

Foreign Investments Review Reform – an Update

Further to our [article published on 30 June 2020](#) regarding the Federal Government's announcement that significant reforms to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) would be introduced to ensure that Australia's foreign investment framework keeps pace with emerging risks and global developments, the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (**Amending Act**) has now come into effect.

Supporting regulations have also commenced, with the *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (Cth) (**Amending Regulations**) amending the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**Principal Regulations**).

The Amending Act and Amending Regulations reinstate the monetary thresholds for review of actions that were effective prior to 29 March 2020, introduce two new categories of actions relating to national security, narrow the "foreign government investor" definition to exclude certain investment funds and narrow the money lending exception.

The majority of the package of reforms came into force on 1 January 2021.

BACKGROUND

The reforms are aimed at updating Australia's foreign investment review framework by addressing national security risks, further strengthening the existing framework, and streamlining investment in non-sensitive businesses.

KEY ELEMENTS

The reforms cover the following key elements, each taking effect from 1 January 2021:

1. Reinstatement of Monetary Thresholds

In response to the COVID-19 pandemic and potential risks of foreign investors taking advantage of distressed Australian businesses, the monetary value thresholds for significant and notifiable actions were reduced to zero from 29 March 2020. As a consequence, any acquisition of relevant Australian assets required referral to FIRB for consideration, regardless of the value of the acquisition.

The Amending Regulations reinstate the pre-29 March 2020 thresholds from 1 January 2021, with minor increases in accordance with the pre-existing annual indexation process.

The Amending Regulations also provide for mining and production tenements to be treated consistently with residential land and vacant commercial land when determining whether a transaction involving land held by an Australian land corporation or trustee is subject to a nil threshold.

2. Introduction of new national security review

The Amending Act and Amending Regulations introduce provisions that allow for the Treasurer to specifically consider whether certain actions and investments would be contrary to Australia's national security. These provisions define two new categories of actions, being 'notifiable national security actions' and 'reviewable national security actions'.

'Notifiable national security actions' are actions relating to a 'national security business' or 'national security land'.

'National security land' is Defence land or land in which an agency in the national intelligence community has an interest (where that interest is publicly known or is ascertainable by the making of reasonable enquiries).

A 'national security business' is effectively an endeavour that if disrupted or carried out in a particular way, could create national security risks, for instance if the operations

are controlled or influenced by persons acting not in Australia's interests. A business involved in or connected with critical infrastructure, telecommunications, or the defence and national intelligence communities (or suppliers of critical goods, technology or services to those communities) is likely to be a **'national security business.'**

A person proposing to take a notifiable national security action is required to give notice of the action to the Treasurer, regardless of the value of the investment. The proponent is not able to take the action before:

- / receiving a 'no objection' notification from the Treasurer;
- / being granted an exemption certificate covering the action; or
- / the decision period lapses.

Separately, a new 'call in' power applies if an action is either a 'reviewable national security action', or a 'significant action' that is not otherwise notifiable under the Act.

'Reviewable national security actions' are those actions which are expected to give foreign persons potential influence and rights, where they are not otherwise a significant action, notifiable action or notifiable national security action.

A person is not required to notify the Treasurer before taking a reviewable national security action, but the Treasurer may independently 'call in' the action for review if the Treasurer considers that the action may pose a national security concern. The call in must be exercised within 10 years after the action is taken.

In addition, if national security risks emerge in respect of an investment already approved under the FATA, the Treasurer may impose conditions, vary existing conditions, or, as a last resort, require the divestment of that realised investment.

3. Streamlining of less sensitive investments

The definition of 'foreign government investor' has been amended to exempt some entities that would otherwise have been treated as a 'foreign government investor'.

This has been achieved by removing the substantial interest cap on the combined interests that multiple passive foreign governments may hold in an investment fund before the fund itself is considered a foreign government investor.

The exemption is to apply only where the foreign government could not have, or could not be perceived to have, influence or control over the investment or operational decisions of the fund entity or any of its underlying assets.

These entities will still be considered 'foreign persons' for the purpose of foreign investment screening, but not 'foreign government investors', and as such higher monetary thresholds will apply to their acquisitions before review is required.

4. Moneylending exemption

The moneylending exemption contained in section 27 of the Principal Regulation has been narrowed so that it does not apply where:

- / the legal interests in the assets of a national security business;
- / national security land;
- / an interest in an exploration tenement in respect of Australian land that is national security land; or
- / an interest in securities in an entity that carries on a national security business,

are acquired by way of enforcement of a moneylending agreement.

The amendments will apply to moneylending agreements entered into on or after 1 January 2021 and apply to both private foreign investors and foreign government investors.

FURTHER INFORMATION

We recommend that you seek specific legal advice if you have any queries on any of the changes to the FATA and Principal Regulations.

CONTACT DETAILS

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