FOREIGN DIRECT INVESTMENT REGULATION GUIDE

Editor
Veronica Roberts

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Publisher's Note

Foreign direct investment is an area in flux, where the appetite – and necessity – for outside capital is running into growing national security concerns, as well as increasingly strict regulations on mergers. Although there were already controls in place before covid-19, the pandemic and a growing shift towards protectionist economic policies have crystallised these concerns more widely among governments around the world. As Veronica Roberts, Ruth Allen and Ali MacGregor point out in their introduction, there is increased scrutiny of deals in a number of jurisdictions, including the United States, Europe and Australia. At the same time, there is still a keen need for foreign investment in many Asian countries. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is therefore critical.

The *Foreign Direct Investment Regulation Guide* – published by Global Competition Review – provides just such detailed analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which foreign direct investment is possible. The Guide draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as the evolving perspective on deals with China to the changing face of national security – for all competition professionals.

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Australia

Deborah Johns[1]

Introduction

Australia generally welcomes foreign investment. 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 (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); and
- 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.

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).

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1 Deborah Johns is a partner at Gilbert + Tobin.

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', 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 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 corporation, trust or unincorporated limited partnership includes the interests of a person's associates and, in general, includes:

- ownership interests, voting interests and the ownership interests or voting interests a person or his or her associates would hold if they exercised the rights they have (such as options); and
- in certain cases, rights to distributions.[2]

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.[3]

2 Foreign Acquisitions and Takeovers Act 1975 (Cth) [FATA], Section 17.

3 id., Section 16A.

Associates

As noted above, the interests that are counted include the interests of a person's associates. The 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.[4]

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) the person holds 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 income or property of the trust.[5]

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.[6]

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; and
- 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.[7]

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.[8]

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4 id., Section 6(1)(b).
5 id., Section 4: Definition of 'substantial interest'.
6 id., Section 4: Definition of 'aggregate substantial interest'.
7 Foreign Acquisitions and Takeovers Regulation 2015 [FATR], Regulation 16.
8 FATA, Section 22(4).

A substantial interest, aggregate substantial interest and direct interest 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 (higher party), and the higher party has an interest of any percentage in a corporation, trust or unincorporated limited partnership (lower party), the person is taken to hold as much of the lower party as the higher party holds.[9] 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, agricultural and residential land, and mining and production tenements.[10] 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.[11]

Foreign persons and foreign government investors

Foreign persons

The FI legislation generally regulates foreign investment proposals made by a foreign person. 'Foreign person' means:

- an individual not ordinarily resident in Australia;[12]
- 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

9 id., Section 19.

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

11 id., Section 12.

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

    - 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).[13]

FGIs

An FGI includes:

- a foreign government;
- 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');
- a corporation, trustee of a trust or general partner of a limited partnership in which (1) a foreign government, separate government entity or FGI from one country holds a 20 per cent or more interest, or (2) foreign governments, separate government entities or FGIs from more than one country hold a 40 per cent or more interest. This definition is recursive so that it includes FGIs captured by prior applications and this paragraph.[14]

The definition of FGI captures not only state-owned enterprises and sovereign wealth funds but also public sector pension funds, the investment funds into which state-owned enterprises, sovereign wealth funds and public sector pension funds invest and, owing to tracing rules, portfolio companies for the aforementioned investment funds.

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

14 FATR, Regulation 17.

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 how the FI legislation operates and how a private equity fund actually operates.

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.

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.[15]

15 id., Regulation 17(2).

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).[16]

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 (EC), introduced in August 2021. This EC 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, FIRB will assess these funds case by case to determine whether the investors are passive. As this regime is new, it remains unclear how the ECs will operate in practice, but applicants should expect to divulge a significant amount of sensitive information about how the fund in question operates and who its investors are.[17]

The idea behind both of these reforms is to treat the private equity fund like a private foreign person (which is 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:

- 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 notice of no objection cuts off the Treasurer's powers (subject to the last resort powers described below). Once notified, a significant action cannot proceed until a notice of no objection is obtained. Seeking approval is strongly advised, as these transactions are above a high monetary threshold and are therefore material, by definition. See also 'Call-in powers', below.

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

17 Guidance Note 9 published on the website of the Foreign Investment Review Board [FIRB].

- Notifiable actions: These transactions must be notified and cannot proceed until a notice of no objection 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. These actions must be notified and cannot proceed until a notice of no objection 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.

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

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).

Action	Direct acquisition	Indirect acquisition (via the tracing rules)
Acquisition by a foreign person of an interest of 5% or more 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$61 million; • those assets are worth less than 5% 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)
Start of any new business in Australia by an FGI, regardless of value[23]	Significant and notifiable action for FGIs	Significant and notifiable action 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% in securities in an entity where the value of the tenements exceeds 50% of the total asset value of the entity[24]	Significant and notifiable action for FGIs	Significant and notifiable action 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)

21 FATR, Regulation 55.

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

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

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

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. Where there is a monetary threshold, it is indexed on 1 January each year for inflation.

The FIRB website is the best source of information for the current monetary thresholds[25] 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:
  - 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.[26]

The scope of this definition is not well understood and there is significant overlap with other concepts in the legislation. There have been suggestions to do away with this concept – for example, investments in Australian media businesses are significantly regulated anyway (and 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 was not done with the recent amendments.

25 https://firb.gov.au/general-guidance/monetary-thresholds.

26 FATR, Regulation 22.

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 as defined in the SOCI Act;
- 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 use, or an intelligence use, by Australian or foreign defence or intelligence agencies;
- provides critical services to Australian or foreign defence agencies or intelligence agencies;
- stores or has access to information that has a security classification;
- stores or maintains personal information about Australian defence and intelligence personnel collected by the Australian Defence Force, the Defence Department or an agency in the 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 in the 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.[28]

27 FATA, Section 55B(1).

28 FATR, Regulation 8AA.

National security land generally includes land that is known or could, following reasonable enquiry, be known to be occupied by the Commonwealth for use by the defence or intelligence agencies.[29]

Key issues with notifiable national security actions are the following:

- The SOCI Act is likely to be significantly expanded in the near future, and the broader the definition of 'critical infrastructure assets' under the SOCI Act, the more transactions will become subject to A$0 thresholds under the FI legislation. This threatens once again to swamp the system with many low-value applications, as occurred during 2020 when all proposals were subject to A$0 thresholds, without any corresponding benefit in terms of protection of the national interest (including national security).
- A national security business can be carried on by a non-Australian entity. Care in particular needs to be taken when acquiring non-Australian entities that directly or indirectly supply goods to the Australian defence or intelligence agencies.
- The 'reasonable enquiries' that 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 (PSPF), the various guidance provided on the PSPF website, the system for classifying information and the types of information that is or may be classified. It is irrelevant that the target is unaware that they store this information.

Reviewable national security actions

Reviewable national security actions include a wide range of transactions involving influence over an Australian entity or business.[30] Because this captures such a broad range of things, FIRB has provided some guidance as to when it is recommended that approval be sought.[31]

We assess these transactions case by case. However, as a matter of market practice, when an offshore transaction is not otherwise captured by the FI legislation, we are not generally seeing people apply for these voluntary approvals.

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

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

31 See Guidance Note 8 published on the FIRB website.

Call-in powers

In respect of any reviewable national security action, or any significant action that is not a notifiable action or notifiable national security action and for which approval was not sought, the Treasurer retains the power for 10 years after the action is taken to 'call in' the transaction for review if he or she considers that the transaction poses national security concerns. Notifying the transaction and obtaining a notice of no objection cuts off this power, subject to the Treasurer's last resort review powers.[32]

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 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 those 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 omission directly relates to the national security risk;
  - 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

32 FATA, Section 66A.

- the relevant material change alters the nature of the national security risk posed at the time of the original approval.[33]

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
- the character of the investor.[34]

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

The decision as to what is contrary to the national interest or national security is the Treasurer's at his or her sole discretion. A decision can be challenged only on procedural grounds, except that 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.[35]

Process

The purchaser is responsible under the legislation for seeking approval.

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

There may be several rounds of questions and answers between 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

33 id., Division 3 of Part 3.

34 See section entitled 'The national interest test' in Australia's Foreign Investment Policy (1 January 2021), published on the FIRB website, page 9 *et seq.*

35 FATA, Division 1 of Part 7.

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.[36] 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 the sensitivity of the transaction, staff shortages, the availability of the decision maker, elections or other key events in the political calendar (such as 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.

Penalties and offences

Significant civil and criminal penalties apply to breaches of the legislation.[37] 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 significant breaches such as 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);
    - an amount determined by reference to the value for the action.

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

37 id., Part 5.

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) for high-value acquisitions that are 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.

Tier	Individual	Corporation
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:

- *Tax conditions*. The 'standard' tax conditions, and some of the more common bespoke tax conditions, are set out in Guidance Note 12 on FIRB's website. 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 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.

Insights into recent enforcement practice and current trends

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

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

Practical insights and strategic guidance for investors

Timing

It continues to be important for acquirers to engage with 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 entity that is already deemed to hold an interest in it, or to an Australian buyer; close the global transaction, and then seek FIRB approval for the original owner (i.e., the target in the global transaction) to reacquire the business. Although this approach has continued, it is generally only feasible when the Australian business is small and non-sensitive – with 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 – such as 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 at his or her sole discretion, it is possible for voter perception of the national interest to influence the government's thinking. The more high profile a transaction in the media, 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 outcome of the vast majority of applications. For sensitive transactions, it can be helpful to ensure that the transactions receive as little media coverage as possible, and also to keep in mind the election cycle in terms of transaction timetable planning.

Reform proposals

The reform efforts relating to the treatment of private equity funds have been discussed above (see 'Private equity funds and FGIs').

Aside from this, the most significant change on the horizon relates to the amendments to the SOCI Act. As noted above, one limb of the definition of national security business ties into the definition of 'critical infrastructure assets' under the SOCI Act. Currently, the SOCI Act covers certain ports, water, gas and electricity assets, but a bill to significantly expand this is currently making its way through Parliament. When passed, certain assets in the following sectors will become 'national security business', subject to the A$0 thresholds for 'notifiable national security actions', described above:

- communications;
- data storage or processing;
- financial services and markets;
- water and sewerage;
- energy;
- healthcare and medical;
- higher education and research;
- food and grocery;
- transport;
- space technology; and
- defence industry.

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 does not use an offshore call centre, whereas its domestic competitor (for whom 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 the FI legislation also regulates critical infrastructure more generally), or through other national regulation.

APPENDIX 1

About the Authors

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Deborah Johns is a partner in Gilbert +Tobin's leading corporate advisory practice. She is an expert in matters relating to the Foreign Acquisitions and Takeovers Act 1975 (Cth) and is a member of the Law Council's Foreign Investment Committee. Deborah has led the firm's participation in the consultation processes in relation to Australia's foreign investment rules and has been particularly involved in efforts to improve the way private equity funds are treated under the foreign investment legislation.

Deborah also edits the firm's Doing Business in Australia guide and Foreign Investment Guide.

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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. Although controls on foreign direct investment were already in place before covid-19, the pandemic and a growing shift towards protectionist economic policies have brought these concerns into sharper focus for governments. The *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.

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