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Major reforms to
Australia's foreign investment
framework to commence
on 1 January 2021

The Australian government has introduced the most significant reforms to Australia's foreign investment laws (the **FIRB regime**) in nearly 50 years. This client alert provides a high level summary of the key changes to the FIRB regime from 1 January 2021.

There is also legislation to replace the current FIRB fee regime, which will significantly increase fees for larger transactions.

The changes come amid a renewed focus by FIRB on enforcement, so investors are well advised to tread carefully when it comes to considering whether FIRB approval is required.

The key changes to be introduced on 1 January 2021 are:

- the pre-29 March 2020 monetary thresholds are being re-instated (putting the thresholds back to their pre-COVID levels);
- all “national security actions” will need to be pre-approved by FIRB;
- the Treasurer has a new “call-in” power which enables him to review an action which did not need pre-approval but which raises a national security concern;
- the Treasurer will be given a “last resort” power to reassess approved foreign investments when subsequent national security risks emerge;
- the Treasurer has the power to unilaterally extend the FIRB decision period by up to 90 days;
- penalties for non-compliance have been increased and the Treasurer will have wider enforcement powers; and
- the definition of “foreign government investor” (**FGI**) has been modified to mitigate its application to funds with limited partners that are sovereign wealth funds or state pension funds.

Further details about these key changes and other changes are detailed below.

Monetary thresholds reinstated

The pre-29 March 2020 monetary thresholds for notifiable actions and significant actions will

1. It is proposed that the Security of Critical Infrastructure Act 2018 (Cth) be amended to cover critical assets in communications, data storage and processing, defence industry, financial services and markets, food and grocery, higher education and research, healthcare and medical, transport, energy, space technology, and water and sewerage.

be reinstated. See the table below at the end this client alert that summarises the key thresholds.

New category of “notifiable national security action”

FIRB approval will be required for any of the following proposed actions, regardless of the value of the investment:

- to start a “national security business”, a broad concept which will cover the following but only if it is publicly known (or could be known upon making reasonable inquiries) that the business meets the criteria for being a “national security business”:
 - critical infrastructure assets under *Security of Critical Infrastructure Act 2018* (Cth) such as those in the electricity, gas, water and ports sectors¹;
 - carrier or carriage service providers under the *Telecommunications Act 1997* (Cth);
 - critical goods, services or technology intended for military end-use;
 - businesses that store or have access to information that has a security classification; and
 - businesses that store or maintain personal information collected by defence or national intelligence agencies;
- to acquire $\geq 10\%$ in a “national security business” or in an entity that carries on a “national security business”; and
- to acquire an interest in “national security land”, being defence premises or land which is publicly known (or could be known upon making reasonable inquiries) that a national intelligence agency has an interest in the land.



“Call-in” power

The Treasurer will be given a new “call-in” power to review:

- any action taken or proposed to be taken on or after 1 January 2021;
- any action not previously notified to FIRB;
- any significant action or any “reviewable national security action” (being actions expected to give foreign persons potential influence and rights, such as the ability to influence or participate in the central management or policy of an entity or business, that would otherwise not be captured as significant actions notifiable actions or notifiable national security actions, for example, acquisition $\geq 10\%$ interest in an entity or an Australian business that is not otherwise a significant action, notifiable action or notifiable national security action, which may give rise to a national security concern); or
- any action which may pose a national security concern.

The review can be initiated at any time within 10 years after the action. Following such a review, the Treasurer can make orders (such as prohibition or divestment orders) if the Treasurer is satisfied that the action would be, or that the result of it is, contrary to national security.

To remove the risk of the “call-in” power being exercised in respect of an action, investors should voluntarily apply for FIRB approval.

“Last resort” power

The Treasurer will be given a “last resort” power to reassess approved foreign investments where subsequent national security risks emerge. The “last resort” power will allow the Treasurer to impose new conditions, vary existing conditions, or, as a last resort, force the divestment of any realised investment if:

- after having reviewed the action and taken into account national intelligence agency advice, the Treasurer is satisfied that a national security risk exists;
- one or more of following applies:
 - the applicant made a false or misleading statement and the Treasurer is reasonably

satisfied that the misstatement directly relates to the national security risk; and

- the business, structure, organisation or market in which the action is taken has materially changed and the national security risk posed by the material change could not have been reasonably foreseen, or could have been reasonably foreseen but was only a remote possibility at the time of the original approval, or the material change alters the nature of the national security risk posed at the time of the original approval;
- the Treasurer has taken reasonable steps to negotiate in good faith with the applicant to achieve an outcome of eliminating or reducing the national security risk; and
- the existing regulatory systems would not adequately eliminate or reduce the national security risk.

The power is exercisable in respect of:

- any no objection notice given on or after 1 January 2021, unless it is given in respect of a significant action that is notified to the Treasurer before 1 January 2021; and
- any exemption certificate given on or after 1 January 2021.

Investors will be able to apply to the Administrative Appeals Tribunal for review of a decision by the Treasurer that a national security risk exists.

Power to extend the statutory decision period

The Treasurer will have the power to unilaterally extend a decision period by up to 90 days by providing a reason to the applicant but without the need to issue an interim order or seek consent from the applicant. This power applies to FIRB applications submitted on or after 1 January 2021 and will be in addition to the existing power to make a public interim order.

New compliance and enforcement tools and increased penalties

Under the new FIRB regime:

- the infringement notice regime will be expanded to cover all types of foreign investments, not just residential real estate investments;
- the Treasurer will have monitoring and investigative powers in line with other business regulators, including access to premises with consent or as permitted by a warrant to gather information; and
- foreign persons who undertake actions pursuant to a no objection notice must notify the Australian government within 30 days after taking the actions.

The Treasurer will also have the power to:

- accept enforceable undertakings from foreign persons;
- give directions to persons in order to prevent or address suspected breaches; and
- revoke a FIRB approval where the applicant provided false or misleading information.

There will also be a significant increase to the civil and criminal penalties. For example, failing to give notice of a notifiable action will attract a:

- maximum criminal penalty:
 - for an individual – 10 years imprisonment or 15,000 penalty units or both (currently three years or 750 penalty units or both);
 - for a corporation – 150,000 penalty units (currently 3,750 penalty units); and
- maximum civil penalty of the lesser of the following:
 - 2.5 million penalty units; or
 - the greater of the following:
 - 5,000 penalty units (or 50,000 penalty units if the person is a corporation); and
 - a specified amount referable to the value of the relevant action (there will be a table setting out how to calculate the specified amount)

(Currently the maximum civil penalty is 250 penalty units for an individual and 1,250 penalty units for a corporation.) The value of 1 penalty unit is currently A\$222.

Change in control test

Currently, increases in shareholdings of an Australian business or entity are not significant actions if the acquisition does not result in a change of control. This means that private investors who already qualify as “controlling” an Australian business may be able to increase their holdings in a target Australian business or entity over time without reverting back to FIRB.

Under the new FIRB regime, once a foreign person controls an entity or business, the change of control test is not relevant in determining whether a further increase in shareholding is a significant action. This is however only limited to acquisitions of interests in securities of an entity and issuing of securities in an entity.

Also a person will no longer be taken to control an entity if the person is one of two or more persons holding $\geq 40\%$.

Amended definition of FGI

A corporation, trustee of a unit trust or general partner of an unincorporated limited partnership will no longer be considered an FGI under the “40% threshold test” (that is if a total of 40% or more of the investors are FGIs no matter which countries they come from) if they operate a passive investment fund or scheme where (in broad terms) individual investors in the fund are not able to influence any individual investment decisions, or the management of any individual investments, of the corporation, trustee or general partner under the investment fund or scheme. An individual investor:

- will be considered able to influence individual investment decisions if:
 - they have the ability to determine whether the fund or scheme makes an acquisition of shares, assets or property; or
 - they have voting rights over the operation of a particular business that the fund or scheme has invested in; and
- will not be considered able to influence individual investment decisions:
 - if they have the right to vote on a conflict of interest decision that may relate to an individual investment or on a broad investment strategy that may lead to

the acquisition or divestment of certain investments; or

- merely by having a representative on an advisory committee.

However, the “20% threshold test” remains (so if 20% of the investors are FGIs from one country, the fund is still “tainted” as an FGI).

Passive increases

Increases in actual or proportional shareholdings, including through share buybacks, selective capital reductions, cancellation of securities and trust redemptions, will now be notifiable actions or significant actions if the other conditions to such actions are met. For example, a foreign person who does not participate in a share buyback will be deemed to have acquired an interest in securities in an entity where it results in an increase in their proportional holdings.

Where a passive increase constitutes a notifiable or significant action, the foreign person must notify FIRB within 30 days.

Changes to certain exemptions

Non-material exemption for offshore transactions by FGIs: The *de minimis* value of the Australian assets threshold will be increased from A\$55 million to A\$60 million (subject to annual indexation). There will also be a requirement that the Australian assets are not part of a national security business (in addition to the requirement that the Australian assets not be part of a sensitive business) for the *de minimis* exemption to apply.

Moneylending exemption: The exemption will apply to acquisitions of interests in national security land or national security businesses by way of enforcement of a security. However it will only apply in limited circumstances – if a receiver (or a receiver and manager) takes possession of the asset in their capacity as a receiver (or a receiver and manager). In practice this exemption will cover most security packages that banks will put in place, however, banks will need to be mindful to stay within the limited scope when lending to national security businesses, so for example the exemption would not apply where a mortgagee forecloses on the mortgaged property.

Tracing rules to apply to unincorporated limited partnerships

The tracing rules will be extended to allow interests to be traced through unincorporated limited partnerships in the same manner as the rules apply to corporations and trusts. This means that limited partners can be deemed to hold a substantial interest in an Australian asset and limited partners who are associates can be deemed to hold an aggregate substantial interest in an Australian asset.

The tracing rules however will still not apply to unincorporated general partnerships.

Register of Foreign Ownership of Australian Assets

The Register of Foreign Ownership of Water Entitlements and Register of Foreign Ownership of Agricultural Land will be replaced by a Register of Foreign Ownership of Australian Assets which will record information about foreign ownership of:

- interests in Australian land;
- interests in Australian water entitlements; and
- interests in certain Australian entities or businesses.

The Register will not be made public.

Notice will need to be given to the registrar of the new Register of Foreign Ownership of Australian Assets within 30 days after certain events occur, including:

- a foreign person starts or ceases to hold registrable land or water interest;
- a foreign person takes an action in relation to an entity or business where the action is: a notifiable action, a notifiable national security action, a significant action that has been notified to or called in for review by the Treasurer, or a reviewable national security action that has been notified to or called in for review by the Treasurer;
- a person described above becomes or ceases to be a foreign person while holding the relevant interest; and
- any change of $\geq 5\%$ in a previously disclosed interest in an Australian entity or business.

More coordinated information gathering and sharing

The Australian government will also have greater ability to share information obtained within various departments of the Australian government and with foreign governments. Information can only be shared with foreign government:

- where national security risks may exist for Australia or the foreign country;
- disclosure is not contrary to the Australian national interest; and
- the foreign government has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.



Overview of M&A transactions (excluding land related transactions) under the new FIRB regime

Proposed action	Type of investor	Thresholds	Type of action	Mandatory notification	“Call-in” power	“Last resort” power
Acquisition of an entity or business that wholly or partly carries on an Australian media business ²	All	25% A\$0	Significant and notifiable action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Acquisition of an Australian agribusiness ³	All	≥10% A\$60million (value of the interest) ⁴	Significant and notifiable action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Acquisition of a national security business that is carried on wholly or partly in Australia or an entity that carries on a national security business wholly or partly in Australia ⁵	All	≥10% A\$0	Notifiable national security action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Acquisition of an Australian entity or business that is not a national security business	FGI	≥10% A\$0	Significant and notifiable action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Offshore acquisition of an entity with an Australian subsidiary and none of its Australian assets are assets of a sensitive business or national security business	FGI	≥10% A\$60m (Australian asset value) or Australian asset value is ≥5% of global asset value	Significant and notifiable action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Offshore acquisition of an entity with an Australian subsidiary and any of its Australian assets are assets of a sensitive business or national security business	FGI	≥10% A\$0	Significant and notifiable action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Acquisition of an Australian entity that is not a sensitive business, national security business, Australian media business or Australian agribusiness ⁶	Private investors	≥20% A\$275million (gross asset value or value determined based on consideration) ⁷	Significant and notifiable action	Yes	No, assuming transaction does not proceed without approval	Yes, if prior approval obtained
Acquisition of an entity that carries on an Australian business or an Australian business if the action is not otherwise a significant, notifiable or notifiable national security action	All	≥10% A\$0	Reviewable national security action	No	Yes, if no prior approval obtained	Yes, if prior approval obtained

2. From 1 January 2021, the definition of “Australian media business” includes an Australian business that publishes daily newspapers, broadcasts TV or radio (including websites from which these may be accessed), or operates an “electronic service” (a media business that delivers content over the internet, operates wholly or partly for the purpose of servicing Australian audiences and meets a content and threshold test). The new definition captures traditional media businesses as well as media businesses that exclusively publish or broadcast online.

3. Where the foreign person already holds ≥10% in an Australian entity that is an agribusiness, acquiring additional interests in the entity will also require approval if the relevant monetary threshold test is met with respect to the action.

4. A higher threshold for A\$1,192million applies for Chile, New Zealand and United States of America.

5. Where the foreign person already holds ≥10% in an entity that carries on a national security business, acquisitions of additional interests in the entity will also require approval.

6. Where the foreign person already holds ≥20% in an Australian entity, acquiring additional interests in the entity will also require approval if the relevant monetary threshold is met with respect to the action. However, the foreign person will not need to apply for approval where they are only proposing to acquire additional interests in securities in an existing wholly owned subsidiary, for example, by way of capital injection.

7. A higher threshold of A\$1,192million applies for FTA partner countries: United States of America, New Zealand, Chile, Japan, Republic of Korea, China, Singapore, Peru, Canada, Mexico, Vietnam and Hong Kong.

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