

Changes to Australian Foreign Investment Rules

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The Australian Government is proposing to make two sets of amendments to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (“FATA”). The first set of proposed amendments seeks to clarify the application of approval requirements for complex investment proposals. The second set of proposed amendments is intended to simplify the procedures for approval of low risk investment proposals.

Application to complex investments

The Foreign Acquisitions and Takeovers Amendment Bill was introduced into the Australian Federal Parliament on 20 August 2009. The amendments in the Bill are designed to ensure that the FATA extends to apply to all foreign investment proposals irrespective of their structures, including more complex transactions such as acquisitions of convertible instruments.

Currently the FATA is structured on traditional concepts of ‘control’ such as acquiring shares or voting power. There have however been an increasing number of proposals for complex investment structures that do not fit cleanly within these traditional concepts.

Among other things, the proposed amendments seek to clarify that certain proposed acquisitions of rights (to acquire shares, voting power, etc.) will still be acquisitions falling under the scope of the FATA, whether or not:

- the rights are exercisable now or in the future; or
- any conditions needs to be satisfied before the rights become effective.

If the Bill is passed, the amendments will apply retrospectively from 12 February 2009. However, there will be transitional provisions to ensure that investors entering into relevant transactions prior to the Bill taking effect have a grace period in which to make an application.

Simplification of approvals for low risk proposals

Further proposed amendments to the FATA not included in the 20 August 2009 Bill, intended to simplify the approval process for low risk foreign investment proposals, were flagged in a media release issued by the Federal Treasurer on 4 August 2009. It is likely that these amendments will be introduced into Parliament this September.

The proposed amendments include:

- replacing various existing thresholds for notifications of acquisitions with a single 'higher' threshold (which is more than double the existing threshold);
- indexing this threshold against GDP to avoid it becoming more restrictive over time; and
- abolishing the notification requirement for private foreign investors intending to establish a new business in Australia valued above \$10 million.

However, these amendments, if passed, will only apply to private investors. Investment proposals by foreign governments and sovereign wealth funds for any level of investment will still need to be notified. Also, examination of investment proposals in sensitive areas such as urban land and media will not change.

Implications for Foreign Investors

If the amendments are passed as currently proposed, foreign investors proposing to invest into Australia will need to take them into account when determining whether or not approval is required for future investment proposals. Also, investors involved in acquisitions from 12 February 2009 onwards who have not sought approval will have to consider whether the first set of proposed amendments would apply to their investments.

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