

# AUSTRALIAN FOREIGN INVESTMENT REFORM LEGISLATION PASSED BY PARLIAMENT

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Legal Briefings – By **Matthew FitzGerald**, **Phillip Podezebenko** and **Elizabeth Charlesworth**

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The *Foreign Investment Reform (Protecting Australia’s National Security) Act 2020* (**Reform Act**) and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (**Fees Act**) received Royal Assent on 10 December 2020, confirming that the Commonwealth Government’s changes to Australia’s foreign investment regime will take effect from **1 January 2021**.

## TIMELINE FOR REFORMS IS NOW CONFIRMED

The Reform Act passed both Houses of Parliament on 9 December 2020, after amendments made by the Senate were agreed to by the House of Representatives. The Fees Act passed both houses on 8 December 2020 without amendment. The operative provisions of both Acts will commence on **1 January 2021**.

### 2021 BRINGS SIGNIFICANT CHANGE TO THE FOREIGN INVESTMENT REGIME

We have previously released an [overview](#) of the proposed headline changes dealt with in the Reform Act, together with [commentary](#) on their potential implications. These changes include:

- mandatory review of all investments relating to a new category of “national security business”;

- narrowing the “moneylending exemption” from Foreign Investment Review Board (**FIRB**) approval for foreign lenders;
- a new register of foreign ownership of Australian businesses and assets;
- increased penalties for non-compliance;
- a new “call-in” power for the Treasurer to review certain actions that may pose national security concerns, where FIRB approval was not compulsory and was not obtained; and
- a new “last resort” power for the Treasurer to review FIRB-approved actions in exceptional circumstances.

The Fees Act establishes the framework for changes to foreign investment fees, including changes to the calculation methodology and potentially significant fee increases for high-value acquisitions.

## **AMENDING REGULATIONS REGISTERED**

Much of the detail of the proposed reforms is contained within the Foreign Investment Reform (Protecting Australia’s National Security) Regulations 2020 (Cth) (**Reform Regulations**), which were also registered on 10 December 2020 and will commence on 1 January 2021. It is pleasing to note that, in response to submissions received on the exposure draft regulations in September-October 2020 (including a submission from HSF), changes were made to a number of proposed measures. Some of the key items contained within the Reform Regulations include:

- an entity will not be a “national security business” unless it is publicly known, or could be known upon the making of reasonable inquiries, that the entity meets the criteria for being a “national security business”;
- the definition of a “foreign government investor” has been narrowed to avoid capturing small, passive foreign government investments in private investment funds;
- monetary thresholds that were in place before the COVID-19 pandemic will be reinstated and adjusted for indexation on and from 1 January 2021;
- the “moneylending exemption” will continue to apply to the holding of interests in national security assets by way of security, but only receivers and receivers and managers will be able to rely on the exemption in relation to acquiring interests in such assets as a result of enforcement. Accordingly lenders will require FIRB approval before acquiring title to or an interest in a national security asset through an enforcement

process; and

- the definition of a “media business” now includes online-only businesses but introduces a threshold test of an average daily audience of more than 10,000 people.

At the time of writing, regulations made under the Fees Act have not yet been registered. Further details of these will be provided once final regulations are registered.

## SENATE AMENDMENTS PROVIDE WELCOME OVERSIGHT

Following amendments to the Reform Act proposed in the Senate, the Treasury Secretary must conduct an evaluation of the reforms implemented by the Reform Act, Fees Act and associated instruments, giving a written report to the Treasurer within 12 months. The evaluation and report, which will be made publicly available, must consider the impact of the reforms on foreign investment in Australia and the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia’s national interests. This is a welcome oversight mechanism that will allow appropriate scrutiny of these reforms to ensure Australia’s continued attractiveness as a destination for foreign investment.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**MATTHEW  
FITZGERALD**  
PARTNER, BRISBANE

+61 7 3258 6439  
Matthew.FitzGerald@hsf.com



**ELIZABETH  
CHARLESWORTH**  
PARTNER, SYDNEY

+61 2 9225 5734  
Elizabeth.Charlesworth@hsf.com



**PHILIP  
PODZEBENKO**  
PARTNER, SYDNEY

+61 2 9225 5381  
philip.podzobenko@hsf.com

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