



➤ FIRB Overview

CHANGES TO AUSTRALIA'S FOREIGN INVESTMENT REGIME FOR ENERGY PROJECTS

On 1 January 2021, a number of changes were introduced by the Federal Government to Australia's foreign investment regime.

Australia has a foreign investment regime that regulates certain acquisitions by 'foreign persons' of:

- direct and indirect equity interests in Australian companies and unit trusts; and
- interests in Australian businesses and interests in Australian land, subject to exceptions and applicable monetary screening thresholds.

NEW FIRB APPROVAL TRIGGER

There is a new mandatory Foreign Investment Review Board (*FIRB*) approval requirement for 'notifiable national security actions', which have a zero dollar threshold. Transactions that trigger a *notifiable national security action* are:

Starting a 'national security business'

A national security business is generally one that is involved in or connected with a 'critical infrastructure asset', telecommunications, defence or a national intelligence community (of either Australia or a foreign country), or their supply chains. Critical infrastructure is defined by reference to the *Security of Critical Infrastructure Act 2018* (currently critical assets in electricity, gas, water and ports); however, it has been proposed the legislation be amended to expand critical infrastructure to include critical assets in 11 additional sectors, including energy.

Acquiring a direct interest in a 'national security business'

Acquiring an interest in 'national security land'

National security land is generally land that is defence premises or where it is publicly known (or could be known upon the making of reasonable enquiries) that a national intelligence agency has an interest in the land. The acquisition of an interest in national security land requires FIRB approval.

MONETARY THRESHOLDS REINSTATED

In welcome news for all foreign investors, the zero dollar monetary threshold for all foreign investments, which was implemented from 29 March 2020 as part of certain COVID-related measures, has now been lifted (effective 1 January 2021).

The effect of these changes is that FIRB approval will be required prior to starting a business or acquiring a direct interest in an entity that owns or operates a *critical electricity asset*, being:

A network, system or interconnector for the transmission or distribution of electricity to ultimately service at least 100,000 customers; or

An electricity generation asset that is 'critical' (based on prescribed capacity thresholds) to ensuring the security and reliability of electricity networks or electricity systems in a state or territory. The relevant capacity thresholds are New South Wales (1,400MW), Victoria (1,200MW), Queensland (1,300MW), Western Australia (600MW), South Australia (600MW), Tasmania (700MW) and the Northern Territory (300MW).

As FIRB's assessment is on an asset-by-asset basis, FIRB approval would not be mandatory if the target entity operated a number of energy assets, in circumstances where each individual energy asset did not meet the criteria set out above.

NEW CALL-IN AND LAST RESORT POWERS

The Federal Treasurer also has a new call-in power to review a broad range of transactions that were not previously notified to FIRB on a voluntary basis. Following such a review, the Treasurer can make orders (such as prohibition or divestment orders) where the Treasurer is satisfied that the transaction would be, or that the result of it is, contrary to national security. The risk of the call-in power being exercised can be removed by voluntarily applying for FIRB approval.

The Treasurer also has a last resort power to make divestment orders and unilaterally impose a new condition (or vary existing conditions) after FIRB approval has been granted. In effect, the introduction of the call-in power will significantly expand the pre-existing voluntary notification regime for significant actions, especially as FIRB has identified the energy sector as essential to maintaining Australia's national security. In guidance for the energy sector, FIRB has indicated that a voluntary filing is recommended in circumstances where a foreign person proposes to invest in:

a business or entity that owns or operates an electricity generation station (including storage) with a generation capacity of at least 50MW (and is not covered by the mandatory notification requirements);

an energy retailer (gas or electricity) where the foreign person would subsequently hold interests in energy retailers with more than 100,000 customers; and

an energy market operator, or an asset used by an energy market operator that is essential to ensuring the security and reliability of an energy market.

The 50MW threshold for a voluntary filing is rather low and we expect to see an increase in voluntary filings, as most renewable energy assets in the pipeline are expected to exceed this threshold.

For further details of Australia's foreign investment regime, please see our [FIRB Guide](#) or contact our specialist FIRB team.

Contact our specialist FIRB team

Jeremy Low

Partner

T +61 2 9230 4041

M +61 404 056 479

Jeremy.Low@allens.com.au

Wendy Rae

Partner

T +61 3 9613 8595

M +61 411 646 774

Wendy.Rae@allens.com.au

Andrew Wong

Mergers & Acquisitions Counsel

T +61 2 9230 4141

M +61 405 318 680

Andrew.Wong@allens.com.au

Kate Axup

Partner, Sector Leader – Energy

T +61 3 9613 8449

M +61 420 647 104

Kate.Axup@allens.com.au

