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FIRB approvals for Business – COVID-19, National Security and Beyond

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Australia's foreign investment rules have recently undergone major temporary changes in response to the economic fallout of the COVID-19 pandemic. The Australian government is considering further permanent changes due to national security concerns. This article considers those changes and the likely impacts on business.

What is FIRB approval?



The Foreign Investment Review Board (“**FIRB**”) is a body that advises the federal Treasurer on Australia's foreign investment policy and administration.

Among other functions, FIRB examines proposed investments in Australia pursuant to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (“**Act**”) and related legislation and provides recommendations as to whether relevant investments should be approved. FIRB is an advisory only and ultimately decisions regarding foreign investment remain with the Treasurer. Nonetheless, the process is usually referred to as seeking “FIRB approval”.

FIRB considers investment by “foreign persons”, which include:

- individuals not ordinarily resident in Australia;
- corporations in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold “substantial interests”;
- corporations in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government together hold “substantial interests”; and
- foreign governments.¹

A “substantial interest” is an interest of 20% or more.² There are also detailed and wide-reaching rules to determine interest held on trust and or through associates of foreign entities.

¹ Section 4 Act.

² Section 4 Act.

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The Act applies to proposed acquisitions by foreign persons of assets, securities or interests in Australian land (including agricultural land, commercial land, residential land, and mining or production tenement). Generally, an acquisition will be generally be a “notifiable action”, and therefore require FIRB approval, if it involves:³

- a foreign person acquiring either:
 - a substantial interest in an Australian entity;
 - an interest in Australian land; or
 - a “direct interest” in an Australian agribusiness;⁴ and
- it exceeds certain monetary thresholds. These thresholds vary depending on the circumstances and the type of investment.

COVID-19 Response

On 29 March 2020, the Federal Government announced that, as a temporary measure due to COVID-19, all monetary thresholds for the purposes of FIRB consideration were reduced to zero.

Government’s stated concern was that Australian assets and businesses might be subject to acquisition by foreign entities seeking to take advantage of the economic situation created by COVID-19.⁵

The changes were implemented through the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* (Cth) (“**COVID-19 Regulations**”). Notably, the COVID-19 Regulations do not have a set end date – the changes will remain until repealed.

The COVID-19 Regulations mean that nearly all transactions involving foreign persons now require FIRB approval. As a result, the timeframe for FIRB processing applications has increased from thirty days to some 6 months. Notwithstanding this FIRB has indicated that priority will be given to applications relating to “investments that protect and support Australian businesses and jobs”.⁶

Proposed Permanent Changes

On 5 June 2020, the government further announced proposed permanent changes to the Act and related legislation in response to national security concerns. These changes are intended to be made through amendments to the Act this year and to be in force by 1 January 2021.⁷ Draft legislation and regulations were released for public consultation on 31 July 2020.⁸

Mandatory FIRB approval will be required for all foreign investments in “national security businesses”, regardless of the value of the investment. The draft regulations define “national security businesses” as including businesses supplying goods or technology to the Australian Defence Force or intelligence agencies, as well as holders of critical infrastructure (such as electricity, ports, gas, and telecommunications).⁹

The Treasurer will also be given a new ‘call-in’ power to review investments that would not otherwise be reviewable if he or she believes that the proposed action poses a national security concern. In exceptional circumstances, the Treasurer will also have a ‘last resort’ power to impose conditions, vary existing conditions or force divestment of any realised investment when national security concerns are later identified.¹⁰

³ Section 47 Act.

⁴ Generally, this is an interest of at least 10%, or 5% if the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity – section 16 *Foreign Acquisitions and Takeovers Regulation 2015* (Cth)

⁵ <https://firb.gov.au/qa-temporary-changes-foreign-investment-framework>

⁶ <https://firb.gov.au/qa-temporary-changes-foreign-investment-framework>

⁷ <https://www.abc.net.au/news/2020-06-05/foreign-investment-restrictions-tighten-australian-businesses/12324276>

⁸ <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/foreign-investment-review-board-consultation-exposure>.

⁹ *Exposure Draft Regulation (Definition of National Security Business)* <https://treasury.gov.au/consultation/c2020-99761>

¹⁰ *Foreign Investment Reform (Protecting Australia’s National Security) Bill 2020 (Cth)* Draft Explanatory Memorandum, pp. 13-14.

The government's proposed changes to the Act will also:

- Provide further powers to enforce conditions imposed on applicants;
- Create a single Register of Foreign Ownership of Australian Assets. Previously, registers were held only for certain assets such as agricultural land, water and residential land; and
- Simplify the fee structure for applications.¹¹

Conclusion

Due to the COVID-19 pandemic and national security concerns, the Australian government has tightened rules around foreign investment:

- As a temporary measure due to COVID-19, all monetary thresholds are currently reduced to zero. This means that nearly all transactions involving foreign entities now require FIRB approval.
- Timeframes for processing have increased from 30 days to 6 months.
- Further permanent changes are proposed from 1 January 2021, which will require FIRB approval for all foreign investments in sensitive businesses, including those involved in military procurement and infrastructure.
- The compliance and enforcement regime will be expanded.
- The Treasurer will be granted new "call in" and "last resort" powers to intervene in transactions on national security grounds.

These changes will impact many businesses proposing to enter into transactions with foreign entities.

How we can help you

JHK is assisting many businesses and individuals affected by COVID-19 and the responses by governments to the crisis. If you are involved in a transaction that may require FIRB approval or if you have any other enquiry, please do not hesitate to [contact us](#).

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¹¹ Draft Explanatory Memorandum, Chapters 3-5.