

Bird & Bird & Changes to Foreign Investment in Australian Real Estate

COVID-19 temporary changes; and proposed new changes from 1 January 2021

In response to the unprecedented economic implications of the COVID-19 pandemic, the Australian Federal Government (**Federal Government**) announced via the Treasurer new Foreign Investment Review Board (**FIRB**) temporary measures, effective from 10:30 pm on 29 March 2020, in pursuit of protecting the national interest.

These changes have significant implications for land proposal transactions that would not otherwise be subject to the *Foreign Acquisitions and Takeovers Act* (Cth) (**FATA**).

Monetary Screening Thresholds Removed

As part of the temporary changes, the Treasurer reduced the monetary screening thresholds to \$0 for all foreign investment via the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* (Cth) (**Amended Regulations**). The Amended Regulations amend the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**Regulations**). The Amended Regulations do not contain an end date, meaning the \$0 threshold will remain in place unless and until repealed by further legislation. The Federal Government indicated that the changes are expected to remain in place for the duration of COVID-19 pandemic. However, more recently, the Treasurer confirmed the temporary changes will remain in place until 1 January 2021.

A high level summary of the monetary threshold changes are detailed below – it should be noted that the monetary thresholds are subject to complex rules and contain a number of exceptions (such as for countries having free trade agreements (**FTA**) with Australia).

Investor	Action	Previous Threshold (prior to 29 March 2020)	New Temporary Threshold (from 29 March 2020)	
All investors	Residential land	\$0	\$0 (unchanged)	
	Vacant commercial land	\$0	\$0 (unchanged)	
Foreign government investors	Any interest in land	\$0	\$0 (unchanged)	
Privately owned investors	Agricultural land	<ul style="list-style-type: none"> \$1,192 million (for <u>certain</u> FTA country investors – Chile, New Zealand and United States of America) \$50 million (for Thailand, where land is used wholly and exclusively for a primary production business – otherwise the land is not agricultural land) \$15 million (cumulative) for all other non-government investors 	\$0	
		Developed commercial land	<ul style="list-style-type: none"> \$60 million (for low threshold land such as mines and public infrastructure) \$1,192 million (for FTA country investors) \$275 million (for all other non-government investors) 	\$0
		Mining and production tenements	<ul style="list-style-type: none"> \$1,192 million (for certain FTA country investors – Chile, New Zealand and United States of America) \$0 (for all other non-government investors) 	\$0

It is important to understand that the changes to the monetary screening thresholds do not mean that **all** foreign investment in Australia now requires FIRB approval¹. The monetary screening threshold is only one of a number of conditions that must be satisfied in order for a proposed investment to trigger the provisions of the FATA and require FIRB approval.

However, a significant number of potential acquisitions which previously did not require FIRB approval will require approval as a result of these temporary changes. Our experience informs us that the following land proposal transactions (previously not impacted by the temporary changes) are more likely to now require the preparation and lodgement of a FIRB application, and consequently such transactions will need to take into account the FIRB application fees payable, and increased FIRB processing time impacting transaction timelines:

- agreements for leases, or acquisitions, of developed commercial land; and
- leases or licences of Australian land where the term of the lease or licence, or the likely term, is more than 5 years (including any options to renew/extension rights).

Increased Application Processing Times

In addition to the changes to the monetary screening threshold, FIRB is contacting applicants to request extensions to decision period for their FIRB applications by up to 6 months from the date the application fees are paid. Prior to this announcement and under the FATA, the Treasurer is required to consider whether a proposed transaction is in the national interest within 30 days of FIRB receiving the application. Where the Treasurer is unable to make a decision within that prescribed period, an interim one-off order extending the period for an additional 90 days can be issued. However, more commonly, FIRB may request that applicants 'voluntarily' extend the statutory time period where either FIRB or the Treasurer require more time to consider the application. Interestingly, the Amended Regulations **do not change this**. Meaning that FIRB will continue to work within their existing statutory timeframes (and use their current powers to extend assessment timeframes) but will otherwise ask applicants to agree to extensions of up to 6 months.

It is expected that a majority of applications would agree to extension requests given it maximises the opportunity of obtaining approval.

The Federal Government will give priority to processing applications for investments that protect and support Australian businesses and jobs. In particular, more routine transactions, such as entering into a new lease agreement for developed commercial land will be appropriately prioritised given the potential link to protecting and supporting Australian businesses and jobs. Accordingly, applicants should provide and include relevant information in their covering letter to FIRB which specifically addresses any request for prioritisation.

Our present experience in relation to extension requests is that FIRB contacts existing applicants requesting that the applicant seek a 6 month extension.

Student Accommodation, Retirement Villages and Residential Care

Prior to the introduction of the Amended Regulations, the Regulations expressly excluded aged care facilities, retirement villages and certain student accommodations from the strict rules applicable to 'residential land'² and such facilities were instead subject to the more lenient rules and thresholds of developed commercial land. The Amended Regulations however have repealed the section of the Regulations which provided for this exclusion. This means all foreign persons proposing to acquire such interests are now taken to be acquiring residential land. In the explanatory memorandum to the Amending Regulations, the Federal Government has stated that this relevant section of the Regulations have been removed as they were no longer relevant given the \$0 screening threshold changes.

Despite this explanation, it is unclear why the Federal Government has made these amendments as the same approach has not been taken on similar, now irrelevant sections of the Regulations.

¹ References to 'FIRB approval' in this article mean obtaining a "no objection notification" or an exemption certificate from FIRB permitting the investment.

² This exemption was previously contained in subsection 38(5) of the Regulations (which has now been repealed by the Amended Regulations).

Application Fees

Fees are payable in respect of all investments that require FIRB approval and the Treasurer is not required to take any action prior to the fee being paid. The time limit on making a decision does not begin until the fee is paid.

Additionally, the Federal Government announced that the Treasurer will consider refunding the fee payable to applicants who wish to withdraw their application. This is a response to the delays to, or deferrals of, investment decisions due to measures being implemented both in Australia and globally as a result of the COVID-19 pandemic.

One issue we have observed with respect to application fees is that there is now a disparity between the fees payable by foreign government investors and non-foreign government investors for acquisitions of low value developed commercial land.

Prior to the \$0 screening threshold changes, only foreign government investors were screened for acquisitions of low value developed commercial land (being less than \$60 million) with a lower application fee of \$2,000 for acquisitions of this kind. However, as acquisitions for developed commercial land are now subject to a \$0 threshold regardless of value, there is a differentiated fee outcome for acquisitions between \$10 million and \$60 million for foreign non-government investors. Namely, in circumstances where the value of the transaction is between \$10 million to \$60 million, foreign government investors will be required to pay a fee of \$2,000 while foreign non-government investors will be required to pay a fee of \$26,200. This has consequences for a number of routine leasing transactions involving developed commercial land, where as a result of the lease term and rent and outgoings payable per year, the total value of the transaction exceeds \$10 million.

The Federal Government announced that waivers will be considered and processed on a per application basis so that foreign non-government investors ultimately pay the same fee as foreign government investors for acquisitions of interests in developed commercial land of up to \$60 million. Nonetheless, the full application fee will first need to be paid for an application to be considered (before any waivers/partial refunds are considered and applied).

Exemption Certificates

All exemption certificates granted prior to the Amended Regulations remain valid provided the conditions (if any) specified in the exemption certificate continue to be met. Due to the \$0 monetary threshold, certain acquisitions may now give rise to significant and/or notifiable actions where in previous cases they would not (e.g. because the acquisition fell below the threshold). In such circumstances, those acquisitions will now be taken into account towards the financial limit specified in their exemption certificate.

Further Proposed Changes

On 5 June 2020, the Treasurer announced major proposed changes to Australia's foreign investment regime that are intended to address national security risks and ensure greater compliance with FIRB approval conditions. These proposed changes (still to be legislated) are intended to apply from 1 January 2021. The proposed changes include:

- mandatory notification for investments that are classified as "sensitive national security businesses";
- granting the Treasurer broad powers with respect to investments with national security concerns including the power to impose new conditions, unwind transactions or require divestments of foreign interest in a business, entity or land after FIRB approval has been granted for such investments; and
- allowing investments that would not ordinarily require notification to be "called in" for screening on national security grounds.

In addition, the proposed changes increase the threshold/trigger requirements before an investor is deemed a "foreign government investor" (**FGI**). Under the proposed changes, entities which have foreign government investors holding more than 40% aggregate interest will not be deemed foreign government investors provided certain conditions are met. Those conditions include no single foreign government owning more than 20% and no foreign government exercising any influence or control over the investment or operational decisions of the entity. These will be welcome changes to many institutional investors and private equity funds that are considered "FGI's" under the current rules and subject to \$0 thresholds.

Concluding Comments

The changes to the FIRB regime have significant consequences for a majority of current and proposed investments in Australia. All foreign investors should have regard to the increased scope of Australia's foreign investment requirements and appropriately manage approval requirements with their investment objectives to ensure that the commercial viability of their transactions is not compromised or impacted. In particular, parties to transactions that have FIRB approvals as conditions precedent to the transaction coming into fruition will need to consider the impact that a delay in obtaining FIRB approval may have on the overall pricing and economic viability of a transaction.

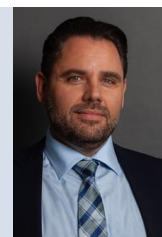
How We Can Help

Bird & Bird are actively advising foreign investors on how to best navigate the changes to Australia's foreign investment approval requirements and their investment objectives.

We provide practical, pragmatic and tailored advice that is sensitive to the needs of your business. Please do not hesitate to contact us should you require any assistance.

Vince Baudille

Partner, Head of Real Estate |
Australia/Asia
Global Co-Head of Real Estate
Tel: +61292269890
vince.baudille@twobirds.com



twobirds.com

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