



Tax Insights

Federal Government announces significant foreign investment approval changes

Snapshot

In light of the ongoing COVID-19 pandemic, the Australian Treasurer, Josh Frydenberg, announced major temporary measures effective immediately “to protect Australia’s national interest as we deal with the economic implications arising from the spread of the coronavirus.”

Highlights

- All foreign investments into Australia subject to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) will require approval from the Foreign Investment Review Board (**FIRB**) “regardless of value or the nature of the foreign investor”
- Extension of the review period for applications from 30 days to up to six months
- Key terms of current and proposed contracts to be closely considered, including the impact of delayed FIRB approvals and the potential for movements in exchange rates impacting the economic viability of transactions.

Temporary changes to Australia's foreign investment framework

Following the Treasurer's announcement, all foreign investments into Australia subject to the FATA will require approval from the FIRB "regardless of value or the nature of the foreign investor". This temporary change has been announced following growing concern of predatory and opportunistic foreign investment bids occurring during the COVID-19 crisis.

In practice, the temporary change will be achieved by reducing the monetary screening threshold to \$0 for all non-residential foreign investments under the FATA. The change will not affect proposed acquisitions that are already subject to \$0 thresholds under existing rules.

The announcement will significantly increase the scope of the FIRB approval regime. By way of example, the following is a list of the types of foreign investments which are subject to the FATA (together with an indication of some of the previous screening thresholds):

- Substantial interest acquisitions (20% or more) of non-sensitive Australian entities (*previous monetary screening thresholds: AUD1,192m for investors from free-trade agreement (FTA) countries / AUD275m for investors from all other countries*)
- Agricultural land (*previous monetary screening thresholds: AUD1,192m / AUD15m*);
- Developed commercial land (*previous monetary screening thresholds: AUD1,192m / AUD275m*);
- Vacant commercial land (*no change to monetary screening threshold*);
- Residential land (*no change to monetary screening threshold*);
- Mining and production tenements (*previous monetary screening thresholds: AUD1,192m / AUD0*);
- Acquisitions of Australian agribusinesses (10% or more) (*previous monetary screening thresholds: AUD1,192m / AUD60m*);
- Substantial interest acquisitions (20% or more) of sensitive Australian entities or businesses (*previous monetary screening thresholds: AUD275m / AUD275m*);
- Acquisitions of Australian businesses in the media sector (5% or more) (*no change to monetary screening threshold*);
- Acquiring interests in the assets of Australian entities and business (*previous monetary screening thresholds: AUD1,192m / AUD275m*); and
- Entering or terminating a significant agreement with an Australian business (*previous monetary screening thresholds: AUD1,192m / AUD275m*).

The greatest impact of these measures will likely be to acquisitions involving Australian entities, businesses and developed commercial land, which were previously subject to monetary screening thresholds of over AUD1bn in certain circumstances.

The reduction of all monetary screening thresholds to \$0 is also expected to lead to a significantly increased administrative burden on the FIRB. To ensure sufficient time for screening applications, the FIRB will be working with existing and new applicants to extend timeframes for reviewing applications from 30 days to up to six months. From our discussions with our contacts at the FIRB, we understand that the Government will prioritise urgent applications for transactions that protect and support Australian business and Australian jobs.

Impact for foreign investors

One of the challenges under the FIRB rules is that an Australian company can be a foreign person as a result of a foreign investor holding a direct or indirect (through a chain of entities/investors) interest in that entity. Therefore, careful consideration needs to be given to whether or not an Australian entity that is deemed to be a foreign person is caught by the temporary changes.

We are also awaiting guidance from Treasury in relation to the implications of this announcement on internal group restructures. In this regard, it is important to note that, under the standard rules, internal group restructures can trigger a FIRB notification requirement – for example, where the Australian target is land rich. If the \$0 threshold extends to internal group restructures, all Australian groups with greater than 20% foreign ownership (directly or indirectly) will need to consider the application of the FATA to their circumstances.

The impact of delayed approvals on current and proposed contracts should also be carefully considered. For example, consideration should be given to the timeline for completion as well as making new contracts conditional on FIRB approval. In addition, the potential for movements in exchange rates between execution and completion should be taken into account in economic models given this period may be prolonged due to the requirement to obtain FIRB approval and their longer processing times.

One of the key stakeholders for FIRB approval is the ATO. The effect of these changes means that the ATO will undertake a pre-transaction review of more transactions, which investors should be prepared for. In addition, standard tax conditions are imposed on many approvals, which includes annual reporting on compliance with these conditions. It is unclear whether the standard tax conditions and additional reporting requirements will be imposed on approvals under these new measures where the proposed actions would not have otherwise required FIRB approval.

According to the Australian Government, Australia is “open for business” and recognises investment at this time can be beneficial if in the national interest. But at this difficult time, the Government has stated that it needs oversight of all foreign investment activity to ensure it is consistent with the standards that would normally be applied and what the community expects. Certainly, it remains to be seen how the national interest considerations will be assessed in light of the COVID-19 crisis.

We await further guidance from the Government on the practical implications of this announcement.

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