SQUIRE PATTON BOGGS

Re-FIRB-ishment

Australia – 9 May 2024

Australian treasurer, The Hon Dr. Jim Chalmers MP, today announced changes to Australia's foreign investment regime.

Reforms to the Foreign Investment Review Board (FIRB) process form part of broader reforms relating to the *Future Made in Australia Act* and the federal budget to be delivered on 14 May 2024. An updated foreign investment policy has been released detailing the reforms.

Background

Australia's foreign investment framework is set by the *Foreign Acquisitions and Takeovers Act 1975* (the Act), the *Foreign Acquisitions and Takeovers Fees Impositions Act 2015*, and associated regulations.

The Act requires foreign investors to notify the treasurer of proposed foreign investments that meet specified criteria, and allows investors to voluntarily notify of certain investments, or seek an exemption from notification requirements.

The treasurer has the power to prohibit these investments or apply conditions.

The treasurer is advised by the FIRB when making foreign investment decisions that examine foreign investment proposals and advise on the national interest implications.

Reforms Announced

Due to national security threats arising from intensifying geopolitical competition and, in some instances, the development of risks to Australia's national interest[a] from foreign investment, the government is accordingly strengthening its risk-based approach to assessing investment proposals.

Scrutiny will be focused on high-risk investments to protect Australia's national interest, while streamlining low-risk investments to rapidly bring in capital. This update to "Australia's Foreign Investment Policy" reflects how the government will give effect to this stronger risk-based approach.

The government points to ensuring that Australia can attract the significant foreign capital flows needed to support Australia's priorities, while protecting the national interest in an increasingly complex economic and geostrategic environment.

This new approach is trumpeted to deliver additional benefits to:

- Investors, by providing the transparency, clarity, timeliness and predictability they need to invest with confidence.
- The Australian economy, by encouraging the flow of foreign capital to contribute to national economic priorities.
- The Australian national interest, including by protecting national security.[1]

The Australian government has repeated that it welcomes foreign investment and is particularly focused on attracting investment in key areas, including those that:

- Assist in delivering the net zero transformation alongside domestic private and government capital
- Increase Australia's housing supply by supporting investment in new housing stock consistent with the government's housing agenda, including through investment in build-to-rent developments
- Support the objectives of Australia's Critical Minerals Strategy to grow the sector; create jobs and downstream industries; diversify global supply chains; help Australia to become a renewable energy superpower; and contribute to global efforts to achieve net zero
- Harness the potential of critical technologies to encourage competition and diversify industries, accelerate the development and uptake of new innovations and frontier technologies, and help Australian businesses commercialise new critical technology ideas[2]

Commentary

The changes to the FIRB process centre on two key areas: streamlining and strengthening.

Streamlining

The government has indicated that it is streamlining the consultation and assessment processes for foreign investment proposals, to enable low-risk capital to flow quickly. This stronger risk-based approach will be informed by consideration of the investor, the target of their investment, and the structure of the transaction.[3]

[1] Australian Government Treasury, *Australia's Foreign Investment Policy* (Government Policy, 1 May 2024) Page 1

[2] Australian Government Treasury, *Australia's Foreign Investment Policy* (Government Policy, 1 May 2024) Page 2

[3] Australian Government Treasury, *Australia's Foreign Investment Policy* (Government Policy, 1 May 2024) Page 3

This will likely favour passive investors, such as pension funds, where they have a strong record of compliance and are seeking to invest in nonsensitive sectors (such as manufacturing, professional services, commercial real estate, new housing and mining of noncritical minerals).

The benefits associated with the reforms will include a reduced wait time and a reduction in compliance costs. Treasury will adopt a new performance target of processing 50% of investment proposals within the 30-day statutory decision period from 1 January 2025. Most foreign investors will see an improvement in the speed of processing from 1 July 2024, as Treasury works to increase the number of investment proposals processed within the statutory decision period.[4]

The Australian Government is also taking additional steps to support streamlining and attract foreign investment by:[5]

- Providing refunds of application fees for foreign investments that do not proceed because the investor was unsuccessful in a competitive bid process.
- Allowing foreign investors to buy established build-to-rent developments, and applying lower application fees to this type of investment. This will encourage investment in build-to-rent developments and ultimately contribute to Australia's housing stock.
- Implementing an exemption for passive or low-risk interfunding transactions from mandatory notification requirements and fees under the foreign investment framework. This will simplify routine transactions for large institutional investors and reduce the regulatory burden they face.
- Clarifying that in rural and regional areas, where labour supply is tight, Pacific Australia Labour Mobility (PALM) employers are able to buy established residential properties for their PALM workers.
- Improving the timeliness of decision-making by removing duplication in the assessment of competition issues between the foreign investment framework and the merger control system, as part of recently announced reforms to Australia's approach to merger control.

Strengthening

Where there are national security considerations, a robust and comprehensive screening process will apply to proposals involving critical infrastructure, critical minerals, critical technology, those that involve sensitive data sets, and investments near defence sites[b].

The Australian government has stated that it is seeking to achieve a balance between the economic benefits of foreign investment and any security risks arising.

Further, compliance functions will be strengthened to monitor and enforce the conditions imposed on high-risk foreign investment and continuing to take proportionate enforcement action, including a boosted capability for on-site visits. Treasury has existing powers to monitor and enter premises to determine compliance with FIRB legislation under the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) and it remains to be seen whether significantly greater powers will be legislated or if it is merely a greater allocation of resources.

Increased scrutiny of tax arrangements will apply where there is a risk to government tax revenue, to ensure that multinational companies are adhering to Australia's taxation laws.

The Australian government has stated that it aims to future-proof the system's ability to deal with emerging risks, including through regularly reviewing policy and legislative settings and undertaking more analysis of sensitive sectors.

The treasurer will also gain a "call-in" power for where investments become relevant for national security considerations over the effluxion of time.

Existing applications will not be affected by the changes.

Summary

We expect the changes to be largely implemented through changes to policies and procedures, and significant legislative change is not expected at this stage.

We expect that with the recent announcement of merger reforms, duplication between the competition law aspects and the FIRB process will be examined by the government with a view to minimising or removing any duplication.

Contacts

Tony Chong
Partner, Perth
T +61 8 9429 7688
E tony.chong@squirepb.com

Anthony Jarvis
Director, Perth
T + 61 8 9429 7416
E Anthony.jarvis@squirepb.com

Benjamin Myburgh
Law Graduate
E benjamin.myburgh@squirepb.com

[4] Australian Government Treasury, *Australia's Foreign Investment Policy* (Government Policy, 1 May 2024) Page 3

[5] Australian Government Treasury, *Australia's Foreign Investment Policy* (Government Policy, 1 May 2024) Pages 4-5

65383/05/24

Endnotes

a As noted in Australia's foreign investment policy, the term, "national interest" is not defined in the Act; however, the Act confers upon the treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.

The foreign policy states that, "National interest considerations include a range of factors such as national security, competition, taxation, consistency with other government policy, impacts on the economy and community, the character of the investor, and specific considerations relating to agricultural land, residential investment and foreign government investors. The government considers a range of factors, and the relative importance of these can vary depending upon the nature of the target being acquired."

b If an investment does not require assessment under the national interest test, it will still require mandatory assessment under the national security test if the investment relates to a national security business or national security land.

Under the national security test, the treasurer is empowered to approve an investment subject to imposing conditions to mitigate national security concerns; prohibit an investment if satisfied that it would be contrary to national security; or, in exceptional circumstances, force divestment. As with the national interest, the Act does not define Australia's national security, nor what would be contrary to it. Instead, the Act confers upon the treasurer the power to decide in each case whether a particular investment would be contrary to national security.