



GILBERT
+ TOBIN

FOREIGN INVESTMENT IN AUSTRALIA'S ENERGY + RESOURCES SECTOR

2019

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1. INTRODUCTION

Australia generally welcomes foreign investment. The Australian Government screens certain foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest. This guide explains some of the rules governing the screening process for foreign investment in Australia's energy and resources sector. However, Australia's foreign investment rules are complex and legal advice should be sought in respect of specific foreign investment proposals. The kinds of proposals examined by the Foreign Investment Review Board (**FIRB**) include both business investment proposals across all sectors of the economy and investment in land, in each case subject to materiality thresholds. Offshore transactions can also be captured.

Gilbert + Tobin has extensive experience advising on acquisitions and disposals in the energy and resources sector, including in the mining, oil and gas, power and renewable energy industries, and engaging with the FIRB in respect of foreign investment proposals. If you would like further information or advice on your particular transaction, please contact one of our experts and we would be pleased to assist.

This guide is current as at 1 April 2019. References to monetary amounts in this guide are amounts in Australian Dollars.

This guide does not cover foreign investment issues in respect of the acquisition by a foreign investor of critical infrastructure assets (e.g. electricity or gas networks, gas generators, water utilities, ports, telecommunications, rail).

The information provided in this guide is of a general nature and intended to aid the reader in identifying issues for which additional expertise and advice should be sought. It does not take into account the particular circumstances of the reader and is not intended as advice on any particular matter. No reader should act or fail to act on the basis of any material contained in this publication. Gilbert + Tobin expressly disclaims all and any liability to any persons whatsoever in respect of anything done in reliance, whether in whole or in part, on this publication.

2. KEY LAWS GOVERNING FOREIGN INVESTMENT

The main laws that regulate foreign investment in Australia are:

- + the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisitions and Takeovers Regulation 2015* (**FATR**). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals or apply conditions to the way such proposals are implemented, to ensure they are not contrary to Australia's national interest; and
- + the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of change of ownership and/or operatorship of energy and resources assets. The applicable legislation will depend on the type of assets and where the assets are located (see section 15).



3. WHO IS REGULATED

The legislation regulates foreign investment proposals by a 'foreign person'. A foreign person means:

Type of person	Criteria
Individuals	An individual not ordinarily resident in Australia, which can, in some circumstances, include a non-resident Australian citizen.
Corporation	A corporation in which: <ul style="list-style-type: none"> + an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20% or more; or + 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate interest of 40% or more.
Trustee of a trust	A trustee of a trust in which: <ul style="list-style-type: none"> + an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20% or more; or + 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate interest of 40% or more.
General partner of a limited partnership	A general partner of a limited partnership in which: <ul style="list-style-type: none"> + an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20% or more; or + 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate interest of 40% or more.
Foreign government investor	A foreign government investor for the purposes of Australia's foreign investment laws (see section 4).

4. FOREIGN GOVERNMENT INVESTORS

Australia scrutinises investments by 'foreign government investors' more than it does investments by other foreign persons.

A 'foreign government investor' includes:

- + a foreign government;
- + an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a 'separate government entity'); and
- + a corporation, trustee of a trust or general partner of a limited partnership in which:
 - a foreign government, separate government entity or a foreign government investor from one country holds an interest of 20% or more; or
 - foreign governments, separate government entities or foreign government investors from more than one country hold an aggregate interest of 40% or more.

The definition of foreign government investor captures not only state-owned enterprises (**SOEs**) and sovereign wealth funds (**SWFs**), but also public-sector pension funds, the investment funds into which SOEs, SWFs and public sector pension funds invest and, due to tracing rules, portfolio companies for such investment funds.

5. TYPES OF TRANSACTIONS THAT ARE REGULATED

SIGNIFICANT ACTION

A 'significant action' is the universe of transactions over which the Treasurer has power to make orders if they determine the action is contrary to Australia's national interest. Not all significant actions need to be notified to FIRB, however notifying a significant action to FIRB and obtaining a notice of no objection cuts off the Treasurer's power to block or unwind the transaction.

Significant actions include change of control transactions in relation to companies, entities and businesses where the relevant Australian assets are valued above the applicable monetary thresholds.

NOTIFIABLE ACTION

A 'notifiable action' is a subset of significant actions which must be notified to the Treasurer. Failure to notify is an offence under the law. The Treasurer has the power to block or unwind a notifiable action that she or he considers to be contrary to the national interest.

Notifiable actions in respect of energy and resources transactions include acquisitions by:

- + a foreign person of a substantial interest (20% or more) in an Australian company or Australian unit trust, subject to applicable monetary thresholds (see section 6);
- + a foreign government investor of a 'direct interest' (see section 6) in an Australian company, unit trust or business (see section 6);
- + a foreign government investor of an interest of at least 10% in the securities in certain mining entities, subject to applicable monetary thresholds (see section 6); or
- + a foreign person of an interest in Australian land (see section 8).



6. INTERESTS IN AUSTRALIAN ENTITIES

SPECIFIED PERCENTAGE IN AN ENTITY

The concept of an interest of a specified percentage in an entity is an important one for the purposes of determining whether a person is a foreign person and whether an action is a 'significant action' or 'notifiable action'. It counts shares or units:

- + that a person or its associate owns; or
- + over which the person or its associates have voting control; or
- + that a person or its associates would own or over which the person or its associates would have voting control, if a person exercised rights that it has (such as exercising an option).

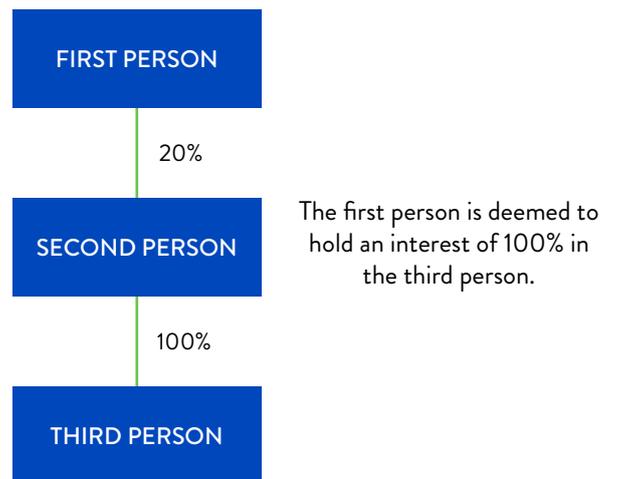
In addition, for certain purposes under the FATA (including determining whether a person is a foreign person), if a person has the power to veto any decision of the board, central management or the general meeting of an entity, the person is deemed to have an interest of 20% or more.

A person is taken to acquire an interest of a specified percentage if they already hold that percentage, and then increase it.

TRACING RULES AND ASSOCIATES

Tracing rules operate up through chains of ownership of 20% or more, so that if an entity (**first entity**) has an interest of 20% or more in another entity (**second entity**), the first entity is taken to hold so much of any entity that the second entity holds.

This test operates through multiple chains of ownership and applies at each level irrespective of whether there is any practical control. These rules can operate to cause an Australian entity to be deemed to be a foreign person, and in some cases, can cause an offshore transaction to be a 'significant action' or a 'notifiable action' (see section 7).



The interests that are counted include the interests of a person's associates. The associates of a person (**first person**) include (among other things, and subject to narrow exceptions):

- + the first person's relatives;
- + any person with whom the first person is acting in concert in relation to an action to which FATA applies;
- + partners in a partnership;
- + any entity of which the first person is a senior officer (and vice versa); and
- + a corporation or trustee of a trust in which the first person holds an interest of 20% or more (and vice versa).



TRANSACTIONS INVOLVING AN AUSTRALIAN COMPANY

Acquisition of substantial interest

A foreign person must obtain FIRB approval for any acquisition of a substantial interest in an Australian company or an Australian unit trust valued above the relevant monetary threshold or which holds a mining or production tenement (see section 8 for the definition of mining or production tenement).

A person holds a substantial interest in an Australian company or unit trust if:

- + the person holds an interest of at least 20% in the company or unit trust; or
- + for a unit trust, the person, together with any one or more associates, holds a beneficial interest in at least 20% of the income or property of the unit trust.

Foreign government investors

The position is different for foreign government investors. Foreign government investors are required to obtain FIRB approval for any acquisition of a direct interest in an Australian company or Australian unit trust or business, regardless of value.

A 'direct interest' includes:

- + an acquisition of an interest of 10% or more in the entity or business;
- + an acquisition of an interest of 5% or more in the entity or business if the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity or business; and

- + an interest of any percentage in the entity or business if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or business or to influence, participate in or determine the policy of the entity or business. This includes offshore transactions, subject to very limited exceptions (see below).

A foreign government investor must also notify and seek a statement of no objection to acquire an interest of at least 10% in the securities in an entity where the value of tenements held by the entity or any subsidiary exceeds 50% of the entity's total asset value.

Australian land corporations

Acquisitions of securities in Australian land corporations may also be notifiable where the value of the company's interests in Australian land (including mining or production tenements) exceeds 50% of the value of its total assets, subject to the applicable monetary thresholds.

Agreement with holder of a tenement

Entering into or terminating a significant agreement with the holder of a mining or production tenement, where the total value of the business exceeds the threshold and the action results in a change of control, is also a significant action. Significant agreements include those relating to the right to use or lease assets or participate in profits or management and control of the business.

7. OFFSHORE TRANSACTIONS

INTEREST IN A FOREIGN CORPORATION

Acquiring an interest in a foreign corporation is a 'significant action' if:

- + the foreign corporation holds relevant Australian assets (that is, land in Australia, including legal or equitable interests in that land, or securities in an Australian entity) and carries on an Australian business, or is a holding entity of such a foreign corporation;
- + the Australian assets or businesses of the target company are valued at more than the applicable monetary threshold value; and
- + there would be a 'change in control' in the foreign corporation as a result of the acquisition. Where one or more foreign persons already control the entity, there will be a change in control if another foreign person would become, or has become, a person who controls the entity or business or a person would cease or has ceased to be a person who controls the entity or business.

However, this type of acquisition is not a 'notifiable action' unless the foreign person is also a foreign government investor, or if the acquisition involves the direct or indirect acquisition of an interest in securities in a land entity.

FOREIGN GOVERNMENT INVESTORS

For a foreign government investor, offshore acquisitions (via the tracing rules) of a direct interest (see section 6) in an Australian entity are notifiable actions regardless of the value, unless the following exception for non-material interests in businesses that are not sensitive businesses (see section 9) is met (in which case it is neither a significant action or a notifiable action):

- + the foreign government investor acquires a 'direct interest' in an Australian entity by acquiring an interest in securities in a foreign entity; and
- + the relevant Australian assets are valued below \$55 million and constitute less than 5% of the target's global gross assets, and none of the assets taken into account in working out the total asset value are assets of a sensitive business.



8. INTERESTS IN AUSTRALIAN LAND

Acquisitions in the energy and resources sector frequently involve acquisitions of interests in land of varying kinds, which may have separate approval requirements.

INTERESTS IN LAND

An interest in Australian land includes:

- + a freehold interest;
- + an interest as lessee or licensee in a lease or licence giving rights to occupy Australian land if the term of the lease or licence (including any extensions or renewals) is reasonably likely to exceed 5 years;
- + an interest in a share in an Australian land corporation, being:
 - a holding entity that prepares financial statements, where based on the financial statements, the interest in Australian land exceeds 50% of the value of the total assets; or
 - any entity whose interests in Australian land exceeds 50% of the total value of the assets of the entity;
- + an interest in a unit in an Australian land trust, being a unit trust where the interests in Australian land held by the trustee exceeds 50% of the total assets of the trustee; and
- + if the trustee of an Australian land trust is a corporation, an interest in a share of that corporation.

A person acquires an interest in Australian land even if the person previously acquired an interest in Australian land or is increasing the amount of an existing interest in Australian land.

A person also acquires such an interest if the person enters into an agreement or has a right to acquire such an interest under an option.

TYPES OF AUSTRALIAN LAND

Under Australia's foreign investment laws, Australian land is categorised as agricultural land, residential land, commercial land or a mining or production tenement.

Different types of Australian land can co-exist on the same area of land or land title. Accordingly, foreign persons should consider all types of Australian land they may be seeking to acquire, as there may be multiple notifiable actions in one acquisition. In particular, mining and production tenements present issues because they are themselves deemed to be an interest in land, but also exist in relation to land that is one of the other types.

Different value thresholds for FIRB approval apply depending on the type of Australian land interest being acquired and notification is required even if the relevant monetary threshold is triggered for only one of the types of Australian land.

Agricultural land

Agricultural land is land in Australia that is used, or could reasonably be used, wholly or partly for a primary production business (which includes carrying on a business cultivating plants, planting or tending trees in a forest plantation and maintaining animals for the purpose of sale).

There are certain key exemptions to land being agricultural land which relate to energy and resources transactions. The land is exempt from being categorised as agricultural land if the land is not used wholly or predominately for a primary production business and:

- + the land is used wholly or predominately for a mine, oil or gas well, quarry or other similar operation under a mining or production tenement (**mining operation**), to locate infrastructure relating to a mining operation or to store waste from a mining operation;
- + an approval from a government authority (that is not a mining or production tenement) is in force allowing a mining operation to be established or operated on the land, infrastructure relating to a mining operation to be located on the land, or waste relating to mining operations to be stored on the land; and



- + zoning allows the land to be used for a primary production business and an application has been made to a government authority:
 - for approval for a mining operation to be established on the land;
 - for approval to locate infrastructure relating to a mining operation on the land; or
 - for approval for waste from a mining operation to be stored on the land.

An acquisition by a foreign person of an interest in agricultural land and any holding of a registerable water entitlement or contractual water right exceeding 5 years must be notified to the Australian Taxation Office.

FIRB approval is not generally granted for an acquisition of an interest in agricultural land that will be used for a primary production business or residential development unless the agricultural land was first offered for sale through an **open and transparent sale process**. A public sales process that was marketed widely to potential Australian bidders for a minimum of 30 days and that allowed Australian bidders an opportunity to participate will generally be considered an open and transparent sale process.

To the extent any agricultural land being acquired will be used for a primary production business or residential development, the open and transparent sale process requirement would apply.

Residential land

Residential land is land in Australia on which there is at least one dwelling, or the number of dwellings that could reasonably be built on the land is less than 10 but does not include land used wholly and exclusively for a primary production business or land on which the only dwellings are commercial residential premises.

Commercial land

Commercial land is all land in Australia or the seabed of the offshore area other than land wholly and exclusively used for a primary production business or residential land. Commercial land is further categorised into developed commercial land and vacant commercial land, depending upon whether there is a substantive permanent building on the land that can be occupied by people, goods or livestock.

Mining or production tenement

A mining or production tenement is a type of Australian land for the purpose of the foreign investment framework.

A mining or production tenement includes:

- + a right under a law of the Commonwealth, a state or territory to recover minerals, oil or gas in Australia or from the offshore area (other than a right to recover minerals, oil or gas for the purposes of prospecting or exploring for minerals, oil or gas);
- + a right preserving such right;
- + a lease under which the lessee has such right; or
- + an interest in such right or lease.

Acquisitions of interests in a mining or production tenement by foreign persons are notifiable and significant actions regardless of value (i.e. a zero threshold applies), other than direct acquisitions from the Australian government or acquisitions by relevant agreement country investors (Chile, New Zealand and United States investors) which have a higher threshold (see section 9).

Exploration or prospecting tenements

An exploration tenement is a right under federal, state or territory law to recover minerals, oil or gas in Australia from land or the seabed for the purpose of prospecting or exploring such minerals, oil or gas. Generally, they will be for a set period and will allow for activities including sampling, testing, drilling, surveys and prospecting.

A foreign investor generally does not need to seek FIRB approval to acquire an exploration tenement, regardless of the value of the tenement or who it is acquired from because an exploration tenement is generally not considered an interest in Australian land under the foreign investment framework. However, if the exploration tenement exceeds 5 years (including any extensions or renewals) and confers a right to occupy the underlying land, then the acquisition of that interest in the land may be a notifiable action and significant action depending on the type of land (for example agricultural land or commercial land), whether the tenement is being acquired directly from the Australian government and the value of the interest in the land.

UNDERLYING LAND FOR MINING OPERATIONS

The grant of exploration licences and mining leases in Australia does not displace land ownership rights in respect of the underlying land. Generally, before a mining lease can be granted, the applicant for the mining lease must compensate the owner of the underlying land and restrictions exist in relation to private land access for the purpose of exploration.

To avoid such issues, it is not uncommon for mining companies to purchase interests in the land underlying the project area. In such circumstances, FIRB notifications in respect of purchases of interests in land should be considered in addition to notifiable actions that relate to mining tenements.

WIND AND SOLAR FARMS

A 'wind or solar power station' is defined in the FATR to mean a solar electricity generation system or wind power station that is an accredited power station under the *Renewable Energy (Electricity) Act 2000* (Cth),¹ and includes each and any component(s) of a solar electricity generation system or wind power station, for example each wind turbine. Importantly, the infrastructure must be used for the purpose of generating electricity for a commercial purpose (rather than for private use).

The presence of a wind or solar power station will impact the treatment of the underlying land under the foreign investment framework and thus the assessment of whether notification is required. In determining the treatment of land that contains a wind or solar power station, there are different considerations for greenfield and brownfield projects.

Developed wind or solar farms

Land which contains a wind or solar power station on the surface of the land will not be considered vacant. If a component of a wind or solar power station is on the surface of the land, the land will be treated as developed commercial land. For example, land that contains a wind turbine will be treated as developed commercial land. In contrast land that contains a component of a wind or solar power station that is underground (e.g. an underground cable) will still be treated as vacant because the location of the cable is unlikely to affect the use of the surface of the land.

The lower threshold applicable to developed commercial land will apply if the project site is used for the purpose of generating electricity to the public. It is not clear whether this lower threshold would also apply to a wind or solar power station with a fully contracted PPA with a public utility company as FIRB has yet to release guidance on this point. If the land upon which the wind or solar power station is located is predominately used for a primary production business it will also be classified as agricultural land.

Special rules apply if a foreign investor that is an owner or operator of one or more existing wind or solar power stations in Australia wishes to acquire an additional developed wind or solar project. In such scenario, if the acquisition involves the acquisition of agricultural land, this fact is disregarded for the purposes of determining whether the threshold test is met (however it is not disregarded for the purposes of determining the application fee payable).

Undeveloped wind or solar farms

Subject to one exception, rural land used to develop solar or wind power stations will be treated as vacant commercial land (assuming there is no substantive permanent building on the land).

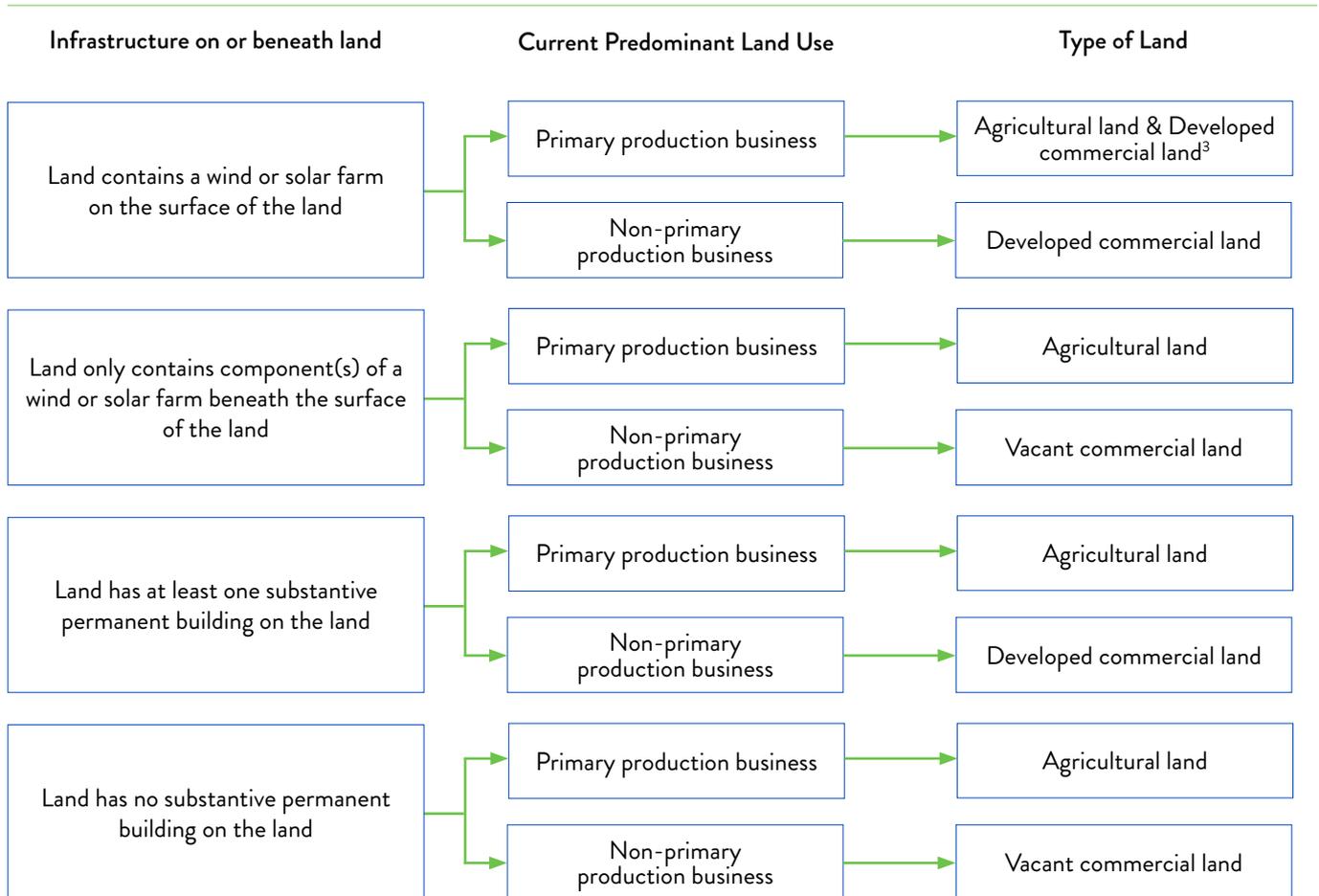
Accordingly, the acquisition of a greenfields wind or solar project will require FIRB approval irrespective of the value of the project or the land. In addition to being vacant commercial land, the site may be classified as agricultural land, however land will not be classified as agricultural land if it is currently used wholly or predominately for a primary production business and one of the following conditions is met:

- + an application has been made to a government authority for approval (including accreditation) for establishing or operating a wind or solar power station on the land (whether on or beneath the surface);
- + an approval of a government authority (including accreditation) is in force allowing a wind or solar power station to be established or operated on the land (whether on or beneath the surface); or
- + the land was acquired solely, or is used wholly or predominantly, to meet a condition of an approval of a government authority (including accreditation) (that relates to other land) for a wind or solar power station to be established or operated on the land.

There is an exception if the land is currently being used 'wholly and exclusively' for primary production. In this case, the land will be classified only as agricultural land and a screening threshold of \$15 million will apply.

¹ A register of all accredited power stations is publicly available at <https://www.rec-registry.gov.au/rec-registry/app/public/power-station-register>.

Treatment of land which contains a wind or solar farm²



² Land can be categorised as more than one type of land for the purposes of the FATA.

³ Where a foreign person currently owns or operates a wind or solar farm, and acquires a developed wind or solar farm for the sole purpose of operating the wind or solar farm, the monetary thresholds for agricultural land will not apply. In this case, whilst the land is still considered to be developed commercial land and agricultural land (for determining the application fee payable), only the monetary thresholds for developed commercial land will apply (irrespective of whether the land is being currently used predominantly for a primary production business).

9. MONETARY THRESHOLDS

OVERVIEW

The system of monetary thresholds is complex. Both the way that the threshold is calculated, and the dollar value of the monetary threshold, differs for different kinds of transactions.

The thresholds are also affected by Australia's treaty obligations, so different thresholds may apply for investors from countries with which Australia has entered into free trade agreements (FTAs). Not all FTAs contain the same thresholds, and the availability of the higher thresholds is interpreted strictly – the interposition of vehicles from non-treaty countries or Australia will void the higher threshold for a transaction.

TRANS-PACIFIC PARTNERSHIP

On 31 October 2018, Australia ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP-11). The TPP-11 is a regional free trade agreement negotiated between 11 economies including, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The TPP-11 has been ratified by the other signatories (except Brunei Darussalam, Malaysia and Peru) meaning that these signatory countries are now 'agreement countries' for the purposes of the FATR.⁴ As such, higher monetary thresholds apply to private foreign investors from those countries in non-sensitive sectors.

SENSITIVE BUSINESS

The higher treaty thresholds do not however apply to transactions involving "sensitive" business sectors.

A "sensitive" business that could be acquired in an energy and resources transaction includes a business carried on wholly or partly in:

- + the transport sector (including business relating to infrastructure for that sector); or
- + the extraction of, or the holding of rights to extract, uranium or plutonium or the operation of a nuclear facility.

SENSITIVE LAND

Certain types of non-vacant commercial land are classified as "sensitive" land and acquisitions of such types of land are subject to lower notification thresholds. "Sensitive" land that could be acquired in an energy and resources transaction includes:

- + land that will be leased to the Commonwealth Government or a state government (or their agencies);
- + land that will be fitted out specifically for the extraction of, or the holding of rights to extract, uranium or plutonium or the operation of nuclear facilities;
- + land where an authorisation under law of the Commonwealth, a state or a territory will allow materials that are regulated under that law to be produced or stored on the land;
- + land upon which a mine, oil or gas well, quarry or other similar operation will operate; and
- + land upon which public infrastructure will be located, which includes an airport or airport site, a port, infrastructure for public transport, and a system or facility that is used to provide the following services to the public:
 - the generation, transmission, distribution or supply of electricity;
 - the supply of gas; and
 - the storage, treatment or distribution of water; or the treatment of sewage.

⁴ Brunei Darussalam, Malaysia and Peru will become 'agreement countries' for the purposes of the FATR when their respective governments ratify the TPP-11. Separately, Peru & Australia have entered into the Peru-Australia Free Trade Agreement and as a result, upon ratification by the Australian government, Peru will become an 'agreement country' for the purposes of the FATR.

HOW IS THE THRESHOLD MEASURED

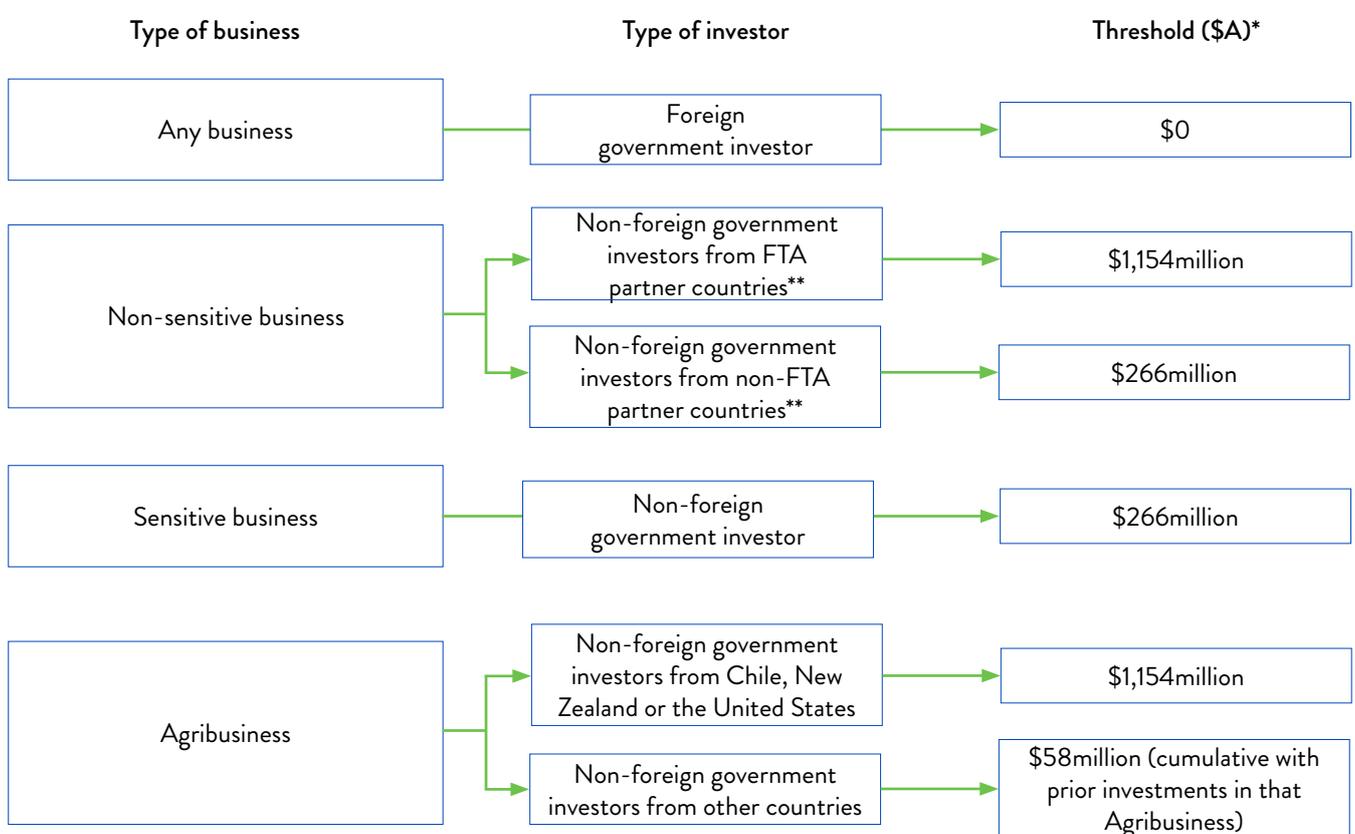
The following table explains how the threshold for different kinds of acquisitions are calculated.

Type of Transaction	How threshold is measured
Non-Land acquisitions	
Acquisitions of shares or units	Higher of the value of the gross assets of the target entity and the value implied by the consideration paid for the share or units. Consideration may be apportioned in offshore transactions based on EBIT.
Change of Control transactions (other than as listed above)	Gross assets of the target entity
Acquisition of assets	Consideration for the acquisition
Acquisition by a foreign government investor	N/A
Land acquisitions	
Acquisition of developed commercial land	Value of the land interest
Acquisition of vacant commercial land	Value of the land interest
Acquisition of agricultural land	For Chilean, New Zealand, United States and Thai investors that are not foreign government investors, the consideration for the land being acquired. For all other investors that are not foreign government investors, consideration for the land being acquired plus the value of all other Australian agricultural land held by the acquirer and its associates.
Acquisition of residential land	N/A
Acquisition of mining tenements	Value of the land interest

APPLICABLE THRESHOLDS

The following two charts provide a guide of how to determine the applicable monetary thresholds, for different kinds of acquisitions that could occur in the context of energy and resources transactions. The thresholds are indexed annually on 1 January using the GDP implicit price deflator. The rates in the charts below apply from 1 January 2019.

Monetary thresholds for non-land proposals



* As of 1 January 2019

** FTA partner countries are Canada, Chile, China, Japan, Mexico, New Zealand, Singapore, South Korea, the United States and Vietnam.



Monetary thresholds for land proposals

Type of Land	Type of investor	Threshold (\$A)*
Any land	Foreign government investor	\$0
Residential land	Any foreign investor	\$0
Vacant commercial land	Any foreign investor	\$0
Non-sensitive developed commercial land	Non-foreign government investor from FTA partner countries**	\$1,154million [#]
	Non-foreign government investor from non-FTA partner countries**	\$266million [#]
Sensitive developed commercial land	Non-foreign government investor from FTA partner countries**	\$1,154million [#]
	Non-foreign government investor from non-FTA partner countries**	\$58million [#]
Mining and production tenements	Non-foreign government investor from Chile, New Zealand or the United States	\$1,154million [#]
	Non-foreign government investor from other countries	\$0 [#]
Agricultural land	Non-foreign government investor from Chile, New Zealand or the United States	\$1,154million ⁺
	Non-foreign government investor from Thailand, where land is used wholly or exclusively for a primary production business (otherwise the land is deemed to <u>not</u> be agricultural land)	\$50million ⁺
	Non-foreign government investor from other countries	\$15million (cumulative) ⁺⁺

*As of 1 January 2019

**FTA partner countries are Canada, Chile, China, Japan, Mexico, New Zealand, Singapore, South Korea, the United States and Vietnam

[#] Threshold is measured based on the value of the land interest.

⁺ Threshold is measured based on consideration for land being acquired.

⁺⁺ Threshold is measured based on consideration for the land being acquired plus the value of all other Australian agricultural land held by the acquirer and its associates

10. NATIONAL INTEREST TEST

In determining whether a foreign investment proposal is contrary to the national interest, the Australian Government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on:

- + national security;
- + competition (noting that this is a different test to the test applied by the Australian Competition and Consumer Commission in examining merger clearances);
- + other Australian government policies such as tax and the environment; and
- + the economy and the community (such as the investor’s plans to restructure the business in Australia after the acquisition).

In addition, the Treasurer will also consider the character of the investor (ie. extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision), in particular where an investment is made by a foreign government investor.



SPECIFIC FOCUS AREAS

In the context of energy and resources transactions, some foreign investment proposals give rise to more specific concerns, which the Australian Government takes into consideration (in addition to those described above) when examining those proposals, including the following:

Type of proposal	Additional factors considered
Agricultural investment proposals	<ul style="list-style-type: none"> + the effect of the proposal on the quality and availability of Australia’s agricultural resources, including water + land access and use + agricultural production and productivity + Australia’s capacity to remain a reliable supplier of agricultural production, both to the Australian community and Australia’s trading partners + biodiversity + employment and prosperity in Australia’s local and regional communities
Foreign government investor proposals	<ul style="list-style-type: none"> + if the proposed investment is commercial in nature + if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia’s national interest
Critical Infrastructure	<ul style="list-style-type: none"> + the capacity for a malicious actor to interfere with Australian critical infrastructure

11. EXEMPTION CERTIFICATES

A foreign person can, in certain circumstances, apply for an exemption certificate to obtain upfront approval for a program of acquisitions.

At present, exemption certificates for acquisitions in land, businesses and/or securities in an entity are available. It is intended that foreign persons with a high volume of acquisitions apply for an upfront approval so that they do not need to seek separate approvals for each acquisition. The process of applying for an exemption certificate is similar to the process for applying for foreign investment approval.

EXEMPTION CERTIFICATES - PROGRAM OF ACQUISITIONS OF INTERESTS IN TENEMENTS

Foreign persons (including foreign government investors) are able to apply for an exemption certificate to cover a program of acquisitions of interests in tenements.

Exemption certificates for mining or production tenements would generally be granted subject to conditions that:

- + specify the geographic region of the tenement; and
- + specify the type of minerals that can be exploited under the tenement.

FOREIGN GOVERNMENT INVESTOR EXEMPTION CERTIFICATES

Foreign government investors may apply for an exemption certificate to cover exploration, mining or production tenements. However, exemption certificates will generally not be granted to foreign government investors that cover a mixture of these tenements over substantially the same area and target resource.

For example, if a foreign government investor is granted an exploration tenement exemption certificate and would also like a mining or production tenement exemption certificate to cover later potential related mining or production tenements, the inclusion of such tenements in the certificate would generally be considered contrary to the national interest.

The related mining or production tenements would normally be expected to be covered by a later exemption certificate application or notice, once the exploration activities have been substantially progressed.

BUSINESS EXEMPTION CERTIFICATES

An exemption certificate is also available for programs of acquisitions of interests in the assets of an Australian business and/or securities in an entity (**Business EC**). The Business EC has broad application but is intended to suit large domestically-managed investment funds and their portfolio companies, particularly those with low risk foreign government investors.

The types of acquisitions likely to be eligible for a Business EC will be those that are unlikely to raise significant national interest issues. FIRB has provided guidance that this generally excludes acquisitions involving "sensitive" entities and businesses.

Whether a business is "sensitive" or a proposed acquisition is low risk would be determined on a case-by-case basis and informed by Treasury and other government agencies responsible for assessments of national interest factors (such as the Critical Infrastructure Centre). For example, an acquisition of interests in critical infrastructure assets and sectors is likely to raise sensitivities and not be suitable for an exemption certificate.

While it is not necessary to know in advance the precise acquisitions that will be made, the more detail that can be provided regarding the size, location and industry sector of proposed acquisitions, the more likely that the certificate will be issued.

Foreign government investors are eligible to apply for a Business EC but the track record of the investor and nature of their proposed investment will be carefully considered.

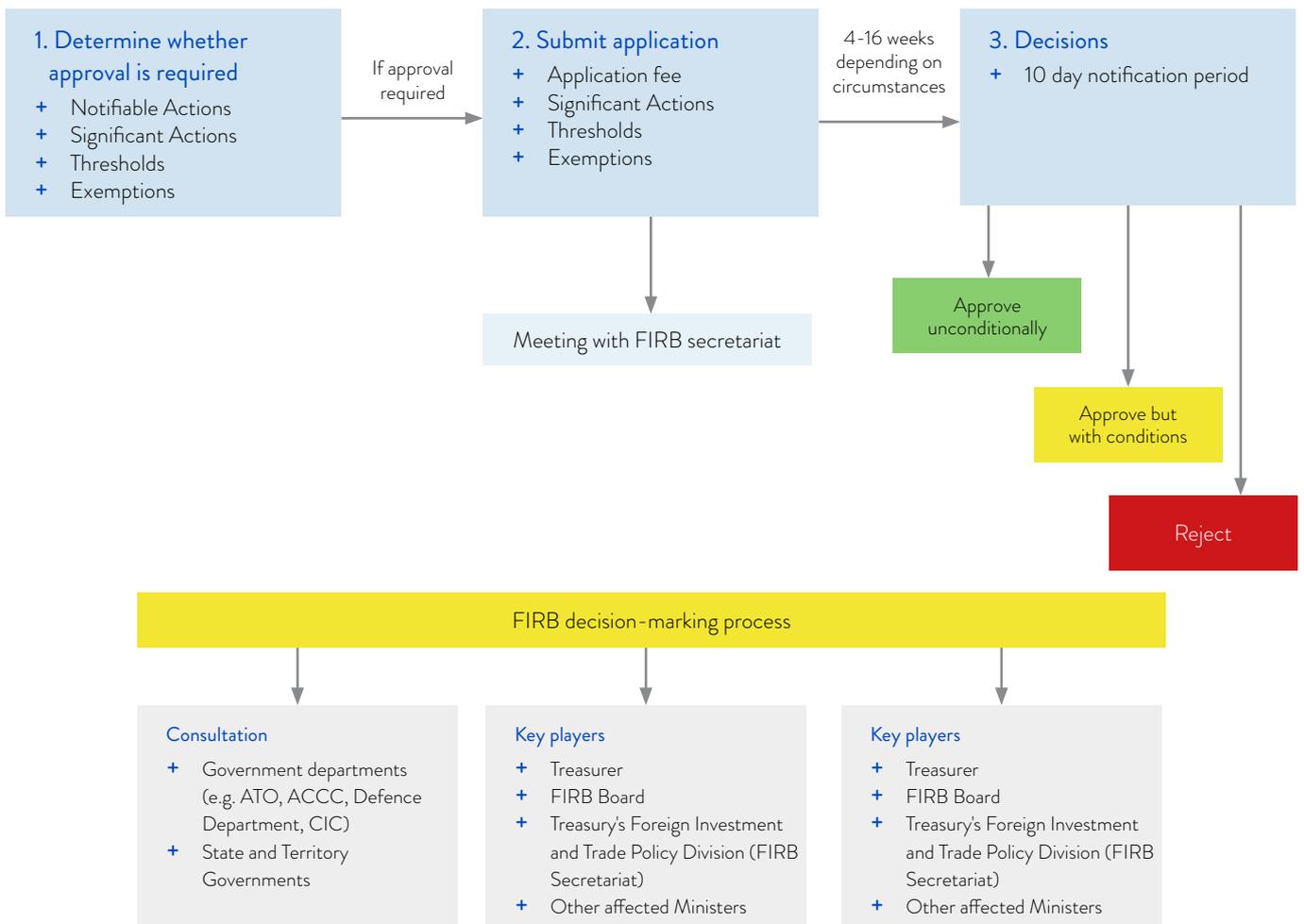


12. FIRB PROCESS

The Treasurer has the ultimate power to decide whether a transaction is contrary to the national interest. In response to an application, the Treasurer may issue a no objection notification (commonly referred to as a FIRB approval) with or without conditions imposed or make an order prohibiting the transaction.

When making foreign investment decisions, the Treasurer is advised by FIRB, which examines foreign investment proposals and advises on the national interest implications of the proposals. FIRB is a non-statutory advisory body.

FIRB is supported by the Australian Government's Treasury Department (**Treasury**) and by the Australian Taxation Office (**ATO**). Treasury is responsible for the day-to-day administration of the framework in relation to business, agricultural land and commercial land proposals. The ATO administers foreign investment into residential real estate. In addition, most applications are referred to other relevant government departments for input, including the ATO and the Australian Competition and Consumer Commission (**ACCC**).



APPLICATION

The procedure for securing approval for a foreign investment proposal that is a notifiable action or a significant action is that the applicant must lodge an application with FIRB online through its website. The online application requires basic information about the transaction, including names and addresses of the parties, the type of transaction and information relevant to calculating the monetary threshold for the transaction and the application fee. The applicant is expected to attach a cover letter that explains the transaction in detail, including reasons for the transaction, the acquirer's intentions for the target and the applicant's assessment of national interest considerations.

FEES

Each application made to FIRB attracts filing fees. The filing fees vary depending on the kind of application. Most transactions attract a \$25,700 filing fee, except that transactions valued over \$1 billion attract a \$103,400 filing fee.⁵

Transactions involving the acquisition of an interest in a mining or production tenement attract a fee of \$25,700 or a fee of \$10,200 where the acquisition is by a Foreign Government Investor. For agricultural land, transactions between \$2 million and \$10 million attract a filing fee of \$25,700 whilst the filing fee for acquisitions above \$10 million is \$103,400.

An application is not considered to be lodged until payment of the filing fee is made.

Potential investors can obtain an estimate of the filing fees on the FIRB website's fee estimator at <http://firb.gov.au/applications/estimator/>.

DECISION-MAKING PROCESS

Once the application is lodged, the case officer assigned to the application may contact the applicant to ask questions. More complex transactions may result in an ongoing dialogue between Treasury, FIRB and the applicant regarding the imposition of conditions.

From a statutory perspective, the review process consists of a 30 calendar day examination period and a 10 calendar day notification period. The examination period can be extended on request by the applicant or by the Treasurer issuing an interim stop order, which gives the Treasurer an additional period of up to 90 calendar days to examine the application. In practice, the length of time is affected by the time of year, the extent to which the application is being reviewed by other government departments, the election cycle and general levels of busyness, and voluntary extensions by the applicant are routine.

CRITICAL INFRASTRUCTURE CENTRE

The Critical Infrastructure Centre (CIC) is Australia's agency responsible for analysing and managing the complex national security risks of sabotage, espionage and coercion from foreign involvement in Australia's critical infrastructure. It coordinates the national security review, including advising FIRB on proposals that involve critical infrastructure across a broad range of sectors including energy, banking, transport, food and groceries.

The CIC's analysis also provides a basis for the exercise of broad powers by the Department of Home Affairs in relation to foreign investments in certain assets in the electricity, gas, water and ports sectors (which are listed on a confidential register). These powers are granted under the Security of Critical Infrastructure Act 2018 (Cth) (SCI Act), and could involve, by way of example, orders to dispose of assets, to operate and manage them in a particular way once acquired by a foreign investor, or to meet reporting requirements. As the SCI Act is relatively new, the Home Affairs Minister's willingness to exercise these powers and the types of conditions that may be imposed on the operation and ownership of critical infrastructure are not yet clear.

⁵ Fees as at 1 January 2019

13. CONDITIONS

As part of the FIRB approval process, the Treasurer may impose conditions on the foreign investor. These conditions are determined on a case-by-case basis and are often framed as behavioural undertakings designed to preserve the national interest. For example, FIRB may require that there is local presence on the board of directors or board committees, or that the location of the organisation's management stays in Australia.

In the process of considering the application, FIRB will consult with the ATO on the tax impact of the investment. In most circumstances, foreign investors should expect that the standard tax conditions will be imposed. Sometimes, specific or additional tax conditions may also be imposed and preliminary ATO views on the proposed investment may be noted as part of the conditions.

TAX CONDITIONS

There are eight standard tax conditions. Most of the standard conditions are ordinary tax compliance obligations which apply to all taxpayers. Their imposition on foreign investors is aimed at encouraging those not familiar with the Australian tax system to seek tax advice and to remain current in compliance. However, as it is part of the FIRB process, breaches of the conditions can result in sanctions beyond the mere imposition of tax-related penalties.

If the proposed investment presents significant tax planning opportunities or significant risks to Australian tax revenue, the Treasurer can either prohibit the investment (which is generally highly unlikely) or allow the investment with additional imposed tax conditions.

For further information in relation to the standard and additional tax conditions, please see our publication on the tax conditions [here](#).

14. PENALTIES

For any notifiable action, it is an offence to fail to notify the foreign investment proposal.

For a significant action (including a notifiable action) that is notified, it is an offence to proceed with the foreign investment proposal until a statement of no objection is received or the Treasurer's power to make a decision in relation to the proposal expires.

The penalties for failure to comply are set out in the table below.

	Criminal	Civil
Individuals	Up to 3 years imprisonment or a fine of up to \$157,500, or both	A fine of up to \$52,500
Companies	A fine of up to \$787,500	A fine of up to \$262,500

Officers of companies commit an offence or may be liable for civil penalties if the corporation is convicted of the offence or is the subject of a civil penalty order and the person authorised or permitted the commission of the offence or the contravention of the civil penalty provision by the corporation.

Third parties who knowingly assist a breach may also be subject to civil and/or criminal penalties.



15. OTHER REGULATORS AND LEGISLATION

MINING INDUSTRY REGULATORS

In Australia, nearly all minerals are vested in the Crown in right of the Australian states and the Commonwealth (with respect to the two Australian territories). Accordingly, each of the states and the Northern Territory have different legislative regimes which govern mining operations.

The responsibility of administering these legislative regimes is vested in the relevant Minister. The Minister is then assisted by a separate department of the public service of the state or territory.

PETROLEUM INDUSTRY REGULATORS

Onshore petroleum operations in Australia are governed by the legislation of the state or territory in which the operations are located. In addition, state or territory legislation applies to petroleum operations which are situated in offshore waters that are within the jurisdiction of that state or territory.

Offshore petroleum operations in Australia beyond designated state and territory coastal waters are governed primarily by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (**OPGGSA**). Pursuant to OPGGSA, the Australian Government administers the regulatory regime together with the state and Northern Territory governments' involvement through Joint Authority arrangements.

The Joint Authority makes decisions under the OPGGSA concerning the granting of petroleum titles and conditions, and decisions about resource management and resource security. The National Offshore Petroleum Titles Administrator (**NOPTA**) is responsible for the day-to-day administration of petroleum and greenhouse gas titles in Commonwealth waters in Australia.

The National Offshore Petroleum Safety and Environmental Management Authority (**NOPSEMA**) is the sole regulator of environmental approvals for offshore petroleum activities in Commonwealth waters. NOPSEMA assesses each environment plan or offshore project proposal against the requirements of the OPGGSA.

ASX

The Australian Securities Exchange (ASX) supports equities, derivatives and enterprise trading markets. It applies the ASX Listing Rules and ensures publicly listed companies comply with certain disclosure and market awareness obligations.

JORC CODE

In respect of energy and resources transactions that include ASX listed companies, Chapter 5 of the Listing Rules may be relevant. This chapter of the Listing Rules provides for quarterly reporting requirements, reporting on mining activities, reporting on oil and gas activities, terms of a mining tenement and a petroleum tenement joint venture and the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (**JORC Code**).

The JORC Code is a professional code of practice that sets minimum standards for public reporting in Australia and Australasia. It provides a mandatory system for the classification of Exploration Results, Mineral Resources and Ore Reserves according to the levels of confidence in geological knowledge and technical and economic considerations in public reports.

ASIC

The *Corporations Act 2001* (Cth) (**Corporations Act**) and its associated regulations, are the principal pieces of legislation which regulate companies in Australia. These are administered by the Australian Securities and Investments Commission (**ASIC**), Australia's corporate, markets and financial services regulator.

Entities operating in Australia must comply with the Corporations Act irrespective of whether the entities are Australian or foreign owned.

ACCC

The Australian Competition and Consumer Commission (ACCC) monitors competition, fair trading and consumer protection issues. It principally administers the Competition and Consumer Act 2010 (Cth) (CCA) which covers, among other things, anti-competitive practices and merger clearances. The ACCC investigates and reviews transactions that may raise concerns under the CCA. Although it is voluntary to notify the ACCC of a merger or acquisition, the ACCC prefers to be informed of all transactions. Formal and informal merger clearance is available and the process and evaluation methodology are both set out in ACCC guidelines.

The ACCC is also assisted by the Australian Energy Regulator (AER), which is Australia's national energy market regulator. The AER's responsibilities include:

- + price setting for energy network charges;
- + compliance monitoring of retail and wholesale energy markets;
- + enforcement action for breaches of energy laws and rules;
- + publishing information on energy markets; and
- + assisting the ACCC with energy-related decisions.

While FIRB will consult closely with the ACCC as part of the foreign investment approval process, FIRB is entitled to adopt its own position on competition matters even if the ACCC clears a transaction.

ATO

The Australian Taxation Office is the statutory authority responsible for administering the Australian tax system. It administers the process of annual self-assessment and conducts audits. It is also responsible for the tax aspects and regulation of Australia's superannuation systems. The ATO also administers the agricultural land register, the residential land register and the water register. If a potential foreign investor is looking to acquire interests in agricultural land, residential land and water entitlements, the foreign investor must register their investment with the ATO.

FOREIGN INFLUENCE

The *Foreign Influence Transparency Scheme Act 2018* (Cth) (**FITS Act**) is intended to curtail covert foreign interference in Australia's political system. Under the FITS Act, the Attorney-General's Department maintains a public register of persons who engage in activities intended to influence Australia's governmental and political processes on behalf of "foreign principals" (being foreign governments and foreign government related entities, political organisations and individuals).

The requirement to register under the FITS Act arises where a person (defined broadly) engages in, or enters into an arrangement to engage in, registerable activities on behalf of a foreign principal. A person has 14 days to apply for registration once they become liable to register under the FITS Act and must comply with ongoing reporting and public disclosure obligations. Failing to register or comply with reporting obligations can result in harsh penalties, including imprisonment for up to 5 years

'Registerable activities' is defined broadly and includes parliamentary lobbying, general political lobbying, communications activities and disbursement activities (giving money or things of value), each for the purpose of political or governmental influence. 'Political or governmental influence' is defined as having the sole or substantial purpose to influencing political and governmental processes, including a process relating to a government decision. The Treasurer's decision in response to a FIRB application is a government decision for the purposes of the FITS Act.

While a person does not need to register under FITS Act solely because of a FIRB application on behalf of a foreign principal, a person may need to register if they engage in (or enter an arrangement to engage in) parliamentary or generally political lobbying, communications activities or disbursement activities for the purpose of influencing the outcome of the FIRB application.





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