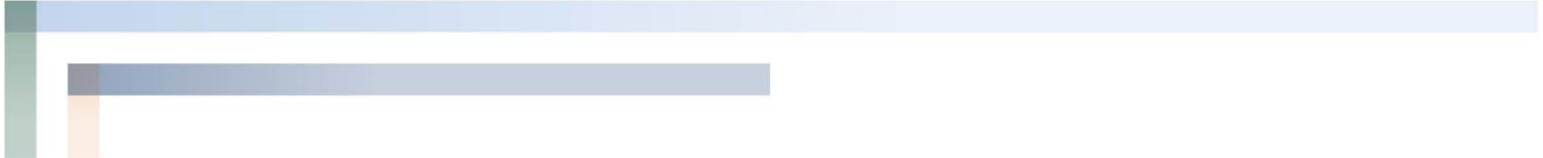




# Guidance Note 9

## Exemption Certificates

- This Guidance Note provides a general overview on exemption certificates under the foreign investment review framework. For further information on a particular type of exemption certificate, depending on the kinds of proposed investments to be covered under the certificate, see the *Agriculture, Commercial Land, Residential Land, Mining, Business Investments*, and *National Security* Guidance Notes.
- Exemption certificates are intended to reduce regulatory burden for foreign persons (including foreign government investors) by enabling them to obtain up-front approval for a program of lower-risk investments over a period of time, rather than having to apply for a no objection notification for each proposed investment.
- Entities in which foreign government investors hold a passive interest may also apply for an exemption certificate pathway that will have the effect of putting them in the same position as a 'foreign person' as opposed to a 'foreign government investor'.
- Applications for exemption certificates will be considered on a case-by-case basis against the national interest test or national security test, as the case requires.
- A person may apply for multiple exemption certificates for different types of interests (for example, land interests and securities interests) in a single application. An application for an exemption certificate will not be considered until the relevant application fee has been paid in full. For further information on fees, see the *Fees* Guidance Note.
- The Treasurer may vary or revoke an exemption certificate given to a person if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest (or national security, as the case requires). A variation may be made on application in writing from the recipient of the exemption certificate or on the Treasurer's own initiative. For further information on variations, see the *Key Concepts* Guidance Note.
- A foreign person who has had an application for an exemption certificate declined or narrowed to exclude certain interests can still seek a no objection notification for individual acquisition(s).



# Looking for more?

- A: When may an exemption certificate be applicable? ..... 3
- B: Effect of an exemption certificate ..... 3
- C: Types of exemption certificates ..... 4
- D: How will applications be assessed? ..... 8
- E: What information needs to be provided? ..... 11
- F: Timeframe and process ..... 12
- G: Conditions and compliance ..... 12
- Further information ..... 13

## A: When may an exemption certificate be applicable?

An exemption certificate is a mechanism available to minimise regulatory burden by enabling foreign investors to obtain approval for a program of investments instead of a separate approval for each investment. It is intended for foreign persons with a high volume of investments. Generally, a certificate will not be granted where the number of likely acquisitions is small and it would be reasonable for the foreign person to notify the acquisitions separately.

A certificate will generally specify the maximum total and individual value of interests that can be acquired as well as the period during which acquisitions can be made. Exemption certificates are generally issued for 12 months for first time exemption certificate holders. Longer durations are considered on a case-by-case basis for investors that have a demonstrated compliance history with the foreign investment framework.

If a foreign person does not utilise the full monetary limit of an exemption certificate, the Treasurer may consider allowing the remaining amount to be 'rolled over' to a future exemption certificate, effectively lowering the fee of a future application. This would be assessed on a case-by-case basis and roll over amounts would likely need to be more than the relevant fee constant. For more information, see the *Fees* Guidance Note.

## B: Effect of an exemption certificate

An exemption certificate is a type of certificate given by the Treasurer (or delegated decision-maker) that specifies an interest or an interest of a kind that, if acquired by a foreign person, does not give rise to a significant action, notifiable action, notifiable national security action, and/or reviewable national security action. The certificate may also specify conditions that are required to be complied with.

The Treasurer is not able to 'call-in', as a reviewable national security action, an investment which has been, or could be, made in reliance on an exemption certificate that covers that action. In determining whether the Treasurer's power to 'call-in' a particular investment made in reliance on an exemption certificate has been extinguished, regard will be had as to whether an investor has satisfied the relevant reporting requirements of the certificate, such that it is clear the acquisition is permissible and was made under the exemption certificate.

### Example 1

SusanCo, a non-government foreign investor, applies for, and is issued with, a land exemption certificate under section 58 of the Act. SusanCo makes two investments within the validity period of the exemption certificate.

For the first investment, SusanCo purchases a title of developed commercial land for consideration of \$400 million in reliance on the exemption certificate. The acquisition would have been a notifiable and significant action, but for the exemption certificate, so it cannot be 'called-in'.

For the second investment, SusanCo purchases another title of developed commercial land for a consideration of \$100 million. As the acquisition is not a notifiable or significant action (as it does not meet the monetary screening threshold), it is not made in reliance on the exemption certificate. This second investment may be subject to the Treasurer's 'call-in' power as it is not an acquisition to which the exemption certificate relates.

SusanCo could have extinguished the Treasurer's 'call-in' power with respect to her second investment by also applying for a reviewable national security action exemption certificate under section 43BB of the Regulation and satisfying the relevant reporting requirements of the certificate.

As with no objection notifications, the Treasurer's last resort power will be available for actions for which an exemption certificate has been given. For further information on the Treasurer's 'call-in' power and last resort power, see the *National Security* Guidance Note.

## C: Types of exemption certificates

A foreign person (including a foreign government investor) may apply for multiple types of exemption certificates for different types of interests in a single application (e.g. businesses/entities exemption certificate, land exemption certificate, and national security exemption certificate) – in effect enabling an investor to obtain an exemption across all of its proposed actions. Below is a list of exemption certificates a person may apply for under the foreign investment review framework.

### Business and entities

A foreign person may apply for an exemption certificate under section 42 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) if they are proposing to acquire one or more kinds of interests in the assets of an Australian business or the securities of an entity, including interests acquired through the business of underwriting.

For further information, see the *Business* Guidance Note.

### Certain interests in exploration tenements, and interests in mining, production or exploration entities

A foreign person may apply for an exemption certificate under section 43 of the Regulation if they are proposing to acquire interests in exploration tenements, and/or interests in mining, production or exploration entities.

For further information, see the *Mining* Guidance Note.



## Land

A foreign person may apply for an exemption certificate under section 58 of the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) for a program of acquisitions of one or more kinds of interests in Australian land.

For further information, see the following guidance notes:

- *Agriculture* Guidance Note
- Commercial Land Guidance Note
- Residential Land Guidance Note
- *Mining* Guidance Note

### Residential land

There are several types of exemption certificates which cover certain kinds of residential land, including those in the below list.

- A foreign person may apply for an exemption certificate under section 59 of the Act to acquire an established dwelling only in limited circumstances, see the *Residential Land* Guidance Note.
- A foreign person may apply for an exemption certificate under section 43B of the Regulation to acquire residential land other than an established dwelling (for example, vacant land or near-new dwelling).
- A property developer may apply for an exemption certificate under section 57 of the Act to sell new dwellings in a development to a foreign person.
- A property developer may apply for an exemption certificate under section 43A of the Regulation to sell near-new dwellings in a development to a foreign person.
- Applicants may apply for one or more types of exemption certificates, where applicable. For further information, see the *Residential Land* Guidance Note.

## National security actions

A foreign person may apply for an exemption certificate under section 43BA of the Regulation in relation to actions that would otherwise be notifiable national security actions. A foreign person may apply for an exemption certificate under section 43BB of the Regulation in relation to actions that would otherwise be reviewable national security actions.

For further information, see the *National Security* Guidance Note.

## Example 2

FarmCo, a foreign person, is seeking to acquire a number of agricultural land parcels over the next 12 months for the purpose of running a primary production business with a total consideration of \$40 million. FarmCo may apply for a land exemption certificate under section 58 of the Act.

If there were already existing Australian businesses operating on the land, FarmCo may also be acquiring interests in a business or assets of a business. In such circumstances, FarmCo may apply for a land exemption certificate under section 58 of the Act and a business exemption certificate under section 42 of the Regulation.

## Example 3

MobileCo is a foreign person who wants to make a \$100 million program of acquisitions of Australian land (in particular, vacant commercial land) for development. As Australian land may also be national security land, MobileCo applies for a land exemption certificate under section 58 of the Act and a national security exemption certificate under section 43BA of the Regulation.

## Example 4

CentralCo, a foreign person, seeks to undertake a program of acquisitions of securities in entities in Australia. Some of the target entities may also be land entities under section 13 of the Regulation. As such, CentralCo submits an application for a land exemption certificate under section 58 of the Act and a business/entities exemption certificate under section 42 of the Regulation.

## Passive foreign government investors

From 1 January 2021, an exemption was included in the Regulation to provide that certain entities in which foreign government investors hold a passive interest will no longer meet the definition of a foreign government investor.

The exemption in section 17(2) of the Regulation operates as an exemption to the definition of foreign government investor in subparagraphs 17(1)(b)(ii), (c)(ii) or (d)(ii) or section 17(1)(e) of the Regulation – i.e. where investors are only captured by the definition of a foreign government investor by virtue of multiple foreign government investors, together with associates, holding an 'aggregate substantial interest' of 40 per cent or more in an entity.

In order for the exemption in section 17(2) of the Regulation to apply the following conditions must also be met:

- the corporation, trustee of a unit trust or general partner of a limited partnership operates a scheme in which people make contributions to acquire rights to benefits produced by the scheme and the contributions are pooled to produce financial benefits or benefits consisting of rights or interests in property for its members;
- no individual member is able to influence any individual investment decisions, or the management of any individual investments under the scheme; and

- each foreign government or separate government entity that holds an interest in the corporation, unit trust or limited partnership holds the interest only as a member of the scheme.

For more information about this exemption, see the *Key Concepts* Guidance Note.

#### Exemption certificate pathway for passive foreign government investors

Where an entity (corporation, trustee of a unit trust or general partner of a limited partnership) in which foreign government investors hold a passive interest, yet does not satisfy the requirements of section 17(2) of the Regulation, the entity may apply under an exemption certificate pathway that will have the effect of putting them in the same position as a ‘foreign person’ as opposed to a ‘foreign government investor’. In particular, where a single foreign government (i.e. the aggregate interest of foreign government investors from the same country) holds, or is reasonably anticipated to hold, an interest of more than 20 per cent in an entity, the entity may apply for an exemption certificate.

The purpose of this exemption certificate pathway, which is informally known as a ‘passive foreign government investor exemption certificate’, is to grant an investor access to the higher monetary thresholds that apply to private foreign investors.

While investors will note the absence of a specific provision under the framework enabling the passive foreign government investor exemption certificate, this exemption certificate will be created administratively using the existing exemption certificate provisions under the framework (e.g. businesses/entities exemption certificate, Australian land exemption certificate and mining production or exploration entities certificate) and will be tailored to the requirements and structure of an investor, including for example where an investment vehicle only has passive investors but does not meet the requirements of the exemption to the foreign government investor definition in section 17(2) of the Regulation. In considering applications for exemption certificates from investment funds (which comprise investment vehicles), regard may be given to the overall composition of the investment fund and its operation as a single economic entity.

In applying for an exemption certificate of this nature, the entity will generally be required to demonstrate that they satisfy the passivity requirements detailed in section 17(2)(b) of the Regulation. That is: the scheme allows people to make contributions to acquire rights to benefits produced by the scheme; the contributions are pooled to produce financial benefits or benefits consisting of rights or interests in property for its members; and no individual member is able to influence any individual investment decision, or the management of any individual investments under the scheme.

For further information on the above passivity requirements, see the *Key Concepts Guidance Note*. In addition, depending on the nature of the investment vehicle, evidence of passivity could be demonstrated in whole or in part by way of a fund establishment document or partnership agreement. However, investors may have other materials that are relevant, and these should be included as part of the application.

Where an investor has obtained a passive foreign government investor exemption certificate, and proposes to undertake an investment that is ...

- **... below the relevant threshold for a private foreign investor**, the investor would not be required to seek foreign investment approval (though they may choose to voluntarily notify if they judge their investment may raise national security concerns – see the *National Security* Guidance Note).

- ... **above the relevant threshold for a private foreign investor**, the investor would be required to apply for foreign investment approval as would a private investor – whether through a no objection notification or a separate exemption certificate.

If the applicant is unable to prove they meet the passivity criteria, they will generally not be eligible for this exemption certificate. In this case, they would remain a foreign government investor under the Act, but could apply for exemption certificates or no objections notifications in the standard way.

See below for details on applying under the passive foreign government investor exemption certificate pathway.

### Example 5

A general partner of a limited partnership operates a scheme, FundCo, which allows people to make contributions to acquire rights to benefits produced by the scheme, the contributions are pooled to produce financial benefits or benefits consisting of rights or interests in property for its members and no individual member is able to influence any individual investment decision, or the management of any individual investments under the scheme.

FundCo is comprised of six limited partners. Four of those limited partners are considered foreign government investors, while the remaining two are considered foreign persons. Only one of the six limited partners holds an interest of more than 20 per cent in the scheme. As the limited partner that holds an interest of more than 20 per cent in the scheme is a foreign government investor, FundCo is considered a foreign government investor.

As such, FundCo submits an application for a passive foreign government investor exemption certificate that will put them in the same position as if they were exempted under section 17(2) of the Regulation. As FundCo seeks to acquire businesses and entities and land, FundCo will need to apply for multiple certificates (i.e. the businesses and entities exemption certificate and land exemption certificate) to give effect to the passive foreign government investor exemption certificate pathway.

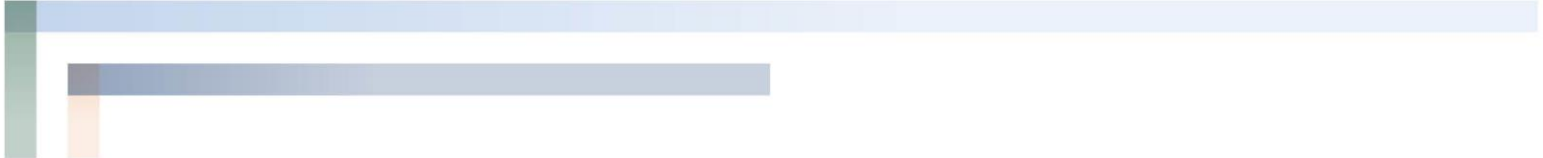
## D: How will applications be assessed?

### Business, entities or land exemption certificates

Applications for business, entities or land exemption certificates will be considered on a case-by-case basis to ensure they are not contrary to the national interest (except for national security exemption certificates under sections 43BA and 43BB of the Regulation, which will be considered on the basis that they are not contrary to national security – see below).

The national interest test takes into account factors such as the character of the investor and the nature of its Australian business, the purpose and scope of the proposed acquisitions, investment history, potential benefits of the proposed investment, and compliance standing (for example, meeting reporting requirements and any existing conditions) as well as any national security risks. For more information on the assessment of the national interest, see *Australia's Foreign Investment Policy* on the foreign investment website.





The Treasurer may grant exemption certificates that exempt one or more acquisitions covered by the certificate from being notifiable actions or significant actions where the proposed acquisitions are:

- capable of being assessed against the national interest test at the time of application (that is, this will likely necessitate a higher level of certainty about the nature of the acquisition/s); and/or
- the investor and investment is assessed to be sufficiently low risk; and/or
- the proposed target company, business, industry, sub-sector or sector typically does not raise national interest issues.

If an applicant, or any related person or entity, has previously held an exemption certificate, their compliance history with respect to the conditions of that exemption certificate will be taken into account when assessing the applicant's suitability to hold a subsequent exemption certificate.

Examples of situations where the granting of an exemption certificate may be considered contrary to the national interest by the Treasurer include where:

- The program of proposed acquisitions is not well defined by an applicant and the scope is very broad.
- National interest factors cannot be adequately assessed at the time of the application.
- The program of investment is not considered to be sufficiently 'low risk' or 'low sensitivity'.
- The potential tax risks cannot be adequately assessed at the time of the application.

Non-compliance with conditions of a certificate, or more generally, may also lead to revocation of a certificate by the Treasurer.

## National security exemption certificates

Applications for exemption certificates with respect to notifiable national security actions will be considered on a case-by-case basis to ensure they are not contrary to national security. An action that is covered by the certificate would not be a notifiable national security action and therefore would not be subject to the notification requirements that attach to notifiable national security actions (if the action is also a significant or notifiable action, the obligations that attach to those actions would remain unless an exemption applies).

Similarly, applications for exemption certificates with respect to reviewable national security actions will be considered on a case-by-case basis to ensure they are not contrary to national security. An action that is covered by the certificate will no longer constitute a reviewable national security action and therefore not be subject to the 'call-in' power.

The Treasurer may grant exemption certificates that exempt one or more acquisitions covered by the certificate from being notifiable national security actions or reviewable national security actions where the proposed acquisitions are:

- capable of being assessed against the national security test at the time of application (that is, this will likely necessitate a higher level of certainty about the nature of the acquisition/s); and/or
- the investor and investment is assessed to be sufficiently low risk; and/or

- the proposed target company, business, industry, sub-sector or sector typically does not raise national security issues.

Given the sensitivity of national security related exemption certificates, investors are encouraged to engage with Treasury early in the process of preparing an application.

## **Passive foreign government investor exemption certificate pathway**

Applications under the passive foreign government investor exemption certificate pathway will be considered on a case-by-case basis to ensure they are not contrary to the national interest. Investors will generally only be eligible for this exemption certificate pathway if they fulfil the passivity requirements set out in s17(2)(b).

When applying under this exemption certificate pathway, an investor will need to apply for all of the national interest exemption certificates (i.e. businesses and entities exemption certificate, Australian land exemption certificate and tenements and mining production or exploration entities certificate).

The applicant is not required in their application to outline the details of a proposed investment if that investment is below the relevant threshold of a private foreign investor. This is because this exemption certificate pathway seeks to grant an investor access to the higher monetary thresholds that apply to private foreign investors, so investments below those monetary thresholds are not relevant for screening purposes.

Passive foreign government investor exemption certificates may be granted for a specified period including up to the life of the scheme (e.g. a typical closed ended fund with a 10 year life plus two year potential extension, and 4 to 7 year investment period) and may include conditions.

An essential condition of a passive foreign government investor exemption certificate is that it only applies while the passivity requirements are in place. If the passivity requirements are not satisfied at the time an acquisition is undertaken, that acquisition will not be covered by the passive foreign government investor exemption certificate.

The Treasurer will consider both open and closed ended funds when deciding whether to grant these kinds of exemption certificates. Although it may be easier for closed ended funds to prove the passivity of their foreign government owner(s), applications will be considered on a case-by-case basis. Applicants are encouraged to disclose whether they are an open or closed ended fund.

The Treasurer will also consider an application for a passive foreign government investor exemption certificate at any stage during a scheme's life. For example, it may be the case that halfway through the initial fundraising period, a foreign government or separate government entity expresses an interest in acquiring a substantial interest (i.e. more than 20 per cent interest) in the scheme, which would make the scheme a foreign government investor for the purposes of the Act. In this case, the entity (corporation, trustee of a unit trust or general partner of a limited partnership) in which a foreign government investor proposes to hold a passive interest may seek a passive foreign government investor exemption certificate.

If the ownership of the entity that received the exemption certificate changes post-approval, they will only be required to submit another application if there is a new foreign government or separate government entity that seeks to acquire a substantial interest in the entity. This includes a situation where a foreign government or separate government entity increases their interest from below a substantial interest to above a substantial interest.

However, a new application would generally not be required where a foreign government or separate government entity already holds a substantial interest in the entity as part of the original exemption certificate and seeks to further increase that substantial interest.

### Example 6

MaxiFund is an investment vehicle in which a number of passive foreign government investors propose to hold an interest. Of these foreign government investors, only KaliCo, a foreign government investor from Country A, will hold an interest that is greater than a substantial interest (KaliCo will hold a 22 per cent interest). MaxiFund applies for and is granted a passive foreign government exemption certificate.

Following this approval, CapiCo, which is another a passive foreign government investor from Country A, seeks to acquire a 23 per cent interest in MaxiFund.

Despite CapiCo's proposed acquisition of a substantial interest in MaxiFund, MaxiFund's passive foreign government investor exemption certificate remains in force, meaning MaxiFund is not required to apply for a new exemption certificate. That is because MaxiFund's existing exemption certificate already covers passive foreign government investors from Country A that, alone or together with associates, exceed a substantial interest.

Separately, FinCo, which is a passive foreign government investor from Country B, seeks to increase its interest in MaxiFund to the level of a substantial interest. In this case, MaxiFund would require a further approval as the exemption certificate did not contemplate Country B holding a substantial interest.

Similarly, BlueCo, which is a passive foreign government investor from Country C, has a 12 per cent interest in MaxiFund. If GreenCo, which is another passive foreign government investor from Country C, proposes to acquire a 9 per cent interest in MaxiFund, Country C's overall interest in MaxiFund would increase to a substantial interest. In this case, MaxiFund would require a further approval as the exemption certificate did not contemplate Country C holding a substantial interest.

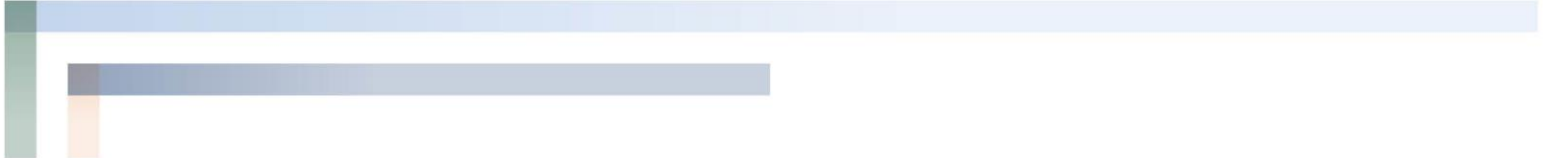
For information on relevant fees for a passive foreign government investor exemption certificate, see the *Fees Guidance Note*.

## E: What information needs to be provided?

Applicants should refer to the *Foreign Investment Application Checklist* to ensure that they provide the required information, noting that additional information may also be requested during the assessment stage.

The proposed acquisitions must be of a kind that the Treasurer can be satisfied are not contrary to the national interest (or national security, as the case applies) at the time of granting the certificate. As such, when granting an exemption certificate, the Treasurer must be satisfied that the proposed investments to be covered by the certificate are not individually or collectively contrary to the national interest (or national security, as the case applies).

As such, applications for exemption certificates need to contain sufficient detail about proposed acquisitions to allow the national interest test or national security test to be applied. While in certain cases an applicant may not know the target or targets for the investment, applications will need to provide sufficient detail about potential targets by identifying target industries,



locations and/or (as relevant) the nature of the businesses and assets that the foreign person proposes to invest in. The provision of additional information that is not well targeted may hinder the efficient processing of applications.

## F: Timeframe and process

Exemption certificate applications are typically more complex than applications for individual transactions, and therefore may take longer to process than standard applications.

The applicant can assist with the efficient processing of the application by completing all fields in the online application, with specific attention to detail which will assist government agencies to identify the likely targets for investment. The more specific the application is about likely targets and the scale and nature of the proposed acquisitions, the more straightforward the assessment process will likely be.

## G: Conditions and compliance

An exemption certificate will generally be given subject to conditions. Conditions contained in an exemption certificate will apply in the same way as if a target was being acquired individually and subject to a no objection notification with conditions.

For example, where the exemption certificate relates to acquisitions of vacant commercial land or agricultural land or an agricultural land entity, the Australian opportunity requirement may apply (that is, the exemption certificate is conditional on the land/entity being sold through an open and transparent sale process).

Further information on the particular conditions that apply to particular assets can be found in the relevant Guidance Notes for each of those assets (e.g. agricultural land, commercial land, residential land, etc).

Each exemption certificate will also set clear parameters for proposed acquisitions that can be made under it. This will generally involve a limit on total consideration value and the kinds of interests that can be acquired (for example, one or more of assets or securities). Acquisitions relating to a particular kind of interest or specific targets may be subject to specific limits. This may mean a certificate is granted on a narrower basis than what was initially applied for.

Acquisitions that are not within the scope of an exemption certificate are not covered by the exemption certificate – and, if a notifiable action or a notifiable national security action, must be separately notified and assessed. Failure to do so may constitute an offence or other breach of the Act and result in penalties. Non-compliance with the Act or the conditions of an exemption certificate may also lead to revocation of an existing exemption certificate.

Foreign persons granted an exemption certificate may be required to report periodically (for example, quarterly) on the acquisitions made during the period specified under their certificate, as per any specific reporting conditions. The frequency of reporting will depend on factors such as the period the certificate is in force and the nature of the acquisitions covered by the certificate. For more information, see the [Compliance page on the Foreign Investment website](#).



## Further information

Further information is available on the [Foreign Investment 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.