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CORPORATE & COMMERCIAL

COVID-19: Transactions Involving Foreign Investment

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The Commonwealth Government (**the Government**) has announced temporary changes to the foreign investment regime to protect Australia's national interest during the COVID-19 pandemic - a historically challenging time for the economy, businesses and the broader community.

The changes will apply to all new foreign investment applications which fall within the scope of the *Foreign Acquisitions and Takeovers Act 1975* (**the Act**).

Foreign investment in Australia

Australia has the 14th highest amount of direct foreign inward investment in the world, having a total of \$3.5 trillion invested by foreign economies in Australia at the end of 2018.

A '*foreign person*' is defined under the Act as:

- an individual that is not ordinarily resident in Australia;

- a foreign government or foreign government investor;
- a corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government holds substantial interest of at least 20 per cent; or
- a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40 per cent.

It is not uncommon for transactions in relation to the sale of South Australian businesses to involve foreign persons as a potential purchaser. As such, Foreign Investment Review Board (**FIRB**) approval is often a mandatory element in transactions that we come across, particularly in the agricultural, defence, mining and

manufacturing industries. In fact, recently, we were involved in two transactions acting for a Vendor and Purchaser respectively, that both required FIRB approval.

The first transaction was the sale of shares in a defence business to an Australian private equity fund owned in part by foreign government interests. FIRB approval was contemplated in the Share Sale and Purchase Agreement as a Condition Precedent.

The second transaction was the acquisition of agricultural land (a large farm on the Eyre Peninsula) by an agricultural investment trust, owned by a listed company group which in turn was partly owned by foreign interests. In the Land Sale Agreement, Settlement was conditional upon the receipt of FIRB approval.

Key FIRB amendments

Through consultation with and endorsement by FIRB, the Government announced a series

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of temporary changes to the Australian foreign investment review framework to protect Australian businesses and assets from predatory foreign takeovers.

The Treasurer, Josh Frydenberg was emphatic in dismissing any suggestions that the new temporary measures are intended to discourage foreign investment in Australia, noting that foreign investment remains vital to Australia's long-term economic success and stability. However, the temporary measures will lead to greater scrutiny and significantly increase the number of first-time applicants to FIRB.

Period of temporary measures

These temporary measures took effect from 10:30pm AEDT on Sunday, 29 March 2020 and they will remain in place for the duration of the current crisis.

Zero monetary screening thresholds for all foreign investments

The monetary screening thresholds previously prescribed by the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) have now been **reduced to \$0**. This means all new foreign investment applications that are subject to the Act will require FIRB approval irrespective of the value, nature of investment or origin of the foreign investor. Therefore, FIRB approval is required for all investments in or acquisitions of an Australian company or business (including assets) made by a foreign person as defined in

the Act.

Prior to this change, the thresholds ranged from \$0 - \$1,192 million. The previous thresholds remain applicable to transactions that were entered into via contract prior to 29 March 2020 but have not yet completed (i.e. settled). Transactions entered into prior to 29 March 2020 involving foreign persons will not require FIRB approval under the recent zero monetary threshold amendments.

By way of background, prior to the new temporary amendments, the precise monetary thresholds were dependent on various factors, such as:

- the type of foreign investor (privately owned or foreign government investors);
- the nature of the asset being acquired or invested into (non-sensitive businesses, sensitive businesses including media, telecommunications or defence business, land both for development or agricultural purposes, or agribusiness); and
- the origin of the investor (whether the country of origin is a country with which Australia has a free trade agreement).

As a general summary - without factoring in the variables referred to above - if a Foreign investor was looking to acquire:

- agricultural land – the previous threshold would have been \$15 million;

- shares in an Australian Company – the previous threshold would have been \$275 million; or
- assets in an Australia Business – the prior threshold would have been \$275 million.

Beyond these monetary thresholds, FIRB approval was required. For more detailed information regarding the FIRB monetary thresholds that were previously in place before the new temporary FIRB amendments came into effect, please refer to FIRB's [website](#).¹

Exemptions

Exemptions under the Act and Regulation remain in place. If you would like to learn more about exemptions under the Act or determine if your proposed transaction is exempt, please refer to FIRB's [website](#).²

Extension of application review timeframes

Prior to the changes to application review timeframes, the statutory timeframe the Treasurer had to consider an application and make a decision was 30 days. The Treasurer could extend this period by up to a further 90 days by publishing an interim order or by requesting that investors provide their consent to extend the period voluntarily.

FIRB will now be seeking to extend the application review timeframe from 30 days to up

¹ https://firb.gov.au/guidance-resources/guidance-notes/gn34#_ftn3

² <https://firb.gov.au/exemptions-thresholds/exemptions>

to six months. All new and most existing applications received by FIRB as at 29 March 2020 can expect this extended timeframe to be applied. However, there will not necessarily be an extension in all cases. In instances where an extension is requested, this does not mean FIRB will take the full six month period to process an application.

The extended timeframe will allow FIRB to account for an expected influx of foreign investment applications. In addition, given FIRB deals with each application on a case-by-case basis, it must liaise with relevant government departments on each application, including the ATO, Treasury and any relevant State Departments, before making a recommendation to the Treasurer or Minister assisting the Treasurer. As such, all dealings involving foreign investors should contemplate, expect and consider material delays of up to six months for FIRB approval to be granted.

Where there are any anticipated economic or commercial impacts associated with the extended timeframe, it is important that this is brought to the attention of FIRB. **Priority will be given to urgent applications that either directly protect and support Australian businesses and jobs or have commercial deadlines relating to the proposed investment.**

Take note

If a transaction requires FIRB approval and FIRB approval is not obtained, it will constitute a breach of the FIRB legislative regime and consequences could include:

- the preventing or unwinding of the entire transaction;
- criminal prosecution;
- civil penalty orders; or
- a forced divestiture of assets.

Therefore during the COVID-19 pandemic - as was the case prior to these new temporary amendments - if FIRB approval is required, either a Condition Precedent needs to be inserted into the contract requiring the need for FIRB approval, or alternatively the contract should not be executed by and become binding on the parties until the formal FIRB approval has been obtained.

To conclude

As a result of these changes, all foreign investors and associated parties should lodge their applications with FIRB as early as possible to allow for significant delays, and ensure these expected delays are factored into their decision making processes. If you need further assistance understanding the consequences

of these changes on your business dealings or determining if your transaction will be exempt, please contact our M&A expert Brett Thorneycroft.



MORE INFO

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