

Article Information

Author: Simon Venus

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Foreign Investment (FIRB) Regime Update

The Australian Government's reform package for Australia's foreign investment regime commenced 1 January 2021, representing the most significant reforms to the regime, administered by the Foreign Investment Review Board (FIRB), since the introduction of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Act) in 1975.

The reforms coincided with the reinstatement of monetary screening thresholds for foreign investment transactions that were previously subject to the Act, which had been reduced to \$0 since 29 March 2020 under COVID-19 driven temporary changes to the FIRB regime.

Set out below is an overview of the key legislative reforms.

Monetary thresholds reinstated

As noted above, the monetary screening thresholds for foreign investment transactions known as 'significant actions' and 'notifiable actions' were reinstated to their pre-COVID 19 levels, subject to indexation.

A \$0 monetary screening threshold now however applies for a new category of actions requiring mandatory FIRB approval, known as 'notifiable national security actions' (see below).

New FIRB approval requirement for notifiable national security actions

A new mandatory FIRB approval requirement has been introduced for 'notifiable national security actions'. These involve a foreign person:

- acquiring an interest in certain types of Australian land (termed 'national security land')
- acquiring a direct interest (usually $\geq 10\%$) in a 'national security business' or in an entity that carries on a 'national security business', or
- starting a 'national security business'.

These actions are subject to a \$0 monetary screening threshold.

The definition of '**national security business**' is extensive and is intended to capture endeavours that, if disrupted or carried out in a particular way, may create national security risks. Broadly speaking, the definition extends to businesses involved in or connected with critical infrastructure, telecommunications, defence or the national intelligence community or their supply chains.

The inclusion of businesses involved in or connected with 'critical infrastructure' in this definition may have broader implications than it would seem. This is because proposed reforms to the *Security of Critical Infrastructure Act 2018* (Cth) intend to broaden this concept from critical assets in the electricity, gas, water and ports sectors to cover critical assets in the communications, financial services and markets, data storage and processing, food and grocery, transport, defence, higher education and research, energy, healthcare and medical, space technology, and water and sewerage sectors.

'**National security land**' generally includes defence premises and land in which an Australian intelligence agency has an interest in that is publicly known or could be known upon the making of reasonable enquiries.

New call-in review power

The Treasurer has new powers to 'call-in' certain actions by foreign persons for review within a 10 year period of the action being taken, where the Treasurer is of the view that those actions may pose a national security concern.

The call-in power will apply to an action that (1) is taken or proposed to be taken on or after 1 January 2021, (2) has not been notified to FIRB and (3) may pose a national security concern, if the action is:

- a significant action (that was not voluntarily notified to FIRB)
- a reviewable national security action. The definition of 'reviewable national security action' is extremely broad and is intended to capture a range of transactions involving Australian land, assets, businesses, trusts or entities that would not otherwise be caught by the Act. Importantly, a monetary threshold does not apply to these actions and many of the existing exemptions in the Act do not apply in the context of reviewable national security actions.

If a transaction is called-in for review, the Treasurer's powers in relation to that action will be similar to the powers that exist for significant actions. Specifically, where the Treasurer considers that the action is contrary to national security, the Treasurer may:

- impose conditions on the action
- prohibit the action, if it has not yet been taken, or
- if possible, unwind the action, by making disposal orders.

A foreign person may voluntarily notify of a transaction to eliminate the risk of later being called-in. Similarly actions covered by exemption certificates are not subject to the call-in power.

New last resort power

The Treasurer has a new 'last resort power' which enables the Treasurer to re-assess an action that was the subject of a previous FIRB approval where the Treasurer considers that national security risks exist in relation to the action and:

- there has been a material misstatement or omission in the information provided to the Treasurer in connection with the FIRB application process that directly relates to a national security risk
- the business, structure or organisation of the person has, or the person's activities have, materially changed and that change could not have reasonably been foreseen or was remote, or
- the circumstances or the market relevant to the action have materially changed and have altered the nature of any national security risk.

Following a re-assessment of an action in reliance on this power, the Treasurer will be able to make orders:

- prohibiting a proposed action
- ordering the disposal of any asset or interest acquired, or
- varying existing conditions attached to a FIRB approval, or imposing new conditions.

This power applies only to actions taken on or after 1 January 2021 (unless they were the subject of a FIRB application submitted before 1 January 2021).

Notably, this power is not subject to any time limitation, however there is a prescriptive process that needs to be followed before it can be exercised, due to the nature of the power being a 'last resort' power.

Passive increases in entities

Increases in a foreign person's percentage interest in an entity, which are not the result of that person acquiring an interest in securities (for example as a consequence of non-participation in a capital reduction or buy-back) will now, in certain circumstances, constitute 'the acquisition of an interest in securities'. This may be a notifiable action, significant action and/or notifiable national security action under the Act, and therefore trigger a FIRB notification requirement, although there are some exceptions to this rule.

In these cases, a FIRB application for the relevant action will need to be made within 30 days of the passive increase occurring.

Relaxation of the 'foreign government investor' definition

The definition of 'foreign government investor' under the Act has been relaxed, which means that some investment funds and schemes will now fall outside of this definition and be subject to the less stringent FIRB rules that apply to private

foreign investors.

Specifically, the definition has been relaxed so that unit trusts, companies and limited partnerships in which foreign government investors from multiple countries hold an interest of $\geq 40\%$ will no longer be caught by the definition provided that:

- foreign government investors from any one country do not hold interests of $\geq 20\%$ in the unit trust, company or limited partnership, and
- individual investors are each passive investors (which generally requires that they are not able to influence any individual investment decisions, or the management of any individual investments of the unit trust, company or limited partnership).

Exploration tenements and revenue streams from tenements

The Act has been amended to include exemptions for:

- the acquisition of an interest in an exploration tenement (noting that previously some, but not all, exploration tenements were considered to be interests in Australian land), except where the acquirer is a foreign government investor or national security land is involved
- rights to receive royalties or other amounts generated from the use of, or dealings in, a mining or production tenement, except where the right is an asset of a national security business or national security land is involved.

Changes to the moneylending exemption

The FIRB regime contains a moneylending exemption which exempts many foreign lenders from having to seek FIRB approval in order to take or enforce security over Australian land, assets, businesses, trusts or entities.

Under the amended FIRB regime, the moneylending exemption now also applies to acquisitions of security interests in national security land or national security businesses.

However, in the context of the enforcement of security interests, the moneylending exemption only applies to the acquisitions of interests in national security land or national security businesses where the enforcement is by way of the appointment of a receiver, or a receiver and manager.

Removal of exemption for wills

The exemption for acquisitions of interests in Australian land, assets, businesses, trusts or entities pursuant to a will has been removed from the Act. This means that certain bequests under wills to foreign persons will now need to be conditional on FIRB approval first being obtained.

Timing of applications

For FIRB applications submitted on or after 1 January 2021, the Treasurer has the power to unilaterally extend the decision period applicable to the application by up to 90 days, without making a public order.

Stronger penalties, compliance and enforcement powers

The Government has been afforded with increased monitoring and investigative powers and powers to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws.

In addition, the infringement notice regime now applies to all types of foreign investment (rather than just residential real estate investments) and civil and criminal penalties for breaches of the Act have been significantly increased to ensure that they act as an effective deterrent.

In the compliance context, foreign persons who take actions in accordance with a FIRB approval must now notify the Government within 30 days of taking the relevant action.

Other changes

Other changes to the FIRB regime of note include:

- the introduction of new types of exemption certificates to cover notifiable national security actions and reviewable national security actions
- amendments to the 'change in control' test so that a person is no longer taken to control an entity if the person is

one of two or more persons holding an aggregate substantial interest in the entity

- the removal of the 'change in control' requirement for significant actions where the acquirer already holds a substantial interest in the relevant entity (this removes the previous anomaly which meant that a person who already held a substantial interest in an Australian entity could increase that interest without that being characterised as a significant action)
- minor changes to the de minimis exemption for foreign government investors acquiring an interest in an Australian entity by acquiring an interest in a foreign corporation
- the expansion of the definition of 'Australian media business' to capture more online services
- the extension of the tracing rules in the Act to include unincorporated limited partnerships
- the creation of the framework for a new Register of Foreign Ownership of Australian Assets, which is intended to replace the Register of Foreign Ownership of Water Entitlements and a Register of Foreign Ownership of Agricultural Land in the not too distant future
- greater information sharing powers.