

Foreign investment in Australia during COVID-19: FIRB explains temporary measures

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In response to the COVID-19 outbreak, the regulations governing Australia's foreign investment framework were amended on 29 March 2020 to temporarily reduce all Foreign Investment Review Board (**FIRB**) monetary screening thresholds to \$0.¹

Generally speaking, the effect of the amendments is that any action by a foreign person to acquire interests in securities, assets, Australian land or businesses may require FIRB approval, regardless of the value of the transaction.

FIRB recently released a new guidance note ([Guidance Note 53](#)) providing useful additional guidance about the temporary measures. In this paper, we summarise a few of the key points which will be relevant to foreign investors looking to transact in Australia, and Australian parties involved in transactions with foreign counterparties, in this COVID-19 period.

Key points

- **When do the changes apply?** The \$0 screening threshold applies to actions taken after 10:30pm AEDT on 29 March 2020.

If you have entered into an agreement before this time, then it is unlikely that the changes will apply to actions under that agreement. Broadly, this will also be the case where a foreign person is exercising a pre-existing option granted under an agreement entered into before the changes.

However, as FIRB notes, the changes will apply where parties have not reached agreement about a transaction and are merely in preliminary negotiations.

- **How is FIRB prioritising applications?** The temporary measures mean that FIRB's caseload is likely to be extremely heavy during the COVID-19 period. In connection with the temporary measures, FIRB is pushing applicants to expect an assessment period of up to 6 months rather than the standard 30 day period.

FIRB also states that it is prioritising applications that "protect and support Australian businesses and Australian jobs". Consequently, if elements of a proposed transaction can be shown to be likely to have a positive impact on the Australian community and employment landscape, then it will be possible to make a submission seeking priority for assessment of the transaction.

¹ *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 (Cth)*.

- **Leases:** Importantly, as FIRB notes, the temporary changes mean that many routine lease transactions may now require FIRB approval.

Foreign persons should be aware that FIRB approval is likely to be required under the temporary COVID-19 measures in relation to leases with a term (or likely term) of longer than 5 years (including any options for renewal).

However, FIRB indicates that lease adjustments to “lower, defer, or otherwise delay rental payments under an existing lease, particularly where such adjustment is made in relation to the coronavirus crisis and is temporary in nature” will not require FIRB approval.

- **Direct interests in non-vacant commercial land:** FIRB indicates that non-foreign government investors acquiring a *direct* interest in non-vacant commercial land (e.g. existing office or retail properties) for a consideration of \$55 million or less may be able to take advantage of the lower (\$2,000) application fee usually only available to foreign government investors. However, this will not be available for indirect acquisition of interests in land through a land-owning entity.
- **Residential care, retirement villages and student accommodation:** The temporary measures repeal the exemption in relation to acquiring interests in residential land used for residential care, retirement villages and certain forms of student accommodation. Under that exemption, a foreign person would generally have been subject to the thresholds applicable to commercial land rather than residential land. Now, however, except in certain circumstances, the \$0 threshold will generally apply to acquisitions of interests in this type of land (and FIRB approval will be required regardless of the value of the acquisition).
- **I’m establishing an Australian company/business – do I need FIRB approval?**

Helpfully, FIRB states that a foreign person will generally not need to obtain FIRB approval merely to establish an Australian company in anticipation of undertaking a transaction in the future. However, the foreign person will nevertheless need to consider whether that future transaction will require FIRB approval as a separate matter.

FIRB also reiterates that only foreign government investors require FIRB approval for starting a new Australian business.

Where to from here?

Putting aside the finer details, the crux of FIRB’s temporary COVID-19 measures is that many transactions which previously did not require FIRB approval will now require it and it is likely to take longer to obtain approval for any transaction.

If you would like advice about the recent changes to Australia’s foreign investment framework or whether your particular transaction requires FIRB approval, please do not hesitate to contact us.



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