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FROM THE BACK

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FIRB CHANGES – NATIONAL SECURITY TEST

Major changes have been announced to Australia's Foreign Investment Review Board (FIRB) regime. The changes represent the most significant overhaul of the FIRB regime in over 20 years. The changes are proposed to take effect from 1 January 2021.

Summary of the key changes

- A new 'national security test', allowing FIRB to impose conditions or block any investment by a foreign person on national security grounds (regardless of the value of the investment).
- A permanent \$0 threshold for all foreign investments in a 'sensitive national security business' (i.e. mandatory notification to FIRB).
- 'Sensitive national security business' not yet defined but contemplated to include industries in:
 - Critical infrastructure or telecommunications;
 - Manufacture or supply of defence or national security-related goods;
 - Businesses or land situated near defence or national security installations; and
 - Collection or storage of sensitive data relating to national security or defence.
- An ability for FIRB to 'call in' investments that would not ordinarily require notification for screening on national security grounds. The 'call in' power must be exercised during a prescribed period, and the acquirer has an added option to voluntarily notify FIRB and require an assessment as to whether the 'call in' power will be exercised, for greater certainty.
- Where new national security concerns arise, FIRB will have the power to impose new conditions and potentially require divestment of any investment 'as a last resort' even after approval has already been granted.
- Requirement to notify FIRB that a certain proposed action has actually occurred (i.e. whether a transaction has proceeded or been terminated).
- Reform to the foreign investment fees framework (but no specifics on any fee increases provided yet).
- Greater monitoring and investigative powers given to the Government to ensure compliance and address suspected breaches.
- Enhanced information sharing of foreign investment information.
- Tougher penalties for breaches.

Our thoughts

The power of FIRB to 'call in' investments and require divestment post-approval is particularly notable and may need to be considered in the deal-making stage of transactions (e.g. inserting a condition precedent that the transaction is not called in during the prescribed period or that the acquirer has given a voluntary notification and not been called in).

If you have any queries or require more information, please contact our office at info@leakerpartners.com.au or on (08) 9324 8590.