



OVERHAUL OF AUSTRALIA'S FOREIGN INVESTMENT REGIME PROPOSED

The Federal Government has proposed the most comprehensive reforms to Australia's foreign investment review framework in more than 20 years.

The proposed changes, which are due to take effect from 1 January 2021, aim to preserve Australia's open and welcoming approach to foreign investment while better addressing emerging national security risks arising from foreign ownership. The reforms proposed include:

- enhancing national security in relation to sensitive acquisitions
- improving compliance by foreign investors with FIRB approval conditions
- streamlining investment in non-sensitive areas.

What changes are proposed?

National security test

Before the current Covid-19 emergency measures were introduced, foreign investors were required to obtain government approval for investments above certain thresholds dependent on the sector and country of investor.

Under the proposed changes, the national security test will:

- allow the Treasurer to impose conditions or block investment by a foreign person on national security grounds regardless of value (\$0 threshold)
- require mandatory notification of any proposed investment by a foreign person in a sensitive national security business
- require mandatory notification where a business owned by a foreign person starts to carry on activities of a sensitive national security business
- allow any investment that would not ordinarily require notification to be 'called in' for screening on national security grounds
- allow investors to voluntarily notify to receive investor certainty from 'call in' for a particular investment or apply for an investor specific exemption certificate
- allow the Treasurer to impose conditions, vary existing conditions or, as a last resort, require the divestment of any realised investment which was approved under the FATA where national security risks emerge.

Mandatory pre-notification

Mandatory pre-notification will apply to a direct acquisition in a 'sensitive national security business', which will be defined in regulations allowing flexibility for changes over time. Consultation on the businesses considered sensitive national security business will take place alongside the release of exposure draft legislation. The Government has foreshadowed that the existing definition of sensitive business is too broad and that concepts to be considered will include:

- businesses regulated by the *Security of Critical Infrastructure Act 2018* or the *Telecommunications Act 1997*
- businesses involved in the manufacture or supply of defence or national security related goods,

services and technologies or business within the supply chain of those businesses

- businesses or land situated within proximity to defence or national security installations
- businesses that own, store, collect or maintain sensitive data relating to Australia's national security or defence.

"Call in" power

The Treasurer will have the power to call in any investment not notified under the existing national interest or new national security mandatory pre-notification processes if the investment raises national security concerns. The call in power may be used before, during or after the investment but time limits are proposed to provide investor certainty. An investment called in will be reviewed under the national security test.

Voluntary notification and exemption certificates

To provide greater certainty, investors will be able to voluntarily notify a proposed acquisition to avoid the possibility of being called in for review on national security grounds. Notification will trigger the time period during which the Treasurer can call in the acquisition for review. Investors may also apply for an exemption certificate for eligible acquisitions on a case-by-case basis.

Last resort power

The Government will have a last resort review power to reassess approved foreign investments where subsequent national security risks emerge. The power aims to address a gap in managing investment in sectors where point in time approvals are no longer adequate due to changes such as new technology or changes to security risk. The Treasurer will be able to impose new conditions, vary existing conditions or, as a last resort, require divestment of the asset. The power can only be applied where the Treasurer has taken steps to negotiate in good faith and no other regulatory mechanisms can be used to adequately mitigate the risk. The last resort power will not apply retrospectively - only foreign investment reviewed under the new regime will be caught.

Strengthening compliance powers

Treasury and the ATO will have extra powers and resources in relation to compliance monitoring and enforcement to ensure foreign investors

comply with the terms of their approval. These changes are designed to build confidence in the foreign investment framework, alongside ensuring that any investors who do not follow the rules are appropriately penalised. Treasury will have the power to accept enforceable undertakings from foreign persons to manage non-compliance or to give weight to commitments a foreign person made at the time of applying for a no objection notification or an exemption certificate. The actions which will be permitted by Treasury and the ATO will be proportional to the nature of the non-compliance and are intended to act as a meaningful deterrent to non-compliance.

Streamlining less sensitive investment

Exemptions will be granted for certain investments made by entities which are currently classified as 'Foreign Government Investors' (FGIs). Some investment funds with FGIs are currently treated as FGIs themselves, however, under the proposal, provided their FGIs have no influence or control over the investment or operational decisions of the entity or any of its underlying assets, they will be exempted. This reform is intended to streamline non-sensitive cases and reduce red tape for investors.

Other changes

Other proposed changes to be introduced include:

- foreign persons will require further foreign investment approval for any increase in actual or proportional holdings above what has been previously approved
- increased civil and criminal penalties and expanded infringement notices
- powers to remedy situations where exemptions are granted based on incorrect or incomplete information
- creation of a Register of Foreign Ownership that will merge and expand the existing agricultural land, water and residential registers
- review of the existing fees to make them fairer and simpler.

The Government will release an exposure draft of the legislation for consultation on the proposed reforms before a bill is introduced into parliament.

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