

COVID-19: FIRB changes affect land acquisitions after 29 March 2020

Source: [Treasurer of the Commonwealth Government](#) and [Foreign Investment Review Board](#)

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It was announced by the federal government on 29 March 2020 that:

- effective as of 10:30pm AEDT on 29 March 2020, all proposed foreign investments in Australia subject to the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) will require the approval of the Foreign Investment Review Board (**FIRB**), regardless of the monetary value of the investment or the nature of the foreign investor;
- FIRB will work with existing and new applicants to extend timeframes for reviewing applications from 30 days to up to 6 months but will prioritise urgent applications for foreign investments that protect and support Australian businesses and jobs; and
- the above are temporary measures and will remain in place for the duration of the COVID-19 crisis.

When do the changes take effect?

The relevant legislation ([Foreign Acquisitions and Takeovers Amendment \(Threshold Test\) Regulations 2020 \(Cth\)](#)) commenced on 18 April 2020 and provides that the changes take effect as of 10:30pm AEDT on 29 March 2020.

What do the changes mean?

The changes mean that, as of 10:30pm AEDT on 29 March 2020:

- investments in Australia by foreign persons subject to the Act which, on or before 29 March 2020, did not require FIRB approval because the value of the investments were below certain monetary value thresholds prescribed by the *Foreign Acquisitions and Takeovers Regulation 2015 (Cth)* will, during the COVID-19 crisis, require FIRB approval. This is because the monetary value thresholds have been reduced to \$0. Previously, factors such as the type of foreign investor (e.g. a private investor or a foreign government investor) or a foreign investor's country of origin were taken into account in determining the relevant monetary value threshold; and
- application reviews by FIRB (both new and existing applications) could now take up to 6 months unless an applicant can demonstrate to FIRB that a proposed foreign investment protects and supports Australian businesses and jobs. Previously, FIRB was required to review and make a decision on an application within 30 days.

FIRB has confirmed that:

- the changes do not apply to agreements which were entered into before 10:30pm AEDT on 29 March 2020, including those agreements which have not yet been completed (even if approval conditions have not been met); and
- FIRB approvals granted on or before 29 March 2020 remain valid provided any approval conditions continue to be met.

The changes should also not affect existing exempt investments, i.e. those investments which are already exempt from requiring FIRB approval and are not related to monetary value thresholds.

How long will the changes be in effect?

The amending Regulations provide that the changes are intended to be in place for the duration of the COVID-19 crisis (although there is no indication as to what determines the end of this period).

What does this mean for land acquisitions?

A foreign person subject to the Act who:

- enters into an agreement after 29 March 2020 to acquire an interest in land in Australia; and
- on or before 29 March 2020, would not have required FIRB approval because the value of the interest was below a certain monetary value threshold prescribed by the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth),

will now, during the COVID-19 crisis, require FIRB approval.

For example, any:

- acquisition of developed commercial land; or
- lease of developed commercial land where the term (including any extension or renewal) is reasonably likely, at the time the interest is acquired, to exceed 5 years,

in Australia by a foreign person subject to the Act will now require FIRB approval. Acquisitions of residential land and vacant commercial land already require FIRB approval.

Agreements entered into on or before 29 March 2020 where FIRB approval was not required

If FIRB approval was not required for an agreement entered into on or before 29 March 2020 (e.g. because the value of the interest in the land was below the relevant monetary value threshold), then FIRB approval is not required, even if the agreement has not yet been completed or the approval conditions have not yet been met.

Agreements entered into on or before 29 March 2020 subject to FIRB approval being granted

According to the [FIRB website](#), it is likely that there will now be delays in applications being reviewed by FIRB. If it is unlikely that FIRB approval will be granted before the relevant date in the agreement, the parties could consider agreeing a later date (to allow extra time for FIRB approval to be granted). Alternatively, the applicant could consider asking FIRB to urgently process the application in the circumstances. FIRB states on the [Q&A](#) page of its website that it may not take the full 6 months for applications to be reviewed and that, if requesting prioritisation, an applicant will be required to advise if the application has commercial imperatives or broader economic impacts and submit additional supporting information. Otherwise, the other party to the contract may be entitled to rescind the agreement.

Agreements entered into after 29 March 2020 where FIRB approval is required

As was the case previously, an appropriate “subject to FIRB approval” special condition should be inserted into the agreement making the agreement conditional on FIRB approval being granted; however, while these temporary changes remain in place, the special condition should allow for the longer application review time, i.e. up to 6 months. Alternatively, the parties could refrain from entering into an agreement until FIRB approval has been granted to the foreign person.

Key takeaways

Any foreign person subject to the Act who acquires an interest in land in Australia after 29 March 2020 and who did not previously require FIRB approval because the value of the interest was below a certain monetary value threshold will (at least for the duration of the COVID-19 crisis) require FIRB approval.

Any such foreign person proposing to acquire such an interest in land in Australia after 29 March 2020 should therefore lodge an application with FIRB as soon as possible to avoid significant delays.

Any form of agreement entered into after 29 March 2020 to acquire such an interest in land in Australia should include a “subject to FIRB approval” special condition making the agreement conditional on FIRB approval being obtained within a period of at least 6 months. Alternatively, FIRB approval could be obtained before entering into the agreement and a warranty could be included that FIRB approval has been obtained.

See the [Q&A](#) page on the FIRB website for further information on the changes.