Allens

In alliance with Linklaters

Overview of Australia's foreign investment approval (FIRB) regime

1 Introduction

Australia has a foreign investment approval regime that regulates certain types of acquisitions by 'foreign persons' of equity interests in Australian companies and unit trusts, and of interests in Australian businesses and interests in Australian real property assets.

The principal regime (commonly known as the FIRB regime)[1] is set out in the following legislation:

- *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the ***FATA***);
- *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (the ***FATR***); and
- *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and the accompanying *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth).

The legislation is supported by Australia's Foreign Investment Policy (the ***Policy***) and Guidance Notes on the specific application of the law, each issued by Treasury. Neither the Policy nor Guidance Notes have the force of law.

The FATA provides that certain foreign investment proposals can fall within either:

- a compulsory notification and FIRB approval regime – which applies where the proposal constitutes: both a ***notifiable action*** and ***significant action***, or a ***notifiable national security action***; or
- a voluntary notification and FIRB approval regime – which applies where the proposal constitutes a ***significant action*** or a ***reviewable national security action.***

Responsibility for making decisions on whether or not to approve foreign investment proposals rests with the Australian Treasurer. When making these decisions, the Treasurer is advised by the Foreign Investment Review Board (***FIRB***), which examines foreign investment proposals and advises on the national interest implications. FIRB is a non-statutory advisory body. The FATA refers to the issuance of 'no objection notifications' rather than 'approvals', but such notifications are commonly known as 'FIRB approvals'.

1.1 Foreign persons

A ***foreign person*** is generally:

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

Entities are designated as foreign persons if a foreign holder holds a 'substantial interest' in the entity, ie, 20% or more. Trusts and limited partnerships are similarly designated, through their trustee or general partner, based on foreign holders' interests in the trust or limited partnership.

Entities are also treated as foreign persons if two or more unrelated foreign holders hold an aggregate substantial interest of at least 40%. However, entities having their primary listing on an Australian stock exchange can disregard foreign holdings that are less than 5% (that is, it is not a substantial holding within the meaning of the *Corporations Act* 2001 (Cth) (the ***Corporations Act***)) for the purpose of determining the aggregate substantial interest of 40%.

1.2 What foreign holdings count?

The interests that count towards the 20% substantial interest and 40% aggregate substantial interest threshold held by foreign holders are broadly defined. Holding securities is counted, but so is controlling voting power or potential voting power. 'Potential voting power' is a concept that assumes any right to acquire new votes has been exercised with the resulting percentage of votes calculated on a diluted basis. Any legal or equitable interest is counted, interests under options and conditional agreements are included, and any veto power over board decisions is deemed to be control of 20% of potential voting power.

For trusts, an interest includes any interest in units of a unit trust, and any beneficial interest in the income or property of a trust. If the trust is discretionary, then a beneficiary is deemed to have an interest in the maximum percentage of income or property that the trustee may distribute to that beneficiary – which means a single foreign beneficiary may render an entire discretionary trust foreign for approval purposes.

1.3 Tracing

To determine whether an entity is a foreign person, interests of 20% or more trace up through a chain of corporations, trusts and unincorporated limited partnerships, so that entities are characterised as foreign persons if there are sufficient upstream foreign holders.

An interest of just 20% is sufficient to trigger tracing – eg if ZambiaCo holds 21% of the shares in AusCo1, and AusCo1 holds 21% of AusCo2, AusCo2 is deemed to be a foreign person even if ZambiaCo does not control AusCo1 and AusCo1 does not control AusCo2.

This is broader than the equivalent tracing test (relevant interests) under the Corporations Act, where a 20% plus interest without control can only be traced once in a chain of entities.

1 FIRB stands for Foreign Investment Review Board, a non-statutory advisory body which examines foreign investment proposals and advises the Australian Treasurer on the national interest implications. This paper covers only the FIRB regime and not the various sector and company-specific laws that also impose limits on foreign ownership, eg *Financial Sector (Shareholdings) Act 1998* (Cth), *Air Navigation Act 1920* (Cth), *Qantas Sale Act 1992* (Cth), Airports Act 1996 (Cth), *Shipping Registration Act 1981* (Cth) and *Telstra Corporation* Act *1991* (Cth).

1.4 Associates

When calculating whether a foreign holder holds a 'substantial interest', you add any interests held by an ***associate*** of a foreign holder. Associates include relatives, persons acting in concert, partners in a partnership, any entity of which the foreign holder is a senior officer and vice versa, any entity in which the foreigner holds a greater than 20% interest and vice versa, any trustee of a trust where the foreigner holds a greater than 20% interest and vice versa. Exemptions apply to carve out advisers, proxies, licensed trustees, general partners, consortium vehicles, and certain professional partnerships.

1.5 Foreign government investors

There are different rules in the legislation for investments by a foreign government investor compared with private investors. Foreign government investors are subject to more rigorous screening than other investors – generally there is no monetary threshold that applies before FIRB approval is required. Many commercial investors that operate independently are counted as foreign government investors – not only sovereign wealth funds and state-owned enterprises, but also many entities that have part-government ownership upstream.

Foreign government investors include foreign governments and their separate agencies and instrumentalities, and also corporates, trusts and limited partnerships (through their trustees, general partners and limited partners) in which any of them hold an interest of at least 20%, or more than one – even unrelated – hold an interest of at least 40%. The comments in paragraph 1.2 about the expansive meaning of interests apply here. The definition of foreign government investor contains its own tracing mechanism (so that corporations, trustees and general partners carry the designation as foreign government investor down the chain), plus the tracing provisions explained in paragraph 1.3 also apply.

However, a corporation, trustee of a unit trust or general partner of an unincorporated limited partnership will not be considered a foreign government investor under the above '40% test' if they operate a passive investment fund or scheme where (in broad terms) individual investors in the fund are not able to influence any individual investment decisions, or the management of any individual investments, of the corporation, trustee or general partner under the investment fund or scheme. The intention behind the reference to 'individual' investment decisions and investments is so that the streamlined foreign government investor definition may still be available where investors have representatives on advisory committees and/or where investors can influence broad investment strategy.

Holdings of associates are required to be taken into account when determining whether a FIRB filing is required. Importantly, if a person is a foreign government investor, they are deemed to be an associate of all other foreign government investors originating from the same country, even if they are unrelated. This information is often not public, so investors deemed to be foreign government investors will face a difficult compliance challenge if they do not know whether any other foreign government investors of the same country hold a stake in the target the subject of their transaction.

Stricter rules apply to foreign government investors. Generally, a foreign government investor requires approval in order to acquire a 'direct interest' (normally a 10% or greater interest – see paragraph 1.6) in an Australian company, Australian unit trust or Australian business irrespective of value. A de minimis exception applies where a 'direct interest' is to be acquired via an offshore transaction (ie where the target is not an Australian entity but has one or more downstream Australian entities). For the exception to apply, the total value of the target's Australian assets must be less than $71 million and represent less than 5% of the value of the target's total assets, and none of the target's Australian assets are assets of a national security business (see paragraph 3.3) or sensitive business (see paragraph 3.4).

In addition to the lower 'direct interest' trigger for notifying a transaction to FIRB, the following additional transactions by a foreign government investor require approval:

- starting an Australian business;
- acquiring a legal or equitable interest in a mining, production or exploration tenement; and
- acquiring an interest of at least 10% in securities in a mining, production or exploration entity.

1.6 'Direct interest' trigger for foreign government investors, national security businesses and agribusinesses

Generally, a minimum 20% interest in a target is needed before FIRB approval is mandatory. Not so if the acquirer is a foreign government investor or associate (see paragraph 1.4), or if the target of the acquisition operates a national security business (see paragraph 3.3) or is an agribusiness (see paragraph 5.1). In those cases any ***direct interest*** in a target that meets the monetary threshold (which is nil in the case of a foreign government investor or where the target operates a national security business) will require FIRB approval.

In respect of the 'direct interest' concept the points to understand are:

- Any stake of 10% or more will be a direct interest.
- An interest of 5% or more will qualify as a direct interest if the acquirer taking a 5% stake has entered into a 'legal arrangement' relating to the acquirer's business and the target's business. The explanatory statement accompanying the FATR refers to a strategic alliance as an arrangement that would be caught by this provision, and states that the provision is not intended to capture ordinary arm's length agreements for goods or services (eg an offtake agreement) that is made on ordinary commercial terms – but the FATR itself contains no such exception.
- There is no minimum percentage (so that approval would be needed for any interest above zero) if the person who acquired the interest is in a position to influence central management or the policy of the target.

1.7 What does it all mean?

The tests governing whether a person is foreign or a foreign government investor are complex and layered, and will require careful analysis on a case-by-case basis.

To give a sense of the variation among different types of investors and targets, consider a foreign investor looking to acquire a stake in an Australian entity. Some investors can acquire up to 20% without the need for approval, but not so for foreign government investors, or where targets operate a national security business or are in the agricultural sector or are land rich.

In terms of a dollar threshold, there is no minimum for foreign government investors or where the target operates a national security business. For agribusiness, however, it is $71 million; and it is $330 million for entities not subject to special rules (calculated differently than for agriculture) or $1,427 million if the transaction is not subject to special rules and the acquirer is from one of the free trade agreement counties or regions, namely Canada, Chile, China, Hong Kong, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, South Korea, United Kingdom, the United States of America and Vietnam (each an ***FTA Country***) – but not if the target is in a sensitive sector or operates a national security business, and not if the acquirer is a subsidiary of an FTA Country investor incorporated elsewhere, including Australia. Brunei Darussalam will also be an FTA Country when the TPP-11 comes into force for that particular country. In addition, non-foreign government investors from India have the benefit of a $533 million threshold when seeking to acquire an interest in an Australian entity or business that carries on, or is, a business supplying a service through a commercial presence in Australia (provided the Australian entity or business does not carry on a business in a sensitive sector).

2 The Treasurer's powers

The mechanisms by which the FATA governs transactions involving a foreign person as acquirer are as follows.

- For each proposed transaction which constitutes both a ***notifiable action*** and ***significant action***:
  - the acquirer is legally obliged to notify FIRB of the proposed transaction, and failure to do that is a criminal offence;
  - the acquirer cannot complete the proposed transaction unless and until it obtains FIRB approval; and
  - the Treasurer can choose to:
    - approve the proposed transaction (ie grant FIRB approval) if the Treasurer considers it would not be contrary to the national interest, and such approval can be given on an unconditional basis or subject to binding conditions; or
    - make an order prohibiting the proposed transaction if the Treasurer considers it would be contrary to the national interest (and if the transaction has already occurred the Treasurer has the power to make an order requiring disposal).
- For each proposed transaction which constitutes a ***significant action*** (but not also a ***notifiable action*** or ***notifiable national security action***), the acquirer is not legally obliged to notify FIRB of the proposed transaction. However, if prior FIRB approval is not obtained, the acquirer is subject to the risk that the Treasurer considers the transaction to be contrary to the national interest and that they may be subject to adverse orders.
- For each proposed transaction which involves a national security business or national security land, and which constitutes a ***notifiable national security action***:
  - the acquirer is legally obliged to notify FIRB of the proposed transaction, and failure to do that is a criminal offence;
  - the acquirer cannot complete the proposed transaction unless and until it obtains FIRB approval; and
  - the Treasurer can choose to:
    - approve the proposed transaction (ie grant FIRB approval) if the Treasurer considers it would not be contrary to national security, and such approval can be given on an unconditional basis or subject to binding conditions; or
    - make an order prohibiting the proposed transaction if the Treasurer considers it would be contrary to national security (and, if the transaction has already occurred, the Treasurer has power to make an order requiring disposal).
- For each proposed transaction which constitutes a ***reviewable national security action***, the acquirer is not legally obliged to notify FIRB of the proposed transaction. However, if prior FIRB approval is not obtained, the acquirer is subject to the risk that the Treasurer, at any time within 10 years after the transaction completes, exercises his/her ***call-in power*** to review the transaction on national security grounds and to make orders (such as a disposal order) if the Treasurer is satisfied that the transaction is contrary to national security. FIRB Guidance Note 8 (National security) contains guidance on the types of reviewable national security actions that may raise national security concerns and in respect of which the Government encourages that a voluntary notification (and therefore application for FIRB approval) be made.

The notifiable action, significant action and notifiable national security action categories are not mutually exclusive, nor is one a subset of the other – each has its own set of tests which must be applied to decide if a transaction is caught. However, an action that is a notifiable action, significant action or notifiable national security action cannot also be a reviewable national security action.

The result is that there are different tests within each category (notifiable action, significant action and notifiable national security action) for different types of transactions. Broadly, Australian targets can be separated into three categories:

- Australian entities and businesses generally (but excluding land and the agricultural sector);
- land and land rich entities; and
- agricultural land and agribusinesses.

We deal with each of these in paragraphs 3, 4 and 5 below, with the focus being on mandatory FIRB approval triggers (ie an action which is both a notifiable action and significant action, or which is a notifiable national security action).

The Treasurer has a ***last resort power*** to make orders (such as disposal orders) on national security grounds in respect of a transaction after FIRB approval has been granted. The power is exercisable in respect of any FIRB approval given on or after 1 January 2021, unless given in respect of a significant action notified to FIRB or taken before 1 January 2021.

Various requirements must be satisfied before this power can be exercised in respect of an action, including:

- that, after having reviewed the action and taken into account national intelligence agency advice, the Treasurer is satisfied that a national security risk exists in relation to the action;
- that one or more of the following applies: (i) the applicant made a false or misleading statement and the Treasurer is reasonably satisfied that the misstatement directly relates to the national security risk; (ii) the business, structure or organisation of the person has materially changed since the FIRB approval was granted, and the Treasurer is reasonably satisfied that the national security risk that has emerged as a result of this change could not have been reasonably foreseen at the time of the FIRB approval or that the likelihood of the risk arising was remote; and (iii) the market in which the action is taken has materially changed since the FIRB approval was granted, and the Treasurer is reasonably satisfied that the change altered the nature of the national security risk posed at the time the decision was made;
- that the Treasurer has taken reasonable steps to negotiate in good faith with the applicant to achieve an outcome of eliminating or reducing the national security risk;
- that existing regulatory systems would not adequately eliminate or reduce the national security risk; and
- if a disposal order is to be made – the action must have been taken and the result of the action is contrary to national security.

It is possible to apply to the Administrative Appeals Tribunal for review of a decision by the Treasurer that a national security risk exists, but it is not possible to seek review of orders made by the Treasurer (such as a disposal order).

3 General: Australian entities and business (not land rich or agricultural)

3.1 Do any special tests apply?

Before applying the general rules as to when FIRB approval is needed to acquire a stake in an Australian entity or business, you must first ensure that none of the special rules apply (there are many). If the transaction relates to the agricultural sector, land-rich entities, media, mining, or oil and gas, consider the rules explained in paragraphs 3.4, 4, 5 and 7. If the acquirer is a foreign government investor, see paragraphs 1.5 and 1.6.

3.2 Acquisitions of securities and businesses: general thresholds

If no special rules apply:

(a) the acquisition by a foreign person of a direct interest (generally 10% plus) in a target's securities or in the assets of a business is a ***notifiable national security action*** if the target operates, or the business is, a 'national security business' (see paragraph 3.3), and in such cases a nil monetary threshold applies;

(b) the acquisition by a foreign person of a substantial interest (20% plus) in a target's securities is both a ***notifiable action*** and a ***significant action*** if the target does not operate a national security business and the target is:

(i) an Australian corporation carrying on an Australian business;

(ii) an Australian unit trust; or

(iii) a holding entity of either of them,

and the target is valued above the thresholds in the table below; and

Investor	Threshold	How calculated
FTA Country investors – An entity that is an enterprise or national of an FTA Country (see paragraph 1.7) but excluding: • acquisitions by their subsidiaries incorporated elsewhere, including Australia • foreign government investors; and • acquisitions of targets which are or operate a national security business (see paragraph 3.3) or which are sensitive (see paragraph 3.4)	$1,427 million, indexed annually	Where target is an entity, the higher of: • the total asset value for the entity; and • the total value of the issued securities of the entity Where target is a business and proposed action is acquisition of interest in assets of business – the value of consideration for the acquisition Where target is a business and proposed action is entry into or termination of significant agreement – total value of assets of the business
FTA Country investors – where the target is carrying on a sensitive business	$330 million, indexed annually	
Foreign persons other than foreign government investors	$330 million, indexed annually	

(c) subject to (a), each of the following is a significant action (but not also a notifiable action):

(i) the entry into an agreement relating to the affairs of one of the entities mentioned in (b), or the alteration of a constituent document of one of those entities, such that senior officers are subject to instruction or direction by a foreign person that holds a substantial interest (20% plus) in the entity's securities; and

(ii) the acquisition by a foreign person of interests in the assets of an Australian business or entry into or termination of a significant agreement with an Australian business which is valued above the thresholds in the table above and which results in the foreign person controlling the business (and

for this purpose a person has 'control' where they are in a position to determine the policy of the business in relation to any matter).

(d) each of the following is a r***eviewable national security action*** (and in each of these cases a nil monetary threshold applies):

(i) the acquisition by a foreign person of a direct interest (generally 10% plus) in a target's securities; and

(ii) the acquisition by a foreign person of any interest in the assets of an Australian business, as a result of which:

(A) the person has a direct interest (generally 10% plus) in the business;

(B) the person will be in a position, or more of a position, to influence or participate in the central management and control of the business; or

(C) the person will be in a position, or more of a position, to influence, participate in or determine the policy of the business.

Once a foreign person (with associates) holds a 20% plus stake or 10% plus stake (as applicable), any further acquisition of securities will require a new FIRB approval where the applicable monetary threshold is exceeded, unless an exemption applies.

There is no exemption for internal reorganisations even if they do not cause any change in ultimate ownership.

3.3 National security businesses

A 'national security business' is generally one which is involved in or connected with a 'critical infrastructure asset', telecommunications, defence or a national intelligence community (of either Australia or a foreign country), or their supply chains.

However, a business is only a 'national security business' if it is publicly known, or could be known upon the making of reasonable inquiries, that the business meets the criteria for being a national security business.

'Critical infrastructure asset' has the meaning given in the *Security of Critical Infrastructure Act 2018* (Cth) and accompanying *Security of Critical Infrastructure (Definitions) Rules (LIN 21/039) 2021*, which is defined to include certain assets within the following 10 sectors: communications, data storage or processing, financial services and markets, water and sewerage, energy, healthcare and medical, higher education and research, food and grocery, transport, and the defence industry.

3.4 Sensitive businesses, media, and financial sector companies

The FATR defines sensitive businesses to include media, telecommunications, transport, and various military applications. Those businesses simply trigger the lower threshold for FTA Country investors shown in the table in paragraph 3.2. However, the FATR also creates special rules for media and certain finance sector companies.

Any acquisition of a 'direct interest' (normally a 10% or greater interest – see paragraph 1.6) in an Australian media business is deemed to be both a significant and a notifiable action, and therefore requires FIRB approval.

An exception applies so that the FATA does not apply to an acquisition of an interest in shares in a financial sector company within the meaning of the *Financial Sector (Shareholdings) Act 1998* (Cth). A 'financial sector company' is an Authorised Deposit-taking Institution (***ADI***), an authorised insurance company, or a holding company of an ADI or an authorised insurance company. 'Authorised insurance company' includes insurers under the *Insurance Act 1973* (Cth) and life insurers under the *Life Insurance Act 1995* (Cth). Investments in financial sector companies are not regulated by the FATA – rather, approval is required under the *Financial Sector (Shareholdings) Act 1998* (Cth). The relevant threshold for both foreign and domestic acquirers under the *Financial Sector (Shareholdings) Act 1998* (Cth) is 20%. Foreign government investors do not benefit from this exception, so that the FATA applies to transactions relating to ADIs and authorised insurance companies in addition to the *Financial Sector Shareholdings Act 1998* (Cth).

Agribusinesses are also subject to a range of specific thresholds and rules as explained in paragraphs 5 and 6.

3.5 Passive increases

Passive percentage increases in an Australian company or Australian unit trust (eg as a result of non-participation in a share buy-back, capital reduction or unit redemption) can in certain circumstances constitute the acquisition of an interest in securities of an entity and therefore can constitute a notifiable action, significant action, notifiable national security action or reviewable national security action if the other conditions to such types of actions are met, except in relation to:

- passive increases of an existing substantial interest or direct interest;
- the foreign government investor 'direct interest' rules; and
- the rules regarding Australian land entities.

Where a passive increase constitutes a notifiable action or notifiable significant action, the relevant foreign person must make a notification to FIRB within 30 calendar days after the increase.

3.6 Exemption certificates for securities and business acquisitions

The Treasurer has the power to issue exemption certificates allowing foreign persons to undertake multiple acquisitions of Australian businesses and securities in Australian entities without having to obtain individual approval for each transaction (including where the transaction would otherwise be a notifiable national security action or reviewable national security action).

The Government has indicated that exemption certificates are intended for foreign persons with a high volume of investments. In practice, exemption certificates are often granted to large investment funds, particularly those with low-risk foreign government investors and investors who intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

Applications for exemption certificates are considered on a case-by-case basis to ensure they are not contrary to the national interest. Examples given by the Government of where the grant of an

exemption certificate would be considered contrary to the national interest are: the program of proposed acquisitions is not well defined by an applicant and the scope is very broad; national interest factors cannot be adequately assessed at the time of the application; the program of investment is not considered to be 'low risk' or 'low sensitivity' and do not raise national security issues; and the potential tax risks cannot be adequately assessed at the time of the application.

An exemption certificate will generally specify the period during which acquisitions can be made. While a period of 12 months will often apply (and is the default period for first time exemption certificate holders), certificates can be issued for shorter or longer periods depending on the circumstances. However, periods exceeding 12 months are generally granted only for investors that have a demonstrated compliance history with exemption certificates.

3.7 Privatisations

Foreign persons that are not foreign government investors benefit from an exemption allowing Australian governments (whether Commonwealth, state or territory), their wholly owned entities and entities established for a public purpose to privatise any Australian business that they carry on, or to dispose of any interest in land, without the acquirer needing to obtain FIRB approval.

However, this exception does not apply in relation to the following:

- An acquisition of an interest by a foreign government investor (that is, the FATA applies to any action of a foreign government investor to acquire interests through an Australian government privatisation or asset sale process, if the action is a significant action, notifiable action, notifiable national security action or reviewable national security action under the FATA).
- An acquisition of an interest in Australian land that is 'national security land' (see paragraph 4.1), or if the interest is, or includes, an interest in any of the following types of infrastructure: public infrastructure (an airport or airport site, a port, infrastructure for public transport, electricity, gas, water and sewerage systems), existing and proposed roads, railways, inter-modal transfer facilities that are part of the National Land Transport Network or are designated by a state or territory government as significant or controlled by the state or territory, telecommunications infrastructure and nuclear facilities.
- An acquisition of an interest in a national security business.

4 Australian land and land-rich entities

4.1 Australian land and interests in Australian land

The concept of ***Australian land*** covers four separate categories of land, being agricultural land, commercial land, residential land (which we will not consider), and mining or production tenements.

The legislation deems various things to be an interest in Australian land – including:

- interests under a lease or licence giving rights to occupy land for an unexpired term of more than five years (inclusive of any options to renew); and
- interests in the following land-rich entities:
  - an Australian land corporation or Australian land trust, if interests in Australian land account for more than 50% of the corporation or trust's total assets by value; and
  - an agricultural land corporation or agricultural land trust, if interests in agricultural land account for more than 50% of the corporation or trust's total assets by value (see further paragraph 5.2).

Land which falls into any one or more of these categories can also constitute ***national security land***. National security land is generally land which is defence premises or where it is publicly known (or could be known upon the making of reasonable enquiries) that a national intelligence agency has an interest in the land. The acquisition of an interest in national security land requires approval – because the acquisition of an interest in national security land is a notifiable national security action irrespective of value.

4.2 Thresholds for Australian land

Unless an exemption applies, foreign persons must obtain approval for all acquisitions of interests in Australian land or of securities in land-rich entities where the value of the consideration for the interest to be acquired exceeds the thresholds. Note that there is no minimum percentage stake (except for listed entities, as noted in the table overleaf).

In broad terms, foreign persons require FIRB approval to acquire interests in land as follows:

Type of Land	Type of Transaction	Threshold
1. National security land	All	No threshold – notifiable regardless of value
2. Residential land[2]	All	No threshold – notifiable regardless of value
3. Any land, where acquirer of interest in land is a foreign government investor	All, except acquisitions of less than 10% (for listed entities, or for unlisted entities that do not invest in established dwellings) where there is no influence over management or policy	No threshold – notifiable regardless of value
4. Commercial land that is vacant[3]	All	No threshold – notifiable regardless of value
5. Mining or production tenement	All, except acquisitions by certain FTA Country investors (US, NZ, Chile) which are covered in item 10	No threshold – notifiable regardless of value
6. Interests in an Australian land corporation or Australian land trust where 10% or more of the value of its total assets comprise: a. residential land;[2] b. vacant commercial land;[3] or c. mining or production tenements, or where the Australian land corporation or Australian land trust has any interests in national security land	All, except acquisitions of less than 10% (for listed entities, or for unlisted entities that do not invest in established dwellings) where there is no influence over management or policy	No threshold – notifiable regardless of value
7. Agricultural land (including interest in any agricultural land corporation or agricultural land trust)	All, whether by acquiring interests in the land or in a share or unit in an agricultural land corporation or trust, except: • acquisitions by certain FTA Country investors (US, NZ, Chile) which are covered in item 12; and • acquisitions by an enterprise or national of Thailand in land used wholly and exclusively for a primary production business which are covered in item 13	$15 million calculated by adding the consideration to the value of agricultural land that the acquirer already holds
8. Commercial land that is not vacant[3], or an aged care facility, retirement village or student accommodation, where in each case the interest acquired gives a right to occupy the land, and the land: a. will be leased to an Australian government entity (other than most corporate Commonwealth entities including Australian Broadcasting Corporation, Australian Postal Corporation and Civil Aviation Safety Authority) or houses public infrastructure; b. is used for an identified sensitive purpose (eg conducting a sensitive business, regulated production and storage, airports, banking); or c. houses certain telecommunications infrastructure or data facilities; or d. a mining operation will operate on the land	All, except: • acquisitions by FTA Country investors which are covered in item 12 (excluding FTA Country investors from Peru or Hong Kong as they are subject to the $71 million threshold); and • acquisitions by foreign government investors which are covered in item 3	$71 million calculated by reference to the value of the interest in the land

2 Excludes aged care facilities, retirement villages and student accommodation.

3 Land is 'vacant' if there is no permanent substantive building on the land that can be lawfully occupied by persons, goods or livestock, but land is not considered vacant if a wind or solar power station is located on the land's surface.

Type of Land	Type of Transaction	Threshold
9. Interests in an Australian land corporation or trust where *less* than 10% of the value of its total assets comprise: a. residential land[2]; b. vacant commercial land[3]; and c. mining or production tenements	All, except: • acquisitions of less than 10% (for listed entities, or unlisted entities that do not invest in established dwellings) where there is no influence over management or policy; • acquisitions by certain FTA Country investors (US, NZ, Chile) which are covered in item 12; and • acquisitions to which item 7 or item 13 applies	If Australian land corporation or trust has land of the type listed in item 8: $71 million calculated by reference to the value of the interest to be acquired in the Australian land corporation or trust Otherwise: $330 million calculated by reference to the value of the interest to be acquired in the Australian land corporation or trust
10. Mining or production tenement	Acquisitions by certain FTA Country Investor (US, NZ, Chile), except foreign government investors who are covered in item 3	$1,427 million calculated by reference to the value of the interest in the land
11. Commercial land that is not vacant[3] and which is not subject to item 8 and where the acquirer intends to use the land predominantly for the supply of a service through a commercial presence in Australia	Acquisitions by Indian investors who are not foreign government investors	$533 million calculated by reference to the value of the interest in the land
12. Land described in item 7, 8 or 9 Other land (not listed above)	In respect of item 7: acquisitions by certain FTA Country investors (US, NZ, Chile) In respect of items 8 and 9 and other land (not listed above): acquisitions by FTA Country investors, except foreign government investors who are covered in item 3	$1,427 million calculated by reference to the value of the interest in the land (or, where interest in an Australian land corporation or trust is to be acquired, by reference to the value of that interest)
13. Land used wholly and exclusively for a primary production business (excluding interests in any Australian land corporation or trust which has interests in such land)	An acquisition by an enterprise or national of Thailand and used wholly and exclusively for a primary production business	$50 million calculated by reference to the value of the interest in the land
14. All other land (not listed above)	All other circumstances not listed above	$330 million calculated by reference to the value of the interest in the land

Note that special rules apply in determining the type of land on which a wind or solar power station is, or is proposed to be, located.

4.3 Exemption certificates for land

The FATA provides for the grant of exemption certificates covering one or more interests in Australian land (including national security land), where the Treasurer is satisfied that the acquisition would not be contrary to the national interest. The comments in paragraph 3.6 regarding exemption certificates for businesses and entities also apply here.

5 Significantly different rules for agriculture

The political significance of agriculture is clear when looking at the vastly different treatment for agricultural land and agribusiness.

5.1 Agribusiness

All foreign persons making a direct interest (which is generally 10% but may be less – see paragraph 1.6) for consideration of $71 million or more (including the value of any existing investment in that agribusiness) must obtain FIRB approval before proceeding.

An agribusiness entity is a business that:

- derives earnings from carrying on a prescribed class of agricultural businesses which represent more than 25% of the entity's EBIT; or
- uses assets in carrying on a prescribed business and the value of the assets exceeds 25% of the total asset value of the entity.

The prescribed agricultural businesses are based on Australian and New Zealand Standard Industrial Classification Codes and include agriculture, forestry, fishing and food product manufacturing (with some exceptions). Given that entities do not typically separate their books and accounts along these lines, a fair amount of work is required to segregate the earnings and asset values, including apportionment where assets have mixed use. It may be a challenge for an acquirer to find out such information even with the full cooperation of the target.

5.2 Agricultural land

Agricultural land is land in Australia that is used, or could reasonably be used, for a primary production business. The *Income Tax Assessment Act 1997* (Cth) definition of primary production applies, being production resulting directly from:

- cultivation or propagation of plants;
- maintenance of animals for the purpose of selling them or their bodily produce; and/or
- fishing, forestry or horticulture operations.

The definition of agricultural land is expansive (including as a result of the extension to potential use) and includes land which is partially used for a primary production business and land where only part of the land could reasonably be used for a primary production business.

FIRB's Guidance Note on agricultural land investments states that factors that may provide a reasonable indicator that land could (or could not) reasonably be used for a primary production business include: the primary uses allowed on the land under its zoning, land use history, land characteristics, and lease or licence conditions or limitations.

However, exemptions from the definition of agricultural land apply for:

- land for which its zoning requires approval for primary production businesses, or where an application has been made to rezone the land that would not allow for use a primary production business;
- applications for approval for 'mining operations' (which includes oil and gas operations), associated waste storage and to locate related infrastructure on the land;
- applications for approval (including accreditation) for establishing or operating a wind or solar power station to be located on the land (whether on or beneath the surface);
- land that is used wholly or predominantly for a mining operation, associated waste storage or to locate related infrastructure;
- an approval from a government authority (other than a mining or production tenement) for mining or oil and gas projects, related infrastructure and waste storage, and land acquired or used wholly or predominantly to meet a condition of such approval;
- land that is used wholly or predominantly for a wind or solar power station located on the land (whether on or beneath the surface);
- an approval from a government authority (including accreditation) allowing a wind or solar power station to be established or operated on the land (whether on or beneath the surface), and land acquired or used wholly or predominantly to meet a condition of such approval;
- land used wholly or predominantly for environmental protection, conservation, tourism or outdoor recreation;
- land within industrial estates; and
- small areas of land (1 hectare or less).

All acquisitions of agricultural land that will give a foreign person (and associates) total agricultural landholdings valued at more than $15 million will require approval. That means that once a foreign person holds $15 million of agricultural land, any further acquisition of agricultural land needs approval, no matter how small.

The Government's general policy is not to grant FIRB approval for an acquisition of agricultural land, or an interest in a land entity that holds agricultural land, if Australian investors were not offered an equal opportunity to invest in that land or entity through an open and transparent sale process.

6 Register of Foreign Ownership of Australian Assets

Since 1 July 2023, the FATA has required foreign persons who:

- acquire certain types of interests in Australian land, exploration tenements and water interests (in each case irrespective of whether FIRB approval is required for such acquisitions); or
- acquire interests in Australian entities and businesses where FIRB approval is required for such acquisitions,

to notify the Registrar (being the Australian Taxation Office (***ATO***)) of the Register of Foreign Ownership of Australian Assets (the ***Register***) of such acquisitions, within 30 calendar days of each such acquisition.

Subsequent changes – including disposals of relevant assets, changes in the nature of the relevant land in which a foreign person has an interest and changes of five percentage points or more of a foreign person's interest in a relevant entity or business – also need to be

notified to the Registrar, in each case within 30 calendar days of the relebvant change.

In addition, a person who becomes a foreign person is required to notify the Registrar of certain types of existing interests in Australian land, exploration tenements and water interests, as though the person acquired those interests on the day it became a foreign person. Also, a person who becomes a foreign person is required to notify the Registrar of existing interests in an entity or business where that person would have needed FIRB approval to acquire that interest if they had acquired the interest on the day they became a foreign person.

Acquisitions which are wholly exempt from the FATA are not subject to the Register notification requirements.

Persons needing to report under the Register regime must do so via an online portal on the ATO website. A significant volume of information is required.

Where a person fails to provide the requisite notification within the relevant 30 day period, the person could be subject to a civil penalty in the form of a fine.

There are exemptions from the notification requirements in respect of the enforcement of a security held solely for the purposes of a moneylending agreement.

7 Mining, oil and gas

7.1 Mining or production tenements

Acquisitions of interests in mining or production tenements will be notifiable as an acquisition of an interest in Australian land. As noted in paragraph 4.1, an interest in 'Australian land' expressly includes a 'mining or production tenement'. The 'mining or production tenements' definition includes mining leases and licences, and petroleum production leases (both onshore and offshore), rights that preserve a right to recover minerals, oil or gas (which we assume is intended to address retention titles), leases under which the lessee has rights to recover minerals, oil or gas (which would extend to subleases) and an 'interest' in any of these (including, certain interests in profit/income sharing agreements). However, mere rights to revenue streams are not considered as a mining or production tenement, except if such rights are an asset of a national security business or the tenement is national security land.

As set out in the table in paragraph 4.2, the acquisition of interests in mining or production tenements will be notifiable regardless of value for foreign investors, other than relevant FTA Country investors who will be subject to a $1,427 million threshold.

7.2 Exploration and prospecting tenements

The acquisition of an exploration or prospecting tenement is exempt from the FIRB approval regime, except where the acquirer is a foreign government investor or the exploration tenement is in respect of national security land, in which case one needs to consider whether the tenement constitutes an interest in Australian land. If the tenement gives a right to occupy Australian land for a term (including extensions and renewals) that is reasonably likely at the time of the grant to exceed five years, then it constitutes an interest in Australian land and FIRB approval may be needed to acquire the interest.

7.3 Mining and oil and gas companies

The notification requirements for acquisitions of interests in companies will apply in respect of acquisitions of interests in companies which hold tenements (eg a foreign person acquiring a substantial interest in an Australian entity that meets the threshold will need to notify).

The acquisition of shares in an Australian mining or oil and gas company will also be a significant action where it meets the prescribed threshold (generally $330 million), where the company carries on an Australian business and the action results in a change in control. In relation to the concept of 'control', a person determines the policy of an entity or business of exploiting a mining or production tenement (and thereby controls the entity or business) if that person determines questions relating to disposal of an interest in the tenement.

Entering into, or terminating, an agreement with the holder of a mining or production tenement where the total value of the business exceeds $330 million and the action results in a change in control of the business is also a significant action. Agreements include those relating to leasing assets, the right to use assets, participating in profits or management and control of the business.

A transaction may also be notifiable as the acquisition of an interest in an Australian land corporation where the value of the company's interests in Australian land (including mining or production tenements) exceeds 50% of its total assets by value (see items 4 and 7 of the table in paragraph 4.2).

7.4 Agricultural land

Agricultural land is relevant in the context of mining, oil and gas projects because it is defined by reference to use and potential use for a primary production business. This could include mining, production and exploration tenements that overlap, for example, with pastoral leases and other 'land' that is or could be used for a primary production business.

As noted above, there are exemptions to the definition of agricultural land, including:

- Applications for approval for 'mining operations' (including oil and gas operations), associated waste storage and to locate related infrastructure on the land;
- land that is used wholly or predominantly for a mining operation, associated waste storage or to locate related infrastructure; and
- an approval from a government authority (other than a mining or production tenement) for mining or oil and gas projects, related infrastructure and associated waste storage (which we assume is intended to cover future rights to use land for mining and oil and gas projects – such as State Agreements), and land acquired or used wholly or predominantly to meet a condition of such approval (eg, land used for biodiversity purposes).

In relation to operating mining and oil and gas projects described in the second bullet above:

- the reference to 'is used' (in the present tense) is problematic as it raises issues around whether, for example, a mining lease that has been granted, but is yet to have an operating mine (or at least works commenced for construction of one) is caught; and
- similarly, the reference to 'wholly or predominantly' may be problematic for mining projects which could cover a large area of 'land' beyond the area of the mining operation itself.

Offshore oil and gas tenements will be exempted where the only primary production business for which the land could potentially be used relates to prescribed types of aquaculture.

The exemptions do not appear to capture land incidental to mining operations (eg, buffer zones). As noted above, exploration and prospecting tenements may also qualify as agricultural land. While interests in mining and production tenements should be caught by the exemptions, mining and oil and gas companies will still need to consider their tenure portfolios and determine whether the exceptions apply or whether registration on the agricultural land register is required.

8 Exemptions

8.1 General

There are various statutory exemptions to the notifiable action, significant action and notifiable national security action concepts. These include:

- moneylending exemption (see paragraph 8.2);
- acquisitions from government, other than in respect of national security businesses (see paragraph 3.3) and national security land (see paragraph 3.7);
- devolution by operation of law;
- acquisitions by foreign custodian corporations;
- compulsory acquisitions and buy-outs;
- acquisitions of interests in land entities below certain percentage thresholds;
- certain types of easements;
- rights issues and dividend reinvestment plans; and
- acquisitions of interests in an entity's securities where the acquirer's percentage interest in the entity does not increase.

However, many of these exemptions do not also operate as exemptions to the reviewable national security action concept.

8.2 Moneylending exemption

Overview

There is a fairly broad exemption for debt financiers – known as the 'moneylending exemption' from the notifiable action, significant action, notifiable national security action and reviewable national security action concepts.

The FATA does not apply to acquisitions of interests in entities and land for the purposes of:

- securing payment obligations under a moneylending agreement; and
- enforcement of that security, except in respect of national security land and national security businesses where the moneylending exemption only applies in an enforcement scenario to a receiver (but given it is exceptionally rare for a mortgagee to foreclose on mortgaged property (ie acquiring it directly) the moneylending exemption in large part will in practice apply to enforcement of security over national security land and national security businesses).

This exemption applies for moneylending agreements that are in good faith, on ordinary commercial terms, and in the course of carrying on a business of lending or providing financial accommodation. The moneylending agreement can be one that is entered into by a person which carries on such a business, or by an entity established by such a person for the purpose of lending money.

The moneylending exemption covers connected parties to reflect modern lending and debt trading practices, including any subsidiary or holding entity, a person who is in a position to determine the investments or policy of the lender, a security trustee or a receiver, or a receiver and manager appointed by a lender or another connected party. The exemption also applies to secondary debt trades provided the acquirer (or its holding entity or subsidiary) carries on a business of lending money or otherwise providing financial accommodation.

Foreign government investor lenders

No FIRB approval is required for simply taking and holding a security interest, and a foreign government investor which is an ADI or a subsidiary of an ADI may acquire an interest through enforcement (except in respect of national security land and national security businesses) and hold it for 12 months but also does not require approval after that time if it is making a genuine attempt to dispose of the interest. Foreign government investor lenders which are not ADIs have a shorter safe-harbour period. The exemption applies to non-ADI foreign government investor lenders which acquire an interest through enforcement (except in respect of national security land and national security businesses) where six months have not passed since the acquisition of the interest or it is making a genuine attempt to dispose of the interest. The process of deciding on the method of disposal or complying with requirements of law in relation to a disposal process constitute examples of genuinely attempting to dispose of an interest.

The exemption gives foreign lenders comfort that the moneylending exemption will allow an orderly enforcement of security without approval, but foreign lenders may still need to consider whether the requirement of making a genuine attempt to dispose of their interest aligns sufficiently with their enforcement strategy.

Lenders taking security over residential land

There are specific additional tests for a foreign lender which is not a foreign government investor (where the regime above applies) nor an ADI (or a subsidiary of an ADI) when taking security over residential land. If a non-ADI foreign lender, which is not a foreign government investor, wishes to take a security interest over residential land the moneylending exemption will only apply if the lender (or its holding entity) is otherwise licensed as a financial institution (whether or not in Australia) and either has at least 100 holders of its securities or has at least 100 members or is listed on a stock exchange (whether or not in Australia).

The following table summarises how the exemption protects lenders for taking and enforcing security over residential land:

Lender type:	Taking security	Enforcing security (assuming the residential land is not also national security land)
Foreign government lender	Exemption applies	If ADI – 12 months to hold (plus extension for genuine attempt to dispose) Not ADI – 6 months to hold (plus extension for genuine attempt to dispose)
Other lenders	Exemption applies: • if ADI • if not ADI but registered as a financial institution plus ≥100 holders of securities or ≥100 members or listed on a stock exchange	Exemption applies: • if ADI • if not ADI but registered as a financial institution plus ≥100 holders of securities or ≥100 members or listed on a stock exchange

9 Practicalities

9.1 Fees

Fees are imposed for considering applications, not for approvals, and must be paid before an application will be considered. FIRB's time limit to consider the application (see paragraph 9.3) does not start until the fee is paid.

The rules regarding the determining of FIRB fees are complex. The fee in any given case will depend on a range of factors, including: the type of target, the value of the transaction, the type of transaction, whether the application is for a no-objection notification or an exemption certificate, or whether the special fee adjustment rules apply.

In general terms, the fee for any single application for a no objection notification under the mandatory FIRB approval triggers can range from $4,200 up to $1,191,100. In many cases the higher the transaction value the higher the fee subject to a fee cap of $1,191,100.[4]

Separately, there is an annual vacancy fee levied on foreign owners of residential property that has not been occupied, or genuinely available on the rental market, for less than 183 days in a 12-month period.

9.2 FIRB applications, no-objection notifications, and conditions

Foreign persons are advised to make applications for FIRB approval to remove the risk of adverse orders (such as disposal) if the Treasurer decides the proposed transaction will be contrary to the 'national interest' or, in the case of notifiable national security actions and reviewable national security actions, contrary to 'national security'.

The concept of 'national interest' is not defined in the legislation. The Treasurer has the power to determine on a case-by-case basis whether a proposed transaction will be contrary to the 'national interest'. The Policy states that the Government typically considers the following factors when assessing foreign investment proposals: national security; competition; other Australian government policies (including tax); impact on the economy and the community as well as employees; and character of the investor.

Foreign investors should be aware that in many cases it is a criminal offence to proceed without approval (see paragraph 10). In response to an application the Treasurer (through FIRB) may decide that:

- there are no objections to the proposal, and give a no-objection notification (commonly known as a 'FIRB approval') to the applicant accordingly;
- there are no objections to the proposal provided certain conditions are met, and give a no-objection notification (commonly known as a 'FIRB approval') to the applicant imposing conditions (in which case the conditions notified to the acquirer are legally binding if the transaction proceeds); or
- the proposal is contrary to the national interest or national security (as applicable), and make a public order prohibiting the transaction.

The Government has publicly stated that conditions are the regulatory mechanism by which it can allow foreign investment to occur while at the same time managing the risks to the national interest or national security associated with that investment. The types of conditions that have been imposed on previous FIRB approvals include:

- reporting conditions, such as the requirement to provide FIRB with annual reports on whether or not the applicant has complied with Australian tax laws in relation to the proposed transaction, and also to provide FIRB with information regarding the applicant and target group's post-transaction equity and debt funding structure;
- conditions to support national security, such as a requirement for at least half of the target's board to comprise Australian citizens and residents, and a requirement that the target's chairman be an independent director who is an Australian citizen and resident;
- conditions relating to the treatment of sensitive data, which seek to mitigate risks of unauthorised access, corruption, denial or exfiltration, such as:
  - a requirement to develop and implement data security policies and procedures that extend beyond the requirements of general Australian law;

4 On 10 December 2023, the Australian Government announced a proposal to triple application fees for the acquisition of established dwellings.

- restrictions on access to specified data by directors, representatives and staff of the applicant;
- restrictions on the location of data storage and access;
- cybersecurity arrangements; and/or
- reporting requirements in the event of a data breach;

- conditions relating to sensitive infrastructure, which seek to mitigate risks relating to espionage and sabotage, such as a requirement that operational control or maintenance of sensitive assets generally occurs within Australia;
- conditions relating to commercial property, which seek to mitigate risks relating to client security, such as:
  - notification to tenants of changes in ownership and/or property management; and/or
  - restrictions on investor access to the property;
- conditions to support competition policy, such as restricting the aggregate ownership by associated investors in a specific industry or sub-market;
- conditions designed to mitigate risks to the community or to the national or regional economy, such as:
  - a requirement to maintain company headquarters in Australia;
  - a requirement to maintain production facilities in specified regional areas without loss of employment for a specific period;
  - a requirement that there should have been an open opportunity for Australian investors to acquire a parcel of agricultural land before its purchase by a foreign investor; and
- conditions to address the risk of land banking and speculation, such as a requirement to commence continuous construction on vacant land within a specified period and not to sell the land until construction is complete.

Finally, it should also be noted that the Treasurer has powers to request information and documents from other parties if relevant to an application (information request).

9.3 Timing

Once a FIRB application has been lodged (and FIRB confirms that the application fee has been paid) there is a statutory time period for the Treasurer to make a decision, and if no decision is made then no further orders can be made (that is, the Treasurer cannot prohibit or unwind a transaction if a decision is not made in time). The general rule is that the Treasurer has 30 calendar days to make a decision and a further 10 calendar days to notify the applicant.

However, there are several ways this timeframe can be extended:

- if an information request is made (see paragraph 9.2), the clock stops until the request has been satisfied;
- the Treasurer may also make an interim order (which is publicly available) which has the effect of prohibiting a transaction on a temporary basis (up to 90 calendar days), effectively extending the time for the Treasurer to make a final decision;
- the Treasurer can unilaterally extend the timeframe by up to 90 calendar days (and this is in addition to the power to make an interim order); and
- an applicant can request that the timeframe be extended. The usual circumstances in which an applicant will request an extension is where FIRB indicates that it requires further time to assess an application and asks that the applicant consider requesting an extension – this is a common occurrence. In that situation an applicant will usually agree to make an extension request to avoid a public interim order being made or the application being rejected.

Despite the statutory time period there is no certainty that FIRB approval will be given by a particular time given that either FIRB or the applicant may take steps that extend that timeframe.

9.4 FIRB consultation

Before making a recommendation to the Treasurer (or their delegate) on whether to approve an application, FIRB consults broadly with Commonwealth, state and territory government departments and agencies, and in particular with the Australian Competition and Consumer Commission (***ACCC***) the Australian Taxation Office (***ATO***) and, where critical infrastructure assets (such as telecommunications, gas, electricity, water and ports) are involved, the Cyber and Infrastructure Security Centre (***CISC***) which is part of the Commonwealth Attorney-General's Department.

The ATO will undertake a 'tax risk assessment' of each FIRB application. Following input from the ATO, FIRB might recommend that the Treasurer (or their delegate) impose 'tax conditions' on approvals. While FIRB will consult closely with the ACCC, FIRB is entitled to adopt its own position on competition matters even if the ACCC clears a transaction. The CISC undertakes a national security risk assessment of a proposal where the target is or has critical infrastructure assets, and then provides advice to FIRB.

These regulatory interdependencies can lead to timing and transaction risks. It is therefore important to analyse likely issues early – especially competition and tax issues – and develop an integrated strategy to manage those risks.

9.5 Confidentiality and information sharing

The Government's stated policy is that it respects any 'commercial-in-confidence' information it receives from an applicant and ensures that appropriate security is provided. Further, it is government policy not to provide applications to third parties outside of the Government unless it has permission or it is ordered to do so by a court of competent jurisdiction, and the Government has stated it will defend this policy through the judicial system if needed.

However, the Government can share information obtained under the FATA (including the contents of an application for FIRB approval), both within government and also with foreign governments. Information can only be shared with the government of a foreign country where national security risks may exist for Australia or the foreign country, and where it is not contrary to the Australian national interest. The information can only be shared if there is an agreement in place between the Australian Government and the relevant foreign government.

9.6 Notification and record keeping requirements

The FATA has a regime requiring foreign persons to make certain notifications to FIRB following receipt of a no objection notification or exemption certificate. In general terms, the regime requires a foreign person to notify FIRB within 30 days of the taking of an 'action' covered by the no objection notification or exemption certificate. Notifications are also required in various situations where a foreign person ceases to have an interest the acquisition of which was covered by the no objection notification or exemption certificate. Notifications are made online on FIRB's website via completing and submitting an online notification form.

In addition, the FATA requires records relating to foreign investment notices and applications to be maintained. Failure to keep such records is an offence under the FATA.

A person must make and keep records of every act, transaction, event or circumstance relating to the matters shown for the length of time specified in the following table.

Action, transaction, event or circumstance	Length of time the record must be kept
Significant actions, notifiable actions, notifiable national security actions, actions specified in exemption certificates, and reviewable national security actions notified to the Treasurer	Five years after the action is taken by the person.
Compliance with conditions in a no objection notification and an exemption certificate.	Two years after the condition ceases to apply to the person.
The disposal of an interest in residential land if the acquisition of the interest by the person was a significant action, notifiable action or notifiable national security action, or would have been a significant action, notifiable action or notifiable national security action if the action had not been specified in an exemption certificate, or was a reviewable national security action notified to the Treasurer	Five years after the interest is disposed of by the person.
Any register notice required to be given to the Registrar of the Register of Foreign Ownership of Australian Assets	Five years after the register notice is given to the Registrar

10 Enforcement

Significant criminal and civil penalties can apply for non-compliance with the FATA. For instance, in relation to non-residential land transactions, for failure to give notice of a 'notifiable action' or 'notifiable national security action', or for taking an action notified to FIRB prior to receiving FIRB approval, or for contravening an order made by the Treasurer, or for contravening a FIRB approval condition, or for the giving of false or misleading information relating to a FIRB application:

- maximum criminal penalty of:
  - for an individual – 10 years' imprisonment or 15,000 penalty units or both;
  - for a corporation – 150,000 penalty units; and
- maximum civil penalty of the lesser of the following:
  - 2.5 million penalty units; or
  - the greater of the following: (i) 5,000 penalty units (or 50,000 penalty units if the person is a corporation); and (ii) a specified amount referable to the value of the relevant action (there is a table in the legislation setting out how to calculate the specified amount).

Currently, one penalty unit equates to $313.

The Criminal Code extends liability to persons who incite others to commit an offence (which may include officers of a corporation that is in breach). Anti-avoidance rules also apply.

In addition to seeking criminal and civil penalties, the Treasurer has a range of enforcement tools, including:

- the power to impose fines under an infringement notice regime;
- broad monitoring and investigative powers;
- power to accept enforceable undertakings from foreign persons;
- power to give directions to persons in order to prevent or address suspected breaches of the FIRB regime; and
- power to revoke a FIRB approval where relevant information provided by the applicant prior to the grant of the approval was false or misleading in a material particular.

Contacts

Jeremy Low
Partner, Corporate
T +61 2 9230 4041
Jeremy.Low@allens.com.au

Wendy Rae
Partner, Corporate
T +61 3 9613 8595
Wendy.Rae@allens.com.au

Jessica Choong
Partner, Corporate
T +61 3 9613 8095
Jessica.Choong@allens.com.au

Andrew Wong
Mergers & Acquisitions Counsel, Corporate
T +61 2 9230 4141
Andrew.Wong@allens.com.au