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Foreign Investment in Australia

What you need to know

COVID-19 Edition

Want to know more?

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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.

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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.

On 29 March 2020, the Treasurer announced temporary changes to Australia's foreign investment regime to address perceived risks arising from the COVID-19 pandemic, including that non-Australian investors might acquire Australian businesses on a fire-sale basis. The key temporary change is that most FIRB monetary thresholds have been set to nil – so all foreign acquisitions of Australian companies currently require FIRB approval. FIRB has publically stated that the temporary changes will be rolled back as of 1 January 2021.

Separate to the temporary COVID-19 measures, the Treasurer announced significant reforms to Australia's foreign investment regime on 5 June 2020, which would be the most sweeping changes to the FIRB regime since the introduction of the FATA. This is explored further on page 30.

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. Under current rules, the scope of transactions requiring FIRB approval is very broad.
- **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 historical figures

Figure 1 sets out the number and value of proposals reviewed by FIRB from 2010-11 to 2018-19. The Treasurer approves the vast majority of applications and the majority of rejections have been on the grounds of national interest.

However, the changes to the FIRB regime together with a change in the assertiveness of Australian policy in relation to foreign investments may mean increased rejections going forwards.

For example:

- 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.

A public example of a withdrawal is China Mengniu Dairy Company Limited who, on 25 August 2020, abandoned its \$600 million bid for Lion Dairy & Drinks because it was unlikely to win approval from the Australian regulators. Figure 2 sets out the value and number of proposals in 2018-19 approved by the Treasurer by country of investor.

Figure 1 – Proposals reviewed by FIRB from 2010-11 to 2018-19

Outcome	Number of proposals (excluding reorganisations) (Value of proposed investment (billion))								
	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Approved unconditionally	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)	6,301 (\$40.1)	4,575 (\$45.9)
Approved with conditions	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)	4,844 (\$123.0)	4,149 (\$185.1)
TOTAL APPROVED	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)	11,145 (\$163.1)	8,724 (\$231.0)
Rejected	43 (\$8.8)	13 (\$0.2)		3 (\$2.2)		5 (\$0.0)	3 (\$20.0)	2 (\$0.1)	1 (\$10.0)
TOTAL DECIDED	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)	11,150 (\$166.1)	8,725 (\$241.0)
Withdrawn	390	534	446	719	799	1,319	770	644	670
Exempt	139	170	145	181	180	244	60	61	71
TOTAL CONSIDERED	10,865	11,420	13,322	25,005	38,932	43,013	15,190	11,855	9,466

Source: Foreign Investment Review Board Annual Report 2016-17 and 2018-19.

Figure 2 – Approvals by country of investor, by industry sector in 2018-19 (\$million)

Country	Number of approvals	Agriculture, forestry & fishing	Finance & insurance	Manufacturing, electricity & gas	Mineral exploration & development	Real estate	Services	Total
		\$m	\$m	\$m	\$m	\$m	\$m	\$m
United States	401	1,169.30	791.8	2,571.30	2,934.30	19,559.10	31,152.00	58,177.80
Canada	238	1,581.60	190.2	643.1	1,077.60	13,299.70	9,222.70	26,014.90
Singapore	501	257.5	176.7	3,136.50	24.1	9,797.80	2,604.80	15,997.40
Japan	125	57.8	4,117.00	2,509.40	3,057.70	3,809.70	1,515.00	15,066.70
China (B)	4,901	251.9	84.8	502.4	2,679.70	6,071.00	3,549.00	13,138.70
Hong Kong	531	684.1	34	108.9	757.1	9,328.00	119.5	11,031.40
United Kingdom	377	143.2	94.7	1,503.10	916.9	1,579.50	1,884.70	6,122.00
New Zealand	50	243.6	-	593.1	-	4,710.10	525.3	6,072.20
Switzerland	51	69.9	337	2,164.20	847.4	678.7	1,053.70	5,150.90
France	101	28.8	0.4	730.1	35.2	740.1	2,194.90	3,729.50

Source: Foreign Investment Review Board Annual Report 2018-19.

Do I need FIRB approval?

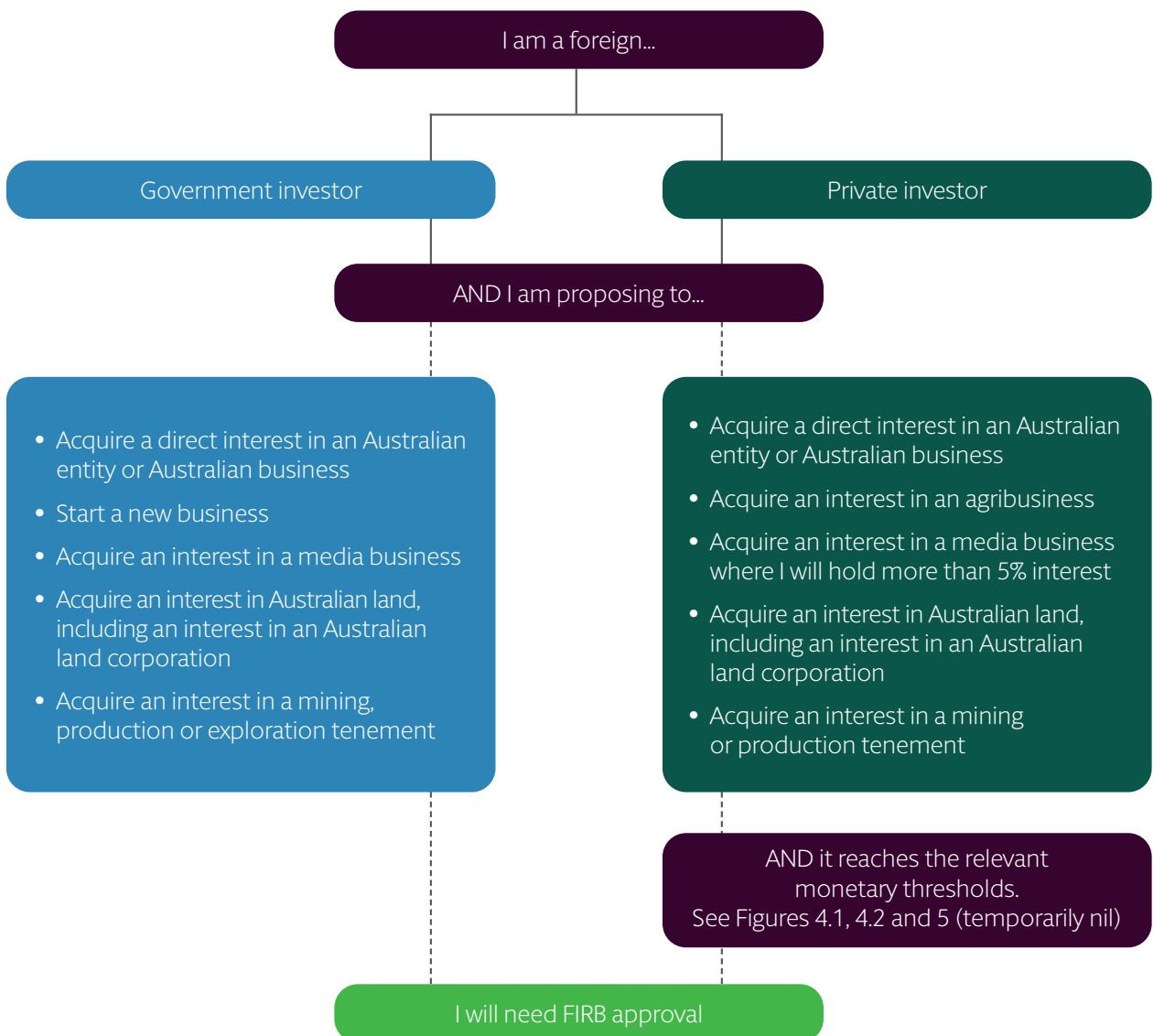


There are three key questions which determine whether FIRB approval is required:

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
 - importantly, these include sovereign wealth funds and state owned pensions funds.
- 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%.

For example, a private equity fund with a substantial proportion of sovereign wealth funds or state owned pension funds in its investor base may be deemed to be a foreign government investor under these rules.

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 does not have jurisdiction over the transaction.

Does my transaction meet
the monetary threshold?



Monetary thresholds

Temporary COVID-19 thresholds

The threshold values are subject to temporary COVID-19 amendments which are due to expire on 1 January 2021. The effect of temporary COVID-19 amendments is the thresholds values have dropped to nil.

Thresholds when temporary measures expire

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 2020 are set out in Figure 4.1 .

Trade Agreements

Australia has thirteen 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);
10. Japan (15 January 2015);
11. Canada (8 March 2018);
12. Mexico (8 March 2018); and
13. Vietnam (8 March 2018).

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 4.1 – Background monetary screening thresholds for 2020 (not currently in force)*

Type of investment	Non-Government Investor				Government Investor
	Other	Chilean, New Zealand and United States	Japanese, Korean, Singaporean, Chinese, Canadian and Mexican	Thai	
Land proposals					
Residential land	\$0	\$0	\$0	\$0	\$0
Commercial land – Vacant	\$0	\$0	\$0	\$0	\$0
Commercial land – Developed	\$60 million (sensitive land) \$275 million	\$1,192 million	\$1,192 million	\$60 million (sensitive land) \$275 million	\$0
Agricultural land	\$15 million ¹	\$1,192 million	\$15 million ¹	\$50 million ²	\$0
Mining and production tenements	\$0	\$1,192 million	\$0	\$0	\$0
Non-Land proposals					
Agribusiness	\$60 million ³	\$1,192 million	\$60 million ³	\$60 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	\$275 million	\$275 million (sensitive business) \$1,192 million	\$275 million (sensitive business) \$1,192 million	\$275 million	\$0

*The monetary thresholds for 2020 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.

Figure 4.2 - Impact of the COVID-19 temporary changes – \$0 monetary threshold *

Type of investment	Non-foreign Government Investor				Foreign Government Investor
	Other	Chilean, New Zealand and United States	Japanese, Korean, Singaporean and Chinese	Thai	
Non-Land Proposal					
Assets or shares in an Australian business or company holding Australian assets	\$0	\$0	\$0	\$0	\$0
Agribusiness	\$0	\$0	\$0	\$0	\$0
Shares or units in an Australian land corporation or trust	\$0	\$0	\$0	\$0	\$0
Media sector	\$0	\$0	\$0	\$0	\$0
Land Proposals					
Residential land	\$0	\$0	\$0	\$0	\$0
Commercial land – vacant	\$0	\$0	\$0	\$0	\$0
Commercial land – developed	\$0	\$0	\$0	\$0	\$0
Agricultural land	\$0	\$0	\$0	\$0	\$0
Mining and production tenements	\$0	\$0	\$0	\$0	\$0

*The monetary thresholds for 2020 are published on the FIRB website.

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.



Impact of COVID-19 on FIRB regime



On 29 March 2020, the Australian Treasurer announced temporary changes to Australia's foreign investment review regime to combat risks associated with the COVID-19 pandemic. The changes were implemented in line with the timing announced by the Treasurer, and have since been affirmed by the Foreign Acquisitions and Takeover Amendment (Threshold Test) Regulation 2020 dated 16 April 2020. The changes are as follows:

- The monetary thresholds are reduced to A\$0. Effective from 10:30pm AEDT 29 March 2020, all proposed investments into Australia subject to the FATA require a no objection notification from the Treasurer regardless of its value.
- FIRB's review period for applications under the FATA was extended by up to six months, with priority given to processing applications for investments that protect and support Australian businesses and jobs.

The changes substantially expand the scope of transactions which will now require FIRB approval and significantly lengthen the FIRB review period for applications.

The key points of change include:

- all foreign persons subject to the FATA will be affected by the new A\$0 monetary threshold. The meaning of significant action, notifiable action and foreign persons has not changed under the FATA;
- all countries subject to a free trade agreement with Australia are not exempt from the temporary regime;
- the temporary amendments do not apply to agreements entered into prior to 10:30pm AEDT 29 March 2020, including in relation to acquisitions that have not yet occurred, regardless of any unmet conditions; and
- if foreign investors do not agree to the extended review period of up to six months, the Treasurer may extend the statutory period by up to a further 90 days by publishing an interim order.

Impact on proposed transactions

Examples of transactions which now require FIRB approval under the temporary measures include:

- foreign persons acquiring a substantial interest (of 20 percent or more) in an Australian company irrespective of its value;
- foreign persons acquiring an equity interest in an Australian land corporation irrespective of its value (unless it is a passive interest of less than 10 percent in a listed company, or a passive interest of less than 5 percent of an unlisted non-residential company);
- foreign persons acquiring 10 percent or more in an Australian agribusiness irrespective of its value;
- foreign persons seeking to underwrite a capital raising by any Australian company (regardless of the value of the company) requires FIRB approval unless they enter into arrangements to cap their potential interest in the company to less than 20 percent, or unless the underwriter has an exemption certificate;
- a foreign person indirectly acquires a substantial interest (of 20 percent or more) in a foreign company which holds an Australian land corporation or agribusiness regardless of the value of the Australian land corporation or agribusiness;
- more internal reorganisations involving a change of ownership of Australian entities (even if those entities are of little value);
- in particular all reorganisations by groups in which a foreign government investor holds a substantial interest (20% or more) requires FIRB approval, where the reorganisation involves the direct or indirect change of control of an Australian company; and
- foreign persons acquiring an interest in Australian land irrespective of its value.

The FIRB approval process



How long does it take to get FIRB approval?

All applications are lodged online through the FIRB portal.

When the current COVID-19 changes expire, 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.

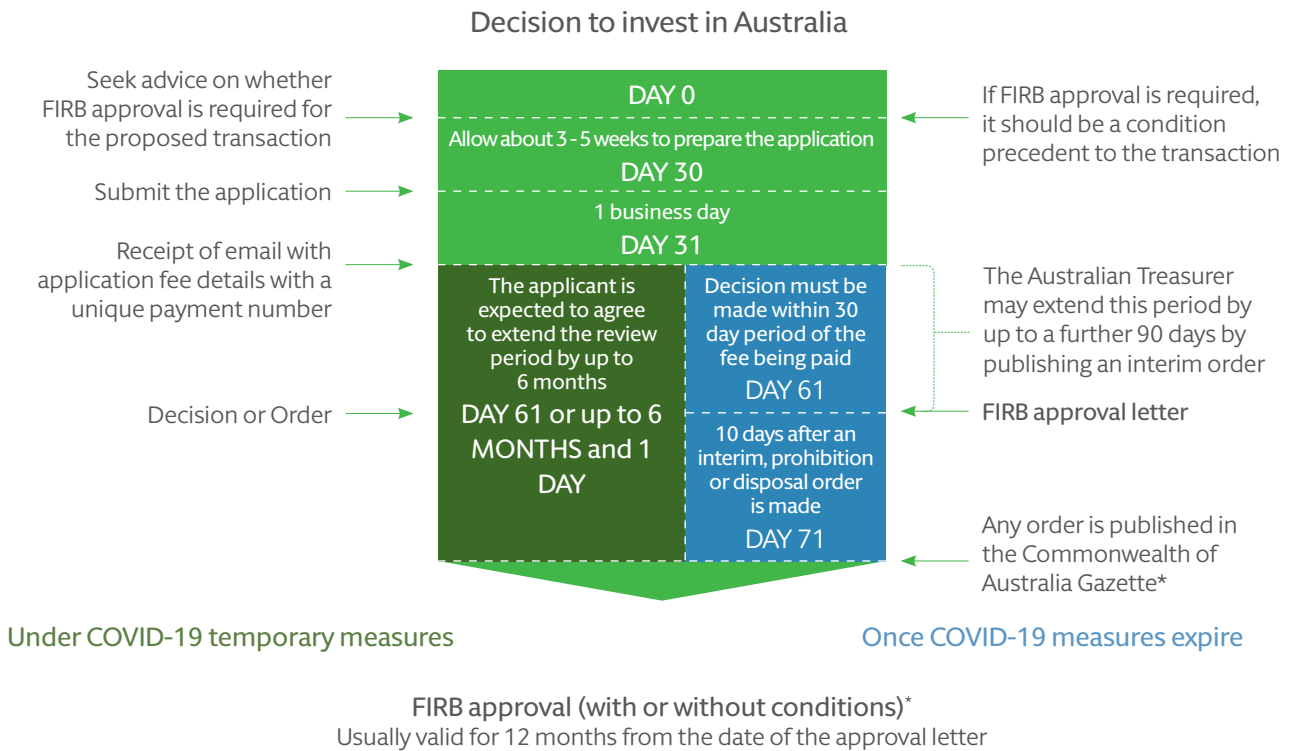
While the current COVID-19 changes are in effect, once an application has been submitted and the correct application fee paid, FIRB will normally

request an extension to the Review Period of up to six months. If the applicant refuses, then FIRB can publish an interim order, which can extend the review period by 90 days and make the transaction public. In practice, many applications are taking a lot less than six months, particularly where the application is not atypical and does not involve sensitive industries.

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 – FIRB Timetable*

+ Timetable shows the typical application times (pre-COVID-19 temporary changes) as well as the impact of the temporary COVID-19 changes.



* 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.

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 2019-20.

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 2019-20

Type of investment	Fees
Acquiring an interest in commercial land- vacant and developed	Consideration is \$10 million or less: \$2,100 Consideration is greater than \$10 million and not more than \$1 billion: \$26,700 Consideration is above \$1 billion: \$107,100
A foreign government investor acquiring a direct interest in an Australian entity or business	Consideration is \$10 million or less: \$2,100 Consideration is greater than \$10 million and not more than \$1 billion: \$26,700 Consideration is above \$1 billion: \$107,100
Acquiring an interest in assets or securities in a business	Consideration is \$10 million or less: \$2,100 Consideration is greater than \$10 million and not more than \$1 billion: \$26,700 Consideration is above \$1 billion: \$107,100
Internal reorganisation	\$10,600

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.

Proposed FIRB changes in 2021



Separate to the temporary COVID-19 measures, the Treasurer announced significant reforms to Australia’s foreign investment regime on 5 June 2020, which would be the most sweeping changes to the FIRB regime since the introduction of the FATA.

On 31 July 2020, the Government released the exposure draft *Foreign Investment Reform (Protecting Australia’s National Security) Bill 2020: National security reviews and last resort power* (the “**Bill**”) amending FATA which includes provisions for the new national security powers. If the Bill becomes law in its current form, the reforms are expected to have effect from 1 January 2021.

Heightened national security focus

The Government will introduce a new national security test which will stand alongside the existing “national interest” test. National security is one limb of the “national interest” analysis that FIRB undertakes when considering transactions currently. The new national security test expands the scope of FIRB’s review powers if the wider national interest test does not otherwise apply, but FIRB identifies specific national security concerns. The proposed changes:

- a) enable the Treasurer to impose conditions or block any investment by a foreign person on national security grounds regardless of the investment value;
- b) require mandatory FIRB notification of any proposed investment by a foreign person in a sensitive national security business regardless of the value (although not currently defined, examples that have been proposed are businesses involved in critical infrastructure, the national security supply chain, telecommunications, the storage of sensitive data and the manufacture or supply of defence-related goods);
- c) require mandatory notification where a business or entity owned by a foreign person starts to carry on the activities of a sensitive national security business;
- d) allow any investment that would not ordinarily require notification to be ‘called in’ for screening on national security grounds;
- e) allow investors to voluntarily notify FIRB to receive investor certainty from a ‘call-in’ for a particular investment or apply for an investor-specific exemption certificate; and
- f) allow the Treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of any consummated investment which was approved under the FATA where national security risks emerge.

Revised thresholds to impute foreign government investor status on private fund managers

Under the current rules, many managed funds, including private equity funds, are deemed to be foreign government investor (“**FGIs**”) due to their investor/limited partner (“**LP**”) base. Under the current rules, a managed fund is an FGI if:

- a) FGIs (including sovereign wealth funds and state-managed pension funds) from any one country/state make up 20% or more of the fund’s LP base; or
- b) FGIs from all countries make up 40% or more of the LP base in aggregate.

The result is that many private managed funds fall within FIRB’s review parameters as though they are FGIs, despite no foreign government having real control over them.

FIRB has sought to rectify its position on this issue under the new reforms and the proposed changes, which provide that:

- a) funds which have more than 40% FGI ownership in aggregate but less than 20% from any single country will not be considered FGIs; and
- b) funds where the LP base includes 20% of FGIs from a single country will still be FGIs, but those funds will be able to apply for broad exemption certificates on a case-by-case basis, provided the FGI LPs do not have direct rights to influence the underlying investment entities.

From the perspective of a sovereign wealth fund or state run pension fund, this reform should make it easier to invest in Australia via managed funds without tainting the fund as an FGI.

More coordinated information gathering and sharing with overseas counterparts

The proposed reforms introduce new information-sharing provisions permitting information sharing with international counterparts if there are national security considerations.

Stronger penalties, compliance and enforcement powers

Currently, the only existing mechanism for penalising breaches of the FATA for investments is to initiate Court proceedings to impose civil or criminal penalties (excluding residential real estate). The proposed reforms allow the Treasurer to revoke or alter no objection notifications (if new information becomes available) or exemptions and issue directions to cure a contravention.

The proposed reforms increase the criminal and financial penalties for contravention of certain criminal and civil offences. In some instances, the proposed reforms increase the financial penalties by a factor of ten and increase potential imprisonment terms from three to ten years.

Integrity of the foreign investment review framework

The proposed reforms clarify that foreign persons must obtain FIRB approval for any increase in actual or proportional holdings above what FIRB has approved previously, including as a result of creep acquisitions and proportional increases through share buybacks and selective capital reductions.



What happens if I don't get
FIRB approval?



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 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 (\$166,500) 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 (\$2,264) plus application fee Tier 2 (FIRB discovers): 60 penalty units (\$13,320) plus application fee
Company	3,750 penalty units (\$833,500)	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 (\$13,320) plus application fee Tier 2 (FIRB discovers): 300 penalty units (\$66,600) 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.

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.

Lion Dairy & Drinks (August 2020)

On 25 August 2020, China Mengniu Dairy Company Limited abandoned its \$600 million bid for Lion Dairy & Drinks because it was unlikely to win approval from the Treasurer. Despite the Australian Competition and Consumer Commission providing its approval of the purchase in February and FIRB being comfortable with Mengniu Dairy’s latest deal, it is understood that with political and trade relations straining over Chinese threats to impose more export penalties on Australian agricultural and food products, Australian government officials informed the parties there were no plans to approve the sale.

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	A person acquires an interest of a specified percentage in a business if the person: <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	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: <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	Two or more persons hold an aggregate substantial interest in an entity or trust if: <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	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.
Asset	Includes an interest in an asset.	Direct Interest	An interest of: <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	Includes: <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
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.
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.
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.
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.
Notifiable action	<p>An investment that must be notified to the Australian Treasurer. See page 15.</p>

Term	Meaning
Policy	<p>Australia's Foreign Investment Policy published by FIRB in December 2015.</p>
Regulations	<p>Foreign Acquisitions and Takeovers Regulation 2015 (Cth).</p>
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.
Separate government entity	<p>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.</p>
Significant action	<p>An investment that is not required to be notified but may be subject to orders by the Australian Treasurer. See page 15.</p>
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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