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Australia's foreign investment regime – budget changes relating to solar and wind farms

In the 2017 Budget, the Australian Government flagged a number of changes to Australia's foreign investment regime, including clarifying the treatment of solar and wind farms under the regime.

While the exact scope of these changes in relation to the treatment of solar and wind farms are to be clarified before 1 July 2017 and are subject to the introduction of legislation, the scope of the proposed changes are a welcome development for Australia's foreign investment regime, given that there has been substantial debate regarding:

- the classification of the land on which solar and wind farms are located (namely whether it is agricultural or commercial land); and
- whether the solar and wind farm infrastructure is a chattel or fixture (and therefore whether the solar and wind farm contributes to the value of the land, and consequently satisfies the applicable monetary threshold).

The treatment of solar and wind farms under Australia's foreign investment regime has been subject to substantial debate. Currently, the land on which solar and wind farms are located is ordinarily considered agricultural land, attracting a monetary threshold of $15 million (satisfaction of which is calculated based on the applicant's cumulative interests in agricultural land). The debate that has arisen relates to the treatment of the solar or wind farm infrastructure, namely, whether this infrastructure is considered a chattel or a fixture. To the extent the solar or wind farm infrastructure is considered a fixture, this infrastructure contributes to the value of the land and therefore the monetary threshold is more likely to be satisfied. Whether the solar or wind farm infrastructure is considered a chattel or a fixture is a matter determined by FIRB on a case-by-case basis.

Changes to Australia's foreign investment regime are proposed in respect of the treatment of solar and wind farms, such that solar and wind farm infrastructure will be deemed to be fixtures. Furthermore, the treatment of the underlying land will depend upon the stage of the solar or wind farm project, as described below.

- Where development approval has yet to be obtained for the construction of the solar or wind farm on the land, the land will continue to be considered agricultural land (and therefore the $15 million cumulative monetary threshold will apply).
- Where development approval has been obtained for the construction of the solar or wind farm on the land, though construction of the solar or wind farm has not completed, the land will be considered vacant commercial land (and therefore no monetary threshold will apply).
- Where a solar or wind farm has been constructed on the land, the land will be considered non-vacant commercial land, in which case, given that public infrastructure is located on the land, either:
  a) a $55 million threshold will apply (if the foreign person has a right to occupy the land or be involved in the central management and control of the entity that holds the land); or
  b) a $252 million threshold will apply (if the foreign person does not have a right to occupy the land or be involved in the central management and control of the entity that holds the land).

A more detailed discussion of the broader changes proposed to Australia's foreign investment regime can be seen here *Client Update: Australia's foreign investment regime – Budget changes* .

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