aequus counsel

Australian M&A Foreign Investment Regulation

26 February 2015

Disclaimer

This paper ("**Publication**") is based on the law applicable in Australia at the time of its preparation and:

- is intended to provide a summary and general overview of its subject matter only;
- is not comprehensive and should not be relied upon on that account; and
- is not legal advice and is not intended to be relied upon as such.

Accordingly this Publication may not reflect most recent developments and is subject to change without notice.

Persons using this Publication should not rely or act on this Publication and should obtain their own legal advice specific to their situation and only rely and act on that advice.

Use of this Publication does not create any solicitor-client relationship.

Aequus Counsel Pty Ltd is not responsible for any loss suffered in connection with the use of this Publication or any of its content and does not give any warranty or representation about this Publication or any of its content. To the maximum extent permitted by law, all liability which may arise as a result of the use of this Publication or its content is expressly excluded.

Index

Executive Summary

The value of proposed foreign investment requiring Australian regulatory approval decreased significantly to $135.7 billion in fiscal 2013 compared with $170.7 billion in fiscal 2012. Prior to the global financial crisis proposed foreign investment exceeded $190 billion and this has not been achieved since. Also the nature of proposed investment continues to change significantly.

Proposed investment in the mineral exploration and development sector has fallen from 58% of total proposed investment in fiscal 2010 to around 30% in fiscal 2013.

Proposed investment in the real estate sector is now the major area of proposed investment accounting for approximately 35% of total proposed investment last year and significantly most of the growth in proposed real estate investment has been in developed commercial real estate. This has occurred in spite of Australia's strong currency.

In the last 10 years, the United States has been the largest source of proposed foreign investment in Australia. The other major sources in 2012/2013 were Switzerland, UK, China and Japan.

Australian foreign investment is regulated by the Foreign Acquisition and Takeovers Act 1975 which applies to foreign persons (individuals and corporations) as well as foreign government investors and entities which a foreign government investor either controls or has a substantial interest in.

For private foreign investment, approval is required for acquisitions of 15% or more (or when aggregated with other foreign persons, 40% or more) in an Australian company and the acquisition of an Australian business or assets above specified financial thresholds, including the acquisition of real estate. However, if the acquisition relates to an interest in "Australian urban land" approval will be required regardless of the value of the interest that is proposed to be acquired. Approval is also required for acquisitions of vacant land or commercial property regardless of the value.

Any direct investment in Australian entities or Australian assets by foreign government investors (including investments in new businesses) requires approval regardless of the value of the investment.

Foreign investments in certain sensitive sectors (e.g. media, financial sector, airports and shipping) are subject to separate and additional regulation. In addition, acquisitions which may be anti-competitive are subject to separate competition law screening and review.

Whether a proposed foreign investment is approved depends on whether the investment is judged to be contrary to Australia's national interest and in this regard a number of factors are taken into account including national security, competition, other Australian government policies, the impact on the economy and the community and the character of the investor. Historically, very few applications are not approved.

Applications for approval must be made before the proposed transaction documents are executed or the transaction must be conditional on foreign investment approval. Generally, the approval decision is taken within 30 days (which is the prescribed limit under the legislation) but this period can be extended by a further 90 days. Applicants are notified of the Treasurer's decision within 10 days of it being made. Most applications are processed promptly. Last year over 99% of acquisition investment proposals were decided within the 30 day period.

Generally Australia welcomes foreign investment and acquisition proposals are rarely rejected. The most recent rejection of Archer Daniels proposed acquisition of Graincorp is generally regarded as bad policy and a politically motivated decision. However, it does demonstrate the importance of being able to navigate a pathway through Australia's foreign investment regulatory landscape as failure to do so can have material adverse consequences for foreign investors and proposed acquisitions.

The Government has recently announced proposed policy changes in the agricultural and residential real estate sectors including lower thresholds in agriculture, new application fees, new civil penalties and increased criminal penalties.

1. Introduction

Australia regulates proposed acquisitions by "foreigners" of interests in Australian entities (corporations and trusts), businesses and real estate ("**Foreign Investment**").

This paper provides an overview of the regulation of Australian Foreign Investment with a specific focus on mergers and acquisitions.

Foreign investment is regulated primarily through a regime established under:

- *Foreign Acquisition and Takeovers Act 1975* (Cth) ("**Act**");
- Regulations pursuant to the Act; and
- Australian Federal Government Foreign Investment Policy ("**Policy**");

("**Regulatory Regime**").

Foreign Investment in specific sectors of the Australian economy of some sensitivity (including for example media, airports, shipping and banking) are further regulated under other industry/organisation specific legislation.

The Foreign Investment Review Board ("**FIRB**"), a Federal Government agency, is responsible for reviewing proposed acquisitions and provides advice to the Australian Treasurer ("**Treasurer**") with respect to Foreign Investment proposals. With the benefit of advice from FIRB it is the Treasurer who decides whether to approve, impose conditions or reject Foreign Investment proposals based on the Treasurer's assessment as to whether the proposed investment is contrary to the national interest.

The latest FIRB Annual Report (2012-2013) provides information on Foreign Investment applications made under the Regulatory Regime in 2011-2012 and 2012-2013 and an analysis of this information is provided by way of introduction to discussion of the Regulatory Regime

1.1 FIRB Applications Received

Table 1 summarizes Foreign Investment proposals examined and results in the last 2 years:

Table 1 – FIRB Applications (2012 & 2013)

	Applications	Approved	Withdrawn	Exempted	Rejected
2012/2013	13322	12731	446	145	0
2011/2012	11420	10703	534	170	13

The low level of rejection indicates Australia's open door policy to Foreign Investment. There were no rejected applications in 2012/13. In the previous year, all the rejected applications related to real estate purchases.

The information on FIRB applications received only takes into account applications for the fiscal year 2012/2013, and accordingly does not include the Australian Treasurer's rejection in November 2013 of Archer Daniels Midland Company's proposal for the acquisition of 100% of the shareholding in Graincorp Limited. The Australian Treasurer prohibited this acquisition on the grounds that it was contrary to Australia's national interest. Regrettably the ADM decision is widely considered to be a political decision made by the new conservative coalition government pandering to Australia's farming lobby without any redeeming economic or other sensible rationale and bad policy.

Prior to the ADM decision , the two other major non real estate acquisition proposals rejected by FIRB since 2001 were the proposed $8.4 billion takeover of the Australian Securities Exchange Ltd

by the Singapore Stock Exchange in April 2011 and Shell's proposed acquisition of Woodside Petroleum Limited in 2001. Both of these decisions were rejected on reasonable national interest grounds.

Proposed Foreign Investment of $135.7 billion was approved in 2012-2013 representing a 20.5% decrease over the prior year approvals of $170.7 billion. These results should be compared with $192 billion in proposed Foreign Investment approved in 2007-2008 before the global financial crisis.

1.2 FIRB Approvals by Sector Value

Table 2 summarizes by industry sector (excluding corporate reorganisations) Foreign Investment proposals approved in the last 2 years.

Table 2 – FIRB Applications by Sector (2012 & 2013)

Sector	2012-2013		2011-2012	
	Number of Approvals	Proposed Investment	Number of Approvals	Proposed Investment
Agriculture, Forestry & Fishing	91	2.86	49	3.60
Finance & Insurance	36	2.92	25	4.56
Manufacturing	44	6.51	70	29.52
Mineral Exploration & Development	289	45.14	241	51.65
Resource Processing	7	0.42	6	0.30
Services	154	25.91	109	21.02
Tourism	1	0.02	4	0.94
Real Estate	12,025	51.91	10,118	59.12
Total	12,647	135.70	10,662	170.7

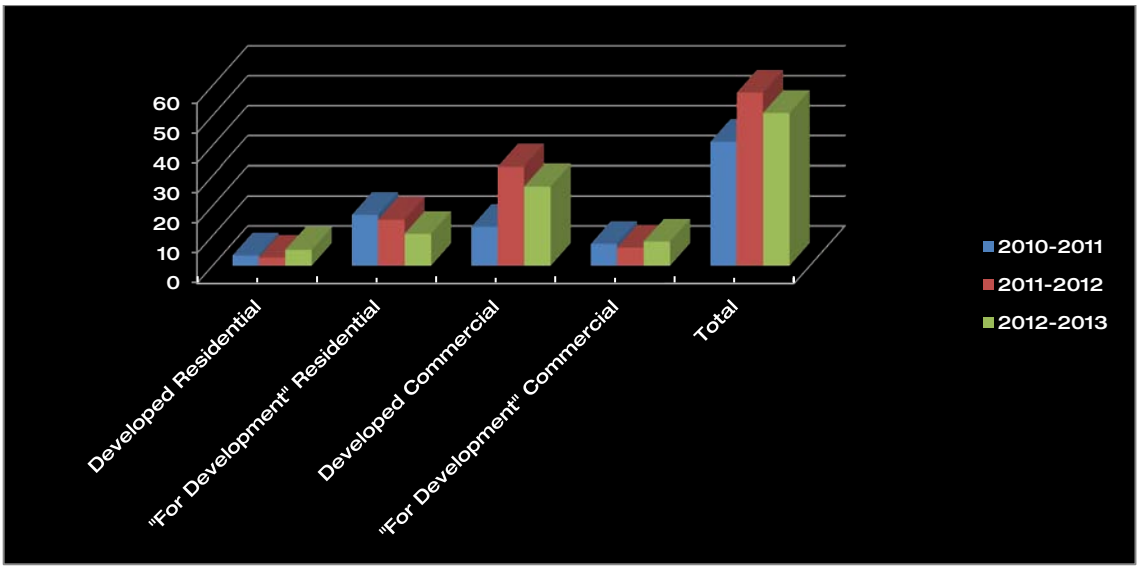
Proposed Foreign Investment in real estate nominally fell from 59.1% to 51.9% of total proposed investment but is still the largest industry sector by value of approvals (having overtaken mineral exploration and development in 2011-2012. Despite the value of investment decreasing, the number of approvals increased from 10,118 proposals to 12,025 proposals.

Historically the number of real estate sector applications is distorted because of the reintroduction of screening of temporary residents purchasing real estate in 2010-2011. On 24 April 2010, temporary residents residing in Australia were no longer exempted from notification of proposed acquisitions of established residential real estate for personal residence, established residential real estate and vacant residential land. Previously, temporary residents were exempt from notification under changes announced in December 2008.

However, as can be seen from the bar chart in Figure 1, it is growth in proposed investment in developed commercial real estate that is almost exclusively responsible for the near A$20 billion increase in proposed real estate investment particularly between 2011 and 2012 and this is even more noteworthy given the strength of the Australian dollar during that period.

A portion of the increase in proposed commercial real estate investment is referrable to existing developed commercial property outside of annual program arrangements, which allow foreign investors to make real estate acquisitions within a specified global monetary limit.

Figure 1 – Australian Real Estate Investment Approvals – 2011, 2012 & 2013

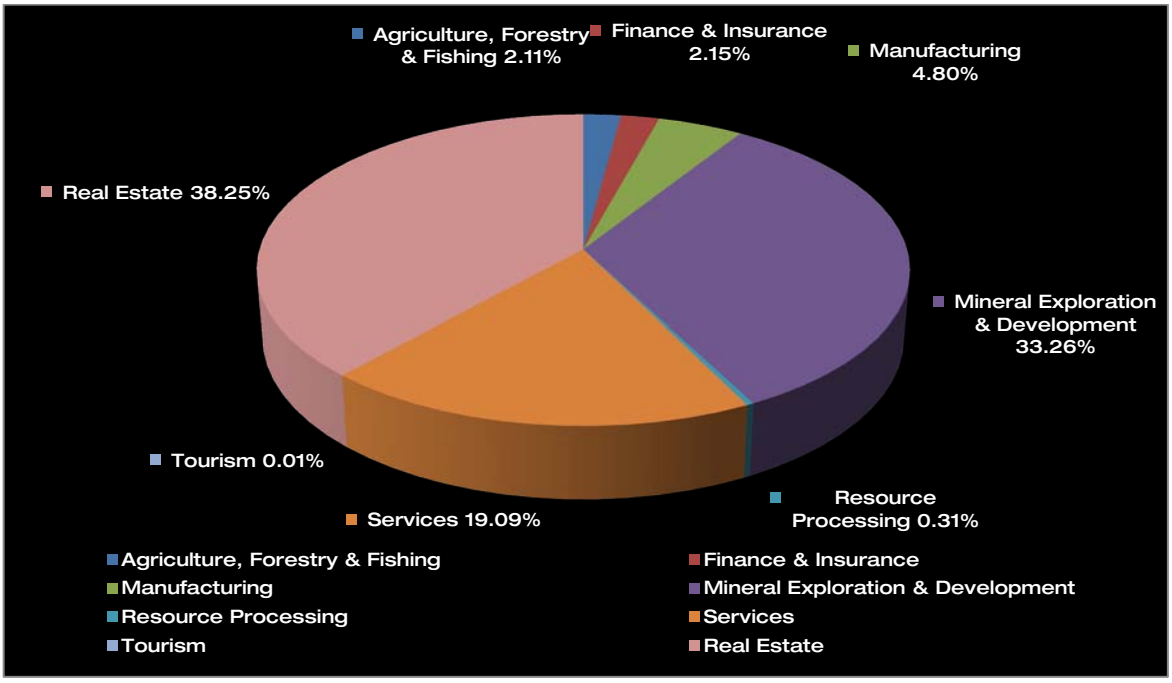


Outside of the real estate sector, approved proposed investment overall actually decreased last year by 25% (from $111.6 billion to $83.71 billion) primarily as a result of a material reduction in proposed investment in the manufacturing sector which had decreased by 78%. There were also reductions in the finance and insurance, agriculture, forestry & fishing, mineral exploration & development, tourism and real estate sectors.

The mineral exploration and development sector remains a significant area of Foreign Investment in Australia although the end of Australia's resources boom has already been called.

The following pie chart in Figure 2 shows approvals by value in 2012-2013 by industry sector.

Figure 2 – Approvals by Industry Sector & Value (2012 - 2013)

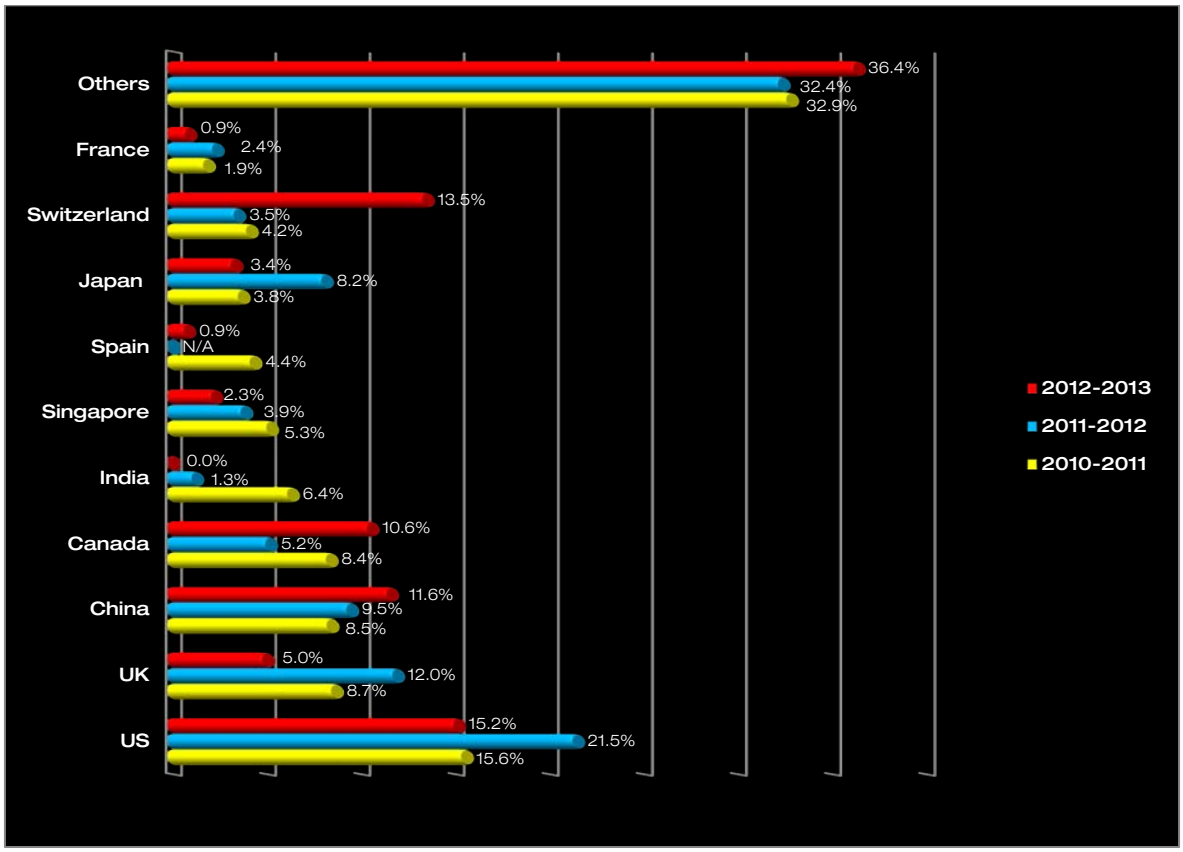


1.3 Sources of Investment

In 2012-2013, the United States was the largest source of proposed investment in Australia with $20.6 billion (2011-2012: $36.6 billion). The other major sources of proposed investment in 2012-2013 were Switzerland, China, Canada and the United Kingdom.

The bar chart in Figure 3 sets out the percentage by country of total FIRB approvals by value for the last three years. Switzerland re-emerged to replace Japan in the top five sources of proposed investment last year.

Figure 3 – Approvals by Country & Value (2011, 2012 & 2013)



2. Foreign Investors

The Regulatory Regime applies to acquisitions by "foreign persons" and "foreign government investors".

A "foreign person" is[1]:

- A natural person not ordinarily resident in Australia;
- A corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a "controlling interest";
- A corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation holding an "aggregate controlling

[1] Section 5 Foreign Acquisition and Takeovers Act 1974 (Cth).

interest" control/have potential to control 40% or more of the voting power in the corporation)[2];

- The trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a "substantial interest" (e.g. a person and/or its associates control/have potential to control 15% or more of the voting power in the corporation)[3]; or

- The trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an "aggregate substantial interest" [4].

A foreign person has a "controlling interest" in an Australian corporation if alone or together with any "associates" they have legal or beneficial ownership of or rights to acquire 15% or more of the issued capital of the corporation or 15% or more of the actual or potential voting power in the corporation[5].

A foreign person has an "aggregate controlling interest" in an Australian corporation if two or more persons together with any "associates" have legal or beneficial ownership of or rights to acquire 40% or more of the issued capital of the corporation or 40% or more of the actual or potential voting power in the corporation[6].

- Any officer of the corporation (including directors);

- A person who holds a "substantial interest" in the corporation (15% of shares or voting power); and

- The trustee of a trust estate in which the person holds a substantial interest in the trust estate (15% of corpus or income).

The interests of a foreign person's "associates" are relevant to determining whether a foreign person has a "controlling interest" or "aggregate controlling interest" in an Australian corporation.

The Regulatory Regime also applies to a "foreign government investor" which includes:

- A body politic of a foreign country;

- Entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15% or more; or

- Entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40% or more; or

- Entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group. [7]

---

[2] Pursuant to section 9(2) of the Foreign Acquisition and Takeovers Act 1974 (Cth), persons are taken to have an "aggregate controlling interest" where 2 or more persons hold an "aggregate substantial interest" (see n. 4 below).

[3] Pursuant to section 9(1) of the Foreign Acquisition and Takeovers Act 1974 (Cth), a person is taken to have a "substantial interest" if the person alone or together with any associate or associates of the person: (a) Is in a position to control not less than 15% of the voting power in the corporation; (b) Is in a position to control not less than 15% of the potential voting power in the corporation; or (c) Holds interests in not less than 15% of the issued shares in the corporation; or (d) Would hold interests in not less than 15% of the issued shares in the corporation, if shares in the corporation were issued as the result of the exercise of all rights of a kind mentioned in subsection 11(2A).

[4] Pursuant to section 9(1A) of the Foreign Acquisition and Takeovers Act 1974 (Cth), 2 or more persons are taken to hold an "aggregate substantial interest" in a corporation if they, together with any associate or associates of any of them: (a) are in a position to control not less than 40% of the voting power in the corporation; or (b) are in a position to control not less than 40% of the potential voting power in the corporation; or (c) hold interests in not less than 40% of the issued shares in the corporation; or (d) would hold interests in not less than 40% of the issued shares in the corporation if shares in the corporation were issued as the result of the exercise of all rights of a kind mentioned in subsection 11(2A).

[5] Section 9 (1) Foreign Acquisition and Takeovers Act 1974 (Cth).

[6] Section 9 (1 A) Foreign Acquisition and Takeovers Act 1974 (Cth).

[7] Australian Treasurer, "Foreign Investment Policy", March 2013.

3. Acquisition of Shares

In general terms the Regulatory Regime will only apply where there is an acquisition of a "substantial interest", being an equity interest in 15% or more, in an Australian company or related company that is valued at more than A$252 million, subject to two exceptions:

- If two or more foreign persons already own 40% or more of the Australian company or related company then the 15% threshold does not apply and any acquisition of any size will be subject to the Regulatory Regime; and
- If the Australian company or trust is one whose principal assets comprise Australian real estate then any acquisition of any size will be subject to the Regulatory Regime.

3.1 Substantial Interest Acquisitions

Foreign persons are required to notify before entering into an agreement by virtue of which the foreign person will acquire a "substantial interest" (i.e. interest of 15% or more, or where aggregated with other foreign persons, 40% or more) or increase an existing "substantial interest" in an Australian corporation or Australian subsidiary of an offshore company that is valued above A$252 million. At present, a higher threshold of A$1,094 million applies for US, NZ, Chilean and Korean investors[8] and a threshold of A$252 million applies for US, NZ, Chilean and Korean investors in prescribed sensitive sectors.[9] These thresholds were similarly applied to Japanese investors from 15 January 2015. Prior to December 2014, the increased thresholds applied only to US and NZ investors. On 30 October 2014, the Trade Agreements Legislation Amendment Regulation 2014 extended the benefit of the higher Australian foreign investment thresholds to investors from Japan, South Korea and Chile. The increased thresholds could also soon apply to China, as negotiations for the China Australia Free Trade Agreement have been concluded. However, we note that the China Australia Free Trade Agreement key outcomes paper specifically notes that the screening of investment by Chinese state owned enterprises, regardless of transaction size, will still continue and the China Australia Free Trade Agreement will not impact this policy position. In summary, as of the date of this paper, the current higher thresholds apply to US, NZ, Chilean, Japanese and Korean investors

The term "substantial interest" includes actual voting power, number of shares held, "potential voting power" or a "right to issued shares" amounting to a substantial interest (i.e. 15% or 40%) being acquired. These provisions have been drafted to ensure that the acquisition of options and convertible notes (not just shares in an entity) also require approval from FIRB.

The aggregate controlling interest provisions operate to aggregate the proposed acquisition with existing foreign holdings whether related to the acquirer or not.

Notification of the proposed acquisition of a substantial interest (or if the person already has a substantial interest, an increase of that interest) under section 26 of the Act is **compulsory**.

3.2 Other Share Acquisitions

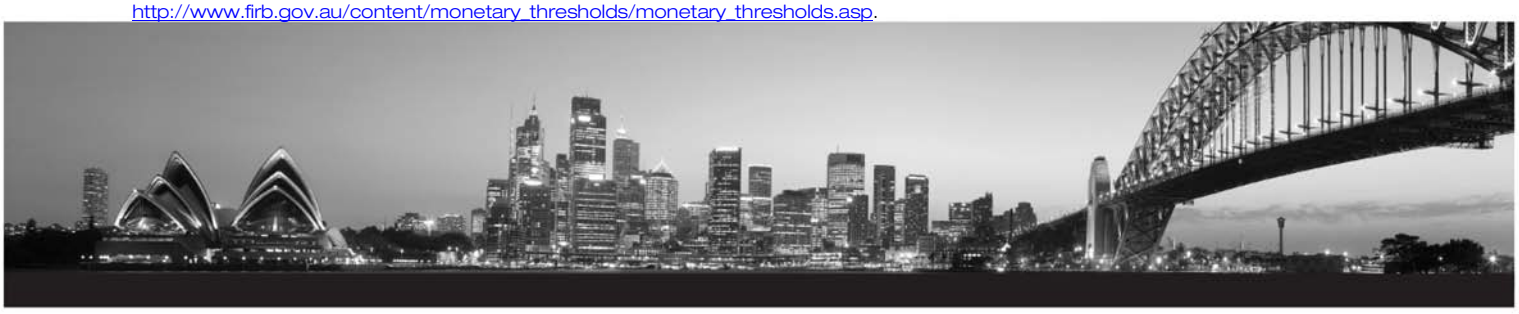
An acquisition of shares which does not involve acquisition of a "substantial interest" for which notification is mandatory, as referred to in section 3.1, may be **voluntarily** notified under section 18 of the Act

The reason for voluntary notification is that the Treasurer has the power to prohibit:

- acquisitions of shares (or interests in shares) and similar interests;
- in a corporation that carries on an Australian business;

[8] The Foreign Acquisitions and Takeover Regulations 1989 (Cth) amended the Regulations to extend the higher threshold approval for US investors to New Zealand investors in 2013.

[9] These thresholds apply as at 1 January 2015, and the thresholds are indexed annually on 1 January. Refer to http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp.



- that is valued above A$252 million or a higher threshold of A$1,094 million applies for US investors and NZ investors[10] and a threshold of A$252 million applies for US investors and NZ investors in prescribed sensitive sectors; and

- which would result in foreign persons acquiring a "controlling interest" (or two or more person acquiring an "aggregate controlling interest") in the Australian business and that the Treasurer decides would be contrary to national interest.

The Treasurer's powers under section 18 of the Act may be exercised in circumstances where either compulsory or voluntary notification applies. For example, the section 26 compulsory notification requirement does not apply where a foreign person may join an "aggregate substantial interest" but does not have a "substantial interest". Whilst this acquisition is not subject to compulsorily notification it may be subject to an order by the Treasurer under section 18.

3.3 Australian Urban Land Corporation

An Australian urban land corporation or trust is a corporation or trust that has interests in Australian urban land (see further discussion in Section 4.2-4.4) which makes up more than 50% of the value of its total assets.

Regardless of whether a "substantial interest" is acquired, where foreign persons acquire an interest (e.g. shares or units) in an Australian urban land corporation or trust, prior **compulsory** notification is also required unless specifically exempted.

4. Acquisition of Australian Assets

4.1 Australian Business

The Treasurer has the power to prohibit:

- acquisitions of an "Australian business";

- where the assets of the business are valued at above $252 million or a higher threshold of A$1,094 million which applies for US investors and NZ investors[11] and a threshold of A$252 million applies for US investors and NZ investors in prescribed sensitive sectors;[12]

- which would result in the business not controlled by foreign persons, being controlled by foreign persons; and

- which the Treasurer decides that the acquisition would be contrary to national interest.

"Australian business" is defined as a business that is carried on wholly or partly in Australia in anticipation of profit or gain but does not include a business carried on by the Government, a corporation constituted for a public purpose or a local governing body.

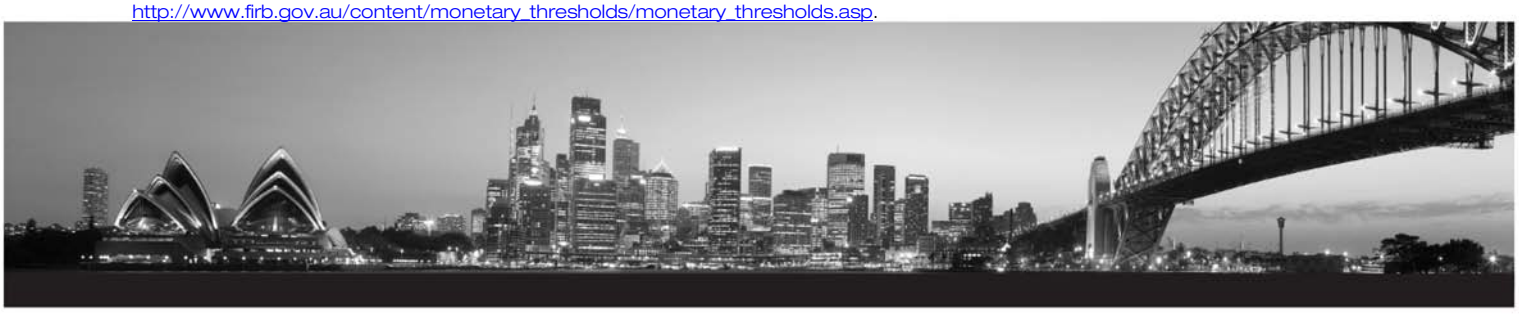
The test for control is whether the Treasurer is satisfied that one or more foreign persons, either alone or together with associates, are in a position to determine the policy of the business.

Notification of the proposed acquisition is **voluntary** under section 19 of the Act, unless the assets include Australian urban land and an exemption does not apply (sections 4.2-4.4).

4.2 Real Estate

"Australian urban land" means any land not used exclusively for primary production.

[10] The Foreign Acquisitions and Takeover Regulations 1989 (Cth) amended the Regulations to extend the higher threshold approval for US investors to New Zealand investors in 2013.
[11] The Foreign Acquisitions and Takeover Regulations 1989 (Cth) amended the Regulations to extend the higher threshold approval for US investors to New Zealand investors in 2013.
[12] These thresholds apply as at 1 January 2015, and the thresholds are indexed annually on 1 January. Refer to http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp.



The concept is quite broad and includes a wide range of property from commercial office buildings and shopping centres to residential homes and vacant building allotments.

An acquisition of an interest in "Australian urban land" requires approval unless the acquisition is specifically exempted.

The concept of an "interest" in Australian Urban Land is very wide and extends beyond acquisitions of ownership of real estate to include:

- Any legal or equitable interest other than an interest under a lease or licence or in a unit in a unit trust estate;
- An interest in a share in a company, being a share that entitles the holder to a right to occupy a dwelling of a kind known as a flat or home unit situated on the land;
- An interest as lessee or licensee in a lease or licence giving rights to occupy where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years; and
- An interest in an arrangement involving the sharing of profits or income from use or dealings.

An interest in Australian urban land includes an interest in a corporation or trust that holds more than 50% of its total assets in Australian urban land. For example if an Australian corporation whose shareholders are foreign residents wishes to purchase shares in another corporation which has real estate which comprises more than 50% of its total assets by value then the purchase would require approval by the Treasurer. In determining the value of the assets:

- If the assets in the company's audited balance sheet or accounting records are fairly valued, those values are to be used; and
- When ascertaining the value of total assets of a holding company and its subsidiaries, any asset of a holding company that consists of shares in its subsidiaries will be disregarded.

Certain interests in mining tenements (i.e. mineral rights, mining leases, mining tenements or production licences) are also incorporated in the concept of Australian urban land and in particular where the mining interest gives the investor:

- A right of occupation which is likely to exceed 5 years; or
- An interest in an arrangement involving the sharing of profits or income from the land.

Whether or not an interest in a mining tenement is an interest in "Australian urban land" is relevant to the acquisition of mining companies and/or mining assets. Depending on the nature of the mining tenements held by the target, certain mining tenements may be deemed interests in "Australian urban land", and accordingly acquisition of such assets will require approval from FIRB.

Prior **compulsory** notification under section 26A of the Act is required unless the acquisition is exempted.

Examples of acquisitions of Australian urban land that require compulsory notification include:

- Vacant non-residential land (such proposals are normally approved subject to development conditions)[13];
- Residential real estate (some exemptions apply);
- All shares or units in an Australian urban corporation or trust estates (some exemptions apply); and

[13] pp.12, Australian Treasurer, "Australia's Foreign Investment Policy", 2013.

- All developed commercial real estate above specified value thresholds (exemptions apply below those thresholds).

4.3 Urban Land Exemptions

Certain acquisitions of interests in Australian urban land are exempt from the Regulatory Regime. Some of the exemptions relevant in the context of mergers and acquisitions are summarised below:

(a) Mortgages & Security Interests

Acquisition of an interest in Australian urban land is exempt if the interest is acquired solely as security for the purposes of a "moneylending agreement" or by way of enforcement of the security held solely for the purposes of a "moneylending agreement".

A "moneylending agreement" is an agreement entered into in the ordinary course of carrying on a business of lending money.

Acquisition of a security interest, other than in the ordinary course of a "moneylending business" will require approval.

(b) Developed Commercial Real Estate (Below Certain Thresholds)

An acquisition of non-residential commercial real estate which has a value of less than A$55 million (or if the property is heritage listed, a value of less than $5 million) is exempt. If the acquisition is being made by a US or New Zealand investor a higher threshold of A$1,094 million or more applies. Where the property value exceeds the relevant thresholds, prior **compulsory** notification is required. Proposals involving developed commercial property are normally approved without conditions.[14]

Developed commercial property includes hotels, motels, hostels or guesthouses or an individual dwelling that forms part of these is also within the exemption scope.

Where a proposed investment in a developed mining tenement is part of an operational mine, it will be treated as "developed commercial property". This is clearly relevant for foreign investors in Australian mining entities that have an operational mine. However, the following matters remain unclear:

- What constitutes an "operational mine";
- How the value of an "operational mine" is determined; and
- Whether an investor who has a mining tenement approval, will have to obtain a second approval if (and when) the mining tenement becomes part of an "operational mine".

On 12 September 2011 the Australian Treasurer (Mr Wayne Swan) issued a statement in which he observed that there appears to be a two-stage test requiring firstly FIRB approval for foreign investments in an exploration business, and, secondly if a viable discovery is made, to reapply for permission to develop the resource.[15] This suggests that where an investor has obtained approval for a mining interest (i.e. Australian urban land), a second approval will be required to develop the resource (i.e. to establish an "operational mine").

(c) Business Related Commercial Real Estate

Acquisitions of interests in industrial or non-residential commercial real estate which is wholly incidental to the conduct of the existing or proposed business activities of the foreign person concerned are exempt. However, the land must either be currently used or able to

[14] pp.12, Australian Treasurer, "Australia's Foreign Investment Policy", 2013.
[15] BusinessDay, "China Warns of Boycott", 12 September 2011 and Sydney Morning Herald, "Double trouble for China in Swan's mine approvals", 12 September 2011.

be used immediately and in its present state for industrial or non-residential commercial activities. This exemption operates so as to exclude many commercial leases from the notification requirements unless the leased premises are in the course of construction (where the developed commercial property is below the specified threshold in Section 4.3(b)).

This exemption does not apply where the business activities of the foreign person involve real estate acquisition, development or investment or the development, investment in and operation of "accommodation facilities", and so, for example, a hotel management contract will require approval.

(d) Off the Plan Sales

Acquisitions from real estate developers of residential condominiums and dwellings under construction or off-the-plan, where the developer has obtained the Treasurer's prior approval are exempt under the Regulations. The developer must provide the foreign purchaser with a copy of the certificate of approval from the Treasurer (which is usually issued subject to the condition that the developer markets the dwellings locally as well as overseas).

(e) Certain Acquisitions of Shares in Public Listed Companies (Australian Urban Land Corporation)

Acquisitions by foreign persons of less than 15% of shares or voting power of a company which is listed on the ASX and which is an Australian urban land corporation and either:

- Primarily involves the development of land and holds less than 10% of its real estate assets in developed residential real estate that it has not developed itself; or
- Holds less than 10% of its real estate assets in the form of developed real estate,

is exempt under Regulations 3(i) and 3(j) respectively.

(f) Public Unit Trusts (Australian Urban Land Trust Estate)

Acquisitions of units by a foreign person in a unit trust in consequence of which the foreign persons holds interests:

- In the case of a listed trust – 10% of units in the trust;
- In the case of any other public trust with at least 100 members – 5% of the units in the unit trust,

is exempt.

To qualify for this exemption, the trust must have at least 100 unitholders, be primarily engaged in the development of land and hold not more than 10% of its real estate assets in developed residential real estate that the trustee has not developed itself.

5. Corporation Directorates

The Australian Treasurer has the power to make an order prohibiting the entering into of certain proposed arrangements in relation to the affairs of a corporation or the proposed alteration of constituent documents of a corporation where, in consequence:

- A director of the corporation "will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person;
- That foreign person holds a substantial interest in the corporation or an associate of such a foreign person";
- The assets of the business are valued at above $252 million; and

- The Treasurer decides that the arrangement would be contrary to national interest.

A higher threshold of A$1,094 million applies for US investors and NZ investors[16] and a threshold of A$252 million applies for US investors and NZ investors in prescribed sensitive sectors.[17]

Notification of the proposed arrangement is **voluntary** under section 20 of the Act.

6. Control of Australian Business

Under section 21 of the Act, the Australian Treasurer has the power to make an order prohibiting:

- A proposed arrangement in relation to an Australian business; or
- The termination of an existing arrangement in relation to such an Australian business;
- Which would result in the business not now controlled by foreign persons, becoming controlled by foreign persons (or where controlled by foreign persons, the business would continue to be controlled by foreign persons); and
- The Treasurer decides that the arrangement would be contrary to national interest.

"Arrangement" means an arrangement relating to the leasing or letting on hire of, or the granting of other rights to use, assets of an Australian business or relating to the participation by a person in the profits or management of an Australian business.

Notification of the proposed arrangement or termination of an existing arrangement is **voluntary** under section 21 of the Act.

7. New Businesses in Australia

In, 2009, the Australian Government abolished the requirement for private foreign investors to notify proposals to establish a new business in Australia.

Accordingly, under the Regulatory Regime investments by **non government** foreign persons in new Australian businesses (regardless of the amount) do not require approval.

8. Foreign Governments & Related Entities

All foreign governments and their related entities are required to notify and obtain approval before making any "direct investment" in Australia regardless of the value of the investment.

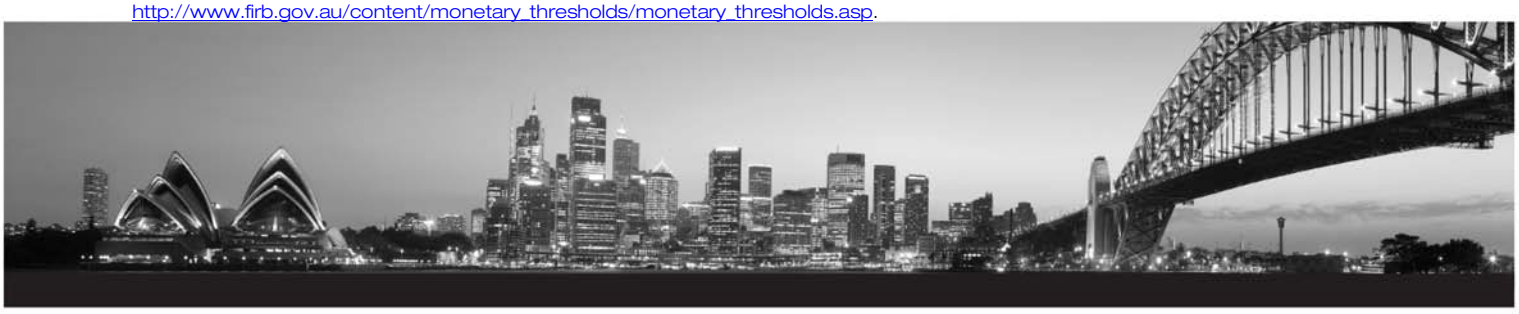
A "direct investment" includes investments of more than 10%, but investments of less than 10% may also require approval where the investor is building a strategic stake in the target or can use that investment to influence or control the target. The enforcement of a security interest over assets or shares above the 10% threshold also constitutes a "direct investment".

The current Regulatory Regime specifically requires notification by foreign government investors of any proposal for establishment of "new businesses". "New Business" is defined and includes starting a business in Australia or if already operating a business in Australia, commencing a new primary activity that is not incidental to an existing primary activity(s) within a different Statistical Division under the Australian and New Zealand Standard Individual Classification published by the Australian Bureau of Statistics.

Foreign government investors must notify and obtain approval to acquire an interest in land, including any interest in a prospecting, exploration, mining or production tenement (see 3.2(b) above) (except when acquiring land for diplomatic or consular requirements).

[16] The Foreign Acquisitions and Takeover Regulations 1989 (Cth) amended the Regulations to extend the higher threshold approval for US investors to New Zealand investors in 2013.

[17] These thresholds apply as at 1 January 2015, and the thresholds are indexed annually on 1 January. Refer to http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp.



The following mitigating factors will assist in determining whether acquisition proposals from foreign government investors are contrary to the national interest:

- Existence of external partners or shareholders in the investment;
- Level of non-associated ownership interests; and
- Governance arrangements for the investment, ongoing arrangements to protect Australian interests from non-commercial dealings and whether the target will be, or remain listed on the Australian Stock Exchange ("**ASX**") or other recognised exchange.

All proposed foreign government investments, regardless of value, require **compulsory** notification.

The only exception (as specified in the Policy) is with respect to foreign government investors that are regulated by the Australian Prudential Regulation Authority as Authorised Deposit Taking Institutions in Australia ("**ADIs**"). These investors do not need to notify the Treasurer when they take security over an asset(s) as part of a money lending agreement. Notification and approval is also no longer required if the security is enforced and the asset(s) is sold. However, the investor must give compulsory notification if the security is enforced and the investor gains control over the asset(s) and retains it for more than 12 months.

We note that the Prime Minister of Australia in April 2014 signalled that the Australian Government is considering lifting the zero threshold that currently applies for all bids by Chinese state owned companies. However, it would appear based on the China Australia Free Trade Agreement outcomes paper, that the screening of investment by Chinese state owned enterprises, regardless of transaction size, will still continue and the China Australia Free Trade Agreement will not impact this policy position.

9. Specific Sectoral Investment

Separate and specific statutory controls are imposed on foreign investment in certain sectors or for specific purposes.

Representative examples of these provisions are outlined in this section to provide an indication of the nature and scope of specific regulation and policy.

9.1 Media

Under the Act, all foreign persons, including US investors and NZ investors are required to notify the government and obtain FIRB approval to make investments of 5% or more in the media sector, regardless of the value of the investment. The approach of the government to media is more relaxed than it has been historically as exemplified by approval of the ownership of the Nine Network by foreign private equity investors and hedge funds.

9.2 Financial Sector Companies

Foreign investment in the banking sector must be consistent with the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998 and banking policy.

9.3 Australian International Airlines

Total foreign investment in Australian international airlines (which includes Qantas) is limited to 49%.

9.4 Airports

The *Airports Act 1996* (Cth) limits foreign ownership of airports for sale by the Commonwealth to 49%, with a 5% airline ownership limit and cross ownership limit between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

9.5 Shipping

The *Shipping Registration Act 1981* (Cth) requires a ship to be majority Australian-owned if it is to be registered in Australia.

9.6 Anti-Competitive Acquisitions

Under the *Competition and Consumer Act 2010* (Cth), acquisitions which would have the effect of or would be likely to have the effect of substantially lessening competition in a market in Australia are prohibited.

9.7 Telstra

Aggregate foreign ownership of Telstra is limited to 35% of the privatised equity and individual foreign investors are allowed to own up to 5%.

9.8 Foreign Ownership of Land in Queensland

Under the *Foreign Ownership of Land Register Act 1988* (Qld), foreign persons or trustees of foreign persons are required to lodge a notification of foreign ownership within 90 days of acquisition of land in Queensland.

9.9 Agricultural Sector

As a result of concerns from the Australian community regarding foreign investment in agricultural sector, a senate inquiry was undertaken in 2011. The Senate released its final report on 28 June 2013 which made certain recommendations, including the following:

- The threshold for private foreign investment in agricultural land be lowered to $15 million and once cumulative purchases by that private foreign investor or its associates reaches this value, FIRB approval will be required;
- FIRB reviews any proposed foreign acquisition of an agribusiness where investment exceeds 15% or more in an agribusiness valued at $248 million (indexed annually, and currently this threshold is $252 million) or exceeds $54 million (current threshold is $55 million).
- The zero trigger required for approval by FIRB for any purchase of agricultural land or an agribusiness by a state owned enterprise will continue to apply;
- The government undertake a review of Act to address contemporary issues of foreign investment, particularly in agriculture;
- A national register in which information on all foreign ownership in agricultural land (including information on country of origin of foreign investors, divestments and investments) is established and that information on country of origin of all foreign government investors and specific investments be published annually; and
- The Policy is amended to clearly define "the interests of local economies" and the "interests of local communities", and that FIRB be required to take into account such local interests in the assessment of foreign purchases of agricultural assets.

As a result of the Senate inquiry recommendations, on 11 February 2015 and 25 February 2015, the Australian Government announced the following changes to foreign investment in the agricultural sector:[18]

[18] Prime Minister of Australia, Treasurer and Minister of Agriculture, "Government tightens rules on Foreign Purchases of Agricultural Land" [Accessed on 17 February 2015] <https://www.pm.gov.au/media/2015-02-11/government-tightens-rules-foreign-purchases-agricultural-land>

- **$55 Million Threshold for Agribusinesses**

  The Government will introduce a new $55 million screening threshold for foreign investment in Australian agribusiness, subject to public consultation on the definition of "agribusiness".

- **$15 Million Threshold (Cumulative) for Agricultural Land**

  The Government will reduce the screening threshold to $15 million (from $252 million) from 1 March 2015. The $15 million threshold will apply to agricultural land owned by the foreign investor including the proposed purchase on a cumulative basis. This would mean that where a non-government foreign investor who currently owns agricultural land valued at $10 million intends to purchase another piece of agricultural land for more than $5 million, that investor will require FIRB approval to do so.

  For Chilean, New Zealand and United States investors, Australia's free trade treaty obligations mean that their investment proposals will remain subject to an A$1,094 million threshold.

- **New Land Registry for Agricultural Land**

  The Government will establish a foreign ownership register of agricultural land to strengthen reporting requirements and provide a clear picture of foreign investment in Australia's agricultural sector. However, Australia's recent free trade agreements with Japan, Korean and China all make provision for the $15 million screening threshold for agricultural land investments. These free trade agreements also make provision for a $53 million screening threshold for foreign investment in agribusinesses which is below the $252 million default threshold for foreign investment in agribusiness.

  From 1 July 2015, the Australian Tax Office ("**ATO**") will start collecting information on all new foreign investment in agricultural land regardless of value. The ATO will also commence a stock take of existing agricultural land ownership by foreign interests. The Government will continue to work with state and territory governments so that the ATO register will use land title transfer information.

FIRB has confirmed that these changes will be implemented through revisions to the Policy. The current Policy is dated 2013.

On 25 February 2015, the Government initiated a consultation process seeking feedback from stakeholders regarding reform to Australia's foreign investment regime, with a particular focus on the agricultural sector and residential real estate. Further discussion on this topic is set out in Section 13 of this paper. With respect to the agriculture sector, the Government is currently seeking feedback on specific issues including the following:

- Implementation of the foreign ownership of land register including details that would be published and collected, the approach to information collection (through self reporting then through state and territory land titles processes) and how lawyers or registered conveyancers would verify whether their client is a foreign person;

- Whether the term "agribusiness" should capture all primary production businesses as well as certain first stage downstream businesses beyond the farm gate, which divisions of the Australian and NZ Standard Industrial Classification codes (if it is decided it should be used) should be included in the definition for "agribusiness" and whether there is an alternative approach to be considered to define "agribusiness"; and

- The proposed definition for "agricultural land" (including whether it should be consistent with the common understanding of the term and any other alternative approach that should be considered).

10. Approval Criteria

Whether or not a proposed investment is contrary to the national interest is the primary issue considered by FIRB in considering a notification or approval application.

Current Policy identifies the following five critical factors relevant to determination of whether an acquisition proposal is contrary to national interest, namely, national security, competition, other government policy, economy & community impact and character of the investor.[19]. These criteria are discussed in this Section.

With respect to the relevant criteria under current Policy the following should noted:

10.1 National Security

This criterion has regard for the extent to which the proposed investment will affect Australia's ability to protect its strategic and security interests. The government relies on advice from relevant national security agencies for assessments on whether a particular investment raises national security issues.[20]

10.2 Competition

Consideration is given to whether the proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia and the impact that a proposed investment has on the composition of the relevant global industry, particularly where concentration could lead to distortions to competitive market outcomes. The Policy refers to a particular concern regarding the extent to which an investment may allow an investor to control the global supply of a product or service.

The Australian Competition and Consumer Commission examine competition issues in accordance with Australia's competition regime and this examination is independent of the foreign investment Regulatory Regime analysis.

10.3 Other Australian Government Policies

The impact of the proposed investment on Australian tax revenues and the extent to which the investment is consistent with the government's objectives in relation to other matters (such as environmental impacts) are also considered.

10.4 Economy & the Community

The impact of the proposed investment on the general economy, any plans to restructure an Australian enterprise following an acquisition, the nature of funding of the acquisition, the level of Australian participation in the enterprise after foreign investment occurs, the extent to which the investor will develop the project and ensure a fair return for the Australian people and whether the investment is consistent with the government's aim of ensuring that Australia remains a reliable supplier to all customers in the future are all considered.

10.5 Investor Character

FIRB will also consider the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision. The corporate governance practices of the investor are also material.

---

[19] Australian Treasurer, "Foreign Investment Policy", January 2012.

[20] In respect to the proposed takeover offer by China Minmetals Non-ferrous Metals Co Ltd ("**Minmetals**") to acquire certain mining assets of OZ Minerals Ltd ("**Oz Minerals**"), initially, FIRB rejected the takeover proposal on national security ground. According to a FIRB press release statement dated 27 March 2009, OZ Minerals' Prominent Hill mining operations are situated in the Woomera Prohibited Area in South Australia and the Woomera Prohibited Area weapons testing range made a unique and sensitive contribution to Australia's national defence. FIRB had determined that the Minmetals proposal for OZ Minerals could not be approved if it included Prominent Hill.

11. Applying for Approval

The Treasurer is empowered under the Act to:

- Unwind (by requiring the parties to sell shares or assets) transactions that have closed without prior approval having been obtained, where that transaction is inconsistent with Policy;
- Prosecute persons and companies who fail to obtain prior approval;
- Prosecute persons and companies who fail to comply with an order to sell shares or assets; and
- Prosecute persons and companies who fail to comply with conditions attached to any approval given under the foreign investment legislation.

Substantial penalties apply for non-compliance with notification requirements under the Act. Failure to comply with compulsory notification requirements, orders and any conditions imposed by the Treasurer is an offence. The maximum penalty is 500 penalty units (currently, $85,000) for natural persons or 2 years imprisonment and 2,500 penalty units (currently $1.25 million) for corporations.

Applications for approval from FIRB should be made before the proposed transaction or conditional on foreign investment approval (typically made via an online notification system maintained by FIRB).

Prior notification of a proposed acquisition for approval is either voluntary or compulsory. Set out in the Appendix is a summary of voluntary and compulsory notification requirements.

Voluntary notification should be given in order to obtain a statement of no objection from the Treasurer and take advantage of the safe harbour for the proposed acquisition/investment. Voluntary notification eliminates the risk of the Treasurer making adverse orders in respect of the proposed acquisition.

The government encourages potential investors to consult FIRB prior to lodging applications on significant proposals to allow timely consideration of the proposal.

Applications are only accepted as proposals under the Act when they contain sufficient detail, which includes the following information:

- Information about the parties;
- Information about the proposed investment (including its nature, methods of acquisition, the value of the investment, timetables and whether the investment is public);
- A statement of the investor's intentions (immediate and ongoing); and
- How the proposed investment may impact on the national interest.

Applications must also include statutory notices (as set out under the Regulations) where applicable. The relevant statutory notices required are:

- Form 1 (Notice under s 25 of the Act) – notification for proposals falling within the scope of the Act or FIRB Policy but which are **not subject to compulsory notification** under the Act. These include offshore acquisition of interests, acquisition of business assets, acquisition of shares in prescribed Australian corporations that are less than a substantial holding, and investments by foreign governments and/or their related entities.
- Form 2 (Notice under s 26 of the Act) – compulsory notification for a foreign person to notify the Treasurer of a proposal to acquire or increase a substantial holding in a prescribed Australian corporation where total assets exceed, or the transaction values it above the relevant thresholds.

- Form 3 (Notice under s 26A of the Act) – compulsory notification for a foreign person to notify the Treasurer of a proposal to acquire or increase an interest in Australian urban land.

The Treasurer has 30 days to consider an application and make a decision, but this period can be extended by up to a further 90 days by publishing an interim order. Applicants will be informed of the Treasurer's decision within 10 days of it being made.

A decision may:

- Raise no objections, allowing the proposal to go ahead; or
- Impose conditions, which will need to be met; or
- Prohibit the proposal.

Typical conditions imposed include undertakings to ensure that:

- The operation of the asset is managed in Australia with predominantly Australian staff;
- Pricing of resources is fair (by requiring pricing to refer to international benchmarks and in line with market practices); and
- The foreign owned asset/entity complies with obligations previously made by the target entity.

There is no time limit for processing applications made under Policy (for example, applications made by "foreign governments and their related entities") ,as opposed to applications under the Act, but the government also aims to consider these proposals within 30 days, where possible.

No fees or charges apply to applications.

12. Acquisition Contracts

The compulsory notification provisions specifically provide that a person is deemed not to have entered into an agreement in breach of the compulsory notification requirements under the Act if the provisions of the acquisition agreement do not become binding until the fulfilment of a condition set out in the agreement.

Typically this issue is addressed by including in the acquisition agreement a condition precedent to performance of the relevant obligations under the contract rather than formation of the contract.

13. Potential Changes to Foreign Investment framework

On 25 February 2015, the Australian Government released an options paper to seek feedback from stakeholders on proposed changes to the foreign investment framework, particularly with respect to residential real estate and agriculture ("**Options Paper**").[21]

The Options Paper formed the basis of the Government's consultation on reforms to the foreign investment framework. The proposed reforms include:

- increasing compliance and enforcement activities around foreign investment in residential real estate through the creation of a specialised investigative and enforcement area within the Australian Taxation Office; and
- introducing new civil penalties and increased criminal penalties for foreign investors and third parties who breach the foreign investment rules.

[21] Australian Government, "Strengthening Australia's Foreign Investment Framework – Options Paper", February 2015 [Accessed on 25 February 2015] <http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2015/Strengthening%20Australias%20foreign%20investment%20framework/Key%20Documents/PDF/Strengthening%20Australias%20foreign%20investment%20framework.ashx>

The Government is also considering introducing an application fee on all foreign investment proposals, based on the type of investment.

Section 9 of this paper sets out a discussion of the relevant feedback that the Government is seeking under this consultation process with respect to the agriculture sector.

The closing date for submissions is 20 March 2015.

14. Conclusion

Generally Australia welcomes foreign investment and acquisition proposals are rarely rejected

Other than in exceptional cases foreign investment approval does not give rise to government policy or substantive legal issues, but it is a process that must be taken into account in planning an acquisition transaction.

However, it is important to navigate a pathway through Australia's foreign investment regulatory landscape as failure to do so can have material adverse consequences for foreign investors and proposed acquisitions.

For further information please contact Danny Farrugia on +61 2 9043 4009 or dlf@aequus.net.au

APPENDIX

VOLUNTARY & MANDATORY NOTIFICATION REQUIREMENTS

*Type of Acquisition	Notification
Acquisition of Shares	
Acquisition of "substantial interest" or "aggregate substantial interest" in an Australian corporation, or an increase in "substantial interest" or "aggregate substantial interest" where the value of the assets of the corporation or trust exceeds $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million).	Compulsory
Acquisition of shares in an Australian corporation where the value of the assets of the corporation or trust exceeds $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million) which is not compulsorily notifiable.	Voluntary
Acquisition of "substantial interest" or "aggregate substantial interest" in an offshore corporation or trust which has gross assets valued at more than $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million), where the assets of that corporation or trust that are comprised of Australian land, Australian mineral rights or shares in an Australian corporation constitute 50% or more of the total assets of that corporation or trust.	Voluntary
Acquisition of "substantial interest" or "aggregate substantial interest" in an offshore corporation or trust, where the assets of that corporation or trust that are comprised of Australian land, Australian mineral rights or shares in an Australian corporation constitute less than 50% of the total assets of that corporation or trust, but those Australian assets are valued at more than $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million).	Voluntary
Acquisition of Assets	
Acquisition of an Australian business where the assets are valued at more than $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million).	Voluntary
Acquisition of interests in Australian urban land or in an Australian urban land corporation or trust (unless where an exemption applies).	Compulsory
Corporation Directorates	
Entry into certain proposed arrangements in relation to the affairs of a corporation or the proposed alteration of constituent documents of a corporate where, as a consequence, a director of the corporation will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the corporation or an associate of such a foreign person, where the assets of the business exceeds $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million).	Voluntary
Control of Australian Business	
Acquisition of control of an Australian corporation (for example, through board representation arrangements, leasing or hiring of assets, management agreements or profit sharing agreements) where the assets are valued at more than $252 million (US, Chilean, Korean, Japanese and NZ investors: $1,094 million).	Voluntary
New Businesses	
Investment in a new business by a foreign person (not a foreign government investor)	None
Investment in a new business by a foreign government investor	Compulsory
Foreign Government Investors	
All investments by foreign government investors.	Compulsory

*Certain exceptions may apply

aequus counsel