



Foreign Investment in Australia

What you need to know

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**Hogan
Lovells**

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Australia's foreign investment framework

What you need to know

Under Australia's foreign investment regime, certain types of investments by foreign private investors or foreign government investors need to be notified to, and reviewed and a statement of no objection is issued by the Australian Treasurer ("**Treasurer**"). This process is referred to as "obtaining FIRB approval".

The Foreign Investment Review Board ("**FIRB**") reviews foreign investment proposals on a case-by-case basis and advises the Treasurer on the national interest implications of the proposed transaction. The decision to grant or refuse FIRB approval is made by the Treasurer.

If FIRB approval is required and a foreign investor makes an acquisition without it, the investor risks delaying the transaction, the transaction not completing, having the investment unwound, facing orders to have all unauthorised interests divested or criminal or civil penalties being imposed.

This guide provides an overview of Australia's foreign investment framework and the FIRB approval process.

Before you make an investment

You should be asking the following questions:

- **Do I need FIRB approval?**
Certain investments by foreign persons must be approved by the Treasurer. Obtaining FIRB approval is the responsibility of the investor.

You should seek advice on whether your investment will require FIRB approval as soon as possible. See Figure 3 for a simple flow chart on when FIRB approval may be required.
- **When should I get FIRB approval?**
FIRB approval should be obtained before completion of the acquisition.

Transactions should be made conditional on FIRB approval being obtained and the transaction should not complete until you have been advised of the Treasurer's decision.
- **What happens if I don't get FIRB approval?**
You run the risk of delaying the transaction (i.e. postponing completion), the transaction not completing (i.e. failing to satisfy a condition precedent which can result in forfeiture of any deposit, termination and termination fees), having the investment unwound, facing orders to have all unauthorised interests divested or having criminal or civil penalties imposed.
- **Will any conditions apply?**
FIRB approvals can be granted subject to conditions. For example, various tax conditions can be imposed where the Treasurer considers the investment may involve a tax risk.
- **Is there a fee?**
A fee will apply on all applications or notices. The amount of the fee will depend on the type of application and the value of the transaction. See Figure 7.

You should seek advice on whether your investment will require FIRB approval as early as possible.

Australia's foreign investment framework

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) ("FATA") (and associated acts and regulations) and supported by Australia's Foreign Investment Policy (December 2015) ("Policy"), which outlines the Australian Government's approach to administering the foreign investment framework, and the guidance notes published by FIRB.

The regime can be broken down into three key questions:

1. Is the investor a foreign person?
2. Is the proposed transaction a significant action, a notifiable action or a notifiable national security action?
3. Is the proposed transaction contrary to Australia's national interest?

When reviewing proposed transactions, a whole-of government approach is taken to protect Australia's national interest. Accordingly, the Treasurer has the ability to consult with, and exchange confidential information with, other government departments or agencies before making a decision [e.g. national security agencies, the Department of Immigration and Border Protection, the Australian Taxation Office ("ATO") and the Australian Competition and Consumer Commission ("ACCC")]. Importantly, the Critical Infrastructure Centre was established within the Department of Home Affairs in 2017 to pre-emptively create a register of national security risks relating to critical infrastructure, in order to aid the FIRB review process. Part 6 of this guide (The FIRB Approval Process, on pages 22-29) discusses the nature of the relationship between FIRB, the Register of Foreign Ownership of Australian Assets and the Critical Infrastructure Centre.

Some historical figures

Figure 1 sets out the number and value of proposals reviewed by FIRB from 2009-10 to 2019-20. The Treasurer approves the vast majority of applications and the majority of rejections have been on the grounds of national interest.

For example:

- In 2021, China State Construction Engineering Corporation withdrew its application to acquire Probuild, a major building contractor in Australia following FIRB's indication that the application would ultimately be rejected on the basis of national security concerns.
- In 2020, China Mengniu Dairy Company Limited abandoned its proposed takeover bid of Lion Dairy & Drinks after the Treasurer indicated the investment would be contrary to the national interest of Australia and therefore would not be likely to receive FIRB approval.
- In 2016, proposed bids by State Grid Corporation of China and Cheung Kong Infrastructure Holdings for the 99-year lease 50.4% of Ausgrid, the NSW electricity distribution network, were blocked due to concerns over foreign control of critical power and communication services.
- In 2015 and 2016, proposed bids by Pengxin Group and Dakang Australian Holdings for S. Kidman & Co were rejected due to concerns that the sale of Australia's largest cattle empire would be against the national interest.

A summary of a number of recent high profile decisions have been included at the end of this guide.

Figure 1 also shows a proportion of applications being withdrawn. All FIRB applications and discussions are confidential. However, rejections are made public. Accordingly, where FIRB has indicated to an investor that the proposal may be rejected or that specific conditions will apply, the investor will often withdraw their application before the review deadline to avoid any details of the transaction being made public. Figure 2 sets out the value and number of proposals in 2019-20 approved by the Treasurer by country of investor.

Figure 1 – Proposals reviewed by FIRB from 2009-10 to 2019-20

Outcome	Number of proposals (excluding reorganisations) [Value of proposed investment (billion)]										
	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Approved unconditionally	2,672 (\$125.3)	4,606 (\$145.7)	5,535 (\$108.7)	5,535 (\$108.7)	12,307 (\$125.3)	21,507 (\$157.1)	26,954 (\$97.0)	8,607 (\$53.8)	6,301 (\$40.1)	4,575 (\$45.9)	4,508 (\$56.5)
Approved with conditions	1,729 (\$14.2)	5,687 (\$31.0)	7,196 (\$27.0)	7,196 (\$27.0)	11,795 (\$42.1)	16,446 (\$37.5)	14,491 (\$150.8)	5,750 (\$139.1)	4,844 (\$123.0)	4,149 (\$185.1)	3,713 (\$139.0)
TOTAL APPROVED	4,401 (\$139.5)	10,293 (\$170.7)	10,703 (\$170.7)	12,731 (\$135.7)	24,102 (\$167.4)	37,953 (\$194.6)	41,445 (\$247.9)	14,357 (\$192.9)	11,145 (\$163.1)	8,724 (\$231.0)	8,221 (\$195.5)
Rejected	3 (<\$0.05)	43 (\$8.8)	13 (\$0.2)		3 (\$2.2)		5 (\$0.0)	3 (\$20.0)	2 (\$0.1)	1 (\$10.0)	3 (\$0.0)
TOTAL DECIDED	4,404 (\$139.5)	10,336 (\$185.5)	10,713 (\$170.8)	12,731 (\$135.7)	24,105 (\$169.6)	37,953 (\$194.6)	41,450 (\$247.9)	14,360 (\$212.9)	11,150 (\$166.1)	8,725 (\$241.0)	8,224 (\$195.5)
Withdrawn	167	390	534	446	719	799	1,319	770	644	670	715
Exempt	132	139	170	145	181	180	244	60	61	71	65
TOTAL CONSIDERED	4,703	10,865	11,420	13,322	25,005	38,932	43,013	15,190	11,855	9,466	9,004

Source: Foreign Investment Review Board Annual Report 2019-20

Figure 2 – Top 10 investors by country

Country	2019-20		Past 3 years	
	Number of Approvals	Total (AU\$billion)	Number of Approvals	Total (AU\$billion)
United States	305	49.189	1103	121.142
Canada	260	16.023	658	60.224
Singapore	423	16.191	1,531	37.461
Japan	129	22.081	374	15.390
China	4,314	12.752	21,431	75.703
Hong Kong	743	11.299	1,790	31.582
United Kingdom	350	14.921	1,131	28.009
New Zealand	35	1.805	114	8.465
Switzerland	47	1.520	134	10.284
France	90	8.986	-	≤3.729

Source: Foreign Investment Review Board Annual Report 2016-17, 2017-18, 2018-19 and 2019-20.

Note: 'Past 3 years' denote the cumulative figures available from the 2016-17, 2017-18, and 2018-19 annual reports.

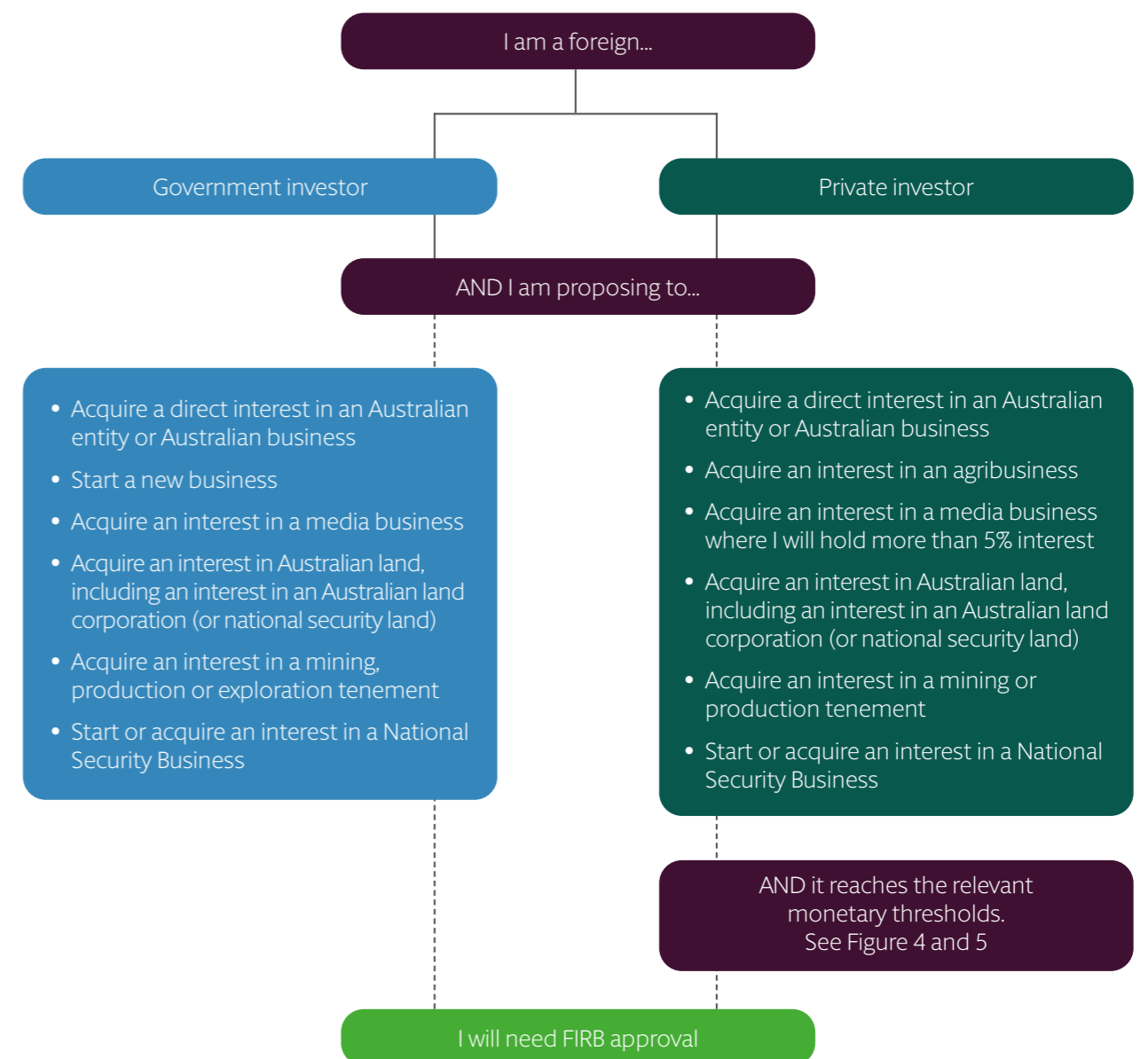
Do I need FIRB approval?

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

1. Is the acquirer a foreign person?
2. Is the proposed transaction of the type that must/could be notified?
3. Does the proposed transaction meet the relevant thresholds?

Set out below in Figure 3 is a simple flow chart in relation to the most common types of transactions that may require FIRB approval. The following chapters provide more detail on how to assess whether you and your proposed transaction will require FIRB approval.

Figure 3 – Do I need FIRB Approval?



Am I a foreign person?

Under the Foreign Acquisitions and Takeovers Act (“**FATA**”), the term ‘foreign person’ is defined broadly to capture various types of persons.

Simply, a foreign person is:

- any individual who does not ordinarily reside in Australia; or
- a corporation or trustee of a trust in which:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds a substantial interest (at least 20%); or
 - two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, that hold an aggregate interest of at least 40%; or
- a foreign government.

Different rules apply to investments by foreign government investors compared with private investors. These additional requirements apply regardless of the foreign government.

Key Point

Australia’s foreign investment regime requires various transactions involving foreign persons to be reviewed and approved before completion.

It is important to establish whether you are a foreign government investor as different rules apply compared with private investors.

What you need to know

A foreign government investor is:

- A foreign government or separate entity, being:
 - a body politic or part of a body politic of a foreign country; or
 - an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or part of a foreign country; or
 - importantly, these include sovereign wealth funds and state owned pensions funds.
- A corporation, trustee or general partner of a limited partnership in which:
 - a foreign government or separate government entity, alone or together with one or more associates, holds an interest of at least 20%; or
 - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of at least 40%.
- However, the “40% threshold test” does not apply to the underlying investments in a corporation, unit trust or limited partnership, if they are part of a passive investment fund or scheme where individual investors in the fund are not able to influence investment in or management of any individual investments under the investment fund or scheme. An individual investor:
 - will be considered to influence individual investment decisions if they have the ability to determine whether the investment fund or scheme make an acquisition or have voting rights over the operation of a particular business which the investment fund or scheme has invested in; and
 - will not be considered able to influence individual investment decisions if they have the right to vote on a conflict of interest decision relating to an individual investment or on a broad investment strategy or by merely having a representative on an advisory committee.

Is my proposed investment a type of transaction that requires FIRB approval?

Under the regime, transactions fall within three categories:

1. significant actions;
2. notifiable actions; and
3. notifiable national security action.

Significant action

A significant action is:

- an acquisition of interests in securities, assets or Australian land, or otherwise an action in relation to entities and business (e.g. entering into agreements);
- that meets the relevant monetary thresholds;
- has a connection to Australia; and
- other than in relation to the acquisition of interest in Australian land, results in a change of control involving a foreign person.

If your proposed investment is a significant action, you are not obliged to obtain FIRB approval prior to completing the transaction. However, if the proposed transaction has not been notified, the Treasurer still has powers to make a range of orders if the proposed transaction is considered to be contrary to the national interest.

If you chose to notify the Treasurer of a significant action, it becomes a notifiable action.

Notifiable action

The following acquisitions that meet the monetary thresholds are notifiable actions:

- acquisition of a direct interest in an Australian entity or business that is an agribusiness;
- acquisition of a substantial interest (at least 20%) in an Australian entity; and
- acquisition of an interest in Australian land.

There does not need to be a change of control.

A 'direct interest' generally means at least a 10% interest or an interest that will result in the foreign investor having the ability to influence, participate or control the Australian entity or business. Refer to the glossary for a more detailed definition of 'direct interest'.

If your proposed investment is a notifiable action, you must obtain FIRB approval prior to completing the transaction.

The Treasurer may:

1. provide a no objection letter with or without conditions; or
2. make an order prohibiting the transaction if the investment is considered to be contrary to the national interest.

More information on the Treasurer's power is set out in the last chapter of this guide.

Key Point

If your proposed investment is a:

- significant action, you are not required but may voluntarily elect to obtain FIRB approval. However, the Treasurer has powers to make various orders in relation to significant action transactions;
- notifiable action, you must obtain FIRB approval;
- notifiable national security action, you must obtain FIRB approval.

If the proposed transaction does not fall within any of these categories, FIRB approval is not required.

Notifiable national security action

FIRB approval will also be required for any of the following proposed actions, regardless of the value of the investment:

- to start a “national security business”, being a broad concept covering any of the following if its publicly known (or could be known upon reasonable inquires) that the business meets the criteria for being a “national security business”:
 - critical infrastructure asset under the Security of Critical Infrastructure Act 2018 (Cth) such as those in the electrical, gas, water and ports sectors¹;
 - critical goods, services or technology intended for military end-use;
 - businesses that store or have access to information that has a security classification; and
 - businesses that store or maintain personal information collected by defence or national intelligence agencies;
- to acquire ≥10% in a “national security business” or in an entity that carries on a “national security business”; and
- to acquire an interest in “national security land”, being defence premises or land which is publicly known (or could be known upon making reasonable inquires) that a national intelligence agency has an interest in the land.

If you are a foreign government investor

Regardless of value, FIRB approval is required to:

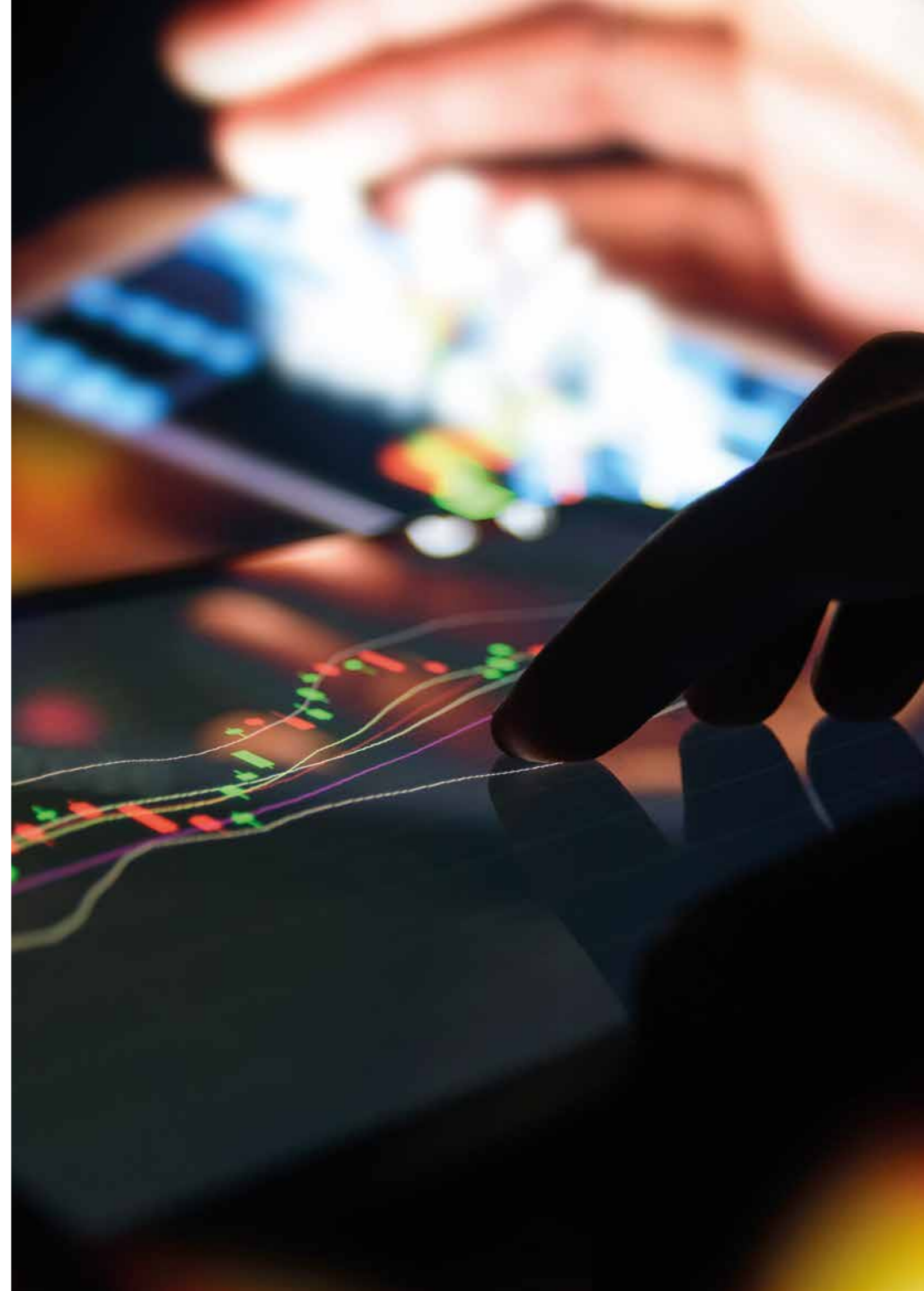
- acquire a “direct interest” (as defined on page 15) in an Australian entity or an Australian business;
- start a new business;
- acquire in Australian land; and
- acquire an interest in a mining, production or exploration tenement.

Passive increases

Increases in actual or proportional shareholdings, including where other shareholders are subject to share buybacks, selective capital reductions, cancellation of securities and trust redemptions, are notifiable or significant actions if other conditions to such actions are met.

Where a passive increase constitutes a notifiable action, reviewable action or notifiable national security action, the foreign person must notify FIRB within 30 days. Failure to notify FIRB is an offence under the FATA and may result in civil and/or criminal penalties (see Figure 8). The Treasurer may also exercise a range of powers once made aware of the increased percentage of interests in securities, including imposing conditions on the investment, ordering that all unauthorised investments be unwound and in some cases where partial divestment is not possible, or where the business is a national security business, order a full divestment of the investment (for more information on the Treasurer’s powers, see pages 30-33 of this guide).

1. It is proposed that the Security of Critical Infrastructure Act 2018 (Cth) be amended to cover critical assets in communications, data storage and processing, defence industry, financial services and markets, food and grocery, higher education and research healthcare and medical, transport, energy, space technology and water and sewerage.



Does my transaction meet the monetary threshold?

Monetary thresholds

The monetary thresholds are indexed on 1 January every year, except for the general threshold for agricultural land (including those specific to Singapore and Thailand investors) which is not indexed. The thresholds also vary depending on whether Australia has entered into trade agreements with the country that the investor is from, in which case higher thresholds may apply to investors from that country (but not subsidiaries incorporated in Australia).

The monetary threshold values for 2022 are set out in Figure 4.

Trade Agreements

Australia has fifteen Free Trade Agreements currently in force with:

1. New Zealand (1983);
2. Singapore (July 2003);
3. Thailand (1 January 2005);
4. The United States (1 January 2005);
5. Chile (6 March 2009);
6. ASEAN – Australia's first multi-country FTA between the 10 ASEAN countries (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand and Vietnam) and New Zealand (1 January 2010);
7. Malaysia (1 January 2013);
8. Republic of Korea (South Korea) (12 December 2014);
9. Japan (15 January 2015);
10. China (20 December 2015);
11. CPTPP - Comprehensive and Progressive Agreement for Trans-Pacific Partnership between Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam (and Brunei, Chile, Malaysia, and Peru who are still not actively participating members) (30 December 2018);
12. Hong Kong (17 January 2020);
13. Peru (11 February 2020);
14. Indonesia (5 July 2020); and

15. PACER - Pacific Agreement on Closer Economic Relations between Australia, Cook Islands, Kiribati, New Zealand, Niue, Samoa, Solomon Islands and Tonga (13 December 2020).

Other trade agreements include:

- Regional Comprehensive Economic Partnership (RCEP) - a regional free trade agreement involving 16 countries (Australia, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam, China, India, Japan, New Zealand and Republic of Korea). Ministers from 15 countries have signed the Agreement, however India has indicated it had several issues preventing it from joining RCEP and has since indicated it is not in a position to sign the Agreement. Australia is expected to ratify the RCEP Agreement in 2021.
- India – Since May 2011, there have been nine rounds of negotiations, the most recent being in September 2015.
- European Union – On 18 June 2018, Australia and the European Union launched negotiations for a free trade agreement to facilitate the services export market and stimulate foreign investment.
- United Kingdom - Australia and the United Kingdom of Great Britain and Northern Ireland (UK) launched negotiations for a free trade agreement on 17 June 2020 with the intention to drive increased trade in goods and services, two-way investment, economic growth and job creation.

Key Point

The transaction must meet the monetary threshold to be a significant and/or a notifiable action, noting that a notifiable national security action must obtain FIRB approval irrespective of value.

The type of acquisition determines:

1. the monetary threshold; and
2. how the value of the acquisition is calculated.

Unless an exemption applies, a relevant transaction that meets the monetary threshold may require FIRB approval.

Figure 4 - Monetary screening thresholds for 2022 (AU\$)*

Non-Government Investor						
Type of investment	Other	Chile, New Zealand and United States	JCPTPP Countries (not otherwise listed in this table) ¹	Thailand	Hong Kong, Peru	Government Investor
Land proposals						
Residential land	\$0	\$0	\$0	\$0	\$0	\$0
Commercial land – Vacant	\$0	\$0	\$0	\$0	\$0	\$0
Commercial Land – Developed	\$63 million (sensitive land) \$289 million	\$1,250 million	\$1,250 million	\$63 million (sensitive land) \$289 million	\$63 million (sensitive land) \$289 million	\$0
Agricultural land	\$15 million ²	\$1,250 million	\$15 million ²	\$50 million ³	\$15 million ²	\$0
Mining and production tenements	\$0	\$1,250 million	\$0	\$0	\$0	\$0
National Security Land	\$0	\$0	\$0	\$0	\$0	\$0
Non-Land proposals						
Agribusiness	\$63 million	\$1,250 million	\$63 million	\$63 million	\$63 million	\$0
Shares or units in Australian Land corporation or trust	\$0	\$0	\$0	\$0	\$0	\$0
Media sector ⁴	\$0	\$0	\$0	\$0	\$0	\$0
Assets or shares in an Australian business or company holding Australian assets	\$289 million	\$289 million (sensitive business) \$1,250 million	\$289 million (sensitive business) \$1,250 million	\$289 million	\$289 million (sensitive business) \$1,250 million	\$0
National Security Business	\$0	\$0	\$0	\$0	\$0	\$0

*The monetary thresholds for 2022 are published on the FIRB website

1. Being Japan, Republic of Korea, Singapore, China, Canada Mexico and Vietnam.

2. The cumulative value of interest held by the foreign person (including its associates).

3. For land used wholly and exclusively for a primary production business, otherwise the land is not agricultural land.

4. For investments in the media sector, a holding of 5% or more requires notification and prior approval regardless of the value of the investment. Where the foreign person already holds 5% or more in an Australian media business, acquisitions of additional interests in that entity will also require approval.

What is the value of your proposed investment?

The type of investment determines:

1. the applicable monetary threshold for the investment to be a significant or notifiable action; and
2. how the value of the acquisition is calculated.

Three types of values are used to calculate the value of the acquisition:

1. Consideration, which is applicable for determining most fees and for some threshold tests;
2. Asset value, which is applicable to some threshold tests; and
3. Securities value, which is only applicable to the threshold test for acquisitions of interests in securities in an entity or issuing securities in an entity.

Figure 5 sets out how the value of the investment is determined for certain types of investments.

Consideration

Under the regime, consideration is taken to mean consideration in any form including consideration that is 'in kind' and Goods and Services Tax (or any equivalent tax payable). In most cases, the value set out in the agreement or a value based on a reasonable assessment of the investment.

Asset value

The following assets are taken into account when determining the total asset value of an entity:

- for an Australian entity – the total assets of the entity; and
- for a foreign entity – the total relevant Australian assets [e.g. Australian land (including legal and equitable interests in Australian land) and securities in an Australian entity], and any other assets in Australia.

Generally, the value of the assets of an entity or business on a particular day is the value shown in the most recent financial statement or in the accounting records of the entity.

Securities value

The total issued securities value of an entity is the total of the class values worked out for each class of security of the entity.

Figure 5 – The value of the acquisition

Type of investment	Value
Direct interest in an Australian entity or business that is an agribusiness.	Aggregate value of: <ul style="list-style-type: none"> • the consideration for the acquisition; and • aggregate value of other interests held by it (and its associates) in the entity or business (including value of interests previously acquired).
Interest in (or issue of) securities.	Higher of: <ul style="list-style-type: none"> • the total asset value for the entity; and • the total issued securities value for the entity.
Interests in the assets of an Australian business.	Consideration for the acquisition.

Key Point

Depending on the type of investment, generally the monetary threshold will be met when:

- the amount paid for an interest; or
- the value of the entity or its assets; exceeds the threshold amount.

Three types of values are used to calculate the value of a transaction: consideration, asset value and value of securities.

The FIRB approval process

How long does it take to get FIRB approval?

All applications are lodged online through the FIRB portal.

Once an application has been submitted and the correct application fee has been paid, the Treasurer has 30 days to consider the application and to make a decision (“**Review Period**”), and a further 10 calendar days to give notice of the decision. The Review Period can be extended by up to a further 90 days by an interim order.

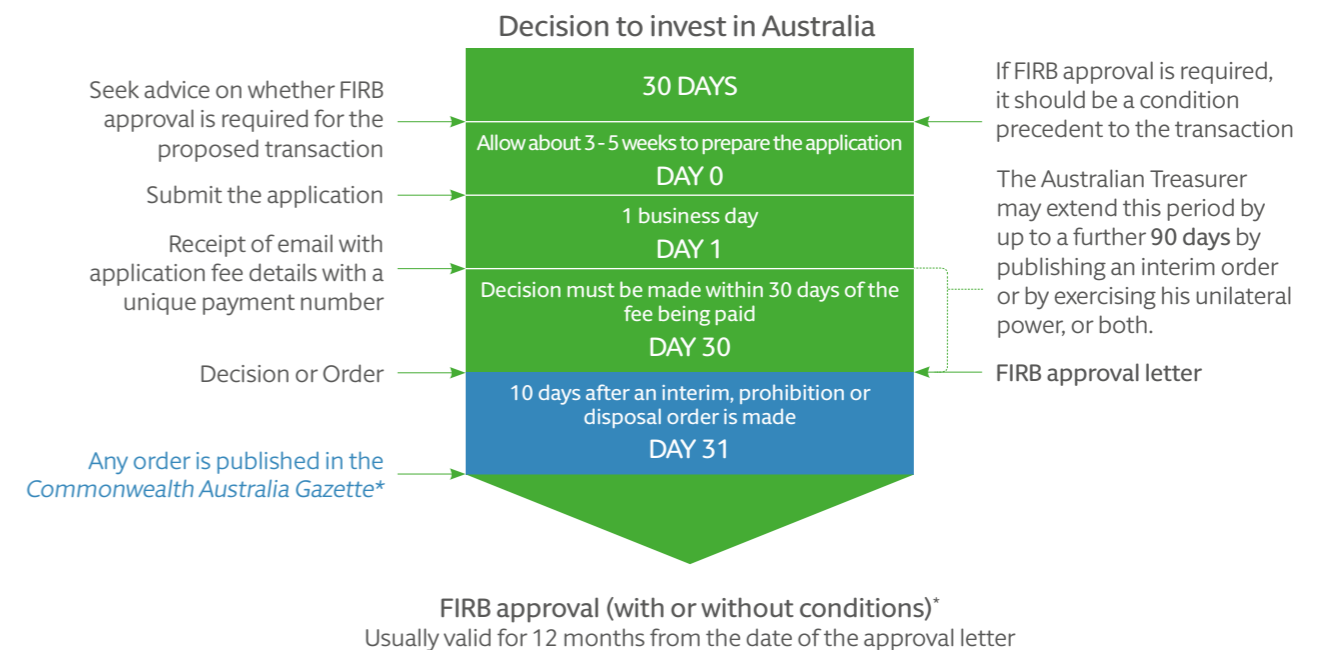
In addition to this interim order, the Treasurer also has the power to unilaterally extend a decision period by up to 90 days without providing

reason to the applicant (and without the need to issue an interim order or seek the consent of the applicant).

In some circumstances, particularly where there are concerns with details of the acquisition being made public (see the section in relation to confidentiality on page 24), the investor can voluntarily extend the Review Period. There is no limit to the number of times the Review Period can be voluntarily extended.

Figure 6 sets out a typical timetable for a FIRB application.

Figure 6 – Typical timetable+



* FIRB approvals remain confidential while rejections are made public. Therefore, investors will often withdraw their application before the end of the Review Period if they are advised by FIRB that their application may be rejected.

Key Point

An applicant fee will apply to all FIRB applications.

The Australian Treasurer has 30 days to review and make a decision on whether to grant FIRB approval, unless the period is extended, and a further 10 days to give notice of the decision.

Most investment proposals will be approved unless it is considered to be contrary to Australia’s national interest.

In 2018-19, 8,725 foreign investment proposals with a total value of \$231.0 billion were approved. One was rejected of the 9,466 applications considered.

What are the fees?

An application fee is payable on all foreign investment applications and notices. The fee payable depends on the type of proposed investment.

If an application falls into a number of categories, the highest fee will apply. For any voluntary notification, the fee payable for the equivalent notifiable action applies.

Figure 7 sets out the fees applying to the most common categories of foreign investment applications for 2021-22.

What information do I include in the application?

To ensure FIRB and the Treasurer are able to properly review and assess the proposed transaction, the application must contain details of the proposed transaction and the parties (including details of any relevant subsidiaries and parent companies), the reasons for the proposed investment and financial information.

To assist parties with completing their application, FIRB has published a checklist on the documents and information required (which can be found on the FIRB website).

Confidentiality

Applications will often contain commercial sensitive and confidential information. Appropriate procedures have been put in place in Australia's foreign investment framework to:

- protect the confidentiality of any information provided; and
- allow the Treasurer to consult with and provide information to other government agencies before making a decision, aligning with the whole-of-government approach.

All FIRB applications and any discussions between the investor(s) and FIRB are confidential. However, rejections (and the reasons for the rejection) and any conditional approvals are made public. Accordingly, where FIRB has indicated to an investor that the proposal may be rejected or that specific conditions will apply, the investor will often withdraw their application before the review deadline to avoid any details of the transaction being made public.

Figure 7 – Fees 2021-22*

Consideration for the Investment		Applicable fees	
Acquiring an interest in agricultural land	Acquiring an interest in commercial land (vacant and developed), tenements, business and entities	Fee for single action	Fee for single reviewable national security action ⁶
Less than \$75,000	Less than \$75,000	\$2,000	\$500
\$2 million or less	\$50 million or less	\$6,350	\$1,587.50
\$4 million or less	\$100 million or less	\$12,700	\$3,175
\$6 million or less	\$150 million or less	\$25,400	\$6,350
\$8 million or less	\$200 million or less	\$38,100	\$9,525
\$10 million or less	\$250 million or less	\$50,800	\$12,700
...
Over \$80 million	Over \$2 billion	\$503,000 maximum fee	\$125,750 maximum fee

Note: an internal reorganisation carries a flat fee of \$12,700.

Source: FIRB Guidance Note 10 – Fees on foreign investment applications

* All monetary figures stated are in AU\$.

Key Point

An application fee will apply to all FIRB approval applications.

Three types of values are used to calculate the total value of a transaction: consideration, asset value and value of securities.

The Treasurer and FIRB may take into account other various factors when assessing the national interest implications of a proposed transaction, including national security, other government policies (e.g. tax) and impact of the transaction on the economy and community.

6. Where an action is only a reviewable national security action, fees are calculated at 25 per cent of the fee for an equivalent notifiable action.

What is the national interest test?

Each investment is reviewed on a case-by-case basis. If it is considered to be contrary to Australia's national interest, it will be prohibited or conditions may be imposed on the investment to address any concerns or increase the Government's oversight of sensitive investments.

In circumstances where the investment is a significant action and the Treasurer was not notified, the Treasurer has powers to make various orders, including the power to unwind the transaction, if the investment is considered to be contrary to Australia's national interest.

The term 'national interest' is not defined in the FATA or the Policy. However, the Policy provides a non-exhaustive list of factors typically considered by FIRB when advising the Treasurer of the national interest implications of the proposed investment:

- type of investment – whether or not the investment is in a sensitive business and its effects.
- national security – the extent to which the investment will affect Australia's ability to protect its strategic and security interests.
- competition – whether it would promote healthy competition.
- other Australian Government policies – for example, the impact on Australian tax revenues (see page 29) and environment.
- impact on the economy and community – the extent to which the investment will develop and provide fair return for the Australian people (e.g. creation of jobs).
- character of the investor – corporate governance practice of the investor and the basis of operations and regulations.



How does the FIRB Approval process interact with the Critical Infrastructure Centre?

• Critical Infrastructure Centre

The Government established the Critical Infrastructure Centre (“Centre”) within the Department of Home Affairs in early 2017, for the purposes of safeguarding Australia’s critical infrastructure assets from national security risks by maintaining a register of critical infrastructure assets. The purpose of the register is to build a clearer picture of critical infrastructure ownership and control in high-risk sectors, and to support proactive management of the risks these assets face.

• Critical Infrastructure

The Australian and state governments share the following definition of critical infrastructure:

‘those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia’s ability to conduct national defence and ensure national security’.

Critical infrastructure provides services that are essential for everyday life such as energy, communications, water, transport, health, food and grocery, banking and finance, and the Australian government.

• FIRB and the Centre

The Centre complements, but does not encroach, the FIRB application process by providing consolidated and early national security advice to inform the Treasurer’s decisions on foreign investment proposals. Thus, it is important to note that the Centre is not a part of FIRB and does not change the law on foreign investment approvals in Australia, but will play a role in assisting the Treasurer in making national interest decisions on foreign investment proposals.

Register of Foreign Ownership of Australian Assets

In addition to the Critical Infrastructure Centre, the Government also established the Register of Foreign Ownership of Australian Assets in early 2021 to record information about foreign ownership of interests in Australian land, interests in Australian water entitlements and interests in certain Australian entities or businesses. The Register is not publicly available. Notice must be given to the Register of Foreign Ownership of Australian Assets within 30 days following a notifiable event.

Conditional approvals

The Treasurer can issue a no objection notification for certain investments, subject to one or more conditions if the Treasurer considers the conditions are necessary to ensure the investment is not contrary to the national interest. Conditions are the regulatory mechanism by which the Treasurer can allow foreign investment to occur whilst minimising risks to the national interest or national security associated with it. If a condition is attached to a ‘no objection’ decision, that condition may only be varied if the Treasurer is satisfied that such a variation would not be contrary to the national interest or national security (as applicable), and the applicant has consented to the variation, or the variation does not disadvantage them.

Tax related conditions

Where the Treasurer considers the investment may involve a risk to tax revenues, a standard set of tax conditions may be imposed as conditions of a no objection notification.

The tax conditions require the investor (and entities within its control group) to:

1. comply with Australian tax laws;
2. provide any documents or information required by the ATO in relation to the proposed transaction;
3. pay any outstanding taxation debt when due and payable;
4. provide an annual report to FIRB on compliance with the tax conditions; and
5. advise FIRB within 60 days of a termination event.

In addition, where a significant tax risk has been identified, the investor (and entities within its control group) may also be required to:

- engage in good faith with the ATO to resolve any tax issues; and
- provide information specified by the ATO on a periodic basis, including at a minimum a forecast of tax payable.

See the glossary for the meaning of ‘investor’s control group’ and ‘termination event’.

Other conditions

Where the Treasurer considers necessary (due to matters including increased national security, competition, economic, community or other concerns) approval may be subject to other conditions. Such conditions are at the Treasurer’s discretion and are often deal specific. Such conditions may require the investor (or entities within its control group) to:

1. require the target’s business to be undertaken solely from within Australia;
2. to limit foreign ownership to less than 50%;
3. to require a percentage of the target’s board to comprise Australian citizens and residents and/or the target’s chairman to be an independent director (who is an Australian citizen and resident);
4. to require commitments to support local communities, local employment and/or to operate and pursue growth in certain locations or in, at or around certain assets;
5. to require certain domestic sales; and/or
6. require divestment of certain assets or ownership interests within a specified timeframe post acquisition.



What happens if I don't get FIRB approval?

The Australian Treasurer's powers

The Treasurer has the following key powers in relation to significant and notifiable actions:

- make a no objection notification with or without conditions.
- make a prohibition order – prohibiting the proposed significant action.
- make a disposal order – unwinding the action.

Where a person is found to have been involved in a scheme to avoid the applications of FATA, the Treasurer has powers to make a disposal order or an order prohibiting the proposed investment.

Some foreign investors will voluntarily submit a FIRB application in relation to a significant action so that it can be satisfied that the proposed investment is permitted under the regime (i.e. avoid and prevent the Treasurer from making a prohibition or disposal order later on).

“Call-in” power

The Treasurer has a “call-in” power to review:

- any action taken or proposed to be taken on or after 1 January 2021;
- any action not previously notified to FIRB;
- any significant action or any “reviewable national security action”; or
- any action which may pose a national security concern.

The review can be initiated at any time within 10 years after the action. Following such a review, the Treasurer can make orders (such as prohibition or divestment orders) if the Treasurer is satisfied the action would be, or that the result of it is, contrary to national security.

To mitigate the risk of the “call-in” power being exercised in respect of an action, investors may voluntarily apply for FIRB approval.

Figure 8 - Penalties

	Maximum Criminal Penalty	Maximum Civil Penalty	Infringement Notice
Individual	15,000 penalty units and/or 10 years imprisonment	The lesser of: 2.5 million penalty units; or the greater of: - 5,000 penalty units; and - a specified amount referable to the value of the relevant action.	Tier 1 (applicant notifies): 12 penalty units plus application fee Tier 2 (FIRB discovers and action valued less than value referable to the relevant action): 60 penalty units plus application fee Tier 3 (FIRB discovers and action valued less than value referable to the relevant action): 300 penalty units plus application fee
Company	150,000 penalty units	The lesser of: 2.5 million penalty units; or the greater of: - 50,000 penalty units; and - a specified amount referable to the value of the relevant action.	Tier 1 (applicant notifies): 60 penalty units plus application fee Tier 2 (FIRB discovers and action valued less than value referable to the relevant action): 300 penalty units plus application fee Tier 3 (FIRB discovers and action valued less than value referable to the relevant action): 1500 penalty units plus application fee

Note: the current value of 1 penalty unit is A\$222

“Last resort” power

The Treasurer may exercise a “last resort” power to reassess approved foreign investment where subsequent national security risks emerge. The “last resort” power allows the Treasurer to impose new conditions, vary existing conditions, or, as a last resort, force the divestment of any realised investment if:

- after having reviewed the action and relevant national security advice, the Treasurer is satisfied a national security risk exists;
- one or more of the following applies:
 - the applicant made a false or misleading statement and the Treasurer is reasonably satisfied that the misstatement relates to the national security risk; and
 - the business, structure, organisation or market in which the action is taken has materially changed and the national security risk posed by the material change could not have been reasonably foreseen, or could have been reasonably foreseeable but was only a remote possibility at the time of the original approval, or the material change alters the nature of the national security risk posed at the time of the original approval;
- the Treasurer has taken reasonable steps to negotiate in good faith with the applicant to achieve an outcome which eliminates or reduces the national security risk; or
- the existing regulatory frameworks would not adequately eliminate or reduce the national security risk.

The power is exercisable in respect of any no objection notice given on or after 1 January 2021 and any exemption certificate given on or after 1 January 2021.

Investors are able to apply to the Administrative Appeals Tribunal for review of a decision by the Treasurer that a national security risk exists.

The penalties set out in Figure 8 may be imposed on foreign investors who fail to apply for FIRB approval when required or fail to comply with any approval conditions (note, an infringement notice or civil penalty may be sought, but not both).

Key Point

If you fail to obtain approval either at all or within required timeframe and proceed with the transaction, the proposed transaction could:

- be delayed (i.e. postpone completion);
- fall through (e.g. not complete due to a failure to satisfy a condition precedent which can result in a forfeiture of any deposit, termination or termination fee); or
- be subject to orders by the Treasurer:
 - the transaction be unwound;
 - substantial fines be imposed; or
 - in serious circumstances, imprisonment.

As at the date of the most recent FIRB Annual Report (2019-20), the Treasurer ordered the divestment of 70 properties held by foreign persons in breach of the foreign investment framework.



Recent high profile decisions

 *Not Approved*

Lion Dairy & Drinks (August 2020)

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

CKI (1 July 2018 – 20 November 2018)

Cheung Kong Infrastructure (Hong Kong) ("CKI") lodged a \$13 billion dollar bid to take over APA Group - Australia's biggest gas pipeline company - and obtain majority control. In early November, the Treasurer issued a "preliminary" view that the foreign bid should be turned down on national interest grounds as the takeover would result in an "undue concentration of foreign ownership by a single company group in our most significant gas transmission business". On 20 November 2018, FIRB failed to reach a unanimous recommendation to the Treasurer on the application and expressed concerns that the acquisition would give a single foreign company monopoly of a majority of Australian pipelines.

It is probable that CKI and its advisors assessed the likelihood of obtaining approval under the proposed transaction structure under the application as low. As such, CKI did not take the opportunity to reapply with an amended proposal within the two week period.

 *Approved*

DuluxGroup (June 2019)

FIRB approved the \$3.8 billion acquisition of Australia's largest manufacturers and distributors of paints, adhesives and other building products, ASX listed DuluxGroup Limited, by the Japanese owned Nippon Paint's.

It was noted that competition was a key national interest consideration when assessing proposed investments. In this particular transaction Nippon Paint only sold specialised paint in Australia to the car repairs industry and, as such, there was little overlap between its and Dulux's business, thereby mitigating concerns around a lessening of competition.

Tasmanian Land Company (February 2016)

FIRB approved the \$280 million acquisition of Australia's oldest dairy farm, being the land and assets of the Tasmanian Land Company, including Van Diemen's Land Company, by a Chinese investment firm (Moon Lake Investments).

The Treasurer approved the acquisition based on the investor making various undertakings in relation to its current employees, future investment projects, current contracts and various environmental and cultural agreements.

 *Not Approved*

Probuild (2021)

Prior to receiving a formal rejection of its application, China State Construction Engineering Corporation withdrew its application for the nearly \$300 million acquisition of major building contractor Probuild having received indications from FIRB that it was not going to approve the application. This followed from eight months of deliberation by FIRB.

It is understood that national security concerns was the key justification for FIRB's intention to not approve the acquisition, citing links between the state-owned China State Construction Engineering Corporation's and the Chinese defence industry.

Lion Dairy and Drink (2019)

China Mengniu Dairy Co withdrew its application for the proposed \$600 million acquisition of Australian food company Lion and Dairy Drinks after the Treasurer indicated the foreign investment would be contrary to the national interests of Australia and therefore would not be likely to receive FIRB approval.

The Treasurer justified these national security concerns on the basis the proposed acquisition would include large parcels of agricultural land crucial to the sustainable supply of Australian food products.

 *Not Reviewed*

Port of Darwin lease (October 2015)

The commercial Port of Darwin (and facilities) was leased by the Northern Territory Government to Landbridge Group (a Chinese owned company) for 99 years for \$506 million. FIRB stated that the transaction did not require FIRB approval due to its structure. This decision influenced changes to the foreign investment framework in relation to acquisitions involving critical infrastructure and communication between FIRB and other government departments and agencies.

The transaction raised national security concerns due to the strategic position and use of the port by Australian Defence and significant US military presence in the area.

Following this decision, the regime was changed to require all investments by government and non-government investors involving critical infrastructure assets owned by the State and Territory governments to be reviewed by FIRB and a focus on a whole-of-government approach.

Glossary

Term	Meaning	Term	Meaning	Term	Meaning	Term	Meaning
ACCC	Australian Competition and Consumer Commission.	ATO	Australian Taxation Office.			Policy	Australia's Foreign Investment Policy published by FIRB in December 2015.
	A person acquires an interest of a specified percentage in a business if the person: <ul style="list-style-type: none"> starts to hold an interest of that percentage in the business; would start to hold an interest of that percentage in the business if the person held interests in assets of the business that are interests that he or she has offered to acquire; or for a person who already holds an interest of that percentage in the business: <ul style="list-style-type: none"> starts to hold additional interests in assets of the business; or would start to hold additional interests in assets of the business if interests in assets of the business were transferred. 	Australian business	A business that is carried wholly or partly in Australia in anticipation of profit or gain.	Foreign government investor	<ul style="list-style-type: none"> A foreign government or separate government entity. A corporation, trustee of a trust or general partner of a limited partnership in which: <ul style="list-style-type: none"> a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest; or foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest. 	Regulations	Foreign Acquisitions and Takeovers Regulation 2015 (Cth).
Acquire		Australian land corporation	An entity that holds an interest in Australian land and the value of the interest in Australian land exceeds 50% of the value of the total assets of the entity.	Foreign person	<ul style="list-style-type: none"> An individual not ordinarily a resident in Australia. A corporation or trustee of a trust in which: <ul style="list-style-type: none"> an individual not ordinarily resident in Australia, foreign corporation or a foreign government holds a substantial interest; or two or more persons (each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) hold an aggregate substantial interest. A foreign government. Any other person, or any other person that meets the conditions, prescribed by the regulations. 	Sensitive business	The business that is wholly or partly: <ul style="list-style-type: none"> carried on in media, telecommunications or transport sectors; or the supply or manufacture of goods, equipment, technology or persons: <ul style="list-style-type: none"> to the defence forces; for military purposes; relating to encryption and security technologies and communications systems; or the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of a nuclear facilities.
Aggregate interest	Two or more persons (who are not associates of each other) hold an aggregate interest of a specified percentage in an entity if they, together with any one or more associates of any of them: <ul style="list-style-type: none"> are in a position to control at least that percentage of voting power or potential voting power in the entity; hold interests in at least that percentage of the issued securities in the entity; or would hold interests in at least that percentage of the issued securities in the entity if securities in the entity were issued or transferred. 	Change of control	Requires: <ul style="list-style-type: none"> the person (whether alone or together with one or more associates) is in a position to determine the policy of the entity or business (first limb); or in relation to the acquisition of interests in securities in an entity or an issue of securities in an entity, the person holds a substantial interest in the entity (second limb). For acquisitions of interests in the securities of an entity, both limbs are relevant considerations. For acquisitions of interests in assets of an Australian business, only the first limb is applicable.	Interest	A person holds an interest of a specified interest in: <ul style="list-style-type: none"> an entity if the person, alone or together with its associates: <ul style="list-style-type: none"> is in a position to control that percentage of voting power (or potential voting power) in the entity; holds the percentage interest in the issued securities of the entity; or would hold that percentage interest of the issued securities if securities in the entity were issued or transferred; and Australian land if the person holds: <ul style="list-style-type: none"> a legal or equitable interest in Australian land, subject to exceptions; or an interest in a security in an entity that owns Australian land, including an interest in a share in an Australian land corporation. 	Separate government entity	An individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or a part of a foreign country, but not part of the body politic of a foreign country or part of a foreign country.
Aggregate substantial interest	Two or more persons hold an aggregate substantial interest in an entity or trust if: <ul style="list-style-type: none"> for an entity – the persons hold an aggregate interest of at least 40% in the entity; or for a trust – the persons, together with any one or more associates of any of them hold, in the aggregate, beneficial interests in at least 40% of the income or property of the trust. 	Direct interest	An interest of: <ul style="list-style-type: none"> at least 10% in the entity or business; at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business; any percentage in the entity or business if the person who acquired the interest is in a position: <ul style="list-style-type: none"> to influence or participate in the central management and control of the entity or business; or to influence, participate or determine the policy of the entity or business. 	Investor's control group	For the purposes of the tax conditions, the investor's control group consists of entities: <ul style="list-style-type: none"> within the control of the investor; and that control the investor. 	Significant action	An investment that is not required to be notified but may be subject to orders by the Australian Treasurer. See page 15.
Asset	Includes an interest in an asset.	FATA	Foreign Acquisitions and Takeovers Act 1975 (Cth).	Notifiable action	An investment that must be notified to the Australian Treasurer. See page 15.	Significant agreement	An agreement relating to: <ul style="list-style-type: none"> the leasing of, the letting or hire of, or the granting of other rights to use, assets of the business; or the participation by a person in the profits or central management control of the business.
Associate	Includes: <ul style="list-style-type: none"> a relative; a person acting, or proposing to act, in concert in relation to the action to an action to which the FATA applies; any entity of which the person is a senior officer; a holding entity; and any person holding a substantial interest. 	FIRB	Foreign Investment Review Board, a nonstatutory body established to advise the Australian Treasurer and Government on the Policy and its administration.	Notifiable national security action	An investment that must be notified to the Australian Treasurer. See page 16.	Substantial interest	A person holds a substantial interest in: <ul style="list-style-type: none"> an entity if the person holds an interest of at least 20%; and a trust if the person, alone or together with its associates, holds a beneficial interest in at least 20% of the income or property of the trust.
		FIRB approval	The act of obtaining approval or a no objections notification from the Australian Treasurer in regards to a proposed investment.	National security business	Endeavours that if disrupted or carried out in a particular way may create national security risks.	Termination event	For the purposes of the tax conditions, a termination event occurs when the investor ceases to: <ul style="list-style-type: none"> hold the interest the subject of the no objection notification; control the entity or business which was the subject of the no objection notification; or carry on the Australian business which was the subject of the no objection notification.
		Foreign government	<ul style="list-style-type: none"> a body politic of a foreign country; a body politic of a part of a foreign country; or a part of a body politic of a foreign country or a part of a body politic of part of a foreign country. 			National security land	Land is national security land if it is: <ul style="list-style-type: none"> a 'defence premises' within the meaning of section 71A of the Defence Act 1903 (which includes all land owned or occupied by the Defence, including buildings and structures; or land in which an agency in the national intelligence community has an interest if the existence of that interest is publicly known or could be known upon the making of reasonable inquiries.



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