



HERBERT
SMITH
FREEHILLS

DOING BUSINESS IN AUSTRALIA

FOREIGN INVESTMENT REGULATION



Chapter 10

Foreign Investment Regulation

The Australian government welcomes foreign investment that is consistent with Australia's national interest and its national security interests, assessing proposals on a case-by-case basis. Assessments of foreign entities and persons acquiring assets in Australia are carried out under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and associated regulations.

Overview of the framework

The FATA gives the Australian Federal Treasurer (**Treasurer**) the power to prohibit a proposed acquisition by foreign persons of certain specified assets or securities in an Australian corporation (or a foreign corporation that holds relevant Australian assets or entities) which are contrary to the national interest (see description of national interest factors below). The Treasurer can also make divestment orders when such an investment has already been implemented without prior approval. Even where an application is not mandatory, where an application has not been made in respect of an action and the Treasurer has the power to review the action, a retrospective order can be made up to 10 years after the action has been taken.

The Treasurer has the power to approve proposals subject to conditions designed to ensure the proposal will not be contrary to the national interest, for example, by imposing conditions relating to payment of tax, management of personal information or governance of an Australian entity. These rights apply in relation to the Treasurer's retrospective review rights also.

Outright rejections of foreign investment proposals into Australia have been very rare but it is relatively common for the Treasurer to impose conditions on approvals (and some applications will be withdrawn, either as a result of feedback or through negotiation on the proposed conditions, meaning that they are not formally recorded as 'rejections').

The Treasurer's decision is made through consultation with the Foreign Investment Review Board (**FIRB**) as well as a range of other consultation agencies (e.g. the Australian Competition and Consumer Commission). The Australian Taxation Office (**ATO**) supports FIRB by

administering foreign investment applications with respect to residential real estate.

In relation to sensitive infrastructure assets, the Critical Infrastructure Centre (**CIC**) is also relevant. The CIC monitors, and maintains a register of, ownership and operational arrangements in relation to critical infrastructure assets. Review of investments into critical infrastructure assets has expanded following the introduction of the *Security Legislation Amendment (Critical Infrastructure Protection Act 2022 (Cth)* which amended the *Security of Critical Infrastructure Act 2018 (Cth)* (**SOCI Act**). FIRB engages closely with the CIC (particularly on national security issues) in relation to proposed foreign investment into critical infrastructure assets. In addition to ownership arrangements, the CIC will provide views on matters such as system stability, data security, and operational arrangements.

When an application is required, it is a criminal offence to enter into an unconditional agreement for the acquisition or to proceed with the acquisition without prior approval from the Treasurer.

Australia's foreign investment framework is complex and layered, with multiple thresholds and rules applying to different groups of investors and types of investments (and multiple approval requirements may be triggered by a single transaction). There is also a myriad of exceptions which may be applicable in certain circumstances. Accordingly, careful consideration should be given to proposed investment on a case-by-case basis to determine if approval is required.

Approvals are generally valid for 12 months from the date of the decision. That is, the approved action must be taken within 12 months. Relevantly, a party is deemed to have taken an action when it has entered into an agreement to take the action. However, if the provision of the agreement to take the action only becomes binding when a condition is met (for instance, when a FIRB condition precedent is satisfied), the action is deemed to be taken only when the condition precedent is satisfied and not when the agreement is entered into.

Who needs foreign investment approval?

All foreign persons

Under the FATA, a 'foreign person' is generally:

- an individual not ordinarily resident in Australia;
- a corporation, trustee of a trust or general partner of a limited partnership where an individual not ordinarily resident in Australia, foreign corporation or foreign government (together with its associates) holds an equity interest of at least 20%;

- a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons (together with their associates) hold an aggregate equity interest of at least 40%; or
- a foreign government or foreign government investor (see further below).

At a basic level, the FATA requires that the Treasurer (acting through FIRB) be notified in advance of a proposed acquisition by a single foreign person (together with its associates) of 20% or more of the securities or votes (including potential votes or rights to securities pursuant to an option) of an Australian corporation (a 'substantial interest') with total assets or issued securities valued at more than a set amount (currently A\$289 million) and a higher threshold (currently A\$1,250 million) applies to acquisitions by certain non-government investors from Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea, the United States of America and foreign persons from countries (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed in Santiago on 8 March 2018, is in force, in non-sensitive sectors). Lower (and varying) thresholds apply to various nominated sectors and types of companies (e.g. landholders).

Foreign government investors

More stringent rules apply to investments by foreign government investors. The definition of a foreign government investor is very broad and can capture some commercial investors and private equity vehicles with upstream foreign government investors (even where such government investors are entirely passive).

At a high level, a foreign government investor includes foreign governments, their agencies (for example, state-owned enterprises, public universities, public pension funds and sovereign wealth funds) and entities in which:

- foreign governments, their agencies or associates (including other foreign government investors from the same country) hold an interest of 20% or more; or
- multiple foreign government investors collectively have an aggregate substantial interest of 40% or more.

In general, regardless of the monetary value of the investment, all direct investments (which is generally 10% but may be less depending on the circumstances) by a foreign government investor in an Australian entity or in Australian land require approval.

An exception applies to the definition of a foreign government investor where an entity only meets the definition because 40% of its investors are foreign government investors (i.e. the exception does not apply where the 20% rule is triggered by a single state) and those investors are passive investors. In such a case, the entity will not be considered a foreign government investor, but would be considered to be a foreign person.

Investors need to be aware that the interests of foreign government investors can be traced through ownership structures, such that an Australian subsidiary lower down in an ownership structure may be considered to be a foreign government investor for the purposes of FATA merely due to the presence of a foreign government investor higher up in the ownership structure.

Lower notification thresholds for certain assets

The FATA also contains important provisions, which impose different thresholds and obligations, in respect of acquisitions of:

- Australian land (including mining and production tenements) and companies whose Australian land assets comprise more than 50% of the value of their total assets (noting that relevant thresholds differ for each type of land);
- agribusiness and companies whose agricultural land assets comprise more than 50% of the value of their total assets;
- portfolio investments in the media sector amounting to a direct interest (all foreign investors must obtain approval to acquire a 'direct interest' in an Australian media business, regardless of the value of the investment);
- businesses in sensitive sectors, which include media, telecommunications, transport, defence and military related industries, encryption and securities technologies and communication systems and the extraction of uranium and plutonium or the operation of nuclear facilities; and
- national security businesses (detailed below).

The National Interest Test

The Foreign Investment Policy outlines the following 'National Interest Considerations', which the Australian Government considers when assessing foreign investment proposals.

National security: the government considers the extent to which investments affect Australia's ability to protect its strategic and security interests.

Competition: the government considers the impact of the proposed investment on diversity of ownership and competition within Australian industries and sectors. A particular consideration is whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service, either within Australia or in the relevant global industry. The Australian Competition and Consumer Commission (**ACCC**) examines competition issues in accordance with Australia's competition policy regime. This examination is independent of Australia's foreign investment regime.

Other Australian Government policies (including tax): the government considers the impact of a foreign investment proposal on Australia's tax revenues. Other policies such as environmental policy may be considered, and a proposed investment will be assessed according to its consistency with those policy objectives.

Impact on the economy and the community: the government considers the impact of the proposed investment on the general economy, including the impact of any plans to restructure an Australian enterprise following acquisition, the nature of the funding of the acquisition, and the level of Australian participation in the enterprise that will remain after the acquisition, as well as the interests of employees, creditors and other stakeholders.

Character of the investor: the government considers the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision, as well as the investor's corporate governance practices. In the case of investors who are fund managers, including sovereign wealth funds, the government considers the fund's wealth policy and how it proposes to exercise voting power in relation to Australian enterprises in which the fund proposes to take an interest. Proposals by foreign investors that operate on a transparent and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Additional factors: the government will pay specific attention as to whether Australia's national interest is served in transactions involving the agricultural sector, residential land and foreign government investors.

It is important to recognise that the dominant assumption is that foreign investment is good for the economy so investments will not be contrary to the national interest, except in rare circumstances.

National security

Amendments to the FATA took effect on 1 January 2021 to provide for notifiable national security actions (which are mandatorily notifiable to FIRB) and reviewable national security actions (which are voluntarily notifiable but subject to a 10-year potential review period (or 'look back') if the action is not notified).

Notifiable national security actions are when a foreign person:

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

A nil dollar threshold applies to these actions, which means that they are mandatorily notifiable irrespective of value.

National security businesses cover:

- the responsible entities for businesses deemed critical in the following sectors:
 - telecommunications;
 - broadcasting;
 - domain name systems;
 - data storage or processing;
 - banking;
 - superannuation;
 - insurance;
 - financial market infrastructure;

- water;
 - electricity;
 - gas;
 - energy market operator;
 - liquified fuel;
 - hospitals;
 - education;
 - food and groceries;
 - ports;
 - freight infrastructure;
 - public transport;
 - aviation;
 - defence;
 - systems of national significance; and
 - any other assets prescribed or declared to be a critical infrastructure asset.
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- 'direct interest' holders (as defined in the SOCI Act, as opposed to the different term of the same name defined in the FATA) in critical infrastructure assets;
 - a carrier or nominated carriage service provider to which the *Telecommunications Act 1997* applies;
 - businesses which develop, manufacture or supply critical goods or critical technology that are intended for military or intelligence use (whether in relation to Australia or a foreign country) or provide critical services to them;
 - businesses which store or have access to information that has a security classification; and
 - businesses which collect, store or maintain personal information about national defence or

intelligence personnel which, if accessed, could compromise national security.

A reviewable national security action is essentially a 'catch all' concept and can apply to any action by a foreign person which is not otherwise a notifiable national security action, a notifiable action or a significant action.

Other relevant legislation

Foreign persons should also be aware that separate legislation includes other requirements and/or imposes limits on foreign investment in the following instances:

- foreign ownership in the banking sector must be consistent with the *Banking Act 1959* (Cth), the *Financial Sector (Shareholdings) Act 1998* (Cth) and banking policy;
- aggregate foreign ownership in an Australian international airline (including Qantas) is limited to 49 per cent (see *Air Navigation Act 1920* (Cth) and *Qantas Sale Act 1992* (Cth));
- the *Airports Act 1996* (Cth) limits foreign ownership of some airports to 49 per cent, with a 5 per cent airline ownership limit and cross-ownership limits between Sydney airport (together with Sydney West) and either Melbourne, Brisbane, or Perth airports;
- the *Shipping Registration Act 1981* (Cth) requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
- aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5%.

Separate to the FIRB notification requirements, foreign persons are also required to register acquisitions of interests in agricultural land and water entitlements, irrespective of whether they had to notify FIRB.

Practical considerations

Foreign persons should lodge applications in advance of any notifiable transaction, or make contracts conditional on foreign investment approval. Such a transaction should not proceed until the Treasurer advises of the outcome of its review.

The government encourages potential investors to engage with FIRB prior to lodging applications on significant proposals to allow timely consideration of the proposal.

Exemption Certificates

Under the FATA, foreign persons are required to notify the Treasurer in relation to each individual investment (unless otherwise exempt). The government has introduced exemption certificates in relation to multiple acquisitions as a way of reducing the regulatory burden of the FATA.

The grant of such exemption certificates will be assessed on a case-by-case basis to ensure they are not contrary to the national interest. However, it is unlikely that an exemption certificate will be granted to first time investors to Australia.

The exemption certificate will generally specify the maximum value of interests that can be acquired and the period during which acquisitions can be made. Typically, exemption certificates granted will be subject to periodic reporting conditions (eg quarterly compliance reporting and report on acquisitions made under the exemption certificate) and will often only obviate the requirement to notify the Treasurer of certain proposed investments, leaving intact the Treasurer's powers to make divestment orders post completion of the investment.

There are two types of exemption certificates (see below).

Exemption certificates for business acquisitions

A business exemption certificate allows for programs of acquisitions of interests in the assets of an Australian business and/or securities in an entity, including interests acquired through the business of underwriting.

The business exemption certificates are generally suited to large investment funds, particularly those with low-risk foreign government investors. It also suits those types of investors who may not have exact target acquisitions in mind when they seek approval but intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

There is no standard cap on the duration of a business exemption certificate but applicants will generally seek a certificate for a period of longer than 12 months.

Exemption certificates for a program of acquisitions of

interests in kinds of land

Foreign persons making multiple acquisitions of interests in land can apply for an up-front approval for a program of land acquisitions without seeking separate approvals. The exemption certificate is intended for foreign persons with a high volume of acquisitions of interests in land (generally not individuals). For example, such certificates might be used by energy and resources companies that plan to make a series of rolling land acquisitions to underpin a development project.

Application process

The FATA provides the Treasurer with 30 days to make a decision from the date of payment of the required fee. The Treasurer has a further 10 days to notify applicants of the decision. In addition, the Treasurer may in certain circumstances extend this period by up to a further 90 days by written notice, and another 90 days by publishing an interim order (which is publicly available). In addition, investors can voluntarily extend the period by providing written consent.

In practice, applicants are often asked to request an extension to the decision date while FIRB and the Treasurer consider the application. The likelihood of this occurring depends on the sensitivity of the application, the government's current policy focus and the number of applications being assessed.

Applications are filed online and can be done by the applicant's advisers.

Fees

Fees are payable to submit a FIRB application. The fees are indexed each financial year, from the averages of the Consumer Price Index.

The following table summarises fees applicable to corporate matters for the financial year:

Kind of action		Applicable fees ^(a)
Land	Residential land	Fee tiers increase every \$1 million of consideration; Fees start at \$13,200 for acquisitions of \$1 million or less, ^(b) rising to a maximum of \$1,045,000 for acquisitions of more than \$40 million
	Agricultural land	Fee tiers increase every \$2 million of consideration; Fees start at \$13,200 for acquisitions of \$2 million or less, ^(b) rising to a maximum of \$1,045,000 for acquisitions of more than \$80 million

Businesses and entities (excl. land entities)	
Starting an Australian business (including starting a national security business)	\$4,000 flat fee
Entering agreements and altering documents	\$26,400 flat fee
Internal reorganisations	\$26,400 flat fee

- a. where an action is a reviewable national security action, fees are calculated at 25 per cent of the fee for an equivalent notifiable action.
- b. a lower fee of \$4,000 will apply where the consideration value of an action is less than \$75,000.

Source: FIRB Guidance Note 10.

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

Consideration for the action			Applicable fee	
Residential land	Agricultural land	Commercial land, tenements, businesses and entities	Fee for single action	Fee for single Reviewable national security action ^(a)
Less than \$75,000 ^(b)	Less than \$75,000 ^(b)	Less than \$75,000 ^(b)	\$4,000	\$1,000
\$1 million or less	\$2 million or less	\$50 million or less	\$13,200	\$3,300

\$2 million or less	\$4 million or less	\$100 million or less	\$26,400	<input type="checkbox"/> \$6,600
\$3 million or less	\$6 million or less	\$150 million or less	\$52,800	\$13,200
\$4 million or less	\$8 million or less	\$200 million or less	\$79,200	\$19,800
\$5 million or less	\$10 million or less	\$250 million or less	\$105,600	\$26,400
...
Over \$40 million	Over \$80 million	Over \$2 billion	\$1,045,000 maximum fee	\$261,250 maximum fee

- a. where an action is a reviewable national security action, fees are calculated at 25 per cent of the fee for an equivalent notifiable action.
- b. lower fee of \$4,000 will apply where the consideration value of an action is less than A\$75,000.

Source: FIRB Guidance Note 10.

Conditions

The types of conditions that the Treasurer imposes on any approval will generally depend on the government agencies consulted as part of the application. The Treasurer will typically consult with the ATO and regularly consults with the ACCC and the Australian Security Intelligence Organisation.

The Treasurer is now in the practice of imposing the standard tax conditions on most FIRB approvals. Applicants must opt out for these conditions to not be automatically applied. These standard tax conditions cover the following areas: ongoing compliance with Australia's tax laws, provision of information to the ATO, undertaking to pay outstanding tax debts and annual reporting on compliance with these FIRB tax conditions. The additional tax conditions are only imposed in circumstances where the ATO considered the foreign investment to have a significant or particular tax risk.

Depending on the sensitivity of the transaction, the Treasurer may also impose other conditions, including, conditions that provide for a minimum level of Australian independent corporate governance (e.g. minimum number of Australian independent directors, Australian independent chairman etc.), conditions that ensure that operations are conducted out of Australia (e.g. board meetings to be held in Australia and head office to be located in Australia) or conditions to protect Australian data (e.g. requiring 'on shoring' of sensitive personal information).

Last updated: 01/01/2023

Key contacts



Philippa Stone
Partner
+61 2 9225 5303
Sydney
philippa.stone@hsf.com



Malika Chandrasegaran
Partner
+61 2 9225 5783
Sydney
Malika.Chandrasegaran@hsf.com



Damien Hazard
Partner
+61 2 9225 5564
Sydney
damien.hazard@hsf.com



Philip Podzebenko

Partner

+61 2 9225 5381

Sydney

philip.podzebenko@hsf.com



Stephen Dobbs

Partner

+61 2 9225 5511

Sydney

Stephen.Dobbs@hsf.com



Matthew FitzGerald

Partner

+61 7 3258 6439

Brisbane

matthew.fitzgerald@hsf.com



Melissa Swain-Tonkin

Partner

+61 7 3258 6461

Brisbane

melissa.swain-tonkin@hsf.com