NATIONAL PROTECTIONISM IN M&A – AUSTRALIA’S COVID-19 RESPONSE

Thomas Hill, Lawyer and Brett Cowell, Director

Many jurisdictions are introducing increased foreign investment protections in light of the COVID-19 pandemic. This note looks at the changes to Australia’s foreign investment screening.

Most western countries screen foreign investments to protect national interests and security. The United States of America has the Committee on Foreign Investment in the United States (“CFIUS”). In Australia, foreign investment proposals are assessed by the Foreign Investment Review Board (“FIRB”).

FIRB screens foreign investment applications and makes recommendations to the Federal Treasurer, who is the ultimate decision maker regarding the approval of foreign investment proposals. We call this process FIRB approval.

There are both monetary and non-monetary thresholds for requiring FIRB approval, depending on both the investor and the type of investment. Prior to 29 March 2020, monetary thresholds ranged from AUD 0 for certain sensitive investments, to AUD 1.192 billion.

Australia is a net importer of capital and as such, generally welcomes foreign investment. Most applications to FIRB are approved (some with conditions) so long as there are no national interest concerns that may prevent the approval.

**Coronavirus response**

On 29 March 2020, the Federal Treasurer announced temporary COVID-19 response amendments to the Foreign Acquisitions and Takeovers Act 1975, the law that governs foreign investment in Australia. The changes were to:

- Lower all monetary thresholds for FIRB approval to AUD 0.
- Extend FIRB’s decision making timeframe from 1 month to 6 months.

The lowering of all thresholds to AUD 0 was to monitor and if necessary, prevent the transmission of Australian land and other assets to foreign buyers at fire sale prices. This move has drastically increased the number of FIRB applications required, particularly in sectors that were previously subject to the highest thresholds. An example of this is in the commercial leasing space, where leases of over 5 years are considered interests in commercial land. Commercial land acquisitions were previously subject to the AUD 1.192 billion threshold, but are now subject to the AUD 0 threshold, meaning foreign owned retailers are requiring FIRB approval for the first time.

The extension of the decision making timeframe from 1 month to 6 months is a necessary measure given the increase in applications. Decisions may be made sooner than 6 months and FIRB will try to work to commercial deadlines, but cannot guarantee early decisions.
**National Security Protection Bill**

The Federal Government is in the process of implementing reforms to strengthen Australia’s foreign investment regime. The reforms include:

- Implementing a permanent AUD 0 threshold for all investments in sensitive national security land or businesses (which includes sectors such as critical infrastructure, defence and the national intelligence community)

- Enhancing FIRB’s monitoring and investigatory powers and prescribing stronger enforcement options and penalties

FIRB already has a permanent AUD 0 monetary threshold for foreign government investors.

**Considerations for foreign investors**

Foreign investors and their advisers should consider the following when contemplating investing in Australia:

- **What is the investor investing in?** It is important to understand the non-monetary thresholds and other provisions that apply to various investment types. For example, an investment to acquire as little as a 5% interest in an agribusiness may require FIRB approval.

- **How does the FIRB approval timing impact a transaction?** Consider the extended time for obtaining FIRB approval in the context of a transaction timeline and submit applications sooner rather than later.

- **Contract conditions.** If an investment is subject to FIRB approval, consider an express contractual condition that the foreign investor’s investment into Australia is subject to FIRB approval. Also consider making it a condition of the contract that the counterparty cooperates in providing any information FIRB may require. Some acquisitions require certain conduct by a seller prior to selling to a foreign investor (for example, agricultural land acquisitions).

A much broader array of investments into Australia now require FIRB approval. Please contact us if you wish to discuss the FIRB regime in Australia generally or if you require specific advice on a particular transaction.