

PROPOSED NEW FOREIGN INVESTMENT RULES AND POWERS

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Legal Briefings - By **Matthew FitzGerald, Robert Nicholson, Raj Mathew and James Rigby**

The Government's draft reforms to the Foreign Investment Review Board (**FIRB**) screening process represent a major shift in the scope of FIRB's powers and its review of investments that may affect national security.

IN BRIEF

- **New notifications:** FIRB approval will now be needed for 'notifiable national security actions' involving sensitive land, critical infrastructure, telecommunications providers and sensitive data holders, and those in the defence and intelligence supply chain - **a zero dollar threshold will apply.**
- **Implications:** This will widen the range of transactions requiring approval and generate a lot more due diligence to support some FIRB applications. It may be difficult for investors to identify the relevant security considerations. The Treasurer will also be able to unilaterally extend the review period for a FIRB application to 90 days.
- **New powers:** FIRB will gain new powers across the entire investment lifecycle to review investments after they occur, with call-in and last resort powers, as well as increased compliance and enforcement tools, and penalties.

'NATIONAL SECURITY BUSINESSES' AND SENSITIVE LAND

WHAT NEW ACTIONS WILL REQUIRE FIRB APPROVAL?

'Notifiable national security actions' include any action by a foreign person that is:

- a. an acquisition of a direct interest (generally a 10% voting interest, unless the acquirer obtains additional control rights, in which case a lower threshold may apply) in a 'national security business';
- b. an acquisition of an interest in Australian land:
 1. that is 'defence premises' (as defined in the *Defence Act 1903* (Cth));
 2. in which an intelligence agency has or will have an interest (if, when acquired, the foreign person could reasonably be expected to be aware of the interest or prospective interest); or
 3. is within land declared by the Treasurer by legislative instrument;
- b. starting a 'national security business'; or
- c. foreign lenders taking security over the above even if wholly Australian owned.

What is a 'national security business'?

- **Critical infrastructure:** 'responsible entities' and 'direct interest holders' under the *Security of Critical Infrastructure Act 2018* (Cth), such as ports and electricity and gas utilities. This asset class is also under review and could be broadened considerably.
- **Telecoms providers:** 'carriers' and 'carriage service providers' under the *Telecommunications Act 1997* (Cth). This includes owners of network facilities such as transmission infrastructure, cabling and wireless services (which can capture electricity and gas utilities, ports, rail operators and internet providers) or anyone selling services which use those facilities.
- **Industries serving defence or intelligence:** any business which develops, manufactures or supplies 'critical' goods or technology for military use by, or provides or intends to provide 'critical' services to, defence or intelligence agencies or foreign defence forces, in relation to Australia's national security, may be captured. What is 'critical' could be a grey area.

- **Access to classified information:** any business which stores or has access to information with a security classification. This may be difficult for investors to ascertain.
- **Access to personal information used by defence or intelligence:** any business which stores, maintains, collects or has access to personal information for defence or intelligence agencies. The information must relate to defence or intelligence personnel and be something which, if accessed, could compromise Australia's national security. This may also be difficult for investors to identify.

TREASURER'S NEW CALL-IN AND LAST RESORT POWERS

WHEN CAN THE TREASURER 'CALL-IN' AN INVESTMENT, AND WHAT WILL THIS MEAN?

For actions where FIRB approval is optional (for example, where it is below relevant monetary thresholds) and where it is not sought, the Treasurer will now have a power to review those investments for national security risks, before or after the action has taken place. The Treasurer may impose conditions on the investment or require its disposal.

To obtain certainty, investors may choose to seek FIRB approval first, removing the potential for the call-in power to be exercised.

WHAT IS THE NEW 'LAST RESORT' POWER?

The proposed last resort power gives the Treasurer a final opportunity to review actions for which FIRB approval has been given, if exceptional circumstances arise.

If the Treasurer considers that a national security risk exists in relation to a particular action, the relevant person must be provided a notice with reasons (albeit that the notice may be redacted, possibly in full, on grounds of national security). An investor has a right to seek merits review before the Administrative Appeals Tribunal.

Conditions for use

The national security considerations must arise from:

- a. a misleading statement or omission (eg in a FIRB application), even if unknown to the investor;
- b. the business, structure, organisation or activities of an applicant changing materially; or
- c. the circumstances of the relevant market changing materially.

The Treasurer must also:

- consider advice from intelligence agencies;
- take reasonable steps to negotiate in good faith with the investor; and
- be satisfied that Australian governments do not have adequate options to reduce the national security risk using existing regulatory systems.

Examples of Last Resort Powers

If the Treasurer is satisfied that a national security risk exists, and that exercising the last resort power is reasonably necessary to reduce or eliminate the risk, the Treasurer may:

- prohibit a proposed action;
- make a disposal order;
- impose conditions; or
- vary existing conditions.

‘INTEGRITY MEASURES’

The reform package closes various ‘gaps’ in the existing legislation, which will now:

- capture **increases in proportional holdings resulting from buy backs**, or acquisition of additional stakes over time in entities already invested in;
- extend the tracing rules which apply to companies and trusts to **trace ownership up through limited partnerships**; and
- permit **broader sharing of information within government** (and to foreign governments in limited circumstances), but maintaining criminal offence protection against non-permitted disclosure.

PENALTIES AND ENFORCEMENT

Significant general increases to penalties for breaches of the regime are proposed, including civil penalties with a maximum from \$11 million to \$555 million (depending on deal sizes), and criminal penalties for directors who authorise or permit contraventions of up to 10 years' imprisonment and \$3.3 million.

Providing false or misleading information (including by omission) will now be subject to revocation of approvals and civil penalties (even where not deliberate).

FIRB will also generally gain monitoring and enforcement powers, including requiring notices when transactions are completed (or divested), and permitting enforceable undertakings and infringement notices.

KEY CONTACTS

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



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