

Q&S CONVEYANCING UPDATE

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“FOREIGN BUYERS NEED FIRB APPROVAL”

BUYER AND AGENT MAY COMMIT OFFENCE BY NOT MAKING CONTRACT
CONDITIONAL ON FIRB APPROVAL

A recent matter that came across my desk involved the purchase of property by a person from overseas. The Real Estate Agent forgot or omitted to insert a clause in the contract indicating that the contract was conditional upon the foreign purchaser's Foreign Investment Review Board (FIRB) approval.

The Foreign Acquisitions and Takeovers Act 1975 (“the Act”) defines a foreign person as someone who does not ordinarily reside in Australia.

All contracts by foreign persons to acquire Australian real estate must be made conditional upon FIRB approval, unless approval was obtained prior to entering into the contract.

If a foreign person enters a contract that is not conditional upon FIRB approval, they may commit a criminal offence under the Act and may face fines (up to 500 penalty units or \$37,500.00) or imprisonment (up to 2 years). Furthermore, if a foreign person enters a contract that is conditional but purchases the property before obtaining FIRB approval, they will also be in breach of the Act and face the above fines or imprisonment.

Real Estate Agents may also be liable for abetting a criminal offence if they knew the purchaser was a foreign person without FIRB approval and they did not take steps such as recommending that the purchaser and vendor amend a non conditional contract to be conditional upon FIRB approval.

It should be noted that an offence against the Act will not cause a contract to be void or voidable. For example, if the purchaser is a foreign person who enters into a contract without FIRB approval, they cannot say to the vendor “give me my money back and I'll give you your land back because our contract is now void/voidable”.

When preparing contracts Agents should identify if the purchaser is a foreign person as defined by the Act and if so, insert a condition that they obtain FIRB approval prior to the completion of the contract.

To date I am unaware of anyone being prosecuted for a breach but no one wants the dubious honour of being the first. If you need a suitable FIRB clause please call me.

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