

Major Reforms to Australia's Foreign Investment Law

16 November 2020

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1. Introduction

In recent years some of the world's largest economies including Japan, the United States, China and the EU have modified policies to address foreign investment risks in response to a rapid technological change and changes in international security environment¹. Against this backdrop, on 5 June 2020 the Australian government proposed major reforms to the Foreign Acquisition Takeovers Act 1975. The reforms will introduce a national security test with \$0 threshold, dramatically broadening the government's powers to assess foreign investments. The new powers also entail a broader call-in power, a new 'last resort' power and stricter compliance and enforcement measures. The bill has gone through two stages of public consultations and is expected to come into force on 1 January 2021. This newsletter will provide an overview of the reforms.

2. Current Regulatory Regime

Australia's foreign investment screening regime is established under the Foreign Acquisitions and Takeovers Act 1975 (Cth) ("FATA"). Under the regime private foreign investors are required to seek prior government approval before acquiring an interest in an Australian business of a threshold value, while all foreign governments and their related entities must apply for approval irrespective of the value of the assets being acquired. The Treasurer is responsible for all decisions relating to foreign investment, with the advice from the Foreign Investment Review Board ("FIRB") to which all applications for foreign investment approval are made. Currently, decisions made by the Treasurer are conclusive and not open to judicial recourse².

(1) Who does the FATA apply to?

The FATA applies to a foreign person who is an individual not ordinarily resident in Australia, and a corporation, trust or limited partnership where a single foreign person holds a substantial interest (i.e. 20%) or multiple foreign persons hold an aggregate substantial interest (i.e. 40%)³. It also applies to a foreign government investor that includes not only a foreign government entity but also a corporation, trust or limited partnership in which a foreign government entity holds a substantial interest (i.e. 20%) or multiple foreign government entities (from one or more countries) hold an aggregate substantial interest (i.e. 40%)⁴. Notably, an associate of a foreign person (i.e. a holding entity, senior officer, entity in which a foreign person holds a substantial interest or otherwise under the directions of a foreign person⁵) may be taken to be a foreign person even if the associate is not a foreign person⁶.

(2) What actions require approval?

There are two types of actions relevant under the current regime – significant actions and notifiable actions as described below. Some significant actions are 'notifiable actions' that must be notified to the Treasurer for approval before a deal can proceed⁷. However, the regime gives the Treasurer a power to make orders against significant actions, which in return means investments that fall under significant actions are encouraged to voluntarily notify the Treasurer for greater business certainty.



notifiable action

¹ p.3 Foreign investment reforms, The Treasury, https://treasury.gov.au/sites/default/files/2020-06/p2020-87595_0.pdf

² Administrative Decisions (Judicial Review) Act 1977 specifically exempts decisions made under the FATA from judicial review.

³ ss. 4 of the FATA; s.18 of the Foreign Acquisitions and Takeovers Regulation 2015 (FATR)

⁴ ss. 4 of the FATA; s.18 of the FATR

⁵ s.6 of the FATA

⁶ ss.19, 54(7) of the FATA

⁷ s.81 of the FATA



(a) Significant actions

Not only an acquisition of interests in an entity or business but also an action to enter into an agreement or alter a constituent document can be a significant action if it has the effect of giving a foreign person a controlling influence over an Australian business. Other conditions prescribed in s.40 of the FATA are **the threshold test** (in the following table) and a change in control (where a foreign person alone begins to hold at least 20% or in concert with other foreign persons/associates begins to hold at least 40%, or otherwise gains a power to determine the policy of the business⁸). Notably, s.40 catches an acquisition of a foreign holding entity which controls an Australian entity.

The Threshold Test⁹

For applications to FIRB made on or after 29 March 2020, all monetary threshold is temporarily reduced \$0¹⁰. The following table shows the threshold value which will be restored upon expiration of the temporary amendments scheduled to be on 31 December 2020.

Investor type	Acquisition of:	Threshold value (AUD) – more than
Private foreign investors	Non-sensitive business	\$1,192m for FTA countries ¹¹ \$275m for other countries
	Sensitive business ¹²	\$275m
	Media business	\$0
	Agribusiness (a direct interest i.e. ≥10% or the ability to influence, participate in or control)	\$60m (interest being acquired + existing interest held by the foreign person in the entity) ¹³
	Agricultural land (including acquisition of interests in a corporation or trust with assets in the land)	\$15m (interest being acquired + existing interest held by the foreign person in the land) ¹⁴
	Commercial land	- Vacant: \$0 - Developed: \$1,192m for FTA countries; \$275m for other countries - Mines and critical infrastructure ¹⁵ : \$60m
	Residential land	\$0
	Tenement	\$0 ¹⁶
Foreign government investors	All direct interest in entity or business	\$0
	Starting a business ¹⁷	
	Any interest in land	

*Acquisition of interest in land includes lease/licence likely to exceed 5 years¹⁸.

⁸ s.54 of the FATA

⁹ ss.51 and 52 of the FATA; ss.49-58 of the FATR

¹⁰ Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020

¹¹ for agreement country or region investors from the United States, New Zealand, Chile, Japan, Korea, China, Singapore, Peru, a country for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force (CPTPP) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam), and the region of Hong Kong, China

¹² e.g. media, telecommunications, transport, defence and military related industries, extraction of uranium or plutonium or the operation of nuclear facilities (s.26 of the FATA; s.22 of the FATR).

¹³ \$1,192m for Chilean, New Zealand and United States investors.

¹⁴ \$1,192m for Chilean, New Zealand and United States investors and \$50m for Thai investors.

¹⁵ (airport, port, storage of bulk data, network unit, stock exchange, public infrastructure, sensitive business)

¹⁶ \$1,192m for Chile, New Zealand and United States investors.

¹⁷ including starting a new activity in an existing business if the activity is in different industrial classification (s.10 of the FATR)

¹⁸ s.12 of the FATA

(b) Notifiable actions

Generally, a notifiable action is limited to an acquisition of a direct interest in agribusiness, a substantial interest (i.e. 20%) in an entity or an interest in land that meets the threshold test¹⁹. Unlike significant actions, there does not need to be a change in control for actions to be notifiable actions. For foreign government investors, any action described in the above table is a notifiable action²⁰.

(3) National interest test

The Treasurer has the power to prohibit or impose conditions on a proposed significant action, or to dispose of assets or interests acquired through a past significant action, if it is satisfied that the action would be contrary to the national interest²¹. The national interest is not defined in the Act; instead, it is considered on a case-by-case basis. The relevant factors are national security, competition, other Australian government policies, impact on the economy and the community, transparency and compliance²².

(4) What happens after a proposed action is notified to the Treasurer?

The Treasurer will make a decision within 30 days after receipt of a notice of a significant action (or longer if an interim order is made), and a ‘no objection notification’ will be issued to the foreign person if the Treasurer is satisfied that the action is not against the national interest²³. A no objection notification may specify certain conditions to be fulfilled before the action is taken²⁴.

3. Reforms

(1) National security test

The bill introduced a new category of actions, ‘notifiable national security actions’, that must be notified to the Treasurer for review regardless of the value of investment and regardless of whether they are significant actions or notifiable actions²⁵. A notifiable national security action involves acquisition of an interest in a ‘national security land’ (i.e. defence premises, national intelligence related land, land prescribed by the Treasurer²⁶) or ‘national security business’ (i.e. critical infrastructure such as electricity, gas, water, ports and telecommunication, defence, national intelligence or their supply chain²⁷). This may pose a great investor uncertainty, as usual due diligence might not reveal the existence of a defence or intelligence community’s interest in the land or business due to the classified nature of such information, though the notification requirement in respect to national intelligence related land will be limited in circumstances where a reasonable person would not be aware of such interest.

(2) Call-in power

The Treasurer has a new power to call in and review actions that have been taken or proposed to be taken if the Treasurer considers that the action may pose a national security risk. The actions are called ‘reviewable national security actions’ and are actions that would otherwise not meet the criteria of being ‘significant actions’²⁸. However, acquisitions of small-scale interests such as less than 10% interest in an entity where the foreign person is afforded no influence or participation in the policy of the entity are not reviewable national security actions. Moreover, the Treasurer is not allowed to call in significant actions that have already been notified or have been subject to orders, no objection notifications or exemption certificates²⁹.

¹⁹ s.47 of the FATA

²⁰ s.56(1) of the FATR

²¹ ss. 67 and 69 of the FATA

²² p.7-10, Australia’s Foreign Investment Policy, the Treasurer, <https://firb.gov.au/sites/firb.gov.au/files/inline-files/2020-FIP-cv.pdf>

²³ s.74 and 75 of the FATA

²⁴ s. 76 of the FATA

²⁵ National Security Bill, items 58 to 62, s. 80 to 82 of the FATA

²⁶ National Security Bill, item 7, s. 4 of the FATA

²⁷ Draft National Security Business Regulations, Item 2, s.10A of the FATR

²⁸ National Security Bill, item 10, s.37B of the FATA

²⁹ National Security Bill, item 10, s.37C of the FATA

The Treasurer may request for information from any person under the existing information gathering powers; however, the person may have to respond to the Treasurer in less than 14 days of such request³⁰, which is a shorter timeframe than usual, reflecting the need to consider possible national security concerns promptly.

Once the Treasurer exercises the call-in power and gives a notice to the foreign person, the Treasurer will have the 30-day decision period as described in 2(4) above. Notably, a new power is given to the Treasurer to extend the decision period by up to 90 days³¹, making **the maximum review period of 210 days** (30 days + 90 days + an interim order period up to 90 days). The foreign person is not allowed to take a proposed action before the earliest of 10 days after the end of the decision period, the period specified in an interim order or the day a no objection notification is given³². If it fails to make an order within the aforementioned period, The Treasurer’s power is extinguished³³, with the exception of the last resort power explained below. Moreover, the Treasurer will not be able to exercise the call-in power after 10 years of the action having been taken.³⁴

(3) Last resort power

Under the current regime, the Treasurer is unable to unilaterally amend a no objection notification without the foreign person’s consent. The Bill introduces a new division that gives the Treasurer powers to impose new conditions, vary existing conditions or force the divestment of any realised investment where national security concerns are identified. The last resort power is reserved for revisit of previously-issued no objection notifications or exemption certificates (or an implied no-objection or exemption where the Treasurer previously failed to make a decision within the prescribed period)³⁵. Notably, the Treasurer may exercise the last resort power to modify conditions imposed under an earlier exercise of the last resort power.

This potentially over-reaching power, however, is limited by a number of conditions. Firstly, there must be a misleading statement or omission in a material particular in the notification by the foreign person, or a material change in a circumstance³⁶. In addition, it is the ‘last resort’ power in that the Treasurer is required, among other things, to be satisfied that the use of all other regulatory systems would not adequately eliminate the national security risk³⁷. The most notable of all the limits imposed on the last resort power would be the judicial recourse allowed for the aggrieved foreign person to the Administrative Appeals Tribunal for the Treasurer’s decision that a national security risk exists³⁸.

(4) Penalties

The current regime provides both criminal and civil penalties with the penalty for bodies corporate being 5 times the amount for individuals. An officer of a corporation who permits the corporation to contravene the FATA may also be penalised. Those who contravene the FATA will face heavier penalties after the reforms come into force, and the corporate multiplier will be 10. The following table is a comparison between before and after the reforms of the maximum penalties for some of the breaches of the FATA.

Penalty Unit 1 unit = AUD222 as of 1 July 2020³⁹

<i>Offence</i>	<i>Current</i>	<i>New</i>
Failure to notify a notifiable action or notifiable national security action	3 years imprisonment 750 penalty units or both.	10 years imprisonment 15,000 penalty units or both
Taking an action before the decision period or other prescribed period ends		

³⁰ National Security Bill, item 89 to 91, s. 133 of the FATA

³¹ Technical Bill, item 16, paragraph 77(5)(c) and section 77A of the FATA

³² s.82 of the FATA

³³ s.77 of the FATA

³⁴ National Security Bill, Item 10, s.37C(2) of the FATA; Draft National Security Regulations Bill, Item 18, s.59A of the FATR

³⁵ National Security Bill, item 39, s. 73A(1)(a) of the FATA

³⁶ National Security Bill, item 39, s. 73A(1)(b) of the FATA

³⁷ National Security Bill, item 36, ss. 73C(d) and 73K(d) of the FATA

³⁸ National Security Bill, item 39, s.73P(1) of the FATA

³⁹ <https://www.legislation.gov.au/Details/F2020N00061>

<i>Offence</i>	<i>Current</i>	<i>New</i>
Failure to adhere to orders made by the Treasurer or conditions imposed on a no objection notification	3 years imprisonment 750 penalty units or both.	10 years imprisonment 15,000 penalty units or both

<i>Civil penalty provision</i>	<i>Current</i>	<i>New</i>
Failure to notify a notifiable action or notifiable national security action	Individuals: 250 penalty units	Lesser of: (a) 2,500,000 penalty units; or (b) the greater of: 5,000 (50,000 for corporation) penalty units; or 75% of consideration or market value
Taking an action before the decision period or other prescribed period ends	Corporation; 1,250 penalty units	
Failure to adhere to orders made by the Treasurer or conditions imposed on a no objection notification		

There are also new offences (and obligations) created for keeping the Treasurer informed of any change in circumstances or action taken in relation to a no objection notification or an exemption certificate within 30 days of such change or action⁴⁰. This is in line with a new register of foreign investor Australian assets (said to be non-public) that must be updated by relevant foreign investors⁴¹.

(5) Fees

The Bill introduces a new fee structure which is staggered based on the value of consideration given in relation to the relevant action. The fee is payable not only when a foreign person voluntarily applies for approval, but also when a foreign person receives a notice of review from the Treasurer⁴².

Example: fees for a notifiable action or a notifiable national security action⁴³ (AUD)

Acquisition of:	Fee constant	Multiply by
Residential land	\$1m Consideration/1m, rounding down to the nearest whole number	\$13200
Agricultural land	\$2m Consideration/2m, rounding down to the nearest whole number	
Commercial land	\$50m Consideration/50m, rounding down to the nearest whole number	
Tenement	\$50m Consideration/50m, rounding down to the nearest whole number	
Interest in business or entity	\$50m Consideration/50m, rounding down to the nearest whole number	

(6) Other changes

The current regime offers certain exemptions for notification requirements, some of which are amended while new exemptions are added by the draft Bill as follows.

Passive investment funds operated by foreign government investors (NEW)

As discussed in 2(2) above, an entity is regarded as a foreign government investor if multiple foreign government investors hold an aggregate substantial interest (i.e. 40%), and therefore is subject to the \$0 threshold for notification requirements. This meant that certain foreign passive investment funds (e.g. mutual funds) have been subject to the notification requirements under the FATA. The reforms streamline approval for such investments by removing the aggregate substantial interest cap on the combined interests that multiple foreign governments may hold in a passive investment fund before the fund is considered a foreign

⁴⁰ Compliance Bill, item 9, ss. 98B, 98C, 98D of the FATA

⁴¹ Register Bill Item 5, ss.130E-130Z of the FATR

⁴² Fees Imposition Bill, s.17-23, s.113(1) Item 5 of the FATA)

⁴³ Fees Imposition Bill, ss.8-12

government investor⁴⁴. Eligible funds will enjoy the higher threshold for notification requirements as non-government foreign investors. In order to be eligible for this exception, funds must be passive (i.e. investors are not able to influence individual investment decisions and do not have access to any sensitive information about the fund's investments).

Exemption certificates for national security actions (NEW)

New types of exemption certificates are introduced for a notifiable national security action and a reviewable national security action⁴⁵. The exemption certificates will allow one or more kinds of actions (i.e. a series of investments) that are notifiable national security actions without having to notify each separate acquisition. However, as the exemption certificate only covers the national security test, actions that are likely to fall under significant actions or notifiable actions should go through the existing national interest regime.

Moneylending exemption

The current regime provides a moneylending exemption whereby the Act does not apply to an interest if it is held solely by way of a money lending agreement. This exemption is amended so that it does not apply where the interest is in an asset of a national security business or national security land. This means that a foreign person will need to notify the Treasurer prior to entering into such money lending agreement⁴⁶.

Furthermore, the control of foreign investments under the FATA is reinforced in the following areas.

Share buy-backs and selective capital reductions

The Bill ensures to capture a situation where a foreign person's shareholding percentage in an Australian entity increases due to share buy-backs or capital reduction (therefore without an increase in the number of shares held by the foreign person). Such an action or inaction (i.e. non-participation in share buy-backs) gives rise to a notifiable and/or significant action⁴⁷.

Tracing rules

The current tracing rules do not apply to unincorporated limited partnerships, which inhibits effective enforcement. The Bill will allow tracing unincorporated limited partnerships⁴⁸ so that beneficial interests can be traced to the limited partners and consequently to the higher entities in the organisational structure.

4. Conclusion

As Australia remains one of the most preferred business destinations due to its stable politics, transparent governance, abundant natural resources and robust economy, the number of investment opportunities will continue to rise despite the current economic climate. Though Australian government maintains the stance of welcoming foreign investments for their significant economic benefits, the stricter reforms suggest the government's intention to encourage voluntary notifications and thus achieve greater control over foreign investments. Companies who are looking into investing in Australia, as well as those who have already invested in Australia, should consider the implications of both their past and future investment decisions in light of the reformed FATA.

⁴⁴ Draft National Security Regulation Schedule 2, Item 6, s.17 of the FATR

⁴⁵ Draft National Security Regulations Schedule 1 Item 15, ss.43BA and 43BB the FATR

⁴⁶ Draft National Security Regulations, Schedule 4 Item 6; s.27 of the FATR

⁴⁷ Integrity Bill, item 5, ss. 15A(1) and (2) of the FATA

⁴⁸ Integrity Bill, items 30 to 32, s. 19 of the FATA

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