

Australia

Global rules on foreign direct investment

Introduction

On January 1, 2021, major reforms were effected to the Australian foreign investment framework, which apply to any foreign investments subject to the Foreign Acquisitions and Takeovers Act 1975 (the **Act**) occurring on or after January 1, 2021.

Notification Requirement

Under the Act, particular “significant actions” must be notified to the Foreign Investment Review Board (**FIRB**) prior to the foreign investment action. Notifiable actions are those that acquire a direct interest in an Australian entity or Australian business that is an agribusiness; acquire a substantial interest in an Australian business; or acquire an interest in Australian land. Whether or not an action is deemed “significant” varies depending on the type of action and the particular circumstances. Specifically, significant actions require a (i) change of control for entities or an Australian business, and (ii) a certain monetary threshold to be met.

Notifiable National Security Actions

The reform introduced a new category of “notifiable national security actions”, where a \$0 threshold is applied. “Notifiable national security actions” are actions that involve:

- Starting a national security business;
- Acquiring a direct interest in a national security business or an entity that carries on a national security business; and
- Acquiring an interest in national security land.

A “national security business” is broadly defined as one involved in or connected with a “critical infrastructure asset”, telecommunications, defense or a national intelligence community (of either Australia or a foreign country), or their supply chains.

New Powers of the Treasury

The Treasurer is able to make divestment orders and unilaterally impose new conditions or vary existing conditions after FIRB approval has been granted. This power is subject to various requirements, including:

- a national security risk exists as a result of the action;
- One or more of the following is satisfied:
 - the application contained false or misleading statements, such statements relating directly to a national security risk;
 - the business, structure or organization that the application relates to has materially changed since FIRB approval was granted, and now presents a national security risk (such risk not having been reasonably foreseeable);
 - The market in which the action occurs has materially changed since FIRB approval was granted, resulting in the action presenting a national security risk.
- the Treasurer has taken reasonable steps to negotiate in good faith with the applicant to eliminate the national security risk;

- existing regulatory systems would not adequately address/manage this risk;
- if a divestment order is made, the action must have been taken and the result of the action is contrary to national security; and
- for the imposition of a new condition, or variation of a current condition, the Treasurer must be satisfied that it is reasonably necessary to eliminate or reduce any national security risk.

The Treasurer is now also granted the power to unilaterally extend the decision period by up to 90 calendar days.

Contact



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Significant increases in penalties for Non-Compliance

Non-compliance with the FIRB regime can result in significant fines for both corporations and individuals, including up to 10 years imprisonment for individuals.