

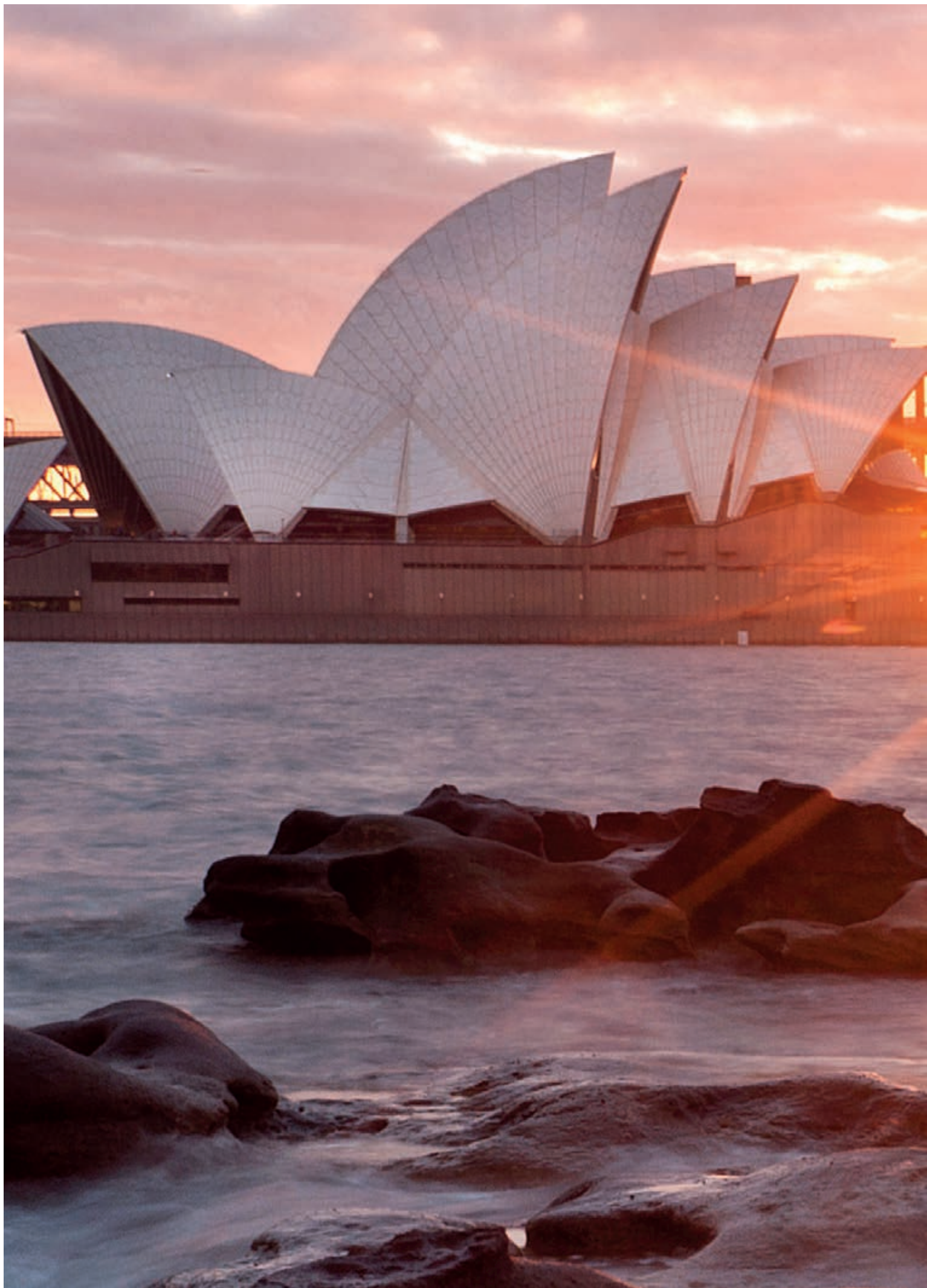


Hogan
Lovells

Foreign Investment in Australia

What you need to know

November 2018



Contents

Australia's foreign investment framework	5
Do I need FIRB approval?	10
Am I a foreign person?	12
Is my proposed investment a type of transaction that requires FIRB approval?	14
Does my transaction meet the monetary threshold?	16
The FIRB approval process	20
What happens if I don't get FIRB approval?	26
Recent high profile decisions	28
Glossary	30

Want to know more?

If you would like more information or assistance, drop us an email or give us a call. Do I need FIRB approval?



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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.



Australia's foreign investment framework

What you need to know

Under Australia's foreign investment regime, certain types of investments by foreign private investors or foreign government investors need to be notified to, and reviewed and approved by, the Australian Treasurer ("Treasurer"). This process is referred to as "obtaining FIRB approval".

The Foreign Investment Review Board ("FIRB") reviews foreign investment proposals on a case-by-case basis and advises the Treasurer on the national interest implications of the proposed transaction. The decision to grant or refuse FIRB approval is made by the Treasurer.

If FIRB approval is required and a foreign investor makes an acquisition without it, the investor risks delaying the transaction, the transaction not completing, having the investment unwound or criminal or civil penalties being imposed.

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

Before you make an investment

You should be asking the following questions:

- Do I need FIRB approval?
Certain investments by foreign persons must be approved by the Treasurer. Obtaining FIRB approval is the responsibility of the investor.
You should seek advice on whether your investment will require FIRB approval as soon as possible. See Figure 3 for a simple flow chart on when FIRB approval may be required.
- When should I get FIRB approval?
FIRB approval should be obtained before completion of the acquisition.
Transactions should be made conditional on FIRB approval being obtained and the transaction should not complete until you have been advised of the Treasurer's decision.
- What happens if I don't get FIRB approval?
You run the risk of delaying the transaction (i.e. postponing completion), the transaction not completing (i.e. failing to satisfy a condition precedent which can result in forfeiture of any deposit, termination and termination fees), having the investment unwound or having criminal or civil penalties imposed.
- Will any conditions apply?
FIRB approvals can be granted subject to conditions. For example, various tax conditions can be imposed where the Treasurer considers the investment may involve a tax risk.
- Is there a fee?
A fee will apply on all applications or notices. The amount of the fee will depend on the type of application and the value of the transaction. See Figure 7.

You should seek advice on whether your investment will require FIRB approval as early as possible.

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, and the guidance notes published by FIRB.

The regime can be broken down into three key questions:

1. Is the investor a foreign person?
2. Is the proposed transaction a significant action or a notifiable action?
3. Is the proposed transaction contrary to Australia’s national interest?

When reviewing proposed transactions, a whole-of-government approach is taken to protect Australia’s national interest. Accordingly, the Treasurer has the ability to consult with, and exchange confidential information with, other government departments or agencies before making a decision (e.g. national security agencies, the Department of Immigration and Border Protection, the Australian Taxation Office (“**ATO**”) and the Australian Competition and Consumer Commission (“**ACCC**”). Importantly, the Critical Infrastructure Centre was established within the Department of Home Affairs in 2017 to pre-emptively create a register of national security risks relating to critical infrastructure, in order to aid the FIRB review process. Part 6 of this guide (The FIRB Approval Process, on pages 20-25) discusses the nature of the relationship between FIRB and the Critical Infrastructure Centre.

Some interesting facts

Figure 1 sets out the number and value of proposals reviewed by FIRB from 2008-09 to 2016-17. The Treasurer approves the vast majority of applications and the majority of rejections have been on the grounds of national interest.

For example:

- In 2001, Royal Dutch Shell’s proposed takeover bid for Woodside Petroleum was blocked due to concerns over foreign ownership of one of Australia’s largest natural resources companies and its natural gas interests in Australia. Similar foreign ownership anti-monopolistic sentiments were cited by the Treasurer in rejecting Cheung Kong Infrastructure’s (Hong Kong) \$13billion bid to take over APA Group - Australia’s biggest gas pipeline company. A process initiated on 1 July 2018 and formally rejected on 20 November 2018;
- In 2011, Singapore Exchange’s proposed merger of the ASX was blocked due to concerns that it would diminish Australia’s economic and regulatory sovereignty over the ASX.
- In 2016, proposed bids by State Grid Corporation of China and Cheung Kong Infrastructure Holdings for the 99-year lease 50.4% of Ausgrid, the NSW electricity distribution network, were blocked due to concerns over foreign control of critical power and communication services.
- In 2015 and 2016, proposed bids by Pengxin Group and Dakang Australian Holdings for S. Kidman and Co were rejected due to concerns that the sale of Australia’s largest cattle empire would be against the national interest.

A summary of a number of recent high profile decisions have been included at the end of this guide.

Figure 1 also shows a proportion of applications being withdrawn. All FIRB applications and discussions are confidential. However, rejections are made public. Accordingly, where FIRB has indicated to an investor that the proposal may be rejected or that specific conditions will apply, the investor will often withdraw their application before the review deadline to avoid any details of the transaction being made public. Figure 2 sets out the value and number of proposals in 2016-17 approved by the Treasurer by country of investor.

Figure 1 – Proposals reviewed by FIRB from 2008-09 to 2016-17

Outcome	Number of proposals (excluding reorganisations) (Value of proposed investment (billion))								
	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-6	2016-7
Approved unconditionally	2,266 (\$135.9)	2,672 (\$125.3)	4,606 (\$145.7)	4,900 (\$137.5)	5,535 (\$108.7)	12,307 (\$125.3)	21,507 (\$157.1)	26,954 (\$97.0)	8,607 (\$53.8)
Approved with conditions	3,086 (\$45.5)	1,729 (\$14.2)	5,687 (\$31.0)	5,803 (\$33.2)	7,196 (\$27.0)	11,795 (\$42.1)	16,446 (\$37.5)	14,491 (\$150.8)	5,750 (\$139.1)
TOTAL APPROVED	5,352 (\$181.4)	4,401 (\$139.5)	10,293 (\$176.7)	10,703 (\$170.7)	12,731 (\$135.7)	24,102 (\$167.4)	37,953 (\$194.6)	41,445 (\$247.9)	14,357 (\$192.9)
Rejected	3 (<\$0.05)	3 (<\$0.05)	43 (\$8.8)	13 (\$0.2)		3 (\$2.2)		5 (\$0.0)	3 (\$20.0)
TOTAL DECIDED	5,355 (\$181.4)	4,404 (\$139.5)	10,336 (\$185.5)	10,713 (\$170.8)	12,731 (\$135.7)	24,105 (\$169.6)	37,953 (\$194.6)	41,450 (\$247.9)	14,360 (\$212.9)
Withdrawn	341	167	390	534	446	719	799	1,319	770
Exempt	125	132	139	170	145	181	180	244	60
TOTAL CONSIDERED	5,821	,703	10,865	11,420	13,322	25,005	38,932	43,013	15,190

Source: Foreign Investment Review Board Annual Report 2016-17

Figure 2 – Top 10 investors by country (\$billion)

Country	2016-17		Past 3 years	
	Number of Approvals	Number of Approvals	Number of Approvals	Number of Approvals
China	9,714	\$38.867	65,756	\$132.73
United States	316	\$26.454	1,209	\$82.54
Canada	193	\$23.190	774	\$46.77
Hong Kong	649	\$15.717	3,411	\$22.15
Singapore	477	\$10.159	2,553	\$26.50
Japan	113	\$5.409	473	\$19.35
Malaysia	666	\$4.267	5,182	\$12.72
United Kingdom	488	\$4.159	3,175	\$13.34
Netherlands	83	\$4.049	247	\$22.27
United Arab Emirates	90	\$3.220	233	\$11.70

Source: Foreign Investment Review Board Annual Report 2016-17, 2015-16, 2014-15.

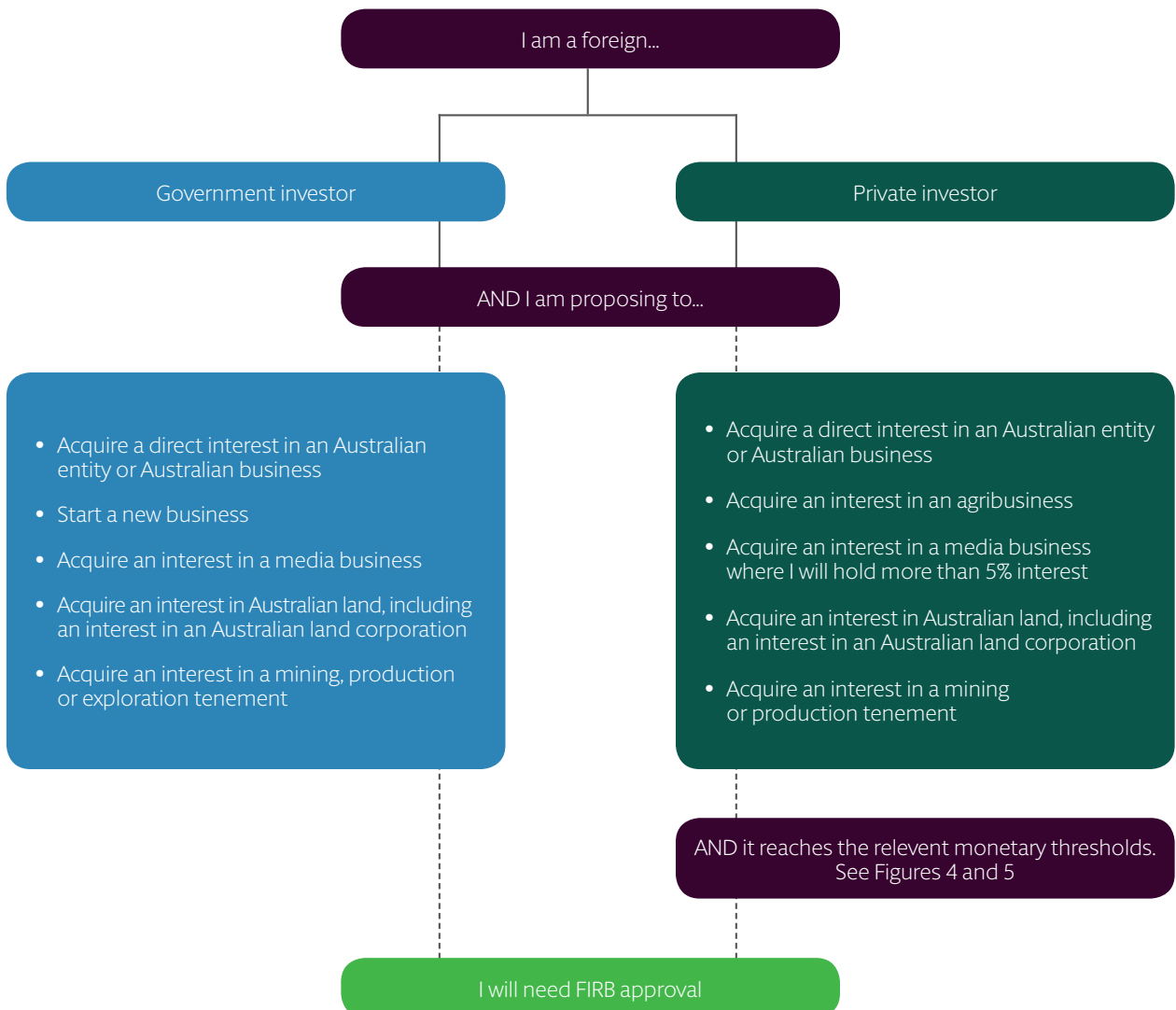
Note: 'Past 3 years' denote the cumulative figures from 2014-15, 2015-16 and 2016-17

There are three key questions which determine whether FIRB approval is required:

1. Is the acquirer a foreign person?
2. Is the proposed transaction of the type that must/could be notified?
3. Does the proposed transaction meet the relevant thresholds?

Set out below in Figure 3 is a simple flow chart in relation to the most common types of transactions that may require FIRB approval. The following chapters provide more detail on how to assess whether you and your proposed transaction will require FIRB approval.

Figure 3 – Do I need FIRB Approval?



Am I a foreign person?



Under FATA, the term ‘foreign person’ is defined broadly to capture various types of persons.

Simply, a foreign person is:

- any individual who does not ordinarily reside in Australia; or
- a corporation or trustee of a trust in which:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds a substantial interest (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.

Different rules apply to investments by foreign government investors compared with private investors. These additional requirements apply regardless of the foreign government.

What you need to know

A foreign government investor is:

- a foreign government or separate entity, being:
 - a body politic or part of a body politic of a foreign country; or
 - an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or part of a foreign country; or
- a corporation, trustee or general partner of a limited partnership in which:
 - a foreign government or separate government entity, alone or together with one or more associates, holds an interest of at least 20%; or
 - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of at least 40%.

Key Point

Australia’s foreign investment regime requires various transactions involving foreign persons to be reviewed and approved before completion.

It is important to establish whether you are a foreign government investor as different rules apply compared with private investors.

Is my proposed investment
a type of transaction that
requires FIRB approval?



Under the regime, transactions fall within two categories:

1. significant actions; and
2. notifiable actions.

Significant action

A significant action is:

- an acquisition of interests in securities, assets or Australian land, or otherwise an action in relation to entities and business (e.g. entering into agreements);
- that meets the relevant monetary thresholds;
- has a connection to Australia; and
- other than in relation to the acquisition of interest in Australian land, results in a change of control involving a foreign person.

If your proposed investment is a significant action, you are not obliged to obtain FIRB approval prior to completing the transaction. However, if the proposed transaction has not been notified, the Treasurer still has powers to make a range of orders if the proposed transaction is considered to be contrary to the national interest.

If you chose to notify the Treasurer of a significant action, it becomes a notifiable action.

Notifiable action

The following acquisitions that meet the monetary thresholds are notifiable actions:

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

There does not need to be a change of control.

A 'direct interest' generally means at least a 10% interest or an interest that will result in the foreign investor having the ability to influence, participate or control the Australian entity or business. Refer to the glossary for a more detailed definition of 'direct interest'.

If your proposed investment is a notifiable action, you must obtain FIRB approval prior to completing the transaction.

The Treasurer may:

1. provide a no objection letter with or without conditions; or
2. make an order prohibiting the transaction if the investment is considered to be contrary to the national interest.

More information on the Treasurer's power is set out in the last chapter of this guide.

If you are a foreign government investor

Regardless of value, FIRB approval is required to:

- acquire a direct interest in an Australian entity or an Australian business;
- start a new business;
- acquire an interest in Australian land; and
- acquire an interest in a mining, production or exploration tenement.

Key Point

If your proposed investment is a:

- significant action, you are not required to obtain FIRB approval. However, the Treasurer has powers to make various orders in relation to significant action transactions;
- notifiable action, you must obtain FIRB approval.

If the proposed transaction does not fall within either of these categories, FIRB approval is not required.



Does my transaction meet
the monetary threshold?

Monetary thresholds

The monetary thresholds are indexed on 1 January every year, except for the general threshold for agricultural land (including those specific to Singapore and Thailand investors) which is not indexed. The thresholds also vary depending on whether Australia has entered into trade agreements with the country that the investor is from, in which case higher thresholds may apply to investors from that country (but not subsidiaries incorporated in Australia).

The monetary threshold values for 2018 are set out in Figure 4.

Trade Agreements

Australia has ten Free Trade Agreements currently in force with:

1. New Zealand (1983);
2. Singapore (July 2003);
3. Thailand (1 January 2005);
4. The United States (1 January 2005);
5. Chile (6 March 2009);
6. ASEAN – Australia’s first multi-country FTA between the 10 ASEAN countries (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam) and New Zealand (1 January 2010);
7. Malaysia (1 January 2013);
8. Republic of Korea (South Korea) (12 December 2014);
9. China (20 December 2015); and
10. Japan (15 January 2015).

Other trade agreements include:

- Trans-Pacific Partnership (“TPP”) – A regional free trade agreement currently involving 11 countries (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam). The United States was originally a party to this agreement but formally withdrew in the first week of President Donald Trump’s office. This agreement has not yet entered into force.
- European Union – In November 2015, Australia and the European Union agreed to work towards the negotiation of a FTA. Following Brexit, the current rules state that individual members of the European Union cannot sign their own agreements with non-European nations. Accordingly, Australia will not enter into trade negotiations with the UK until it leaves the European Union.
- India (CECA) – Since May 2011, there have been nine rounds of negotiations, the most recent being in September 2015.
- Regional Comprehensive Economic Partnership – Negotiations between leaders from ASEAN and ASEAN’s FTA partners launched in November 2012 and are continuing with further negotiation rounds scheduled for 2017.

Key Point

The transaction must meet the monetary threshold to be a significant and/or a notifiable action.

The type of acquisition determines:

1. the monetary threshold; and
2. how the value of the acquisition is calculated.

Unless an exemption applies, a relevant transaction that meets the monetary threshold may require FIRB approval.

Figure 4 – Monetary screening thresholds for 2018*

Type of investment	Non-Government Investor				Government Investor
	Other	Chilean, New Zealand and United States	Japanese, Korean, Singaporean and Chinese	Thai	
Land proposals					
Residential land	\$0	\$0	\$0	\$0	\$0
Commercial land – Vacant	\$0	\$0	\$0	\$0	\$0
Commercial land – Developed	\$57 million (sensitive land) \$261 million	\$1,134 million	\$1,134 million	\$57 million (sensitive land) \$261 million	\$0
Agricultural land	\$15 million ¹	\$1,134 million	\$15 million ¹	\$50 million ²	\$0
Mining and production tenements	\$0	\$1,134 million	\$0	\$0	\$0
Non-Land proposals					
Agribusiness	\$57 million ³	\$1,134 million	\$57 million ³	\$57 million ³	\$0
Shares or units in Australian land corporation or trust	\$0	\$0	\$0	\$0	\$0
Media sector ⁴	\$0	\$0	\$0	\$0	\$0
Assets or shares in an Australian business or company holding Australian assets	\$261 million	\$261 million (sensitive business) \$1,134 million	\$261 million (sensitive business) \$1,134 million	\$261 million	\$0

*The monetary thresholds for 2018 are published on the FIRB website.

1. The cumulative value of interest held by the foreign person (including its associates).

2. For land used wholly and exclusively for a primary production business, otherwise the land is not agricultural land.

3. Total value of consideration and value of interests held before and after the proposed acquisition.

4. For investment in the media sector, a holding of 5% or more requires notification and prior approval regardless of the value of investment.

What is the value of your proposed investment?

The type of investment determines:

1. the applicable monetary threshold for the investment to be a significant or notifiable action; and
2. how the value of the acquisition is calculated.

Three types of values are used to calculate the value of the acquisition:

1. Consideration, which is applicable for determining most fees and for some threshold tests;
2. Asset value, which is applicable to some threshold tests; and
3. Securities value, which is only applicable to the threshold test for acquisitions of interests in securities in an entity or issuing securities in an entity.

Figure 5 sets out how the value of the investment is determined for certain types of investments.

Consideration

Under the regime, consideration is taken to mean consideration in any form including consideration that is ‘in kind’ and Goods and Services Tax (or any equivalent tax payable). In most cases, the value set out in the agreement or a value based on a reasonable assessment of the investment.

Asset value

The following assets are taken into account when determining the total asset value of an entity:

- for an Australian entity – the total assets of the entity; and
- for a foreign entity – the total relevant Australian assets (e.g. Australian land (including legal and equitable interests in Australian land) and securities in an Australian entity), and any other assets in Australia.

Generally, the value of the assets of an entity or business on a particular day is the value shown in the most recent financial statement or in the accounting records of the entity.

Securities value

The total issued securities value of an entity is the total of the class values worked out for each class of security of the entity.

Figure 5 – The value of the acquisition

Type of investment	Value
Direct interest in an Australian entity or business that is an agribusiness.	Aggregate value of: <ul style="list-style-type: none"> • the consideration for the acquisition; and • aggregate value of other interests held by it (and its associates) in the entity or business (including value of interests previously acquired).
Interest in (or issue of) securities.	Higher of: <ul style="list-style-type: none"> • the total asset value for the entity; and • the total issued securities value for the entity.
Interests in the assets of an Australian business.	Consideration for the acquisition.

Key Point

Depending on the type of investment, generally the monetary threshold will be met when:

- the amount paid for an interest; or
- the value of the entity or its assets; exceeds the threshold amount.

Three types of values are used to calculate the value of a transaction: consideration, asset value and value of securities.

The FIRB approval process



How long does it take to get FIRB approval?

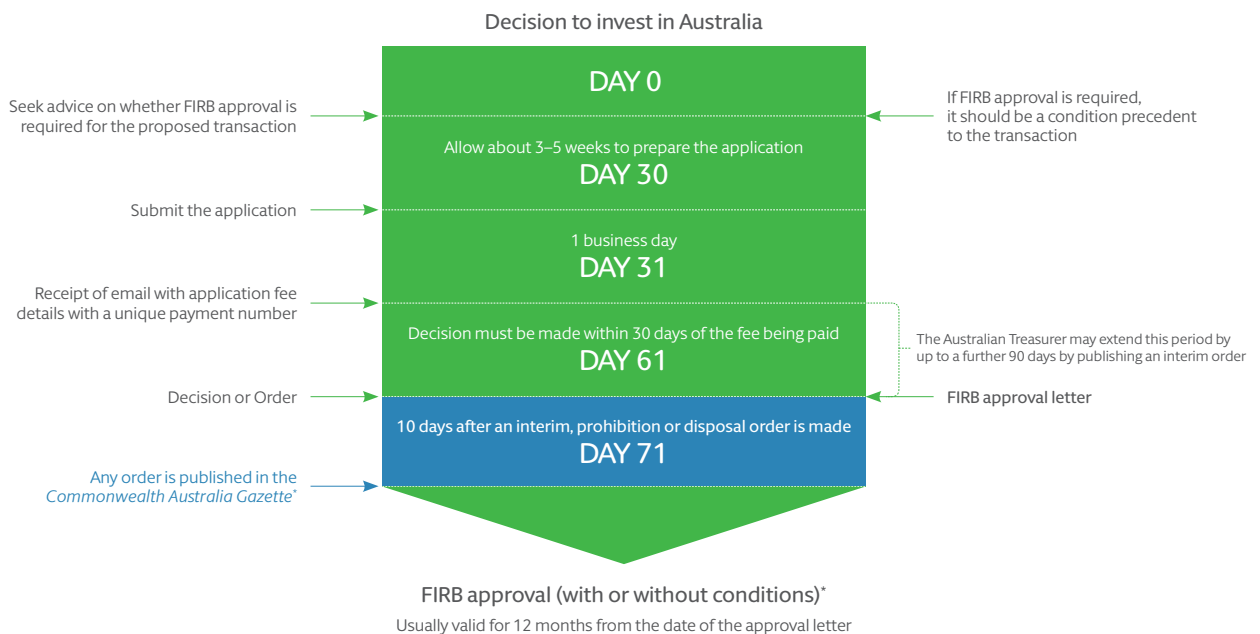
All applications are lodged online through the FIRB portal.

Once an application has been submitted and the correct application fee has been paid, the Treasurer has 30 days to consider the application and to make a decision (“**Review Period**”), and a further 10 calendar days to give notice of the decision. The Review Period can be extended by up to a further 90 days by an interim order.

In some circumstances, particularly where there are concerns with details of the acquisition being made public (see the section in relation to confidentiality on page 22), the investor can voluntarily extend the Review Period. There is no limit to the number of times the Review Period can be voluntarily extended.

Figure 6 sets out a typical timetable for a FIRB application.

Figure 6 – Typical timetable



* FIRB approvals remain confidential while rejections are made public. Therefore, investors will often withdraw their application before the end of the Review Period if they are advised by FIRB that their application may be rejected.

Key Point

An applicant fee will apply to all FIRB applications.

The Australian Treasurer has 30 days to review and make a decision on whether to grant FIRB approval, unless the period is extended, and a further 10 days to give notice of the decision.

Most investment proposals will be approved unless it is considered to be contrary to Australia’s national interest.

In 2016-17, 14,357 foreign investment proposals with a total value of approximately \$192.9 were approved. Three proposals were rejected compared to five rejections in 2015/16 (out of 41,450 proposals).

What are the fees?

An application fee is payable on all foreign investment applications and notices. The fee payable depends on the type of proposed investment.

If an application falls into a number of categories, the highest fee will apply. For any voluntary notification, the fee payable for the equivalent notifiable action applies.

Figure 7 sets out the fees applying to the most common categories of foreign investment applications for 2018-19.

What information do I include in the application?

To ensure FIRB and the Treasurer are able to properly review and assess the proposed transaction, the application must contain details of the proposed transaction and the parties (including details of any relevant subsidiaries and parent companies), the reasons for the proposed investment and financial information.

To assist parties with completing their application, FIRB has published a checklist on the documents and information required (which can be found on the FIRB website).

Confidentiality

Applications will often contain commercial sensitive and confidential information. Appropriate procedures have been put in place in Australia's foreign investment framework to:

- protect the confidentiality of any information provided; and
- allow the Treasurer to consult with and provide information to other government agencies before making a decision, aligning with the whole-of-government approach.

All FIRB applications and any discussions between the investor(s) and FIRB are confidential. However, rejections (and the reasons for the rejection) and any conditional approvals are made public. Accordingly, where FIRB has indicated to an investor that the proposal may be rejected or that specific conditions will apply, the investor will often withdraw their application before the review deadline to avoid any details of the transaction being made public.

Key Point

An application fee will apply to all FIRB approval applications.

Three types of values are used to calculate the total value of a transaction: consideration, asset value and value of securities.

The Treasurer and FIRB may take into account other various factors when assessing the national interest implications of a proposed transaction, including national security, other government policies (e.g. tax) and impact of the transaction on the economy and community.

Figure 7 – Fees 2018-19

Type of investment	Fees
Acquiring an interest in commercial land-vacant and developed	Consideration is \$10 million or less: \$2,000 Consideration is greater than \$10 million and not more than \$1 billion: \$25,700 Consideration is above \$1 billion: \$103,400
A foreign government investor acquiring a direct interest in an Australian entity or business	Consideration is \$10 million or less: \$2,000 Consideration is greater than \$10 million and not more than \$1 billion: \$25,700 Consideration is above \$1 billion: \$103,400
Acquiring an interest in assets or securities in a business	Consideration is \$10 million or less: \$2,000 Consideration is greater than \$10 million and not more than \$1 billion: \$25,700 Consideration is above \$1 billion: \$103,400
Internal reorganisation	\$10,200

Source: FIRB Guidance Note 30 Fees-business

What is the national interest test?

Each investment is reviewed on a case-by-case basis. If it is considered to be contrary to Australia's national interest, it will be prohibited or conditions may be imposed on the investment to address any concerns or increase the Government's oversight of sensitive investments.

In circumstances where the investment is a significant action and the Treasurer was not notified, the Treasurer has powers to make various orders, including the power to unwind the transaction, if the investment is considered to be contrary to Australia's national interest.

The term 'national interest' is not defined in the FATA or the Policy. However, the Policy provides a non-exhaustive list of factors typically considered by FIRB when advising the Treasurer of the national interest implications of the proposed investment:

- 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 – for example, the impact on Australian tax revenues (see page 25) and environment.
- 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 and the basis of operations and regulations.



How does the FIRB Approval process interact with the Critical Infrastructure Centre?

- **Critical Infrastructure Centre**

The Government established the Critical Infrastructure Centre (“Centre”) within the Department of Home Affairs in early 2017, for the purposes of safeguarding Australia’s critical infrastructure assets from national security risks by maintaining a register of critical infrastructure assets. The purpose of the register is to build a clearer picture of critical infrastructure ownership and control in high-risk sectors, and to support proactive management of the risks these assets face.

- **Critical Infrastructure**

The Australian and state governments share the following definition of critical infrastructure:

‘those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia’s ability to conduct national defence and ensure national security’.

Critical infrastructure provides services that are essential for everyday life such as energy, communications, water, transport, health, food and grocery, banking and finance, and the Australian government.

- **FIRB and the Centre**

The Centre complements, but does not encroach, the FIRB application process by providing consolidated and early national security advice to inform the Treasurer’s decisions on foreign investment proposals. Thus, it is important to note that the Centre is not a part of FIRB and does not change the law on foreign investment approvals in Australia, but will play a role in assisting the Treasurer in making national interest decisions on foreign investment proposals.



Tax related conditions

Where the Treasurer considers the investment may involve a risk to tax revenues, a standard set of tax conditions may be imposed as conditions of a no objection notification.

The tax conditions require the investor (and entities within its control group) to:

1. comply with Australian tax laws;
2. provide any documents or information required by the ATO in relation to the proposed transaction;
3. pay any outstanding taxation debt when due and payable;
4. provide an annual report to FIRB on compliance with the tax conditions; and
5. advise FIRB within 60 days of a termination event.

In addition, where a significant tax risk has been identified, the investor (and entities within its control group) may also be required to:

- engage in good faith with the ATO to resolve any tax issues; and
- provide information specified by the ATO on a periodic basis, including at a minimum a forecast of tax payable.

See the glossary for the meaning of ‘investor’s control group’ and ‘termination event’.

Other conditions

Where the Treasurer considers necessary (due to matters including increased national security, competition, economic, community or other concerns) approval may be subject to other conditions. Such conditions are at the Treasurer’s discretion and are often deal specific. Such conditions may require the investor (or entities within its control group) to:

1. require the target’s business to be undertaken solely from within Australia;
2. to limit foreign ownership to less than 50%;
3. to require a percentage of the target’s board to comprise Australian citizens and residents and/or the target’s chairman to be an independent director (who is an Australian citizen and resident);
4. to require commitments to support local communities, local employment and/or to operate and pursue growth in certain locations or in, at or around certain assets;
5. to require certain domestic sales; and/or
6. require divestment of certain assets or ownership interests within a specified timeframe post acquisition.

What happens if I don't get
FIRB approval?

150

The Australian Treasurer's powers

The Treasurer has the following key powers in relation to significant and notifiable actions:

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

Where a person is found to have been involved in a scheme to avoid the applications of FATA, the Treasurer has powers to make a disposal order or an order prohibiting the proposed investment.

Some foreign investors will voluntarily submit a FIRB application in relation to a significant action so that it can be satisfied that the proposed investment is permitted under the regime (i.e. avoid and prevent the Treasurer from making a prohibition or disposal order later on).

The following penalties may be imposed on foreign investors who fail to apply for FIRB approval when required or fail to comply with any approval conditions (note, an infringement notice or civil penalty may be sought, but not both).

Key Point

If you fail to obtain approval either at all or within required timeframe and proceed with the transaction, the proposed transaction could:

- be delayed (i.e. postpone completion);
- fall through (e.g. not complete due to a failure to satisfy a condition precedent which can result in a forfeiture of any deposit, termination or termination fee); or
- be subject to orders by the Treasurer:
 - the transaction be unwound;
 - substantial fines be imposed; or
 - in serious circumstances, imprisonment.

As at the date of the most recent FIRB (2016-17) Annual Report, the Treasurer ordered the divestment of 61 properties with a combined value of \$107 million held by foreign nationals in breach of the foreign investment framework.

	Maximum Criminal Penalty	Maximum Civil Penalty	Infringement Notice
Individual	750 penalty units (\$157,500) and/or three years imprisonment	The greater of: 10% of the consideration for the acquisition; or 10% of market value of the interest	Tier 1 (applicant notifies): 12 penalty units (\$2,250) plus application fee Tier 2 (FIRB discovers): 60 penalty units (\$12,600) plus application fee
Company	3,750 penalty units (\$787,500)	The greater of: 10% of the consideration for the acquisition; or 10% of market value of the interest	Tier 1 (applicant notifies): 60 penalty units (\$12,600) plus application fee Tier 2 (FIRB discovers): 300 penalty units (\$63,000) plus application fee

Recent high profile decisions

Not Approved

CKI (1 July 2018 – 20 November 2018)

Cheung Kong Infrastructure (Hong Kong) (“CKI”) lodged a \$13 billion dollar bid to take over APA Group - Australia’s biggest gas pipeline company- and obtain majority control. In early November, the Treasurer issued a “preliminary” view that the foreign bid should be turned down on national interest grounds as the takeover would result in an “undue concentration of foreign ownership by a single company group in our most significant gas transmission business”. On 20 November 2018, FIRB failed to reach a unanimous recommendation to the Treasurer on the application and expressed concerns that the acquisition would give a single foreign company monopoly of a majority of Australian pipelines.

After the Treasurer’s preliminary decision and FIRB’s split recommendation, CKI was given a two week period within which to reapply with a renewed or amended proposal. It is probable that CKI and its advisors assessed the likelihood of obtaining approval under the proposed transaction structure under the application as low. As such, CKI did not take the opportunity to reapply with an amended proposal within the two week period. CKI has expressed continuing interest in acquiring APA Group, as such, industry commentators have suggested that a revised application which involves “teaming up” with a local partner or agreeing to sell part of the assets within a certain post acquisition timeframe as a condition to approval could be enough to get the controversial deal over the line with FIRB. These approaches have been taken in the past by certain foreign investors with relative success.

Approved

Transgrid (November 2015)

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

Tasmanian Land Company (February 2016)

FIRB approved the \$280 million acquisition of Australia’s oldest dairy farm, being the land and assets of the Tasmanian Land Company, including Van Diemen’s Land Company, by a Chinese investment firm (Moon Lake Investments).

The Treasurer approved the acquisition based on the investor making various undertakings in relation its current employees, future investment projects, current contracts and various environmental and cultural agreements.

Not Approved

S Kidman & Co (November 2015 and April 2016)

FIRB blocked the potential sale of a cattle station (Kidman) for \$350 million to a foreign investor (Chinese) on the basis that it would be contrary to the national interest.

The initial application and revised proposal was not approved due to:

- the size and significance of the total portfolio of the property (over 1% of Australia's total land area, and 2% of Australia's agricultural land); and
- national security concerns (part of the station is located in a weapons testing range in South Australia).

Ausgrid (August 2016)

FIRB blocked the proposed 99 year lease of 50.4% of Ausgrid, the NSW electricity transmission distribution network, to foreign investors (Chinese and Hong Kong).

The Treasurer did not approve the application on national security grounds (relating to the critical power and communications services provided by Ausgrid) and the proposed transaction structure.

Not Reviewed

Port of Darwin lease (October 2015)

The commercial Port of Darwin (and facilities) was leased by the Northern Territory Government to Landbridge Group (a Chinese owned company) for 99 years for \$506 million. FIRB stated that the transaction did not require FIRB approval due to its structure. This decision influenced changes to the foreign investment framework in relation to acquisitions involving critical infrastructure and communication between FIRB and other government departments and agencies.

The transaction raised national security concerns due to the strategic position and use of the port by Australian Defence and significant US military presence in the area.

Following this decision, the regime was changed to require all investments by government and non-government investors involving critical infrastructure assets owned by the State and Territory governments to be reviewed by FIRB and a focus on a whole-of-government approach.

Glossary

Term	Meaning	Term	Meaning
ACCC	Australian Competition and Consumer Commission.	ATO	Australian Taxation Office.
Acquire	<p>A person acquires an interest of a specified percentage in a business if the person:</p> <ul style="list-style-type: none"> starts to hold an interest of that percentage in the business; would start to hold an interest of that percentage in the business if the person held interests in assets of the business that are interests that he or she has offered to acquire; or for a person who already holds an interest of that percentage in the business: <ul style="list-style-type: none"> - starts to hold additional interests in assets of the business; or - would start to hold additional interests in assets of the business if interests in assets of the business were transferred. 	Australian business	A business that is carried wholly or partly in Australia in anticipation of profit or gain.
Aggregate interest	<p>Two or more persons (who are not associates of each other) hold an aggregate interest of a specified percentage in an entity if they, together with any one or more associates of any of them:</p> <ul style="list-style-type: none"> are in a position to control at least that percentage of voting power or potential voting power in the entity; hold interests in at least that percentage of the issued securities in the entity; or would hold interests in at least that percentage of the issued securities in the entity if securities in the entity were issued or transferred. 	Australian land corporation	An entity that holds an interest in Australian land and the value of the interest in Australian land exceeds 50% of the value of the total assets of the entity.
Aggregate substantial interest	<p>Two or more persons hold an aggregate substantial interest in an entity or trust if:</p> <ul style="list-style-type: none"> for an entity – the persons hold an aggregate interest of at least 40% in the entity; or for a trust – the persons, together with any one or more associates of any of them hold, in the aggregate, beneficial interests in at least 40% of the income or property of the trust. 	Consideration	<p>Consideration in any form including any GST that is payable in relation to the acquisition or issue and any consideration that is contingent on the occurrence or non-occurrence of a particular event. The value of consideration for an acquisition is the value in the agreement or the reasonable assessment of the value of consideration.</p>
Asset	Includes an interest in an asset.	Direct Interest	<p>An interest of:</p> <ul style="list-style-type: none"> at least 10% in the entity or business; at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business; any percentage in the entity or business if the person who acquired the interest is in a position: <ul style="list-style-type: none"> - to influence or participate in the central management and control of the entity or business; or - to influence, participate or determine the policy of the entity or business.
Associate	<p>Includes:</p> <ul style="list-style-type: none"> a relative; a person acting, or proposing to act, in concert in relation to the action to an action to which the FATA applies; any entity of which the person is a senior officer; a holding entity; and any person holding a substantial interest. 	FATA	Foreign Acquisitions and Takeovers Act 1975 (Cth).
		FIRB	Foreign Investment Review Board, a non-statutory body established to advise the Australian Treasurer and Government on the Policy and its administration.
		FIRB approval	The act of obtaining approval or a no objections notification from the Australian Treasurer in regards to a proposed investment.
		Foreign government	<ul style="list-style-type: none"> a body politic of a foreign country; a body politic of a part of a foreign country; or a part of a body politic of a foreign country or a part of a body politic of part of a foreign country.

Term	Meaning	Term	Meaning
Foreign government investor	<ul style="list-style-type: none"> A foreign government or separate government entity. A corporation, trustee of a trust or general partner of a limited partnership in which: <ul style="list-style-type: none"> a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest; or foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest. 	Policy	Australia's Foreign Investment Policy published by FIRB in December 2015.
Foreign person	<ul style="list-style-type: none"> An individual not ordinarily a resident in Australia. A corporation or trustee of a trust in which: <ul style="list-style-type: none"> an individual not ordinarily resident in Australia, foreign corporation or a foreign government holds a substantial interest; or two or more persons (each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) hold an aggregate substantial interest. A foreign government. Any other person, or any other person that meets the conditions, prescribed by the regulations. 	Regulations	Foreign Acquisitions and Takeovers Regulation 2015 (Cth).
Interest	<p>A person holds an interest of a specified interest in:</p> <ul style="list-style-type: none"> an entity if the person, alone or together with its associates: <ul style="list-style-type: none"> is in a position to control that percentage of voting power (or potential voting power) in the entity; holds the percentage interest in the issued securities of the entity; or would hold that percentage interest of the issued securities if securities in the entity were issued or transferred; and Australian land if the person holds: <ul style="list-style-type: none"> a legal or equitable interest in Australian land, subject to exceptions; or an interest in a security in an entity that owns Australian land, including an interest in a share in an Australian land corporation. 	Sensitive business	<p>The business that is wholly or partly:</p> <ul style="list-style-type: none"> carried on in media, telecommunications or transport sectors; or the supply or manufacture of goods, equipment, technology or persons: <ul style="list-style-type: none"> to the defence forces; for military purposes; relating to encryption and security technologies and communications systems; or the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of a nuclear facilities.
investor's control group	<p>For the purposes of the tax conditions, the investor's control group consists of entities:</p> <ul style="list-style-type: none"> within the control of the investor; and that control the investor. 	Separate government entity	An individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or a part of a foreign country, but not part of the body politic of a foreign country or part of a foreign country.
Notifiable action	An investment that must be notified to the Australian Treasurer. See page 15.	Significant action	An investment that is not required to be notified but may be subject to orders by the Australian Treasurer. See page 15.
		Significant agreement	<p>An agreement relating to:</p> <ul style="list-style-type: none"> the leasing of, the letting or hire of, or the granting of other rights to use, assets of the business; or the participation by a person in the profits or central management control of the business.
		Substantial interest	<p>A person holds a substantial interest in:</p> <ul style="list-style-type: none"> an entity if the person holds an interest of at least 20%; and a trust if the person, alone or together with its associates, holds a beneficial interest in at least 20% of the income or property of the trust.
		Termination event	<p>For the purposes of the tax conditions, a termination event occurs when the investor ceases to:</p> <ul style="list-style-type: none"> hold the interest the subject of the no objection notification; control the entity or business which was the subject of the no objection notification; or carry on the Australian business which was the subject of the no objection notification.

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