

Foreign investment advisory

Update on enhanced FIRB compliance

WHAT HAS HAPPENED?

The Foreign Investment Review Board (**FIRB**) recently announced an increased focus on enhancing its compliance arrangements for foreign investment. This includes placing additional resources into foreign investment compliance, developing a revised compliance framework, undertaking a rolling annual compliance audit program, and establishing a clearer enforcement policy.

It is likely that the initial focus will be on FIRB clearances that had specific conditions imposed – that is, conditions specific to that particular transaction, rather than the ‘standard’ tax or property development conditions. An increased focus on general compliance is expected in due course.

WHAT THIS MEANS FOR YOU?

This is a timely reminder for investors with interests in Australia to check their transactions for compliance with Australia’s foreign investment regime and to address any issues before an issue is raised by FIRB through its enhanced compliance framework.

WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?

The *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (**FATA**) contains both criminal and civil penalty regimes for offences under the FATA. There is also an accessorial liability regime, and the Treasurer has powers to make adverse orders for non-compliance, including ordering disposal of the relevant asset.

Examples of non-compliance include:

- not seeking FIRB clearance when required under the FATA
- not complying with specific conditions of FIRB clearance if granted, including the standard tax related conditions which are increasingly imposed on transactions or
- obtaining clearance, but carrying out the relevant transaction outside of the validity period for the FIRB clearance (generally 12 months) or on materially different terms that those notified to FIRB in the application for FIRB clearance.

WHEN SHOULD I CONSIDER CHECKING HISTORICAL COMPLIANCE?

If one or more of the statements below, drawn from our experience of potential compliance issues, applies to your organisation, you would benefit from a historical compliance check.

In the last 10 years, my organisation has:

1	acquired 15% or more of an Australian entity or business with gross assets of \$100 million or more, or has paid \$100 million or more for the acquisition
2	acquired 5% or more in an Australian media business
3	acquired options, convertible notes, warrants or other securities in an Australian company without seeking FIRB clearance
4	indirectly acquired an Australian entity due to an upstream, offshore transaction
5	had completion for a deal extend beyond 12 months
6	carried out an internal restructure
7	had a partial change of shareholding following completion
8	relied on the higher thresholds for countries with a free trade agreement (USA, Chile, New Zealand, China, Korea, Japan and for agricultural land, Singapore and Thailand) as a reason not to seek FIRB clearance
9	acquired an interest in a food production business
10	acquired a mining interest, or a company with mining interests (exploration, production or other mining tenements).

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HOW MINTERELLISON CAN HELP?

The MinterEllison Foreign Investment Advisory Team has assisted investors with interests in Australia with a range of work including:

- compliance with a disposal order made by the Treasurer after a separate firm provided incorrect advice on the application of the FATA
- compliance with the requirements of the 12 month moratorium announced in respect of breaches of the residential real estate rules in the FATA
- historical application of the FATA as it has changed over the last 30 years
- retrospective applications by fund investors following identification of inadvertent breaches of the FATA
- applications of tax conditions, standard and additional, increasingly imposed in FIRB clearance and which include ad hoc and annual reporting requirements.

Our team has also assisted major banks to facilitate compliance by borrowers where those borrowers received incorrect advice on the application of the FATA.

The team assists the broad range of MinterEllison's clients with their general inbound transactions, including M&A, real estate, projects and financing, and has deep relationships with the Treasury and FIRB. The team also works collaboratively with our experienced antitrust, corporate, tax and stamp duty lawyers to provide a complete regulatory and structuring solution.

In our experience, FIRB has shown a willingness to provide retrospective clearance where an investor proactively identifies a potential breach – particularly if there has been in breach due to incorrect advice – and seeks retrospective clearance from FIRB. In this context, it will be important for investors to show their systems of compliance are in place, including performing regular compliance 'health checks'.

We offer a number of compliance health checks as appropriate for your organisation including:

PRELIMINARY CHECK

Review most recently completed transactions (up to 10 transactions) where a FIRB application was not made on the basis of advice received from someone other than MinterEllison to confirm compliance with FIRB regime – that is, to check the advice that FIRB clearance was not required.

DETAILED CHECK

Review most recently completed transactions (up to 10 transactions) to confirm whether or not FIRB clearance was required, or if a FIRB application was made and was carried out in compliance with the FIRB clearance.

PREMIUM CHECK

Review all transactions completed over the last 10 years (up to 20 transactions) to confirm whether or not FIRB clearance was required, or if a FIRB application was made and clearance received, whether the transaction was carried out in compliance with the FIRB clearance. Advise on the strategy to seek retrospective clearance if any compliance issues are identified. Provide a compliance tool to manage future FIRB requirements.

RETROSPECTIVE APPLICATION

Seek retrospective clearance where a compliance issue is identified.

COMPLIANCE TOOLS

Prepare on-going compliance tools tailored for your organisation.

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