



## BUSINESS INVESTMENTS

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This guidance document incorporates content from the pre-1 January 2021 FIRB website and Guidance Notes 25, 26, 28 and 34, as well as new content indicated by a sidebar. Please note, this is a temporary provision to assist reader's transition to these new guidance documents and may be removed in due course.

- Foreign persons generally require foreign investment approval before acquiring interests in securities or assets, or taking other actions in relation to corporations, unit trusts and businesses that have a connection to Australia.
- Foreign persons generally require foreign investment approval before acquiring a substantial interest (generally at least 20 per cent) in an Australian entity that is valued above the relevant monetary threshold.
- Other business investments involving acquisitions of securities or assets may require approval at a lower percentage threshold and monetary threshold. For example:
  - Foreign persons acquiring a direct interest (generally 10 per cent, or in a position of control) in an Australian agribusiness above the relevant monetary threshold;
  - Foreign persons acquiring 10 per cent or more in a listed Australian land entity, or 5 per cent or more in an unlisted Australian land entity, above the relevant monetary threshold;
  - Foreign persons acquiring 5 per cent or more in an Australian media business, regardless of value;
  - Foreign persons acquiring a direct interest in an national security business or in an entity that carries on a national security business, regardless of value; and
  - Foreign persons starting a national security business.
- From 1 January 2021, a foreign person may require foreign investment approval in certain circumstances where their percentage of interests in an entity have increased, even where they did not acquire additional interests in securities in the entity (passive increases).
- Where the foreign person is a foreign government investor, additional rules apply. For example, foreign government investors generally require foreign investment approval where they:
  - acquire a direct interest in an Australian entity or Australian business, or start an Australian business, regardless of value; or
  - acquire an interest of 10 per cent or more in securities in a mining, production or exploration entity, regardless of value.
- Other actions (for example, some offshore takeovers and acquisitions) may be significant actions or reviewable national security actions, but not notifiable actions or notifiable

national security actions. For such proposals, notification is not required prior to an action being taken. Nonetheless, foreign investors may apply for a no objection notification in respect of proposed significant actions to obtain certainty. Similarly, where the actions are reviewable national security actions, foreign investors may voluntarily notify, and in doing so, extinguish the Treasurer's call-in power.

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## A: WHEN DOES A PROPOSED BUSINESS INVESTMENT REQUIRE APPROVAL?

See also the *Overview, Key Concepts, National Security and Fees* Guidance Notes.

Under Australia's foreign investment framework, foreign persons must notify the Treasurer before taking a notifiable action or a notifiable national security action. Some notifiable actions are also significant actions. A foreign person must not take a notifiable and significant action, or a notifiable national security action, until they have received foreign investment approval for that proposed action.

A foreign person may be taking a notifiable and significant action when investing into an Australian business, corporation or trust. Where the investment is in a national security business, the action may be a notifiable national security action.

A foreign person must apply for foreign investment approval before taking a notifiable and significant action, or a notifiable national security action<sup>1</sup>. Applications are submitted electronically on the [Foreign Investment Review Board \(FIRB\) website](#), and are supported by further guidance (see, for example, the FIRB application checklist). A fee is payable for all foreign investment applications.

If the proposed investment is a notifiable and significant action, it will be screened for foreign investment approval under the national interest test. If the proposed investment is a notifiable national security action, and is not also a significant action, it will be assessed under the narrower national security test. Regardless of which test the investment is assessed under, the foreign person must not take the action until they have received foreign investment approval.

Significant penalties (including infringement notices, civil and criminal penalties) may apply for breaches of the foreign investment law.

### Exemptions from requiring approval

Part 3 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) provides a number of exemptions, where a business investment may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer. See the *Key Concepts* Guidance Note.

A foreign person is also not obliged to notify the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action or notifiable national security action. However, under the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) the Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken (even if they do not inform the Treasurer about it).

Certain foreign investments that are not notifiable actions or notifiable national security actions may be reviewable national security actions. Where a reviewable national security action is not notified to the Treasurer (including as a result of one of these exemptions), the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily notifying of reviewable national security actions. Guidance on investment areas that may raise

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1 Foreign persons who want to minimise the risk of an asset they are interested in purchasing being sold to someone else before they receive foreign investment approval can enter into a contract as long as the contract is conditional on receiving foreign investment approval.

national security concerns, and where investors are therefore encouraged to voluntarily notify, are outlined in the *National Security* Guidance Note.

## B: ACQUISITIONS OF SECURITIES IN ENTITIES

See also the *Key Concepts* Guidance Note.

### Australian entities

Foreign persons must notify the Treasurer before acquiring a substantial interest (generally at least 20 per cent) in an Australian entity (an Australian corporation or an Australian unit trust) that is valued above the relevant monetary threshold. See section 47 of Act.

The Treasurer's powers (with respect to significant actions) are triggered where there would be or has been a change in control of the entity as a result of the action, or where the foreign person already controls the entity immediately before the action. See section 40 of the Act.

For an acquisition of interests in securities in an entity or a substantial interest in an Australian entity, the monetary thresholds are based on the total asset value or the total issued securities value for the entity, whichever is higher. See section 51 of the Act.

The relevant monetary threshold for most business investments is currently \$281 million. A higher threshold of \$1,216 million applies for private investors from certain free trade agreement partners<sup>2</sup>. However, for these investors the \$281 million threshold still applies for investments into sensitive businesses.

- Sensitive businesses include those operating in the sectors of transport, telecommunications, media (additional requirements also apply to Australian media businesses (see [media businesses](#) below), defence and military related industries and the extraction of uranium or plutonium or the operation of nuclear facilities. See section 22 of the Regulation.

Where the foreign person already holds a substantial interest in an Australian entity, acquiring additional interests in the entity will also require approval if the relevant monetary threshold is met with respect to the action. However, the foreign person will not need to apply for approval where they are only proposing to acquire additional interests in securities in an existing wholly-owned subsidiary, for example, by way of capital injection.

### Agribusinesses

See also the *Agriculture* and *Key Concepts* Guidance Notes.

Different thresholds apply to acquisitions of interests in an Australian entity that is an agribusiness. Foreign persons must notify the Treasurer and obtain approval before acquiring a direct interest (generally at least 10 per cent, or in a position of control) in an Australian entity that is an agribusiness if the relevant monetary threshold is met.

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2 The certain FTA partners are: Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea, the United States of America, and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, and Vietnam). To be eligible for these thresholds, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of the subsidiary's jurisdiction.

Where the foreign person already holds a direct interest in an Australian entity that is an agribusiness, acquiring additional interests in the entity will also require approval if the relevant monetary threshold test is met with respect to the action.

The relevant monetary thresholds depend on whether or not the foreign person is a foreign government investor. See sections 50 and 56 of the Regulation.

- For foreign government investors, a \$0 threshold applies;
- For private investors (except those from Chile, New Zealand and the United States, who are exempt from the special rules for agribusiness investments<sup>3</sup>), a cumulative \$61 million threshold applies. In working out if this cumulative threshold is met, sum up:
  - the consideration for the current proposed investment;
  - the value of any other interests currently held in the agribusiness by the foreign person and their associates (using a reasonable assessment of the current market value of those interests); and
  - the value of any other interests previously acquired from the agribusiness (for example, this may include machinery or equipment), and still held, by the foreign person and their associates (using a reasonable assessment of the current market value of those interests).
- For private investors from Chile, New Zealand and the United States, the significant and notifiable actions specific to agribusiness do not apply (see section 40 of the Regulation). An action taken by investors from these countries will generally only be a notifiable and significant action if it is a significant or notifiable action for general business investments, which often involve the higher test of the acquisition of a substantial interest and a greater monetary threshold of \$1,216 million.

### Land entities

See also the *Agriculture, Commercial Land, and Residential Land* Guidance Notes.

An acquisition of securities in a land entity may give rise to multiple notifiable or significant actions, including acquiring an interest in Australian land and acquiring a substantial interest in an Australian entity.

Foreign persons generally require foreign investment approval before acquiring 10 per cent or more in a listed land entity, or 5 per cent or more in an unlisted land entity. Foreign persons may also require foreign investment approval before acquiring a lesser interest in a land entity if the foreign person will be in a position to influence or participate in the central management and control of the land entity, or to influence, participate in or determine the policy of the land entity (see section 37 of the Regulation).

‘Land entity’ means an agricultural land corporation, an agricultural land trust, an Australian land corporation or an Australian land trust. See section 13 of the Regulation.

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<sup>3</sup> To be eligible for this exemption, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will not be eligible.

For acquisitions of securities in an agricultural land corporation or an agricultural land trust, the relevant monetary threshold depends on the nationality of the foreign person and whether the foreign person is a foreign government investor.

- For foreign government investors, a \$0 threshold applies (see section 52(1)(d) of the Regulation).
- For private investors (except those from Chile, New Zealand, Thailand and the United States), a cumulative \$15 million threshold applies (see section 52(3) of the Regulation).
  - To meet the cumulative threshold, the total value of all interests in agricultural land in Australia held by the foreign person (and their associates) and the consideration for the acquisition of the interest in the agricultural land together must exceed \$15 million.
- For private investors from Chile, New Zealand and the United States, a threshold of \$1,216 million applies (see sections 40(3), 40(4) and 52(5) of the Regulation).
- For Thai investors who propose to acquire agricultural land which is being used wholly and exclusively for a primary production business, a threshold of \$50 million applies (see section 52(5) of the Regulation).

For acquisitions of securities in an Australian land corporation or Australian land trust, the relevant monetary threshold is based on the value of the interest in the land being acquired. Given that the interest in the land being acquired is the securities in the Australian land corporation or Australian land trust, the value of the land is the total consideration payable for the securities in the land entity and not the total value of the physical land that the Australian land entity holds.

- For foreign government investors, a \$0 threshold applies.
- For private investors, a \$281 million threshold applies. However, a lower threshold applies in the following circumstances:
  - The land entity has interests in low threshold (sensitive) land, in which case the threshold is \$61 million. See section 52(6) of the Regulation.
  - The total value of interests in residential land, vacant commercial land and mining and production tenement is 10 per cent or more of the value of the total assets of the land entity, in which case the threshold is \$0. See section 52(1)(e) of the Regulation.
- For investors from certain free trade agreement partners<sup>4</sup>, a higher threshold of \$1,216 million applies. However, the \$61 million threshold still applies to Hong Kong and Peruvian investors where the land entity has interests in sensitive land.

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4 The certain FTA partners are: Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea, the United States of America, and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, and Vietnam).

Where the foreign person already holds 5 per cent or more in an unlisted land entity, or 10 per cent or more in a listed land entity, acquiring additional interests in that entity will also require approval if the relevant monetary threshold test is met with respect to the action.

### Media businesses

Foreign persons generally require foreign investment approval before acquiring an interest of 5 per cent or more in an entity that wholly or partly carries on an 'Australian media business', regardless of value. Where the foreign person already holds 5 per cent or more in an Australian media business, acquisitions of additional interests in that entity will also require approval.

From 1 January 2021, the definition of 'Australian media business' includes an Australian business that publishes daily newspapers, broadcasts TV or radio (including websites from which these may be accessed), or operates an 'electronic service' (see section 13A of the Regulation). The definition captures traditional media businesses as well as media businesses that exclusively publish or broadcast online.

An Australian business that operates an 'electronic service' is considered to be an Australian media business if the electronic service:

- delivers content over the internet;
- operates wholly or partly for the purpose of 'serving Australian audiences';
- meets the content test (set out below); and
- meets the threshold test (set out below).

To satisfy the content test, the content delivered by the electronic service must be at least one of the following kind:

- 1) The content must consist predominately of news, which means content that reports, investigates or explains:
  - issues or events that are relevant in engaging Australians in public debate and in informing democratic decision making; or
  - current issues or events of public significance for Australians at a local, regional or national level; or
  - current issues or events of interest to Australians.

This definition of news aims to include content that relates to Australia's democratic processes or issues of broad interest to Australians. It is intended to capture journalism and reporting about politics, current affairs, business and major events, such as sports competitions or cultural events. Examples of content that it is not intended to cover include product reviews, academic publications, lifestyle issues unrelated to public policy, and entertainment issues unrelated to public policy.

- 2) Otherwise, the content must be delivered wholly or predominantly by way of programs of audio or video content.

Examples include podcasts and TV streaming services.

To satisfy the threshold test, it must be reasonable to conclude that the average daily audience for the electronic service exceeds 10,000 people. This test is designed to exclude small electronic services from the definition of an Australian media business.

- For traditional media, the 10,000 threshold figure applies to the average daily numbers of viewers of a broadcast TV service owned by the business, the average daily number of listeners to a broadcast radio service owned by the business, or the average daily readership of a newspaper owned by the business.
- For an electronic service, the threshold figure applies, for example, to the average daily number of unique page views of a news website owned by the business, the average daily number of listeners to a podcast owned by the business, or the average daily number of viewers of a TV streaming service owned by the business.
- For a daily podcast, the 10,000 threshold figure applies to the average number of listeners to each episode (whether streamed or downloaded). For a weekly podcast, it applies to the average number of listeners to each episode, divided by seven.

#### **Example 1: Online news**

XYZ Ltd is a digital media company that owns two websites targeting readers in Australia and New Zealand: *Sweaty Gamer*, which provides written reviews of computer games, and is typically accessed by more than 30,000 users a day; and *The Daily Planet*, which provides content on politics, international affairs and gossip from the entertainment industry. While some of *The Daily Planet*'s news articles have gone viral and been viewed by as many as 20,000 people (as measured in unique page views), its daily audience is typically less than 7,000.

Foreign investor Big Cheese Pty Ltd is seeking to acquire a 25 per cent interest in XYZ Ltd. Big Cheese does not require foreign investment approval, because neither of XYZ Ltd's websites (each an electronic service) satisfies both the content and threshold tests for an electronic service. *Sweaty Gamer* satisfies the threshold test but not the content test. *The Daily Planet* satisfies the content test – given its content is predominantly news – but not the threshold test.

Foreign persons proposing to acquire interests in an Australian entity that carries on a business in the media sector (and therefore a sensitive business under section 22 of the Regulation) may also be subject to other notification requirements under the Act. See above 'Acquisitions of securities in entities – [Australian entities](#)'.

#### **National security businesses**

See also the *National Security* Guidance Note.

Foreign persons must notify the Treasurer and obtain approval before acquiring a direct interest in an entity (a corporation or a unit trust) that carries on a national security business, regardless of the value of the investment. Such investment is a notifiable national security action.

Where the foreign person already holds a direct interest in an entity that carries on a national security business, acquisitions of additional interests in the entity will also require approval.



### Foreign government investors

Where the foreign person is a foreign government investor, additional rules apply with respect to acquisitions of securities in entities.

#### *Investing in an Australian entity*

Foreign government investors generally require foreign investment approval before acquiring a direct interest in an Australian entity, regardless of the value of the investment. See section 56(1)(a) of the Regulation.

Where the foreign government investor already holds a direct interest in an Australian entity, acquisitions of additional interests in the entity will also require approval.

#### **Example 2: Legal arrangement**

Sunset Air is an airline carrier and foreign government investor. Sunset Air proposes to acquire a 5 per cent interest in Australian Air, an Australian airline carrier. As part of the acquisition, the airline carriers also decide to enter into a legally binding strategic alliance agreement in relation to the conduct of their businesses. As the proposed interest is at least 5 per cent, and there is a proposed legal arrangement relating to the business of Australian Air, these actions are considered to involve the acquisition of a direct interest in an Australian entity and are significant actions and notifiable actions under the Act.

Section 16(b) of the Regulation is not intended to capture ordinary goods or services provision agreements on normal commercial terms. For example, if Sunset Air was to enter into a commercial agreement with Australian Air Catering, for the provision of catering services to Sunset Air on normal commercial terms, this would not be considered a legal arrangement relating to the business for the purposes of ascertaining whether the action is a direct interest, and therefore not a significant action or a notifiable action.

#### **Example 3: Position to influence**

A foreign government investor is acquiring a 2 per cent interest in an Australian entity. As part of the agreement entered into with the entity, the foreign government investor will be entitled to appoint a director to the four member board. While the interest being acquired is less than 10 percent, the acquisition is considered the acquisition of a direct interest in an Australian entity as the agreement includes the ability of the foreign government investor to participate or influence the central management of the business and, therefore, the acquisition of the interest is a notifiable action and a significant action.

### **Exceptions**

There are exceptions to the characterisation of actions as significant actions or notifiable actions for foreign government investors under section 56(1)(a) of the Regulation. If one of the exceptions apply, a foreign government investor will not be regarded to be taking a significant or notifiable action for the purposes of section 56(1)(a) of the Regulation (that is, the exceptions apply to this provision only). These exceptions do not affect the characterisation of actions as significant actions, notifiable actions or notifiable national security actions under other provisions of the Act or Regulation, which the foreign government investor remains subject to.

Subsection 56(3) of the Regulation exempts the mere establishment by a foreign government investor of a *new wholly-owned subsidiary* from being a significant action and a notifiable action. However, if the new wholly-owned subsidiary then takes an action to acquire a direct interest in an Australian entity, this action will be a significant and notifiable action.

Subsection 56(4) also provides an exception for acquiring *non-material interests in businesses* that are not sensitive businesses or national security businesses that meet certain conditions, including the entity's asset value being below a certain threshold. This exception is only applicable where the direct interest is being acquired in securities in a foreign entity. This exception generally covers circumstances where a foreign government investor acquires an interest in an Australian entity indirectly through the act of acquiring another foreign company that has Australian interests. For example, this is intended to provide some relief from notifiable and significant action rules for global offshore transactions that have foreign government investor holdings and are below the relevant threshold. See '[Offshore acquisitions and takeovers](#)' below.

Subsection 56(5) of the Regulation provides an exception for foreign government investors who, as part of a consortium, initially acquire a direct interest in a *consortium entity* if the entity is established for the purposes of making a later acquisition that is a significant action and a notifiable action. In such instance, the later acquisition by the consortium entity will be a significant action and a notifiable action. However, if the later acquisition is not a significant action and notifiable action (including as a result of an exemption under the Regulation), then subsection 56(5) does not apply.

#### ***Investing in a mining, production or exploration entity***

See also the *Mining* Guidance Note.

Foreign government investors generally require foreign investment approval before acquiring an interest of 10 per cent or more in securities in a mining, production or exploration entity, regardless of the value of the investment. See section 56(1)(c)(ii) of the Regulation.

- A mining, production or exploration entity means an entity where the total value of legal or equitable interests in tenements held by the entity, or any subsidiary of the entity, exceeds 50 per cent of the total asset value for the entity. See section 5 of the Regulation.

Where the foreign government investor already holds an interest of 10 per cent in a mining, production or exploration entity, generally acquisitions of additional interests will also require approval.

#### **Passive increases**

From 1 January 2021, a foreign person may be required to notify the Treasurer and obtain approval in certain circumstances where their percentage of interests in an entity have increased, even where they did not acquire additional interests in securities in the entity (passive increases – see section 18A of the Act). Passive increases in a foreign person's securities holdings may occur in a number of situations, including:

- On- and off-market share buybacks;
- Capital reductions;

- Cancellation of securities; and
- Trust redemptions.

Passive increases in securities holdings may result in a foreign person taking a significant action or notifiable action under the Act, or both. In particular, passive increases are notifiable actions (or notifiable national security actions) and must be notified to the Treasurer within 30 days where they cause any of the following outcomes:

- a foreign person starts to hold a direct interest in an Australian entity that is an agribusiness, and the threshold test is met in relation to the entity or business;
- a foreign person starts to hold a substantial interest in an Australian entity, and the threshold test is met in relation to the entity;
- a foreign person starts to hold a direct interest in a national security business;
- a foreign person starts to hold a direct interest in an entity that carries on a national security business;
- a foreign person starts to hold 5 per cent in an unlisted Australian land entity, and the threshold test is met in relation to the land entity; or
- a foreign person starts to hold 10 per cent in a listed Australian land entity, and the threshold test is met in relation to the land entity.

For foreign government investors, in addition to the above, passive increases are also notifiable when the foreign government investor starts to hold a direct interest in an Australian entity or Australian business, or starts to hold 10 per cent in securities in a mining, production or exploration entity.

Any passive increases beyond the holdings specified above may be significant actions (or reviewable national security actions), but not notifiable actions or notifiable national security actions. This means that a foreign person is not obliged to notify the Treasurer that they are proposing to take a significant action or a notifiable national security action, but may choose to do so where they want the certainty offered by a no objection notification.

If a passive increase is notifiable, a foreign person must notify the Treasurer within 30 days after the passive increase has occurred (see item 7 in section 18A(4) of the Act). Failure to notify is an offence and may result in a civil penalty. For example, in the event of an off-market buyback, a person must notify within 30 days of the company buying back its shares. In the event of an on-market buyback, the 30 day period would commence from the final buyback (for example, as indicated on the ASX lodgement of a final share buy-back notice). In the event of an equal or selective capital reduction, the 30 day period would commence from when the company reduces the share capital.

**Example 4**

Caitlin is a foreign person who holds 25 per cent of Crash Band Co. Crash Band Co is an Australian corporation carrying on an Australian business with a total share value of \$600 million. Crash Band Co

undertakes a share buyback and Caitlin does not participate. After the buyback is finalised, Caitlin holds 26.5 per cent of Crash Band Co.

Caitlin has not taken a notifiable action because she held a substantial interest in Crash Band Co prior to the buyback (i.e. item 2 in section 18A(4) of the Act does not apply). However, Caitlin may be taking a significant action.

#### **Example 5**

Nick is a foreign person who holds 18 per cent of Company X. Company X is an Australian corporation carrying on an Australian business. Company X undertakes an on-market share buyback and Nick does not participate. After the buyback is finalised, Nick holds 21 per cent of Company X. Nick has taken a notifiable action. He is required to notify the Treasurer within 30 days after the Australian Securities Exchange lodgement of a final share buy back notice.

### **Offshore acquisitions and takeovers**

See also the *Key Concepts* Guidance Note.

For all foreign persons, acquiring an interest in a foreign entity may be subject to Australia's foreign investment review framework where the action has a connection to Australia (for example, if the foreign entity holds relevant Australian assets).

The tracing rules (see the *Key Concepts* Guidance Note) are a key consideration when determining whether an offshore acquisition is a notifiable action, notifiable national security action, significant action, or reviewable national security action. See also section 19 of the Act and section 48 of the Regulation.

- Relevantly, section 19 of the Act provides that substantial interests in corporations and trusts are traced back through the ownership of relevant entities. This applies where higher entities are in a position to control the voting power of, or hold interests in shares in a corporation or interests in trusts of, the lower entities.
- The tracing of interests apply for the purposes of determining whether an action taken by a foreign government investor is a significant action or notifiable action (to the extent those actions relate to the acquisition of an interest in an entity).
- The tracing provisions also apply for the purposes of determining whether an action is a notifiable national security action under section 55B of the Act or a reviewable national security action under section 55D of the Act (to the extent those actions relate to the acquisition of an interest in an entity).
- The tracing provisions do not apply to acquisitions of assets or Australian land, other than the acquisition of interests in land entities.
- For non-government foreign investors, the tracing provisions do not apply to acquisitions of a direct interest in an agribusiness.
  - This ensures that acquisitions of these interests which are offshore and remote from Australia are not notifiable actions under section 47(2)(a) or significant actions under

sections 40(2)(a) or 41(2)(a). However, this does not prevent acquisitions from being regulated by the Act for other reasons. For example, an acquisition of an agribusiness may also be a significant action as an acquisition of securities in an entity.

- For non-government foreign investors, the tracing provisions do not apply for the purposes of determining notifiable actions under section 47(2)(b) of the Act, that is the acquisition of a substantial interest in an Australian entity. Accordingly, offshore acquisitions of securities in a foreign entity may be significant actions but not notifiable actions.
  - In many cases, where the target entity is an offshore entity an acquiring entity may not know that the target entity holds securities in an Australian entity. This exemption to the tracing rules ensures that these acquisitions, which are offshore and remote from Australia, are not notifiable actions. They may still be significant actions and the Treasurer may exercise powers under the Act.
  - For example, if a non-government foreign investor is acquiring a substantial interest in the foreign target entity it may be taken to be acquiring an interest in the Australian subsidiaries of the foreign target entity and therefore be a significant action under section 40 of the Act.

The implications of the tracing rules on notification requirements for offshore acquisitions are explained further below.

#### **Land entities**

Offshore acquisitions of interests in securities of an Australian land entity are notifiable and significant actions if the relevant monetary thresholds are met and after the acquisition, the foreign person, alone or together with one or more associates, holds an interest of:

- 5 per cent or more in the land entity where the land entity is unlisted; or
- 10 per cent or more in the land entity where the land entity is listed on a stock exchange; or
- any percentage in a listed or unlisted entity and the foreign person is in a position to influence or participate in the central management and control of the land entity, or to influence, participate in or determine the policy of the land entity (see section 37 of the Regulation).

See also Acquisitions of securities in entities – ‘[Land entities](#)’ above.

#### **National security business**

Offshore acquisitions of a direct interest in an entity that carries on a national security business are notifiable national security actions. See section 55B of the Act.

#### **Foreign government investors**

For foreign government investors, offshore acquisitions of a direct interest in an Australian entity may be notifiable and significant actions (regardless of the value). See section 56(1)(a) of the Regulation.

If the tracing rules apply, an acquisition of an interest in an offshore entity or unincorporated limited partnership may be taken to be an acquisition of a direct interest in an Australian entity that is the subsidiary of the offshore target entity.

However, there is an exception in section 56(4) of the Regulation that may apply. To be covered by the exception (and thus constitute neither a significant action nor a notifiable action under section 56(1)(a) of the Regulation) the following conditions must all be met:

- the foreign government investor acquires a direct interest in an Australian entity by acquiring an interest in securities in a foreign entity;
- the Australian total asset value for the foreign entity is less than 5 per cent of the value of the global total assets of the entity;
- the Australian total asset value is less than \$61 million; and
- none of the assets taken into account in working out the Australian total asset value are assets of a 'sensitive business' or a 'national security business'.
  - A sensitive business is defined in section 22 of the Regulation.
  - A national security business is defined in section 8AA of the Regulation.

Notwithstanding this exception, foreign government investors must notify the Treasurer of the offshore acquisition if it meets the conditions of a notifiable action under section 47 of the Act.

**Example 6: Offshore acquisitions of a substantial interest in an Australian entity**

Foreign government investor State Corporation acquires a substantial interest in a European holding corporation that holds its interest in a wholly owned Australian subsidiary entity through a holding entity in Asia. Based on the tracing rules, the offshore acquisition of a substantial interest in the European holding corporation will also be an acquisition of a substantial interest in an Australian entity and thus, a significant action and notifiable action for the foreign government investor.

**Example 7: Offshore acquisition of a direct interest in an Australian entity**

Foreign government investor GovCo acquires a substantial interest in a European holding corporation EuroCo that has a direct interest in Australian entity AusCo. Based on the application of the tracing rules, the offshore acquisition by GovCo of a substantial interest in EuroCo will also involve an acquisition of a direct interest in AusCo. Therefore, GovCo will be acquiring a direct interest in an Australian entity (AusCo) and this will give rise to a significant action and notifiable action for GovCo.

***Other acquisitions – significant actions or reviewable national security actions***

A foreign person acquiring an interest in a foreign corporation takes a significant action under section 40 of the Act if:

- the foreign corporation holds relevant Australian assets (that is, land in Australia, including legal or equitable interests in that land or securities in an Australian entity) and carries on an Australian business, or is a holding entity of such a foreign corporation;
- the Australian assets or businesses of the target company are valued at more than the applicable monetary threshold value; and

- there would be a 'change in control' in the foreign corporation as a result of the acquisition, noting that the 'change in control' condition does not need to be met if the action is taken by a foreign person who already controls the entity immediately before the action is taken.

A foreign person is not obliged to notify the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action or a notifiable national security action. However, under the Act the Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken (even if they do not inform the Treasurer about it).

Acquiring an interest in a foreign corporation is a reviewable national security action under section 55D of the Act if a foreign person will acquire:

- a direct interest in an entity;
- be in a position, or more of a position to influence or participate in the central management and control of the entity; or
- be in a position to influence, participate in or determine the policy of the entity,

and the entity carries on an Australian business or is the holding entity of such a corporation or an Australian unit trust and the action is not a significant action, a notifiable action or a notifiable national security action.

A foreign person is not obliged to notify the Treasurer that they are proposing to take a reviewable national security action. However, under the Act the Treasurer may review an action of this kind if the Treasurer considers that the action may pose a national security concern (see section 66A of the Act). The Treasurer has the power to make a range of orders in relation to a reviewable national security action that a person is proposing to take or has already taken (even if they do not inform the Treasurer about it).

## C: ACQUISITIONS OF INTERESTS IN BUSINESSES

See also the *Key Concepts, Agriculture and National Security* Guidance Notes.

Foreign persons generally require foreign investment approval before acquiring a certain level of interests in an Australian business (e.g. assets of an Australian business) where:

- the acquisition involves a direct interest in an agribusiness;
- the acquisition involves an interest of 5 per cent or more in an Australian media business;
- the acquisition involves a direct interest in a national security business; or
- the foreign person is a foreign government investor.

Generally, a direct interest in a business is an interest of at least 10 per cent in the business but an interest of less than 10 per cent in a business may also constitute a direct interest if the person has entered a legal arrangement relating to the businesses of the person or has a certain level of control of the business (see section 16 of the Regulation).

Relevantly, a person acquires an interest of a specified percentage in a business if the person starts to hold an interest of that percentage in the business (see section 6 of the Regulation). A

person holds an interest of a specified percentage (for example, direct interest or 5 per cent interest in the case of a media business) in a business if the value of the interests in assets of the business held by the person, alone or together with one or more associates of the person, is that specified percentage of the value of the total assets of the business (see the definition of 'interest' under section 5 of the Regulation).

There are also other actions in relation to Australian businesses that are significant actions, for example to acquire interests in assets of an Australian business, or to enter or terminate a significant agreement with an Australian business. See section 41 of the Act.

### Agribusinesses

See also the *Key Concepts and Agriculture Guidance Notes*.

Foreign persons generally require foreign investment approval before acquiring a direct interest in an Australian business that is an agribusiness if the relevant monetary threshold is met. See sections 41(2)(a) and 47(2)(a) of the Act.

Where the foreign person already holds a direct interest in the agribusiness, acquiring additional interests in the business will also require approval if the relevant monetary threshold test is met with respect to the action.

The relevant monetary thresholds depend on whether or not the foreign person is a foreign government investor. See sections 50 and 56 of the Regulation.

- For foreign government investors, a \$0 threshold applies;
- For private investors (except those from Chile, New Zealand and the United States, who are exempt from the special rules for agribusiness investments<sup>5</sup>), a cumulative \$61 million threshold applies. In working out if this cumulative threshold is met, sum up:
  - the consideration for the current proposed investment;
  - the value of any other interests currently held in the agribusiness by the foreign person and their associates (using a reasonable assessment of the current market value of those interests); and
  - the value of any other interests previously acquired from the agribusiness (for example, this may include machinery or equipment), and still held, by the foreign person and their associates (using a reasonable assessment of the current market value of those interests).
- For private investors from Chile, New Zealand and the United States, the significant and notifiable actions specific to agribusiness do not apply (see section 40 of the Regulation). An action taken by investors from these countries will generally only be a notifiable and significant action if it is a significant or notifiable action for general business investments, which often involve the higher test of the acquisition of a substantial interest and a greater monetary threshold of \$1,216 million.

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<sup>5</sup> To be eligible for this exemption, the immediate acquirer must be an entity formed in one of these countries. An investor acquiring through a subsidiary incorporated in another jurisdiction will not be eligible.



### Media businesses

Foreign persons generally require foreign investment approval before acquiring an interest of 5 per cent or more in a business that wholly or partly carries on an 'Australian media business', regardless of value. Where the foreign person already holds 5 per cent or more in an Australian media business, acquisitions of additional interests in that business will also require approval.

See the 'Media business' section above in this guidance note.

### National security businesses

See also the *National Security* Guidance Note.

Foreign persons generally require foreign investment approval before acquiring a direct interest in business that carries on a national security business, regardless of the value of the investment. Such investment is a notifiable national security action. See section 55B of the Act.

Where the foreign person already holds a direct interest in a business that carries on a national security business, acquisitions of additional interests in the business will also require approval.

### Foreign government investors

Additional rules apply where the foreign person is a foreign government investor. Foreign government investors must notify the Treasurer and obtain approval before acquiring a direct interest in an Australian business, regardless of the value of the investment. See section 56(1)(a) of the Regulation.

Where the foreign government investor already holds a direct interest in an Australian business, acquisitions of additional interests in the business will also require approval.

### Other acquisitions – significant actions or reviewable national security actions

It is a significant action for a foreign person to acquire interests in the assets of an Australian business if the total consideration for the acquisition is more than the applicable monetary threshold value, and there would be a 'change in control' in the Australian business as a result of the acquisition. The 'change in control' condition does not need to be met if the action is taken by a foreign person who already controls the business immediately before the action is taken. See section 41 of the Act.

The monetary screening threshold for acquisitions of interests in the assets of an Australian business is based on the total consideration for the acquisition. The relevant monetary threshold for most investments is \$281 million. A higher threshold of \$1,216 million applies to investors from certain free trade agreement partners<sup>6</sup> – however, the \$281 million threshold still applies for investments into sensitive businesses. See section 51 of the Regulation.

- Sensitive businesses include those operating in the sectors of transport, telecommunications, media (tighter requirements also apply to Australian media businesses), defence and military related industries and the extraction of uranium or plutonium or the operation of nuclear facilities. See section 22 of the Regulation.

<sup>6</sup> The certain FTA partners are: Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea, the United States of America, and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, and Vietnam).

A foreign person is not obliged to notify the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action. However, under the Act the Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken (even if they do not inform the Treasurer about it).

A foreign person acquiring an interest in the assets of an Australian business is taking a reviewable national security action under the Act if the action is not otherwise a significant action, notifiable action or notifiable national security action, and if as a result of the action:

- a foreign person acquires a direct interest in the Australian business (and the acquisition is not a significant action, notifiable action or notifiable national security action); or
- a foreign person will be in a position, or more of a position, to influence or participate in the central management and control of the Australian business; or
- a foreign person will be in a position, or more of a position, to influence, participate in or determine the policy of the Australian business.

A foreign person is not obliged to notify the Treasurer that they are proposing to take a reviewable national security action. However, under the Act the Treasurer may review an action of this kind if the Treasurer considers that the action may pose a national security concern (see section 66A of the Act). The Treasurer has the power to make a range of orders in relation to a reviewable national security action that a person is proposing to take or has already taken, even if they do not inform the Treasurer about the action.

## **D: STARTING A BUSINESS IN AUSTRALIA**

### **Starting a national security business**

See also the *National Security* Guidance Note.

Foreign persons must notify the Treasurer before starting a national security business if the action constitutes a notifiable national security action under section 55B(1)(a) of the Act.

### **Starting an Australian business**

Generally, a foreign person is not taking a notifiable action or a significant action when they start an Australian business (unless the foreign person is a foreign government investor, see further below), but they may be taking a reviewable national security action.

A foreign person is not obliged to notify the Treasurer that they are proposing to take a reviewable national security action. However, under the Act the Treasurer may call-in and review an action of this kind if the Treasurer considers that the action may pose a national security concern (see section 66A of the Act). The Treasurer has the power to make a range of orders in relation to a reviewable national security action that a person is proposing to take or has already taken, even if they do not inform the Treasurer about the action. A foreign person may voluntarily notify the Treasurer, and in doing so, extinguish the Treasurer's call-in power.

### **Foreign government investors**

Foreign government investors require foreign investment approval before starting a new Australian business (section 56(1)(b) of the Regulation).

A foreign person starts an Australian business if (see section 8B of the Act):

- the foreign person starts to carry on an Australian business; or
- for a foreign person that already carries on an Australian business—the business starts a new activity that:
  - is not incidental to an existing activity of the Australian business; and
  - is within a different Division under the *Australian and New Zealand Standard Industrial Classification (ANZSIC) codes* from the current activities of the Australian business.

However, a foreign person does not start an Australian business merely because the foreign person, alone or together with one or more persons, establishes a new entity:

- that carries on the same Australian business; or
- for the purposes of acquiring interests in assets of the same Australian business.

**Example 8: New Australian business**

A foreign government investor is operating an agricultural business in Australia. The investor decides to create a new subsidiary to begin operating an accommodation and food services business in rural Australia. As the new subsidiary will be operating a business that is within a different Division under the ANZSIC Codes, and is not incidental to the business already being conducted, this is considered to involve a proposal to start a new business and is therefore a notifiable and significant action.

**Example 9: Foreign government investors establishing a consortium entity**

A seven member consortium has two foreign government investors as members. The foreign government investors establish an entity on behalf of the consortium to provide local bus services in a large city. The foreign government investors who are members of the consortium already carry on businesses in Australia within the same Division of the ANZSIC Codes, so establishing the new entity is not treated as starting a new business and is neither a notifiable nor significant action.

***What is starting to carry on an Australian business?***

A foreign person will be considered to be starting to carry on an Australian business where they take actions that are required for commencing a new business, rather than merely making plans or acquiring information about starting a business.

Taking actions that are required for commencing a new business (thus, starting a new Australian business) includes actions such as:

- applying for an Australian Business Number;
- taking out a lease for business use;
- engaging employees;
- entering into business contracts; or

- applying for various licences or approvals that may be required – for example an exploration licence.

## E: EXEMPTION CERTIFICATES FOR BUSINESS ACQUISITIONS

See also the *Exemption Certificates* Guidance Note.

Foreign persons (including foreign government investors) seeking to make multiple acquisitions of interests in the assets of an Australian business and/or securities in an entity, including interests acquired through the business of underwriting, may apply for an *Business Exemption Certificate (Business EC)* under section 42 of the Regulation. An exemption certificate grants up-front approval for a program of acquisitions, without the need to seek separate individual approval (in the form of a no objection notification) for each investment.

### When is a Business EC appropriate?

An exemption certificate is a mechanism available to reduce the regulatory burden of foreign investment screening that would otherwise apply to each acquisition covered by a certificate. It can significantly streamline the approval process for those foreign persons seeking to make a number of investments.

Business ECs may be suitable for large investment funds, particularly those proposing to make low risk investments. It may also suit investors who may not have exact target acquisitions in mind when they seek approval but intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

Ultimately, the types of acquisitions likely to be eligible for a Business EC will be those that are unlikely to raise significant national interest issues – occasionally referred to as 'low risk' or 'low sensitivity' transactions. While this is not defined, it does not necessarily mean that acquisitions involving 'sensitive businesses' (pursuant to section 22 of the Regulation) are not eligible for an exemption certificate.

Whether a business is 'sensitive' or a proposed acquisition is low risk would be determined on a case-by-case basis and informed by Treasury and other government agencies responsible for assessing national interest factors. For example, acquisitions of businesses or assets in sectors likely to raise competition issues, or where the applicant already has significant interests identified, are unlikely to be covered by any Business EC.

### Who can apply for a Business EC?

Section 42 of the Regulation does not limit which foreign persons can apply for a Business EC. However, given that Business ECs are intended to facilitate low risk business transactions:

- Typically applications should be made by or on behalf of a corporate entity and not an individual.
- Foreign government investors are eligible to apply for a Business EC but the track record of the investor and the nature of their proposed investment (including the level of control or influence they might achieve over a business, industry or sector) will be carefully considered.
- It is unlikely that an exemption certificate will be granted to first time investors to Australia (for example, an investor with no prior investment activity in Australia). The character of the

investor is a key criterion in applying the national interest test, and this includes assessing the investor's track record in complying with Australian laws (for example, tax and company laws as well as the foreign investment review framework).

An application can be made on behalf of an entity or entities that already exist or an entity or entities that have not been established at the time of applying (for example, investment consortiums, subsidiaries or trusts), noting that sufficient details of the entity or entities must be provided in the application.

Applicants should refer to the FIRB application checklist to ensure that they provide the required information, noting that additional information may also be requested during the assessment stage.

Further, an applicant may seek to include future acquisitions by an acquired entity (for example, bolt-on acquisitions). This will likely only be appropriate where the bolt-on acquisitions fall within the target industry or business the applicant proposes to acquire interests in, and where they do not exceed the maximum level of interests and/or the consideration cap specified in the Business EC. Accordingly, if the Business EC is to capture bolt-on acquisitions the application will need to specify this and the nature of the likely bolt-on acquisitions.

### **Nationalsecurity**

Where a program of business investments may give rise to a notifiable national security action or a reviewable national security action, foreign persons can apply for a *National Security Exemption Certificate* under sections 43BA and 43BB of the Regulation.

A foreign person may apply for multiple exemption certificates (e.g. under sections 42 and 43BA of the Regulation) in a single application to ensure that they obtain cover across all of their proposed investments.

## **FURTHER INFORMATION**

Further information is available on the [FIRB website](#) or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

**Important notice:** This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.