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FOREIGN DIRECT INVESTMENT REGULATION GUIDE

THIRD EDITION

Editor
Veronica Roberts

Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-275-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Clifford Chance

Covington & Burling

Creel, García-Cuéllar, Aiza y Enríquez

Cyril Amarchand Mangaldas

Dechert LLP

Gilbert + Tobin

Herbert Smith Freehills

Hogan Lovells

McCarthy Tétrault

Nagashima Ohno & Tsunematsu

Pestalozzi Attorneys at Law

WilmerHale

Publisher's Note

While the appetite, and necessity, for outside capital remains unabated, increasingly this is running into national security concerns as well as stricter regulations on mergers. This step change is illustrated by the growing number of high-profile deals that have been blocked or unwound by regulators in the last few years, or cleared but with commitments. There has also been a significant uptick in activity on the part of screening authorities, both in terms of notifications received and the monitoring of non-notified transactions. Such reviews can have a significant knock-on impact on timetables, making it crucial to consider whether upfront voluntary engagement is worthwhile.

The third edition of the Global Competition Review *Foreign Direct Investment Regulation Guide*, edited by Veronica Roberts, provides practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment. The *Guide* draws on the wisdom and expertise of distinguished practitioners globally to provide essential guidance on subjects as diverse as the evolving perspective on deals with China to the changing face of national security.

CHAPTER 5

Australia: A Deep Dive Into the Impact of Screening Legislation on Investments

Deborah Johns[1]

Introduction

Australia generally welcomes foreign investment (FI). The Australian government screens foreign investment proposals case by case to determine whether a particular proposal is contrary to the national interest or, in certain circumstances, national security only. This chapter explains some of the rules governing the screening process, although the impact of the regime in practice will always depend on the specific transaction.

Applicable legislation

The main laws that regulate foreign investment in Australia (the FI legislation) are:

- The Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Foreign Acquisitions and Takeovers Regulation 2015 (FATR). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block any proposals that are contrary to the national interest (or national security, as applicable), or apply conditions to the way proposals are implemented, to ensure they are not contrary to the national interest (or national security, as applicable).
- The Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

1 Deborah Johns is a partner at Gilbert + Tobin.

In addition, the concept of 'national security business' in the FI legislation ties into certain concepts in the Security of Critical Infrastructure Act 2018 (Cth) (the SOCI Act).

Separate legislation imposes other requirements in respect of foreign ownership in certain industries, which are outside the scope of this chapter.

Role of the Foreign Investment Review Board and decision-making

The Foreign Investment Review Board (FIRB) is a non-statutory body that advises the Treasurer, or his or her delegate, in relation to foreign investment proposals. Because of this role, the approvals sought under the FI legislation are colloquially known as 'FIRB approvals' (properly called a 'no objection notice' (NON)), although the decision maker is actually the Treasurer or his or her delegate.

FIRB is supported in its work by personnel within the Foreign Investment Division of the Treasury.

Key concepts

To understand how the FI legislation operates, it is first necessary to understand some important key concepts that underpin the legislation.

Interest of a specified percentage

The term 'interest of a specified percentage' is the most important concept in the FI legislation. It ultimately determines whether a person[2] is a foreign person and, if so, whether the action that person is taking is one that is regulated by the FI legislation.

An interest of a specified percentage in a corporate, trust or unincorporated limited partnership includes:

- the ownership or voting interests that a person together with its associates holds, and the ownership or voting interests that a person together with its associates would hold if they exercised rights that they have (e.g., options); and
- in certain cases, rights to distributions.[3]

2 'Person' refers to individuals, corporations, trusts, unincorporated limited partnerships, foreign governments, etc.

3 Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), Section 17.

An interest of a specified percentage in a business means the value of the interests in assets of the business held by a person and the person's associates versus the value of the total assets of the business.[4]

Associates

As noted above, the interests that are counted include those of a person's associates. Associates of a person include, among others, any person with whom the first person is acting in concert in relation to an action to which the FI legislation applies.[5]

Substantial, aggregate substantial and direct interests

The concept of 'interest of a specified percentage' feeds into the definitions of 'substantial interest', 'aggregate substantial interest' and 'direct interest'.

A person holds a 'substantial interest' if (in relation to a corporation, unit trust or unincorporated limited partnership) they hold an interest of at least 20 per cent or (if in relation to a trust) a beneficial interest in at least 20 per cent of the trust's income or property.[6]

The definition of 'aggregate substantial interest' is similar, but it considers the holding of two or more persons, the threshold is 40 per cent and it does not apply to unincorporated limited partnerships.[7]

A 'direct interest' is one of the most misnamed concepts in the legislation because the term has nothing to do with whether an investment is 'direct' or 'indirect'. It includes:

- An interest of 10 per cent or more in an entity or business.
- An interest of 5 per cent or more in an entity or business, if the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity or business being acquired.
- An interest of any percentage in an entity or business, if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or business, or to influence, participate in or determine the policy of the entity or business. This is generally accepted to include the ability to appoint a director.[8]

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4 id., Section 16A.

5 id., Section 6(1)(b).

6 id., Section 4: Definition of 'substantial interest'.

7 id., Section 4: Definition of 'aggregate substantial interest'.

8 Foreign Acquisitions and Takeovers Regulation 2015 (FATR), Regulation 16.

For certain purposes under the FI legislation, if a person has the power to veto any resolution of the board, central management or general meeting of a corporation, unit trust or unincorporated limited partnership, the person is deemed to have an interest of 20 per cent or more.[9]

Substantial interests, aggregate substantial interests and direct interests can be acquired indirectly, via the operation of the tracing rules.

Tracing rules

Tracing rules operate upwards through chains of substantial interests, so that if a person has a substantial interest in a corporation, trust or unincorporated limited partnership (a higher party), and the higher party has an interest of any percentage in a corporation, trust or unincorporated limited partnership (a lower party), the person is taken to hold as much of the lower party as the higher party holds.[10] This test operates through multiple chains of ownership and applies at each level irrespective of whether there is any practical control.

The legislation turns these tracing rules on or off for certain purposes, most notably in respect of certain offshore transactions for certain foreign persons, as described in more detail under 'Significant and notifiable actions', below.

Land

Australian land includes commercial (whether developed or vacant), agricultural and residential land, and mining and production tenements.[11] An interest in land includes, among other things:

- a freehold interest;
- a lease or licence that is reasonably likely to exceed five years;
- an interest in an income or profit-sharing venture relating to land (which includes royalty arrangements) that is reasonably likely to exceed five years; and
- an interest in a share or unit of an entity where Australian land makes up more than 50 per cent of the assets of the entity.[12]

9 FATA, Section 22(4).

10 id., Section 19.

11 id., Section 4: Definition of 'land'.

12 id., Section 12.

Foreign persons and foreign government investors

Foreign persons

The FI legislation generally regulates foreign investment proposals made by foreign persons. A 'foreign person' means:

- an individual not ordinarily resident in Australia;[13]
- a corporation in which, or the trustee of a trust, where in relation to the trust:
  - an individual not ordinarily resident in Australia, a 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;
- the general partner of a limited partnership, where in relation to the limited partnership:
  - an individual not ordinarily resident in Australia, a 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 interest of 40 per cent or more;
- a foreign government investor (FGI).[14]

FGIs

An FGI includes:

1. a foreign government;
2. an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a 'separate government entity');
3. a corporation, trustee of a trust or general partner of a limited partnership where in relation to the corporation, trust or limited partnership:
   - a foreign government, separate government entity or FGI from one country holds a 20 per cent or more interest; or
   - foreign governments, separate government entities or FGIs from more than one country hold a 40 per cent or more interest.

13 id., Section 5. Note that Australian citizens can, in certain circumstances, be treated as foreign persons.

14 id., Section 4: Definition of 'foreign person'.

The above definition is recursive, so that it includes FGIs captured by prior applications of item 3, above.[15]

The definition of FGI captures not only state-owned enterprises and sovereign wealth funds, but also:

- public sector pension funds and public universities;
- the investment funds into which state-owned enterprises, sovereign wealth funds, public sector pension funds and public universities invest; and
- owing to tracing rules, portfolio companies for the aforementioned investment funds.

Private equity funds and FGIs

Private equity funds (or, more specifically, their general partners) can be deemed to be FGIs based on the investors in those funds, but this determination is fraught with difficulty, including the incongruity between the structure of the FI legislation and how a private equity fund actually operates in practice.

At the heart of the issue is that a private equity fund may consist of a number of separate vehicles. Despite this, a fund manager typically looks at interests in the fund on a 'whole of fund' basis – that is, based on the relative capital commitments of each investor to the fund. The specific fund vehicle in which an investor invests is irrelevant to the investor's voting or economic interest in the fund, and indeed investors may be pulled through different vehicles for a given investment.

However, as can be seen above, the definition of FGI is tied to corporations, trusts or limited partnerships. In other words, the FI legislation demands that we look at each specific vehicle comprising a fund and determine, for each vehicle in isolation, whether it would qualify as an FGI. Once that is determined, association rules apply, and vehicles comprising a fund will generally be 'acting in concert' for the purposes of the definition of 'associate' outlined above. The end result is that a small amount of investment in a fund by an FGI can taint the entire interest held by a fund, depending on how that investment is grouped into different vehicles. It can also mean that a fund that ordinarily is not subject to the FGI rules may become subject to those rules when investors are pulled through an alternative structure for a given investment, because of the different way investors may be grouped together for the purposes of that investment.

15 FATR, Regulation 17.

This is clearly not a sensible outcome and one that many practitioners have been highlighting to FIRB for a number of years. Rather than tackling this issue head on (which would require a rethink of some of the most basic concepts in the legislation), the government has attempted to address the more pernicious effects of these rules by introducing two reforms.

The first is an exception for investment funds from the '40 per cent' limb of the definition of 'foreign government investor', where:

- a fund is a scheme in which investors pool contributions to produce benefits;
- no individual member of the scheme is able to influence any individual investment decisions, or the management of any individual investments of the scheme (i.e., no direct influence); and
- no individual member that is an FGI has any position in respect of the fund other than as a member the scheme.[16]

Funds may benefit from this exception even if investors:

- have representatives on the advisory committee; or
- are able to influence the broad investment strategy of the fund (e.g., typical ethical investing criteria).[17]

We have run into increasing examples, however, where a cornerstone investor that is an FGI may have a seat on the investment committee itself, or may have an ownership interest in the fund manager. In our view, these investors would fail the 'passivity' test outlined above.

A second reform is a passive foreign government investor exemption certificate, introduced in August 2021. This type of exemption certificate is designed for investment funds that are deemed to be FGIs because they have 20 per cent or more investment from FGIs from one country. Essentially, the FIRB will assess these funds case by case to determine whether the investors are passive.

The idea behind both of these reforms is to treat the private equity fund like a private foreign person, who are often able to benefit from higher thresholds and from provisions that make filings voluntary, rather than mandatory.

Regulated actions

Four types of actions are regulated under the FI legislation.

16 id., Regulation 17(2).

17 See Schedule 2 – Passive Investments in the Explanatory Statement relating to the Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020.

Significant actions

The Treasurer has the power to make orders in relation to these kinds of transactions (including to block them or to order divestments) if he or she considers the transaction to be contrary to the national interest. Significant actions only have to be notified if they are also notifiable actions or notifiable national security actions, but doing so and obtaining a NON cuts off the Treasurer's powers (subject to the last resort powers described below). Once notified, a significant action cannot proceed until a NON is obtained. Seeking approval is often advised, as these transactions are above a high monetary threshold and are therefore material, by definition. See also 'Call-in powers', below.

Notifiable actions

These transactions must be notified and cannot proceed until a NON is obtained. Most notifiable actions are also significant actions.

Notifiable national security actions

The Treasurer has the power to make orders in relation to these transactions (including to block them or to order divestments) if he or she considers the transaction to be contrary to national security (which is narrower than the national interest test relating to significant actions). These actions must be notified and cannot proceed until a NON is obtained.

Reviewable national security actions

These are transactions with an Australian nexus that are not significant actions, notifiable actions or notifiable national security actions. They do not require approval, but see 'Call-in powers', below.

Significant and notifiable actions

Types of actions

The following is a simplified description of the actions that are caught as significant actions and notifiable actions, and how the treatment differs depending on whether the transaction is a direct or indirect acquisition of the interest in question.

Significant actions and notifiable actions		
Action	Direct acquisition	Indirect acquisition (via the tracing rules)
Acquisition by a foreign person of a substantial interest in an Australian company or unit trust valued above the then current monetary thresholds.[18]	Significant and notifiable action for all foreign persons.	Significant action for private foreign persons. Significant and notifiable action for FGIs.
Acquisition by a foreign person of a direct interest in an Australian agribusiness where the investment (together with all prior investments of the acquirer and its associates in the target) is valued above the then current monetary thresholds.[19]	Significant and notifiable action for all foreign persons.	Significant action for private foreign persons. Significant and notifiable action for FGIs.
Acquisition by a foreign person of an interest in Australian land where the interest is valued above the then current monetary thresholds, subject to certain exceptions for small interests in land entities.[20]	Significant and notifiable action for all foreign persons.	Significant and notifiable action for all foreign persons. Note: Land can generally only be acquired indirectly if the target is an Australian land entity.
Acquisition by a foreign person of a direct interest in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value.[21]	Significant and notifiable action for all foreign persons.	Significant and notifiable action for all foreign persons.
Acquisition by a foreign government investor of a direct interest in an Australian company, unit trust or business, regardless of value.[22]	Significant and notifiable action for FGIs.	Significant and notifiable action for FGIs, except: • where the acquisition is an acquisition of securities in a non-Australian entity that has an Australian subsidiary; • the total assets of the Australian subsidiary are worth less than A$67 million;[23] • those assets are worth less than 5 per cent of the total assets of the target group; and • none of those assets are used in a sensitive business (see 'Monetary thresholds', below) or a national security business (see 'Notifiable national security actions', below).

18 FATA, Sections 40(2)(b), 40(2)(c) and 47(2)(b).

19 id., Sections 40(2)(a) and 47(2)(a).

20 id., Sections 43 and 47(c).

21 FATR, Regulation 55.

22 id., Regulation 45(1)(a).

23 This threshold is indexed annually on 1 January for inflation.

Significant actions and notifiable actions		
Action	Direct acquisition	Indirect acquisition (via the tracing rules)
Start of any new business in Australia by an FGI, regardless of value.[24]	Significant and notifiable action for FGIs.	Significant and notifiable actions for FGIs. Note: If an FGI qualifies for the *de minimis* exemption described above, it is generally not market practice to apply for approval to start a new business, even though the exemption does not apply to this head of approval.
Acquisition by an FGI of a legal or equitable interest in a tenement (including tenements that would not be classified as land) or an interest of at least 10 per cent in securities in an entity where the value of the tenements exceeds 50 per cent of the total asset value of the entity.[25]	Significant and notifiable action for FGIs.	Significant and notifiable actions for FGIs. Note: Tenements can generally only be acquired indirectly if the target is an Australian land entity or an entity as described (see left).

Monetary thresholds

The system of monetary thresholds is complex. Both the way that a threshold is measured and the dollar amount of the threshold differ depending on the kind of action, the identity of the acquirer and whether the threshold is affected by a treaty obligation. Most monetary thresholds are indexed on 1 January each year for inflation.

The Australian government's foreign investment website is the best current source of information for the current monetary thresholds[26] applying to different transactions.

Sensitive business

The definition of 'sensitive business' is important for determining whether treaty thresholds apply and whether FGIs are able to access the *de minimis* threshold for offshore acquisitions.

A 'sensitive business' is one that is:

- carried on wholly or partly in the telecommunications, transport or media sectors (including a business relating to infrastructure in those sectors); or
- wholly or partly:

24 id., Regulation 56(1)(b).

25 id., Regulation 55(1)(c).

26 https://foreigninvestment.gov.au/guidance/general/monetary-thresholds.

- the supply of training or human resources to, or the manufacture or supply of military goods, equipment or technology for or to, the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems;
- uranium or plutonium extraction;
- the operation of a nuclear facility.

The scope of this definition is not well understood and there is significant overlap with other concepts in the FI legislation. For example, investments in Australian media businesses are significantly regulated anyway, and are subject to A$0 thresholds, so the reference to the media sector is potentially redundant. As a result, there have been calls to eliminate this concept, but, unfortunately, this has not yet been done.

Notifiable national security actions

A foreign person takes a notifiable national security action (in each case regardless of value) if they:

- start a national security business;
- acquire a direct interest in a national security business or an entity that carries on a national security business;
- acquire an interest in Australian land that, at the time of acquisition, is national security land; or
- acquire an interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.[27]

A national security business is one that is carried on wholly or partly in Australia whether or not for profit or gain and is publicly known, or could be known after reasonable enquiry, that the business:

- is an owner or operator of critical infrastructure assets[28] as defined in the SOCI Act;

27 FATA, Section 55B(1).

28 The definition of 'critical infrastructure' is broad and includes certain assets within the following 22 sectors: aviation, banking, broadcasting, data storage or processing,

- is a carrier or nominated carriage service provider to which the Telecommunications Act 1997 applies;
- develops, manufactures or supplies critical goods or critical technology that are for a military or an intelligence use by Australian or foreign defence or intelligence agencies;
- provides critical services to Australian or foreign defence or intelligence agencies;
- stores or has access to information that has a security classification;
- stores or maintains personal information about Australian defence and/or intelligence personnel collected by the Australian Defence Force, the Defence Department or an agency within Australia's National Intelligence Community, that, if accessed, could compromise Australia's national security;
- collects, as part of an arrangement with the Australian Defence Force, the Defence Department or an agency within Australia's National Intelligence Community, personal information about defence and intelligence personnel, that, if disclosed, could compromise Australia's national security; or
- stores, maintains or has access to personal information as specified in the previous point that, if disclosed, could compromise Australia's national security.[29]

National security land generally includes land that is known or could, following reasonable enquiry, be known to be occupied by the Commonwealth of Australia for use by the defence or intelligence agencies.[30]

Key issues with the concept of 'national security business'

The concept of 'critical infrastructure asset' is broad. While not every asset within the 22 sectors referred to in footnote 28 is captured, many are not subject to any kind of materiality thresholds, meaning relatively benign businesses become national security businesses.

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the defence industry, domain name systems, education, electricity, energy markets, financial market infrastructure, food and grocery, freight infrastructure, freight services, gas, hospitals, insurance, liquid fuel assets, port, public transport, superannuation, telecommunications, and water and sewerage.

29 FATR, Regulation 8AA.

30 See FATR, Regulation 4: Definition of 'national security land'; Defence Act 1903 (Cth), Section 71A.

A national security business can be carried on by a non-Australian entity. Particular care needs to be taken when acquiring non-Australian entities that directly or indirectly supply goods to Australian defence or intelligence agencies and can be taken to be carrying on business in Australia despite not having an Australian subsidiary.

The 'reasonable enquiries' that the FIRB expects an applicant to undertake to determine whether something is publicly known are significant: a casual Google search, or simply asking the target, will not suffice. For example, in determining whether a target has access to or stores classified information, applicants and their advisers are expected to be familiar with the Protective Security Policy Framework, the system for classifying information, the various pieces of guidance provided on the Framework's website,[31] and the types of information that is or may be classified. It is irrelevant that the target is unaware that they store classified information.

Reviewable national security actions

Reviewable national security actions include a wide range of transactions involving influence over an Australian entity or business.[32] Because this captures such a broad range of things, the FIRB has provided guidance as to when it is recommended that approval be sought.[33]

We assess these transactions case by case. However, as a matter of market practice, if an offshore transaction is not otherwise captured by the FI legislation, these approvals are only applied for when there is uncertainty as to whether the target business constitutes a national security business.

Call-in powers

In respect of any reviewable national security action, or any significant action that is not a notifiable action nor a notifiable national security action, and for which approval is not sought, the Treasurer retains the power to 'call in' the transaction for review up to 10 years after the action was taken, if he or she considers that

31 www.protectivesecurity.gov.au.

32 FATA, Sections 55D, 55E and 55F.

33 See Guidance Note 8 relating to national security available on the Australian government's foreign investment website (https://foreigninvestment.gov.au/guidance/types-investments/national-security)

the transaction now poses national security concerns. Notifying the transaction and obtaining a NON cuts off this power, subject to the Treasurer's last-resort review powers.[34]

Last resort review powers

The Treasurer can re-review actions notified after 1 January 2021, if approval has been given, to determine whether a national security risk relating to the action exists, if:

- since the transaction was notified:
  - the Treasurer has become aware that the applicant made a statement:
    - that was false or misleading in a material particular; or
    - that omitted a matter or thing without which the statement was misleading in a material particular;
  - the business, structure or organisation of the person has, or the person's activities have, materially changed; or
  - the circumstances in which the action was, or is proposed to be, taken have materially changed;
- the Treasurer then:
  - conducts a review;
  - receives and considers advice in relation to the action from an agency in the National Intelligence Community;
  - takes reasonable steps to negotiate in good faith with the foreign person; and
  - is satisfied that exercising these powers:
    - is reasonably necessary for purposes relating to eliminating or reducing the national security risk; and
    - that the use of other options under the existing regulatory systems of the Commonwealth, states and territories would not adequately reduce the national security risk; and
- the Treasurer is reasonably satisfied that:
  - the false or misleading statement, or the omission, directly relates to the national security risk;

34 FATA, Section 66A.

- the national security risk posed by the change of the business, structure or organisation of the foreign person, or the change to the person's activities, could not have been reasonably foreseen or could have been reasonably foreseen but was only a remote possibility at the time of the original approval; or
- the relevant material change alters the nature of the national security risk posed at the time of the original approval.

National interest considerations

In determining whether a foreign investment proposal is contrary to the national interest, the Treasurer is able to examine any factors that he or she considers appropriate. Typically, these factors include the effects of the foreign investment proposal on:

- national security (a concept that is expanding to include such things as data security and security of critical infrastructure);
- competition;
- the economy and the community;
- other government policies such as tax and the environment; and
- as well as the character of the investor.[35]

Notifiable national security actions and reviewable national security actions are only reviewed against national security.

The decision as to what is contrary to the national interest or national security is at the sole discretion of the Treasurer. A decision can be challenged only on procedural grounds, except where the Treasurer exercises his or her last-resort review power it is possible to appeal to the Australian Administrative Tribunal for a review of the Treasurer's decision that a national security risk exists.[36]

Process

The purchaser is responsible under the legislation for seeking approval.

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35 See section entitled 'The national interest test' in Australia's Foreign Investment Policy (20 June 2023), published on the Australian government's foreign investment website (https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-06/AUSTRALIAS_FOREIGN_INVESTMENT_POLICY.pdf), page 8 et seq.

36 FATA, Division 1 of Part 7.

Applications are lodged with the FIRB. Once the application is lodged and the applicable fee is paid, the FIRB sends the application to all the agencies (typically referred to as the FIRB's 'consult partners' or 'consult agencies') it considers to be relevant.

There may be several rounds of questions and answers between the FIRB, its consult agencies and the applicant. Once all input has been received, and assuming a positive recommendation is being made, the applicant will have the opportunity to comment on the proposal description and any proposed conditions. As the target is most often tasked with complying with the conditions in practice, it is useful to get the target (and particularly its information technology team, in the case of data handling conditions) involved in reviewing the wording of the conditions. If the recommendation is not positive, then the applicant will usually be given the opportunity to withdraw the application, as formal rejections are publicly gazetted.

Timing

The FI legislation includes a nominal period for review of an application consisting of a 30-day review period and a 10-day notification period.[37] However, it is important to understand that this period is a fiction when it comes to business proposals – it can be extended through formal and informal means, and extensions are the norm. In practice, decisions about business proposals are usually made within two to four months, although this can be delayed by a number of internal and external factors, including:

- whether the parties are seeking formal or informal merger clearance in Australia (as foreign investment applications for significant and notifiable actions will not be decided until competition clearance is received);
- the sensitivity of the transaction;
- staff shortages;
- the availability of the decision maker; and
- key events in the political calendar (e.g., elections, delivery of the budget in May).

The Australian government will generally attempt to work within time frames for global deals, where there are mandatory statutory deadlines in other jurisdictions.

37 id., Sections 74(3), 75(3) and 77(8).

Penalties and offences

Significant civil and criminal penalties apply to breaches of the FI legislation.[38] The maximum criminal penalty is 10 years' imprisonment or a monetary penalty (A$3.33 million for an individual or A$33.3 million for a corporation).

The maximum civil penalty for a significant breach (e.g., failure to give notice to the Treasurer before taking a notifiable action, taking a significant action in certain circumstances without having first obtained a no objection notification, or breaching conditions contained in a no objection notification), is the lesser of:

- A$555 million; or
- the greater of the following:
  - A$1.1 million (A$11.1 million if the person is a corporation); or
  - an amount determined by reference to the value for the action.

The FI legislation also contains a three-tier infringement notice regime for more minor contraventions:

- tier 1 penalties apply if the person self-discloses an alleged contravention of the FATA before the person is notified by the Commonwealth that the conduct is being investigated;
- tier 2 applies in all other cases, except (generally) high-value acquisitions captured by tier 3; and
- tier 3 for non-compliance in relation to high-value acquisitions.

The penalties that can be issued under the infringement notice regime are set out in the following table.

Penalties for minor infringements of infringement notice regime		
Tier	Individuals	Corporations
1	A$2,664	A$13,320
2	A$13,320	A$66,600
3	A$66,600	A$333,000

Remedies

As noted above, it is possible for the Treasurer to impose conditions on an applicant in granting approval. Common conditions are as follows:

38 id., Part 5.

- Tax conditions: The 'standard' tax conditions, and some of the more common bespoke tax conditions, are set out in Guidance Note 12 on the Australian government's foreign investment website.[39] These usually relate to ensuring that the applicant complies with its tax obligations in Australia, provides information or enters into discussions with the Australian Tax Office (ATO) relating to the structure, or agrees to engage with the ATO prior to selling the asset in relation to how funds will flow out of Australia, to ensure all Australian tax obligations are complied with.
- Data handling conditions: These vary from one transaction to the next but generally focus on who has access to sensitive information and for what purpose, where the information is stored, technical requirements in respect of access to and storage of the information, and customer notification requirements (which go beyond applicable legislation).
- Security clearances: In some cases, a condition is imposed that at least one director has a security clearance.
- Location: Occasionally conditions are imposed requiring the headquarters of the business to remain in Australia, particularly for large, iconic Australian businesses.
- Maintenance: Particularly for businesses that involve dual-use technology, conditions may be imposed that require maintenance to occur onshore.
- Reporting and audit: Where conditions are imposed, a separate audit and reporting condition is usually imposed also.

It is possible to negotiate the conditions (other than tax conditions) to some degree. As the target is most often tasked with complying with the conditions in practice, it is useful to get the target (and particularly its information technology team, in the case of data handling conditions) involved in reviewing the wording of the conditions, to ensure they are workable going forward.

Impact of the covid-19 pandemic

Most people who have been involved in transactions involving Australia would know about the temporary reduction in monetary thresholds to A$0 for all foreign persons from 29 March 2020 to 31 December 2020, greatly increasing the volume of transactions that required foreign investment approval. All thresholds returned to normal from 1 January 2021, subject to those businesses that are deemed 'national security businesses' (as described above). The retention of the

39 https://foreigninvestment.gov.au/guidance/conditions-and-reporting/tax-conditions.

A$0 thresholds for those businesses was unrelated to the pandemic and was part of a separate process that had been under way within the government for some time prior to the pandemic.

Register of Foreign Ownership of Australian Assets

The Register of Foreign Ownership of Australian Assets (Register) came into force on 1 July 2023 and includes ongoing reporting obligations for foreign persons in respect of Australian land or businesses that they own.

Before the Register came into force, foreign persons were subject to a number of reporting obligations. The Register is intended to amalgamate and expand upon these reporting obligations, so that most of the reporting obligations going forwards will be via the Register (relating to the fact of ownership of Australian assets) and via reporting obligations imposed under NONs and exemption certificates (relating to compliance with any conditions imposed).

In general, the following transactions must be notified to the Register:

- In relation to land transactions:
  - All acquisitions of legal interests in land and exploration tenements (whether or not FIRB approval was required).
  - All acquisitions of equitable interests in long-term leases of agricultural land (whether or not FIRB approval was required).
  - All disposals of the foregoing land interests.
  - Any change in the nature of the land held (e.g., from residential to commercial).
  - If a person that already owns land becomes or ceases to be a foreign person.
- In relation to non-land transactions:
  - Any non-land acquisition that is the subject of a notifiable action or notifiable national security action (i.e., those things that require FIRB approval).
  - Any non-land acquisition that is a significant action or reviewable national security action and which were the subject of a NON or an exemption certificate (i.e., transactions where FIRB approval was voluntarily sought and received, which were covered by an exemption certificate or which the Treasurer called in).
  - All disposals of the foregoing interests.
  - Any change of 5 per cent or more in interests held in businesses or entities that are subject to the above reporting obligation.
  - If a person already owns an interest that would be caught by FATA and becomes or ceases to be a foreign person.

Registering to lodge notices to the Register is complex and clients have reported numerous problems. The first step is that the foreign person must set up access to the ATO's Online Services for Foreign Investors system. This step cannot be delegated to external legal counsel. Full instructions are available on the ATO's website.[40] Once access is set up, the foreign person can appoint an agent to lodge the Register notices on their behalf.

Insights into recent enforcement practice and current trends

The government has a number of enforcement tools at its disposal (see 'Penalties and offences', above). Although the imposition of penalties has historically been rare in the business context (they have commonly been employed in respect of residential real estate), the FIRB has been expanding its compliance team, and we are starting to see more cases referred to its compliance team for consideration.

In addition, although reporting and audit conditions have been imposed for a long time, the FIRB has become more prompt and consistent in following up with applicants that fail to comply with these conditions.

Practical insights and strategic guidance for investors

Timing

It continues to be important for acquirers to engage with the FIRB as early as possible to ensure that transaction timelines can be met.

However, timing remains a significant issue. Although most acquirers accept that there is a level of regulation associated with acquiring Australian entities, there is a perception that in many global transactions, the cost and time associated with FIRB approvals is disproportionate to the overall importance of Australia to the global transaction. Further, there is no statutory process for agreeing to remedies or a hold separate prior to lodging a FIRB application or while a FIRB application is pending (the process is completely suspensory).

One common approach during the temporary A$0 thresholds of 2020 was to transfer the Australian business to an Australian buyer or an entity that is already deemed to hold an interest in the business, then close the global transaction and seek FIRB approval for the original owner (i.e., the target of the global transaction) to reacquire the business. Although this approach has continued, it

40 Entities that do not have an Australian Business Number: www.ato.gov.au/general/online-services/foreign-investors/accessing-online-services-for-foreign-investors. Entities that have an Australian Business Number: www.ato.gov.au/general/online-services/foreign-investors/Access-to-Online-services-for-foreign-investors-for-entities-with-an-ABN/

is generally only feasible when the Australian business is small and nonsensitive, and as the thresholds having returned to normal, there is less need to undertake these measures.

National security

As national security issues have become more prominent, it is necessary for transacting parties to engage with national security issues in a more thoughtful way. Gone are the days when we could simply look at whether the target supplied the military or was located next to a military base. Having a proper understanding of the sorts of things that can affect national security in its broadest sense – including data security and the operation of critical infrastructure – is essential to describing the transaction appropriately to the government and understanding how the government will approach the assessment.

Although the government stresses that the same criteria are applied to all proposals, our observation is that acquirers from some countries (e.g., China) are more likely to raise national security issues than other investors. The government's concerns in this respect are both influenced by and further influence the broader geopolitical situation.

Politics

Because of the amorphous nature of the concept of national interest, and because the decision maker is ultimately the Treasurer, who acts at his or her sole discretion, it is possible for voters' perception of what constitutes 'national interest' to influence the government's thinking. The higher a media profile a transaction has, and the closer a transaction is to an election, the more acute these concerns can become. However, we would stress that politics do not affect the outcomes of the vast majority of applications. It can be helpful to ensure that sensitive transactions receive as little media coverage as possible and to mind the election cycle when planning a transaction's timetable.

Reform proposals

The reform efforts relating to the treatment of private equity funds have been discussed above (see 'Private equity funds and FGIs' above). We remain hopeful that further reforms are pursued so that private equity funds can be assessed on a 'whole of fund' basis.

Finally, as a result of the imposition of conditions, it is apparent that foreign-owned companies can be put at a competitive disadvantage to domestic-owned businesses. For example, data handling conditions may dictate that a foreign-owned business cannot use an offshore call centre, whereas its domestic competitor (for

which the same security risks exist in relation to data security) can, at significant cost savings. It is likely that some of this disparity will be remedied in the future, as more comprehensive national regulation on these issues is developed (whether through the reforms to the SOCI Act, which, aside from tying into FI legislation, also regulates critical infrastructure more generally), or other national regulation.