons proposed to undertake — not the level of actual acquisitions or investment undertaken.

In comparing the foreign investment proposals considered by FIRB with the ABS data, the level of foreign investment in the residential real estate sector represents a small proportion of activity in the sector, noting that FIRB data overstates the value of final acquisitions.

The reintroduction of the notification requirement for temporary residents seeking to acquire residential real estate was introduced to counter two concerns at the time:

- concerns about the lack of transparency in foreign investment activity in Australia’s residential real estate sector; and
- concerns about residential real estate acquisitions by temporary residents that may have breached Australia’s foreign investments laws.

Lack of transparency

The removal of the notification requirement for temporary residents in 2008-09 had reduced visibility of the proposed level of foreign investment in the residential real estate sector by temporary residents. In 2010-11, when the notification requirement was in place, FIRB approved 9,556 residential real estate applications. By contrast, in 2009-10, FIRB only

¹ *Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1)*.

² Catalogue 5609, Table 1 June 2011 – *Housing Finance Commitments (owner occupation) By Purpose: Australia*.

³ Foreign Investment Review Board Annual Report 2010-11, page 28.

approved 3,723 residential real estate applications, reflecting that when the exemption regime was in place, the number of residential real estate acquisitions which were being screened was reduced. This is particularly the case for the sub-category of established dwellings which can only be purchased by temporary residents (there are some exceptions to this approach).⁴ In 2010-11, FIRB approved 3,881 acquisitions of established dwellings by foreign persons, compared with 647 approvals in 2009-10 during the operation of the exemption regime.

Table 1: Investment in residential real estate by type of expenditure and number of proposals approved from 2007-08 to 2010-11⁵

	2007-08		2008-09		2009-10		2010-11	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
Residential								
Developed								
- existing residential property	4,015	2.97	2,450	1.81	647	0.81	3,881	3.57
- annual programs	13	0.44	7	0.68	7	0.56	4	0.20
<i>Sub-total 'Developed'</i>	<u>4,028</u>	<u>3.41</u>	<u>2,457</u>	<u>2.49</u>	<u>654</u>	<u>1.38</u>	<u>3,885</u>	<u>3.77</u>
For development								
- vacant land	1,667	3.93	988	2.72	1,010	1.44	1,514	2.33
- new dwellings								
- individual purchases	1,043	0.66	954	0.60	1,937	1.20	3,911	2.46
- developer 'off-the-plan'	324	9.49	235	5.48	22	2.30	65	10.08
<i>Sub-total 'new dwellings'</i>	<u>1,367</u>	<u>10.15</u>	<u>1,189</u>	<u>6.08</u>	<u>1,959</u>	<u>3.50</u>	<u>3,976</u>	<u>12.54</u>
- redevelopment	103	1.61	73	1.06	92	0.34	171	0.45
- annual programs	6	1.34	8	2.58	8	2.11	10	1.83
<i>Sub-total 'For development'</i>	<u>3,143</u>	<u>17.02</u>	<u>2,258</u>	<u>12.43</u>	<u>3,069</u>	<u>7.39</u>	<u>5,671</u>	<u>17.15</u>
Total residential	<u>7,171</u>	<u>20.43</u>	<u>4,715</u>	<u>14.92</u>	<u>3,723</u>	<u>8.77</u>	<u>9,556</u>	<u>20.92</u>

Note: Totals may not add due to rounding.

The 2008-09 to 2010-11 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Compliance with the law

During the exemption regime which began during 2008-09, compliance with foreign investment laws relied on temporary residents self-assessing whether they were eligible to purchase residential real estate under the Act and Policy. There was no screening of whether temporary residents who purchased residential properties were eligible.

Table 2 below shows that during the exemption regime, in 2009-10, there were 3 applications rejected and 167 applications withdrawn. In 2010-11 when the notification requirement was reintroduced, 43 applications were rejected (42 of these related to real estate purchases) and 390 applications were withdrawn (of these 67 per cent involved real estate purchases).⁶ Applications are rejected when the proposed acquisition is contrary to the national interest. In the case of residential real estate proposals this includes when the foreign person is not eligible to purchase the property. There are a range of reasons why applicants may choose to withdraw their application. In the case of proposed acquisitions of residential real estate, applicants may choose to withdraw their application if they are advised that the application is unlikely to meet the eligibility requirements for purchasing residential property, but may also withdraw where they decide not to go ahead with a purchase.

⁴ The other category of foreign persons that are eligible to purchase an established dwelling are companies who propose to use the dwellings for Australian based staff or companies who are purchasing established dwellings for redevelopment (that is, to demolish the existing dwelling and build new buildings). The FIRB Annual Report does not provide a breakdown of type of foreign persons who purchased established dwellings.

⁵ Foreign Investment Review Board Annual Report 2010-11, page 28.

⁶ Foreign Investment Review Board Annual Report 2010-11, pages 19-20.

The number of foreign investment proposals which were inconsistent with the Act and Policy for purchasing residential real estate (as indicated by the rejection and withdrawal figures for 2010-11) are less likely to have been detected under the exemption regime which existed during parts of the 2008-09 and 2009-10 financial years.

Table 2: Applications considered: 2005-06 to 2010-11 (number of proposals)⁷

	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
Outcome	No.	No.	No.	No.	No.	No.
Approved unconditionally	1,386	1,520	1,656	2,266	2,672	4,606
Approved with conditions	3,800	4,637	6,185	3,086	1,729	5,687
Total approved	5,186	6,157	7,841	5,352	4,401	10,293
Rejected	37	39	14	3	3	43
Total decided	5,223	6,196	7,855	5,355	4,404	10,336
Withdrawn	373	629	521	341	167	390
Exempt	185	200	172	125	132	139
Total considered	5,781	7,025	8,548	5,821	4,703	10,865

Note: Figures include corporate reorganisations (80 in 2010-11).
The 2008-09 to 2010-11 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Implementation of the regulatory measure

On 24 April 2010, the then Assistant Treasurer, the Hon Senator Nick Sherry MP, announced a number of changes to the residential real estate screening regime.⁸

The changes included the reintroduction of the requirement for temporary residents to notify the Government and receive approval before purchasing residential real estate, introduction of a civil penalties regime in relation to the real estate acquisitions, a new national data-matching compliance monitoring program, the establishment of a national hotline to report compliance issues and measures to improve compliance by real estate agents with the Act.

This Post Implementation Review will focus on assessing the impact of the reforms in relation to the requirements for temporary residents to notify and obtain approval before purchasing residential real estate.

The changes in relation to temporary residents⁹ essentially reintroduced the requirement for temporary residents to notify and seek foreign investment approval for proposed acquisitions of residential real estate.

The Assistant Treasurer also announced that certain conditions would be imposed on temporary residents who are approved to purchase residential real estate. Proposals for the acquisitions of second-hand dwellings by temporary residents are now approved subject to the conditions that the temporary resident must sell the property when it ceases to be their principal place of residence in Australia or when they permanently depart Australia and cannot use it for investment purposes. Proposals for the acquisitions of vacant residential

⁷ Foreign Investment Review Board Annual Report 2010-11, page 20.

⁸ Press release: The Hon Nick Sherry, Assistant Treasurer, 'Government Tightens Foreign Investment Rules for Residential Housing', 24 April 2010 (<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/074.htm&pageID=003&min=njsa&Year=&DocType=0>).

⁹ See *Foreign Acquisitions and Takeovers Regulations 2010 (No. 2)*.

land are now approved subject to the condition that the temporary resident commences continuous construction on the land within 2 years of approval.

The Government's policy objectives

The Government's purpose for re-introducing the notification and screening requirements was to:

- strengthen monitoring arrangements to ensure that acquisitions by temporary residents were undertaken in compliance with the eligibility requirements under the Act and Regulations;
- ensure that temporary residents can only invest in Australian real estate if that investment adds to the housing stock, and that investments by temporary residents in established properties are only for their use whilst they live in Australia;
- that foreign investment by temporary residents does not place pressure on housing availability or housing affordability for Australians; and
- improve transparency by collecting data on the number of residential real estate proposals considered by the FIRB each year (aspects of which are published in the FIRB's annual report).

Possible implementation options

There were two broad alternative options that could have been implemented in order to try and achieve the Government's objective.

An alternative to reintroducing the notification requirement for temporary residents would have been to **maintain the exemption regime**. Under this option purchases of residential real estate by temporary residents would still need to comply with the requirements set out in the Act or Policy.

However, the 'self-assessment' nature of the exemption may have given rise to some instances of non-compliance with the eligibility requirements for purchasing residential real estate. In the absence of a screening regime, it is less likely that these instances of non-compliance would be identified.

Secondly, the absence of the notification regime would make it difficult to effectively impose conditions in these cases (for example requiring disposal if the property is no longer the principal place of residence).

Finally, the exemption regime does not include any mechanism for data collection, and is therefore less transparent.

An alternative would be a 'half-way option' between having no screening regime at all to having only a **notification regime**, without an additional screening and approval process.

Under this option temporary residents would be required to notify the Government within 30 days of completing a transaction to purchase residential real estate.

After the notification has been received, the investor would receive a confirmation from FIRB that this information has been recorded and noting that the investment is not reviewable (that

is not subject to the screening and approval process) or a request stating that further information is required.

A notification only requirement is likely to improve the quality of data available on the purchases of residential real estate by temporary residents — particularly as the data would capture the number of actual purchases of residential real estate by temporary residents.

Under this option purchases of residential real estate by temporary residents would still need to comply with the requirements set out in the Act or Policy. However, compared to the current screening and approval process, a notification regime would not involve screening of the acquisition against the eligibility requirements prior to the acquisition taking place. Any instances of non-compliance with the eligibility criteria would be identified once the temporary resident has purchased the property. Where a temporary resident has acquired a residential property and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may issue a divestment order requiring the temporary resident to sell the property.¹⁰

The option chosen by the Government was to reintroduce the notification and approval requirement for all temporary residents prior to seeking to purchase residential real estate.

Consultation process to assess the impact of the regulatory measure

Consistent with the Office of Best Practice Regulation's requirements, Treasury undertook a consultation process in October 2012 as part of the Post Implementation Review to assess the impact of the regulatory measure on the individual compliance costs of foreign investors.

The consultations were undertaken through a survey on the FIRB website to gather feedback from applicants who lodged their application via the Online Real Estate Notification (**OREN**) system on the time and compliance cost burdens in relation to lodging an application. A copy of the survey and its results is at [Attachment A](#).

Over the two and half week period in which the survey was undertaken, 320 responses were received from foreign investor applicants. The results of the survey are analysed below.

Impact analysis of the regulatory measure

Transparency

The reintroduction of the notification requirement has facilitated greater transparency of the level of *proposed* investment in the residential real estate sector by temporary residents. It has enabled FIRB to report annually on the number of proposals it has considered, the number approved and the number which have been rejected (see Table 1).

It should be noted that the number of notified proposals is not representative of the number of actual transactions — this is because a single purchaser will often submit a number of approvals before they are successful in purchasing a house (each property must be separately notified). However, the information collected does form the basis of useful comparisons from year to year.

¹⁰ Sub-section 21A(4) of the *Foreign Acquisitions and Takeovers Act 1975*.

Compliance with the law

The previous exemption framework introduced during 2008-09 exempted temporary residents from notifying acquisitions if they met the eligibility requirements for purchasing particular types of residential property. This essentially relied on self-assessment on the part of temporary residents against the eligibility requirements. By contrast, under the current regime, temporary residents are required to submit applications to purchase residential real estate, which are then screened by FIRB for compliance with the eligibility requirements under the Act and Policy.

The current regime has also enabled FIRB to impose conditions in granting approval for certain types of residential real estate purchases. Such conditions include that temporary residents must sell their established dwelling when it ceases to become their principal place of residence in Australia or that construction on vacant residential land must commence within two years of approval.

The reintroduction of the notification and approval regime, together with the imposition of conditions on certain types of residential property has facilitated greater compliance with the Act and the Government's policy on foreign investment in the residential real estate sector.

Particularly, the placing of conditions on purchasers of established dwellings by temporary residents has ensured that the acquisitions of these properties do not put pressure on housing availability for Australians since they must sell the property when it ceases to be their principal place of residence or when they depart Australia.

Housing affordability has improved since the exemption framework was removed. However, it is difficult to quantify the impact of the reform on the improvement in housing affordability.

House prices are affected by a range of supply and demand factors. The National Housing Supply Council's (NHSC's) 2011 *State of Supply Report* outlined influences such as:

- life-cycle factors;
- confidence;
- strength of the labour market and prospects for income;
- perceptions of the housing market;
- availability and cost of finance;
- the impact of wider living costs such as utility bills; and
- with regard to investors, anticipated returns.

The NHSC also identified policy changes that affected demand. For example, the surge in first home buyers encouraged by the Government's stimulus measures introduced during the Global Financial Crisis have ended. Some of these buyers would have brought forward their decision to buy a home, inevitably leading to a fall in housing transactions following this surge.

Compliance costs

The notification requirement for temporary residents acquiring residential real estate consists of completing a relatively simple statutory notice, and forwarding the completed notice (including via email) to FIRB for processing.

The form itself consists of three pages, requiring the applicant to complete basic identification and address details, their visa details, details of the land being acquired and the purchase price of the property. The applicant must also sign a declaration that the applicant understands and will abide by the conditions upon which such applications are approved.

Because some foreign investors do not have English as their primary written language, some applicants use an ‘agent’ (often a real estate agent, conveyancer or solicitor) to assist them in completing the form.

Additionally, applicants and their agents will often seek advice and assistance from FIRB directly, in relation to their eligibility, notification requirements, exemptions or when completing the form. The FIRB Secretariat has a telephone inquiry line to assist applicants on these matters.

In July 2011, FIRB introduced OREN — an online application lodgement system for foreign persons in relation to residential real estate applications. Given that over 95 per cent of total annual applications processed by FIRB fall into the residential real estate category, the online system has significantly streamlined the lodgement process (see discussion of survey results below) and lowered compliance costs, and has also facilitated more timely decisions on these foreign investment proposals.

From the October 2012 consultation survey, approximately 72 per cent of the applicants surveyed reported it took up to 15 minutes of their time to fill in the relevant residential real estate application form via OREN.

Around 93 per cent of applicants surveyed also reported that the information they required to fill out the form from the FIRB website was easily found and accessible while 98 per cent reported that the instructions on the OREN system were either ‘good’ or ‘very good’ in assisting them to complete and lodge their application forms.

Around 85 per cent of applicants reported that they did not seek the services of an agent to assist them in lodging an application. The vast majority of those that did seek such advice, paid less than \$250 for these services (88 per cent). The remainder 12 per cent reported paying between \$250 and \$1000. For those applicants (44 per cent) that had also lodged manual applications within the last 12 months, 61 per cent reported taking up to 15 minutes to complete the manual forms while the remainder taking up to 25 minutes or more.

Overall, the results of the consultation survey show a relatively low level of compliance costs for temporary residents seeking foreign investment approval for residential real estate acquisitions.

Conclusion

When viewed in the context of the number of temporary resident applications annually and compliance and other costs associated with purchasing a residential property, the notification and approval requirements reintroduced in 2010 do not represent a substantial regulatory impost for individual temporary residents.

The reform has enhanced transparency and ensured that foreign investment by temporary residents in the residential real estate sector is consistent with the relevant eligibility requirements under Australia's foreign investment policy.

The notification and approval process for temporary residents seeking to purchase residential real estate in Australia has also enabled conditions to be imposed on approvals (which were previously not able to be imposed due to the existence of the exemption regime). This has facilitated greater alignment of foreign investment in the residential real estate sector with the Government's policy.

On this basis, the regulatory change is likely to have achieved its policy objectives with greater compliance with the law, and increased transparency for purchases of residential real estate by temporary residents, while having imposed a low compliance burden on foreign investors.

Attachment A — Survey Questions and Results

Total number of survey respondents: 320 persons

1. How long did it take you to complete the form?

Answer Options	Response per cent	Response Count
Less than 5 minutes	13.1%	42
Between 5 and 10 minutes	28.1%	90
Between 10 and 15 minutes	31.3%	100
Between 15 and 25 minutes	18.8%	60
More than 25 minutes	8.8%	28

2. How easy was it to find the information required to fill out the form?

Answer Options	Response per cent	Response Count
Very easy	42.5%	136
Somewhat easy	50.9%	163
Moderately difficult	5.9%	19
Very difficult	0.6%	2

3. How would you rate the instructions and information on the OREN (Online Real Estate Notification) system to assist you in completing and lodging the form?

Answer Options	Response per cent	Response Count
Very good	54.4%	174
Good	43.8%	140
Poor	1.9%	6

4. Did you seek advice in preparing your application?

Answer Options	Response per cent	Response Count
Yes	15.3%	49
No	84.7%	271

5. If you sought advice on your application, how much did it cost?

Answer Options	Response per cent	Response Count
Less than \$250	88.2%	97
Between \$250 and \$500	5.5%	6
Between \$500 and \$750	5.5%	6
Between \$750 and \$1000	0.9%	1
Over \$1000	0.0%	0

6. In the last 12 months if you submitted an application for approval using a manual form, how long did it take you to complete?

Answer Options	Response per cent	Response Count
Less than 5 minutes	11.4%	16
Between 5 and 10 minutes	24.3%	34
Between 10 and 15 minutes	25.7%	36
Between 15 and 25 minutes	15.7%	22
More than 25 minutes	22.9%	32