COVID-19 and Australia's Foreign Investment Regime

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COMMENTARY

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IN SHORT

The Situation: The Australian Government has temporarily reduced the monetary thresholds under the *Foreign Investments and Takeovers Act 1975* (Cth) ("the Act")—which had long been in place to exempt some foreign investment transactions from the Treasury's approval—to $nil in an effort to ensure Australia's national interests are protected during the current pandemic. The Foreign Investment Review Board ("FIRB") has flagged that as a result of the change and other COVID-19-related delays, foreign investment approval processing times may now extend up to six months.

The Result: The majority of transactions which fall within the scope of the Act (being most investments by foreign persons into Australia) will now, irrespective of the value of the investment, require approval from the Treasurer prior to being undertaken. Given the reality of further FIRB processing delays, the approval process will likely present real challenges for urgent transactions, including where one or more of the parties are distressed or are confronting near-insolvency circumstances.

Looking Ahead: Counterparties to transactions which did not previously require FIRB approval, due to the value of the transaction falling below the monetary thresholds, will now need to consider whether their transition requires approval from the Treasurer. In addition, all counterparties should now be particularly focused on long-stop dates for the satisfaction of any FIRB condition and the impact that a delay in FIRB approval may have on the commercial viability of transactions proceeding, or general pricing issues.

Background on FIRB Thresholds and Timelines

- **Relevant transaction types**: Under Australia's foreign investment laws, foreign persons are required to seek approval from the Treasurer—via applications submitted to FIRB—prior to undertaking certain types of transactions involving Australian entities or businesses.

- **Monetary thresholds for FIRB approvals**: Under prevailing FIRB rules, non-foreign government investors who were not acquiring an Australian media business were only required to apply for FIRB approval if the value of the transaction exceeded a prescribed monetary threshold. The applicable monetary threshold depended on the asset being acquired and the identity of the investor. The threshold for non-government investors from countries that are party to a Free Trade Agreement with Australia is generally AUD 1 billion. For investors from countries that are not party to a Free Trade Agreement with Australia, the threshold is generally AUD 275 million. Foreign government investors do not receive the benefit of the monetary thresholds and are generally required to seek approval from FIRB for all transactions, irrespective of the value involved. Similarly, investors acquiring certain sensitive types of businesses or assets are subject to lower thresholds.

- **Typical approval time frame**: Under the regime, the Treasurer is required to consider whether the proposed transaction is in the national interest within 30 days of FIRB receiving an application for approval from a foreign person (an "Applicant"). Foreign persons are prohibited from taking the relevant action during that period of consideration unless the Applicant is given a "no objection" notification from the Treasurer. If the Treasurer is unable to make a decision within the prescribed 30-day period, he or she can issue a one-off interim order extending the period for an additional 90 days. Alternatively, the Applicant can 'voluntarily' request that the time period be extended. An Applicant can make any number of 'voluntary' extensions. FIRB commonly requests that Applicants 'voluntarily' extend the statutory time period when either FIRB or the Treasurer needs more time to consider an application. It is market practice for Applicants to meet FIRB's request and extend the application deadline 'voluntarily'.

Temporary Reduction of All Thresholds to Nil Monetary Threshold and Extension of Statutory Review Period to 'Up to' Six Months

- **Immediate reduction of thresholds to $nil**: Late on 29 March 2020, the Treasurer publicly announced temporary changes to Australia's foreign investment regime whereby all transactions—which are subject to the Act that would have otherwise been exempt due to not meeting the monetary threshold—will now require FIRB approval, regardless of the transaction value. The change will be effected by reducing the monetary threshold which applies to all investments that require FIRB approval to $nil.

- **No application to agreements entered into prior to 29 March 2020**: In addition to the announcement by the Treasurer, FIRB has issued guidance to investors which, among other things, confirms that the new rules will not apply to agreements entered into before 10:30 p.m. AEDT 29 March 2020.

- **Impact on FIRB processing abilities**: Prior to the announcement, FIRB had already confirmed that it anticipated longer statutory approval periods taking hold due to the high volume of applications submitted in the first quarter of 2020 and the pressures placed on its workforce and those of its consult partners by the COVID-19 pandemic. The removal of monetary thresholds from the FIRB regime will almost certainly see a further increase in the volume of applications being submitted to FIRB for approval, and a proportionate increase in the number of consult partner interactions that FIRB will need to facilitate and help shepherd through internal government processes. Whether the uplift in FIRB applications is material will turn, among other things, on how active the Australian transaction market becomes as the COVID-19 pandemic continues to evolve. It is currently unclear whether FIRB will recalibrate their resourcing capabilities to deal with the expected uplift in applications.

- **Statutory review periods**: At the same time, as the changes to monetary thresholds were announced, the Treasurer also announced that FIRB will be contacting applicants to request that they agree to decision periods for FIRB applications to be extended by "up to" six months from the date on which application fees are paid. However, the Treasurer also made a point of noting that any such extension does not necessarily mean that FIRB will take the full six-month period to process an application. This change does, however, raise a real possibility that routine FIRB applications (which had previously taken somewhere between 30 and 90 days to be processed) may now take much longer to come to finality.

- **Urgent applications to be given priority**: The Treasurer confirmed in his announcement that FIRB will give priority to urgent applications for investments that directly protect and support Australian businesses and employment, and will take into account any commercial deadlines related to those proposed investments. This is consistent with the position that we had understood FIRB had already adopted in the preceding week when it started to 'triage' urgent applications from others as a way of dealing with some of the economic consequences of the COVID-19 pandemic.

- **Changes have already taken effect**: The policy changes referred to above took effect at 10:30 p.m. (AEDT) on 29 March 2020 and, therefore, will apply to all transactions entered into and FIRB applications submitted by counterparties after that time. There are a range of complex issues that may arise in determining how the changes apply to transactions that were entered into prior to the effective date but which had not otherwise required FIRB approval under the old rules. The government has noted that the changes are temporary in nature only and will only apply for the duration of the COVID-19 pandemic.

Policy Rationale

- **Protecting the national interest**: The Federal Government's reduction of the foreign investment monetary threshold to $nil comes in response to political concerns that, in the wake of COVID-19, Australian businesses will be the target of opportunistic and predatory investment by foreign acquirers. There is a perception that the change in FIRB policy is particularly targeted at Chinese buyers. Speaking in support of the measures, Member of Parliament Andrew Hastie, chair of the Parliamentary Joint Committee on Intelligence and Security, stated that the decision was made to protect the 'vulnerable' from certain states 'angling for bargains'.

- **Economic "hibernation"**: The change in FIRB policy also appears to be broadly consistent with the Federal Government's recently stated intention to attempt to put the Australian economy into "hibernation" until the worst of the COVID-19 crisis passes. Other recent measures announced by the Australian government include a $130 billion wage subsidy package to help businesses retain employees during the downturn and tenancy relief prohibiting eviction of lessees who are under financial stress.

Impact of Transactions

- **Transaction vulnerability**: Prior to the Treasurer's announcement, many applicants were already experiencing delayed processing times with FIRB. Notwithstanding assurances from the Federal Government to the contrary, we believe that processing delays by FIRB now run the risk of significantly blowing out. This is due to the combination of: (i) the extension of the statutory review period to up to six months; (ii) an inevitable uplift in the number of applications that will likely be made to FIRB because the monetary threshold has gone to $nil; and (ii) the general disruptions to the Australian government work force that are occurring because of COVID-19. These delays could become particularly problematic where one or more transaction counterparties are distressed or are confronting near-insolvency circumstances, or where a transaction is occurring in a sensitive sector (such as media or agribusiness). Transactions in the latter category attract a high-level of application scrutiny by FIRB and its consult partners in the normal course, and that scrutiny will no doubt be heightened in the present environment.

- **Enhanced focus on FIRB conditions**: There is a real likelihood that for certain types of transactions or sectors, FIRB will once again choose to impose new conditions of the kind that became a feature of approvals in the period after the global financial crisis. These included conditions that were targeted at ensuring that target businesses maintained an ongoing physical presence in Australia, and appropriate assurances were provided by investors regarding the ongoing employment of Australian employees.

- **Deal terms**: Counterparties to both urgent and customary transactions should now be particularly focused on long-stop dates for the satisfaction of any FIRB condition, and the impact that a delay in FIRB approval may have on the commercial viability of transactions proceeding, or general pricing issues. Investors who have not typically been exposed to FIRB will now need to adjust their activities to take FIRB approval into account and build appropriate conditions into transaction documents. We also expect the ability to be able to clearly communicate deal timelines to FIRB at the outset of an application being lodged, and establish critical business reasons for FIRB which support urgent consideration of applications to come to the fore.

Limited Filing Fee Refunds for Withdrawn Applications

- **Filing fees**: All foreign investment applications filed with FIRB attract fees of between $2,000 and $105,200 that must be paid when the application is submitted. Normally, these fees are non-refundable, even where the FIRB application is ultimately not approved or withdrawn.

- **Limited refunds**: On 23 March 2020, FIRB announced on its website that it will take into account the impact of the COVID-19 pandemic on the ability of some investors to progress investment decisions. FIRB will consider refunding FIRB filing fees in circumstances where applicants withdraw a current FIRB application due to COVID-19. FIRB will retain its discretion not to refund fees where the decision to withdraw is not clearly linked to the COVID-19 pandemic. FIRB's decision will help Applicants recoup some of their transaction costs (in the form of the FIRB fee) in circumstances where a transaction, the subject of a FIRB application, is put on hold or cancelled due to the COVID-19 pandemic.

THREE KEY TAKEAWAYS

1. The majority of transactions which fall within the scope of the Act (being most investments by foreign persons into Australia) will now, irrespective of the value of the investment, require approval from the Treasurer prior to being undertaken.

2. Statutory review periods for FIRB applications may also now be extended to up to six months from the time the application fee is paid.

3. Counterparties to both urgent and customary transactions should now be particularly focused on long-stop dates for the satisfaction of any FIRB condition, and the impact that a delay in FIRB approval may have on the commercial viability of transactions proceeding, or general pricing issues.


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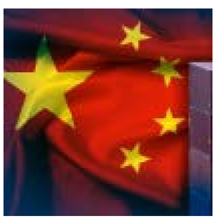

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