Foreign Investment Review 2021

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Getting The Deal Through

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Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

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Contents

Australia

Deborah Johns
Gilbert + Tobin

LAW AND POLICY

Policies and practices

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Australia generally welcomes foreign investment. The Australian government screens foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest (or in some cases, national security). The kinds of proposals examined include both business investment proposals (which can capture transactions outside of Australia if there is a sufficient Australian nexus) across all sectors of the economy and investment in land, in each case subject to materiality thresholds.

In determining whether a foreign investment proposal is contrary to the national interest, the Australian government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition, the economy and the community (eg, as a result of the investor's plans to restructure the business in Australia after the acquisition), and other government policies such as tax and the environment, as well as the character of the investor. Increasingly, the government also now considers data security.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian government takes into consideration (in addition to those described above) when examining those proposals:

- for agricultural investment proposals, the Australian government typically considers the effect of the proposal on the quality and availability of Australia's agricultural resources, including water; land access and use; agricultural production and productivity; Australia's capacity to remain a reliable supplier of agricultural production, to both the Australian community and Australia's trading partners; biodiversity; and employment and prosperity in Australia's local and regional communities;
- for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- where a foreign investment proposal involves a foreign government investor, the Australian government considers whether the proposed investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

In general, Australia does not impose currency controls (subject to limited exceptions prohibiting, for example, transfers of funds to certain regimes).

Main laws

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The main laws that regulate foreign investment in Australia are the following:

- The Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Foreign Acquisition and Takeovers Regulation 2015 (FATR). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals, or apply conditions to the way such proposals are implemented, to ensure they are not contrary to the national interest.
- The Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of foreign ownership in certain industries, for example:

- the Broadcasting Legislation Amendment (Foreign Media Ownership, Community Radio and Other Measures) Act 2018 (Cth) requires each foreign person, as defined in the FATA, that has a company interest of 2.5 per cent or more in an Australian media company to notify the Australian Communications and Media Authority;
- the Security of Critical Infrastructure Act 2018 (Cth) requires owners and operators of certain critical infrastructure to report information about the ownership and operation of the asset, which is maintained on a non-public register, and allows the relevant minister to make orders in relation to matters pertaining to the security of the relevant asset;
- the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998 (Cth) and banking policy regulate foreign ownership in the banking sector;
- the Air Navigation Act 1920 (Cth) and Qantas Sale Act 1992 (Cth) limit aggregate foreign ownership in an Australian international airline (including Qantas) to 49 per cent;
- the Airports Act 1996 (Cth) limits foreign ownership of some airports to 49 per cent, airline ownership in airports to 5 per cent and cross ownership between Sydney airport (together with the proposed future Sydney West Airport) and any of Brisbane, Melbourne or Perth airports;
- the Shipping Registration Act 1981 (Cth) requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
- aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5 per cent.

Scope of application

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

There are four kinds of actions that are regulated:

- Significant actions: the Treasurer has the power to make orders in relation to these kinds of transactions (including to block them, or to order divestments) if he or she considers the transaction to be contrary to the national interest. Approval only has to be sought for these if they are also notifiable actions or notifiable national security actions, but obtaining approval cuts off the Treasurer's powers (subject to the Treasurer's last resort review powers). Seeking approval is advisable.
- Notifiable actions: these are a category of transactions that require approval. Most notifiable actions are also significant actions (meaning the Treasurer has the above powers).
- Notifiable national security actions: the Treasurer has the power to make orders in relation to these kinds of transactions (including to block them, or to order divestments) if he or she considers the transaction to be contrary to national security (which is narrower than the national interest test above). These actions require approval.
- Reviewable national security actions: these are transactions with an Australian nexus that are not significant actions, notifiable actions or notifiable national security actions. These transactions, together with significant actions for which approval is not sought, are subject to the Treasurer's 'call in' powers for a period of 10 years if he or she considers that the transaction poses a national security concern. Like significant actions, reviewable national security actions do not have to be notified, but getting approval cuts off the Treasurer's powers (subject to the Treasurer's last resort review powers). The Australian government encourages seeking approval for reviewable national security actions in certain sensitive sectors.

A foreign person must not proceed with a notifiable action or notifiable national security action, or a significant action (which is not also a notifiable action) or a reviewable national security action that it has elected to notify, until the Treasurer has issued a statement of no objection, or ceases to be empowered to make orders in relation to the proposal under the law.

Notifiable actions include:

- the acquisition by a foreign person of an interest of 20 per cent or more in the shares or units of an Australian company or unit trust valued above the then current monetary thresholds;
- the acquisition by a foreign person of an interest in Australian land valued above the then current monetary thresholds (subject to certain exceptions);
- the acquisition by a foreign person of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in an Australian company or unit trust or Australian business that is an agribusiness, where the value of the acquirer's past and current investments in the target exceed the then current monetary thresholds;
- the acquisition by a foreign person of an interest of 5 per cent or more in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value; and
- the following transactions by foreign government investors:
    - the acquisition of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus);
    - the acquisition of an interest in Australian land, regardless of value;
    - starting an Australian business; and
    - acquiring a legal or equitable interest in a tenement or an interest of at least 10 per cent in securities in a mining, production or exploration entity (ie, an entity where the total value of legal or equitable interests in tenements held by the entity, or any subsidiary of the entity, exceeds 50 per cent of the total asset value for the entity).

Aside from the notifiable actions described above, significant actions include change of control transactions in relation to Australian companies, entities and businesses valued above the then current monetary thresholds, which (unlike most notifiable actions) can capture offshore transactions if they have a significant Australian nexus.

The system of monetary thresholds is complex: both the way that the threshold is calculated and the dollar value of the monetary threshold differ for different kinds of transactions. Monetary thresholds are also indexed annually for inflation and are affected by Australia's treaty obligations, so different thresholds may apply for investors from countries with which Australia has entered into free trade agreements. Not all free trade agreements contain the same exemptions. The standard monetary threshold for foreign persons who are not foreign government investors and who are investing into an Australian company or business that is not an agribusiness, media business or national security business is A$281 million for 2021.

A notifiable national security action includes:

- to start a national security business;
- to acquire an interest of 10 per cent or more (and in some cases less than 10 per cent) in a national security business or an entity that carries on a national security business;
- to acquire an interest in Australian land that, at the time of acquisition, is national security land; and
- to acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.

A national security business is one that is carried on wholly or partly in Australia (whether or not for profit) that is publicly known, or could be known upon making reasonable enquiries, to be one or more of the following:

- it owns or operates certain ports, water, gas or electricity assets (as defined under the Security of Critical Infrastructure Act 2018);
- it is a carrier or nominated carriage service provider to which the Telecommunications Act 1997 applies;
- it develops, manufactures or supplies critical goods or critical technology that are for a military or intelligence use by, or it provides critical services to, defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- it stores or has access to information that has a security classification;
- it stores or maintains personal information of defence and intelligence personnel collected by the Australian Defence Force, the Defence Department or an agency in the national intelligence community which, if accessed, could compromise Australia's national security;
- it collects, as part of an arrangement with the Australian Defence Force, the Defence Department or an agency in the national intelligence community, personal information on defence and intelligence personnel that, if disclosed, could compromise Australia's national security; or

- it stores, maintains or has access to personal information on defence and intelligence personnel that, if disclosed, could compromise Australia's national security.

National security land is:
- certain defence premises; and
- land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that is publicly known or could be known upon the making of reasonable enquiries.

Definitions

4 | How is a foreign investor or foreign investment defined in the applicable law?

The legislation regulates foreign investment proposals by a 'foreign person'. A foreign person, in general, means:
- an individual not ordinarily resident in Australia;
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds an interest of 40 per cent or more;
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an interest of 40 per cent or more;
- the general partner of a limited partnership in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20 per cent or more;
- the general partner of a limited partnership in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an interest of 40 per cent or more; or
- a foreign government or foreign government investor.

Special rules for SOEs and SWFs

5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Australia scrutinises a broader range of investments by 'foreign government investors' than it does investments by other foreign persons.

A 'foreign government investor' includes:
- a foreign government;
- an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a 'separate government entity'); and
- a corporation, trustee of a trust or general partner of a limited partnership in which (1) a foreign government, separate government entity or foreign government investor from one country holds a 20 per cent or more interest, or (2) foreign governments, separate government entities or foreign government investors from more than one country hold a 40 per cent or more interest.

The definition of foreign government investor captures not only SOEs and SWFs, but also things such as public sector pension funds, the investment funds into which SOEs, SWFs and public sector pension funds invest and, owing to tracing rules, portfolio companies for such investment funds.

There is an exception from the definition of 'foreign government investor' for collective investment vehicles that are caught solely because of the '40 per cent test', where such investors have no say in individual investment, divestment and management decisions and the investor has no role (other than as investor) in respect of the fund.

As foreign government investors are also foreign persons, they are subject to the usual range of significant actions, notifiable actions, notifiable national security actions and reviewable national security actions that apply to all foreign persons. In addition, the following transactions by foreign government investors are notifiable actions:
- the acquisition of an interest of 10 per cent or more (and in some cases interests below 10 per cent) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus);
- the acquisition of an interest in Australian land, regardless of value;
- the starting of an Australian business; and
- acquiring a legal or equitable interest in a tenement or an interest of at least 10 per cent in securities in a mining, production or exploration entity (ie, an entity where the total value of legal or equitable interests in tenements held by the entity, or any subsidiary of the entity, exceeds 50 per cent of the total asset value for the entity).

These are subject to very limited exemptions. A key exception is for offshore transactions that meet a de minimis test – namely that the action is the acquisition of securities in a non-Australian entity with an Australian subsidiary; the assets of the Australian subsidiary are worth less than A$61 million (for 2021); those assets constitute less than 5 per cent of the total assets of the target group; and none of those assets are used in either a sensitive business (which broadly covers telecoms; transport; media; supply of military goods; development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; uranium or plutonium extraction; and operation of a nuclear facility) or a national security business.

Relevant authorities

6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Treasurer has the ultimate power to decide whether a transaction is contrary to the national interest.

When making foreign investment decisions, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals and advises on the national interest implications. The FIRB is a non-statutory advisory body.

The FIRB is supported by a secretariat located in the Treasury and by the Australian Taxation Office (ATO). The Treasury is responsible for the day to-day administration of the framework in relation to business transactions and some land transactions. The ATO administers foreign investment into residential real estate and certain other types of proposals.

7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The Australian government has wide discretion to approve or reject significant actions and notifiable actions on national interest grounds.

In determining whether a foreign investment proposal is contrary to the national interest, the Australian government is able to examine any

factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition, the economy and the community (eg, as a result of the investor's plans to restructure the business in Australia after the acquisition), and other government policies such as tax and the environment, as well as the character of the investor. Increasingly, the government also now considers data security.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian government takes into consideration (in addition to those described above) when examining those proposals:

- for agricultural investment proposals, the Australian government typically considers the effect of the proposal on the quality and availability of Australia's agricultural resources, including water; land access and use; agricultural production and productivity; Australia's capacity to remain a reliable supplier of agricultural production, to both the Australian community and Australia's trading partners; biodiversity; and employment and prosperity in Australia's local and regional communities;
- for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- where a foreign investment proposal involves a foreign government investor, the Australian government considers whether the proposed investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

As noted above, notifiable national security actions and reviewable national security actions are reviewed against national security only.

PROCEDURE

Jurisdictional thresholds

8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The system of monetary thresholds is complex: both the way that the threshold is calculated and the dollar value of the monetary threshold differ for different kinds of transactions. Monetary thresholds are also indexed annually for inflation and are affected by Australia's treaty obligations; therefore, different thresholds may apply for investors from countries with which Australia has entered into free trade agreements. Not all free trade agreements contain the same exemptions. The standard monetary threshold for foreign persons who are not foreign government investors and who are investing into an Australian company or business that is not an agribusiness, media business or national security business is A$281 million for 2021.

In terms of the way that the threshold is calculated:

- for acquisitions of interests in shares of Australian corporations or units in Australian trusts, the threshold is the higher of the value of the gross assets of the target entity and the value implied by the consideration paid for the shares or units;
- for acquisitions of interests in Australian land other than agricultural land, the threshold is the value of the interest in land being acquired;
- for acquisitions of interests in Australian agricultural land, the threshold is the consideration for the land being acquired plus the value of all other Australian agricultural land held by the acquirer;
- for acquisitions of interests in Australian agribusinesses, the threshold is the consideration paid for the investment plus the value of all other investments in that agribusiness held by the acquirer;
- for asset acquisitions, the threshold is the consideration for the acquisition; and
- for other control type transactions, the threshold is the gross assets of the target entity.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Notifiable actions and notifiable national security actions must be notified and approval must be sought – failure to do so is itself an offence – while significant actions that are not notifiable actions or notifiable national security actions do not, strictly speaking, have to be notified, but doing so and obtaining a statement of no objection cuts off the Treasurer's powers (subject to the Treasurer's last resort review powers).

The procedure for securing approval for a foreign investment proposal that is a notifiable action, significant action, notifiable national security action or reviewable national security action is that the applicant must lodge an application with the FIRB online. The online application requires basic information about the transaction: names and addresses of the parties, the kind of transaction and information relevant to calculating the monetary threshold for the transaction and the application fee. The applicant is expected to attach a cover letter that explains the transaction in detail, including reasons for the transaction and the acquirer's intentions for the target.

Each application attracts filing fees, which are calculated based on a formula for each transaction. The application is not considered to be lodged until payment is made, and if FIRB determines during the course of assessment that additional fees are owed, the statutory deadline recommences from the date the final correct fee is paid.

Once the application is lodged, the case officer assigned to the application may contact the applicant to ask questions. In addition, all FIRB applications are submitted to other government agencies for input. Consult agencies will always include the Australian Taxation Office and the Australian Competition and Consumer Commission (ACCC) (even if ACCC clearance is not being sought by the parties). It may also include other government agencies such as the Critical Infrastructure Centre, which coordinates the national security review of applications involving critical infrastructure and industries, securities services and state governments.

More complex transactions may result in an ongoing dialogue between the Treasury and the FIRB and the applicant regarding the imposition of conditions.

10 | Which party is responsible for securing approval?

The acquirer is responsible for securing approval.

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

From a statutory perspective, the review process consists of a 30-calendar-day examination period and a 10-calendar-day notification period. The examination period can be extended on request by the applicant, or by the Treasurer (either exercising a new power to extend unilaterally, or issuing a public interim stop order). In practice, the length of time is affected by the time of year, the extent to which the application is being reviewed by other government departments, the election cycle and general levels of business, and voluntary extensions by the applicant are routine.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

For any notifiable action or notifiable national security action, it is an offence to fail to notify the foreign investment proposal. For a significant action (including a notifiable action), notifiable national security action or a reviewable national security action that is notified, it is an offence to proceed with the foreign investment proposal until a statement of no objection is received or the Treasurer's power to make a decision in relation to the proposal expires. (There is an exception for certain 'passive increases' that amount to significant or notifiable actions, where post-completion approval can be sought.) Penalties for failing to comply are: for individuals, up to ten years' imprisonment or a A$3,330,000 fine or both; and for companies, a fine of up to A$33,300,000.

There are a range of other civil and criminal penalties that apply for various other contraventions of FATA.

Officers of companies commit an offence or may be liable for civil penalties if the corporation is convicted of the offence or is the subject of a civil penalty order and the person authorised or permitted the commission of the offence or the contravention of the civil penalty provision by the corporation.

Third parties who knowingly assist a breach may also be subject to civil and criminal penalties.

Involvement of authorities

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Most foreign investment proposals are routine and do not require any prior consultation with the Australian government. If an applicant considers that a foreign investment proposal may be controversial, it is possible to engage in dialogue with the Treasury and the FIRB before and during the application process. However, guidance will generally not be given as to how an application will be decided.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

Most foreign investment proposals are routine, and the review process is confidential. However, given the case-by-case nature of the examination process, high-profile transactions have the potential to become politicised. It is sensible for applicants to monitor the Australian media and political process to ensure that information in the public domain that is inconsistent with the application is appropriately addressed.

There is no procedure for expediting approvals. The Treasury and the FIRB may take into account requests for early decisions based on commercial imperatives, but they have no obligation to do so and these requests should be used sparingly.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

If a foreign investment proposal is a notifiable action or significant action, if the Treasurer is satisfied that the proposal is contrary to the national interest, or if the proposal is a notifiable national security action or a reviewiable national security action and the Treasurer is satisfied that it is contrary to national security, the Treasurer has the power to order the disposal of any interests in Australian securities, assets or land that were acquired under the proposal, unless the proposal was notified and a statement of no objection obtained.

The Treasurer can re-review actions notified after 1 January 2021 where approval has been given to determine whether a national security risk relating to the action exists, if since the transaction was notified, the Treasurer has become aware that:

- the applicant made a statement that was false or misleading in a material particular, or that omitted a matter or thing without which the statement was misleading in a material particular;
- the business, structure or organisation of the person has or the person's activities have materially changed; or
- the circumstances in which the action was or is proposed to be taken have materially changed.

The Treasurer may make orders in relation to the action if:

- the Treasurer conducts a review in compliance with the law;
- the Treasurer is reasonably satisfied that:
  - the false or misleading statement or omission directly relates to the national security risk; the national security risk posed by the change of the business, structure or organisation of the foreign person or the change to the person's activities could not have been reasonably foreseen or could have been reasonably foreseen but was only a remote possibility at the time of the original approval; or
  - the relevant material change alters the nature of the national security risk posed at the time of the original approval; and
- the Treasurer is satisfied that reasonable steps have been taken to negotiate in good faith with the person, and is satisfied that requiring the person to comply with an order is reasonably necessary for purposes relating to eliminating or reducing the national security risk and the use of existing regulatory systems would not adequately eliminate or reduce the national security risk.

SUBSTANTIVE ASSESSMENT

Substantive test

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

To make an order prohibiting the implementation of a foreign investment proposal or an order to dispose of property acquired under a foreign investment proposal, the Treasurer must be satisfied that the proposal is contrary to the national interest (or national security, in the case of notifiable national security actions or reviewable national security actions). Because of the discretionary nature of the decision, the question of burden of proof does not really arise, although it is prudent for applicants to show why a proposal is not contrary to the national interest in their applications.

In determining whether a foreign investment proposal is contrary to the national interest, the Australian government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition, the economy and the community (eg, as a result of the investor's plans to restructure the business in Australia after the acquisition), and other government policies such as tax and the environment, as well as the character of the investor. Increasingly, the government also now considers data security.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian government takes into consideration (in addition to those described above) when examining those proposals:

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- for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- where a foreign investment proposal involves a foreign government investor, the Australian government considers whether the proposed investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

The Foreign Investment Review Board (FIRB) has published a variety of resources to provide guidance to prospective applicants. These are all located on the FIRB's website.

17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

FIRB may consult with agencies in other countries, particularly on matters of national security.

Other relevant parties

18 | What other parties may become involved in the review process? What rights and standing do complainants have?

The application process is confidential (including the fact that an application has been made, unless the acquirer chooses to make a public announcement), and there are no formal rights for third parties to intervene in the process. It is possible for third parties to intervene informally, through the media or by lodging a submission to the FIRB if they are aware that an application has been made. The FIRB may undertake any inquiries that it wishes, although it does not engage in any formal public consultation processes. Applications are routinely shared with other government departments.

Prohibition and objections to transaction

19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the Treasurer is satisfied that a regulated proposal is contrary to the national interest (or national security, in the case of notifiable national security actions or reviewable national security actions), the Treasurer has the power to issue an order prohibiting completion of the proposal, or if the proposal has completed (or is deemed to have been completed), an order requiring the acquirer to dispose of any relevant Australian securities, assets or land that were acquired under the proposal.

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Part of the application process involves a dialogue with the Treasury and the FIRB, which may result in agreement on conditions that the Treasurer may impose as a condition to allowing a foreign investment proposal to proceed. If a foreign investment proposal is completed without having been notified, it is possible to reach a negotiated solution with the Treasurer, but there is no guarantee that a negotiated solution will be reached.

Challenge and appeal

21 | Can a negative decision be challenged or appealed?

An order prohibiting a foreign investment proposal, or requiring disposal of assets, could be challenged on the grounds that the transaction was not a regulated transaction. In addition, the exercise of the Treasurer's last resort review powers can be challenged in certain circumstances. Otherwise, an order cannot be challenged as the Treasurer has complete discretion to decide what the national interest (or national security, in the case of notifiable national security actions and reviewable national security actions) is and whether a foreign investment proposal is contrary to it.

Confidential information

22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

For its part, the government respects confidentiality, and 'leaks' are extremely rare. However, there are no remedies if confidentiality is breached. The government may be compelled to disclose information under freedom of information laws, but the information contained in the FIRB applications is usually commercial in confidence information, which is not subject to this disclosure. However, applicants should state in their applications that the information contained in them is commercial in confidence and is not subject to disclosure under freedom of information laws.

RECENT CASES

Relevant recent case law

23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The vast majority of applications for business proposals are approved without conditions. Counting the number of rejections can be difficult: in some cases, foreign investment proposals were never formally rejected, but the parties terminated the transactions for reasons associated with the foreign investment review process (for example, conditions may have been imposed that the parties did not accept, or the approval was taking too long to obtain, or the Treasurer indicated that the proposal would not be approved).

Because of the case-by-case nature of the review process, it is more instructive to look at trends rather than individual cases. Trends evident in rejections (and effective rejections) include:

- national security concerns (eg, the recent attempted acquisition of ProBuild, a construction contractor, by a Chinese bidder);
- genuine competition concerns (eg, the attempted acquisition of a rare earths miner by an acquirer from China, when Chinese companies already controlled a significant portion of the world's supply of rare earths; or the attempted acquisition of an Australian miner by a Chinese miner where there was insufficient diversity of ownership in a newly emerging resources area);
- concerns around the ability of the acquirer to move important Australian assets offshore and to be beyond the reach of Australian regulation (eg, the attempted acquisition of the Australian Securities Exchange by the Singapore Stock Exchange);
- concerns as to the motivations of foreign government investors (eg, the attempted acquisition of the Australian Securities Exchange by

the Singapore Stock Exchange; and the attempted acquisition of Rio Tinto by Chinalco); and

- political issues (eg, the attempted acquisition of S Kidman & Co (which holds approximately 1 per cent of Australian land and approximately 3 per cent of Australia's arable land); and the attempted acquisition of Graincorp by ADM, both of which were thought to have been driven by election-year politics).

UPDATES AND TRENDS

Key developments of the past year

24 Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

The legislation was substantially amended with effect from 1 January 2021. A key change likely in the coming year relates to the new definition of national security business. One limb of this definition is tied to assets regulated under the Security of Critical Infrastructure Act 2018 (Cth). Changes have been proposed to this legislation that will significantly expand its reach. It is currently expected that this expansion will carry through into the definition of 'national security business' under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), meaning a number of transactions will become subject to the A$0 thresholds.

Further, a number of transactions that are not otherwise caught by FATA (eg, because they are below threshold) will now be caught as reviewable national security actions (which is a category of voluntary approval). Because of the breadth of transactions caught by this definition, the Foreign Investment Review Board has issued guidance as to which transactions it recommends should be submitted for approval. As this guidance is expected to evolve, advice should be sought.

Coronavirus

25 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The government had introduced A$0 thresholds for all foreign investment proposals during 2020, in an effort to ensure that foreign persons did not engage in predatory behaviour as a result of worsening economic conditions. However, those thresholds have now been reinstated (and indexed for 2021), except for transactions involving national security risks.

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