



Major Reforms to Foreign Investment and Security Laws now in Force

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Australia introduced the *Foreign Acquisitions and Takeovers Act 1975* (Cth) to regulate the acquisition of land and assets in Australia, by foreign persons or entities. It imposed reporting obligations on foreign persons and entities engaging in transactions, and provided the Federal Government extensive powers to monitor and intervene in transactions involving foreign persons.

From 1 January 2021, the following laws have come into force which have amended the current Foreign Investment Review Board (**FIRB**) regime:

- *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth); and
- *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (Cth).

National Security Business and National Security Land

The biggest change is to the acquisition of land and businesses deemed to be in the national interest. The reforms require mandatory notification of:

- any proposed acquisition of an interest (usually 10% or more), by a foreign person in a National Security Business or National Security Land, regardless of its value; and
- where a business or entity owned by a foreign person starts to carry on a National Security Business.

A '**National Security Business**' encompasses many types of businesses including:

- critical infrastructure business under the *Security of Critical Infrastructure Act 2018* (Cth);
- telecommunications carrier or carriage service provider under the *Telecommunications Act 1997* (Cth);
- a business involved in critical goods or technology for military or intelligence end-use;
- a business involved in critical defence or intelligence services; and
- a business involved in sensitive information, including storage of classified information associated with national security.

'**National Security Land**' is land owned or occupied by the Australian Defence Force, or land in which a national intelligence agency has an interest that is publicly known, or could be known upon the making of reasonable enquiries.

Notifiable National Security Action

Previously there were two types of transactions that attracted scrutiny by the Treasurer, being Notifiable and Significant Actions.

A '**Notifiable Action**' is a proposed action by a foreign person to:

- to acquire a direct interest in an Australian entity or Australian business that is an agribusiness;
- to acquire a substantial interest in an Australian entity; or
- to acquire an interest in Australian land.

A foreign person must notify the Treasurer before taking any Notifiable Actions.

A '**Significant Action**' is where there is a change in control of an Australian business, involving a foreign person. This involves:

- a change in control in an Australian entity; and
- applicable monetary thresholds being satisfied.

A foreign person does need to notify the Treasurer before taking any Significant Actions.

Under the current reforms, a two further actions have been introduced. The '**Notifiable National Security Action**' is where a foreign person proposes to:

- to start a National Security Business;
- to acquire a direct interest in a National Security Business;
- to acquire a direct interest in an entity that carries on a National Security Business;
- to acquire an interest in Australian land that, at the time of acquisition, is National Security Land; or
- to acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is National Security Land.

The Treasurer must be notified regardless of the investment's value before any proposed Notifiable National Security Action is taken.

The other introduced action is the '**Reviewable National Security Action**'. This targets conduct which gives 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, or the right to occupy Australian land.

A person is not required to notify the Treasurer before taking a Reviewable National Security Action. However, as discussed below, the Treasurer does have the power to call in these types of Actions for assessment.

Exemptions

Foreign Government Investors

A 'Foreign Government Investor' (**FGI**) is required to notify the Treasurer before taking any Notifiable Action or Notifiable National Security Action. However, the definition of FGI has changed.

Now entities in which foreign governments investors hold a passive interest will no longer meet the definition of a foreign government investor. This exemption will not apply if a foreign government or separate government entity, alone or together with one of more associates, holds a substantial interest in the entity (substantial interest is defined as 20% from a single foreign government).

The exemption will also not apply if a member of the scheme could influence individual investment decisions, or the management of any individual investments under the scheme.

Finally, off-shore transactions by FGI require notification to FIRB, unless they are under \$60M. However, the assets must not be part of a National Security Business.

Foreign Money lenders

The other significant exemption relates to Foreign Money lenders. Generally the exemption applies to the acquisition of an interest in securities, assets, a trust, Australian land or a tenement if the interest is:

- held solely by way of security for the purposes of a moneylending agreement; or
- acquired by way of enforcement of a security held solely the purposes of a moneylending agreement.

Additionally, the entity that holds or acquires the interest must be:

- the entity (lender) that entered the moneylending agreement;
- a subsidiary or holding entity of the lender;
- person who is (alone or with others) in a position to determine the investments or policy of the lender;
- a security trustee who holds or acquires the interest on behalf of the lender; or
- a receiver, or a receiver and manager, appointed in relation to one of the above persons.

The money lending exception has limitations depending on the proposed land, asset or interest to be acquired. The exemption will not apply where the interest is in a National Security Business or National Security Land acquired by a foreign lender for the purposes of a security interest. However, the exemption remains where the enforcement of security interests involves a receiver.

Existing exemptions

Existing exemptions are modified in several ways:

- **Acquisition from government:** exemption now covers acquisitions from bodies corporate established by Government for a public purpose, but does not apply to acquisitions of interests in National Security Businesses or National Security Land.
- **Acquisitions under wills:** no longer exempt.
- **Acquisition by devolution of law and compulsory acquisition:** no longer exempt with respect to passive increases.

Exemption Certificate

A foreign investor is permitted to apply for an Exemption Certificate which is intended to reduce the burden of frequent reviews by the Treasurer, by allowing them to obtain up-front approval for a program of lower-risk investments over a period of time, rather than having to apply for a no objection notification for each proposed investment.

Applications for exemption certificates will be considered on a case-by-case basis against the national interest test or national security test, as the case requires. The Treasurer may vary or revoke an exemption certificate given to a person.

Penalties and Enforcement

These reforms grant powers to improve Government oversight and enforcement of conditions attached to FIRB approvals. The powers include:

- **Investigative powers** – Standard monitoring and investigative powers, including access to premises with consent, or by warrant.
- **Directions** – Government can give directions to investors to prevent or address suspected breaches of conditions or of foreign investment laws.
- **Penalties** – Significantly increased civil and criminal penalties, including a maximum criminal penalty of 10 years imprisonment or 15,000 penalty units (or both) for individuals who have failed to give notice of a Notifiable Action, or acting in contravention of an order made by the Treasurer.
- **Notices** – Expanded infringement notices to cover all types of foreign investments.
- **Enforceable undertakings** – Can now be accepted from foreign persons.
- **Remedy powers** – Government can remedy situations by revoking FIRB approvals where foreign persons are given a no objection notification, or omits an important piece of information.
- **Tracing rules** – now applies to unincorporated limited partnerships (as well as corporations and trusts), so that beneficial interests can be traced.
- **Call-in powers** – Any investment not subject to mandatory pre-approval under national interest or new in power notifications processes, can be called in by the Treasurer for assessment, if the Treasurer considers the investment a national security concern. The Treasurer retains this power for 10 years after the investment/action took place.
- **Last Resort Powers** – The Treasurer may reassess an approved foreign investment if a security concern subsequently emerges. The Treasurer may impose conditions, vary conditions, or even require the foreign entity to divest their interest in the land, business or entity.
- **Sharing of information:** Government can now share foreign investment information to third parties in absence of a court order. Information can only be shared if there is an agreement between the Australian and the foreign government, a national security risk exists and the sharing of the information is not contrary to Australian national security interests.

What does this mean for Foreign Investors?

- **Family or friends of an Australian resident** – must seek foreign investment approval prior to the purchase of Australian land, where money is provided to Australian family member other than by way of gift.
- **Performing Government services or functions associated with privatisation programs** – if this raises a national security risk, foreign investment approval must be sought from government bodies.
- **Passive increase in actual or proportional holdings** – Further foreign investment approval is required for any increase in actual or proportional holdings, including passive increases as a result of creep acquisitions and proportional increases through share buybacks and selective capital reductions. The foreign person must notify FIRB within 30 calendar days after the increase.
- **New Register of Foreign Ownership of Australian Assets** – This has replaced the Register of Foreign Ownership of Water Entitlements and a Register of Foreign Ownership of Agricultural Land. Alongside interests in Australian land and water entitlements, the new register will record information about certain actions related to interests in Australian entities, businesses and other assets.

Generally, a foreign person who acquires or disposes of such an interest must update the register. Civil penalties apply for failing to update the register or giving notice. Once the new Register commences, a foreign person must notify the Register within 30 days of the following events:

- a foreign person acquires interest in Australian land, an exploration tenement, or a registrable water interest;
- a foreign person becomes a foreign person while holding interest in land, registrable water interest, an entity or business, or a National Security Business;
- a foreign person ceases to be a foreign person while holding interest;
- the foreign person's nature of interest in land changes;
- certain characteristics of a registrable water interest in an entity or business;
- there is a change in a foreign person's interest in an entity or business (5% or more);
- a foreign person takes a Notifiable Action and a no objection notification of a notice imposing conditions has been given;
- a foreign person takes a Notifiable Action; or
- a foreign person takes action that is a Notifiable National Security Action or a Reviewable National Security Action.

Changes to Fees

A new fee regime has been introduced by the amendments. Whilst the regime is complex with different formulae, exceptions and variations, fees for an acquisition can amount to an additional \$13,200 for every additional \$50M of consideration.

Conclusion

The new regime is complex and there are many circumstances where pre-approval will be required from the Treasurer, or where it is preferable to voluntarily file an application.

If you would like more information on the regime change, or advice in complying with current foreign investment laws in Australia, please contact Greg Lee on 02 8235 1254.