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Practical cross-border insights into FDI screening regimes

Foreign Direct Investment Regimes

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1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

Australia's foreign investment rules apply broadly such that certain foreign direct investment transactions are captured and screened to ensure that they are not 'contrary to the national interest'. The national interest is determined at the discretion of the Treasurer of the Commonwealth of Australia (**Australian Treasurer**) as advised by the Foreign Investment Review Board (**FIRB**), though usually five factors are taken into account – national security, competition, Australian government policies (including tax), impact on the economy and community, and the character of the investor. Certain investments that do not require screening under the 'national interest' test can be screened under a separate 'national security' test. Transactions can be screened on a mandatory basis (requiring a mandatory and suspensory pre-closing notification) or a voluntary basis (where a transaction can proceed without prior approval). If a voluntary filing is not made, the Australian Treasurer has the ability to call in a transaction for review for up to 10 years after the transaction where he or she considers that it may give rise to national security concerns. In any case, even if approval is obtained after a mandatory or voluntary notification is made, the Australian Treasurer has a last resort power to review those transactions where there is a change to the investor, the business or the market, or where false or misleading information was provided and there is a national security risk.

1.2 Are there any particular strategic considerations that the State will apply during foreign investment reviews? Is there any law or guidance in place that explains the concept of national security and public order?

If a transaction is contrary to the national interest, then no approval will be granted. However, most transactions will be approved unconditionally or on a conditional basis (where the conditions are imposed to ensure that the transaction is not contrary to the national interest). FIRB has published extensive administrative guidance that provides investors with information on the operation of Australia's foreign investment framework, including on national security. Investors should consider their previous investment history and compliance record and any issues that may be associated with their character, as well as the nature of the target and whether the target gives rise to any sensitivities when considering the approval process. Sensitivities include investments in national security-related businesses, businesses with government contracts, businesses in the health sector, businesses dealing with bulk or sensitive data, agribusinesses, businesses in the transport, media, telecommunications and critical infrastructure sectors.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

There are no current specific proposals, although in February 2022 the Australian Government announced an intention to develop a package of legislative and regulatory refinements to Australia's foreign investment framework to proceed in two tranches. The first tranche of amendments commenced in the first half of 2022 and the Government indicated that the second tranche is to be implemented in the second half of 2022.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Does the law also extend to domestic-to-domestic transactions? Are there any notable developments in the last year?

The principal regime that applies to the control of foreign investments includes:

- the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**);
- the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**);
- the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth); and
- the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth).

Due to the broad scope of the FATA (including extensive tracing provisions in respect of the ownership of investors), in certain circumstances even a domestic-to-domestic transaction can be subject to the FATA. One example of this is where an acquiring entity incorporated in Australia is considered a foreign person for the purposes of the FATA due to its upstream ownership.

The legislative amendments that were implemented to the regime on 1 January 2021 were the most significant changes to the regulation of Australia's foreign investment since the introduction of the rules in 1975. Some of the most notable developments arising from those changes include the introduction of:

- a new national security test alongside the concepts of 'national security business' and 'national security land'; and
- call in and last resort powers for the Australian Treasurer.

In December 2021, changes to the *Security of Critical Infrastructure Act 2018* (Cth) and accompanying rules expanded the scope of what constitutes a national security business for the purposes of the FATR, with further changes made to the relevant rules in the first half of 2022. Significant changes have been made in relation to the classification of certain critical infrastructure assets, and investors should consider whether they hold, or intend to hold, interests in assets that may now fall under this expanded scope.

Further regulatory amendments commenced in the first half of 2022 that made refinements to the regime, including changing the threshold interest in an Australian media business that requires mandatory approval. On 29 July 2022, filing fees for applications for foreign investment approval doubled, increasing the maximum fee payable for lodgement of an application for a single action from A$522,500 to A$1,045,000.

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught? Is internal re-organisation within a corporate group covered? Does the law extend to asset purchases?

'Foreign persons' are required to notify the Australian Treasurer of certain transactions and obtain approval before proceeding with the transactions. A subset of 'foreign persons' known as 'foreign government investors' (**FGIs**) are required to notify the Australian Treasurer in respect of a broader range of transactions. Voluntary notifications can also be made in certain circumstances. Specifically, a proposed transaction may be considered either of the following:

- a 'notifiable action' and/or a 'significant action', or a 'notifiable national security action', for which a mandatory notification obligation arises; or
- a 'significant action' or a 'reviewable national security action', for which a voluntary filing option arises.

These actions arise from a broad range of transactions including the following categories:

- acquisitions of direct or indirect interests in:
  - Australian entities;
  - Australian businesses (i.e., by way of asset purchases);
  - Australian land; and
  - exploration tenements by FGIs or for areas of land considered to be 'national security land';
- other investment proposals such as:
  - starting a 'national security business'; or
  - for FGIs, starting any new Australian business.

Foreign persons may be required to notify and obtain prior approval for acquisitions of minority interests in various circumstances, due to the low acquisition thresholds that can apply – see question 3.1.

Internal re-organisations within a corporate group may be covered by the FATA. Acquisitions of an interest in the securities of another entity, the assets of another entity or Australian land will be treated as an internal reorganisation where both the acquiring and disposing entities belong to the same corporate group (e.g., are subsidiaries of the same holding entity). Characterisation of a proposed transaction as an internal reorganisation means that the application fee is assessed as a flat fee.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

As noted above, the regime introduced a new national security test and the concepts of 'national security business' and 'national security land' in January 2021. In relation to 'national security businesses', the sectors and activities that may constitute a 'notifiable national security action' are given particular scrutiny. The current definition of a 'national security business' is generally one which is involved in or connected to:

- critical infrastructure, for example, utility providers (gas, water, electricity), telecommunications and port providers;
- the supply of critical goods, technology or services to the Australian Department of Defence or a national intelligence agency (or their supply chains); or
- the storage of, or access to, information with a security classification.

Businesses in the media, transport, telecommunications and aviation sectors are subject to additional scrutiny under separate regulatory rules that interact with the Australian foreign investment rules. Other sensitive investments are also flagged at question 1.2 above.

2.4 How are terms such as 'foreign investor' and 'foreign investment' defined in the law?

The regime regulates certain investments and related activities of 'foreign persons'. Under the FATA and FATR, a foreign person is generally:

- an individual that is not ordinarily resident in Australia;
- a corporation, trustee of a trust or general partner of a limited partnership in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest (generally an interest of at least 20%, together with associates);
- 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 (generally an interest of at least 40%, together with associates); or
- an FGI, which can be summarised as:
  - a foreign government or separate government entity; or
  - a corporation, trust or limited partnership in which foreign government entities/separate government entities/FGIs from:
    - a single country, together with associates, hold (directly or indirectly) an interest of 20% or more (including through actual or potential voting power); or
    - multiple countries, together with associates, hold (directly or indirectly) interests of 40% or more in aggregate (including through actual or potential voting power) – provided the interest holders do not meet certain passive investor requirements.

There are tracing provisions under the FATA which have the effect that the foreign person characterisation of an entity is determined by the status of the ultimate legal and beneficial interest holders of the entity.

'Foreign investment' is not a defined term under the regime. As discussed above, the relevant approval requirement for foreign investments in Australia is regulated based on the nature of the foreign investor and the types of actions that arise from a proposed transaction.

2.5 Are there specific rules for certain foreign investors (e.g. non-EU/non-WTO), including state-owned enterprises (SOEs)?

Yes, specific rules apply for certain foreign investors. This includes:

- stricter rules apply to foreign government investors (such as SOEs) compared with private foreign persons. At a

high level, FGIs require prior FIRB approval for a broad range of transactions, regardless of the value of the relevant asset; and

- some countries with whom Australia has a free trade agreement, as well as countries for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**TPP-11**) is in force (which extends to the region of Hong Kong), have less stringent notification requirements. This is provided that very specific criteria are met and that the acquirer is not considered an FGI. Accordingly, in practice, the higher thresholds for certain free trade agreements or TPP-11 countries are rarely available.

2.6 Is there a local nexus requirement for an acquisition or investment? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

With respect to acquisitions of interests in a 'national security business' or 'national security land' (for which a 'notifiable national security action' arises), there is a local nexus requirement as one of the threshold questions as both concepts involve the determination of:

- in relation to 'national security business', whether the business is carried on wholly or partly within Australia. Under FIRB's current Guidance Note on this test, this is a factual question for each case, but the business would generally be expected to '*have a presence in Australia or some form of connection to Australia*' to be considered a national security business – though note that very minor connections to Australia have been determined to be sufficient; and
- in relation to 'national security land', the land must be located in Australia.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

Foreign persons may require prior approval for indirect acquisitions of Australian subsidiaries or other Australian assets as part of transactions occurring offshore of Australia. This would depend on a number of factors including:

- whether the foreign person is considered an FGI;
- whether the offshore transaction involves any assets of a 'national security business' or 'sensitive business', as well as the relevant Australian land assets; and
- the total value of the Australian assets.

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary or market share-based thresholds?

As discussed above, the foreign investment rules apply to certain transactions proposed by 'foreign persons', with the regime applying differently to FGIs and private foreign persons. The relevant thresholds vary depending on the nature of the investors and the proposed transactions (for example, an acquisition resulting in a holding of as low as 10% requires approval where transactions involve an Australian media business. Acquisitions of national security businesses are screened when they involve acquiring or holding an interest of 10% or more (or lower where there is an element of influence or control). FGIs generally require approval for all direct or indirect acquisitions resulting in a holding of 10% or more in an Australian business. Otherwise, generally transactions resulting in a holding of 20% or more are caught by the Australian foreign investment rules. Specific rules apply for the acquisition of land interests (including entities holding land interests).

3.2 Do the relevant authorities have discretion to review transactions that do not meet the prescribed thresholds?

If a transaction does not constitute any of the actions described in question 2.2 above, the Australian Treasurer does not have discretion to review the transaction under the FATA. However, in practice, given that a broad range of transactions may be considered 'reviewable national security actions' (even if no other action arises), the transactions are subject to a voluntary filing option and the Australian Treasurer is able to call in and review such transactions that have not been approved by the Australian Treasurer for a period of up to 10 years, even after they have completed. The effect of this call-in period is that for certain transactions, foreign investors may need to consider making 'voluntary' applications to exclude the risk of a transaction being called in and subsequently unwound at any time during the call-in period. This consideration is required despite the transaction not meeting the prescribed thresholds for a mandatory notification.

3.3 Is there a mandatory notification requirement and is there a specific notification form? Are there any filing fees?

As described above, there are both mandatory filing obligations and voluntary filing options for foreign persons under the regime. Filings are made by completing and submitting the online application form through FIRB's online portal, together with supporting documents.

There are filing fees associated with foreign investment applications that must be paid before an application will be considered by FIRB. The fee is primarily based on the type of transaction and the transaction value.

3.4 Is there a 'standstill' provision, prohibiting implementation pending clearance by the authorities? What are the sanctions for breach of the standstill provision? Has this provision been enforced to date?

Yes, there are standstill provisions that apply to the application process. It is an offence under the FATA to complete (close) or otherwise proceed with a proposed transaction after notification (whether on a mandatory or voluntary basis) has been made to the Treasurer prior to obtaining a no objection notification. The maximum penalty is imprisonment for 10 years or 15,000 penalty units (150,000 penalty units for a corporation), or both. We are not aware of this provision being enforced to date.

Transaction documents may be signed prior to obtaining a no objection notification provided there is a condition precedent relating to FIRB approval, and the agreement does not become unconditional prior to receipt of that approval.

3.5 In the case of transactions, who is responsible for obtaining the necessary approval?

The entity making the acquisition of the relevant interest under

the proposed transaction is responsible for preparing the FIRB application, paying the applicable filing fee and seeking the necessary approval.

Typically, in the context of a 'friendly' acquisition that has the support and cooperation of the counterparty, the acquiring entity seeks input of a factual nature into the application from the counterparty. This input typically concerns the counterparty's business operations and financial information.

In the context of a 'hostile' acquisition that does not have the support and cooperation of the counterparty, the acquiring entity will base its application purely on publicly available information concerning the counterparty.

3.6 Can the parties to the transaction engage in advance consultations with the authorities and ask for formal or informal guidance as to whether the authorities would object to the transaction?

Foreign investors can engage in consultations with FIRB in advance of making a filing and request informal guidance only on the application of the approval procedure. In general, such prior engagement may be recommended for transactions of a sensitive nature. However, any formal assessment by FIRB can only commence once an application is lodged and the correct application fee is received by FIRB.

3.7 What type of information do parties to a transaction have to provide as part of their filing?

There is a broad range of information that investors are required to provide as part of their filing, including profiles of the applicant and target entity, asset or land, details of the proposed transaction, the nature of the interests to be acquired and the basis on which notification is given and approval sought under the FATA (i.e., the legislative basis on which approval is required or requested). Applications should also include submissions as to why the proposed transaction is not contrary to the national interest or to national security (as the case may be).

FIRB has published a 'FIRB Application Checklist' that contains information required in most foreign investment applications. There is also a 'FIRB Appendix – Application Tax Checklist' which sets out the tax information that may be requested by the Australian Taxation Office during the application process.

3.8 Are there any sanctions for not filing (fines, criminal liability, invalidity or unwinding of the transaction, etc.) and what is the current practice of the authorities?

There are significant criminal and civil penalties for non-compliance with the FATA. This includes, for example, a failure to make a mandatory notification, or proceeding with a transaction after notifying it to FIRB and prior to receiving the approval. In addition, the Australian Treasurer has a range of enforcement powers, including:

- the power to impose administrative payments under an infringement notice regime;
- the power to make an order which is directed at unwinding the action by requiring disposal of the interest by the acquirer;
- access to premises with consent or by warrant to gather information in order to monitor compliance with the FATA; and
- the power to accept and enforce undertakings relating to compliance with the FATA.

There is also an accessorial liability regime.

3.9 Is there a filing deadline and what is the timeframe of review in order to obtain approval? Is there a two-stage investigation process for clearance? On what basis will the authorities open a second-stage investigation?

For transactions that require mandatory approval, investors are required to seek and obtain approval prior to taking the relevant action. The application process requires the applicant to complete an application form and pay the relevant filing fee. There is no two-stage investigation process and requests for further information can be (and typically are) put by FIRB to the applicant during the assessment process.

Under the FATA, the Treasurer has a 30-day assessment period to consider an application after the applicable filing fee has been paid. However, in practice FIRB can (and typically does) suggest an extension of this time period. If the applicant does not request the extension, FIRB can issue an interim order preventing the foreign person from carrying out the proposed transaction and allowing FIRB a further 90 days to consider the application or the Treasurer making a declaration to this effect. The timeframe for approval varies significantly depending on a range of factors such as the complexity of the underlying proposed transaction, whether the acquisition is occurring in a sensitive sector, the identity and country of origin of the applicant, whether the applicant has had any previous dealings with FIRB, whether the acquisition raises potential antitrust (competition), national interest or national security concerns, whether the application straddles a shut-down period for FIRB over late December/mid-January and whether the application straddles a Federal election period during which time FIRB typically enters a caretaker mode. Having regard to these broad variables, the timeframe for approval can be as little as six to eight weeks for a straight-forward application to several months for a more complex or sensitive application.

There is no formal second stage to the assessment process, although the Treasurer retains certain powers to call in for review certain transactions after FIRB approval has been granted on limited grounds.

3.10 Can expedition of review be requested and on what basis? How often has expedition been granted?

The FATA does not provide grounds for applicants to expedite the assessment process. However, any urgent submissions relating to an application can be made to FIRB for consideration.

3.11 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

The FIRB application process involves mandatory engagement with relevant Australian government departments and agencies, which customarily includes the Australian Competition

and Consumer Commission, the Australian Taxation Office, national security agencies and government agencies relevant to the issues raised by an application. If the relevant agencies raise any issues or request further information, FIRB will work through those issues with the relevant agency and may ask the applicant to provide additional information. FIRB approval for a proposed transaction will not be issued until these agencies are each satisfied that the proposed transaction does not raise specific concerns within their respective purview (noting that in some cases any such concerns may be able to be addressed by way of conditions to the FIRB approval and/or by way of the applicant providing undertakings to FIRB). There is no other formal process for third parties to comment on an application.

3.12 What publicity is given to the process and how is commercial information, including business secrets, protected from disclosure?

FIRB applications remain confidential and are not publicly available for review. That said, information submitted in a FIRB application will be disclosed to other Australian government departments and agencies as part of FIRB's consultation process. The FATA contains provisions restricting the disclosure of 'protected information', which includes certain confidential information that is obtained under, in accordance with or for the purposes of the FATA. If there is a delay to a decision, an interim order may be published permitting an additional review period of up to 90 days. If a FIRB application is not approved, that decision is also published unless the application is withdrawn (with FIRB generally foreshadowing an applicant in advance any material concerns and giving the applicant the opportunity to either address those concerns or withdraw the application).

3.13 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

As discussed above, the FIRB application process involves mandatory engagement with relevant Australian government departments and agencies, and FIRB approval will not be issued until these agencies confirm that they do not object to the proposed transaction. In addition, a variety of administrative approvals and requirements under other laws may apply to transactions in specific industry sectors, such as investments in the financial services, media and telecommunications, civil aviation and mining sectors.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

The Australian Treasurer makes his or her decision with the advice and assistance of FIRB. As part of FIRB's review process, it will consult with relevant Australian federal and state government agencies on the application (as noted at question 3.11 above).

4.2 What is the applicable test and what is the burden of proof and who bears it?

The applicant must show that the transaction is not contrary to Australia's national interest or Australia's national security as relevant to the type of application that is made.

4.3 What are the main evaluation criteria and are there any guidelines available? Do the authorities publish decisions of approval or prohibition?

The decision as to whether a transaction is contrary to Australia's national interest or Australia's national security is determined at the Australian Treasurer's discretion; however, as noted at question 1.1, certain factors are taken into account.

Applications that are approved are not published. FIRB's decision with respect to applications that are not approved will be published unless the application is withdrawn prior to the making of the decision (again noting that FIRB generally foreshadows an applicant in advance of any material concerns and gives the applicant the opportunity to either address those concerns or withdraw the application).

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

Yes. When the character of the investor is evaluated, an applicant's compliance with laws in other jurisdictions can also be taken into account.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds? Can the authorities impose conditions on approval?

The decision is made solely at the Treasurer's discretion. Approvals may be granted on an unconditional basis or subject to conditions considered necessary to ensure that the transaction is not contrary to the national interest or national security.

4.6 Is it possible to address the authorities' objections to a transaction by the parties providing remedies, such as by way of a mitigation agreement, other undertakings or arrangements? Are such settlement arrangements made public?

Yes. If conditions are required to ensure that a transaction is not contrary to the national interest or national security, conditions are typically proposed by FIRB. It is open to applicants to offer to accept approval on certain conditions, depending on the nature of the transaction. It is also possible for applicants to accept or offer undertakings to address national interest or national security concerns.

4.7 Can a decision be challenged or appealed, including by third parties? On what basis can it be challenged? Is the relevant procedure administrative or judicial in character?

There are limited appeal rights available. The review rights relate to procedural fairness and can extend to the merits of a decision when the Treasurer's last resort power has been used.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

There is an increasing focus on national security in the review process due to the changes introduced on 1 January 2021, and it is expected that there may be an increasing number of applications withdrawn or refused over national security concerns.

Penalties for non-compliance have been increased as well as resources for compliance monitoring. Due to the limited review rights this is an area without any significant cases noted publicly, though the authors are aware of an increase in specific compliance and enforcement activity.

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