



Australia's foreign investment law rewrite

DECEMBER 2015

The new package of legislation overhauling Australia's foreign investment laws commenced on 1 December 2015. While many features of the previous regime have been retained (and sometimes re-named), there are also a number of significant changes.

In brief

Some of the key new elements are as follows:

- **Fees** – applications under the Act will now attract an application fee, ranging from \$5,000 to \$100,000.
- **20% threshold** – previously an acquisition of a substantial interest of 15% could trigger a requirement to make an application under the Act. That threshold has generally increased to 20%.
- **Lower review thresholds for agricultural land and agribusiness** – Acquiring a stake of 10% in an agribusiness, or less in some cases, will need approval. The screening threshold for agricultural land was lowered from \$252 million to \$15 million (cumulative). A \$55 million threshold (based on the value of the investment) for investments in agribusiness now applies.
- **Agricultural land register** – foreign holders of land in Australia that is used, or could reasonably be used, for a primary production business are required to submit detailed information for this new register (filings are due 31 December 2015). A register of water rights is to follow.
- **Revised exemptions for moneylenders** – a modernised and expanded exemption for moneylenders and others involved in financing transactions will benefit foreign lenders.
- **Exemption power** – the Treasurer will now have the power to issue exemption certificates, a power not available previously. The existing practice of allowing ‘annual programs’ for certain land acquisitions will now be conducted using exemption certificates. They will also be used for the benefit of foreign underwriters and to facilitate certain tenement acquisitions.

1 Introduction

This is the first comprehensive revision of the law since 1975 and involves four key pieces of legislation: the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) which amends the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **Act**), the associated *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (the **Regulations**), the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth), and the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) (the **Fees Imposition Act**). While the legislative re-write aspired for a ‘more modern and simpler foreign investment framework’,¹ the package still delivers a complex and layered system of categories, exceptions and multiple thresholds, not unlike its predecessor.

While the foreign investment review framework is set by the legislative framework, it is supported by Australia’s Foreign Investment Policy (the **Policy**) and Guidance Notes on the specific application of the law, each issued by Treasury. When making foreign investment decisions, the Treasurer is still 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. Responsibility for making decisions continues to rest with the Treasurer.

In this paper we set out how the law now operates, to guide foreign investors as they consider how their transactions will fit into the new regime.

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 where 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 40%. However, entities having their primary listing on an Australian stock exchange can now 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%. This will be welcome relief to many ‘accidental’ foreign persons previously scouring their registers to see whether foreign holders had pushed above 40%.

1.2 What foreign holdings count?

The **interests** that count towards the 20% substantial interest 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 an existing concept that assumes that any right to acquire new votes has been exercised with the resulting percentage of votes calculated on a diluted basis (which is why convertible instruments can render the issuer foreign). 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 that a single foreign beneficiary may render an entire discretionary trust foreign for approval purposes.

¹ Media Release “Government strengthens the foreign investment framework” (2 May 2015) <http://jhb.ministers.treasury.gov.au/media-release/034-2015/>

1.3 Tracing

To determine whether an entity is a foreign person, interests of more than 20% trace up through the chain of entities, 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 – for example, 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.

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. The definition of associate was previously so broad it was, in some circumstances, not meaningful. It has now been replaced with a test similar to sections 10 to 17 of Corporations Act. 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 clearance 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 or general partners) in which any of them hold an interest of 20%, or more than one – even unrelated – hold an interest of 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.

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 associates 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. In addition to the lower ‘direct investment’ trigger for notifying a transaction to FIRB, the following additional transactions 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 investment’ trigger for agriculture and foreign government investment

Generally, a 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 is an agribusiness (see paragraph 5.1). In those cases any **direct investment** in a target that meets the monetary threshold will require FIRB approval.

Direct investment is a concept that went through a few iterations in previous Policy requirements, and has been refined again when incorporated into the legislation, so that:

- Any stake of 10% or more will be a direct investment.
- An interest of 5% or more will qualify as a direct investment 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 Regulations 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 (for example, an offtake agreement) that is made on ordinary commercial terms – but the Regulations themselves contain 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 are in the agricultural sector or land rich. In terms of a dollar threshold, there is no minimum for foreign government investors; for agribusiness, it is \$5 million; \$252 million for entities not subject to special rules (calculated differently than for agriculture); right up to \$1,094 million if the acquirer is from one of the free trade agreement countries, namely the United States of

America, New Zealand, Chile, Japan, and the Republic of Korea (each an **FTA Country**) – but not if the target is in a sensitive sector and not if the acquirer is a subsidiary of an FTA Country investor incorporated elsewhere, including Australia.

2 The Treasurer’s Powers: Unwind Powers and FIRB Clearance

There are two mechanisms by which the Act governs transactions.

- For **significant actions**, the Treasurer has broad powers to make orders if satisfied that the transaction would be contrary to the national interest. The transaction may be prohibited or, if it has already occurred, an order may require disposal. The Treasurer can also impose binding conditions (whether or not the foreign investor asks for FIRB approval) if necessary to ensure the transaction is not contrary to the national interest. The risk of adverse orders is removed if FIRB approval for the transaction is obtained.
- For **notifiable actions**, there are criminal penalties if FIRB approval is not obtained before proceeding.

The categories are not mutually exclusive, nor is one a sub-set of the other – each has its own set of tests which must be applied to decide if a transaction is caught. The result is that there are different tests within each category (significant and notifiable) 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 agribusiness.

We deal with each of these in paragraphs 3, 4 and 5 below.

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 clearance 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, foreign investors need FIRB approval to:

- acquire a substantial interest (20% plus) by issuing or transferring securities if the target is:
 - an Australian corporation carrying on an Australian business;
 - an Australian unit trust;
 - a holding entity of either of them; or
- to enter into an agreement relating to the affairs of one of the entities mentioned in (a), or alter a constituent document, such that senior officers are subject to instruction or direction by a foreign person that holds a substantial interest (20% plus); or
- acquire a substantial interest (20% plus) or gain an element of control (which does not require majority holding) of an Australian business by acquiring interests in its assets or entering into or terminating a significant agreement,

where the target is valued above the following thresholds:

Investor	Threshold	How calculated
Agreement country investors – An entity that is an enterprise or national of an FTA Country but excluding: <ul style="list-style-type: none"> • acquisitions by their subsidiaries incorporated elsewhere, including Australia • foreign government investors • acquisitions of targets which are sensitive (see paragraph 3.4) 	\$1,094 million, indexed annually	The higher of: <ul style="list-style-type: none"> • the total asset value for the entity • the total value of the issued securities of the entity
Agreement country investors – where the target is carrying on a sensitive business	\$252 million, indexed annually	
Foreign persons other than foreign government investors	\$252 million, indexed annually	

Once a foreign person (with associates) holds a 20% stake, any further acquisition of securities will require a new FIRB approval, unless an exemption applies.

Trust investors will be pleased that the updated laws have streamlined acquisitions of interests in unit trusts, which are treated in the same way as securities issued by corporations.

3.3 Internal reorganisations

Whenever a foreign person acquires or increases a substantial interest (20% plus) in an Australian entity that meets the requisite threshold, pre-clearance is mandatory. There is no exemption for internal reorganisations that do not cause any change in ultimate ownership.

Under section 4 of the Fees Imposition Act, internal reorganisation means an acquisition by an entity (the first entity) of:

- an interest in securities in another entity if:
 - both entities are subsidiaries of the same holding entity; or
 - the other entity is a subsidiary of the first entity; or
- an interest in an asset or Australian land from another entity if:
 - both entities are subsidiaries of the same holding entity; or
 - the other entity is the holding entity of the first entity; or
 - the other entity is a subsidiary of the first entity.

For foreign government investors, the definition as it applies to interests in Australian land has also been extended to cover interests in tenements that are not interests in Australian land. For internal reorganisations which include more than one action, of which at least one is acquiring a legal or equitable interest in a tenement, a single fee of \$10,000 will apply to the internal reorganisation.

3.4 Sensitive businesses, media, and financial sector companies

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

Any acquisition of 5% or more in an Australian media business is deemed to be both a significant and a notifiable action (requiring mandatory pre-clearance).

An exception applies so that the Act 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) (the **Financial Sector (Shareholdings) Act**). 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 Act – rather, approval is required under the Financial Sector (Shareholdings) Act. The relevant threshold for both foreign and domestic acquirers is 15%. Foreign government investors do not benefit from this exception, so that the Act applies to transactions relating to ADIs and authorised insurance companies in addition to the Financial Sector Shareholdings Act.

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

3.5 Exemptions for capital markets transactions

A new development is the capacity for the Treasurer to issue an exemption certificate to foreign underwriters. A foreign person, including a foreign government investor, may apply for an exemption certificate if they propose to acquire interests in securities through their business of underwriting. Actions covered by the certificate do not need to be notified to the Treasurer provided the conditions (if any) specified in the certificate are met. A foreign person who is a financial services licensee authorised under the Corporations

Act to underwrite (including sub-underwrite) securities and who proposes to acquire interests in securities that are likely to lead to more than one notifiable action over a specified period may apply for a certificate. A certificate will generally specify the period during which acquisitions can be made. While a default period of 12 months will apply, certificates can be issued for shorter or longer periods depending on the circumstances. An exemption certificate will generally be subject to a reporting condition. Other conditions will be considered on a case-by-basis and may apply in only particular circumstances.

Other acquisitions of securities may be subject to some exemptions applying to capital changes by the target: rights issues and, for entities primarily listed in Australia, bonus issues, DRPs or switching facilities do not require FIRB approval. Again the position is clearer for investments in unit trusts which are now treated the same way as corporations. Other exemptions may apply to specific foreign investors (eg. moneylenders – see paragraph 8).

3.6 Privatisations

Foreign investors that are not foreign government investors benefit from an exemption allowing Australian governments (whether Commonwealth, State or Territory) and their wholly owned entities 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. This exception does not apply in relation to an acquisition of an interest by a foreign government investor (that is, this Act 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 or notifiable action under the Act).

4 Australian Land and Land Rich Entities

4.1 Australian land and interests in Australian land

The new concept of **Australian land** has replaced the counterintuitive 'Australian urban land'. The new definition covers four separate categories of land, being agricultural land, commercial land, residential land (which we will not consider), and mining or production tenements.

As was the case previously, the legislation expands the regime's application by deeming 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 at least five years;
- 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; 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 (see further paragraph 5).

4.2 Thresholds for Australian land

Unless an exemption applies, foreign investors must obtain approval for all acquisitions of Australian land or securities in land rich entities where the target value exceeds the thresholds – there is no minimum percentage stake (except for widely held and listed entities as noted in the table).

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

Type of Land	Type of Transaction	Threshold
1. Land acquired by a foreign government investor	All	No threshold – notifiable regardless of value
2. Commercial land that is vacant	All	No threshold – notifiable regardless of value
3. Mining or production tenement	All, except acquisitions by certain FTA Country investors (US, NZ, Chile)	No threshold – notifiable regardless of value
4. Interests in an Australian land corporation or trust where <i>more</i> than 10% of the value of its total assets comprise residential land or vacant commercial land	All, except acquisitions of less than 10% (for listed entities) or 5% (for unlisted entities) where there is no influence over management or policy	No threshold – notifiable regardless of value
5. Agricultural land (including 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	\$15 million calculated by adding the consideration to the value of agricultural land that the acquirer already holds
6. Commercial land that is not vacant, where the interest acquired gives a right to occupy or control, and the land: <ul style="list-style-type: none"> a. will be leased to an Australian government entity or house public infrastructure; b. is used for an identified sensitive purpose (for example conducting a sensitive business, regulated production and storage, airports, banking); c. houses certain telecommunications infrastructure or data facilities; or d. a mining operation will operate on the land 	All, except acquisitions by an FTA Country investor, foreign government investors	\$55 million calculated by reference to the value of the interest being acquired
7. Interests in an Australian land corporation or trust where <i>less</i> than 10% of the value of its total assets comprise residential land or vacant commercial land, and the land held by the corporation or trust is not of the type listed in row 6 above	All, except acquisitions of less than 10% (for listed entities) or 5% (for widely held unlisted entities) where there is no influence over management or policy	\$252 million
8. Mining or production tenement	An acquisition by a relevant agreement country investor (US, NZ, Chile), except foreign government investors	\$1,094 million
9. Other land (not listed above)	An acquisition by an FTA Country investor, except foreign government investors	\$1,094 million
10. Other land (not listed above)	An acquisition by an enterprise or national of Singapore or Thailand and used wholly and exclusively for a primary production business	\$50 million
11. All other land (not listed above)	All other circumstances not listed above	\$252 million

4.3 Exemption certificates

The Act provides for the grant of exemption certificates covering one or more interests in Australian land, where the Treasurer is satisfied that the acquisition would not be contrary to the national interest. The certificate must say who it applies to and what types of Australian land to which it relates to. The Act contemplates an exemption certificate specifying 'a period during which the certificate is in force'. This is broader than the current regime for 'annual programs'.

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 investment (which is generally 10% but may be less – see paragraph 1.6) for consideration of \$55 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.

However, exemptions will 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;
- 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 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.

6 Register of agricultural land

Foreign investors should now be well advanced towards meeting the requirement that they register certain land holdings that constitute agricultural land by 31 December 2015. The registration requirement applies to holdings of freehold interests in agricultural land and rights to occupy agricultural land under a lease or licence whose term exceeds or is reasonably likely to exceed 5 years. Registration is to be completed online and a significant volume of information is required, including details of the value of the landholdings.

6.1 Water

The *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth) will cease under a 12 month sunset provision unless the proposed a register of foreign owned water rights is established by that time. Accordingly we expect that foreign persons who hold water rights will be required to submit those holdings to a register of foreign held water rights during 2016.

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).

The definition does not include exploration and prospecting licences. However, these may be covered by other types of land under the new regime (see below).

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 \$1,094m threshold.

7.2 Exploration and prospecting tenements

In response to long-standing issues surrounding whether or not interests in exploration and prospecting rights are notifiable, the new regime expressly carves these rights out of the definition of mining or production tenements. However, acquisitions of interests in exploration or prospecting tenements may still be notifiable if the acquisition constitutes 'an interest in agricultural land' (where a \$15m threshold generally applies) or an interest in commercial land that is not vacant (where a \$55m threshold generally applies).

The question is whether the exploration or prospecting tenement gives a right to occupy Australian land for a term (including extensions and renewals) that is reasonably likely at the time of grant to exceed five years. This will depend on the legislative regimes in each State and Territory or the Commonwealth (as is currently the case). Therefore, the uncertainty around this issue remains.

It is, however, now possible to obtain an exemption certificate for the acquisition of interests in exploration and prospecting tenements or securities in an exploration entity, where those interests are not interests in Australian land. The Treasurer may grant the exemption if satisfied that the acquisition is not contrary to the national interest. See paragraph 4.3 for further detail regarding exemption certificates.

Foreign government investors, however, will need approval to acquire interests in exploration tenements – see paragraph 1.5.

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 \$252m), 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 \$252m 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 (see items 6 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 Improvements for moneylenders

8.1 Moneylending agreements

There is a broad exemption for financiers. The Act does not apply to acquisitions of entities and land for the purposes of securing payment obligations under a moneylending agreement, or on enforcement of that security. 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.

In previous legislation the moneylending exemption was unclear in its operation to finance parties connected with the funding that were not themselves lenders. The current 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 receiver and manager appointed by a lender or another connected party. Specific changes have been made to clarify that the exemption 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.

8.2 Foreign government owned lenders

It is now clear that no FIRB approval is required for simply taking and holding a security interest and a foreign government owned investor which is an ADI or a subsidiary of an ADI may acquire an interest through enforcement and hold it for 12 months (as under the current Policy) but also does not require approval after that time if it is *making a genuine attempt to dispose of the interest*. Foreign lenders which are not ADIs have a shorter safe-harbour period. The exemption applies to non-ADI foreign government owned lenders which acquire an interest through enforcement where 6 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 when determining whether to depart from the previous practice of seeking upfront FIRB approval for enforcement of security.

8.3 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 in section 8.2 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 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
Foreign government lender	Exemption applies	If ADI – 12 months to hold (plus extension for genuine attempt to dispose) Not ADI – as above, but initial 6 month limit
Other lenders	Exemption applies: <ul style="list-style-type: none"> • if ADI • if not ADI but registered as a financial institution plus >100 holders of securities or listed on a stock exchange 	Exemption applies: <ul style="list-style-type: none"> • if ADI • if not ADI but registered as a financial institution, plus >100 holders of securities or listed on a stock exchange

8.4 Register of agricultural land

Foreign lenders will not be required to register security interests over agricultural land on the agricultural land register but should consider whether they need to register upon enforcement.

9 Practicalities

9.1 Fees

From 1 December 2015 significant fees will apply. The 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 does not start until the fee is paid.

The table on the following page gives an overview of the fees that generally apply for major commercial transactions. Fees are indexed and will increase annually.

If a transaction would trigger more than one fee, then typically only the highest fee needs to be paid (not multiple fees), but residential land acquisitions do not benefit from that rule. The fee may be reduced to \$1,000 if it would otherwise be more than 25% of the consideration for the acquisition, and the Treasurer may waive or remit the fee if satisfied that it is not contrary to the national interest to do so.

Application type		Fee
Acquisition of entities and businesses		
1	Acquiring securities in an Australian entity (whether by transfer or issue), or assets of an Australian business having consideration of \$1 billion or less, including generally by foreign government investors (but see item 16 below) and including agribusiness	\$25,000
2	Acquiring securities in an Australian entity (whether by transfer or issue), or assets of an Australian business having consideration of more than \$1 billion, including generally by foreign government investors (but see item 16 below) and including agribusiness	\$100,000
3	Entering into an agreement or altering a constituent document such that a senior officer is under instruction or direction of a substantial holder	\$25,000
4	Entering into or terminating a significant agreement with an Australian business	\$25,000
5	Internal reorganisations	\$10,000
Acquisition of Australian land and agricultural land		
6	Acquiring agricultural land if consideration for the acquisition is \$1 million or less	\$5,000
7	Acquiring agricultural land if the consideration for the acquisition is greater than \$1 million	\$10,000 incremental fee per \$1 million (capped at \$100,000)
8	Acquiring an interest in a mining or production tenement	\$25,000
9	Acquiring commercial land that is not vacant	\$25,000
10	Acquiring commercial land that is vacant	\$10,000
11	Exemption Certificate for annual program of land acquisitions if consideration is \$1 billion or less	\$25,000
12	Exemption Certificate for annual program of land acquisitions if consideration is greater than \$1 billion	\$100,000
13	Exemption Certificates for a development of new dwellings on Australian land for sale to foreign persons – upfront fee with subsequent reconciliation against properties sold	\$25,000
14	Exemption Certificates for acquisitions of interests in tenements and mining, production or exploration entities, and underwriters	\$25,000
15	Variation to an Exemption Certificate	\$5,000
Additional approvals required for foreign government investors		
16	Starting an Australian business, acquiring a legal or equitable interest in a tenement, or acquiring an interest of at least 10% in securities in a mining, production or exploration entity. This fee applies even where the fees in items 1 and 2 otherwise would	\$10,000

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 national interest has been compromised. 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 to the applicant accordingly;
- that there are no objections to the proposal provided certain conditions are met, and give a no objection notification to the

applicant imposing conditions (in which case the conditions notified to the acquirer are legally binding if the transaction proceeds); or

- that the proposal is contrary to the national interest, and make a public order prohibiting the transaction.

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 the fee 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 days to make a decision and a further ten days to notify the applicant. However, there are several ways that 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 days), effectively extending the time for the Treasurer to make a final decision; or
- an applicant can request that the timeframe be extended (which it may wish to do to avoid a public interim order being made).

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 Record keeping requirements

The Act now requires records relating to foreign investment notices and applications to be maintained. Failure to keep such records is an offence under the Act.

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, and actions specified in exemption certificates.	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 or notifiable action, or would have been a significant or notifiable action if the action had not been specified in an exemption certificate.	Five years after the interest is disposed of by the person.

10 Enforcement

Certain breaches of the Act are criminal offences, and significant penalties apply. A fine of \$135,000 or 3 years jail time could be imposed for:

- taking actions that are **notifiable actions** without FIRB approval (before the Treasurer's decision period expires);
- taking **significant action**, once a FIRB application has been made, but without a no objection notification before Treasurer's decision period has expired;
- conduct in contravention of an order made by the Treasurer's, or a condition in such an order.

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

Contacts



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



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



Richard Kriedemann
Partner
T +61 2 9230 4326
Richard.Kriedemann@allens.com.au



Mark McAleer
Partner
T +61 8 9488 3758
Mark.McAleer@allens.com.au



Ben Farnsworth
Partner
T +61 8 9488 3877
Ben.Farnsworth@allens.com.au



David McLeish
Partner
T +61 3 9613 8954
David.McLeish@allens.com.au