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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 securities in Australian companies and unit trusts, and of Australian businesses and 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***);
- *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) and its accompanying regulations; and
- *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and its accompanying regulations.

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 or Guidance Notes have the force of law.

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 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%.

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 (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.

1.3 Tracing

To determine whether an entity is a foreign person, interests of 20% or more 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 in a chain of entities.

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 the 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 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 which 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).

1.5 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.

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. In recognition of this, the FIRB Guidance Note on foreign government investors indicates that the Australian Government '*will not impose fines or pursue penalties or offences for breaches where it is not reasonable for a foreign government investor to know that one or more other foreign government investors from the same country already hold, or are concurrently acquiring, interests in the target entity*.'

Stricter rules apply to foreign government investors. Generally, a foreign government investor requires approval in order to acquire a 'direct interest' (normally a 10% 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 $55m 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 sensitive business (see paragraph 3.4).

In addition to the lower 'direct interest' 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 interest' trigger for agriculture and foreign government investment

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 is an agribusiness (see paragraph 5.1). In those cases any ***direct interest*** in a target that meets the monetary threshold 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 (for example, 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 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 $58 million; $266 million for entities not subject to special rules (calculated differently than for agriculture); right up to $1,154 million if the acquirer is from one of the free trade agreement counties, namely Canada, Chile, China, Japan, the Republic of Korea (ie. South Korea), Mexico, New Zealand, Singapore, the United States of America, and Vietnam (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. Each of Brunei Darussalam, Malaysia and Peru will also be an FTA Country when the TPP-11 comes into force for that particular country (or, in the case of Peru, when the Australia-Peru Free Trade Agreement comes into force, whichever occurs earlier). Hong Kong will be an FTA Country once the Australia-Hong Kong Free Trade Agreement comes into force.

2 The Treasurer's Powers: Unwind Powers and FIRB Approval

There are two mechanisms by which the FATA 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 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 substantial interest (20% plus) in a target's securities is both a notifiable action and a significant action if 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

(b) 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 (a), 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 below 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).

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 • acquisitions of targets which are sensitive (see paragraph 3.4)	$1,154 million, indexed annually	Where target is an entity, the higher of: • the total asset value for the entity • 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	$266 million, indexed annually	
Foreign persons other than foreign government investors	$266 million, indexed annually	

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

Acquisitions of interests in unit trusts 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 even if they do not cause any change in ultimate ownership.

Under section 4 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth), '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.

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 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 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% (prior to 1 April 2019 it was 15%). 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 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.

The Government has indicated that such an exemption certificate is suitable for 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' or involves critical infrastructure or a sensitive business (eg media, telecommunications, transport, etc) or an agribusiness; 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 usually apply, certificates can be issued for shorter or longer periods depending on the circumstances. The Government has indicated that the longer the period sought the more likely the proposed acquisitions covered by the exemption certificate will need to be restricted to very low risk transactions and very low risk investors, and in circumstances where the applicant is able to describe the type of investment, maximum value and interest.

Other acquisitions of securities may be subject to some statutory exemptions applying to capital changes by the target: rights issues and, for entities primarily listed in Australia, bonus share plans, DRPs or switching facilities do not require FIRB approval. Other exemptions may apply to specific foreign investors (eg, moneylenders – see paragraph 8).

3.6 Privatisations

Foreign persons 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.

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 or notifiable action under the FATA).

- An acquisition of an interest in Australian land 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.

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 exceeding five years; 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).

4.2 Thresholds for Australian land

Unless an exemption applies, foreign persons 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 listed entities as noted in the table below).

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

Type of Land	Type of Transaction	Threshold
1. Residential land[2]	All	No threshold – notifiable regardless of value
2. Any land, where acquirer of interest in land is a foreign government investor	All, except acquisitions of less than 10% (for listed entities) or 5% (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
3. Commercial land that is vacant[3]	All	No threshold – notifiable regardless of value
4. Mining or production tenement	All, except acquisitions by certain FTA Country investors (US, NZ, Chile) which are covered in item 9	No threshold – notifiable regardless of value
5. Interests in an Australian land corporation or Australian land trust where *more* than 10% of the value of its total assets comprise: a. residential land[2]; or b. vacant commercial land[3].	All, except acquisitions of less than 10% (for listed entities) or 5% (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

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
6. 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 10; and • acquisitions by an enterprise or national of Thailand of land used wholly and exclusively for a primary production business which are covered in item 11.	$15 million calculated by adding the consideration to the value of agricultural land that the acquirer already holds
7. 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 or control 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 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 FTA Country investors which are covered in item 10; and • acquisitions by foreign government investors which are covered in item 2.	$58 million calculated by reference to the value of the interest in the land
8. Interests in an Australian land corporation or trust where *less* than 10% of the value of its total assets comprise: a. residential land[2]; or b. vacant commercial land[3].	All, except: • acquisitions of less than 10% (for listed entities) or 5% (for 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 10; and • acquisitions to which item 6 or item 11 applies	If Australian land corporation or trust has land of the type listed in item 7: $58 million calculated by reference to the value of the interest to be acquired in the Australian land corporation or trust. Otherwise: $266 million calculated by reference to the value of the interest to be acquired in the Australian land corporation or trust
9. Mining or production tenement	Acquisitions by certain FTA Country Investor (US, NZ, Chile), except foreign government investors who are covered in item 2	$1,154 million calculated by reference to the value of the interest in the land
10. Land described in item 6, 7, or 8 Other land (not listed above)	In respect of item 6: acquisitions by certain FTA Country investors (US, NZ, Chile) In respect of items 7 and 8 and other land (not listed above): acquisitions by FTA Country investors, except foreign government investors who are covered in item 2	$1,154 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)
11. 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
12. All other land (not listed above)	All other circumstances not listed above	$266 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

The FATA 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 FATA contemplates an exemption certificate specifying 'a period during which the certificate is in force'. The Treasurer commonly grants exemption certificates to developers of new residential property which allow foreign persons to acquire newly built residential properties without FIRB approval.

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 $58 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.

6 Register of water and agricultural land

The *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (the ***Register Act***) requires each foreign person to notify the Australian Taxation Office (***ATO***) of the following.

- its freehold interests in agricultural land and its rights to occupy agricultural land under a lease or licence whose term (including any extension or renewal) after the person becomes a foreign person is reasonably likely to exceed 5 years – such notifications must be given within 30 calendar days after the person becomes a foreign person;
- its holdings of registrable water entitlements and contractual water rights (each of which is a defined term) which are held, or will be held, at the end of 30 November 2017 – such notification must be given by the later of 30 November 2017 and 30 days after the foreign person started to hold that entitlement or right; and
- any acquisitions or disposals of registrable water entitlements and contractual water rights (where the remaining term of the contractual water right (including any extension or renewal) is reasonably likely to exceed 5 years), and any changes to the volume of water referred to in a registrable water entitlement or contractual water right (where the remaining term of the contractual water right (including any extension or renewal) is reasonably likely to exceed 5 years) – such notifications must be given within 30 days after the end of the financial year in which such events occurred (and the Register Act specifies that for this purpose the first financial year begins on 1 December 2017 and ends on 30 June 2018).

The only exemption from the notification requirement in respect of agricultural land interests is in respect of the enforcement of a security held solely for the purposes of a moneylending agreement.

There are no exemptions from the notification requirement in respect of registrable water entitlements and contractual water rights held at the end of 30 November 2017. The only exemption from the annual notification requirements in respect of changes to registrable water entitlements and contractual water rights are where the relevant foreign person ceases to be a foreign person as at the end of the relevant financial year or ceases to hold registrable water entitlements and contractual water rights acquired during the relevant financial year.

The Register Act does not provide for the ATO or any other body to grant exemptions from the notification requirements or to extend the 30 day notification periods.

Notifications are to be made online and a significant volume of information is required.

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 paragraph 7.2 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 $1,154m 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 $266m 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 $266m), 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 $266m 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 Moneylenders

8.1 Moneylending agreements

There is a broad exemption for financiers. The FATA 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 the pre-December 2015 foreign investment regime 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. 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.

8.2 Foreign government owned 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 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 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 under the pre-December 2015 foreign investment regime 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 paragraph 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: • if ADI • if not ADI but registered as a financial institution plus >100 holders of securities 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 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.

Below is a summary of the application fees which are generally applicable to acquisitions of interests in commercial land, entities and businesses, and agricultural land.

Fees by category and value			
Acquisition of commercial land (vacant or developed)	Consideration is $10 million or less: $2,000	Consideration is above $10 million but not above $1 billion: $26,200	Consideration is above $1 billion: $105,200
Acquisitions of securities in entities and assets of businesses	Consideration is $10 million or less: $2,000	Consideration is above $10 million but not above $1 billion: $26,200	Consideration is above $1 billion: $105,200
Acquisitions of agricultural land	Consideration is $2 million or less: $2,000	Consideration is above $2 million but not above $10 million: $26,200	Consideration is above $10 million: $105,200
Flat fees			
Exemption certificate	$36,200		
Mining and production tenements	$26,200		
Agreement regarding affairs of entity or its governance	$10,400		
Legal or equitable interests in mining, production or exploration tenement	$10,400		
An interest of at least 10% in securities in a mining, production or exploration entity	$10,400		
Starting an Australian business	$10,400		
Internal reorganisation	$10,400		
Variation of no objection notification or exemption certificate	$10,400		

Different application fees apply to acquisitions of interests in residential land and in relation to exemption certificates for residential land.

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'.

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

The types of conditions that have been imposed on previous FIRB approvals include:

- where the Treasurer considers a proposal involves a risk to tax revenues – conditions which require the applicant to comply with Australian federal tax laws in relation to the proposed transaction, to provide information to the ATO in relation to the proposed transaction in accordance with Australian federal tax laws, to pay outstanding tax debt to the Australian Federal Government and to provide an annual report on compliance with the conditions (the form of such conditions are set out in a Guidance Note);
- in particular cases where the target has been involved in a particularly sensitive sector or operates critical infrastructure – conditions which require the target's business to be undertaken solely from within Australia, to limit foreign ownership to less than 50%, to require half of the target's board to comprise Australian citizens and residents, and to require the target's chairman to be an independent director who is an Australian citizen and resident;
- in respect of acquisitions of vacant commercial land – conditions which require commencement of continuous construction of the proposed development on the land within 5 years of the date of approval 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 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 time frame 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.

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 his 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, electricity, water and ports) are involved, the Critical Infrastructure Centre 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 his 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 Critical Infrastructure Centre 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 that 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

The Australian 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 that it will defend this policy through the judicial system if needed.

9.6 Record keeping requirements

The FATA now 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, and actions specified in exemption certificates.	5 years after the action is taken by the person.
Compliance with conditions in a no objection notification and an exemption certificate.	2 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.	5 years after the interest is disposed of by the person.

10 Enforcement

Certain breaches of the FATA are criminal offences, and significant penalties apply. A fine of $157,500 (or $787,500 for companies) 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.

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