

COVID-19 crisis inspires global tightening of Foreign Investment Screening

Australia

On March 29, 2020, temporary changes were announced to Australia's foreign investment framework in response to concerns relating to Australia's economic security as a result of COVID-19. All foreign investments subject to the *Foreign Acquisitions and Takeovers Act 1975* (the Act) now require approval from the Foreign Investment Review Board (FIRB) regardless of the monetary value or nature of the foreign investment. These temporary changes are deemed necessary and in the national interest as COVID-19 puts intense pressure on the Australian economy and business.

Overview of Australian foreign investment framework

The Act defines certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to Australian entities and businesses, as significant actions. Ordinarily, particular significant actions must be notified to the FIRB prior to the foreign investment action.

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. A foreign person is not obliged to inform the FIRB that they are proposing a significant action unless the action is also a notifiable 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.

What has changed?

The monetary screening threshold for all foreign investments subject to the Act is now \$0. Accordingly, FIRB approval will be required for every foreign investment.

Practically, this means that all foreign investment subject to the Act, irrespective of value and the nature of the foreign investor but provided all the other criteria for significant action and notifiable action are met, now requires approval from the FIRB. However, these changes will only affect corporate transactions involving an acquisition of an interest of 20 percent or more (but note that

lower percentage thresholds apply to some sectors and foreign government investors). Additionally, review timeframes have been extended from 30 days to six months, although FIRB has indicated it will seek to accommodate commercial deadlines wherever possible.

Implications of changes

Part of the FIRB review involves consulting with the Australian Competition and Consumer Commission (ACCC) on whether a proposed investment raises antitrust concerns. This may result in the ACCC commencing a merger review of a transaction, including on transactions where parties have not notified the ACCC. Consequently, the need for FIRB approval can operate as an ACCC merger notification trigger.

The changes to the FIRB monetary screening threshold to \$0 will increase type of transactions that trigger the ACCC notification requirement. The ACCC has advised it will continue to assess each matter on a case by case basis, taking into account current COVID-19 impacts as well as any long term impact on competition due to any changes in the structure of the market. This assessment goes beyond the current impact on the profits and share value of the merger parties. Applicants should be mindful that the ACCC will not be softening its approach on competition clearance.

The ACCC has not substantially changed its current approach to new matters, and will be closely examining future compounding factors, meaning it is likely that future ACCC clearance times may experience delay, in turn causing delay to the FIRB review process.

Implications for foreign investors

The Australian Treasury has indicated that Australia continues to welcome foreign investment, which is crucial for long-term economic success and stability. Foreign investors should expect delays on the normal processing time and voluntarily engage

with the ACCC early on in the process to expedite the FIRB review process.

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