Hogan Lovells

Foreign Investment in Australia

What you need to know

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Want to know more?

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Australia's foreign investment framework

What you need to know

In December 2015, changes were made to Australia's foreign investment framework to simplify and strengthen the regime and to also provide increased legal certainty for foreign investors.

This guide gives an overview of Australia's new foreign investment framework and the FIRB approval process.

Each country has its own regulatory regime in relation to foreign direct investment. Under Australia's foreign investment regime, certain investments by foreign investors or foreign governments need to be notified to, and a no objections notification issued from, the Australian Treasurer (this process is often referred to as obtaining "*FIRB approval*"). The Foreign Investment Review Board ("**FIRB**") reviews most of the foreign investment proposals on a case-by-case basis for approval by the Australian Treasurer.

If FIRB approval is required and a person makes an acquisition without approval, then investors run the risk of delaying the transaction, having the investment unwound or having criminal or civil penalties imposed.

Therefore, before making an investment or entering into a transaction, the first question that should be asked is– **Do I need FIRB approval?**

IMPORTANT

If you are looking to invest in Australia, to avoid delaying a transaction or being prevented from completing a transaction, you should seek advice as early as possible on whether FIRB approval is required for the proposed transaction.

What is Australia's foreign investment framework?

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) ("**FATA**") (and associated acts and regulations) and supported by Australia's Foreign Investment Policy (December 2015) ("**Policy**"), which outlines the Australian Government's approach to administering the foreign investment framework.

In December 2015, Australia's foreign investment framework was modernised and simplified. The motivation for these changes was to:

- increase legal certainty for foreign investors;
- modernise and simplify the foreign investment framework (e.g. to take into account changes in transaction structures (i.e. the previous framework focussed on shares rather than equally dealing with other securities such as units));
- update the legislation to reflect core administrative practices and requirements;
- closer align the foreign investment regime with other regimes (commonwealth legislation) (e.g. takeover regime);
- improve scrutiny and transparency in relation to foreign ownership of agricultural land or agribusiness;
- align with a whole-of-government approach – that is to allow the Australian Treasurer to consult with and provide relevant information to other government departments or agencies before making a decision (e.g. national security agencies, the Department of Immigration and Border Protection and the Australian Taxation Office); and
- simplify, consolidate or clarify the exemptions available across the different acquisition types.

What has changed?

The changes to modernise and streamline Australia's foreign investment framework came into effect on 1 December 2015. The key changes include:

- incorporating the rules in relation to foreign government investors and acquisitions of interests in land under Australia's Foreign Investment Policy (June 2015) into the legislative framework to provide greater certainty;
- increasing the substantial interest from 15% to 20%, to align with Australia's takeover regime;
- changing terminology or modifying definitions to increase clarity or to better fit in the new framework;
- introducing fees for foreign investment approval applications;
- introducing civil penalties and infringement notices for less serious offences and increasing criminal penalties for existing offences;
- categorising transactions into two groups: significant actions and notifiable actions, simplifying the review process;
- the screening threshold for agribusiness investment being set to $55 million;
- creating the agricultural land foreign ownership register where all acquisitions of interests in agricultural land by foreign persons, regardless of whether they require FIRB approval and regardless of value, must be registered; and
- proposals relating to foreign investment in residential non-sensitive real estate being processed by the Australian Taxation Office. Proposals that relate to foreign investment in commercial land, agricultural land or an Australian business will be processed by the Australian Treasurer.

Foreign investment is important in Australia

At the end of 2014, the level of foreign investment in Australia increased $261.2 billion to reach $2,784.5 billion. Foreign direct investment accounted for approximately 25% of this ($688.4 billion), with majority investment (55%) being in the form of portfolio investment ($1,524.0 billion).

Figure 1 sets out the number and value of proposals reviewed by FIRB from 2008-09 to 2013-14. In practice, most investment proposals are approved. A proposed investment can be approved with or without conditions.

Figure 1- Proposals reviewed from 2008-09 to 2013-14

Outcome	Number of proposals (Value of proposed investment)					
	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14
Approved unconditionally	2,266 ($135.9b)	2,672 ($125.3b)	4,606 ($145.7b)	4,900 ($137.5b)	5,535 ($108.7b)	12,307 ($125.3b)
Approved with conditions	3,086 ($45.5b)	1,729 ($14.2b)	5,687 ($31.0b)	5,803 ($33.2b)	7,196 ($27.0b)	11,795 ($42.1b)
TOTAL APPROVED	**5,352 ($181.4b)**	**4,401 ($139.5b)**	**10,293 ($176.7b)**	**10,703 ($170.7b)**	**12,731 ($135.7b)**	**24,102 ($167.4b)**
Rejected	3 (<$0.05b)	3 (<$0.05b)	43 ($8.8b)	13 ($0.2b)	-	3 ($2.2b)
TOTAL DECIDED	**5,355 ($181.4b)**	**4,404 ($139.5b)**	**10,336 ($185.5b)**	**10,716 ($170.8b)**	**12,731 ($135.7b)**	**24,105 ($169.6b)**
Withdrawn	341	167	390	534	446	719
Exempt	125	132	139	170	145	181
TOTAL CONSIDERED	**5,821**	**4,703**	**10,865**	**11,420**	**13,322**	**25,005**

Source: Foreign Investment Review Board Annual Report 2013-14

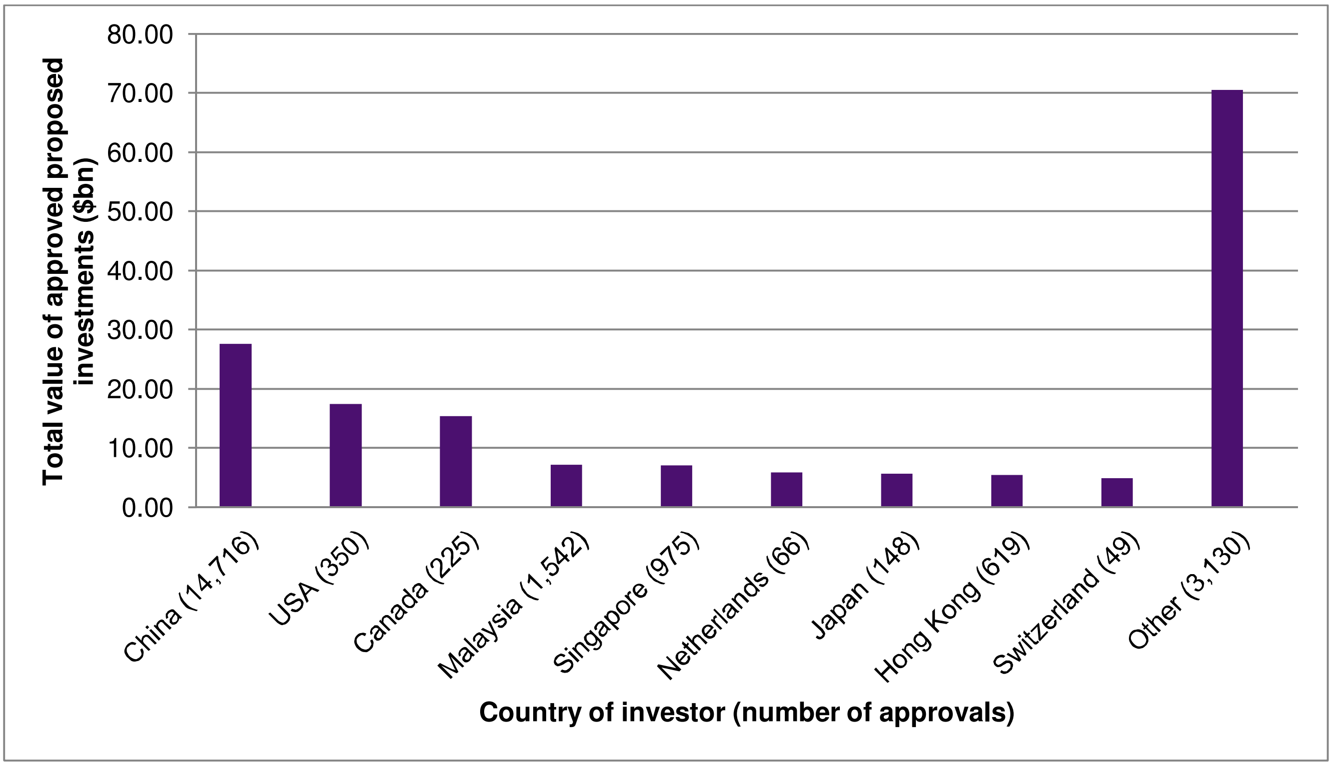
Where are the investment applications coming from?

Figure 2 sets out the value and number of proposals approved by the Australian Treasurer by country of investor in 2013-14. China figures prominently but with the introduction of the China-Australia Free Trade Agreement ("**CHAFTA**") and the higher screening thresholds it will be interesting to see how this figure will look in future years. Other major sources of proposed investments in 2013-14 were the United States, Canada, Malaysia, Singapore and Japan.

Interesting fact

- Australia has entered into bilateral trade agreements (free trade agreements) with various countries, the most recent being with China, Japan, Korea and the Trans-Pacific partnership countries. Currently nine free trade agreements are in force. These agreements have increased the monetary screening thresholds for proposed investments requiring FIRB approval.
- CHAFTA will enter into force on 20 December 2015.

Figure 2 - Approvals by country of investor in 2013-14 ($bn)



Source: Foreign Investment review Board Annual Report 2013-14

Do I need FIRB approval?

If you are a foreign person proposing to make an investment in Australia, FIRB approval may be required. The notification and approval requirements vary based on a number of factors including, whether the investor is a government or non-government foreign investor, the type of acquisition, whether the acquisition is subject monetary thresholds and free trade agreement conditions. A simple flow chart is set out in Figure 3.

Interesting fact

Different criteria apply depending on whether the investor is a non-government or government foreign investor.

Am I a foreign person?

A foreign person is broadly defined.

Simply, a foreign person is:

- any individual who does not ordinarily reside in Australia;
- a corporation or a trustee of a trust in which:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20%; or
  - two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, that hold an aggregate interest of at least 40%; or
  - a foreign government or state-owned enterprise.

I am a foreign government investor

Generally, all acquisitions of a direct interest Australian entity or business, starting a new business and acquisitions of interest in land by foreign government investors require FIRB approval, regardless of value.

A 'direct interest' in an entity or business includes:

- any acquisition of 10% or more;
- any acquisition of 5% or more if the investor has entered into a legal arrangement relating to the business or entity;
- an interest in the entity or business where the investor will have the ability to influence, participate or control the entity or business or policy of the entity.

Does my proposed investment require approval?

The following types of investments that meet the relevant monetary thresholds set out in Figure 5 will require FIRB approval:

- acquisition of a substantial interest (at least 20%) in an Australian entity;
- acquisition of a direct interest in an agribusiness;
- investment of at least 5% in an Australian media business;
- acquisition of an interest in Australian land;
- acquisition of an interest in a mining or production tenement; and
- in relation to a foreign government investor, includes starting an Australian business and the acquisition of a legal or equitable interest in a tenement or an interest of at least 10% in securities in a mining or production entity.

Figure 3 - Do I need FIRB approval?

IF you are a foreign person…

Government investor OR **Non-Government investor**

AND proposing to …

Government investor:

Acquire a direct interest in an Australian entity or an Australian business

OR

Start a new business

OR

Land: Acquire an interest in land, including:

- a legal or equitable interest in a mining or production tenement
- an interest in vacant land or vacant commercial land

Non-Government investor:

Business:

- (**General**) Acquire a substantial interest (at least 20%) or control of an entity or business that has a connection to Australia and the value of the consideration, assets or issued securities meets the threshold – this includes internal reorganisations
- (**Agribusiness**) Acquire a direct interest in an agribusiness and aggregate value of the consideration and value of other interests held (including associates) meets the threshold
- (**Media**) Make an investment of 5% or more in a media business

OR

Land:

- Acquire agricultural land where the value of agricultural land owned by the foreign person (and any associate) is more than the threshold
- Invest in developed commercial land where the value of the interest is more than the threshold
- Acquire an interest in residential land or vacant commercial land
- Acquire an interest in a mining or production tenement where the value of the interest is more than the threshold or at least 10% interest in securities in a mining, production and exploration entity

THEN you will need to …

Notify FIRB and receive a no objection letter before making the investment

Does my proposed investment meet the threshold?

The monetary thresholds are indexed annually on 1 January, except for the general threshold for agricultural land (i.e. $15 million (cumulative)) and the agricultural land threshold for Singapore and Thailand investors, which are not indexed.

The monetary thresholds set out in Figure 5 will remain the same for 2016.

Interesting facts

- Australian bilateral trade agreements (free trade agreements) provide increased monetary screening thresholds for proposed investments.
- The thresholds for China will apply from 20 December 2015.

A proposed acquisition which meets the monetary threshold will require FIRB approval unless an exemption applies.

How do I calculate the value of my proposed investment?

Whether a proposed investment will meet the monetary threshold will depend on the type of acquisition and how the monetary screening threshold is calculated.

Generally, the value of the transaction is calculated as set out in Figure 4.

Figure 4 – How the monetary threshold value is calculated

Type of investment	Calculation
Interest in an agribusiness	Aggregate of the value of: • the consideration for the acquisition; and • other interest held (with associates) in the entity or business
Interest in securities	Higher of the total assets value or the total issued securities value for the entity
Entering into certain agreements relating to the affairs of an entity or altering a constituent document resulting in a change of control	Total asset value for the entity
Entering into or terminating significant agreements with an Australian business	The total value of the assets of the business
Interest in agricultural land	Aggregate of value of: • all interest in the land (with associates); and • the consideration for the acquisition
Interest in other land	The value of the interest in the land.

Figure 5 - Monetary screening thresholds for 2015-16

Type of investment	Non-Government Investors				Government Investor
	Other	Chilean, New Zealand and United States	Japanese, Korean and Chinese	Singaporean and Thai	
Residential land	$0	$0	$0	$0	$0
Vacant commercial land	$0	$0	$0	$0	$0
Developed commercial land	$252 million $55 million (sensitive land)	$1,094 million	$1,094 million	$252 million $55 million (sensitive land)	$0
Agricultural land	$15 million (cumulative value of interest held by the foreign person (with associates))	$1,094 million	$15 million (cumulative value of interest held by the foreign person (with associates))	$50 million (land used wholly and exclusively for a primary production business, otherwise the land is not agricultural land))	$0
Agribusiness	$55 million (total value of consideration and value of interests held before and after proposed acquisition)	$1,094 million	$55 million (total value of consideration and value of interests held before and after proposed acquisition)	$55 million (total value of consideration and value of interests held before and after proposed acquisition)	$0
Mining and production tenements	$0	$1,094 million	$0	$0	$0 (legal and equitable interest)
Shares or units in Australian land corporations or trust	$0	$0	$0	$0	$0 (all direct interests)
Media sector (5% or more)	$0	$0	$0	$0	$0
Assets or shares in an Australian business or company holding Australian assets	$252 million	$252 million (sensitive business) $1,094 million	$252 million (sensitive business) $1,094 million	$252 million	$0 (all direct interests or starting a new business)

How do I get FIRB approval?

When do I notify FIRB?

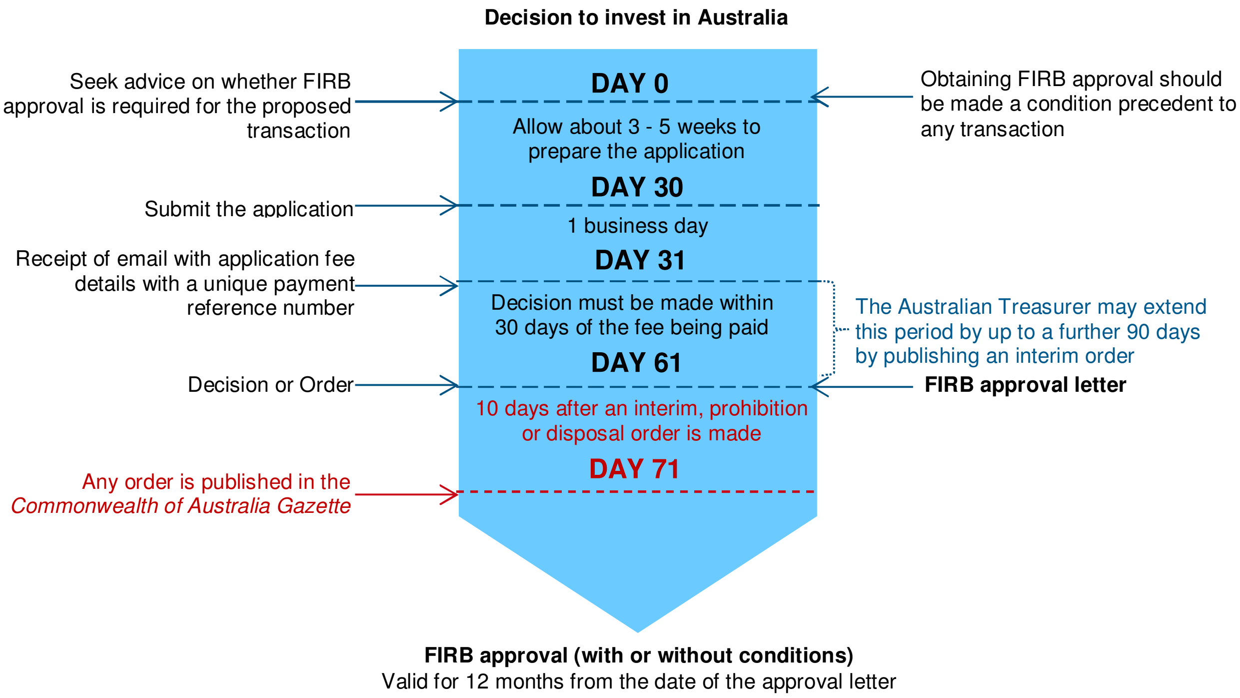
If you are required to or intend to obtain FIRB approval, you should apply for, and obtain approval, before the investment is made. Failure to obtain prior approval of an investment could delay the transaction, result in the investment being unwound or substantial fines being imposed, and in serious circumstances the legislation also provides for imprisonment.

From 1 December 2015, fees will apply on all foreign investment applications.

Set out in Figure 6 is a typical timetable for a FIRB application. The times will vary depending on whether the review period is extended.

Generally, once an application has been submitted and the correct fee has been paid, the Australian Treasurer has 30 days to review the investment proposal and make a decision. The Australian Treasurer can extend this period by up to a further 90 days by publishing an interim order in the *Commonwealth of Australia Gazette.* In some circumstances, particularly where there are concerns with details being published in the *Commonwealth of Australia Gazette*, the investor can voluntarily extend the period by written notification prior to the end of the 30 day review period. There is no limit to the number of times the review period can be voluntarily extended.

Figure 6 - Typical timetable



Generally, most investment proposals will be approved unless it is contrary to Australia's national interest.

Interesting fact

- In 2013-14, FIRB approved 24,102 proposals with a total value of approximately $167.4 billion of proposed investment. Only 3 proposals were rejected.
- In 2013-14, 719 proposals were withdrawn. Some of the proposals were withdrawn because the investment was deferred or the foreign investor decided not to proceed for commercial reasons.

Fees for foreign investment applications and notices

From 1 December 2015, fees apply to foreign investment applications and notices. The fees payable depend on the type of proposed investment. If an application falls into a number of categories, the highest fee will apply. Set out in Figure 7 is a list of fees applying to the most common categories of foreign investment applications.

Figure 7 - Fees for foreign investment applications

Type of investment	Fee
Vacant commercial land	$10,000
Commercial real estate	$25,000
New business proposals and internal re-organisations	$10,000
Business acquisitions where the value of the investment is $1 billion or less	$25,000
Business acquisitions where the value of the investment is greater than $1 billion	$100,000

What is the national interest test?

FIRB considers each investment proposal on a case-by-case basis. An investment will be prohibited if it is considered to be contrary to the national interest.

'National interest' is not a defined term. The Policy provides a list of factors typically considered by FIRB:

- **Type of investment** – whether or not the investment is in a sensitive business and its effects.
- **National security** – the extent to which the investment will affect Australia's ability to protect its strategic and security interests.
- **Competition** – whether it would promote healthy competition.
- **Other Australian Government policies** – such as the impact on Australian tax revenues and environment etc.
- **Impact on the economy and community** – the extent to which the investment will develop and provide fair return for the Australian people (e.g. creation of jobs).
- **Character of the investor** – corporate governance practice of the investor, the basis of operations and regulation.

Confidentiality

Commercial sensitive and confidential information is provided in a foreign investment application.

Appropriate procedures have been put in place in the Australia's foreign investment framework to:

- allow the Australian Treasurer to consult with and provide information to other government agencies before making a decision, aligning with the whole-of-government approach; and
- ensure confidentiality is protected.

What happens if I don't get FIRB approval?

From 1 December 2015, under FATA, certain transactions will be broadly grouped into two categories:

- significant actions which are subject to voluntary notifications; and
- notifiable actions which are subject to mandatory notifications.

Significant action

Generally, a significant action includes the following types of proposed transactions which meet the monetary thresholds:

- acquisition of interests in an Australian entity or business resulting in a change of control;
- acquisition of assets of an Australian business;
- acquisition of interests in Australian land;
- acquisition of an interest in an Australian business that is an agribusiness;
- entering into or terminating certain significant agreements with an Australian business; and
- entering into certain agreements relating to the affairs of an entity or altering a constituent document resulting in a change of control.

Notifiable action

A notifiable action must be notified to the Australian Treasurer before entering into an agreement. Notifiable actions include the acquisition of the following interest which meet the relevant monetary thresholds:

- a direct interest in an Australian entity or Australian business that is an agribusiness;
- a substantial interest (at least 20% in an Australian entity; or
- acquire an interest in Australian land.

The Australian Treasurer's powers and penalties

The Australian Treasurer has powers in relation to a person involved in a scheme to avoid the application of FATA, being to make a disposal order or an order prohibiting the proposed significant action.

The following penalties will apply if a foreign person makes an acquisition without approval or fails to comply with a condition of approval.

Maximum criminal penalty of:

- Individual – 750 penalty units ($135,000) or 3 years imprisonment; and
- Company – 3,750 penalty units ($675,000).

Maximum civil penalty of:

- Individual – 250 penalty units ($45,000)
- Company – 1,250 penalty units ($225,000).

It is possible to make a retrospective notification of an investment if you have inadvertently failed to obtain prior FIRB approval. However, non-compliance may affect consideration of any future proposals.

The Australian Treasurer has the following powers in relation to a significant action:

- provide a no objection notification with or without conditions;
- make a prohibition order – prohibiting the proposed significant action; or
- make a disposal order – unwinding the action.

Some foreign persons will volunteer to notify the Australian Treasurer of a proposed significant action to prevent the Australian Treasurer from making a prohibition or disposal order.

What's next for Australia's foreign investment framework?

Recent cases have indicated that there may need to be further changes to Australia's foreign investment framework in relation to acquisitions involving valuable Australian assets and national infrastructure, particularly where there is a national security implication.

In particular, the following aspects of the framework may need to be reviewed:

- whether or not the acquisition or long-term lease of critical national infrastructure should also be reviewed under Australia's foreign investment framework; and
- laws which enable state governments (or government bodies) to sell strategic assets to foreign companies without government scrutiny.

Recent cases

A vast majority of foreign investment applications are approved by the Australian Treasurer.

Recent high profile FIRB decisions where the investments were not approved by the Australian Treasurer include the S Kidman & co and GrainCorp transactions (see below). These have been widely reported and have shone a (and in some people's minds, an unfavourable) light on Australia's foreign investment framework and the application process.

Of course the Australian Government is supportive of foreign investment, particularly in the infrastructure and business development sectors. The Transgrid transaction (see below is a recent example). In early December, the Australian Government announced that it will spend almost $1.1 billion in the next four years to promote business and innovation. many see this as a positive sign of the government actively and positively encouraging more foreign investment.

High profile recent applications

Not approved

S Kidman & Co (November 2015)

FIRB blocked the potential sale of a cattle station (Kidman) for $350 million to foreign investors on the basis that it would be contrary to the national interest. The identity of the investor is unknown but assumed to be a military-linked Chinese investor.

The Australian Treasurer stated that the sale was blocked due to the size and significance of the total portfolio of the property and the national security concerns (part of the station located within a weapons testing range in South Australia).

Would the potential sale have been approved if part of the land had not been over the weapons testing range?

GrainCorp (November 2013)

Archer Daniels Midland's (a US food giant) $3.4 billion takeover of GrainCorp was blocked by FIRB. The investment was blocked to protect GrainCorp, Australia's largest listed agribusiness, from foreign ownership and due to the potential for a reduction in competition.

Approved

Transgrid (November 2015)

Despite national security concerns, FIRB approved a $9 billion sale of NSW electricity network (owned by Transgrid) to a consortium backed by the Chinese Government-owned investor.

The network supplies power and telecommunications to many government departments, defence bases and intelligence agencies in New South Wales and Canberra.

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