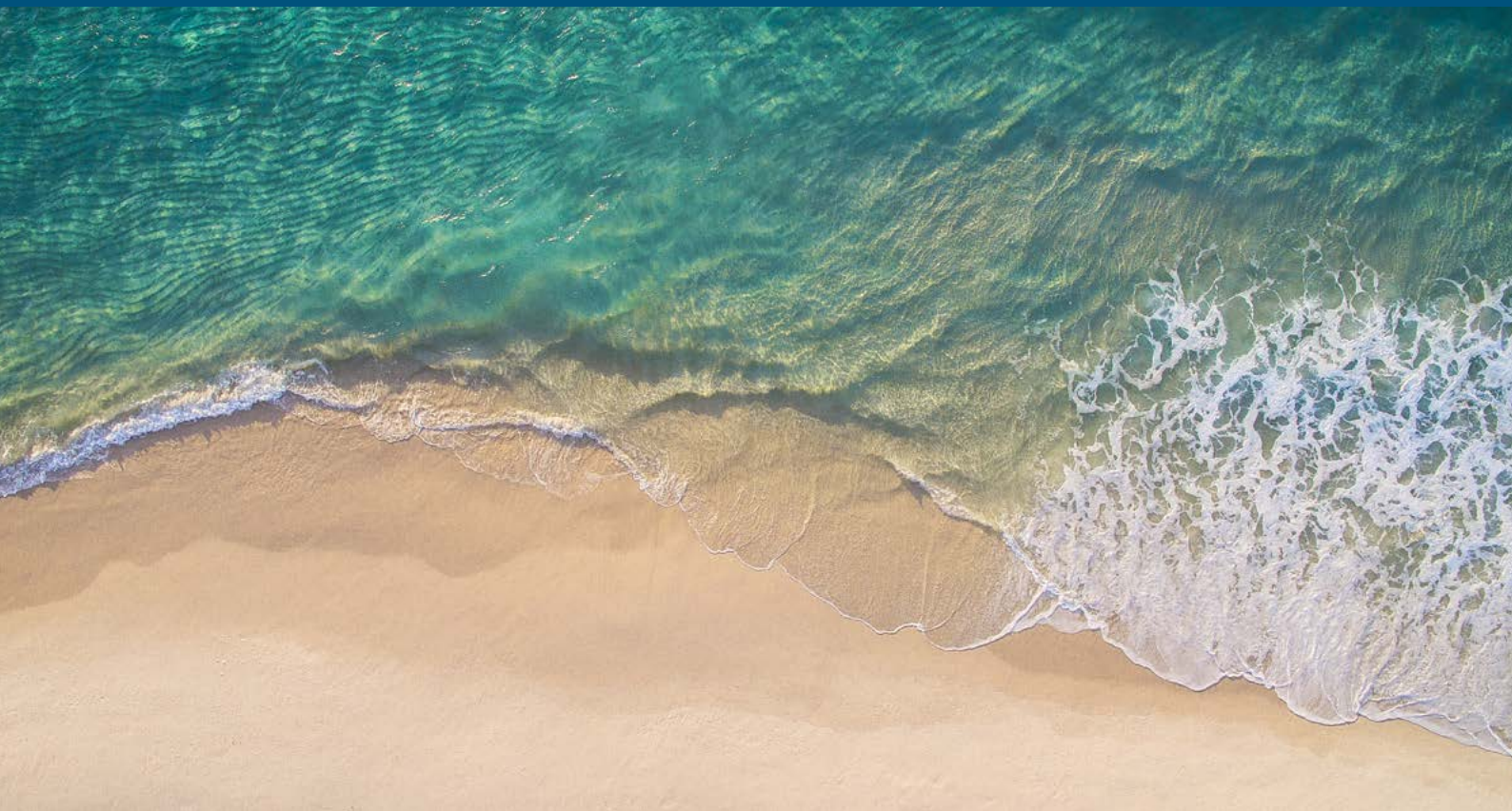




HERBERT  
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# AUSTRALIAN FOREIGN DIRECT INVESTMENT GUIDE

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## **Key issues to consider on Australia's FIRB regime**

# 1. Key issues to consider on Australia's FIRB regime

Whilst Australia's federal government welcomes foreign investment and has a strong track record of supporting foreign investment, Australia's foreign direct investment (**FDI**) regime, administered by the Foreign Investment Review Board (**FIRB**), is becoming increasingly complicated and requires careful consideration by foreign investors and their advisers in relation to any potential investment opportunity.

In preparing this FIRB Guide, we have set out below the key questions that a foreign investor should consider prior to executing on an Australian investment from a FIRB perspective.

No	Key Question	Section
1	Is the <b>investor</b> captured by the FIRB regime?	Section 3 (Who is captured by Australia's FIRB regime?)
2	Does the <b>nature of the investment</b> fall within the FIRB regime?	Section 4 (Investments regulated under the FIRB regime) Section 11 (Investment in businesses and entities) Section 12 (Investment in Australian land) Section 13 (Investment in Australia's resources sector)
3	Does the proposed investment trigger a <b>mandatory</b> FIRB filing?	Section 5 (When is FIRB notification required?) Section 6 (National security considerations) <a href="#">Attachment 1</a> (Monetary Thresholds)
4	Do any <b>exemptions</b> apply to the action being taken by the foreign investor?	Section 15 (Exemptions)
5	What are the <b>procedural considerations</b> for a FIRB filing? For example, what FIRB <b>filing fee</b> applies?	Section 16 (Procedural issues) <a href="#">Attachment 2</a> (FIRB application fee regime)
6	What are the <b>Treasurer's enforcement and supervisory powers</b> and the <b>obligations</b> that can be imposed on an investor?	Section 7 (National interest test) Section 9 (Conditions) Section 10 (Variations to FIRB approvals) Section 14 (The Treasurer's enforcement and supervisory powers) Section 17 (Compliance)

The Australian foreign investment rules are complex and this guide should not be taken as an exhaustive commentary of the FIRB regime.

For more information or assistance with your foreign investment queries, please do not hesitate to [contact us](#).

An aerial photograph of a mangrove forest. A central waterway, colored in shades of yellow and green, winds through the dense green vegetation. The trees are lush and vibrant, with some areas showing more yellowish-green foliage. The waterway is flanked by thick mangrove trees, and the overall scene is a rich, natural landscape.

# 2

## **Overview of Australia's FIRB regime**

## 2. Overview of Australia's FIRB regime

Foreign investment in Australia is regulated by a foreign investment regime which is intended to ensure that certain acquisitions by foreign persons align with Australia's national interests. Proposed acquisitions are assessed on a case-by-case basis under the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* (**FATA**) and the associated regulations.

### 2.1 FIRB Legislative Framework

The following legislation and regulations set out the FIRB regime, in addition to FATA:

- *Foreign Acquisitions and Takeovers Regulation 2015 (Cth)* (**FATR**);
- *Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth)*; and
- *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Cth)*.

The broader FIRB regime is also supported by [Australia's Foreign Investment Policy](#) (the **Policy**), [Guidance Notes](#) issued by the Australian Federal Treasurer (**Treasurer**) and sector specific legislation (eg *Security of Critical Infrastructure Act 2018 (Cth)*). However, it is important to note that neither the Guidance Notes nor the Policy are legally binding.

### 2.2 Overview of the Treasurer's role in FIRB process

The FATA empowers the Treasurer to prohibit certain proposed acquisitions by foreign persons where the Treasurer considers such acquisitions to be contrary to Australia's national interests. Acquisitions relevant to the Treasurer include those by foreign persons of:

- certain Australian assets or securities in Australian corporations;
- certain interests in foreign corporations that hold specified Australian assets or entities; or
- interests in Australian real property.

The FIRB regime is multi-layered with specific rules, thresholds and exceptions applying to certain investors and acquisitions.

The Treasurer is advised by FIRB, which reviews foreign investment proposals and assesses their implications on Australia's national security interests. Other consultation agencies advise and support the Treasurer and/or FIRB, including the Australian Competition and Consumer Commission (**ACCC**) from a competition perspective and the Australian Taxation Office (**ATO**) from a taxation perspective.

A failure to obtain the Treasurer's approval before proceeding with an acquisition or entering into an unconditional agreement (where approval is mandatory or where voluntary approval has been sought and not yet obtained) is a criminal offence.

The Treasurer's approval may be subject to conditions designed to ensure the proposed acquisition is not contrary to national interests. Where investments have already been implemented without prior FIRB approval, the Treasurer can make a divestment order requiring disposal (or can retrospectively impose conditions). In instances where a FIRB application is not mandatory, but no FIRB application has been made prior to a reviewable action, the Treasurer possesses 'call-in' powers to review the relevant action retrospectively for a period of up to 10 years.



**3**

**Who is captured by  
Australia's FIRB regime?**



## 3. Who is captured by Australia's FIRB regime?

### 3.1 Overview

The Australian foreign investment regime regulates the investment activities of 'foreign persons' in Australia. A 'foreign person' is defined to include:<sup>1</sup>

- an individual not ordinarily resident in Australia;
- a foreign government or a foreign government investor;
- a corporation, trustee, or general partner of a limited partnership in which a foreign corporation, foreign government or an individual not ordinarily resident in Australia holds a 'substantial interest' (being **at least 20%**); or
- a corporation, trustee, or general partner of a limited partnership in which two or more foreign persons hold an 'aggregate substantial interest' (being **at least 40%**).

#### Foreign holdings of less than 5%

If an entity is listed on the Australian Stock Exchange (**ASX**) and the total foreign holdings are **less than 5%**, it is not necessary to include such holdings in determining 'aggregate substantial interest'.<sup>2</sup> This is because foreign holdings that are **less than 5%** are not captured within the meaning of substantial holdings under the *Corporations Act 2001* (Cth).<sup>3</sup> As a practical matter, this means that companies listed on the ASX can determine whether they are foreign persons for the purpose of the FIRB regime based on the substantial shareholder notices lodged pursuant to section 671B of the *Corporations Act 2001* (Cth).

### 3.2 Foreign government investors: more scrutiny and approvals required

Foreign government investors are subject to more stringent rules and are often subject to more rigorous screening than private investors.

In practice, this is reflected in a nil monetary threshold for foreign government investors for FIRB applications and lower interest triggers for notifying the Treasurer. For example, foreign persons (who are not also foreign government investors) generally only need to give notice of substantial interests or aggregate substantial interests, and then only above specified financial thresholds.<sup>4</sup> This is contrasted with foreign government investors who must give notice to FIRB of proposed acquisitions of interest in **10% or more** of an Australian entity, regardless of value.<sup>5</sup>



#### Perceived or actual relationship to an FGI?

It is important foreign investors with actual or perceived relationships to a foreign government or a foreign government entity carefully consider whether they are captured within the definition of a 'foreign government investor' for FIRB purposes.

In practice, many private equity investors (particularly those from the United States) are captured within the definition of foreign government investors by virtue of upstream investors which are sovereign wealth funds and state or local government pension funds.

The definition of a 'foreign government investor' is expansive and includes:<sup>6</sup>

- foreign governments (which includes any body politic of 'part of' a foreign country), government entities and their agencies; or
- corporations, trustees of a trust, or a general partner of a limited partnership, in which:
  - a foreign government, another foreign government investor or separate government entity, alone or together with one or more of their associates holds a substantial interest of **at least 20%**; or
  - foreign governments, other foreign government investors or separate government entities of more than one foreign country (or parts of more than one foreign country), together with one or more of their associates holds an aggregate interest of **at least 40%**.

FIRB takes a broad interpretation of foreign government investors and its agencies such that public pensions funds, sovereign wealth funds, state-owned enterprises and public university endowment funds are captured within the definition. The concept of 'associates' as it applies in this context further broadens the reach – see section 3.3 below.

## 3. Who is captured by Australia's FIRB regime? (continued)



### Private Capital

**#1** Financial sponsors and private capital investors should be cognisant of the ultimate investor make-up of their respective funds as this is critical in informing whether FIRB approval is required for any Australian investments. This is particularly important as many private capital investors, and by extension their portfolio companies, may be treated as 'foreign government investors' for the purposes of the FIRB regime because of upstream ownership by entities and agencies associated with foreign governments (both national and local).

**#2** Private capital investors should be aware that FGI status is tested for each vehicle that comprises a fund (with 'associate' rules infiltrating the broader fund as well as downstream 'tracing' once one vehicle is deemed to be an FGI). As such, structuring of the fund can play a crucial role in whether FIRB approval for a specific investment is required or not.

**#3** On a practical note, if a fund is a limited partnership, the FIRB application will need to disclose the identity and country of origin of limited partners that hold an interest of **5% or more** in the fund. It is important that limited partners are aware of this.

### Foreign persons

Under the FATA, the term 'associate' is intended to be broad. The definition, amongst other things, encompasses:<sup>10</sup>

- any relatives;
- persons acting in concert;
- any persons who carry on a business in partnership (subject to certain exceptions, including for limited partners in a limited partnership);<sup>11</sup>
- any holding entities or senior officers of the entity;
- any corporations in which a person holds a substantial interest; or
- an entity if the person is either formally or informally accustomed or obligated to act in accordance with the directions.

### Foreign Government Investors

In relation to foreign government investors, the FATA states that an associate may include any other:

- person that is a foreign government in relation to that country;
- person that is a separate government entity in relation to that country; or
- foreign government investor in relation to that country.<sup>12</sup>

In practice, when coupled with the fact that the definition of 'foreign government' extends to governments of any part of a foreign country, this means that any local or national government agency or entity of a particular country (say, the United States) will be treated as an associate of any other such agency or entity from the same country regardless of whether there is an economic, operational, political or other relationship between those parties (for example, they could be from entirely different States or municipalities).

### 3.3 Associates

The definition of 'associate' for FIRB purposes is central to the calculation of interests and whether a foreign person will be deemed to have met the interest thresholds requiring that person to seek FIRB approval.

For instance, when determining whether a foreign person has a substantial interest in an entity, both the foreign investor's interest in that entity and their associates' interests in that entity are considered in aggregate.<sup>7</sup>

Other key examples include when considering:

- **agricultural land:** the threshold test for an acquisition of agricultural land, the total value of all agricultural land interests held by the foreign investor and their associates are considered,<sup>8</sup> and
- **change of control:** if there is a change of control, then FIRB may consider if one or more foreign persons have control together.<sup>9</sup>

### 3.4 Tracing rules that apply for FATA purposes<sup>13</sup>

Tracing mechanisms operate to determine whether a foreign person requires FIRB approval for a proposed acquisition by considering what interests are being acquired by the relevant parties. Substantial interests of **at least 20%** are traced through a chain of corporations, trusts and unincorporated limited partnerships – regardless of practical control.

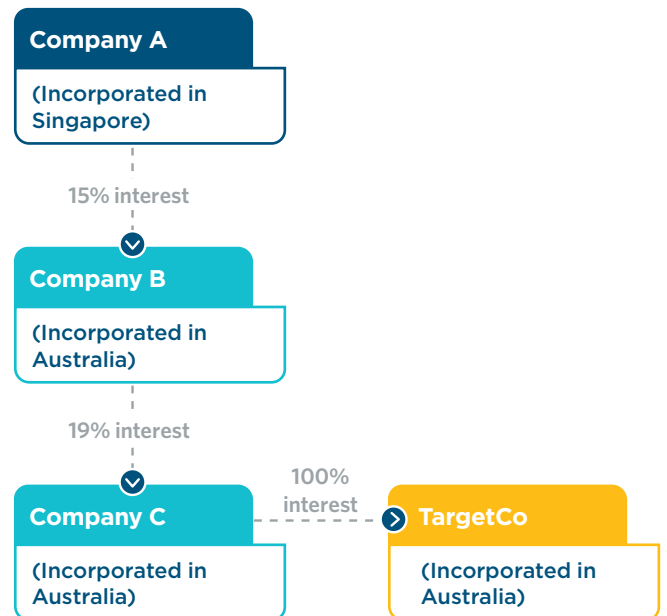
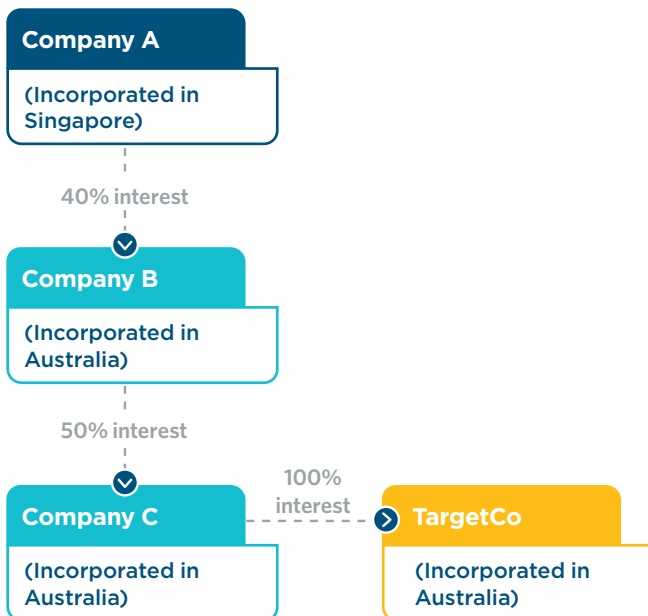
The practical effect of the tracing rules is that an entity may be classed as a foreign person because an upstream entity (ie, the higher entity) has a substantial interest in a downstream entity. Depending on the nature of the upstream entity, this may also result in the downstream entity (even an Australian private company) being regarded as a foreign government investor for FATA purposes. There is no limit on the number of layers FIRB may trace through.

#### Example 1: Foreign person – upstream substantial interest of foreign investor

Company A is a foreign person (not a foreign government investor) and holds a 40% interest in Company B. Company B holds a 50% interest in Company C. Both Company B and Company C are Australian companies but would be considered a foreign person under the FIRB regime because a substantial interest in each of these companies is held by a foreign person, being Company A.

#### Example 2: Foreign person – no upstream substantial interest of foreign investor

Company A holds a 15% interest in Company B and Company B holds a 19% interest in Company C. In this example, Company C will not be regarded as a foreign person (nor will Company A be regarded as acquiring any interest in Target Co) as Company A does not hold a substantial interest in Company B.

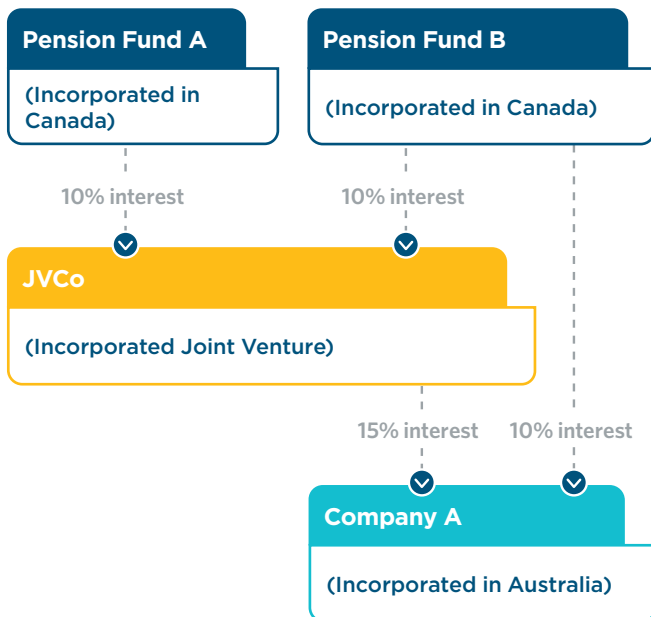


In these circumstances, Company C will need to notify the Treasurer of a proposed acquisition of an Australian target, TargetCo, by operation of the tracing rules, subject to meeting the other thresholds for a mandatory FIRB filing.

### 3. Who is captured by Australia's FIRB regime? (continued)

#### Example 3: Upstream FGI and FGI aggregation rules

Pension Fund A (a Canadian foreign government investor) holds a 10% interest in an incorporated joint venture, JVCo. Pension Fund B (also a Canadian foreign government investor) holds an additional 10% interest in JVCo. JVCo along with Pension Fund B own a combined 25% interest in Company A.



In this scenario, as Pension Fund A and Pension Fund B are both foreign government investors from the same foreign country, their interests will be aggregated as they are considered to be 'associates'.<sup>14</sup> As a result, Pension Fund A and Pension Fund B together hold a substantial interest of 20% in JVCo and due to this aggregation of interests, JVCo will also be deemed to be a foreign government investor.

Additionally, Company A will also be deemed to be a foreign government investor as Pension Fund B and JVCo are both foreign government investors from the same foreign country and their interests in Company A, once aggregated, is also a substantial interest.<sup>15</sup>

#### 3.5 Deeming rules for discretionary trusts

When determining the percentage of interest a person has in an entity or discretionary trust, regard must be had to section 18 of the FATA. Each beneficiary of a discretionary trust is taken to hold a beneficial interest in the maximum percentage of income or property of the trust that the trustee may distribute to that beneficiary.<sup>16</sup>

In practice, this means that the trustee of a discretionary trust may be deemed a foreign person, if it has the power or discretion to distribute **20% or more** of the income or property of the trust to any potential foreign beneficiary. This is irrespective of whether the trustee has historically exercised, or intends to exercise, their discretion in favour of the foreign beneficiary.

If there is a desire to ensure that a discretionary trust is not deemed to be a foreign person, by virtue of the application of the broad deeming rules in section 18(3) of the FATA, trust deeds should make it clear that there are no beneficiaries which are not residents and that the trustee is unable to distribute income or property to foreign residents.



#### Discretionary trusts

It is very common for Australian discretionary trusts to have an extensive and not necessarily identifiable category of potential beneficiaries. The broad deeming provision may have the effect of making many Australian family trusts and family offices technically foreign (for example, because there is a potential beneficiary that is not an Australian resident and lives overseas) — even where no foreign person has any influence or control over the activities of the trust or assets owned by the trust and in many cases, where a foreign beneficiary has not received any distributions, or received only a small amount of distributions.



# **4** Investments regulated under the FIRB regime

## 4. Investments regulated under the FIRB regime

### 4.1 General

Where an intending investor is a 'foreign person' or a 'foreign government investor', whether FIRB approval is required will depend on the nature of the investment being made. Broadly, the Australian regime regulates:


- the acquisition of certain types of interests in:
  - Australian corporations or unit trusts;
  - Australian businesses (or the assets of such businesses); or
  - Australian land (including mining or production tenements); and
- the starting of certain businesses in Australia.

Particular scrutiny will apply where the investment has a national security component – see further section 6.

### 4.2 Entities and business

#### Types of interest regulated

In the case of an acquisition of interests in an Australian corporation or unit trust (or in an Australian business), the Australian foreign investment legislation and regulation distinguish between 'direct interests', 'substantial interests' and 'aggregate substantial interests'.

Type of Interest	Description
<b>Direct Interest</b> (Entities or businesses)	<p>A <b>direct interest</b> exists where a person (individually or with associates) holds:</p> <ul style="list-style-type: none"> <li>• an interest of <b>at least 10%</b> in the entity or business;<sup>17</sup></li> <li>• an interest of <b>at least 5%</b> in the entity or business and the person who acquires the interest has entered into a legal arrangement relating to the business of the person and the entity or business;<sup>18</sup> or</li> <li>• an interest of any percentage in the business or entity, and the person who acquires the interest is in a position to:               <ul style="list-style-type: none"> <li>◦ influence or participate in the central management and control of the entity or business; or</li> <li>◦ influence or participate in the policy of the entity or the business.<sup>19</sup></li> </ul> </li> </ul>
	<div style="background-color: #00a0c0; color: white; padding: 5px; border-radius: 5px;">  <b>Investors beware about 'indirect' direct interests</b> </div> <p>Despite being classified as 'direct interests', investors should not be misled regarding the application of direct interests in the FIRB context. A foreign person may <b>indirectly</b> acquire a <b>direct interest</b> in an entity or business by virtue of the application of the tracing provisions. For further information, see section 3.4 above. There is a mismatch of percentages also, an interest of at least 20% at the 'higher' or upstream levels is required to trigger the tracing provisions but only 10% is required when considering the relevant Australian entity or business.</p>
<b>Substantial Interest</b> (Entities only)	<p>A person (alone or with associates) has a <b>substantial interest</b> in an Australian corporation or trust if it holds an interest of <b>at least 20%</b> in the corporation or a beneficial interest in <b>at least 20%</b> of the income or trust property.<sup>20</sup></p>
<b>Aggregate Substantial Interest</b> (Entities only)	<p>An aggregate substantial interest arises where two or more persons (alone or with associates) hold an <b>aggregate substantial interest</b> of <b>at least 40%</b> in the corporation or a beneficial interest of <b>at least 40%</b> of the income or trust property.<sup>21</sup></p>

### An 'acquisition' is required

A foreign person acquires an interest in an entity's securities or in Australian land when it:<sup>22</sup>

- enters into an agreement;<sup>23</sup>
- has a right to acquire such an interest under an option;<sup>24</sup> or
- has a right, other than by reason of having an interest under a trust, to have such an interest transferred to itself or its associates.<sup>25</sup>

Where an agreement does not become binding on a foreign person until one or more conditions are met then that foreign person is only deemed to have entered that agreement when such conditions are satisfied. Otherwise, a foreign person still acquires the interest:<sup>26</sup>

- whether or not the right or option is presently exercisable or exercisable in the future; or
- if the agreement, right or option requires fulfilment of a condition.

Another important distinction is when a foreign person is deemed to acquire an interest. The term 'acquires' under FATA is broader than what is typically meant by an acquisition. The below demonstrates some examples of when an interest is 'acquired' under the FATA.

Type of Acquisition	Description
<b>Acquiring an initial interest</b>	Where a foreign person starts to hold an interest in the entity. For example: a foreign person initially having a nil% interest and then acquiring a direct interest of 10%. <sup>27</sup>
<b>Acquiring voting rights</b>	Where a foreign person has voting rights in an entity or potential voting power. Potential voting power in this sense assumes any right to acquire new votes has been exercised. It also refers to any legal or equitable interest including options or conditional agreements. Where a foreign person has a veto power, the FATA deems that foreign person to be in a position to control 20% of potential voting power in the entity. <sup>28</sup>
<b>Acquiring a further interest</b>	Where a foreign person already holds an interest and then acquires a further interest that foreign person is considered to acquire the whole interest. For example, where a foreign person initially holds a 10% interest in an entity and then acquires a further 15% interest, then the FATA would consider the initial 10% interest together with the 15% interest and the foreign person would therefore be 'acquiring' a 25% interest, being a substantial interest, in the entity. <sup>29</sup>



### Additional Interests

Where a foreign person has initially completed a notifiable or a notifiable national security action then, subject to the relevant monetary threshold being met, any further acquisitions of that entity will generally require prior FIRB approval.

Moreover, foreign persons should consider what interests their associates (per section 3.3) and related group entities (tracing rules per section 3.4) are holding as this will also impact the relevant interest that a foreign person 'acquires'.

## 4. Investments regulated under the FIRB regime (continued)

### Implications of tracing rules

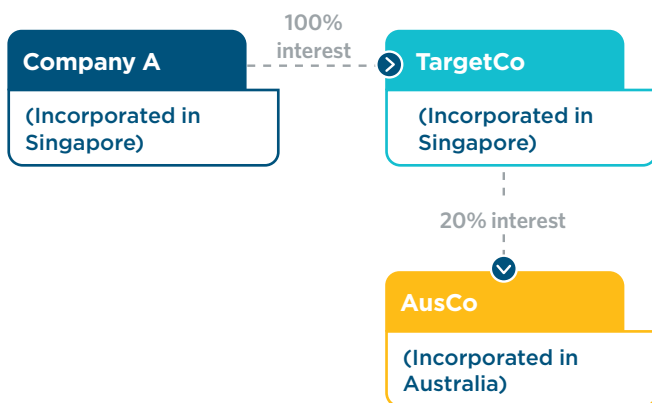
The tracing rules discussed in section 3.4 above will generally apply to determine where a foreign person is acquiring a regulated interest.

However, importantly the tracing provisions **do not apply** to foreign persons (who are not foreign government investors) for the purposes of determining whether:<sup>30</sup>

- a foreign person has a direct interest in an Australian entity or business that is an agribusiness; or
- an acquisition by a foreign person of a substantial interest in an Australian entity is a notifiable action.

The rationale for this exemption is to ensure that offshore transactions or acquisitions of interests that are remote to Australia do not become notifiable provided that the acquirer is a foreign person that is not a foreign government investor.<sup>31</sup> We have illustrated this in example below:

Company A, a foreign person, not being a foreign government investor, is acquiring 100% of TargetCo, who is also a foreign person. TargetCo has a downstream substantial interest in AusCo, which is an Australian company.



In this example, the acquisition of a substantial interest in AusCo will **not** be a notifiable action. In other words, for the purposes of determining whether Company A has a mandatory FIRB notification obligation, the tracing rules will not apply, and Company A will not by virtue of acquiring TargetCo be taken to have made a 20%+ investment in AusCo.

The position would be different if Company A was a foreign government investor (although there is a de minimis exemption that can apply for foreign government investors in relation to offshore acquisitions – see section 15.3 below). Likewise, the exemption from the tracing rules does not prevent the transaction being a significant action (such that voluntary notification may be sought to avoid the potential exercise of the Treasurer’s ‘call-in’ power), nor does it preclude the transaction being deemed a notifiable national security action or a reviewable national security action (as to which see sections 5.2 and 6.3).

### Common scenarios – investments in businesses and entities

See section 11 for further discussion of the Australian foreign investment regime for investments in Australian businesses and entities (and section 13.3 in relation to mining, production or exploration entities).

#### 4.3 Land and tenements

Specific rules apply in relation to acquisitions of interests in Australian land (including mining and production tenements). These are discussed in more detail in sections 12 and 13.

#### 4.4 Starting businesses

In certain circumstances the very act of starting a new business in Australia can require FIRB notification and approval. Specifically, this applies in relation to foreign government investors starting an Australian business, and foreign persons (of any type) starting a national security business.

#### 4.5 Acceleration of agreements

For most purposes under the legislation, a party is deemed to have taken an action when it has entered into an agreement to take the action. That means, for example, an agreement to acquire 20% of the shares in a company at a future time will be taken to be an acquisition of the 20% interest at the time the agreement is entered into.

There is an exemption for agreements which are subject to a condition precedent, such that the right to acquire the interest is not yet legally binding. Under such agreements, the action is not deemed to be taken when the agreement is entered into but rather when the relevant condition precedent under the agreement is satisfied.





**5**

**When is FIRB  
notification required?**

## 5. When is FIRB notification required?

### 5.1 Mandatory vs voluntary notifications

A proposed foreign investment by a foreign person in Australia may require a mandatory or voluntary filing with FIRB, depending on the specific qualification of the proposed action.

Notifications are made via an online portal and are subject to an application fee. Fees scale by transaction type and value and can be significant – see section 16.1 and [Attachment 2](#),

Under the FATA, an investment undertaken by a foreign person may be classified as:

- a ‘notifiable action’, a ‘notifiable and significant action’ or a ‘notifiable national security action’ – actions requiring **mandatory notification**; or
- a ‘significant action’ or a ‘reviewable national security action’ – actions which may at the discretion of the investor be **voluntarily notified** to the Treasurer.

### 5.2 Overview of actions



- Voluntary Notification; and ● Mandatory Notification.

Overview of Actions	
<b>Notifiable Action</b>	<p>A foreign person <b>must</b> seek FIRB approval before it:<sup>32</sup></p> <ul style="list-style-type: none"> <li>• acquires a direct interest (being <b>at least 10%</b>) in an Australian entity that is an agribusiness or Australian business that is an agribusiness;</li> <li>• acquires a substantial interest (being <b>at least 20%</b>) in an Australian entity; or</li> <li>• acquires an interest in Australian land,</li> </ul> <p><b>unless</b> the transaction falls below the applicable monetary threshold (see <a href="#">Attachment 1</a>).</p> <p>The thresholds for a foreign government investor are lower than foreign persons generally. Foreign government investors must seek FIRB approval before:<sup>33</sup></p> <ul style="list-style-type: none"> <li>• acquiring a direct interest in an Australian entity or business;</li> <li>• starting an Australian business; or</li> <li>• acquiring: <ul style="list-style-type: none"> <li>◦ a legal or equitable interest in a tenement; or</li> <li>◦ an interest of at least 10% in securities in a mining, production or exploration entity.</li> </ul> </li> </ul>
<b>Significant Action</b>	<p>A proposed action to acquire interests in Australian land, assets or securities or an action in respect of businesses and entities linked to Australia may be a <b>significant action</b> under the FIRB regime.</p> <p>However, specific conditions dependent on the type of action must be met before an action is considered a significant action.</p> <p>Generally, actions by foreign persons that relate to:</p> <ul style="list-style-type: none"> <li>• Australian land requires an acquisition of an interest in Australian land and the relevant monetary threshold to be met;<sup>34</sup> and</li> <li>• entities or businesses require a change in control and the relevant monetary threshold to be met.<sup>35</sup></li> </ul> <p>The applicable monetary thresholds are set out in <a href="#">Attachment 1</a>.</p> <p>For foreign government investors, the lower thresholds which apply to ‘notifiable actions’ apply to ‘significant actions’.</p>

Overview of Actions	
<b>Notifiable and Significant Action</b>	<p>There is overlap between actions captured within the definition of 'notifiable action' and 'significant action', and which are thereby required to be notified to the Treasurer.</p> <p>Some actions which are both <b>significant actions</b> and <b>notifiable actions</b> include where:</p> <ul style="list-style-type: none"> <li>• a foreign person acquires a direct interest in an Australian media business;<sup>36</sup></li> <li>• a foreign government investor acquires a direct interest in an Australian entity or business;<sup>37</sup></li> <li>• a foreign government investor starts an Australian business;<sup>38</sup></li> <li>• a foreign government investor acquires a legal or equitable interest in a tenement or at least 10% in securities in a mining, production or exploration entity;<sup>39</sup> and</li> <li>• a foreign person acquires an interest in Australian land which exceeds the monetary thresholds (see <a href="#">Attachment 1</a>) subject to relevant exceptions.<sup>40</sup></li> </ul>
<b>Notifiable National Security Action</b>	<p><b>Notifiable national security actions</b> are when a foreign person:</p> <ul style="list-style-type: none"> <li>• starts a national security business;<sup>41</sup></li> <li>• acquires a direct interest in a national security business;<sup>42</sup></li> <li>• acquires a direct interest in an entity that carries on a national security business;<sup>43</sup></li> <li>• acquires an interest in national security land;<sup>44</sup> or</li> <li>• acquires an interest in an exploration tenement in respect of national security land.<sup>45</sup></li> </ul> <p>See further section 6 below.</p>
<b>Reviewable National Security Action</b>	<p>A <b>reviewable national security action</b> encompasses certain actions by foreign persons which do not already fall within the scope of significant actions, notifiable actions or notifiable national security actions.<sup>46</sup></p> <p>Further detail regarding reviewable national security actions is contained in section 6.3.</p>

### 5.3 Voluntary Notification: pros and cons

Where a proposal constitutes a significant action or reviewable national security action (and is not otherwise in a mandatory notification category) the decision to voluntarily make a FIRB application is a commercial decision that hinges on numerous factors and whether a FIRB application should be voluntarily submitted should be assessed on a case-by-case basis.

 <b>Advantages of Voluntary Notification</b>	 <b>Disadvantages of Voluntary Notification</b>
<ol style="list-style-type: none"> <li>1. Extinguishes the Treasurer's ability to 'call-in' that which was not notified to FIRB, which may in extreme circumstances result in a divestment order by the Treasurer on national security grounds (see section 14.2 below).</li> <li>2. Engagement with FIRB may improve both general public and FIRB perception of the applicant which may assist for future investments which could involve a mandatory FIRB filing.</li> <li>3. A foreign investor may gain a better understanding of the FIRB application process, particularly if the foreign investor is intending to engage in significant investments in Australia (either generally or as a follow-on in relation to the specific entity or asset).</li> <li>4. Voluntary notification is specifically recommended by FIRB in certain circumstances.</li> <li>5. Can increase transaction certainty as any conditions that would be imposed by FIRB (ie on exercise of the 'call-in' power) are known and can be assessed prior to completion of the transaction.</li> </ol>	<ol style="list-style-type: none"> <li>1. Cannot extinguish the 'last resort' power in any event.<sup>47</sup></li> <li>2. Potential transaction delays as once notified to FIRB (even voluntarily), a transaction must not complete until a decision has been made. As a result, there can be a material disadvantage in competitive sales processes and may be discouraged by vendors/targets.</li> <li>3. FIRB filing will attract a filing fee, which is dependent on the value and type of transaction and is not refundable.</li> <li>4. Administratively onerous conditions (such as tax conditions and use and storage of data conditions) may be imposed on applicants.</li> <li>5. The FIRB process may open the applicant to scrutiny and questions from other regulators such as the ATO and ACCC, which may not arise if there is no voluntary application.</li> </ol>



# 6

## National security considerations

## 6. National security considerations

### 6.1 Notifiable national security actions

Investments with national security implications are subject to particular scrutiny and a more onerous notification regime. As set out in section 5.2, 'notifiable national security actions' are when a foreign person:<sup>48</sup>

- starts a national security business;
- acquires a direct interest in a national security business;
- acquires a direct interest in an entity that carries on a national security business;
- acquires an interest in national security land; or
- acquires an interest in an exploration tenement in respect of national security land.



#### Knowledge qualification

Investors should be aware that a business will only be deemed a **national security business** if it is publicly known, or could be known by making reasonable inquiries, that the business meets the criteria for being a national security business.

Similarly, the definition of **national security land** is limited by the requirement that the existence of an interest in the land is publicly known, or could be known by making reasonable inquiries, that it is held by an agency in the National Intelligence Community.

Notifiable national security actions are subject to a nil dollar threshold, which means that they are mandatorily notifiable irrespective of value. In effect, a foreign person must notify the Treasurer of a notifiable national security action and receive a no objection notification or an exemption certificate before commencing the action.

Upon receiving notice of a notifiable national security action, the Treasurer may:<sup>49</sup>

- provide a no objection notification without imposing conditions;
- provide a no objection notification subject to conditions; or
- make an order prohibiting the proposed action on national security grounds.

### 6.2 National security assets

#### National security businesses – scope

The concept of 'national security business' is broadly defined in the FIRB legislation and captures:<sup>50</sup>

- 'direct interest' holders (as defined in the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**), as opposed to the different term of the same name defined in the FATA) in critical infrastructure assets;<sup>51</sup>
- a carrier or nominated carriage service provider (as declared by the Minister of an Australian state or territory) to which the *Telecommunications Act 1997* (Cth) applies;<sup>52</sup>
- businesses which develop, manufacture or supply critical goods or critical technology that are intended for military or intelligence use (whether in relation to Australia or a foreign country) or provide critical services to them;<sup>53</sup>
- businesses which store or have access to information that has a security classification;<sup>54</sup> and
- businesses which collect, store or maintain personal information about national defence or intelligence personnel which, if accessed, could compromise national security.<sup>55</sup>

#### Critical infrastructure assets

In line with the key principles of the SOCI Act, to strengthen the security and resilience of critical infrastructure by capturing sectors and asset classes essential to Australia, the responsible entities for businesses deemed critical in the following sectors are also captured within the perimeters of national security businesses:

Critical Infrastructure Sector	Critical Infrastructure Assets
<b>Communications</b>	1. Telecommunications
	2. Broadcasting
	3. Domain Name Systems
<b>Defence Industry</b>	4. Defence
<b>Data Storage and Processing</b>	5. Data Storage and Processing
<b>Energy</b>	6. Electricity
	7. Gas
	8. Energy Market Operator
	9. Liquid Fuel
<b>Financial Services</b>	10. Banking
	11. Superannuation
	12. Insurance
	13. Financial Markets Infrastructure (including Payment Services)

## 6. National security considerations (continued)

Critical Infrastructure Sector	Critical Infrastructure Assets
Food and Grocery	14. Food and Grocery
Health and Medical	15. Hospital
Transport	16. Ports
	17. Freight Infrastructure
	18. Freight Services
	19. Public Transport
	20. Aviation
Higher Education and Research	21. Education
Water and Sewage	22. Water and Sewerage
Space Technology	N/A



### Regulatory Sovereignty

In 2011, the Treasurer blocked an acquisition of ASX Limited, the owner/operator of the Australian Stock Exchange, by Singapore Exchange Limited (SGX), being the owner/operator of the Singapore Exchange.

A key consideration was that ASX Limited operates critical infrastructure which is required for the orderly and stable operation of Australia's capital markets. FIRB also noted that not having full regulatory oversight of the ASX Limited-SGX holding company would present material risks and supervisory issues impacting on the effective regulation of ASX Limited's operations, particularly in relation to its clearing and settlement functions.

This position was supported by key financial market regulators being the Reserve Bank of Australia and Australian Securities and Investments Commission.

A copy of the Treasurer's full statement can be found [here](#).

### Starting a national security business

A foreign person must seek approval prior to starting a national security business.<sup>56</sup>

Whether a foreign person is starting a new business activity which is considered to be a national security business depends on a range of factors and is decided on a case-by-case basis.<sup>57</sup> However, if a foreign person is already carrying on a national security business, creating a new entity or subsidiary will not be considered to constitute starting a business.<sup>58</sup>

### National security land

National security land includes:<sup>59</sup>

- 'defence premises' within the meaning of section 71A of the *Defence Act 1903* (Cth); and
- land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that is publicly known or could be known upon the making of reasonable enquiries.



### Acquisitions of interests in national security land

Consistent with the treatment of other types of land under the FIRB regime, acquisitions of interests in national security land are considered on a title-by-title basis. As a result, if a foreign person is intending to acquire two separate titles of national security land, this will require two separate FIRB applications.

In circumstances where a foreign investor acquires a portion of a title and that portion is not national security land, it will not require mandatory notification as a notifiable national security action.

### 6.3 Reviewable national security actions

A reviewable national security action encompasses certain actions by foreign persons which do not already fall within the scope of significant actions, notifiable actions or notifiable national security actions.

Foreign persons are not legally obliged to notify the Treasurer of reviewable national security actions. However, the Treasurer possesses 'call-in' powers capable of determining whether actions attract national security concerns for a period of up to 10 years.<sup>60</sup> Foreign persons may elect to voluntarily notify the Treasurer in relation to an action not mandatorily notifiable to obtain certainty around whether such action might subsequently be reviewed or not.

Reviewable national security actions arise in a range of scenarios where a significant action, notifiable action and notifiable national security action do not arise. We set out a summary of various examples below.



#### Conditions to address national security concerns

Consistent with an increasing global regulatory trend, national security has been a real focus area for FIRB for a number of years. However, it is usually the case that national security concerns can be addressed through conditions being imposed by FIRB on the prospective purchaser rather than outright prohibitions. Data security is a common issue in this regard and the imposition of strict controls around how sensitive data is accessed, managed and controlled (particularly by any persons or companies located offshore) are common for a business with sensitive data. We further explore FIRB conditions in section 9.

Scenario	Description
<b>Direct interest</b>	A reviewable national security action arises where a person will acquire a direct interest in an entity (and such acquisition is not already a notifiable or significant action – for example it does not relate to an agribusiness and is not by a foreign government investor).
<b>Position of influence</b>	<p>A reviewable national security action arises where a person takes or proposes to take an action to acquire an interest of any percentage in an entity, causing a foreign person to either be in a position or further position to influence or participate in:<sup>61</sup></p> <ul style="list-style-type: none"> <li>• the central management and control of the entity; or</li> <li>• the determination of the policy of the entity.</li> </ul> <p>Where the relevant acquisition is an interest in shares, the entity must be a corporation that carries on an Australian business or the holding entity of such a corporation.</p>
<b>Instructed by foreign persons</b>	A reviewable national security action arises where a person takes an action, or proposes to take an action, to enter an agreement about the affairs of an entity under which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions, or wishes of a foreign person who holds a direct interest in the entity. <sup>62</sup>
<b>Starts an Australian business</b>	Where a foreign person starts or proposes to start an Australian business, a reviewable national security action arises. <sup>63</sup>
<b>Dealing with Australian land</b>	An action may be a reviewable national security action where a foreign person takes or proposes to take an interest in Australian land. <sup>64</sup>



**7**

**National  
interest test**



## 7. National interest test

The Treasurer evaluates foreign investment proposals on a case-by-case basis, considering the 'National Interest Considerations' as set out in the Policy. The terms 'national interest' and 'national security' are not explicitly defined in the FATA and can be interpreted flexibly, taking into account all relevant circumstances.

The Policy outlines National Interest Considerations which the Australian Government must consider when assessing foreign investment proposals in all sectors of the economy.

It is important to note that the dominant assumption is that foreign investment is desirable for the economy. As such, foreign investments will generally not be considered contrary to national interest, except in rare circumstances. The preference is usually to seek to address concerns via the imposition of conditions, as opposed to blanket denials of approval.

FIRB will consult with other Australian government agencies (in particular the ATO and ACCC, but also security and other agencies where relevant) and seek their input to assist the evaluation of the national interest implications of any proposal (see further section 16.4).



### National Interest Considerations – Competition

FIRB have blocked transactions in the past on the basis of competition issues which in turn have national interest concerns. For example, in 2013, the Treasurer prohibited a proposed acquisition by Archer Daniels Midland Company (**ADM**) of a 100% interest in GrainCorp Limited (**GrainCorp**). The key consideration was that GrainCorp owned 28 up-storage sites and seven of the ten grain port terminals in New South Wales, Queensland and Victoria. Moreover, approximately 85% of eastern Australia's bulk grain exports were handled through one of GrainCorp's ports network. As such, industry participants had expressed concerns that the proposed acquisition could reduce competition and impede on growers' ability to access the grain storage, logistics and distribution network. The Treasurer also stated there were no appropriate conditions which could be imposed.

A copy of the Treasurer's full statement can be found [here](#).




### National Interest Considerations – Impact on the economy and community

An example of national interest considerations is the proposed acquisition by Wilmar International Limited (**Wilmar**) of Sucrogen Limited (**Sucrogen**) which was approved in 2010. In approving the transaction, the Treasurer imposed a condition that if Sucrogen acquired an interest in strategic sugar storage infrastructure owned by Sugar Terminals Limited, it must operate this infrastructure with proper regard to the broader interests of the industry and other participants. Moreover, the Treasurer required the seller in this transaction, CSR Limited, to undertake several reviews and actions to ensure it was still able to meet its ongoing obligation in relation to asbestos claims. Such arrangements provide an additional safeguard for current and future asbestos claimants and shows that the Treasurer may influence all parts of a transaction, not just the acquirer.

A copy of the Treasurer's full statement can be found [here](#).

## 7. National interest test (continued)

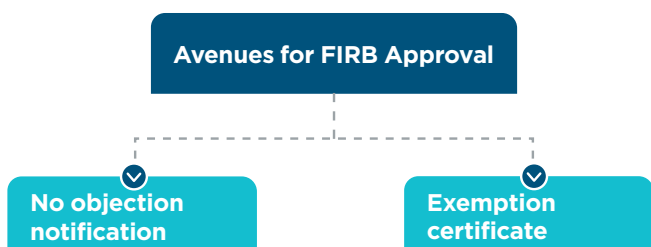
Consideration	Description
<b>National security</b>	The government considers the extent to which investments affect Australia's ability to protect its strategic and security interests.
<b>Competition</b>	<p>The government considers the impact of the proposed investment on diversity of ownership and competition within Australian industries and sectors.</p> <p>A particular consideration is whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service, either domestically or in the relevant global industry.</p> <p>The ACCC examines competition issues in accordance with Australia's competition policy regime. This examination is independent of Australia's foreign investment regime.</p>
<b>Other Australian government policies (including tax)</b>	<p>The government considers the impact of a foreign investment proposal on Australia's tax revenues.</p> <p>Other policies such as environmental policy may be considered, and a proposed investment will be assessed according to its consistency with those policy objectives.</p>
<b>Impact on the economy and the community</b>	The government considers the impact of the proposed investment on the general economy, including the impact of any plans to restructure an Australian enterprise following acquisition, the nature of the funding of the acquisition, and the level of Australian participation in the enterprise that will remain after the acquisition, as well as the interests of employees, creditors and other stakeholders.
<b>Character of the investor</b>	<p>The government considers the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision, as well as the investor's corporate governance practices.</p> <p>In the case of investors who are fund managers, including sovereign wealth funds, the government considers the fund's wealth policy. The government also reviews how fund managers propose to exercise their voting power in relation to Australian enterprises in which the fund proposes to take an interest.</p>
	<div style="background-color: #00a0c0; color: white; padding: 5px; display: flex; align-items: center;">  <span style="margin-left: 10px;"><b>Transparency is key</b></span> </div> <p style="background-color: #e0e0e0; padding: 5px; margin-top: 5px;">In our experience, proposals by foreign investors that operate on a transparent and commercial basis are less likely to raise national interest concerns.</p>
<b>Additional factors</b>	The government will pay specific attention as to whether Australia's national interest is served in transactions involving the agricultural sector, residential land and foreign government investors.



8

## Types of FIRB approvals

## 8. Types of FIRB approvals



### 8.1 No objection notification

After receiving notice of a proposed acquisition, the Treasurer may issue a no objection notification where the Treasurer considers that the investment is not contrary to the national interest or national security.<sup>65</sup> A no objection notification is often referred to as receiving 'FIRB approval' and will permit the notified transaction to occur within a specified timeframe (usually 12 months).

No objection notifications may be issued by the Treasurer with or without conditions. Where necessary, conditions are imposed by the Treasurer to ensure that the action will not be contrary to national interest or national security.<sup>66</sup>

Once a no objection notification has been issued, the Treasurer is unable to issue a prohibition or disposal order in relation to the relevant transaction (provided the foreign person is compliant with all FIRB approval conditions). However, the Treasurer retains the right to use the Treasurer's last resort power (see section 14 for further information on the Treasurer's powers).<sup>67</sup>

The Treasurer must issue a no objection notification to the applicant within 10 days of reaching a decision. Foreign persons must not take a proposed action before the earlier of the date that the no objection notification is issued or the date 10 days after the decision.

#### Conditional no objection notifications: Protecting national interest

The Treasurer may impose conditions on no objection notifications on national interest grounds for:

- a proposed significant action (with or without notice);
- a significant action taken (without notice); or
- a significant action taken (with notice), but the action was taken before the limitation period of the action expired.<sup>68</sup>

#### Conditional no objection notifications: Protecting national security

The Treasurer may issue a no objection notification subject to conditions to protect national security for:

- a notifiable national security action that is not a significant action;
- a reviewable national security action (with notice);
- a reviewable national security action (without notice); or
- a significant action (without notice) that is not a notifiable action or a notifiable national security action.

### 8.2 Exemption certificates

Where a foreign person is a serial transactor and expects to undertake multiple acquisitions over a given timeframe, multiple FIRB notifications can be costly and cumbersome. In these circumstances, a foreign person may be able to apply for an exemption certificate in relation to multiple acquisitions in a single FIRB application to reduce the associated regulatory burden of multiple notifications.

Exemption certificate applications are assessed on a case-by-case basis to determine whether their grant would be contrary to national interest. An exemption certificate will generally specify the maximum value of interests that may be acquired and the time period during which the relevant acquisitions with the scope of the exemption certification may be made. In general, a three-year duration is typical (given that single applications typically permit an action to be taken for a period of 12 months in any event).

A foreign person may apply for multiple types of exemption certificates for different types of interests in a single application including for:

- businesses and entities;
- land;
- certain interests in exploration tenements, and interests in mining, production, or exploration entities;
- national security actions; and
- passive foreign government investors.

Where an exemption certificate expires before the total monetary limit is met, the Treasurer may consider allowing the remaining amount to roll over to a future exemption certificate. The Treasurer decides whether to roll over the remaining amount on a case-by-case basis.

### Application process for exemption certificates

Applications for exemption certificates are lodged online and may be done by the applicant's advisers. Applications are assessed on a case-by-case basis to determine whether approval would be contrary to national interest. Given exemption certificates are often more complex than applications for individual actions, the processing time can often take longer than standard applications.

Where an applicant has obtained an exemption certificate previously, their compliance history will be factored into the Treasurer's decision in relation to a subsequent exemption certificate application. Applicants must submit applications with sufficient detail so that the national interest test or national security test may be applied.



### Exemption certificates for unknown target entities

Sometimes investors may apply for an exemption certificate without knowing the specific target for the investment. In these circumstances, applicants must provide sufficient detail about potential targets, including target industries, locations, and anything else of relevance, to allow FIRB to make its assessment of the exemption certificate application.

The timely processing of exemption certificate applications may, as is the case for general FIRB applications, be hindered by applications that lack detail which may create a detailed line of inquiry from FIRB to plug gaps in the exemption certificate application.

### Compliance

Exemption certificates may be approved subject to conditions and often set out clear parameters outlining the nature of proposed acquisitions that may be made under them (eg monetary thresholds).

Acquisitions outside of the scope of the approval will not be covered by the exemption certificate and will need to be notified separately. Failure to notify FIRB where required may constitute a breach of FATA by the applicant and result in penalties. Likewise, non-compliance by the applicant with the conditions imposed on an exemption certificate may lead to its revocation.

Foreign persons holding an exemption certificate may be subject to periodic reporting obligations of acquisitions made during the period of holding the certificate (eg quarterly). The frequency of reporting obligations varies depending on the certificate's operative period and the nature of acquisitions within the scope of the exemption certificate.



9

**Conditions**

## 9. Conditions

### 9.1 General conditions

In line with FIRB's policy mandate to protect national interest, the Treasurer can attach conditions to a 'no objection notification' and an 'exemption certificate' as a regulatory mechanism to foster foreign investment and address the risks associated with national security and national interest. Depending on the sensitivity, nature of investment and type of investor, the Treasurer may impose a variety of conditions on a proposed transaction.

Generally, any conditions are accompanied with reporting obligations requiring formal reporting to FIRB (usually annually) in relation to ongoing compliance with the applicable conditions. Foreign investors undertaking acquisitions under an exemption certificate will be typically required to report all acquisitions made under the certificate and to report on any material change in their ownership structures.

#### National security risks

Depending on the sensitivity, nature of investment and investor, the Treasurer may impose other conditions to specifically address national security risks. Typical categories of conditions are set out below, although highly bespoke conditions are also possible.

Condition	Example conditions
<b>Board and governance</b>	<ul style="list-style-type: none"> <li>Requirements for a minimum level of Australian independent corporate governance (eg minimum number of Australian independent directors or an Australian independent chairman).</li> <li>Requirements for quorum.</li> <li>Ensure that governance activities are conducted out of Australia (eg board meetings to be held in Australia and head office to be located in Australia).</li> </ul>
<b>Sensitive data</b>	<ul style="list-style-type: none"> <li>Restrictions on access to data by specific key employees.</li> <li>Restrictions on the location of data storage and access.</li> </ul>
<b>Sensitive infrastructure</b>	<ul style="list-style-type: none"> <li>Restrictions seeking to mitigate espionage and sabotage (eg access restrictions and requirements in relation to the appointment of contractors and infrastructure maintenance).</li> </ul>
<b>Commercial property</b>	<ul style="list-style-type: none"> <li>Restrictions on investor access to property.</li> </ul>

### 9.2 Tax Conditions

#### Standard tax conditions

Standard tax conditions may be imposed to ensure an action is not contrary to national interest and assess risks relating to a variety of tax issues including, amongst other things, capital gains tax, transfer pricing, consolidation, and tax avoidance. Broadly, the standard tax conditions require compliance with tax law and annual reporting on compliance with the conditions.

Investors are provided with the opportunity to review and respond to any proposed conditions during the application review process. Investors may agree to standard conditions in advance, but this does not guarantee that the conditions will be imposed. Rather, the Treasurer will not initiate additional discussion on the conditions.

Investors can access examples of standard tax conditions in [Guidance Note 12](#).

#### Additional tax conditions

Actions with significant or particular tax risks may be subject to additional tax conditions and are considered on a case-by-case basis. If the Treasurer intends to impose 'additional tax conditions', investors will be given an opportunity to ask questions and provide comments to the Treasurer as part of the application review process.

Examples of additional tax conditions are set out in [Guidance Note 12](#).



#### Increased ATO scrutiny on private equity investments

Since late 2023, the ATO has considered that private equity investment into Australia raises particular tax risks and is increasingly seeking to impose specific additional tax conditions in relation to private equity investments. These conditions require advance notification of any disposal, and notifications of certain transactions (including transactions with related parties, or which relate to transferring intellectual property) within a fixed period after the transaction completes. Importantly, the conditions also require the provision of Australian tax advice relating to the disposal or transaction.

## 9. Conditions (continued)



### Consultation with FIRB on possible approval conditions

It is very common for foreign investors to engage with FIRB on possible conditions that might attach to an approval being provided by FIRB on a specific transaction. This typically takes one of two forms.

#### #1

A foreign investor can proactively engage with FIRB and include proposed conditions that it would be prepared to accept in its initial FIRB application, or include in the application information which would otherwise be required to be provided pursuant to specific tax conditions. This approach can streamline the process and avoids surprises at the back-end of the FIRB review process, but does involve the foreign investor determining upfront what FIRB conditions might be acceptable.

#### #2

The foreign investor can wait until FIRB reviews the FIRB application and engages on possible FIRB approval conditions. The benefit of this approach is that the foreign investor is not 'negotiating against itself' on FIRB conditions. However, the downside is that FIRB might impose FIRB conditions late in the process which may mean the foreign investor has less time to consider and negotiate with FIRB on these conditions.

Additionally, investors should note that conditions that already exist/apply to a foreign owner of a target entity can be carried over to a new foreign owner of that target entity.





# 10 Variations to FIRB approvals

# 10. Variations to FIRB approvals

As conditions imposed on FIRB approvals are made at a point in time, based on the specific risks to national interest at the time, the FATA allows for variations to an existing foreign investment approval.

Under the FATA, there are two types of variations that can be sought to an existing FIRB approval:

- the Treasurer initiates a variation to an existing no objection notification<sup>69</sup> or exemption certificate,<sup>70</sup> or
- a foreign person applies for a variation to an existing no objection notification<sup>71</sup> or to an existing exemption certificate.<sup>72</sup>

The national interest test or the national security test (as the case requires) applies with respect to variation applications (see section 7 for further information).



## Variation of earlier conditions to align with subsequent conditions

In order to relieve regulatory burden, investors may seek to apply for a variation of earlier conditions to align with subsequent conditions. FIRB has proposed that such requests would be considered favourably by the decision-maker.

### 10.1 Treasurer initiated variations to existing FIRB approval

The Treasurer may vary a no objection notification or an exemption certificate by imposing a new condition, varying an existing condition, revoking a condition, or varying certain information provided in the no objection notification if the Treasurer is satisfied that the variation is not contrary to the national interest (or national security, as the case may be) and:

- the person consents to the new condition or variation; or
- the Treasurer is satisfied that the new condition or variation does not disadvantage the person.

However, where the conditions were imposed prior to 1 December 2015, the variation may only be done with the foreign person's consent.

If an application is varied by the Treasurer, fees are not applicable.

### 10.2 Applicant initiated variation to existing FIRB approval

Similar to a Treasurer initiated variation, upon a foreign person's application, the Treasurer may vary a no objection notification or an exemption certificate by imposing a new condition, varying an existing condition, revoking a condition, or varying certain information provided in the no objection notification if the Treasurer is satisfied that the variation is not contrary to the national interest (or national security, as the case may be).

However, an application for an extension for a period in the no objection notification must be made 2 months before the end of the period.

If a person applies for a variation, a fee is payable at the time of the variation application. For applicable fees, please see [Attachment 1](#).



# 11

## Investment in businesses and entities

# 11. Investment in businesses and entities

## 11.1 Businesses and entities

Generally, a foreign person must notify FIRB before acquiring a substantial interest (**at least 20%**) in any Australian business or entity, subject to the relevant monetary threshold being met.<sup>73</sup>

An Australian business is any business carried on wholly or partly in Australia in anticipation of profit or gain.<sup>74</sup> An Australian entity includes:

- any Australian corporation carrying on Australian business;
- an Australian unit trust; or
- an Australian holding entity of any of those.<sup>75</sup>

However, particular types of businesses or industries considered by FIRB to be more sensitive or of importance may have different thresholds or rules such as sensitive businesses (section 11.2), land entities (section 11.3), agribusinesses (section 11.4), media businesses (section 11.5) and national security businesses (section 6.2).<sup>76</sup>

Voluntary notification to FIRB in relation to Australian entities and businesses requires a 'change of control'.<sup>77</sup> A change in control means that by operation of the action a foreign person begins operating the entity or business, or another foreign person will begin operating entity or business.<sup>78</sup> A foreign person, alongside its associates, controls a business when they can determine the policy of the entity or business in relation to any matter or holds a substantial interest in the entity or business.<sup>79</sup> Without limiting this test, a person is also deemed to have control if they hold a substantial interest in the entity.<sup>80</sup>



### Importance of tracing rules

It is important to consider the tracing rules here as whilst a specific transaction may not be a significant or notifiable action or may not even relate to an Australian entity directly, there may be downstream interests which are relevant.<sup>81</sup> A full consideration of the tracing rules is at section 3.4. In these circumstances, the de minimis exception may apply (see section 15.3). Foreign government investors should also be aware that even broader tracing rules may apply to deem them to control the voting power where they are in possession of any veto rights.<sup>82</sup>

## Passive increases to substantial interests generally require FIRB approval

FIRB approval is generally required where a foreign investor already holds a substantial interest and intends to increase that substantial interest.<sup>83</sup> This includes any passive increases in the investor's substantial interest. Such changes can involve the non-participation in some corporate actions such as share buybacks, capital reductions or unit redemptions.

## 11.2 Sensitive businesses

As noted in [Attachment 1](#), foreign investors from certain free trade agreement (FTA) countries enjoy higher monetary thresholds for investments into most businesses and entities.<sup>84</sup> However, these higher monetary thresholds do not apply to investments into 'sensitive businesses'.

A 'sensitive business' is broadly defined under the FATR to be:<sup>85</sup>

- a business carried on wholly or partly in the media, telecommunications or transport sectors, including a business relating to the infrastructure for those sectors; or
- a business which is wholly or partly involved in:
  - the supply of training or human resources to, the manufacture of military goods, equipment or technology for, or the supply of military goods, equipment or technology to, the Australian Defence Force or other defence forces;
  - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
  - the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; or
  - the extraction of (or the holding rights to extract) uranium or plutonium or the operation of a nuclear facility.

### 11.3 Land entities

Under the Australian foreign investment regime, the definition of 'land entities' includes agricultural land corporations, agricultural land trusts, Australian land corporations and Australian land trusts.<sup>86</sup> Generally, this includes an entity where the interests in Australian land held by the entity exceed 50% of the total value of the total assets of the entity.<sup>87</sup>

Acquisitions of securities in a land entity may result in multiple notifiable or significant actions, including acquiring a substantial interest in an Australian entity and acquiring an interest in Australian land. The land entities' underlying interest may also inform if the acquisition will give rise to a notifiable or reviewable national security action.

As a starting point, foreign persons will require foreign investment approval before acquiring 10% or more in a listed or unlisted land entity (provided that the applicable monetary thresholds are triggered).<sup>88</sup> However, if the foreign person will be in a position to influence or participate in the central management and control of the land entity or determining the policy of the land entity, acquisitions below this threshold will also require FIRB approval.<sup>89</sup>

The relevant monetary threshold for acquisitions of land entities will be the value of the consideration payable for the securities in the land entity – not the total value of the physical land that the entity holds or the total value of the securities of the entity.

### 11.4 Agribusinesses

Given the sensitive nature and importance of agribusinesses to Australia, foreign investment into agribusinesses has different thresholds to investment into other kinds of businesses under the FIRB regime. Generally, FIRB approval is required in instances where a foreign person acquires a direct interest or obtains a position of control in an Australian entity or business that is an agribusiness if the relevant monetary threshold is met.<sup>90</sup>

Under the FIRB regime, an agribusiness is a business that:

- derives earnings from carrying on a prescribed class of agricultural businesses which represent **more than 25%** of the entity's earnings before interest and tax;<sup>91</sup> or
- uses assets in carrying on a prescribed business and the value of the assets **exceeds 25%** of the total asset value of the entity.<sup>92</sup>

The prescribed agricultural businesses are based on Australian and New Zealand Standard Industrial Classification (**ANZSIC**) Codes and include agriculture, forestry, fishing and food product manufacturing (with some exceptions).<sup>93</sup>

If an entity has mixed earnings or mixed-use assets that satisfy the values of the tests, they may be apportioned on the basis of the information available to a foreign person taking action in relation to the business or entity.<sup>94</sup>

#### Interaction with land entities

An agricultural land entity is defined as an Australian entity that holds interests in agricultural land where the value of those interests **exceeds 50%** of the value of the entity's total assets. However, if that entity is captured within one of the ANZSIC class, the entity may also be deemed an agribusiness.



#### Foreign and local/domestic joint venture arrangements

Given the sensitivity of agricultural land transactions, a common way of addressing national interest concerns is for a foreign investor to enter into a joint venture arrangement with a local/domestic owner. The sensitivity of foreign ownership of agribusiness was highlighted by Genius Link Asset Management (**GLAM**), a Chinese investment fund, in its proposed acquisition of Kidman and Co (**Kidman**), a large Australian private company which had significant agricultural land holdings, which was rejected by the Treasurer on the grounds of national interest.

A similar proposal to acquire Kidman from Australian Outback Beef Pty Ltd, which was a joint venture between Hancock Beef Pty Ltd (**Hancock**) (67%), an Australian owned company, and Shanghai CRED Real Estate Stock Co Ltd (33%), a Chinese investment fund, was approved by the Treasurer around a year later. In the Treasurer's reasons, he flagged several considerations for approving the transaction, with the key considerations being that Hancock proposal meant that an Australian company would retain control and significant ownership of Kidman.

A copy of the Treasurer's full statement regarding the denied application can be found [here](#), and a full copy of the approval can be found [here](#).

## 11. Investment in businesses and entities (continued)

### 11.5 Media businesses

FIRB approval is required where a foreign person acquires a direct interest in an entity which wholly or partly carries on an 'Australian media business'.<sup>95</sup> This is because the monetary threshold for such acquisitions is nil for foreign persons (including foreign government investors).<sup>96</sup>

The definition of an Australian media business for FIRB purposes is quite broad and includes businesses which publish newspapers, broadcast TV or radio or operate an electronic service.<sup>97</sup> An electronic service in this context means an Australian business which delivers content over the internet, operates wholly or partly for the purpose of 'serving Australian audiences' and satisfies both a content and threshold test.<sup>98</sup>

- **Content Test:** requires an Australian media business to be delivering predominately content which reports, investigates or explains either:<sup>99</sup>
  - issues or events which are relevant in engaging Australians in public debate and in informing democratic decision-making; or
  - current issues or events of public significance for Australians at local, regional or national level; or
  - otherwise delivers content wholly or predominately by way of programs of audio or video content (ie podcasts and TV streaming); and
- **Threshold Test:** this is satisfied if it is reasonable to assume the average daily audience for the service exceeds 10,000 people in Australia.<sup>100</sup>



#### Content test

FIRB advises that the content test is intended to capture any "journalism and reporting which considers politics, current affairs, business and major events, such as sports competitions and cultural events".<sup>101</sup> As such, businesses which do not provide content related to public policy such as product reviews, academic reporting and lifestyle programs are not intended to be 'Australian media businesses'.



**12**

**Investment in  
Australian land**

# 12. Investment in Australian land

The Australian foreign investment regime regulates investment in interests in Australian land. Australian land includes commercial land, agricultural land, residential land (which we have not covered in this guide) and mining and production tenements. These categories of land may also be classified as 'national security land', which attracts additional scrutiny and regulations (see section 6.2 for further information on national security land).

Importantly, an interest in Australian land includes amongst other things:<sup>102</sup>

- a lease or licence giving rights to occupy Australian land if the term of the lease or licence is expected to exceed 5 years;
- an interest in an agreement involving the sharing of profits or income from the use, or dealings in, Australian land if the terms of the agreement are expected to exceed 5 years (including any extension or renewal);
- an interest in a share in an Australian land corporation or agricultural land corporation, where interests in Australian land account for more than 50% of the corporation's total assets; or
- an interest in a unit in an Australian land trust or agricultural land trust, where interests in Australian land account for more than 50% of the trust's total assets.

In contrast to investments relating to entities and businesses, there is no interest threshold for acquisitions of interests in Australian land. The exception to this is a 10% interest in listed entities and unlisted land entities that do not invest in established dwellings, where there is no influence over management or policy.

## 12.1 Commercial Land

The FATA generally requires foreign persons to seek foreign investment approval before acquiring an interest in commercial land, where the value of the investment meets the relevant monetary threshold (see [Attachment 1](#) for the relevant thresholds).<sup>103</sup> The relevant monetary threshold for all foreign persons is nil where the land is vacant commercial land.<sup>104</sup>

### What is commercial land?

Commercial land is defined in the FATA as land in Australia (including any building on the land) or the seabed of the offshore area, other than land:<sup>105</sup>

- used wholly and exclusively for a primary production business; or
- on which there is at least one dwelling (except commercial residential premises); or
- on which the number of dwellings, other than a commercial residential premises, that could reasonably be built is less than 10 (otherwise it is likely to be considered residential land).

The assessment of when commercial land is considered vacant or developed is considered on a case-by-case basis. However, generally, commercial land is vacant if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock.<sup>106</sup> Whereas developed commercial land is commercial land that does not meet the definition of vacant commercial land.<sup>107</sup>

## 12.2 Agricultural Land

Generally, foreign investors must obtain FIRB approval for any acquisitions of agricultural land valued at more than \$15 million (subject to the relevant monetary thresholds contained at [Attachment 1](#)).<sup>108</sup> As this is an aggregated test, where a foreign investor and its associates (which will include other members of its corporate group) hold in aggregate more than \$15 million worth of agricultural land, any further acquisition of agricultural land by that foreign investor or its associates will require FIRB approval.<sup>109</sup>

FATA defines agricultural land broadly as land used or that could reasonably be used for a primary production business.<sup>110</sup> This means both land which is partially used for primary production and land where only part of the land could be used for primary production may be deemed agricultural land.

There are some exceptions to this classification of land as agricultural land including, but not limited to:<sup>111</sup>

- where zoning of the land would be required by a local, state or federal government to use the land for any primary production business;<sup>112</sup>
- the land was acquired to meet a condition of approval for any mining operation;<sup>113</sup>
- the land is wholly or predominantly used for a solar or wind farm located on the land;<sup>114</sup> or
- the land is one hectare or less.<sup>115</sup>





## Exemption Certificates

When considering a transaction involving multiple acquisitions of commercial land, foreign investors should consider applying for an exemption certificate. Such exemption certificates may grant up-front approval for a program of land acquisitions, without needing to seek separate individual approvals for each investment. The standard conditions which relate to acquisitions of vacant commercial land (ie commencing development within five years) are still likely to be applied, however, it saves having to apply for FIRB approval on each individual acquisition.

Exemption certificates will specify a financial limit which is determined on a case-by-case basis and the duration it is intended to apply for. Generally, an exemption certificate is issued for 12 months for first time exemption certificate holders. However, longer durations are considered on a case-by-case basis for investors with demonstrated history of compliance with the foreign investment framework and FIRB have been flexible with exemption certificates where the foreign investors can present a compelling narrative for the proposed investments. However, investors should be conscious that if the full certificate limit is not exhausted, they will not be able to secure any refund of the fee paid or (necessarily) an extension of the certificate term. As described in section 8.2 above, where an exemption certificate expires before the total monetary limit is met, the Treasurer may, on a case-by-case basis, consider allowing the remaining amount to roll over to a future exemption certificate.

When acquiring either vacant commercial land or national security land, the relevant exemption certificate should be sought as described below.

**#1 Vacant commercial land exemption certificates** may be used where a foreign investor is acquiring a freehold interest or a leasehold interest with freehold characteristics in vacant commercial land. Where these exemption certificates relate to the acquisition for the purpose of undertaking a primary production business or residential development, the exemption certificate will usually contain a condition that the land need to have been offered for sale through an open and transparent sale process. The requirement for an open and transparent sale process is a prerequisite under FATA for transactions of this nature.

**#2 National security land exemption certificates** may be used where a program of acquisitions involves national security land or national security concerns and covers acquisitions which would otherwise be notifiable national security actions or reviewable national security actions.



## Build to Rent (BTR) Properties

On 1 May 2024, the Australian Government released an [updated foreign investment policy document \(Updated Policy\)](#). A key highlight of the Updated Policy is the green light for foreign investors to purchase established BTR properties.

Previously, the Australian Government's policy prohibited foreign individuals from purchasing established dwellings unless they were to be redeveloped for additional housing or met the tests for commercial residential premises under GST legislation. Established BTR does not fall neatly into either of those categories. The Updated Policy has corrected that uncertainty and permits foreign investors to purchase established BTR properties.

This clarification dovetails with the BTR fee reductions [announced by the Treasurer](#) on 10 December 2023. From 14 December 2023, commercial land FIRB application fees apply to all BTR projects, rather than the significantly higher residential application fees.

Prior to 14 December 2023, foreign BTR investors faced substantial application fees for projects involving residential land. For instance, a residential investment worth \$50 million could incur fees of \$3,514,800. Under the new changes, the commercial land FIRB application fees now apply to all BTR projects, even those involving residential or agricultural land, effective from 14 December 2023. This means that the fees for the same \$50 million residential investment would be just \$14,700 (subject to indexation) on the commercial application fee schedule.

The decision to allow foreign investors to invest in existing BTR properties is expected to bolster liquidity in a secondary market for BTR assets, which, while still a nascent sector in Australia, attracts significant institutional investment overseas.



**13**

**Investment in  
Australia's resources  
sector**

# 13. Investment in Australia's resources sector

Foreign investment in the mining sector in Australia may attract FIRB applications and approvals across a range of acquisition actions, including foreign persons acquiring any interest in:

- mining tenements (including exploration tenements and some general-purpose licences that involve an interest in Australian land);
- commercial and/or agricultural land located in Australia required to carry on mining operations;
- the securities of a mining, production or exploration entity;
- existing Australian entities and businesses;
- internal restructures; and
- significant contracts and associated documents.



## Mining production

Mining production or exploration entities can be deemed to be Australian land corporations if at least 50% of their total assets are mining or production tenements or other interests in Australian land (noting, however, that interests in exploration tenements are not an interest in Australian land).

For investments at the holding company level, the test is applied based on the holding company's most recent consolidated audited financial statements. For investments below the holding company level, the test is applied based on the assets of the target entity.

The implication of this is that where a mining target is an Australian land entity by reason of its holding of mining or production tenements, it will always be a zero-dollar threshold acquisition. This is because more than 10% of the value of its assets will constitute mining or production tenements and FIRB approval will be required, unless the transaction falls within an exemption (eg the acquisition of a less than 10% shareholding with no rights to influence or participate in the central management and control of the mining target or determine the policy of the mining target).

For relevant FTA agreement country investors, this will be different to the threshold that would apply if the mining tenements were acquired directly by an investor entity incorporated in the relevant FTA agreement country.<sup>116</sup>

Foreign investors in mining production and exploration entities should be aware of this potential issue when assessing FIRB approval requirements. In practice, this may require engagement with a mining target to determine the value attributed to mining or production tenements (and any other interests in Australian land) in that mining target's most recent financial statements, as this information may not be apparent from the mining target's public financial statements.

## 13.1 Mining or production tenements

Under the FIRB regime, a mining or production tenement is a type of Australian land.<sup>117</sup>

A mining or production tenement<sup>118</sup> is defined as:

- a right (however described) under a law of the Commonwealth, a State or a Territory to recover minerals, oil or gas in Australia or from the seabed or subsoil of the offshore area, other than a right to recover minerals, oil or gas for the purposes of prospecting or exploring for minerals, oil or gas;
- a right preserving a right as defined above;
- a lease under which the lessee has a right mentioned above; or
- an interest in a right or lease mentioned above.

Additionally, under the FATR, it is a notifiable and significant action where a foreign government investor acquires a legal or equitable interest in a mining or production tenement, irrespective of the value or duration of the tenement.



## Mining and energy projects

FIRB will consider the size, relevance and importance of any projects to Australia when applying the national interest test and consider how any proposed transaction will impact Australia's national interest. For example, in 2001 the Treasurer rejected a proposed acquisition by Shell Australia Investments Limited (**Shell**) of a substantial holding in Woodside Petroleum Limited (as it then was) (**Woodside**) as Shell was a joint venturer in the North West Shelf Project (**NWS**) alongside Woodside. The NWS is a large scale liquefied natural gas project and was Australia's largest developed energy resource at the time of the decision. The Treasurer noted that it was in Australia's national interest for the project to be developed to its full capacity and that Australia's export sales from the NWS were maximised. Moreover, the Treasurer referenced the risk of changing corporate strategies and new or evolving strategies by other companies with respect to the NWS project and changing world demand and supply conditions were all considerations.

## 13. Investment in Australia's resources sector (continued)

### Exemption – Mining royalties

Under the FIRB regime, acquisitions of unsecured royalty interests in respect of mining tenements are exempt where such an interest is not a proprietary right and does not provide a right to occupy the land or control or influence who enters or occupies the land. However, this exception will not apply if the interest is an asset of a national security business or the royalty interest is in respect of land that is national security land.

Importantly, the mining royalty exemption does not apply to any security interests over the underlying tenement obtained in connection with the royalty interest. In particular, where a foreign person (ie the royalty holder) proposes to obtain security for the royalty payments by taking a mortgage over the underlying mining or production tenement, the mining royalty exemption does not extend to the interest in Australian land acquired pursuant to the royalty security. Whilst, the mining royalty exemption may not be available, the moneylending exemption explored in section 15.1 may be available where the person or entity holding the security is carrying on a moneylending business and the other conditions of the exemption are satisfied (but in practice, is unlikely to be available for M&A transactions).

### Exemption – Acquisition of interests from Australian government

Another relevant exemption to the FIRB regime in the Australian resources context is the exemption for interests in Australian land acquired from Commonwealth, State or Territory governments.<sup>119</sup>

Generally, this exemption applies so that the initial grant of a mining or production tenement by the relevant statutory authority (eg the Department of Mines in the relevant State or Territory) to a foreign person does not require FIRB approval.

The exemption for interests acquired from Australian governments does not apply in circumstances where:

- the interest is acquired by a foreign government investor;<sup>120</sup>
- the land covered by the tenement is national security land;<sup>121</sup> or
- public infrastructure (except in relation to public roads) will be located on the land.<sup>122</sup>

Any interest in Australian land (ie a mining or production tenement) that is acquired by a foreign person without FIRB approval pursuant to this exemption would be a reviewable national security action and subject to the Treasurer's 'call-in' power.<sup>123</sup>

### Exemption certificates in relation to mining or production tenements

Foreign persons may also apply for an exemption certificate in relation to mining or production tenements to facilitate multiple acquisitions. Generally, an exemption certificate for mining or production tenements would be granted subject to conditions that specify:

- the geographic region of the tenement; and
- the type of minerals that can be exploited under the tenement.

If the land on which the mining or production tenements is over national security land, foreign persons can also apply for a 'national security exemption certificate'.



### Exemption certificates for exploration, and mining or production tenements

In our experience, FIRB is unlikely at this time to grant foreign government investors exemption certificates to cover a mixture of exploration, and mining or production tenements over substantially the same area and target resource. This is because the inclusion of a mining and production tenement alongside an exploration tenement in one exemption certificate is likely to be considered contrary to national interest considerations.

## 13.2 Exploration tenements

In contrast to mining or production tenements, an exploration tenement is defined as:

- a right (however described) under a law of the Commonwealth, a State or a Territory to recover minerals, oil or gas in Australia or from the seabed or subsoil of the offshore area for the purposes of prospecting or exploring for minerals, oil or gas;
- a right that preserves a right mentioned in the paragraph above;
- a lease under which the lessee has such a right or an interest in such a right; or
- an interest under such a lease (such as a prospecting or an exploration license).

Under the FIRB regime, foreign government investors will need to seek FIRB approval for the acquisition of a legal or equitable interest in an exploration tenement (irrespective of the value and duration) as it constitutes a notifiable action and a significant action.

However, foreign persons (who are not foreign government investors) will not be required to seek FIRB approval for acquisitions of interests in exploration tenements (provided the exploration tenement is not on national security land). The exemption also extends to excluding exploration tenements that would generally be captured within the definition of 'an interest in Australian land'. For example, where the exploration tenement confers a right to occupy Australian land for a period exceeding 5 years.

Importantly, foreign government investors may apply for an exemption certificate for a program of acquisition of interests in exploration tenements. The Treasurer may issue such a certificate if the Treasurer is satisfied the acquisitions of those interests are not contrary to the national interest.

Similar to mining or production tenements, where a foreign person (including foreign government investors) acquires a legal or equitable interest in an exploration tenement over national security land, it will be a notifiable national security action. This is irrespective of the value or duration of the tenement.

### 13.3 Mining, production, or exploration entities

A mining, production or exploration entity is an entity where the total value of legal or equitable interests in tenements (exploration tenement, or a mining or production tenement) held by the entity, or any subsidiary of the entity, **exceeds 50%** of the total asset value for the entity.

It will be a significant action and a notifiable action if a foreign government investor acquires **at least 10%** in securities in a mining, production or exploration entity, regardless of value.<sup>124</sup>

Whilst this express provision (which captures exploration tenements, as well as mining or production tenements) only applies to foreign government investors, as noted above, all foreign persons should be aware of (and assess) whether a mining target is deemed to be an Australian land corporation as a consequence of at least 50% of the mining target's total assets being mining or production tenements (or other interests in Australian land).

### 13.4 Register of Foreign Ownership

As set out in Section 16.5, a number of transactions require foreign persons to give a 'register notice' to the Registrar.

The following Australian resources transactions require a foreign person to give a 'register notice' (including in circumstances where the foreign person was not required to obtain FIRB approval for the underlying transaction):

- acquisition of a legal interest in a mining or production tenement by a foreign person;<sup>125</sup>
- acquisition of a legal interest in the shares in an Australian land corporation by a foreign person;<sup>126</sup>
- acquisition of a legal interest in an exploration tenement by a foreign person;<sup>127</sup> and
- acquisition of a registrable water interest by a foreign person during a financial year, which the foreign person continues to hold at the end of the last day of that relevant financial year.<sup>128</sup>



### Critical Minerals

Although the FIRB regime does not differentiate between the variety of minerals, 'critical minerals' – due to their scarcity and geographical concentration – often attract greater scrutiny during the foreign investment screening process (which has the potential to materially extend the timeframe for receiving a decision from FIRB). This may include in circumstances where Australian companies own 'critical minerals' projects located outside of Australia.

Whilst FIRB's 'National Security' Guidance Note identifies investment in certain 'critical minerals' as being in the category of transactions for which voluntary notification is encouraged, as noted above, there are a range of circumstances where foreign investment in the mining sector in Australia will require a FIRB application and approval in any event.



# 14

## The Treasurer's enforcement and supervisory powers

## 14. The Treasurer's enforcement and supervisory powers

The Treasurer has broad powers under the FATA to make orders which prohibit certain actions and orders requiring certain actions to be taken in relation to proposed transactions. Some of the Treasurer's general enforcement and supervisory powers include the ability to prohibit:

- transactions;
- foreign persons entering or altering agreements;
- foreign persons from starting whole or part of an Australian business; and
- foreign persons from terminating existing agreements.

We have set out an overview of some of the Treasurer's specific powers below.

### 14.1 The Treasurer's Divestment Powers

Whilst rare in practice, the Treasurer may make an order requiring a foreign person to either dispose of an interest it has acquired or to prohibit a foreign person from doing something for a period of time where that foreign person, without prior FIRB approval:<sup>129</sup>

- takes a significant action which is contrary to the national interest;<sup>130</sup>
- takes a notifiable national security action that is not a significant action, an action where the Treasurer has given notice that such action may pose a national security concern or is a reviewable national security action and the result of such action is contrary to national security;<sup>131</sup> or
- contravenes any conditions of a no objection notice.

The disposal power may also be exercised where a foreign person fails to satisfy a condition of a no-objection notification (which is a criminal offence).



#### Northern Resources divestment order

On 3 June 2024, for the first time following introduction of the divestment powers, the Treasurer exercised this power to force Yuxiao Fund and four other associates to reduce their shareholdings in Northern Minerals Limited. Northern Minerals Limited is developing the strategically important Browns Range mine in east Kimberly, Western Australia, focusing on the production of dysprosium – a heavy rare earth element used in electric vehicles.

The five investors were directed to sell around 611 million shares, worth some \$24 million, which were largely acquired in September–October 2023 (**Relevant Transactions**). This represented a forced sell-down of about 10.4 per cent of the company's register.

The Treasurer had already blocked Yuxiao Fund from increasing its stake from 9.8 per cent to 19.9 per cent in [February 2023](#). FIRB began probing the Relevant Transactions in November 2023 when Northern Minerals Limited requested FIRB investigate whether the series of share acquisitions were being orchestrated to circumvent the February 2023 ban imposed on Yuxiao Fund.

A [spokesman for the Treasurer](#) said the decision was “designed to protect our national interest and ensure compliance with our foreign investment framework”. The circumstances in which the divestment order was used support the view that it will only be used in exceptional circumstances.

## 14. The Treasurer's enforcement and supervisory powers (continued)

### 14.2 The Treasurer's 'call-in' powers

Where a reviewable national security action or a significant action has not been previously notified to FIRB, the Treasurer may 'call-in' any such action that the Treasurer considers may pose national security concern.<sup>132</sup>

Significantly, the Treasurer's review can occur when the action is still proposed or up to 10 years after the action has been taken.<sup>133</sup> Once 'called-in', the Treasurer may issue a no objection notification (including with conditions) or prohibit the action or require divestment.

The Treasurer, subject to its 'last resort power' noted in section 14.3 below, cannot exercise its 'call-in' power where:<sup>134</sup>

- an action was notified to the Treasurer;
- a no objection notification was granted in relation to an action; or
- an exemption certificate was granted.



#### Voluntary filing – to file or not to file?

In practice, the existence of the 'call-in' power (and its ability to be exercised up to 10 years following the action being taken) is likely to encourage foreign persons to voluntarily lodge FIRB applications in order to avoid the possibility of the power being exercised. Foreign investors may be well advised to consider making a voluntary notification in the event that the relevant transaction may give rise to national security concerns now or in the future.

### 14.3 The Treasurer's last resort review powers

The Treasurer also may review actions notified after 1 January 2021 on national security grounds, even where FIRB approval has already been obtained.<sup>135</sup> This is referred to in the Treasurer's 'last resort' power review. Given there is no limit on the exercise of this power and the consequences are potentially serious (up to and including an order for divestment), the breadth of the Treasurer's powers may be challenging for foreign investors.

Nevertheless, strict controls on the exercise of the Treasurer's last resort review power have been included in the FATA, giving some comfort that it will be used only as a genuine last resort.<sup>136</sup>

- **Firstly**, there must be a false or misleading statement or omission by the foreign person, a material change to their activities, or a material change of circumstances or market.
- **Secondly**, there must be a national security risk relating to the action.
- **Thirdly**, the Treasurer must obtain advice from national intelligence agencies, negotiate with the foreign person to reduce the risk, and be satisfied those existing systems are inadequate to address the risk.



#### Last resort power

Given the significant sovereign risk issues that may emerge should this power be used extensively by the Treasurer, it is envisioned that the last resort review powers will be exercised sparingly and only when strictly necessary.

### 14.4 Anti-avoidance provisions under the FATA

The anti-avoidance provisions apply where a person enters into, begins to carry out or actually carries out a scheme for the sole or dominant purpose of avoiding the application of the Australian foreign investment regime.<sup>137</sup> In these circumstances, the Treasurer is empowered to make any order or decision that it would have been able to make had the scheme not avoided the application of the FIRB regime.<sup>138</sup> However, the Treasurer may not make any order prohibiting a foreign person from doing something which has already been done prior to the order being made.<sup>139</sup>

Where the Treasurer makes an order under the anti-avoidance provisions in relation to more than one person, it may also make an order specifying that all the persons to which the anti-avoidance order relates are associates of each other. Such order can only be made where the Treasurer is satisfied that not making the order is contrary to national security or the national interest.<sup>140</sup>





**15**

**Exemptions**

# 15. Exemptions

There are several broad exemptions which may apply to relieve a foreign person from the requirement to seek FIRB approval. We have set out below a non-exhaustive list of the key exemptions to seeking FIRB approval. We have explored some other exemptions earlier in the guide such as the mining royalties exemption (see section 13.1) and exemption certificates (see section 8.2).

## 15.1 Moneylending exemption

The 'moneylending exemption' is a key exemption relied upon by foreign financiers which provides that the acquisition and enforcement of security interests will not constitute a 'notifiable action' or 'significant action'.

Generally, the moneylending exemption applies to the acquisition of an interest in securities, assets, a trust, Australian land or a tenement if the interest is:

- held solely by way of security for the purposes of a moneylending agreement; or
- acquired by way of enforcement of a security held solely the purposes of a moneylending agreement.<sup>141</sup>

In the context of FIRB, a moneylending agreement is one which is entered into:

- in good faith and on ordinary commercial terms; and
- in the ordinary course of carrying on a moneylending business or providing financial accommodation.

A moneylending agreement may be entered into by a moneylending business or an entity which is established for the purpose of lending money or otherwise providing financial accommodation in its ordinary course. However, the moneylending exemption is not available for any agreement which deals with any matter unrelated to the purpose of moneylending, or where an entity which was established for moneylending carried out any business unrelated to moneylending prior to lending money.

The moneylending exemption is sufficiently broad and covers a foreign lender's subsidiaries, any person who is able to determine the investments or policy of the foreign lender, a security trustee who acquires an interest on behalf of the foreign lender and a receiver or receiver and manager appointed by the foreign lender or a connected party.

### Interests relating to 'national security land' or 'national security businesses'

The moneylending exemption does not apply to acquisitions made by enforcement of security interests in 'national security businesses' or 'national security land', unless the enforcement is undertaken by a receiver (ie it will not apply in the generally rare situation where a lender forecloses or directly acquires the secured property). Interests acquired by a receiver or manager appointed by the foreign lender, or a connected party, are not affected by this carve out and are still covered by the moneylending exemption (subject to the other relevant conditions being met).

### Interest acquired by foreign government investors

There are some exemptions for foreign government investors who acquire an interest by way of enforcement of a security for the purposes of a moneylending agreement. These include:

- where a foreign government investor is either an authorised deposit-taking institution (**ADI**) or a subsidiary of an ADI, they may hold the security for up to 12 months without FIRB approval, or longer if they are making a genuine attempt to dispose of the interest;<sup>142</sup> or
- any other foreign government investor may hold the security for up to 6 months without requiring FIRB approval, or longer if they are making a genuine attempt to dispose of the interest.<sup>143</sup>

Some examples of a genuine attempt to dispose of an interest include deciding on the method of disposal and complying with any requirements of a law that apply before the interest can be disposed of.<sup>144</sup>

Notably, this exemption does not apply to 'national security businesses' or 'national security land' which are also not covered by the moneylending exemption and require prior FIRB approval.



### National Security Business – Securities

Foreign persons who are secured lenders will be required to notify FIRB when the borrower is a national security business (even if that business is wholly Australian owned) in order to exercise their security. Sometimes this will require multiple FIRB applications depending on the lending group. As delays are common when seeking FIRB approval, these delays should be adequately factored into the process including into the appropriate loan documentation.



### Options, warrants and other equity instruments

Where a lender uses options, warrants or other equity instruments it is important to remember that as a starting point a foreign person under FATA is deemed to acquire an interest when such agreements are unconditional and binding on the foreign person. A lender will still 'acquire' an interest under a warrant or option even if it is not presently exercisable or exercisable into the future.<sup>145</sup> A foreign person also 'acquires' an interest where it starts to hold an interest, acquires voting rights or increases its holdings. These concepts mean that a lender who is not covered by the moneylending exemption will need to seek prior FIRB approval when it meets the definition of 'acquires' for the purpose of FIRB (which may be different depending on the security and the instrument being used). See section 4 for more details on equity instruments.

## 15.2 Rights issues

Another key exemption to the FIRB regime is the 'rights issue exemption'. Under this exemption, an action will be exempt from being a 'notifiable national security action' or a 'notifiable action' (as applicable) where:

- a foreign person acquires additional interests in an entity under a rights issue as defined under foreign law, relevant Australian Securities and Investments Commission instrument or the *Corporations Act 2001* (Cth);<sup>146</sup> or
- a foreign person acquires shares from a pro rata share issuance and that person has no reasonable grounds to believe that their overall proportionate interest holding at the end of issue will increase from the acquisition.<sup>147</sup>

In respect of the second limb, as the exemption applies where a foreign person has no 'reasonable grounds' to believe their overall proportionate interest will increase, the exemption may still apply even if a foreign person's proportionate interest holding does increase as a result of a transaction.

This may occur in a capital call situation where a person is required to contribute additional funding to an investment vehicle along with other investors who are also required to contribute additional funding in their respective ownership proportions (and no other persons are expected to provide capital to the investment vehicle) and one or more of the other investors do not participate in the capital raise, resulting in an increase to the foreign investor's proportionate interest.



### Rights issue exemption for capitalisation of wholly owned subsidiaries

The exemption for mandatory FIRB notification for a rights issue is intended to apply to transactions that present a low risk to Australia's national interest (which includes the capitalisation of wholly-owned subsidiaries by foreign persons).<sup>148</sup>

It is recommended foreign investors seek legal advice before seeking to rely on this exemption to ensure compliance with the FIRB regime.

## 15.3 De minimis exemption

Another key exemption is the 'de minimis' exception which applies when a foreign government investor acquires a direct interest in an Australian entity via an offshore transaction and the total asset value of the Australian entity is:

- **less than 5%** of the total asset value of the total assets of that entity;
- **less than \$71 million;**<sup>149</sup> and
- none of the assets must be of a sensitive business or a national security business.<sup>150</sup>

The monetary threshold above is subject to indexation and is updated annually in line with the fees, thresholds and other monetary sums indexed under FATR.<sup>151</sup>



### Low thresholds reduce the utility of the de minimis exemption

In our experience, these thresholds are relatively low and will not act to exempt many transactions.

## 15. Exemptions (continued)

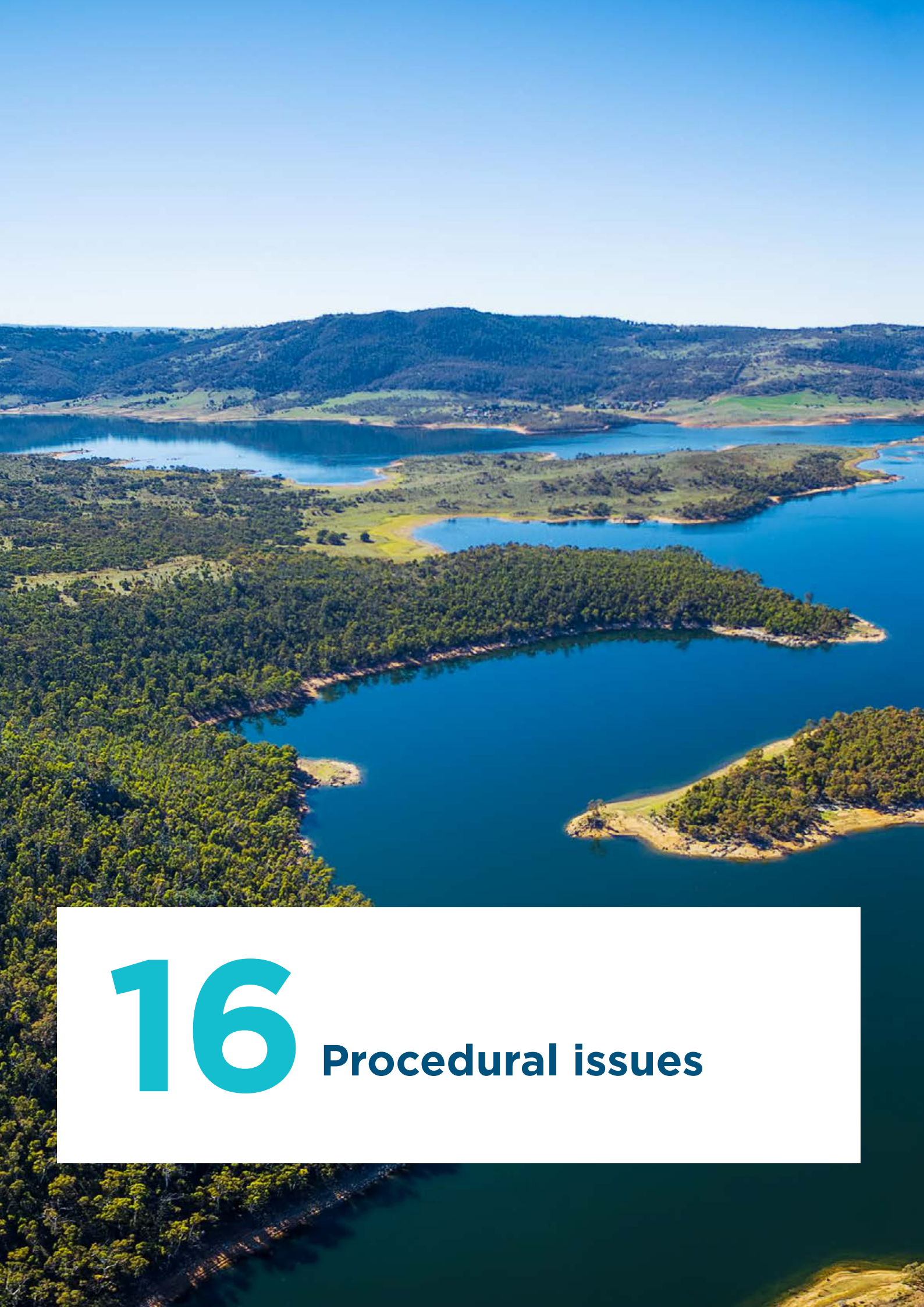
### 15.4 Passive foreign government investors

Certain private equity and pension fund investors may be able to obtain a 'passive foreign government investor exemption certificate', which will result in the investor being treated by FIRB as a 'foreign person' and not a 'foreign government investor'.<sup>152</sup>

The passive investor exemption is available where:

- the foreign person would not be deemed a foreign government investor except that the foreign person is a:<sup>153</sup>
  - corporation;
  - trustee of a unit trust; or
  - a general partner of an unincorporated limited partnership, (each an **Investor**),  
in which foreign government investors of more than one country hold an aggregate substantial interest (**at least 40%**);
- the Investor operates a scheme to obtain a passive return for its members;
- no individual member is able to influence any individual investment decisions; and
- each foreign government or government investor holds an interest in the Investor only has a member of the scheme.

Because this exemption requires that the foreign government investor classification be triggered by virtue of the aggregate substantial interest threshold rather than the 20% substantial interest threshold (where the foreign government investors are all from one country), it is not available for a number of private equity funds that are classified as foreign government investors.



**16**

**Procedural issues**

# 16. Procedural issues

## 16.1 Fees for FIRB applications

Foreign persons are required to pay fees for the consideration of an application or notice under the FATA – not for approvals.<sup>154</sup> Importantly, FIRB's statutory timeframe to consider an application does not commence until the relevant fee is paid.<sup>155</sup> The calculation of fees under the FIRB regime is complex and is contingent on the value and kind of actions that are proposed to be taken or have been taken. A summary of the fees is included in [Attachment 2](#). Fees for foreign investment applications and notices are indexed each financial year and new fees apply from 1 July each year.



### Pay your FIRB filing fee promptly to get the clock ticking

In order to commence FIRB's statutory timeframe, it is critical to pay the FIRB filing fee as soon as possible. However, we note there is limited ability for a foreign investor to receive a refund for all or part of its FIRB application fee.

## 16.2 Fee waivers and remissions

Generally, FIRB filing fees will not be waived or remitted for an unsuccessful application.<sup>156</sup> However, in limited circumstances, the Treasurer has the discretion to waive or remit the whole or a part of a fee that is payable if the Treasurer is satisfied that it is not contrary to the national interest to waive or remit the fee.<sup>157</sup>



### Fee credit for unsuccessful bid in a competitive bid process

In circumstances where a foreign person has been unsuccessful in a competitive bid process, FIRB has indicated that it may look favourably towards applicants seeking their fee credited towards a subsequent application provided that the application is notified within 24 months of the date they were advised of the unsuccessful bid. Whilst applications are considered on a case-by-case basis, amongst other things, FIRB will consider the nature of the competitive bid process and the circumstances of the bid being unsuccessful.



### Applications which have been resubmitted or are substantially the same or similar

Where an application has been withdrawn and an application or notice is resubmitted for substantially the same or similar action, FIRB may consider waiving the fee for the latter application or notice.

## 16.3 Timing for FIRB applications

Once the relevant notice has been provided and the correct FIRB application fee has been paid, the Treasurer has 30 days to consider an application and make a decision.<sup>158</sup> However, the decision period may be extended by:<sup>159</sup>

- an applicant requesting in writing an extension;
- the Treasurer unilaterally extending the decision period for up to 90 days; and
- the Treasurer publishing an interim order, which has the effect of extending the period by 90 days.



### 'Voluntary extensions' to statutory deadline

If FIRB does not believe it will be able to meet the statutory deadline to review an application, it is common practice for FIRB to reach out to an applicant to request they make a 'voluntary request' for an extension to the statutory deadline. However, if an applicant does not agree to the voluntary extension of time, FIRB retains the right to unilaterally extend the statutory deadline by up to 90 days.

## 16.4 Other consult agencies and impact on timetable for FIRB applications

Prior to presenting a recommendation to the Treasurer (or its representative) regarding the approval of an application, FIRB engages extensively with various government departments and agencies at the Commonwealth, state, and territory levels. Notably, FIRB collaborates closely with the ACCC, the ATO, and, when dealing with critical infrastructure assets like telecommunications, gas, electricity, water, and ports, the Cyber and Infrastructure Security Centre (**CISC**) under the Commonwealth Attorney-General's Department.

The ATO conducts a comprehensive evaluation of the tax implications associated with each FIRB application, considering potential tax risks and often issuing a request for additional information in relation to tax outcomes of, and following, the relevant acquisition. Based on input from the ATO, FIRB may suggest the imposition of specific 'tax conditions' on applications approved by the Treasurer (or its representative). While FIRB maintains close consultation with the ACCC, it retains the authority to form its own stance on matters of competition, even if the ACCC grants clearance for a transaction. In the case of target entities possessing or being involved in critical infrastructure assets, the CISC conducts a national security risk assessment and provides guidance to FIRB.



### Regulatory engagement - have you got your ducks in a row?

Due to the interconnected nature of these regulatory processes, there can be risks and delays in timing and transactions. Consequently, it is crucial to conduct an early analysis of potential issues, particularly those pertaining to competition and taxation, and formulate an integrated strategy to effectively manage these risks.

Additionally, if documents or further information are requested by FIRB in relation to an application, the review period is paused until the request has been satisfied.<sup>160</sup> It is very important that any enquiries received by FIRB or one of its consulting agencies, are answered promptly and as comprehensively as possible.

It is imperative that a person does not take action during a decision period, notification period, interim period or until the person is given a no objection notification. Accordingly, if action is taken before the end of the decision period, the Treasurer is no longer restricted by the time limits.<sup>161</sup>

Applicants will be notified of the Treasurer's decision within 10 days of it being made.



### Processing timeframes

FIRB processing times in the quarter ended 31 December 2023

In the December 2023 quarterly report, the Treasury's median processing time increased to 42 days from 37 days in the previous quarter. Though processing timeframes increased, this is, in our experience, generally to be expected during the December and January holiday period. The year-to-date median processing time for 2023-24 remains consistent with 2022-23 (41 days), maintaining the downward trend from the median processing time of 2021-22 (52 days).

We anticipate the general downward trend in processing timeframes will continue in light of new performance targets announced by the Treasurer, Jim Chalmers, on 1 May 2024 (which are further detailed below).

In our experience, most FIRB applications of a routine nature will be approved with or without conditions within 30-60 days of submission. Rejections of FIRB applications do occur from time to time, but in our experience, rejections are rare, particularly in a corporate setting.

For a FIRB application which is more complex (eg multiple Australian regulatory approvals required, or where the transaction carries high tax risks), a period of at least 90-120 days could be possible with FIRB often awaiting the outcome of other regulatory approvals before making its final decision.



### Recent reforms to FIRB policy

On 1 May 2024, the Australian Government announced changes to Australia's foreign investment framework. The key takeaways from the reforms are that, from 1 July 2024, there will be:

- increased resources and scrutiny of foreign investment in "high-risk" sectors of national interest, such as critical minerals, critical infrastructure and critical technologies; and
- a streamlining of "low-risk" investments.

The Australian Government intends that "low risk" foreign investors with good compliance records will benefit from a more streamlined approval process. From 1 January 2025, Treasury aims to process 50% of investment proposals within the statutory 30-day decision period.<sup>162</sup>

On the other hand, "high-risk" foreign investments in relation to critical assets will be subject to greater scrutiny. The increased focus on foreign investment in sensitive sectors should be seen as a confirmation, rather than an extension or overhaul, of existing FIRB policy and practice. In our experience, increased scrutiny from FIRB and its consultation partners on investment proposals in sensitive sectors, such as those involving critical infrastructure or critical minerals, has been evident for some time.

The Australian Government has also introduced various incentives to attract foreign capital into Australia,<sup>163</sup> which include:

- refunding 75 per cent of fees for foreign bidders who were unsuccessful in a competitive bid process;
- exempting interfunding transactions from mandatory notification requirements; and
- permitting foreign investors to purchase BTR properties, as outlined in section 12.1 above.

## 16. Procedural issues (continued)

### 16.5 Register of Foreign Ownership

#### Overview

On 1 July 2023, the Australian Government introduced the Register of Foreign Ownership of Australian Assets (the **Register**) which is administered by the Commissioner of Taxation (the **Registrar**), as appointed by the Treasurer.<sup>164</sup>

#### Pre-1 July 2023

The previous investor reporting framework required foreign persons to notify:

- the Treasurer of actions taken pursuant to a no objection notification or exemption certificate (by email correspondence);
- the ATO of all existing and new holdings in agricultural land (regardless of the land value) within 30 days of settlement; and
- the ATO 30 days after the end of the financial year in which they commenced holding a registrable water entitlement or contractual water right, and every year thereafter within 30 days of the end of the financial year, of certain events regarding their water interests.

#### Post-1 July 2023

The newly introduced Register seeks to centralise the different reporting regimes and create a centralised record for certain actions relating to interests in land, water, entities, businesses and other assets in Australia. The Register is established by Part 7A of the FATA which also sets out the new reporting framework.

Foreign persons are required to give a 'register notice' to the Registrar within 30 days for an expanded list of actions or events concerning their investments in Australia, which are not limited to actions in respect of which a FIRB approval has been obtained.<sup>165</sup>

Event	When registered circumstances exist, change or cease
<b>Acquisition</b>	<ul style="list-style-type: none"> <li>• Acquisition of an interest in Australian land excluding equitable interests (unless the equitable interest is a lease or licence relating to agricultural land, with a term likely to exceed 5 years).<sup>166</sup></li> <li>• Acquisition of a legal interest in an exploration tenement.<sup>167</sup></li> <li>• Acquisition of a registrable water interest during a financial year, which the foreign person continues to hold at the end of the last day of that relevant financial year.<sup>168</sup></li> <li>• A 'significant action' or 'reviewable national security action' relating to interests in businesses or entities for which FIRB approval has been sought/given or which the Treasurer has 'called-in' for review.</li> <li>• A 'notifiable action' relating to businesses or entities.</li> <li>• A 'notifiable national security action'.</li> <li>• Acquisition of a direct interest in an Australian entity or business that wholly or partly carries on an Australian media business.<sup>169</sup></li> <li>• For foreign government investors only:<sup>170</sup> <ul style="list-style-type: none"> <li>◦ starting an Australian business;</li> <li>◦ an acquisition of a direct interest in an Australian entity or business; and</li> <li>◦ an acquisition of a legal or equitable interest in a tenement or an interest of at least 10% in the securities of a mining, production or exploration entity.</li> </ul> </li> <li>• An action that would be a 'significant action', 'notifiable action',<sup>171</sup> or a 'notifiable national security action' if not covered by an exemption certificate.<sup>172</sup></li> </ul>



Event	When registered circumstances exist, change or cease
<b>Change</b>	<ul style="list-style-type: none"> <li>• A person becomes a foreign person:               <ul style="list-style-type: none"> <li>◦ while holding a registrable interest in land;</li> <li>◦ during a financial year and at the end of the last day of that financial year, the person remains a foreign person and holds a registrable water interest;</li> <li>◦ while holding a direct interest in an Australian entity or business that is an agribusiness or a substantial interest in an Australian entity; and</li> <li>◦ while carrying on or holding a direct interest in an entity that carries on a notifiable national security business.</li> </ul> </li> <li>• A registered circumstance relating to an interest in land exists and there is change in the nature of the land interest (ie it becomes an interest in residential land, commercial land, agricultural land, a mining or production tenement, or an exploration tenement).</li> <li>• A registered circumstance relating to a registrable water interest exists and during the relevant financial year, the volume of water or share of a water resource referred to in the registrable water interest changes.</li> <li>• A foreign person's notified percentage legal interest in an entity or business changes by 5% or more (and the foreign person is aware or ought reasonably to have become aware of the change).</li> </ul>
<b>Cessation</b>	<ul style="list-style-type: none"> <li>• The 'registered circumstance' ceases (and the foreign person is aware or ought reasonably to have become aware of the cessations), for example, a foreign person:               <ul style="list-style-type: none"> <li>◦ ceases to hold an interest in Australian land, including an equitable interest which is a lease or licence relating to agricultural land, with a term likely to exceed 5 years;</li> <li>◦ ceases to hold a legal interest in an exploration tenement;</li> <li>◦ ceases to hold a registrable water interest;</li> <li>◦ ceases to hold any percentage in an Australian entity (or the Australian entity ceases to exist or ceases to be an Australian entity) or national security business or an entity that carries on national security business; or</li> <li>◦ no longer carries on the national security business (or the business is no longer a national security business or an Australian business, or the business ceases to be carried on).</li> </ul> </li> <li>• An investor ceases to be a foreign person while registered circumstance exists.</li> </ul>

### Other considerations

Some events (such as acquisitions and disposals of interests) will trigger two notifications. These being:

- a 'register notice' to the Registrar;<sup>173</sup> and
- a report to the Treasurer under conditions imposed on a no objection notification or exemption certificate.<sup>174</sup>

The Treasurer has issued guidance to clarify that it will not take compliance action against foreign investors who fail to report an event that is reportable under conditions imposed on a no objection notification or exemption certificate,<sup>175</sup> if that event also triggers a notice to the Registrar and that 'register notice':

- is submitted before the deadline for reporting under the relevant condition; and
- contains all the information required to be included in the report to the Treasurer to comply with the relevant condition.

Foreign investors should be aware that if they are not required to give notices to the Registrar they may nonetheless still give notice to the Treasurer under the section 98C, 98D and 98E of the FATA regardless of whether conditions have been imposed on a no-objection notification or exemption certificate. Please see [here](#) for further details.

## 16. Procedural issues (continued)

### Procedural matters

Set out below are some of the steps that will need to be followed by a foreign investor when providing a 'register notice' to the Registrar.

Step	Details
<b>Set up access to Online services for foreign investors</b>	<p>'Register notices' will be provided via the ATO's new portal <a href="#">Online services for foreign investors</a>. A MyGovID will be required to access the portal, and company representatives must register before authorising any other representatives to act on their behalf.</p> <p><b>If the foreign investor has an Australian Business Number (ABN), the once off registration process is as follows:</b></p> <ol style="list-style-type: none"> <li>1. set up a myGovID (a digital identity which is unique to the each individual) which involves downloading the myGovID app from the App Store or Google Play (step 1 <a href="#">here</a>);</li> <li>2. link the myGovID to the business in 'Relationship Authorisation Manager' (an authorisation service that allows individuals to act on behalf of a business when their myGovID is linked) (see step 2 <a href="#">here</a>);</li> <li>3. <a href="#">log in</a> to Online services for foreign investors (see step 3 <a href="#">here</a>); and</li> <li>4. access the <a href="#">Online services for foreign investors</a> for the first time and complete the foreign investor registration in one session (see step 4 <a href="#">here</a> for the information that the first authorised person for the foreign investor should have to hand when completing the registration).</li> </ol> <p><b>If the foreign investor does not have an ABN, the once off registration process is as follows:</b></p> <ol style="list-style-type: none"> <li>1. <a href="#">set up a myGovID</a> (a digital identity which is unique to the each individual) which involves downloading the myGovID app from the App Store or Google Play (step 1 <a href="#">here</a>);</li> <li>2. <a href="#">log in</a> to Online services for foreign investors using the foreign investor's myGovID (step 2 <a href="#">here</a>);</li> <li>3. add the individual themselves or entity (through its authorised representative) as a foreign investor. Alternatively, if the foreign investor already has a record (eg previously applying for an Australian tax file number, submitting a foreign investment application or working in Australia), completing a one-off proof of identity (step 3 <a href="#">here</a>);</li> <li>4. if an ATO record is found for the foreign investor, then the foreign investor will need to confirm the details held by ATO (step 4 <a href="#">here</a>); and</li> <li>5. if the ATO is 'unable to match information', the foreign investor must access the <a href="#">Online services for foreign investors</a> for the first time and complete the foreign investor registration in one session (see step 5 <a href="#">here</a> for the information that the foreign investor should have to hand to complete the registration). Once the registration has been successfully submitted it can take up to 5 business days to process and for the foreign investor name to display in the linked entities list. The public guidance provided is that the 'date the entity became a foreign person' will either be the date an Australian asset was acquired, or if this is the first investment in Australia, the date the registration is being completed.</li> </ol> <p>The ATO has also released a <a href="#">webinar</a> which explains how non-individual foreign investor entities (companies and trusts) and their representatives access Online services for foreign investors for the first time. It also covers completing the one-off registration, authorising others to act on behalf of the company and how to register an asset.</p>

Step	Details
<b>Using the Online Services for foreign investors</b>	<p>Once access to the online services is established, the foreign investor will be able to log in to <a href="#">Online services for foreign investors</a> (using their myGovID) and follow the prompts to give a register notice to the Registrar of the registrable circumstance (including any change or cessation).</p> <p>The type of information to be provided in a register notice will not substantially differ from previous typical FIRB notifications. For example, it will include detail on the foreign investor, the nature of the transaction, the target entity or asset, consideration or value, intended use of the land and structure of the target business. The Register will remain unavailable to the public.</p>

There are no fees payable for providing a 'register notice' under the new regime. The civil penalty for non-compliance is a fine of 250 penalty units (currently \$78,250).

### Next steps

Different companies are likely to respond to these new requirements in different ways (and may already have relatively sophisticated systems in place for managing foreign investment risk). However, we consider that it would be preferable for investors that might reasonably be expected to be impacted by the requirements to:

- identify a single accountable person or team who will be responsible for managing the obligations; and
- implement internal processes to monitor any interest-holdings and/or 'foreign status' (particularly as at least some of the new requirements can apply whether or not the relevant person was aware of the change).

An aerial photograph of a body of water, likely a river or stream, showing a mix of vibrant green and yellowish-green hues. The water's surface is textured with numerous small, white, frothy bubbles and ripples, suggesting a fast flow or a rocky bed. The overall appearance is that of a natural, somewhat turbulent waterway.

**17**

**Compliance**

# 17. Compliance

In order to ensure compliance with the Australian foreign investment regime, the FATA provides for a range of enforcement options, including civil penalties and criminal offences.

The range of offences under the FATA in relation to non-residential land acquisitions include, amongst other offences:

- a foreign person failing to provide notice of a 'notifiable action' or a 'notifiable national security action';<sup>176</sup>
- a foreign person taking action prior to the appropriate notice period ending;<sup>177</sup>
- a person taking action while prohibited by the FATA;<sup>178</sup>
- a person contravening an order made by the Treasurer;<sup>179</sup>
- a person contravening a FIRB condition;<sup>180</sup>
- a person contravening directions or interim directions;<sup>181</sup> and
- a person providing false or misleading information and documents.<sup>182</sup>

## 17.1 Civil Penalties

The maximum civil penalties under the FATA include the lesser of the following:

- 2,500,000 penalty units;
- the greater of the following:
  - 5,000 penalty units (or 50,000 penalty units if the person is a corporation);
  - an amount calculated in relation to the relevant action pursuant to the table set out in s 98F of the FATA.

As of 1 July 2023, the value of a penalty unit is \$313. There are also additional civil penalties for non-compliance in relation to residential land.

## 17.2 Criminal Penalties

The maximum criminal offences under the FATA include 10 years' imprisonment, or 15,000 penalty units (or 150,000 penalty units if the person is corporation), or both.

## 17.3 Infringement Notices<sup>183</sup>

The FATA also contains a three-tier infringement notice regime for less serious breaches of the foreign investment rules. The infringement notice regime applies as follows:

- a **Tier 1 Infringement Notice** relates to a voluntary disclosure of a contravention prior to the Commonwealth commencing an investigation of the alleged contravention;
- a **Tier 2 Infringement Notice** applies in all other cases, except for (generally) high value transactions that are captured by Tier 3 Infringement Notices; and
- a **Tier 3 Infringement Notice** will apply if the alleged contravention relates to high value transactions:
  - if the action is an acquisition for an interest in Australian residential land – \$5,000,000; or
  - otherwise – \$275,000,000.

Tier	Individual	Corporations
1	12 penalty units	60 penalty units
2	60 penalty units	300 penalty units
3	300 penalty units	1,500 penalty units

# Attachment 1 – Monetary Thresholds



## FTA classification

Whilst the thresholds for FTA partners are generous, it is quite difficult for investors from FTA partners to utilise the higher thresholds as foreign investors taking the relevant action needing FIRB approval must be incorporated in the relevant FTA jurisdiction to be eligible for the higher threshold. In practice, this means, for example, that special purpose vehicles incorporated in Australia by foreign investors from FTA partners will be unable to utilise the higher monetary threshold.

Investor	Action	Threshold - more than:
<b>Land investments</b>		
<b>All investors</b>	<b>National Security Land</b>	\$0
	<b>Residential Land</b>	\$0
	<b>Vacant commercial land</b>	\$0
<b>Private investors from certain FTA partners*</b>	<b>Agricultural land</b>	For Chile, New Zealand, and the United States, \$1,427 million Others, \$15 million (cumulative)
	<b>Developed commercial land</b>	\$1,427 million
	<b>Mining and production tenements</b>	For Chile, New Zealand, and the United States, \$1,427 million Others, \$0
<b>Private investors not from a certain FTA partner</b>	<b>Agricultural land</b>	For Thailand, \$50 million Others, \$15 million (cumulative)
	<b>Developed commercial land</b>	\$330 million Where the land is sensitive, \$71 million For India, non-sensitive land for the supply of services, \$533 million
	<b>Mining and production tenements</b>	\$0
	<b>All investments</b>	\$0
<b>Non-land investments</b>		
<b>All investors</b>	<b>National security businesses</b>	\$0
	<b>Australian media businesses</b>	\$0
<b>Private investors from certain FTA partners*</b>	<b>Non-sensitive businesses</b>	\$1,427 million
	<b>Sensitive businesses</b>	\$330 million
	<b>Agribusinesses</b>	For Chile, New Zealand, and the United States, \$1,427 million Others, \$71 million (cumulative)
<b>Private investors not from a certain FTA partner</b>	<b>Businesses (sensitive and non-sensitive)</b>	\$330 million
	<b>Agribusinesses</b>	\$71 million (cumulative)
	<b>Service businesses (non-sensitive)</b>	For India, \$533 million
<b>Foreign government investors</b>	<b>All investments</b>	\$0

Source: [FIRB Monetary thresholds](#)

\* includes Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, the Republic of Korea, the United States of America, the United Kingdom and any other country listed in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (8 March 2018).

## Attachment 2 – FIRB application fee regime

**Table 1: Kinds of actions and applicable fees**

Kinds of action		Applicable fees <sup>(a)</sup>
<b>Land</b>	<b>Residential land (established dwellings)<sup>(b)</sup></b>	Fee tiers increase every \$1 million of consideration Fees start at \$44,100 for acquisitions of \$1 million or less, <sup>(c)</sup> rising to a maximum of \$3,514,800 for acquisitions of more than \$40 million
	<b>Residential land (no established dwelling)</b>	Fee tiers increase every \$1 million of consideration Fees start at \$14,700 for acquisitions of \$1 million or less, <sup>(d)</sup> rising to a maximum of \$1,171,600 for acquisitions of more than \$40 million
	<b>Agricultural land</b>	Fee tiers increase every \$2 million of consideration Fees start at \$14,700 for acquisitions of \$2 million or less, <sup>(e)</sup> rising to a maximum of \$1,171,600 for acquisitions of more than \$80 million
	<b>Commercial land and tenements</b>	Fee tiers increase every \$50 million of consideration Fees start at \$14,700 for acquisitions of \$50 million or less, <sup>(f)</sup> rising to a maximum of \$1,171,600 for acquisitions of more than \$2 billion
<b>Businesses and entities (excluding land entities)</b>		
<b>Starting an Australian business</b>		\$4,300 flat fee
<b>Entering agreements and altering documents</b>		\$29,500 flat fee
<b>Variations</b>		Standard Variation – \$29,500 flat fee Minor Variation – \$4,300 flat fee
<b>Internal reorganisations</b>		\$29,500 flat fee

<sup>(a)</sup> where an action is a reviewable national security action, fees are calculated at 25% of the fee for an equivalent notifiable action.

<sup>(b)</sup> this does not apply to acquisitions of land for BTR projects after 14 December 2023, where commercial land application fees are instead applied (refer to section 12.1).

<sup>(c)</sup> a lower fee of \$12,900 if the consideration for the action is less than \$75,000.

<sup>(d)</sup> a lower fee of \$4,300 if the consideration for the action is less than \$75,000.

<sup>(e)</sup> a lower fee of \$4,300 will apply where the consideration value of an action is less than \$75,000 or where the foreign person already holds an interest of more than 50 per cent in Australian land, a tenement, securities in an entity or assets of an Australian business and the acquisition results in the person increasing their interest or where the foreign person already holds an interest of more than 50 per cent in Australian land, a tenement, securities in an entity or assets of an Australian business and the acquisition results in the person increasing their interest.

**Table 2: provides a summary of the different fee tiers for single actions involving residential land, agricultural land, commercial land, tenements, businesses and entities.**

Consideration for the action			Applicable fee <sup>(a)</sup>	
Residential Land <sup>(b)</sup>	Agricultural Land	Commercial land, tenements, businesses and entities	Fees for single action	Fees for single Reviewable National Security Action
Less than \$75,000 <sup>(c)</sup>	Less than \$75,000 <sup>(c)</sup>	Less than \$75,000 <sup>(c)</sup>	\$4,300	\$1,075
\$1 million or less	\$2 million or less	\$50 million or less	\$14,700	\$3,675
\$2 million or less	\$4 million or less	\$100 million or less	\$29,500	\$7,375
\$3 million or less	\$6 million or less	\$150 million or less	\$59,000	\$14,750
\$4 million or less	\$8 million or less	\$200 million or less	\$88,500	\$22,125
\$5 million or less	\$10 million or less	\$250 million or less	\$118,000	\$29,500
...	...	...	...	...
Over \$40 million	Over \$80 million	Over \$2 billion	\$1,171,600 maximum <sup>(d)</sup>	\$292,900 maximum <sup>(d)</sup>

<sup>(a)</sup> where an action is a reviewable national security action, fees are calculated at 25% of the fee for an equivalent notifiable action.

<sup>(b)</sup> where an action is to acquire an interest in residential land on which there is at least one established dwelling, fees will be tripled (up to a maximum of \$3,514,800, being three times the maximum applicable fees for residential land).

<sup>(c)</sup> a lower fee of \$4,300 will apply where the consideration value of an action is less than \$75,000.

<sup>(d)</sup> an ultimate cap of \$7,000,000 (subject to indexation) will apply for any FIRB fee imposed under the foreign investment regime.

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# Endnotes

## Chapter 3

1. FATA s 4 (definition of 'foreign person'); FATR s 18.
2. FATR s 47.
3. *Corporations Act 2001* (Cth) s 9 (definition of 'substantial holding').
4. We explore the various thresholds of interest in section 4 and Attachment 1.
5. FATR s 56.
6. FATA s 4 (definition of 'foreign government investor'); FATR s 17(1).
7. FATA s 6(1).
8. FATA s 52.
9. FATA s 54.
10. FATA s 6.
11. FATA s 6(3)(h).
12. FATA s 6(1)(l).
13. See FIRB Guidance Note 2.
14. FATA s 16A.
15. FATA s 16A.
16. FATA s 18(3).

## Chapter 4

17. FATR s 16(a).
18. FATR s 16(b).
19. FATR s 16(c).
20. FATA ss 4 (definition of 'substantial interest'), 16A, 17, 18.
21. FATA ss 4 (definition of 'aggregate substantial interest'), 16A, 17, 18.
22. FATA s 15(1).
23. FATA s 15(1)(a).
24. FATA s 15(1)(b).
25. FATA s 15(1)(c).
26. FATA s 15(3).
27. FATA s 20(1)(a).
28. FATA ss 20(1)(b), 22.
29. FATA s 20(1)(c).
30. FATA s 19(3).
31. Although this is the acknowledged basis for the exemption, its application is not limited to offshore transactions or to transactions that are necessarily remote to Australia.

## Chapter 5

32. FATA s 47.
33. FATR s 56(1).
34. FATA s 43.
35. FATA ss 40, 41.
36. FATR s 55.
37. FATR s 56(1)(a).
38. FATR s 56(1)(b).
39. FATR s 56(1)(c).
40. FATA ss 43, 47(2)(c).
41. FATA s 55B(1)(a).
42. FATA s 55B(1)(b).
43. FATA s 55B(1)(c).
44. FATA s 55B(1)(d).
45. FATA s 55B(1)(e), (2).
46. FATA Part 2 Division 4B.
47. The 'last resort' power gives the Treasurer an opportunity to review actions for which a no objection notification, an exemption certificate, deemed approval or a notice imposing conditions has been given, if exceptional circumstances arise that create a national security risk.

## Chapter 6

48. FATA s 55B.
49. FATA Part 3 Division 2.
50. FATR s 8AA.
51. FATR s 8AA(2)(b).
52. FATR s 8AA(2)(c).
53. FATR ss 8AA(2)(d) - (f).
54. FATR s 8AA(2)(g).
55. FATR ss 8AA(2)(h) - (j).
56. FATA s 55B(1)(a).
57. FATR s 8AA.
58. FATA s 8A(2).
59. FATR s 5 (definition of 'national security land').
60. FATA s 66A; FATR s 60A.
61. FATA s 55D(1).
62. FATA s 55D(2).
63. FATA s 55E(2).
64. FATA s 55F.

## Chapter 8

65. FATA ss 74, 75.
66. FATA s 74. Where a decision is made in relation to a type of action identified in s 75(1A) of the FATA, only factors relating to 'national security' may be considered by the Treasurer.
67. FATA s 79A.
68. Often the earlier of 10 days after the end of the Treasurer's decision period or the day that a no objection notification was given to the person; FATA s 82.

## Chapter 10

69. FATA s 74(4) - (6).
70. FATA s 62.
71. FATA s 76(6).
72. FATA s 62.

## Chapter 11

73. FATA s 47.
74. FATA s 8.
75. FATA ss 8, 21.
76. FATR ss 8AA, 12, 13A, 22.
77. FATA ss 40, 41.
78. FATA s 54.
79. FATA s 54.
80. FATA s 54(4)(b).
81. See FATA s 19.
82. FATA s 22(4).
83. FATA ss 18A, 20.
84. FATR s 51.
85. FATA s 26, FATR s 22.
86. FATR s 13(1).
87. FATR s 13(2).
88. FATR s 37.
89. FATR s 37.
90. FATA s 47(2)(a).
91. FATR s 12.
92. FATR s 12.
93. See FATR s 12.
94. FATR s 12(4).
95. FATR s 55.

## Endnotes (continued)

96. See Attachment 1.
97. FATR s 13A(1).
98. FATR s 13A(2).
99. FATR s 13A(3).
100. FATR s 13A(4).
101. Guidance note 7 (page 12).
- Chapter 12**
102. FATA s 12.
103. FATA ss 43, 47(2)(c).
104. FATR s 52(1).
105. FATA s 4 (definition of 'commercial land').
106. FATR s 5 (definition of 'vacant').
107. cf FATR s 5 (definition of 'vacant').
108. FATA s 52(2), FATR s 52(4).
109. FATA s 52(2)(b)(i).
110. FATA s 4 (definition of 'agricultural land').
111. FATR s 44.
112. FATR s 44(3).
113. FATR s 44(6).
114. FATR s 44(7A).
115. FATR s 44(11).
- Chapter 13**
116. FATA s 52(1), FATR ss 52(1)(c), 52(1)(e), 52(3)(a)(iii).
117. FATA s 4 (definition of 'Australian land').
118. FATA s 4 (definition of 'mining or production tenement').
119. FATR s 31.
120. FATR s 31(2)(a).
121. FATR s 31(2)(c).
122. FATR s 31(2)(b)(i).
123. FATA ss 55F, 66A.
124. FATR s 56(1)(c)(ii).
125. FATA s 130ZA.
126. FATA s 130ZA.
127. FATA s 130ZB.
128. FATA s 130ZE.
- Chapter 14**
129. FATA s 69.
130. FATA s 69(1).
131. FATA s 69(1A).
132. FATA s 66A.
133. FATR s 60A.
134. FATA s 66A(5).
135. FATA s 79A.
136. FATA s 79A(1)(b).
137. FATA s 78(1).
138. FATA s 78(2).
139. FATA s 78(3).
140. FATA s 79(1).
- Chapter 15**
141. FATR s 27(1)(a)(ii).
142. FATR s 27(3)(a).
143. FATR s 27(3)(b).
144. FATR s 27(3).
145. FATA ss 15(1), (3), (5).
146. FATR s 41(2)(a).
147. FATR s 41(1), (2)(a), (c).
148. *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (Cth) Explanatory Statement, Item 11.
149. We note that indexation has increased this threshold amount from \$60 million to \$71 million as at the date of this guide.
150. FATR s 56(4).
151. FATR s 56, Note 1.
152. While there is no specific provision in the FATA or FATR enabling the 'passive foreign government investor exemption certificate', the exemption certificate will be created using the other exemption certificate provisions in FATR Part 3, Division 4 Subdivision B. See FIRB Guidance Note 9.
153. FATR s 17(2).
- Chapter 16**
154. FATA s 113.
155. FATA ss 77, 114.
156. See Guidance Note 10.
157. FATA s 115.
158. FATA s 77(8).
159. FATA s 77A.
160. See Guidance Note 2: Key Concepts.
161. FATA s 77(3).
162. Refer to [Australia's foreign investment policy](#).
163. Refer to the [Treasurer's media release](#) and our [Insight article](#).
164. FATA s 130R.
165. FATA s 130W.
166. FATA s 130ZA.
167. FATA s 130ZB. However, interests in exploration tenements in respect of non-national security land held by non-foreign government investors are exempted from the operation of FATA and do not require notification to the Register (see FATR 27B).
168. FATA s 130ZE.
169. FATR ss 56, 58B.
170. FATR ss 56, 58B.
171. FATR ss 58C, 58D.
172. FATR s 58E.
173. FATA s 130W.
174. FATA ss 98C, 98D, 98E.
175. Guidance Note 15, page 15.
- Chapter 17**
176. FATA s 84.
177. FATA s 85.
178. FATA s 85A.
179. FATA s 86.
180. FATA s 87.
181. FATA s 88A.
182. FATA s 98B.
183. FATA s 100.



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