

Article Information

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Major changes on the horizon for Australia's foreign investment (FIRB) regime

On 5 June 2020 the Federal Treasurer announced major proposed changes to Australia's foreign investment regime.

The proposed changes are focused on three broad themes:

1. protecting Australia's national security
2. stronger penalties, compliance and enforcement powers
3. streamlining less sensitive investments.

The reforms are said to be the most comprehensive since the introduction of the *Foreign Acquisitions and Takeovers Act (Act)* in 1975 and are expected to come into effect on 1 January 2021.

What will the key changes look like?

Protecting Australia's national security

New national security test

A new national security test will be introduced which will require foreign persons to inform the Foreign Investment Review Board (**FIRB**) if they are proposing to acquire a direct interest (usually 10% or more) in a "sensitive national security business" or if they intend to start carrying on activities of a "sensitive national security business".

This is intended to ensure that acquisitions of interests by foreign persons in critical or sensitive assets must be screened by FIRB, irrespective of value.

The definition of "sensitive national security business" will be the subject of consultation but is expected to include businesses in the telecommunications, electricity, gas, infrastructure and defence industries and potentially those that handle sensitive data.

Call in power

Any investment that is otherwise beyond the scope of the Act will be able to be "called in" if the Treasurer considers the investment raises national security concerns. The Government has indicated that this power will be subject to a time limit and that foreign persons will have the ability to voluntarily notify of a transaction to eliminate the risk of later being called in.

Last resort review power

A national security "last resort" review power will be introduced which will enable the Treasurer to reassess approved foreign investments where new national security risks emerge. This power will allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of foreign interests in a business, entity or land in a

limited number of exceptional circumstances. This power will not apply to investments approved before the changes are introduced.

Stronger penalties, compliance and enforcement powers

The Government will have 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.

Further, civil and criminal penalties for breaches of the Act will be significantly increased to ensure that they act as an effective deterrent.

Streamlining less sensitive investments.

In recognition of the fact that Australia competes globally for capital, the definition of “foreign government investor” will be relaxed so that entities which have more than 40% foreign government ownership in aggregate (without influence or control) but less than 20% from any single foreign government, will no longer be a foreign government investor (which ordinarily attracts a \$0 threshold).

Observations

Whilst the scope of the changes will depend on the legislation that is passed by the Government, initial observations are that:

- the proposed changes will introduce a greater level of uncertainty for foreign investors in critical or sensitive assets
- the introduction of the “call in” power is likely to influence the conditions to be attached to transactions that have the potential to raise national security concerns
- private equity funds with passive foreign government investors that are privately controlled should be able to more freely invest in Australian assets and businesses
- the devil will be in the detail and striking the right balance between protecting Australia’s national interests and ensuring Australia remains an attractive investment destination for foreign investors will be the Government’s key challenge.

Other points to note

The Government has also committed to making a series of amendments to address ambiguity, inconsistencies and unintended consequences in the Act. Some of these announced measures include welcome clarification for the mining sector that will expressly exempt the acquisition of revenue streams in relation to mining and production tenements where they do not provide rights to occupy land or direct control or influence over the land. Further, exploration licences in all Australian states and territories will now all generally be exempt from screening.

Finally, the announcement does not immediately affect the temporary measures announced on 29 March 2020 (reducing the monetary screening thresholds for all foreign investments subject to the Act to \$0 – [see our earlier Insight](#)). Subject to developments in relation to Australia’s COVID 19 situation, the Government is targeting a smooth transition from the current temporary arrangements to the new system at the beginning of 2021.

Key takeaways

The key takeaways from the announcement are:

- proposed investments by foreign persons in a “sensitive national security business” will require FIRB approval (regardless of the value of the investment or the type of investor)
- the Treasurer will have new powers to impose or vary conditions or unwind a transaction after FIRB approval has been granted, where new national security concerns emerge
- there will be more significant penalties for breaches of the Act and the Government will have more powers to enforce compliance with conditions imposed as part of an approval
- certain passive investments by foreign government investors will no longer require FIRB approval.