



VARIATIONS — RESIDENTIAL LAND

Subsection 76(6) of the *Foreign Acquisitions and Takeovers Act 1975* (Act) allows foreign persons to apply for a variation to an existing approval (this includes approvals imposing and not imposing conditions).

The Treasurer may vary an approval if the Treasurer is satisfied that it is not contrary to the national interest.

Variations will be considered on a case-by-case basis. Factors that may be considered when assessing whether the variation is not contrary to the national interest include those set out below:

The nature of the variation

Variations that are minor in nature and which do not substantively change the original approval can generally be considered.

For example, an application for an extension of time to comply with conditions in an existing approval is likely to be considered as a variation, compared with proposals to change the type of action or the foreign person involved in an action, which is more likely to require a new application.

Example 1

Francis applies for and receives approval to purchase a vacant residential block for development. A condition of the approval is that construction of the dwelling is completed within four years of the date of approval. However, the building company that Francis contracted to build the dwelling goes into receivership and he has to find a new builder. This is likely to delay construction by eight months beyond the date of when the dwelling is required to be completed under the conditions of the approval. To ensure he doesn't breach the conditions of the approval, Francis must apply for a variation to allow additional time to complete construction of the dwelling.

Reasons for the variation request

The reasons given for an application to vary will be considered on a case-by-case basis. One factor which will generally be taken into account is whether there are factors beyond the foreign person's control.

Fees

The integrity of the fee system will be considered as part of a proposal for a variation of an approval.

For example, for actions in residential land that are subject to tiered fees, the Treasurer would consider whether the variation would result in an unexpected fee outcome that favours the person over other persons undertaking such actions. The Treasurer may also have regard to whether the variation is something that foreign persons would generally be expected to lodge a new application for and pay the applicable fee.

Example 2

Oliver wants to purchase residential real estate that he expects to buy for \$900,000. Oliver pays the relevant application fee and receives approval imposing conditions allowing him to proceed with the purchase. A condition is that he may only pay \$1 million or less for the property.

If the expected price of the property increases to \$1.2 million, and Oliver has not yet entered into an agreement to purchase the property, he may apply for a variation to his approval and pay the relevant variation application fee. If Oliver had entered into an agreement, he would have breached the foreign investment laws and may be subject to strict penalties.

In making a decision on whether to approve a variation, the decision maker may consider the fees that have already been paid by the foreign investor. If there is a discrepancy in the outcome, the variation may not be allowed (this may occur where the fee outcome would be less than if the correct application had been made originally). In this case Oliver would be able to lodge a new application and pay the relevant fee.

EXTENSION OF TIME TO MEET CONDITIONS

Foreign persons wishing to apply for an extension of time to meet conditions specified in an approval must lodge a variation application at least two months before the end of the time period detailed in their approval conditions (section 76(7) of the Act).

FEES

The fee is payable at the time of application. Processing commences when the correct fee is paid.

For more information on fees, see Guidance Note 29.

HOW TO APPLY FOR A VARIATION FOR AN EXISTING APPROVAL

All applications for variations to residential real estate approvals should be made to the Australian Taxation Office (ATO).

To request a variation to a previous FIRB approval, the applicant should submit a request using the current Residential Real Estate application form. Applicants will need to select 'variation' and complete the requested fields attaching a document outlining the variation reasons. The system will provide them with a Transaction ID, variation fee amount, and a Payment Reference Number (PRN) for making payment.

For general enquiries about variations to approvals, the applicant should email FIRBVariations@ato.gov.au

PENALTIES

Strict penalties may apply for failing to comply with conditions imposed as part of a foreign investment approval to purchase residential real estate in Australia. For more information, see Guidance Note 11.

Cases of non-compliance with Australia's foreign investment framework may also be brought to the attention of law enforcement agencies and other Commonwealth departments such as the Department of Immigration and Border Protection.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.
