



COVID19 TEMPORARY FIRB CHANGES

Background



What is FIRB?

FIRB stands for Australia's Foreign Investment Review Board. It is a non-statutory body established in 1976 to advise the Treasurer and the Government on Australia's Foreign Investment Policy and its administration. FIRB's functions are advisory only; responsibility for making decisions on the Policy and foreign investment proposals rests with the Treasurer.



What is Australia's Foreign Investment Policy?

Australia's Foreign Investment Policy sets out Australia's foreign investment framework and approach. The Policy:

(1) balances:

(a) Australia's recognition of the importance of foreign investment to the Australian economy and well-being (including economic growth, competition, innovation, production, employment, income, induction of new technologies and skills and access to markets); against

(b) Australia's national interest in Australian persons retaining ownership and/or control of Australian businesses and assets.

(2) retains flexibility to maximise investment flows whilst protecting Australia's interests by:

(a) reviewing foreign investment proposals against the national interest on a case by case basis, rather than adopting hard and fast rules or rigid laws that may stop valuable investments; and

(b) retaining the power to impose conditions to safeguard the national interest or prohibit transactions deemed contrary to the national interest.



How do the FIRB rules typically operate?

Where a foreign person proposes to acquire an interest in an Australian entity, business or asset, depending on the size, value and type of asset, that transaction may require the foreign person to give notice to the Treasurer, and/or entitle the Treasurer to impose conditions on the transaction or prohibit the transaction in the national interest. Different size and value thresholds exist for different types of assets and businesses, as well as different types of foreign persons.



What is the rationale for changes to FIRB rules during COVID19?

The changes to FIRB rules have been made in Australia's national interest given the actual & anticipated impacts of COVID19. Specifically, COVID19 has caused fundamental disruptions to the Australian economy from reduced economic and social activity, thereby increasing potential threats to Australia's economic security as well as the viability of critical sectors. Consequently, the Government anticipates there may be a rise in debt restructuring transactions for Australian businesses along with opportunities to invest in distressed assets.

Accordingly, the Australian Government has taken the view that, absent changes to existing monetary thresholds and timeframes for assessing foreign investment proposals, it is possible many normally viable Australian businesses would be sold to foreign interests without any government oversight, presenting (unacceptable) risks to the national interest. The changes enable the Government to prioritise processing of proposed investments that protect and support Australian businesses & jobs.



What is the existing & new legislative & regulatory framework?

Foreign Acquisitions & Takeovers Act 1975 (Cth) ("the Act")
Foreign Acquisitions & Takeovers Fees Impositions Act 2015 (Cth)
Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth)
Foreign Acquisitions & Takeovers Regulation 2015 (Cth)
Foreign Acquisitions & Takeovers Fees Imposition Regulation 2015 (Cth)
Register of Foreign Ownership of Water or Agricultural Land Rules 2017 (Cth)
Foreign Acquisitions & Takeovers Amendment (Threshold Test) Regulations 2020 (Cth) (17 April 2020)
FIRB Guidance Note 53: Temporary Measures in Response to the Coronavirus ("GN53") (24 April 2020)*



Any penalties for breach?

Foreign persons who fail to meet their legal obligations may be subject to a disposal order, civil penalty orders &/or criminal prosecution. The Government's administrative approach to enforcing conditions and/or imposing penalties will recognise the unique and sensitive nature of the crisis.



Changes

Key Changes



What are the key COVID19 changes?

The key COVID19 changes relate to:
 (1) nil monetary screening thresholds for all new applications across investment/asset/investor types;
 (2) timeframes for reviewing (some existing &) all new applications being extended from 30 days to 6 mths.

Key Non-Changes



Has the meaning of "foreign person" or "significant action" or "notifiable actions" changed?

What does this mean in practice?

No*. New measures do not change the meaning of:
 "foreign person" under the Act; or
 "significant actions" or "notifiable actions" under the Act
 (*other than the monetary threshold component of those definitions).

Importantly, while there is:
 no change for foreign government investors, who are already subject to a \$0 monetary threshold;
 no change for acquisitions of residential real estate, which are already subject to a \$0 threshold;
 no change to other de minimis thresholds for "significant actions" or "notifiable actions" (across asset/investment classes), which still need to be satisfied to trigger applicable filing obligations,
the monetary threshold changes mean certain acquisitions or investments (including acquisitions of interests in Australian land by all foreign persons regardless of the value, type or developmental/vacancy status of the land) are now regarded as significant and/or notifiable actions, where this would not necessarily have previously been the case.

Foreign Persons



To whom do the changes apply?

The changes apply to all "foreign persons" subject to the Act irrespective of:
 the investor's country of origin;
 the investor being a private foreign investor or foreign government investor;
 the value of the proposed investment.

Effective Time



What time do the changes take effect?

Changes take effect from 10:30 pm AEDT 29 March 2020 and remain in effect for the duration of the coronavirus.

Grandfathering



Do the changes apply retrospectively to agreements entered into prior to the Effective Time?

What if foreign investors do not agree to the delay for processing?

No*. The Regulations specify that the changes do not apply to agreements entered into prior to the Effective Time, including in relation to acquisitions that have not yet occurred, regardless of whether there are unmet conditions or not.

*However, the push out in timing for processing applications from 30 days to 6 months may affect some existing applications. Specifically, existing applicants may be contacted by FIRB & asked to request that the decision period for their foreign investment application involving significant actions and/or exemption certificates be extended by up to 6 months from the date that their application fee was paid. Extending the statutory deadline to 6 months does not mean that the application will take the full 6 months to process.

If an existing applicant does not agree to any extension suggested, the Treasurer or a delegate may extend the (existing 30 day) statutory period by up to a further 90 days by publishing an interim order. An interim order extends the period in which the proposal can be considered. Interim orders must be published on the Federal Register of Legislation & prohibit the proposed acquisition for that period.

Exemption Certificates



Will the changes impact existing Exemption Certificates?

What about new Exemption Certificates?

Exemption Certificates granted prior to the Effective Time are still valid providing the conditions (if any) continue to be met. The temporary changes do not revoke or amend any certificate.

However, as a result of the temporary changes, certain acquisitions may now give rise to significant actions and/or notifiable actions where this would not have previously been the case. Such acquisitions may be covered by Exemption Certificates that are already held by a foreign investor & where this occurs, those acquisitions will be taken into account in determining whether the Exemption Certificate holder has exceeded the financial limit specified in their Exemption Certificate.

Where some Exemption Certificates granted prior to the Effective Time contain conditions which exclude the acquisition of particular interests specified in sections of prior regulations now repealed, transitional measures have been implemented to preserve the application of them as if the repeal had not happened, such that acquisitions of those relevant interests continue to be excluded from the Exemption Certificate and separate notification may be required

Foreign persons are still able to apply for an Exemption Certificate, which will be granted if the proposed actions by the foreign person are not contrary to the national interest.

Conditions



Will conditions apply to new applications?

Possibly. Any conditions imposed will be determined on a case-by-case basis and will be applied proportionately to address identified risks to the national interest on a non-discriminatory basis.



Thresholds (AUD)^

<i>Investment Type</i>	<i>Acquisition Type</i>	<i>Before</i>	<i>After</i>
<i>Unchanged</i>	Acquisitions by Foreign Government Investors	\$0	\$0
	Private Acquisitions of Media Businesses	\$0	\$0
	Mining & Production Tenements	\$0*	\$0
	Vacant Commercial Land Proposals	\$0	\$0
	Residential Land Proposals	\$0	\$0
		(*except \$1,192m for acquirers from US, NZ, CL)	(for all including acquirers from US, NZ, CL)
<i>Media</i>	Proposal to acquire 5% or more of a Media Business	\$0 (for all foreign persons)	\$0 (for all foreign persons)
<i>Business</i> ¹	Proposal to acquire 10% (if government foreign investor) 20% (if private foreign investor) or more in any business valued at (or above) Threshold Amount	\$0 (foreign government investors) \$275m (for all sensitive businesses) (for all non-sensitive businesses except if acquirer from FTA high threshold country) \$1,192m (for all non-sensitive businesses if acquirer from FTA high threshold country)	\$0 (for all foreign persons)
<i>Agricultural</i>	Proposal to acquire 10% or more interest in an agribusiness ²	\$0 (foreign government investors) \$60m (unless listed above or below) \$1,192m (for acquirer from US, NZ, CL)	\$0 (for all foreign persons)
	Agricultural Land ³	\$0 (foreign government investors) \$15m (unless listed above or below) \$50m ⁴ (for Thailand)	\$0 (for all foreign persons)
<i>Mining</i>	Mining & Production Tenements	\$0 / \$1,192m* (*for acquirers from US, NZ, CL)	\$0 (for all even if from US, NZ, CL)
<i>Commercial Real Estate</i>	Vacant Commercial Land	\$0 (for all foreign persons)	\$0 (for all foreign persons)
	Developed Commercial Land	\$0 (for foreign government investors) \$60m ⁵ / \$275m (low threshold land) / (non low threshold land) (if acquirer is not from a FTA high threshold country) \$1,192m (regardless of whether low threshold land) (if acquirer is from FTA high threshold country)	\$0 (for all foreign persons)
<i>Residential Real Estate</i>	New or Established Residential Dwellings Developed or Undeveloped Residential Land	\$0 (for all foreign persons)	\$0 (for all foreign persons)

Timeframes

<i>Applications</i>	<i>Before</i>	<i>After</i>
All new applications	30 days	6 months
Some existing+ applications (by consent)	30 days	6 months
Some existing+ applications (without consent, interim order)	30 days	Additional 90 days

Notes

- *GN53 provides a more detailed description of the temporary measures, their operation & effect, particularly in relation to fees, land, leases, existing agreements, options & exemption certificates.
 ^ Monetary values are current as at the date of publication and are generally subject to annual indexation. + involving "significant actions" and/or "Exemption Certificates".
 ! FTA countries for whom higher thresholds apply are US, NZ, CL, JP, KR, CN, SG & TPP effective countries (which include those mentioned plus CA, MX, VN, HK).
 # All foreign government investors continue to require approval to acquire any land (of whatever type), a direct interest in an existing AUS entity or business or to start a new AUS business, regardless of the investment value (ie a \$0 monetary threshold).
 1. Business exemption certificate can apply for programs of acquisitions of interests in the assets of an AUS business &/or securities in an entity, including interests acquired through the business of underwriting. 2. Based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity.
 3. Based on the cumulative value of a foreign person's agricultural land holdings.
 4. For Thailand where land is used wholly and exclusively for a primary production business otherwise the land is not agricultural land.
 5. For HK investors, where developed commercial land was also "sensitive land", the threshold of \$60m applied. "Low threshold land" includes mines and public infrastructure (eg an airport or port)