



## PROTECTING THE NATIONAL INTEREST: GUIDING PRINCIPLES FOR DEVELOPING CONDITIONS

Last updated: 17 December 2020. This is a new guidance note introduced to help understand the new legislation that commences on 1 January 2021.

- This Guidance Note explains the guiding principles for the development of advice to decision makers under the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**) relating to the imposition of conditions under section 74 of the Act.
  - The imposition of conditions on foreign investment proposals is guided by the need to facilitate foreign investment while protecting the national interest and balancing regulatory burden with compliance assurance outcomes.
  - Where a decision is to be made in relation to an action of a type identified in section 74(1A) of the Act, only factors relating to national security may be taken into account. References in this Guidance Note to ‘national interest or national security’ are intended to differentiate between decisions made in respect of significant actions or an exemption certificate, where national interest considerations including but not limited to national security may be taken into account, and decisions in relation to actions identified in section 74(1A) of the Act where only national security considerations are relevant.

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## A: THE NATIONAL INTEREST TEST

Australia's foreign investment review framework balances the need to welcome foreign investment with the need to reassure the community that the national interest is being protected.

The national interest, and what would be contrary to it, is not defined in the Act. Instead, the Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest. A range of factors typically taken into account in assessing the impact of a proposal on the national interest is set out in *Australia's Foreign Investment Policy*.

Typically, the Government considers the following factors when assessing foreign investment proposals in all sectors of the economy:

- National security
- Competition
- Other Australian Government policies (including tax)
- Impact on the economy and the community
- Character of the Investor

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## B: CONDITIONS

Under section 74 of the Act, the Treasurer can issue a no objection notification for certain investments (defined in the Act as 'significant actions') subject to one or more conditions if the Treasurer considers that the conditions are necessary to ensure the investment is not contrary to the national interest. Under amendments to section 74 commencing from 1 January 2021, conditions may also be imposed in respect of certain actions other than significant actions, if the Treasurer is satisfied that they are necessary to ensure the action will not be contrary to national security. Exemption certificates issued under Division 5 of Part 2 of the Act may also include conditions that a foreign investor or a developer is required to comply with.

Simply put, conditions are the regulatory mechanism by which the Government can allow foreign investment to occur while at the same time managing the risks to the national interest or national security associated with it.

Conditional no objection decisions under the Act are made at a point in time, based on an assessment at that time of the risks to the national interest (or to national security only if the decision were made under section 74(2)(a)(iii) or (iv)). Under section 74 of the Act, conditions attached to a "no objection" decision may only be varied if the Treasurer is satisfied that the

variation is not contrary to the national interest or to national security as relevant, and that either the applicant has consented to the variation or that the variation does not disadvantage them.

## C: GUIDING PRINCIPLES

While each foreign investment proposal subject to the Act is considered on its merits on a case by case basis, the Treasurer has endorsed a set of guiding principles against which the Treasury will frame any recommendation for conditions on a proposed foreign investment. These principles are drawn from a combination of requirements set out in the Act, matters addressed in the [Australian Government Regulator Performance Framework \(RPF\)](#) and sound regulatory practice. They provide a framework for Treasury, consult partners and the Foreign Investment Review Board (FIRB) to work within when developing advice for decision-makers.

### Threshold Considerations

#### Mandated in legislation

- **Necessary** – Are the conditions necessary to ensure the action will not be contrary to the national interest or, for decisions in relation to actions specified in section 74(1A) of the Act, contrary to national security?
- **Allowable** - Are the conditions being imposed on the person (or persons) taking a significant action, a notifiable national security action, an action in respect of which the Treasurer has given a notice under section 66A(4) or a reviewable national security action, or to whom an exemption certificate is issued?

#### Non-legislated

- **Effective** - Do the conditions represent the best available way to mitigate identified national interest or national security risks and, so far as it is possible to assess, will they continue to do so in an enduring manner?
- **Outcomes Focused** – Do the conditions achieve the best foreign investment outcome in light of Australia’s foreign investment policy?

### Regulatory Approach

- **Risk Based** - Are the conditions proportionate to the identified risk?
- **Non-discriminatory** – Are the conditions non-biased, company / country agnostic and consistent with conditions imposed in similar circumstances, recognising that the assessment of risks to the national interest or national security may vary over time despite the circumstances of a proposed investment being outwardly similar?
- **Workable** – Are the conditions able to be implemented by the investor?
- **Efficient** - Do the conditions impose the minimum burden necessary to mitigate identified risks to the national interest or to national security?

### Compliance & Integrity

- **Clear** - Are the conditions clear as to what is being required of the investor?
- **Observable** – Is compliance with the conditions able to be monitored?

- **Compliant** - Do the conditions comply with domestic and international obligations?
- **Enforceable** - Are the conditions legally enforceable?

While the principles will be taken into account in recommending conditions, they are not binding on the decision maker. The decision-maker has a legal obligation to take into account the merits of a particular case when making a decision.

## **D: REGULATORY APPROACH – HOW ARE CONDITIONS USED?**

The Treasurer is the decision maker responsible for Australia's foreign investment policy and administration of the Act. The FIRB is a non-statutory body established to advise the Treasurer and the Government on Australia's Foreign Investment Policy and its administration.

As the regulator, the Treasury formulates proposed conditions to address national interest risks identified in consultation with partner agencies for consideration by the FIRB and the Treasurer.

As the agency responsible for administering the Act, the Treasury has three objectives when considering the viability and appropriateness of conditions:

- To ensure that conditions meet legal requirements, including that they are required to mitigate risks to the national interest or national security;
- To ensure that conditions are consistent with our regulatory approach under the Regulator Performance Framework and limit the impact of regulatory activity on investors, where possible; and
- To ensure that conditions uphold the integrity and credibility of the foreign investment regime, including through enabling appropriate compliance monitoring, and enforcement when needed.

In preparing its advice on what conditions, if any, are necessary to ensure that the proposal would not be contrary to the national interest or to national security, or whether they should be imposed on an exemption certificate, the Treasury consults with a range of Commonwealth, State and Territory partner agencies to ensure a whole of government perspective is applied.

Recommendations from the Treasury and its partner agencies must be in accordance with the legal requirements of the Act and consistent with Australia's international agreements.

In addition, Commonwealth regulators that administer, monitor or enforce regulation are required to implement the RPF. The RPF was established in 2015 and forms an important part of the Government's commitment to reduce unnecessary and inefficient regulation. It encourages regulators to minimise the regulatory burden created through their administration of regulation.

## **E: TYPES OF CONDITIONS**

To support the guidance principles, in consultation with partner agencies, the Treasury seeks to apply consistent conditions to foreign investment proposals while still recognising the need to be flexible in addressing the risks posed by individual cases.

Commonly used conditions are grouped according to the type of risk to the national interest they seek to mitigate, or the mechanism by which they do so. Over time, it is expected that this will

support better regulatory practice and improve investor experience by streamlining the process of developing and settling conditions.

#### **The national interest**

The Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.

The Government recognises community concerns about foreign ownership of certain Australian assets. The framework allows the government to consider these concerns when addressing Australia's national interest.

The Treasury considers a range of factors and the relative importance of these can vary depending upon the nature of the foreign investment proposal. These are further discussed in *Australia's Foreign Investment Policy*.

#### **Types of condition commonly used to address aspects of the national interest**

Note that the examples provided below represent a non-exhaustive description of the characteristics of some conditions used to mitigate risks arising from different types of foreign investment.

- **General Considerations**

Reporting conditions are applied to all conditional no objection notifications and exemption certificates recommended by Treasury.

If only standard tax conditions are imposed, the reporting obligations are contained within those. See the *Tax Conditions* Guidance Note.

For other conditional no objection notifications there will be a requirement for independent compliance audit or, in low risk, low consideration cases, for reporting in a specified form by an officer of the investor. See the *Conditions Reporting* Guidance Note for further details.

Investors receiving an exemption certificate are typically required to provide periodic reporting detailing all acquisitions made under the certificate and to report on any material change in their ownership structure. If the exemption certificate is subject to geographic or other sub-limits or other constraints, there may be independent audit reporting required in relation to compliance with those elements.

#### **National security**

Several types of condition are employed to address national security risks, whether as a subset of broader national interest considerations or specifically under the national security powers of the Act, depending on the nature of the investment and the assessed risk.

Board and governance conditions are designed to support national security by more closely connecting the company with Australian values, regulatory environment and community perspectives. They signal the importance of Australia's interest to incoming investors. Typically they may specify:

- a certain number or proportion of directors who are Australian citizens ordinarily resident in Australia;
- characteristics of the Chair; and/or

- requirements for a quorum.

Conditions relating to the treatment of sensitive data seek to mitigate risks of unauthorised access, corruption, denial or exfiltration. They may specify:

- requirements for development and implementation of data security policies and procedures that extend beyond the requirements of general Australian law;
- restrictions on access to specified data by directors, representatives and staff of the investor;
- restrictions on the location of data storage and access;
- cybersecurity arrangements; and/or
- reporting requirements in the event of a data breach.

Conditions relating to sensitive infrastructure seek to mitigate risks relating to espionage and sabotage and may include ensuring that operational control or maintenance of sensitive assets generally occurs from within Australia.

Conditions relating to commercial property seek to mitigate risks relating to client security, and may include:

- notification to tenants of changes in ownership and/or property management; and/or
- restrictions on investor access to the property.

Conditions may also be imposed to restrict the types of activity permitted on land in close proximity to sensitive land or facilities.

#### **Other Australian Government policies (including tax)**

Standard tax conditions are set out in the *Tax Conditions* Guidance Note.

Conditions to support competition policy may restrict the aggregate ownership by associated investors in a specific industry or sub-market.

#### **Impact on the economy and the community**

Conditions designed to mitigate risks to the community or to the national or regional economy may seek to ensure that there is no abrupt dislocation of a regional economy, that iconic Australian brands remain in production, that there are limits to the extent of foreign control and/or management in a particular investment or sector; or that domestic supply of certain goods is preserved. Examples may include:

- requirements to maintain company headquarters in Australia;
- requirements to limit aggregate overseas control of an investment and/or to ensure Australian management in key positions;
- requirements to maintain production facilities in specified regional areas without loss of employment for a specific period;
- requirements that there should have been an open opportunity for Australian investors to acquire a parcel of agricultural land before its purchase by a foreign investor; and/or

- limitations on aggregate holdings by an investor and its associates in a business, an industry sector or a geographic region.

Conditions in relation to undeveloped land seek to mitigate risks associated with land banking and speculation. They may include:

- requirements to commence continuous construction on the land within a specified period and to not sell the land until construction is complete; and/or
- specification of the type of activity which may be carried out on the land.

## **FURTHER INFORMATION**

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

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