

Keeping pace with emerging risk and global developments: Foreign Investments Review regime to undergo significant reform

The Federal Government has announced significant reforms to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) to ensure that Australia's foreign investment framework keeps pace with emerging risks and global developments, particularly as they relate to national security. Exposure draft legislation will be released for a six-week consultation period in July 2020, with the reforms scheduled to commence on 1 January 2021.

The reforms are aimed at [updating Australia's foreign investment review framework](#) in three broad ways: addressing national security risks, strengthening the existing framework, and streamlining investment in non-sensitive businesses.

KEY ELEMENTS

The reforms are to cover the following key elements:

1. Introduction of a new national security test

The introduction of a new national security test for proposed foreign acquisitions will, among other things:

- / enable the Treasurer to impose conditions or stop any investment by a foreign person on national security grounds notwithstanding the value of the investment;
- / require mandatory notification of any proposed investment by a foreign person in a sensitive national security business or where a business or entity owned by a foreign person starts to carry on the activities of a sensitive national security business;
- / allow an investment to be 'called in' for review for screening on national security grounds, even if that investment would not ordinarily trigger FIRB review; and
- / if national security risks emerge in respect of an investment already approved under the FATA, allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of that realised investment.

2. Streamline of less sensitive investments

The Federal Government will exempt certain investments made by entities currently classified as 'Foreign Government Investors'. The exemption is to apply only where the foreign government investor could not have, or could not be perceived to have, influence or control over the investment or operational decisions of the entity or any of its underlying assets. These entities will still be considered as 'foreign persons' for the purpose of foreign investment screening.

The measure is intended to streamline the handling of non-sensitive cases and reduce red tape for investors.

3. Stronger penalties, compliance and enforcement powers

The Government aims to deliver reforms to ensure that Treasury and the Australian Taxation Office have the resources, powers and penalties to effectively monitor, investigate and prosecute breaches of foreign investment laws.

Expected changes include:

- / increasing civil and criminal penalties;
- / expanding the infringement notices regime;
- / providing the Government with powers to remedy an unsatisfactory outcome that is the result of a foreign person giving incorrect information when seeking approval; and
- / allowing the Government to accept enforceable undertakings from foreign persons to manage non-compliance or support commitments made at the time of application for approval.

4. Integrity of the foreign investment framework

The Government has indicated that it is committed to improving the integrity of the framework by making foreign investment obligations clearer, and ensuring that the framework continues to be fit for purpose and meets community expectations.

It is anticipated that this will be achieved through:

- / narrowing the scope of the moneylending exemption so as to capture the creation of interests in sensitive national security businesses;
- / allowing review of acquisition of interests from a government body associated with the privatisation of a government service, function or asset;
- / extending the tracing rules to apply to unincorporated limited partnerships; and
- / review of purchases of Australian land with money provided by a foreign person within a family structure.

5. Coordinated information gathering and sharing

The Government will introduce measures to make sure that, subject to appropriate safeguards, there is greater sharing of foreign investment information across government agencies and with international counterparts where national security considerations are present.

The Government is considering implementation of a new Register of Foreign Ownership to merge and expand the existing agricultural land, water and residential registers, to increase visibility of foreign investments made in Australia.

6. A fairer and simpler framework for foreign investment fees

The Government is proposing to update the fee schedule to reflect the enlarged roles and responsibilities of foreign investment activities across government. It will also take into account the growing complexity of cases, and the growing administrative cost of the review process.

7. A timely, consistent and reliable investor experience

It is proposed that the Government will introduce a new measure to extend the statutory decision period in certain circumstances, particularly where a case is complex and sensitive.

The power will, however, be limited so that the total cumulative period by which the Treasurer can seek to extend the consideration period is 90 days.

The Government has indicated that other amendments are also proposed to be made to the foreign investment review framework that will deal with improving the readability of existing provisions, fixing inconsistencies and unintended consequences, and addressing feedback received from investors seeking greater certainty.

We will keep you updated as the exposure draft legislation is released.

FURTHER INFORMATION

For further information in relation to the reformation of the FATA, please see:

- / [Major reforms to Australia's foreign investment framework](#) – The Hon Josh Frydenberg MP Media Release
- / [Foreign Investment Reforms June 2020](#) – The Australian Government
- / [Foreign Investment](#) – Treasury.gov.au

CONTACT DETAILS

If you have any queries please contact



Jeremy Schultz, Partner
jeremy.schultz@finlaysons.com.au
+61 8 8235 7408



Kyra Reznikov, Special Counsel
kyra.reznikov@finlaysons.com.au
+61 8 8235 7561



Andrew Dyda, Managing Partner
andrew.dyda@finlaysons.com.au
+61 8 8235 7706



Lan Lam, Partner
lan.lam@finlaysons.com.au
+61 8 8235 7838