



> Regime overview

Australia's foreign investment approval regime regulates certain types of acquisitions by 'foreign persons' of equity interests in Australian companies and unit trusts, and of interests in Australian businesses and interests in Australian real property assets. The principal regime is set out in the *Foreign Acquisitions and Takeovers Act 1975* and its accompanying regulations (**FATA**).

Under the FATA, a 'foreign person' is generally:

- > an individual that is not ordinarily resident in Australia;
- > a foreign government or foreign government investor;
- > a corporation, trustee of a trust or general partner of a limited partnership in which an individual not ordinarily resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20%; or
- > a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

The Australian Treasurer is responsible for decisions under the FATA and is advised by the Foreign Investment Review Board (**FIRB**).

> Filing thresholds

While this guide aims to provide an overview of the FIRB rules, you should seek legal advice from your Allens contact to confirm whether a FIRB filing is required for a transaction. Determining when FIRB approval is required can be complex. There is a layered system of categories, exceptions and multiple thresholds.

Generally, in the context of an acquisition of securities in an entity, and where no special rules apply (there are many – see further below):

- (a) a foreign person needs FIRB approval to acquire a direct interest (generally 10% plus equity interest) if the target operates a 'national security business' (generally one involved in or connected with a 'critical infrastructure asset', telecommunications, defence or a national intelligence community (of either Australia or a foreign country), or their supply chains) and in such cases a nil FIRB approval monetary threshold applies; and
- (b) a foreign person needs FIRB approval to acquire a substantial interest (20% plus equity interest) if the target is: (i) an Australian company carrying on an Australian business; (ii) an Australian unit trust; or (iii) a holding entity of either of them, in each case where the target is valued above the following thresholds:

INVESTOR	THRESHHOLD	HOW CALCULATED
Agreement country/region investors – an entity that is an enterprise or national of an 'FTA Country/Region' (Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, USA and Vietnam) but excluding: <ul style="list-style-type: none"> > acquisitions by their subsidiaries incorporated elsewhere, including an Australian subsidiary; > foreign government investors (which are subject to more stringent rules); and > acquisitions of targets that operate a national security business or operate in sensitive sectors (which include media, telecommunications, transport and various military applications). 	A\$1,216 million, indexed annually	The higher of: <ul style="list-style-type: none"> > the total asset value for the entity; and > the total value of the issued securities of the entity
Agreement country/region investors – where the target is carrying on a sensitive business (which includes media, telecommunications, transport and various military applications) but excluding: <ul style="list-style-type: none"> > acquisitions by their subsidiaries incorporated elsewhere, including an Australian subsidiary; and > foreign government investors (which are subject to more stringent rules). 	A\$281 million, indexed annually	
Others – Foreign persons who are not agreement country/region investors or foreign government investors (the latter being subject to more stringent rules).	A\$281 million, indexed annually	

Special rules apply in a number of situations, including investments by foreign government investors, investments in media, investments in land-rich entities, and investment in agribusinesses.

> FIRB interaction with regulators, including ACCC and ATO

- > FIRB consults broadly and in particular with the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO), before the decision-maker makes a decision on an application.
 - The ATO will undertake a ‘tax risk assessment’ of the application. Following input from the ATO, FIRB can impose ‘tax conditions’ on approvals.
 - While FIRB will consult closely with the ACCC, FIRB is entitled to adopt its own position on competition matters even if the ACCC clears a transaction.
- > These regulatory interdependencies can lead to timing and transaction risks.
- > It is therefore important to analyse likely issues early – especially competition and tax issues – and develop an integrated strategy to manage those risks.

> Substantive assessment

The Treasurer will consider whether the investment is contrary to Australia’s national interest (or, in the case of an investment which triggers only the national security rules, whether the investment is contrary to national security). ‘National interest’ is not defined, but the Government’s Foreign Investment Policy outlines five factors that the Government typically considers:

- > National security: The extent to which investments affect the Australian Government’s ability to protect the strategic and security interests of Australia.
- > Competition: Whether an investment may result in an investor gaining control over pricing or production of a good or service in Australia.
- > Other Australian government policies: The impact the investment will have on Australia’s tax revenues or environmental objectives.
- > Impact on the economy and the community: The level of Australian participation that will remain and the consequences for employees, creditors and other stakeholders.
- > Character of the investor: The extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision.

The Australian Government will have regard to further considerations where the investor is a **foreign government investor**.

> Fees

A fee is payable at the time the application is submitted. FIRB’s time limit to consider the application does not start until the fee is paid. For business and company acquisitions, the fee can range from A\$2,000 to A\$503,000, depending on the value and type of transaction.

> Fees & Timing

Once the application has been lodged (and the fee paid) the Treasurer has 30 calendar days to make a decision (and a further 10 days to notify the applicant). If no decision is made, the transaction is deemed to be approved and the Treasurer cannot prohibit or unwind a transaction. This time period can be extended:

- > if information and/or documents are requested in relation to the application, the clock stops until the request has been satisfied;
- > the Treasurer may make an interim order (which is publicly available) which has the effect of prohibiting a transaction on a temporary basis (for up to 90 calendar days);
- > the Treasurer can unilaterally extend the timeframe by up to 90 calendar days (and this is in addition to the power to make an interim order); or
- > an applicant can request an extension (for example to avoid a public interim order being made).

In practice therefore the statutory time periods provide no certainty that approval will be given by a particular date.

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‘Elite’ ranking – Australia
Global Competition Review, GC100 2021

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