

COVID-19: (AUSTRALIA) CHANGES TO THE FOREIGN INVESTMENT REVIEW BOARD APPROVAL PROCESS

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Australia Corporate Alert

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**This information is accurate as of 7.00 pm Monday 30 March 2020 and is subject to change as this situation evolves.*

In light of the current global circumstances due to the COVID-19 pandemic, the Australian Government has announced a key change in Australia's foreign investment framework.

NIL MONETARY THRESHOLD FOR APPLICABLE FOREIGN INVESTMENT

To date, the position has been that non-government foreign investors (including individuals, companies, trustees and governments) may need to apply for foreign investment approval prior to entering into a proposed transaction to acquire interests in Australian securities, assets or land, depending upon the various monetary thresholds and the nature of each transaction (eg whether or not the investor is from a free trade agreement partner country).

Effective from 10.30 pm AEDT on 29 March 2020, the monetary threshold for all foreign investments will be nil such that all proposed foreign investments into Australia subject to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) will now require approval (ie irrespective of the value of the investment or the nature of the foreign investor).

The additional Government oversight is aimed at ensuring investments are not contrary to the national interest (including economic and national security) given the likely rise of opportunities to invest in distressed assets and the possibility of debt restructuring.

FIRB IMPLICATIONS

Whilst the Foreign Investment Review Board (FIRB) is currently reviewing its guidance in light of this significant change, what we do know at this stage is the following:

1. The definition of 'foreign person' will not change for these purposes, (ie it will continue to include both government and non-government persons pursuant to section 4 of the Act)
2. The current framework for determining whether a transaction involves the acquisition of an interest in Australian land, securities or assets will not change. For example, private foreign investors may not require approval for acquisitions of less than 20% in a publicly-listed entity except in certain cases (such

as, for instance, acquisitions of 10% or more in an Australian agribusiness or land entity or acquisitions of 5% or more in an Australian media business).

3. The FIRB will work with existing and new applicants to extend timeframes for reviewing applications from the standard 30 day review period to up to six months (this timeframe will continue to commence from the date the application fee was paid). To deal with the increased workload, it is likely that the FIRB will need to triage applications based on urgency, those that directly protect and support Australian businesses and Australian jobs, sensitive industries and supplies, size and the asset type.
4. All FIRB applications will continue to be assessed against Australia's national interest with FIRB expressly noting that the impact on employment and the community is one of the key national interest factors which are taken into account when screening applications.
5. Transactions which were already subject to binding agreements entered into prior to 10.30 pm AEDT on 29 March 2020, including in relation to acquisitions that have not yet occurred, regardless of whether or not there are unmet conditions to completion will not be impacted by this change (provided the transaction satisfied the relevant monetary threshold tests at the time of execution).
6. These are temporary measures likely to remain for the duration of the current COVID-19 pandemic.

Commercially, for relevant transactions, it will become increasingly imperative to assess whether the purchaser(s) are 'foreign persons' for the purposes of the Act. If so, those deals would need to insert FIRB approval as a condition precedent to the formation of the purchase agreement. Timing for completion of transactions will also be impacted and needs to be taken into account – there could be a six month period until completion.

PREVIOUS FIRB THRESHOLDS

The earlier general position was that, proposals by non-government investors to acquire an interest of 20% or more in any business valued at more than AUD275 million (or the higher threshold of AUD1,192 million for acquisitions in non-sensitive businesses by agreement country or region investors from the United States of America, New Zealand, Chile, Japan, the Republic of Korea, China, Singapore, a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force (CPTPP) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam), and the region of Hong Kong, China) required prior approval. Lower thresholds applied for investments in the media, agribusiness or where the investment is in an Australian land entity.

Foreign persons needed to notify before acquiring an interest in developed commercial land only if the value of the interest is more than the relevant notification threshold. The general notification threshold for developed commercial land is AUD275 million unless the proposed acquisition is considered to be sensitive, in which case the threshold is AUD60 million.

If the foreign person is from an agreement investor country or region, the threshold is generally AUD1,192 million regardless of whether the land is considered sensitive.

Land on which the only dwellings are commercial residential premises are considered developed commercial land and includes:

- a hotel, motel, inn, hostel or boarding house
- premises used to provide accommodation in connection with a school
- a marina with berths occupied by ships used as residences
- a caravan park or camping ground, or
- any other premises similar to those outlined under the GST Act, other than premises used to provide accommodation to students in connection with an education institution that is not a school.

'Commercial residential premises' does not include retirement villages, aged care facilities and certain student accommodation.

Investments in agricultural land by non-government investors were subject to a cumulative threshold of AUD15 million unless the investor was from Thailand, where a AUD50 million threshold previously applied or Chile, New Zealand or the United States of America where a AUD1,192 million applied.

A nil threshold already applied to all investments by foreign government investors and foreign investors acquiring any interest in vacant commercial land, residential land or mining production tenements (excluding non-government investors from Chile, New Zealand and the United States of America).

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