



## KEY CONCEPTS

Last updated: 9 July 2021.

This Guidance Note provides information on key concepts under Australia’s foreign investment law and supports the other Guidance Notes on the FIRB website.

Key Concepts .....	1
DEFINED TERMS .....	3
A: Who is a foreign person? .....	3
B: Who is a foreign government investor? .....	7
C: Who is an associate? .....	11
D: Meaning of ‘direct interest’, ‘substantial interest’ and related concepts .....	17
E: Meaning of ‘land’, ‘Australian land’ and ‘interest in Australian land’ .....	20
F: Meaning of ‘change in control’ .....	21
G: Meaning of ‘interests acquired by entering agreements or acquiring options’ – section 15 of the Act .....	22
KEY CONCEPTS - GENERAL .....	27
H: Significant actions and notifiable actions .....	27
I: Notifiable national security actions and reviewable national security actions .....	29
J: Tracing of substantial interests .....	32
K: Calculating consideration, asset values and issued securities values .....	35
L: Time limits and extensions .....	40
M: No objections notifications .....	42
N: Variations .....	45
O: Orders in relation to significant actions, notifiable national security actions or reviewable national security actions .....	50
KEY CONCEPTS – LAND .....	53
P: Determining the type of land .....	53
Q: Mixed use land .....	54
R: Agreements for lease and leases .....	57
S: Subdivision or amalgamation of land .....	62
EXEMPTIONS .....	65
T: Overview of exemptions .....	65
U: Moneylending exemption .....	68

V: Will or devolution by operation of law .....	70
W: Acquisitions from government .....	72
OTHER .....	74
X: Sector specific legislation.....	74
Further information .....	75

---

## DEFINED TERMS

### A: WHO IS A FOREIGN PERSON?

The term 'foreign person' is central to the *Foreign Acquisitions and Takeovers Act 1975* (the **Act**). For example, under the Act a foreign person is required to give notice about a proposal to take a notifiable action or notifiable national security action. The Treasurer has certain powers under the Act if a foreign person takes, or proposes to take, a particular action that is a significant action or notifiable or reviewable national security action.

#### Definition of foreign person

Foreign person is defined in section 4 of the Act to mean the following:

- an individual not ordinarily resident in Australia; or
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- a foreign government; or
- any other person, or any other person that meets the conditions, prescribed by the regulations.

Section 18 of the *Foreign Acquisitions and Takeovers Regulation 2015* (the **Regulation**) provides that a person is also a foreign person if the person is a general partner of a limited partnership where:

- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds at least 20 per cent in the limited partnership, or
- two 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 at least 40 per cent in the limited partnership.

Section 17 of the Regulations defines the term foreign government investor. For further information, see '[Who is a foreign government investor?](#)' below.

Key terms relevant to the definition of a 'foreign person' is further explained as follows.

## Individuals

### Individual not ordinarily resident in Australia

Foreign person is defined in section 4 of the Act to include an individual not ordinarily resident in Australia. As such, an individual will not be treated as a foreign person under the review framework if they are ordinarily resident in Australia. Pursuant to section 5 of the Act, a person will only be taken to be ordinarily resident in Australia at a particular time if:

- the person has actually been in Australia during 200 or more days of the preceding 12 month period; and
- at the relevant time:
  - the person is in Australia and the person's continued presence in Australia is not subject to any limitation as to time imposed by law; or
  - the person is not in Australia, but, immediately before the person's most recent departure from Australia, the person's continued presence in Australia was not subject to any limitation as to time imposed by law.

If a person is an unlawful non-citizen under section 14 of the *Migration Act 1958*, the individual's continued presence in Australia will be subject to a limitation as to time imposed by law (subsection 5(2) of the Act).

### Temporary residents

Temporary residents are foreign persons for the purposes of the foreign investment review framework. A temporary resident is an individual who (section 4 of the Act);

- holds a temporary visa that permits them to remain in Australia for a continuous period of more than 12 months (regardless of how long remains on the visa); or
- is residing in Australia, has submitted an application for a permanent visa and holds a bridging visa which permits them to stay in Australia until that application has been finalised.

For residential land investments, special rules apply to foreign persons who are temporary residents. For further information, see the *Residential Land* Guidance Note.

#### Example 1

Rebecca proposes to acquire a large number of units in an Australian unit trust. Rebecca is a Malaysian citizen and has an Australian permanent visa which allows her to live in Australia indefinitely. Rebecca has been in Australia for the previous 12 months, other than when she visited her parents in Malaysia for 10 days. At the time of the proposed acquisition, Rebecca will be in Australia and her continued presence in Australia will not be subject to any time limitation. In these circumstances, Rebecca is ordinarily resident in Australia and will not be a 'foreign person' as defined in the Act.

#### Example 2

Chak is a Chinese citizen and has been in Australia for 257 days in the past 12 month period. He proposes to acquire shares in an Australian company. Chak is currently in Australia, working as a visiting professor at an Australian university, participating in an Australian research project. Chak's temporary visa only allows him to stay in Australia for the 18 month duration of the research project. Chak will not

be ordinarily resident in Australia because, at the time he proposes to acquire the shares, his continued presence in Australia is subject to a limitation as to time imposed by law. Chak is an individual not ordinarily resident in Australia and, therefore, a 'foreign person' as defined in the Act.

#### Foreign non-residents

Foreign non-residents are foreign persons for the purposes of the foreign investment review framework. A foreign non-resident is an individual not ordinarily resident in Australia, and includes individuals that hold a visa that permit them to remain in Australia for only a limited period (i.e. generally less than 12 months).

#### Example 3

Henry holds a student visa that permits him to remain in Australia for a continuous period of nine months. Henry is considered a foreign non-resident because his continued presence in Australia is subject to a time limitation as imposed by law of less than 12 months.

#### New Zealand citizens

New Zealand citizens not ordinarily resident in Australia are generally considered to be foreign persons for the purposes of the foreign investment review framework, in the same way as citizens from other countries.

New Zealand citizens who hold, or are eligible for, a special category visa are however exempt from requiring foreign investment approval with respect to acquisitions of residential land (see section 38(2) of the Regulation).

#### Australian citizens

An Australian citizen who is living overseas may be a 'foreign person' as defined in the Act. There is no specific rule in the Act for determining whether or not an Australian citizen is ordinarily resident in Australia. It is relevant to have regard to the ordinary meaning of those words and the question is one of fact and degree (see, for example, *Wight v Honourable Chris Pearce MP* (2007) 157 FCR 485 at [15]). Section 35 of the Regulation provides an exemption for land acquisitions by persons with a close connection to Australia, including Australian citizens not ordinarily resident in Australia.

#### Foreign corporation

A foreign corporation is defined in section 4 to mean a foreign corporation to which paragraph 51(xx) of the Australian Constitution applies. It is generally accepted that a foreign corporation is a corporation established or incorporated outside of Australia, notwithstanding that its shares may be owned by Australian interests.

#### Foreign government

An entity will be a 'foreign government' if it falls within one of the following categories:

- it is a body politic of a foreign country;
- it is a body politic of part of a foreign country;

- it is part of a body politic of a foreign country; or
- it is part of a body politic of part of a foreign country.

Note: the term ‘foreign government investor’ is defined in section 17 of the Regulation and is relevant for the purposes of the definition of ‘associate’ (see section 6 of the Act and section 45 of the Regulation). See below for more information on [foreign government investors](#).

**Example 4**

The Department of Agricultural Acquisitions of a foreign country is proposing to acquire agricultural land in Australia for the purposes of farming cattle for export. The Department of Agricultural Acquisitions is part of a body politic of a foreign country and will be a ‘foreign person’ as defined in the Act and a foreign government investor.

***Disregarding small holdings of securities in primary listed entities***

Corporations and trusts are foreign persons if they are held by two or more foreign persons (and their associates) with an aggregate substantial interest. Section 47 of the Regulation modifies this rule so that in the following circumstances small holdings in an entity are not counted towards an aggregate substantial interest.

- If an entity has its primary listing on a stock exchange in Australia; and
- The small holding is less than 5 per cent (that is, it is not a substantial holding within the meaning of the *Corporations Act 2001*).

***Foreign custodians***

Foreign custodian corporations acting in their capacity as custodians are exempt from notifying under the Act (see exemption in section 30 of the Regulation).

In addition, persons who are only foreign persons because of foreign custodian corporation holdings of custodian shares are exempt from notifying under the Act, so long as the custodian shares remain held in the course of providing custodian services (see exemption in section 41A of the Regulation).

For further information on exemptions under the foreign investment review framework, see ‘[Overview of exemptions](#)’ below.

**Example 5**

Foreign custodian corporations are foreign persons. A foreign custodian corporation (Corporation FC) holds a total interest of 25 per cent in another corporation (Corporation F). No other foreign person holds an interest in Corporation F. Corporation FC’s interest makes Corporation F a foreign person because it is a substantial interest (at least 20 per cent).

15 per cent of Corporation FC’s interest in Corporation F is a custodian share to which the exemption (section 41A(2)(c)) applies. However, the exemption does not apply to 10 per cent of the interest. Corporation F would not be a foreign person if it were not for the custodian share held by Corporation FC.

Corporation F therefore is exempt and does not need to notify under the Act and Regulation.

## B: WHO IS A FOREIGN GOVERNMENT INVESTOR?

The definition of foreign government investor is quite broad in its capture, and includes state owned enterprises and sovereign wealth funds. Investors with an actual or perceived relationship to a government or government related entity should carefully determine their status.

Section 17 of the Regulation defines 'foreign government investor' as:

- a foreign government or separate government entity;
- a corporation (including incorporated limited partnerships) or trustee of a trust in which:
  - a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest (that is, an interest of at least 20 per cent); or
  - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest (that is, an interest of at least 40 per cent);
- a general partner of a limited partnership in which:
  - a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest; or
  - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of 40 per cent or more;
- a corporation, trustee or general partner of a kind described in the two dot points above, assuming the references to foreign government (or foreign governments) in those dot points include references to a foreign government investor (or foreign government investors) within the meaning of those dot points.

See also section 4 of the Act for the meaning of 'foreign government' and 'separate government entity'.

### Example 6

The Department of Minerals Exploration of a foreign country is proposing to acquire an interest in an Australian business. The Space Exploration Authority of the same country already holds a 6 per cent interest in the business. Both entities are a part of a body politic of the same foreign country and a 'foreign government' as defined in section 4 of the Act. They are associates under the foreign investment framework and the Department of Minerals Exploration will be required to notify of any proposed acquisition of interests of 4 per cent or more.

---

From 1 January 2021, an exemption was included in the Regulation to provide that certain entities in which foreign government investors hold a passive interest will no longer meet the definition of a foreign government investor. The exemption in paragraph 17(2) of the Regulation provides that a person is not a foreign government investor if:

- the person would not be a foreign government investor except that the person is a corporation, trustee of a unit trust or general partner of an unincorporated limited partnership in which foreign governments or separate government entities of more than one foreign country, together with associates, held an aggregate interest of 40 per cent or more;
- the corporation, trustee of a unit trust or general partner of a limited partnership operates a scheme in which people make contributions to acquire rights to benefits produced by the scheme and the contributions are pooled to produce financial benefits or benefits consisting of rights or interests in property for its members;
- no individual member is able to influence any individual investment decisions, or the management of any individual investments under the scheme; and
- each foreign government or separate government entity that holds an interest in the corporation, unit trust or unincorporated limited partnership holds the interest only as a member of the scheme.

This exemption will not apply if a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest in the corporation, trust or limited partnership (see below for further explanation of how the associates rule applies to foreign government investors).

A member of the scheme will be considered able to influence individual investment decisions if they have the ability to determine whether the scheme makes an acquisition of shares, assets or property. A member will not be considered able to influence individual investment decisions if they have the right to vote on a conflict of interest decision that may relate to an individual investment or on a broad investment strategy that may lead to the acquisition or divestment of certain investments. Similarly, the mere fact that a member's representative is on an advisory committee of the scheme does not, in itself, mean that individual member is able to influence individual investment decisions or the management of individual investments of the scheme. Further, a member will be considered able to influence the management of an individual investment if that member has voting rights over the operation of a particular business that the scheme has invested in.

If a foreign investor would still meet the amended definition of a foreign government investor, the investor could still apply for an exemption certificate for proposed actions or kinds of actions. For further information, see the *Exemption Certificates* Guidance Note.

Foreign government investors (and foreign governments) are 'foreign persons' for the purposes of the Act (section 4 of the Act and section 18 of the Regulation). This means that the requirements imposed by the Act apply to all foreign government investors unless an exemption in the Regulation applies. Exemptions in the Regulations apply to foreign government investors unless foreign government investors have been specifically excluded from the exemption.

## Associates

This sub-section explains the concept of 'associates' as it applies to foreign government investors. For information on associates more broadly, see Section C of this Guidance Note.

Paragraph 6(1)(l) of the Act defines 'associate' to specifically provide that for a foreign government investor, their associates include any other person that is a foreign government in relation to that country (or part of a foreign country), any other person that is a separate government entity in relation to that country (or any part of that country), and any other foreign government investor from the same country (of any part of that country). This is in addition to other associates the foreign government investor may have due to other paragraphs of subsection 6(1) or due to subsection 6(2) of the Act.

### Associates exemptions

Subsection 45(5) of the Regulation provides an exemption to the meaning of associate under paragraph 6(1)(l) of the Act so that this paragraph does not apply in the following instances:

- A corporation or trustee of a trust in which foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest of 40 per cent or more.
- A general partner of a limited partnership in which foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of 40 per cent or more.
- Corporation, trustee or partner of a kind described in the two dot points above, assuming the references to foreign government (or foreign governments) in those dot points include references to a foreign government investor (or foreign government investors) within the meaning of those dot points.

Whether or not a foreign government investor can be considered an associate can have important consequences for the purposes of determining whether the Act applies in a particular situation (see 'Who is an associate?' below).

### Reasonable knowledge of associates

It is acknowledged that there are circumstances where it would not be considered reasonable to expect a foreign government investor to know:

1. that one or more other foreign government investors from the same country already hold, or are concurrently acquiring, interests in the target entity; or
2. that a lower level entity or collective investment vehicle in which the foreign government investor holds a substantial interest, is acquiring or has acquired a direct interest in an Australian entity or an Australian business.

### **Foreign government investor from same country**

In relation to (1), the following are examples of circumstances where one or more other foreign government investors from the same country already hold or are concurrently acquiring interests in the same target entity.

- Where public regulatory disclosures in relation to the target entity do not disclose any such holdings (for example, through a substantial holder notice or a list of the target entity's major shareholders in the target entity's latest financial report) and the foreign government investor is otherwise not privy to information on such holdings.<sup>1</sup>
- Where such a holding in the target entity is disclosed but it is not on its face identifiable as being held by a foreign government investor, and the other foreign government investor is not otherwise privy to information that would identify the holding as being held by a foreign government investor.

#### **Example 7: Acquisition of a direct interest in an Australian entity**

After conducting due diligence, including reading the target's reports and market announcements, foreign government investor State Corporation directly acquires a 7 per cent interest in a listed Australian entity and assesses this as not a notifiable action. Unknown to State Corporation, another foreign government investor from the same country holds a 4 per cent interest in the same target Australian entity. Under the Act this would be an acquisition of a direct interest in an Australian entity and thus, a significant action and notifiable action for State Corporation. The effect of this Guidance Note in this example is that the Government would not enforce compliance through infringement notices, civil penalty proceedings or criminal prosecution in this circumstance as State Corporation would not know of the 4 per cent interest.

#### ***Lower level entity or collective investment vehicle***

In relation to (2), an example of a circumstance where a lower level entity or collective instrument vehicle is acquiring a direct interest in an Australian entity or an Australian business, is where a foreign government investor is a passive investor in a collective investment vehicle (such as a managed investment fund or a limited partnership) and the investor:

- is not in a position to influence or participate in the central management and control or the entity or business or likewise determine the policy of the entity or business;<sup>2</sup> and

<sup>1</sup> Foreign government investors should adopt a reasonable position with respect to monitoring public regulatory disclosures (this does not require intra-day checks). Examples of where a foreign government investor is otherwise privy to information on such holdings is where they have been provided such information by the investor, the investor makes such information freely available on their website, or the foreign government investor has access to such information through third party data services. For listed entities, the Government does not expect the foreign government investor to approach the target to inquire about foreign government investors in the target's securities register.

<sup>2</sup> Where an interest is acquired by a subsidiary of a foreign government investor, the Government considers it reasonable that holding entities (and for entities within a wholly owned group, all entities with common ownership) will be aware of actions by the other entities when managing their portfolio to ensure that none of the entities breach the Act. As acknowledged in the sub-section 'Associates exemptions' above, there may be circumstances where this is not reasonable, such as legal restrictions or information barriers which could not be characterised as for evading accessorial liability under the Act.

- is not privy to details of the underlying investments of the entity or business, including due to legal restrictions.<sup>3</sup>

Similarly, there may be circumstances where it is not reasonable for an entity or a collective investment vehicle to know that foreign government investors hold interests in the entity or vehicle that would make the entity, trustee or general partner a foreign government investor. An example is where there are legal restrictions that prevent them knowing this.

### ***Response to non-compliance***

When considering the appropriate response to non-compliance with the Act, Treasury will take into account the matters set out in the Compliance Framework Policy Statement. Consistent with the Compliance Framework Policy Statement, in these circumstances Treasury would work with the foreign investor to achieve compliance rather than enforcing compliance through infringement notices, civil penalty proceedings or criminal prosecution. This approach extends to accessorial liability where a third party (for example, an adviser, an investment fund manager, discretionary investment manager, securities lending agent, or a target entity) is dealing with a foreign government investor on an arm's length basis without knowledge of all the facts and circumstances that mean the foreign government investor is required to give notice under the Act and in respect of the breach, they neither:

- knowingly assisted; nor
- aided and abetted.

#### **Example 8: Offshore acquisition in a fund that has interests in an Australian entity**

Foreign government investors from a single country hold 25 per cent of Offshore Fund, which in turn holds 20 per cent of Funds Limited Partnership (which is an incorporated limited partnership). The Limited Partnership proposes to subscribe for a 5 per cent interest in a target fund that has Australian assets. Foreign government investors from the same country as Offshore Fund propose to subscribe for a further 5 per cent. The target fund manager and investment adviser conducting the subscription are not aware of the ownership of the Limited Partnership. Under the Act, facilitating the sale such that a significant action and notifiable action takes place without notice may give rise to accessorial liability. The effect of this Guidance Note in this example is that the Government would not enforce compliance through infringement notices, civil penalty proceedings or criminal prosecution in this circumstance where the investment adviser and fund manager could not reasonably be expected to come to know of the ultimate ownership of Offshore Fund.

## **C: WHO IS AN ASSOCIATE?**

If a person has or is an 'associate' for the purposes of the Act this can have important consequences for determining whether the Act applies in a particular situation. For example:

<sup>3</sup> Where the entity tracks indices and this is likely to mean that the entity holds an interest of one per cent or more in another entity that the foreign government investor is otherwise considering acquiring an interest in, it would be reasonable to expect that the entity holds an interest in the other entity equivalent to that entity's weighting in the index.

- in determining whether a person holds a substantial interest in an entity, or two or more persons hold an aggregate substantial interest in an entity, interests of associates of the person or persons are also taken into account (see the definitions of ‘aggregate substantial interest’ and ‘substantial interest’ in section 4 and meanings of ‘interest’ and ‘aggregate interest’ of a specified percentage in an entity in section 17 of the Act);
- some actions are significant actions if they involve an associate (for example, paragraphs 40(2)(d) and (e));
- in considering whether the threshold test for the acquisition of an interest in agricultural land is met, the total value of all interests in agricultural land held by a foreign person with one or more associates is taken into account (paragraph 52(2)(b));
- in determining whether there is a change in control of an entity or business (which may make an action a significant action), the Treasurer may consider if one or more foreign persons have control together with any associates (subsection 54(2)); and
- if the Treasurer has made orders because people have been involved in a scheme of avoidance, then the Treasurer may also make an order declaring persons involved in avoidance to be taken to be associates. The Treasurer must be satisfied that not making the order is contrary to the national interest (section 79).

#### Persons who are associates

The word ‘associate’ has the meaning given in section 6 of the Act. The Act specifies who is an associate and provides for additional circumstances in which a person may be an associate in relation to an interest in residential land. Section 6 of the Act also provides that persons will not be taken to be associates merely because they are involved in a particular activity.

The following people are associates of a person:

- any relative of the person;
- any person with whom the person is acting, or proposes to act, in concert in relation to an action to which the Act may apply (this provision is modified for consortiums: see section 45 of the Regulation);
- any person with whom the person carries on a business in partnership (this provision is modified for limited partners: see section 6(3)(h) of the Act);
- any entity of which the person is a senior officer;
- if the person is an entity:
  - any holding entity of the entity; or
  - any senior officer of the entity;
- any entity whose senior officers are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of:
  - the person; or

- if the person is an entity—the senior officers of the person;
- an entity if the person is accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of:
  - the entity; or
  - the senior officers of the entity;
- any corporation in which the person holds a substantial interest;
- if the person is a corporation—a person who holds a substantial interest in the corporation;
- the trustee of a trust in which the person holds a substantial interest;
- if the person is the trustee of a trust—a person who holds a substantial interest in the trust;
- if the person is a foreign government, a separate government entity or a foreign government investor in relation to a foreign country (or a part of a foreign country):
  - any other person that is a foreign government in relation to that country (or any part of that country); or
  - any other person that is a separate government entity in relation to that country (or any part of that country); or
  - any other foreign government investor in relation to that country (or any part of that country).

(This provision is modified for foreign government investors who are only a foreign government investor because of an aggregate substantial interest or foreign government partnership interests from more than one country or part of a country of at least 40 per cent: see section 45 of the Regulation. It is also modified by the guidance on ‘Reasonable knowledge of associates’: see Section B above.)

A person holds a ‘substantial interest’ in an entity if the person, alone or together with one or more associates, holds an interest of at least 20 per cent in the entity. A person holds a ‘substantial interest’ in a trust (including a unit trust) if the person, together with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust. (See the definition of ‘substantial interest’ in section 4 and meanings of ‘interest’ and ‘aggregate interest’ of a specified percentage in an entity in section 17 of the Act).

#### **Example 9**

Eddie is the Chief Operations Officer of Buildingco Pty Ltd and is, therefore, a senior officer of that entity. Buildingco Pty Ltd and Eddie are both associates.

#### **Example 10**

Buildingco owns 25 per cent of the shares in Concretecompany Pty Ltd. As Buildingco holds an interest of at least 20 per cent in Concretecompany, it holds a ‘substantial interest’ in Concretecompany. Buildingco and Concretecompany are associates.

### When are persons relatives?

Persons who are relatives will be associates for the purposes of the Act (paragraph 6(1)(a) of the definition of 'associate'). The word 'relative' has the same meaning that it has in the *Income Tax Assessment Act 1997* (the **ITAA 1997**) (section 4 of the Act). 'Relative of a person' is defined in subsection 995-1(1) of the ITAA 1997 to mean:

- the person's spouse; or
- the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent or adopted child of that person, or of that person's spouse; or
- the spouse of a person referred to in paragraph (b).

Note: section 960-255 of the ITAA 1997 may be relevant to determining relationships for the purposes of paragraph (b) of the definition of relative. The terms 'adopted child', 'child', 'parent' and 'spouse' are further defined in the ITAA 1997.

#### Example 11

Alice is a foreign investor and is proposing to purchase 10 per cent of the shares in a company. Her nephew already holds 10 per cent of the shares in the company. The nephew will be a 'relative' as defined and they are both 'associates' for the purposes of the Act. Alice would hold a substantial interest because she would hold 20 per cent of the shares together with her nephew.

Any person with whom a person is acting, or proposes to act, in concert in relation to an action to which the Act may apply, will also be an associate (see paragraph 6(1)(b) of the definition of 'associate').

The concept of acting in concert has been considered by the courts in a number of different contexts. It has been held to involve 'a common understanding or arrangement as to a common purpose'<sup>4</sup>. Other authorities have emphasised the need for 'knowing conduct that is the result of communication between parties and not simultaneous actions occurring contemporaneously'<sup>5</sup>. A mere coincidence of separate acts is insufficient<sup>6</sup>. Furthermore, the 'understanding should be consensual and there should be some conscious adoption of it. However, it is not essential that the parties are committed to it or bound to support it ... Such an understanding may be proved by inference from circumstances surrounding the impugned transaction and from what the parties have done, as well as by the direct evidence'<sup>7</sup>.

4 Alan Davis Group v Rivkin Financial Services (2005) 216 ALR 766 at 777 [67]; citing IPT Systems Ltd v MTIC Corporate Pty Ltd (2000) 158 FLR 349 (see 355-356 [24]-[25]). See also Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No.4) [1985] 1 Qd 127 at 132.

5 Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 42 FLR 331 at 373, Davids Distribution Pty Ltd v National Union of Workers (1999) 91 FCR 463 at 496 and Bank of Western Australia v Ocean Trawlers (1995) 16 ACSR 501 at 524, cited in Bateman v Newhaven (2004) 207 ALR 406 at 410 [18].

6 Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4) [1985] 1 Qd R 127 at 132

7 Bank of Western Australia v Ocean Trawlers (1995) 16 ACSR 501 at 524-5.

**Example 12**

Softdrink Co and Juice Co are foreign investors and proposing to acquire shares in an Australian drink manufacturer which supplies soft drink and juice concentrate to those companies respectively. Softdrink Co and Juice Co have a common understanding regarding the proposal to acquire shares in the Australian drink manufacturer (but are not making the acquisitions as members of a consortium). Softdrink Co and Juice Co will be acting in concert in relation to an action to which the Act may apply and will, therefore, be 'associates' (see paragraph 6(1)(b)).

**Additional associates in relation to interests in residential land**

The term 'associate' has a wider meaning for an action taken relating to an interest in residential land (see subsection 6(2) of the Act). In this context, the following persons are also an 'associate' of a person:

- an entity that is not listed for quotation in the official list of a stock exchange if a relative of the person:
  - holds a substantial interest in the entity; or
  - is a senior officer of the entity;
- if the person is an entity (the first entity) — another entity (the second entity) if:
  - an individual holds a substantial interest in the first entity or is a senior officer of the first entity; and
  - a relative of the individual holds a substantial interest in the second entity or is a senior officer of the second entity; and
  - the first entity and the second entity are not, and are not a subsidiary or trustee of an entity, listed for quotation in the official list of a stock exchange.

**Persons who are not associates**

There are a number of circumstances in which a person will not be taken to be an associate of another person merely because of the fact that the person is involved in a particular activity (see subsection 6(3) of the Act).

A person will not be taken to be an associate of another person merely because:

- one person gives advice to the other person or acts on the other person's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; or
- one person, a client, gives specific instructions to the other person, whose ordinary business includes dealing in financial products (within the meaning of the *Corporations Act 2001*), to acquire financial products on the client's behalf in the ordinary course of that business; or
- one person had sent, or proposes to send, to the other person an offer under a takeover bid (within the meaning of the *Corporations Act 2001*) for securities held by the other; or

- one person has appointed the other person, otherwise than for valuable consideration (within the ordinary meaning of the term) given by the other person or by an associate of the other person, to vote as a proxy or representative; or
- both of the following apply:
  - one person provides independent services as a trustee of a trust to the other person who is a beneficiary of the trust;
  - the trustee is licensed to provide those services under a law of the Commonwealth, a state, a territory, a foreign country or a part of a foreign country; or
- one person holds a substantial interest in a managed investment scheme (within the meaning of the *Corporations Act 2001*) and the other person is the responsible entity of the scheme; or
- both people are partners of one of the following kinds of partnerships:
  - a partnership of actuaries or accountants;
  - a partnership of medical practitioners;
  - a partnership of patent attorneys;
  - a partnership of sharebrokers or stockbrokers;
  - a partnership of trade mark attorneys;
  - a partnership that has as its primary purpose collaborative scientific research, and includes at least one university and one private sector participant (whether or not it also includes government agencies or publicly funded research bodies);
  - a partnership of architects;
  - a partnership of pharmaceutical chemists or veterinary surgeons;
  - a partnership of legal practitioners.

**Example 13**

Doug is an independent financial advisor who provides financial advice to Takeovers R Us which is a foreign company. Doug will not be taken to be an associate of Takeovers R Us merely because he gives advice to Takeovers R Us in the proper performance of the functions attaching to his professional relationship with that company (see section 6(3)(a) of the Act).

**Example 14**

Isabella and Jack are siblings and both partners in an architectural business. Isabella and Jack will not be taken to be associates as defined in the Act merely because they are both partners in a partnership of architects. However, Isabella and Jack are siblings and, therefore, 'relatives' as defined in subsection 995-1(1) of the ITAA 1997 and section 6 of the Act. On this basis, they will be associates of each other.

The Treasurer may make an order specifying that certain persons involved in avoidance are taken to be associates if the Treasurer is satisfied that not making the order is contrary to the national interest. The order may provide that the persons are associates for the purposes of the Act or for specified purposes. The order must specify the period during which the order is in force (see section 79 of the Act).

**Forming an association does not in itself constitute a significant and notifiable action.**

When a person is proposing to take an action, the interests of any existing associates of that person may be relevant when determining whether that action is a significant action and/or a notifiable action (for example, see section 17 of the Act). However, the existing associates will not be considered to also be taking the relevant significant action and/or notifiable action merely because they are associates of that person.

Further, the mere formation of an association is unlikely to constitute a significant action or a notifiable action. For example, a person (first person) becomes an associate of another person (second person) who already holds a substantial interest in an Australian entity – forming this association does not mean that the first person will be taking an action to acquire a substantial interest in the Australian entity.

## **D: MEANING OF ‘DIRECT INTEREST’, ‘SUBSTANTIAL INTEREST’ AND RELATED CONCEPTS**

### **When does a foreign person hold a *direct interest* in an entity or business?**

A person holds a direct interest in an entity (a corporation or a unit trust) or business if:

- the person holds, alone or with one or more associates, an interest of at least 10 per cent in the entity or business;
- the person holds, alone or with one or more associates, an interest of at least 5 per cent in the entity or business, and the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity or business; or
- the person holds, alone or with one or more associates, an interest of any percentage in the entity or business, and the person who acquires the interest is in a position:
  - to influence or participate in the central management and control of the entity or business (as determined by the particular facts of the matter); or
  - to influence, participate in or determine the policy of the entity or business (as determined by the particular facts of the matter).

A person holds a specified percentage (e.g. direct interest) in a business if the value of the interests in assets of the business held by the person, alone or together with one or more associates of the person, is that specified percentage of the value of the total assets of the business.

See the definitions of:

- ‘direct interest’ in an entity or business: section 16 of the Regulation;
- ‘interest of a specified percentage in an entity’: section 17(1) of the Act; and

- ‘interest of a specified percentage in a business’: section 16A of the Act.

#### When does a foreign person hold a *substantial interest* in a corporation or trust?

A person holds a substantial interest in a corporation if the person holds, alone or with one or more associates, an interest of at least 20 per cent in the corporation (see the definitions of ‘substantial interest’ in section 4 and ‘interest’ in a security in section 9 of the Act).

A person holds a substantial interest in a trust (including a unit trust) if the person, together with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust (see the definitions of ‘substantial interest’ in section 4 and ‘interest’ in a security in section 9 of the Act).

A substantial interest may be taken to be held through interests in other corporations or trusts (see tracing of substantial interests in section 19 of the Act). For more information on tracing, see ‘Tracing of substantial interests’ below.

#### When do two or more persons hold an *aggregate substantial interest* in a corporation or a trust?

Two or more persons hold an aggregate substantial interest in a corporation if the persons, alone or with one or more associates, hold an aggregate interest of at least 40 per cent in the corporation (see the definition of ‘aggregate substantial interest’ in section 4 and ‘interest’ in a security in section 9 of the Act).

Two or more persons hold an aggregate substantial interest in a trust (including a unit trust) if the persons, together with any one or more associates of any of them hold, in the aggregate, beneficial interests in at least 40 per cent of the income or property of the trust (see the definition of ‘aggregate substantial interest’ in section 4 and ‘interest’ in a security in section 9 of the Act).

#### How to determine the *interest or aggregate interest of a specified percentage in an entity (a corporation or unit trust)*

Sections 17 and 18 of the Act outline the meaning of an interest of a specified percentage in an entity as generally:

- the percentage of the actual or potential voting power in the entity that the person, with associates, is in a position to control;
- the percentage of the issued securities in the entity held by the person, with associates; or
- the percentage of the issued securities in the entity that the person, with associates, would hold at a particular time assuming that any future rights they hold to securities in the entity were exercised (unless it can be determined at that time, from the right itself or from the circumstances existing at that time, that the right will not be exercised).

For an aggregate interest, the interest is as above assuming ‘the person, with associates’, is ‘two or more persons (who are not associates), with one or more associates of any of these persons’.

Section 46 of the Regulation turns off the application of potential voting power and deemed exercise of future rights for paragraphs (b) to (e) of the foreign person definition for certain provisions of the Act relating to the exercise of the Treasurer’s powers and Part 4 of the Act (notice of notifiable actions and significant actions).

For a discretionary trust (that is, a trust where under the terms of the trust, a trustee has the power or discretion to distribute the income or property of the trust to one or more

beneficiaries), each beneficiary that the trustee has discretion to distribute the income or property to is deemed to have the maximum percentage interest in the income or property that the trustee may exercise discretion to distribute to them (section 18 of the Act).

#### **Example 15**

Under the terms of the trust deed, the Australian citizen trustee of an Australian family trust is able to exercise discretion on the distribution of 40 per cent of the property of the trust (this is not expected to happen until the trust is wound up). The trust deed defines the potential beneficiaries as one of five individuals and their spouses. One of these individuals recently married a foreign person. Irrespective of the fact that discretion has not been exercised in favour of this foreign person spouse, and that the trustee may never intend to exercise discretion in favour of the foreign person spouse, the trustee, in their capacity as trustee of the family trust, is now a foreign person (as the foreign person spouse is deemed to have a 40 per cent interest in Australian family trust). Actions of the trustee, such as acquiring interests in residential land in their capacity as trustee, may be both notifiable and significant actions.

#### **Example 16**

The discretionary trust deed defines the potential beneficiaries of the trust by reference to particular relatives of the grandfather (for example, children, grandchildren and their spouses). The trustee has full discretion over who to distribute the income and property of the trust to. One of the children moves to the United States and as part of taking US citizenship, renounces their Australian citizenship. As this child is a potential beneficiary of 100 per cent of the income or property of the trust, the trustee in their capacity as trustee of the trust becomes a foreign person. Actions of the trustee, such as acquiring interests in residential land in their capacity as trustee, may be both notifiable and significant actions.

#### **When does a person *acquire* an interest of a specified percentage in an entity or business?**

Pursuant to section 20(1) of the Act, a person acquires an interest of a specified percentage in an entity (a corporation or a unit trust) if the person:

- starts to hold an interest of that percentage in the entity; or
- would start to hold an interest of that percentage in the entity on the assumption that the person:
  - held interests in securities that are interests that he or she has offered to acquire; or;
  - held rights to votes that might be cast at a general meeting of the entity that are rights that he or she has offered to acquire; or
- for a person who already holds an interest of that percentage in the entity:
  - becomes in a position to control more of the voting power or potential voting power in the entity; or
  - starts to hold additional interests in the issued securities in the entity; or

- would start to hold additional interests in the issued securities in the entity if securities in the entity were issued or transferred as the result of the exercise of rights of a kind mentioned in paragraph 15(1)(b) or (c) of the Act.

**Example 17**

Fashionco, a foreign company, owns 25 per cent of the shares in Silk Pty Ltd, an Australian company that operates an Australian business, and is proposing to acquire more shares in Silk. FashionCo already holds a 'substantial interest' in Silk (an interest of at least 20 per cent) and, following the proposed acquisition, will start to hold additional interests in the securities in Silk. Therefore, by operation of section 20(1)(c)(ii) Fashionco will be taken to acquire a substantial interest in Silk when it acquires the additional interests in the securities in Silk.

Pursuant to section 16A of the Act, a person *acquires* an interest of a specified percentage in a business if the person:

- starts to hold an interest of that percentage in the business; or
- would start to hold an interest of that percentage in the business on the assumption that the person held interests in assets of the business that are interests that he or she has offered to acquire; or
- for a person who already holds an interest of that percentage in the business:
  - starts to hold additional interests in assets of the business; or
  - would start to hold additional interests in assets of the business if interests in assets of the business were transferred as the result of the exercise of rights of a kind mentioned in paragraph 15(1)(b) or (c) of the Act.

Relevantly, a person '*holds* an interest of a specified percentage in a business' if the value of the interests in assets of the business held by the person, alone or together with one or more associates of the person, is that specified percentage of the value of the total assets of the business. Refer to the definition of 'interest' under section 16A of the Act.

## **E: MEANING OF 'LAND', 'AUSTRALIAN LAND' AND 'INTEREST IN AUSTRALIAN LAND'**

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

Section 4 of the Act defines 'land' to include a building (including a new dwelling or an established dwelling) or part of a building and the subsoil of land. 'Australian land' means agricultural land, commercial land, residential land or a mining or production tenement.

The term 'interest in Australian land' is broad in its capture. It includes not just freehold interests but also other interests such as leases and interests in securities in Australian land entities.

Section 12 of the Act defines 'interest in Australian land' to mean:

- a legal or equitable interest in Australian land, other than:

- 
- an interest under a lease or licence or in a unit in a unit trust; or
  - an interest in an agreement giving a right (known as a profit à prendre) to take something off another person’s land, or to take something out of the soil of that land; or
  - an interest in an agreement involving the sharing of profits or income from the use of, or dealings in, Australian land; or
  - an interest in a security in an entity that owns Australian land, being a security 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; or
  - 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 extension or renewal) is reasonably likely, at the time the interest is acquired, to exceed 5 years; or
  - an interest in an agreement giving a right of a kind mentioned in subparagraph (a)(ii) if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed 5 years; or
  - an interest in an agreement involving the sharing of profits or income from the use of, or dealings in, Australian land if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed 5 years; or
  - an interest in a share in an Australian land corporation or agricultural land corporation; or
    - an interest in a unit in an Australian land trust or agricultural land trust; or
    - if the trustee of an Australian land trust or agricultural land trust is a corporation—an interest in a share in that corporation.

Refer to section 13 of the Regulation for the meaning of ‘agricultural land corporation’, ‘agricultural land trust’, ‘Australian land corporation’ and ‘Australian land trust’.

## **F: MEANING OF ‘CHANGE IN CONTROL’**

Certain actions under sections 40 and 41 of the Act require there to be a change in control in order for those actions to constitute significant actions. The change in control condition is not a requirement for notifiable actions.

*Change in control* is defined in section 54 of the Act and includes:

- where one or more foreign persons would begin to control the entity or business; and
- if one or more foreign persons already controls the entity or business, another person would control the entity or business or a person would cease to control the business.

A person *controls* an entity or business if:

- the person (whether alone or together with one or more associates) is in a position to determine the policy of the entity or business in relation to any matter (first limb); or

- in relation to the acquisition of interests in securities in an entity or an issue of securities in an entity, the person holds a substantial interest in the entity (second limb).

For acquisitions of interests in the securities of an entity, both limbs are relevant considerations. For acquisitions of interests in assets of an Australian business, only the first limb is applicable.

However, the change in control condition is not required to be met if:

- the action is the acquisition of interests in securities in an entity or the acquisition of interests in the assets of an Australian business and the action is or is to be taken by a foreign person who controls the entity immediately before the action is or is to be taken (paragraphs 40(7)(a) and 41(6) of the Act); or
- the action is the issue of securities in an entity and a foreign person controls the entity immediately before the action is or is to be taken (section 40(7)(b) of the Act).

#### **Example 18**

Kawaii Co, a foreign person under the Act, currently holds 60 per cent of the securities in Bondi Co, an Australian entity that carries on an Australian business. Under the Act Kawaii Co has control of Bondi Co. The remaining 40 per cent interest is held by Hakai Co, also a foreign person. Kawaii Co is proposing to acquire an additional 10 per cent interest in Bondi Co from Hakai Co.

The acquisition by Kawaii Co of an additional 10 per cent interest in Bondi Co is a significant action. The change of control test does not need to be met as Kawaii Co already controls the entity.

## **G: MEANING OF 'INTERESTS ACQUIRED BY ENTERING AGREEMENTS OR ACQUIRING OPTIONS' – SECTION 15 OF THE ACT**

The Act requires a foreign person to notify the Treasurer of a notifiable action before the action is taken. Section 15 of the Act is an important provision as it determines when a person is taken to have acquired an interest for the purposes of the foreign investment review framework.

- Certain provisions of the Act distinguish between actions that are proposed to be taken and actions that have been taken (see for example sections 67, 69, 74, 75 and 81 of the Act).

### **General operation of section 15**

Section 15(1) of the Act provides that a person acquires an interest in a security, asset, trust or Australian land at the time they:

- enter an agreement to acquire that interest; or
- obtain a right to acquire that interest under an option (whether or not they subsequently exercise that option); or
- have a right to have such an interest transferred to him or herself or an associate.

The general position in the Act is that an interest has been acquired if an agreement has been entered into or an option obtained, regardless of whether or not the transaction is complete or the legal title to the asset is obtained. This is intended to ensure that foreign investors seek

approval *before* entering into an agreement to acquire an interest in securities or an asset or business, even though, in many instances, legal processes mean that the actual legal title to the asset will not be acquired until some future time. The rule in section 15(1) is subject to an exception, see ‘[Conditions precedent – s15\(5\)](#)’ below.

There are certain provisions of the Act that explicitly disregard the operation of part or all of section 15 (see sections 18A, 66A, 98C, 98D and 130X of the Act). Where applicable, this results in the relevant provisions applying when the transaction is complete and the legal title to the asset is obtained and not on entering the agreement or acquiring the option.

### **Conditions precedent – s15(5)**

The way in which section 15 applies to a particular agreement or option may be dependent on whether there is a condition precedent to be met before the agreement or option becomes binding.

Broadly, if an agreement is subject to a condition precedent, the right is not acquired until the condition is met and the provisions of the agreement to acquire the interest become binding.

Section 15(5) provides that if a person proposes to take an action to acquire an interest in a security, asset, trust or Australian land and the provisions of the agreement to acquire or sell the interest do not become binding on the person until one or more conditions are met, then the person takes the action to acquire or sell the interest (and enters the agreement) only when the provisions become binding.

It is relevant that section 15(5) of the Act refers to the point in time where the ‘provisions of the agreement to acquire or sell the interest do not become binding’ until the relevant conditions have been met. Each case will turn on the precise terms of the agreement as to whether the relevant provisions of the agreement have become binding. However, a condition will come within the exception in sections 15(4) and (5) where the condition expresses that an agreement, or the relevant provisions of an agreement, are subject to foreign investment approval before taking effect.

Section 15(5) makes it clear that for the purposes of an agreement with a condition precedent, including a FIRB approval condition:

- an action is regarded as a proposed action for the purposes of giving notice of a notifiable action (section 81); and
- a person will not be regarded as having taken an action prior to giving such a notice.

#### **Example 19**

DB Company Limited, a foreign person under the Act, has entered into a Share Purchase Agreement to acquire a 33 per cent interest in securities in Stopher Planes Pty Ltd (an Australian entity).

The Share Purchase Agreement contains a provision that provides that the obligation to acquire the securities is subject to and conditional on the Treasurer giving a no objection notification under the Act. As a result of section 15(5) of the Act, DB Company Limited is taken to acquire the interest in securities upon receipt of the no objection notification.

### Condition subsequent – s15(3)

Agreements or options may also contain conditions subsequent. If an agreement is subject to a condition subsequent the right is acquired upon entering the agreement.

For the purposes of section 15 of the Act, a condition subsequent can be regarded as a provision under which a contract comes to an end, or the parties' rights and duties are modified, if a certain event occurs (*National Australia Bank Ltd v KDS Construction Services Pty Ltd (in liq)* (1987) 163 CLR 668).

Section 15(3) is regarded as being concerned with conditions subsequent, this is where a person has a presently binding right or option but requires a future event to occur (for example, a particular share price or date) for the acquisition to be triggered.

The way in which section 15 applies in respect of conditions subsequent will depend on the circumstances and facts of each case, as it requires analysis of the clauses or the agreement in a particular case.

#### Example 20

Mr Ferris Brindle, a foreign person under the Act, has entered into a 50 year lease for Australian agricultural land worth \$18 million over the term of the lease.

Mr Brindle's lease contains a clause which provides that he must get foreign investment approval and if he does not obtain foreign investment approval within 6 months of the date of the lease, then the lessor may terminate the lease.

Mr Brindle's lease contains a condition subsequent rather than a condition precedent because the agreement is binding on Mr Brindle unless the lessor terminates the lease. As such, Mr Brindle acquired the interest in land on entering into the lease.

### When is an agreement entered into?

It is possible for an agreement to be reached prior to the formation of a contract, though the question ultimately depends on the facts of each case. In determining whether an agreement has been reached, the agreement will need to be one where the negotiations have been completed and the parties have arrived at a mutual understanding of all the essential elements of their bargain. Therefore, the concept of an agreement does not cover any preliminary stage in negotiations or other circumstances short of a mutual understanding of all the essential elements of a bargain. As such, entry into a 'heads of agreement', 'letter of intent' or an 'agreement in principle' would normally not constitute an agreement for the purposes of section 15, although it is ultimately a question of fact.

### Options generally

The important characteristic of an option for the purposes of section 15 is that it permits the acquiring party (foreign person) to unilaterally acquire the interest in a security, asset, trust or Australian land without the need for further agreement with the other party.

This could be through an initial contract to enter into an option and then a main contract when the option is exercised, or a single contract to acquire and exercise the option. For the purposes

of s15 of the Act, there is no later separate acquisition of that interest at the time the option is exercised because section 15 (1)(b) provides that ‘a person is taken ... to acquire an interest ... if the person ... has a right to acquire such an interest under an option; or ... acquires an option to acquire such an interest.’ This means the acquisition of the option itself is the acquisition of the interest rather than the later exercise of the option, regardless of whether the option requires the fulfilment of a condition (s15(3)).

However, if an option is expressed to be subject to FIRB approval or some other conditions precedent within the meaning section 15(5) of the Act, then the option will only be taken to have been acquired when the provisions become binding.

### Common questions regarding options and other rights

#### Call options

	Buy (Taker)	Sell (Writer)
Call option	Right to buy	Obligation to sell
Put option	Right to sell	Obligation to buy

Call options give the taker the right (but not the obligation) to buy an asset(s), for a specific price, on or before a set date. A call option would generally give the taker a unilateral right to acquire as contemplated by section 15(1) of the Act. For the purpose of deciding when the acquisition occurs, it does not matter that the call option is presently exercisable or exercisable in the future or requires the fulfilment of a condition subsequent, such as reaching the exercise date (see section 15(3) of the Act). This means the acquisition of the call option itself is the acquisition of the interest that may require FIRB approval rather than the later exercise of the option.

#### Example 21

MLBear Pty Ltd, a foreign person under the Act, signs an option agreement to acquire vacant commercial land at 1 Swain Street, Sydney. The option agreement allows MLBear Pty Ltd to acquire the land for \$95 million if MLBear Pty Ltd exercise the option within 2 years of the date of entering into the agreement. There are no other conditions in the agreement.

As MLBear Pty Ltd is entering an option agreement in relation to Australian land (s15(1)(b)(ii)) and there are no conditions precedent in the option agreement, MLBear Pty Ltd is acquiring an interest in Australian land at the time of acquiring the option under the agreement (s15(3)) and not at the time of exercising the option.

#### Put options

	Buy (Taker)	Sell (Writer)
Call option	Right to buy	Obligation to sell
Put option	Right to sell	Obligation to buy

A put option gives the taker the right to sell an asset(s) at a predetermined price on or before an expiry date. The taker of a put option is not obliged to exercise the option. Where the taker exercises the option, the writer has an obligation (not a right) to acquire the asset(s).

A put option agreement does not usually confer any parties with a 'right to buy' the asset, and therefore no one has a 'right' to acquire the relevant interest for the purposes of section 15 of the Act. For this reason, when a foreign person enters into a put option agreement, they are not necessarily acquiring an option within the meaning of section 15(1)(b)(i) of the Act.

However, if a foreign person is a writer of a put option (and hence, may have an obligation to acquire an asset in the future), they may be deemed to acquire the asset when they enter into the put option agreement as provided in section 15(1)(a) of the Act. It will depend on the nature of the conditions if the interest is acquired upon entering the agreement (s15(3) condition subsequent), or when the action to acquire becomes binding, such as when the taker exercises its right to sell (s15(5) condition precedent).

#### ***Pre-emptive rights***

A pre-emptive right, such as a first right of refusal or last right of refusal, is a negative obligation on the vendor refraining him or her from selling an asset before giving the pre-emptive right holder the right to refuse to purchase (*Mackay v Wilson (1947) 47 SR (NSW) 315*).

A pre-emptive right is not an option. It is also unlikely to be an 'agreement to acquire' as provided in section 15(1)(a) given the nature of a pre-emptive right will usually require further negotiation of the acquisition and is unlikely that the parties have arrived at a mutual understanding of all the essential elements of their bargain. However, this will ultimately turn on the facts of the case and is important to consider as it will determine when the right is acquired (that is, whether section 15 applies).

#### ***Convertible notes***

A convertible note is often characterised as a debt arrangement an investor enters into with an entity, which can later be converted into equity (ie securities in the entity). While it is ultimately a question of fact on how section 15 will apply to a particular convertible note, such notes can be seen as a right held by the noteholder (ie the investor) to have an interest in the securities of the entity transferred (converted) to them. In other words, the interest in the securities of an entity may be taken to be acquired when the convertible notes are acquired. As such, foreign investment approval may be required prior to entering into a convertible note. In these cases, further foreign investment approval would generally not be required when the convertible note is exercised (ie when converted into equity), as the interest in the securities are already considered to have been acquired at the time of acquiring the convertible note.

If the convertible note is expressed to be subject to FIRB approval or some other conditions precedent within the meaning section 15(5) of the Act, then the convertible note will only be taken to have been acquired when the provisions become binding.

---

## KEY CONCEPTS - GENERAL

### H: SIGNIFICANT ACTIONS AND NOTIFIABLE ACTIONS

Certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities and businesses, that have a connection to Australia are defined as significant actions.

- For an action to be a significant action under the Act, the action must result in a change in control of the entity or business involving a foreign person, be taken by a foreign person or, for certain actions, the action must be taken by a foreign person who already controls the entity or business. Significant actions under the Act generally also require a threshold test to be met.
- Where a significant action has been taken, or is proposed to be taken, the Treasurer has the power to approve the action, prohibit the action, impose conditions on the action, or require the action to be undone.
- Some significant actions are also notifiable actions, and therefore must be notified to the Treasurer before the actions can be taken.

#### Significant actions

An action will only be a significant action if all of the conditions specified for the type of action are met. The conditions vary depending on the type of action and, in some cases, the particular circumstances (such as whether the target is an agribusiness or the acquirer is a foreign person). For significant actions under the Act:

- An action relating to entities or an Australian business will generally require a monetary threshold test to be met and a change in control (however, certain actions do not require a change in control e.g. actions relating to an agribusinesses, or certain actions taken by a foreign person who already controls the entity or business). The remaining conditions to be met before an action is significant depends on the type of the action and if it relates to an entity or business (sections 40 and 41 of the Act).
  - Section 54 addresses the meaning of control and when there may be a change in control. See also '[Meaning of change in control](#)' above.
  - Sections 51 and 52 of the Act provide the threshold tests applicable to an action and sections 50 to 52 of the Regulation prescribe the applicable monetary values.
- An action relating to Australian land has only two conditions that must be met to be a significant action. They are that the action is for a foreign person to acquire an interest in Australian land and the monetary threshold is met (sections 43 and 52 of the Act).

The significant actions and notifiable actions prescribed in the Regulations, which are for investments in an Australian media business and specified actions by foreign government investors, do not include monetary threshold tests nor a requirement for a change in control.

A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action or a notifiable national security action. However under the Act, the Treasurer has the power to make a range of orders in relation

to a significant action that a person is proposing to take or has already taken. The Treasurer may also 'call-in' a significant action that is not a notifiable action or notifiable national security action if the Treasurer considers that the action may pose a national security concern (see section 66A(1)(b)). For further information on the Treasurer's 'call-in' power see section C of the *National Security Guidance Note*.

Accordingly, foreign persons may choose to notify the Treasurer of a proposed significant action that is not a notifiable action or notifiable national security action. A person may do so by submitting an application and paying the relevant fee to benefit from the certainty offered by a no objection notification, and in doing so, extinguish the Treasurer's powers (with the exception of the last resort power).

#### **Implications when an action is a significant action**

If the Treasurer is notified that a person is proposing to take a significant action, the Treasurer may:

- decide they do not object to the action and give the person a no objection notification not imposing conditions;
- decide they do not object to the action provided the person complies with one or more conditions, and give the person a no objection notification imposing conditions; or
- decide taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

If the significant action has already been taken and the Treasurer was not notified and determines the action is contrary to the national interest, the Treasurer may make a disposal order, which is directed at unwinding the action. For example, the Treasurer could order a foreign person to dispose of shares that they have acquired in an Australian entity by a specified time. The Treasurer may also choose to impose legally enforceable conditions in such circumstances as an alternative to a disposal order.

If the Treasurer 'calls-in' a significant action on the basis of national security grounds, the Treasurer may issue a no objection notification (with or without conditions) or issue an order requiring the disposal of the investment or prohibiting the investment, depending on whether the action has been taken or not.

#### **Notifiable actions**

If an action is a notifiable action, the Treasurer must be notified before the action can be taken. Offences and civil penalties may apply if a notifiable action is taken without a notice having been given. If a notice has been given stating that a significant action is proposed to be taken (including a significant action that is also a notifiable action), the action must not be taken before the end of a specified period (generally 40 days (including 30 days for the Treasurer to make the decision and a further 10 days to notify the application of the decision), or an additional period of up to 90 days from the publication of an interim order).

Under section 47 of the Act, a notifiable action is a proposed action by a foreign person:

- to acquire a direct interest in an Australian entity or Australian business that is an agribusiness;

- to acquire a substantial interest in an Australian entity; or
- to acquire an interest in Australian land.

Generally, the action is only a notifiable action under the Act if the entity, business or land meets the threshold test. A different threshold test applies for certain notifiable actions taken in relation to agribusinesses.

Unlike for a significant action, there does not need to be a change in control for actions relating to entities and businesses to be notifiable actions.

All significant actions prescribed in the Regulation are also notifiable actions. All significant actions relating to Australian land are also notifiable actions.

### Exemption certificates

Foreign persons may apply for multiple types of exemption certificates to cover all of the relevant acquisitions proposed to be taken. Actions to acquire interests covered by a relevant exemption certificate given under either the Act or the Regulation that relates to significant and notifiable actions are generally neither a significant action nor a notifiable action so long as the conditions of the certificate are met. For further information, see the *Exemption Certificates* Guidance Note.

## I: NOTIFIABLE NATIONAL SECURITY ACTIONS AND REVIEWABLE NATIONAL SECURITY ACTIONS

See also the *National Security* Guidance Note.

From 1 January 2021, two new categories of actions, ‘notifiable national security actions’ and ‘reviewable national security actions’ are introduced into the foreign investment review framework.

### Notifiable national security actions

An action is a notifiable national security action if the action is taken, or proposed to be taken, by a foreign person and the action is any of the following (see section 55B of the Act):

- to start a national security business;
- to acquire a direct interest in a national security business;
- to acquire a direct interest in an entity that carries on a national security business;
- to acquire an interest in Australian land that, at the time of acquisition, is national security land; or
- to acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.

### Implications when an action is a notifiable national security action

A person proposing to take a notifiable national security action must give notice of the action to the Treasurer (regardless of the value of the investment) and must not take the action before receiving a no objection notification, an exemption certificate covering the action or before the decision period lapses.

If a person gives notice to the Treasurer of a notifiable national security action, the Treasurer may:

- decide they do not object to the action and give the person a no objection notification not imposing conditions;
- decide they do not object to the action provided the person complies with one or more conditions, and give the person a no objection notification imposing conditions; or
- decide taking the action would be contrary to national security and make an order prohibiting the proposed notifiable national security action.

A person who does not notify the Treasurer of a notifiable national security action may be committing an offence, contravening a civil penalty provision.

### Reviewable national security actions

There are broadly nine scenarios where a reviewable national security action may arise. In all scenarios an action will not be a reviewable national security action if it is otherwise a significant action, notifiable action or notifiable national security action, including where an action can be both an action to acquire an interest in Australian land and an action to acquire an interest in an entity.

- For example, a transaction that involves the acquisition of 15 per cent in a land entity that is a notifiable action under section 47 of the Act (to acquire an interest in Australian land), cannot also be a reviewable national security action under section 55D of the Act (entities) due to the provision under section 55D(1)(c) of the Act.

Broadly, reviewable national security actions are those actions expected to give foreign persons potential influence and rights, such as the ability to influence or participate in the central management or policy of an entity or business, or the right to occupy Australian land. This includes instances where a foreign person is already in a position to influence or participate in the central management or control of the entity, but as a result of the reviewable national security action gains further power to influence or participate.

The first scenario where an action would be a reviewable national security action is where a person takes an action or proposes to take an action, to acquire an interest of any percentage in an entity, and as a result of the action a foreign person either (see section 55D(1) of the Act):

- acquires or will acquire a direct interest in the entity and this is not otherwise a significant action, notifiable action or notifiable national security action;
- will be in a position, or a further position to influence or participate in the central management and control of the entity; or
- will be in a position, or a further position to influence or participate in or determine the policy of the entity.

Where the circumstance is to acquire an interest in shares, the entity must be a corporation that carries on an Australian business or the holding entity of such a corporation. Otherwise, the entity must be a corporation that carries on an Australian business or the holding entity (other than a foreign corporation) of such a corporation. If the action involves a unit trust, the entity must be

an Australian unit trust or a holding entity of an Australian unit trust. See section 55D(3) of the Act.

The second scenario is where a person takes an action or proposes to take an action that is to issue securities in an entity and as a result of the action a foreign person either (see section 55D(2) of the Act:

- acquires or will acquire a direct interest in the entity and this is not otherwise a significant action, notifiable action or notifiable national security action;
- will be in a position, or a further position to influence or participate in the central management and control of the entity; or
- will be in a position, or a further position to influence or participate in or determine the policy of the entity.

The third and fourth scenarios are where a person takes an action or proposes to take an action (see section 55D(2) of the Act:

- to enter an agreement about the affairs of an entity under which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions, or wishes of a foreign person who holds a direct interest in the entity; or
- to alter a constituent document of an entity as a result of which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person.

In the case of the second, third and fourth scenarios the entity must be, for an acquisition in shares or an issue of shares, a corporation that is a relevant entity that carries on an Australian business or the holding entity of such a corporation. For any other action relating to a corporation, the entity must be an Australian business or the holding entity (other than a foreign corporation) of such a corporation. If the action involves a unit trust, the entity must be an Australian unit trust or a holding entity of an Australian unit trust. See section 55D(4) of the Act.

#### **Example 22**

Company B, a foreign person, has a 10 per cent holding with no influence in the management of an entity, Company C. A new shareholder agreement is entered into which provides that all shareholders with a 10 per cent or more holding in Company C are to be directors on the board. As a result of the new shareholder agreement senior officers within Company C are subject to the directions and instructions of Company B. The action of entering into a new shareholder agreement would be a reviewable national security action.

The fifth, sixth and seventh scenarios where an action may be a reviewable national security action is where a person takes or proposes to take an action that is either:

- to acquire an interest of any percentage in an Australian business;
- to acquire an interest in the assets of an Australian business; or

- to enter or terminate a significant agreement with an Australian business, and as a result of the action or proposed action, the foreign person will:
- acquire or acquires a direct interest in the Australian business and this is not otherwise a significant action, notifiable action or notifiable national security action;
- be in a position, or a further position to influence or participate in the central management and control of the Australian business; or
- be in a position, or a further position to influence or participate in or determine the policy of the Australian business.

See section 55E(1) of the Act.

### Example 23

Company D, a large foreign-owned corporation, leases a widget from a small Australian business (Company E). As part of the lease arrangement, Company E agrees to Company D nominating a director to sit on the board of Company E. This would be a reviewable national security action.

The eighth scenario where an action may be a reviewable national security action is where a foreign person takes or proposes to take an interest in Australian land. See section 55F of the Act.

The final scenario where an action may be a reviewable national security action is where a foreign person starts or proposes to start an Australian business. See section 55E(2) of the Act.

### *Implications when an action is a reviewable national security action*

A person is not required to notify the Treasurer before taking a reviewable national security action. However, the Treasurer, in exercising the 'call-in' power, is able to review a reviewable national security action that has not been notified if the Treasurer considers that the action may pose a national security concern. A person may choose to notify the Treasurer of a reviewable national security action, and in doing so, extinguish the Treasurer's 'call-in' power. For further information on the Treasurer's 'call-in' power see the *National Security* Guidance Note.

### **Exemption certificates**

Actions to acquire interests covered by a notifiable national security action exemption certificate are generally not notifiable national security actions as long as the conditions are met. Likewise, actions to acquire interests covered by a reviewable national security exemption certificates are generally not reviewable national security actions as long as the conditions are met. For further information, see the *Exemption certificates* Guidance Note.

## **J: TRACING OF SUBSTANTIAL INTERESTS**

To consider whether a foreign person requires approval for a proposed acquisition of an interest in securities, assets or trusts, it is necessary to determine what interests are being acquired by the relevant entities. One way that an interest may be acquired is by the tracing of interests through corporations, trusts and unincorporated limited partnerships.

Where:

- a person (alone or together with one or more associates) holds a substantial interest in:
  - a corporation (the higher party); or
  - a trust (a trustee of which is the higher party); or
  - an unincorporated limited partnership (a general partner of which is the higher party); and:
- the higher party:
  - is in a position to control all or any of the voting power or potential voting power in a corporation or unincorporated limited partnership (the lower party); or
  - holds interests in all or any of the shares in a corporation (the lower party); or
  - holds an interest in a trust or unincorporated limited partnership (the lower party),
  - then the person or persons are taken to hold the interest in the lower party.

When tracing applies, the person is taken to hold the interest in the lower party that the higher party holds. This may mean that an acquisition of a substantial interest in a foreign target entity that has Australian subsidiaries by another foreign entity is a significant action under the Act. By operation of the tracing rules in section 19 of the Act, the foreign entity is taken to be acquiring the interest in the Australian subsidiaries that the foreign target entity holds which may be a significant action if the relevant conditions are met.

This process can be applied multiple times so that a person's interest can be traced through many entities and unincorporated limited partnerships, including where the general partner of an unincorporated limited partnership is another unincorporated limited partnership. Where the general partner of an unincorporated limited partnership is another unincorporated limited partnership the general partner is an 'intermediate partnership'. For ownership structures with multiple unincorporated limited partnerships, reapplying the rules means there may be multiple intermediate partnerships that are looked at to determine whether a general partner (the intermediate partner) of any of those intermediate partnerships controls the voting power or holds interests in the lower party.

The tracing provisions also apply to foreign persons in determining whether they are proposing to take, or have taken, a notifiable national security action or a reviewable national security action (to the extent those actions relate to the acquisition of an interest in an entity). The tracing provisions do not apply to acquisitions of assets or Australian land, other than the acquisition of interests in land entities.

Under subsection 19(3) of the Act and section 48 of the Regulation, tracing of interests does not apply to foreign persons (who are not foreign government investors) for the purposes of determining whether:

- a foreign person has a direct interest in an Australian entity or Australian business that is an agribusiness. This ensures that acquisitions of these interests which are offshore and remote from Australia are not notifiable actions or significant actions. However, this does not prevent acquisitions from being regulated by the Act for other reasons. For example, an acquisition

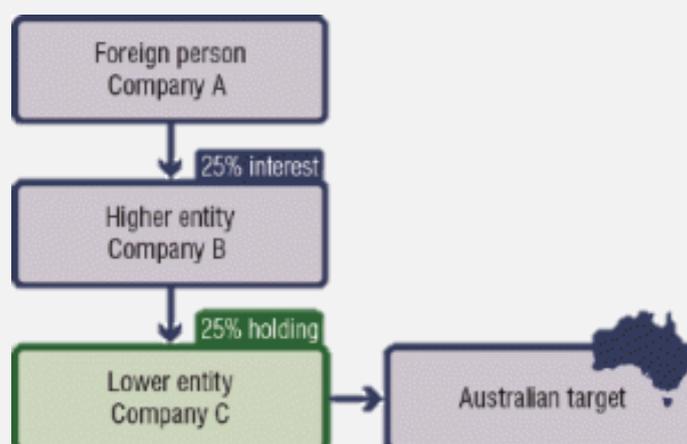
of an agribusiness may also be a significant action as an acquisition of securities in an entity; or

- an acquisition by a foreign person of a substantial interest in an Australian entity is a notifiable action. In many cases, where a target entity is offshore an acquiring entity may not know that the target entity holds securities in an Australian entity. This exemption to the tracing rules ensures that these acquisitions, which are offshore and remote from Australia, are not notifiable actions for foreign persons. They may still be significant actions, notifiable national security actions or reviewable national security actions and, as such, the Treasurer may exercise power.

#### Example 24

Company A is a foreign person and not a foreign government investor. Company A holds a 25 per cent interest in Company B, which has a 25 per cent holding in Company C. Even if Company B and C were Australian incorporated with no other foreign persons holding interests, both Company B and Company C would be considered to be a foreign person, because they are taken to be held by Company A.

Company C would be required to notify its proposed action in relation to the Australian target if the action is a notifiable action. Assuming that the action was acquiring a substantial interest in the Australian target, by virtue of the acquisition being carried out and the tracing rules, Company A and Company B would also be taken to have a substantial interest in Australian target.

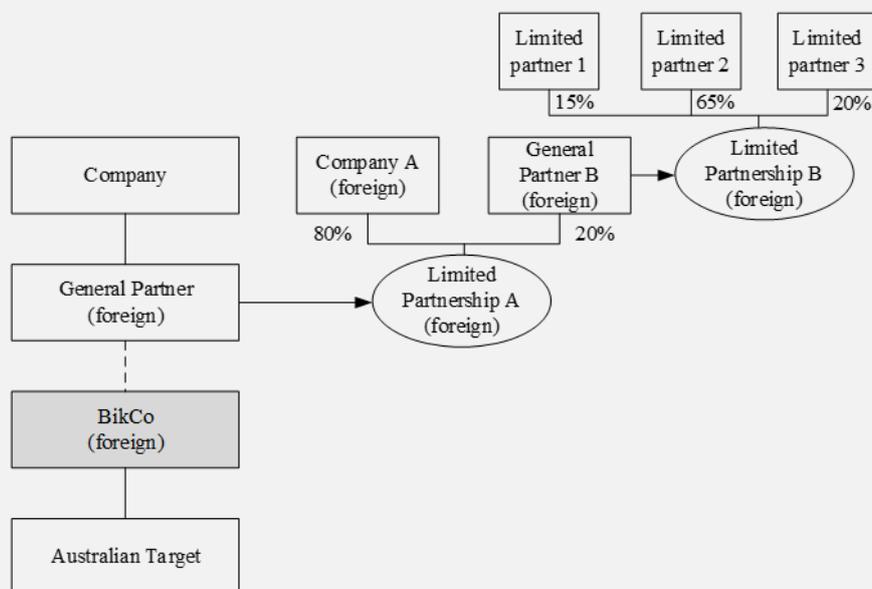


#### Example 25

Limited Partner 1, Limited Partner 2 and Limited Partner 3 are foreign persons (who are not foreign government investors) that are limited partners of an unincorporated limited partnership. Limited Partner 2 and Limited Partner 3 each hold a substantial interest in the unincorporated limited partnership of 65 per cent and 20 per cent respectively.

BikCo would be required to notify the Treasurer of its proposed acquisition of the Australian Target if the action is a notifiable action. Assuming that the action was acquiring a substantial interest in the Australian Target, by virtue of the acquisition being carried out and the tracing rules, Limited Partner 2 and Limited Partner 3 would also be taken to have a substantial interest in the Australian Target. The

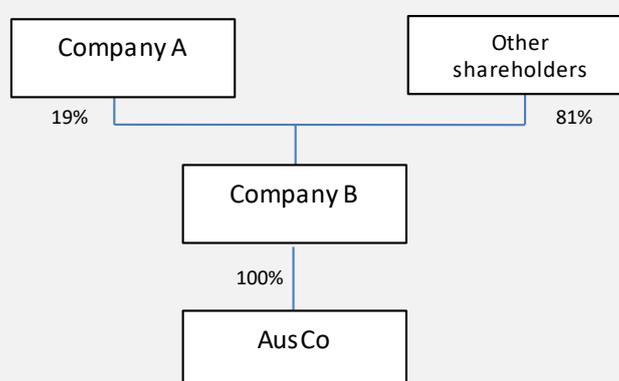
Treasurer may impose conditions on Limited Partner 2, Limited Partner 3, the General Partner B of Limited Partnership B, Company A, the General Partner of Limited Partnership A and BikCo.



### Example 26

Company A is acquiring a 19 per cent interest in Company B. Both Company A and Company B are foreign persons. AusCo is a wholly owned subsidiary of Company B. AusCo is an Australian company that operates an Australian business.

The tracing provisions do not apply in this scenario as Company A does not hold a substantial interest in Company B and is not an associate of any of the other shareholders. Accordingly, there would be no significant action or notifiable action for Company A.



## K: CALCULATING CONSIDERATION, ASSET VALUES AND ISSUED SECURITIES VALUES

There are a number of key concepts in the Regulation relevant for determining the consideration and the monetary threshold value where necessary for certain actions (for example, for fees and in determining if there is a significant action). This includes:

- consideration (section 14 of the Regulation), which is applicable for determining most fees and for some threshold tests;
- assets, that is:
  - the total asset value of an entity (section 20 of the Regulation), which is applicable for some threshold tests for entities in section 51 of the Act, and in the Regulation, applicable to determining when an entity is an agribusiness, or a mining, production or exploration entity, or if the exception in subsection 56(4) applies (that is, the exception for foreign government investors acquiring non-material interests in businesses that are not sensitive businesses or national security businesses); or
  - value of assets of entities or businesses (section 23 of the Regulation), which is applicable for some threshold tests for entities in section 51 of the Act, and in the Regulation, applicable to determining when an Australian business is an agribusiness; and
- total issued securities value (section 21 of the Regulation), which is only applicable for when considering the threshold test for acquiring interests in securities in an entity, or issuing securities in an entity.

Where amounts are expressed in a currency other than Australian dollars, these are to be converted into Australian dollars, preferably using an exchange rate from the Reserve Bank of Australia. Further details are included in section 25 of the Regulation.

### Consideration

Under section 14 of the Regulation, consideration is taken to mean consideration in any form (including consideration that is 'in kind'), as well as any Goods and Services Tax (**GST**) or any equivalent tax payable under a law of a foreign country or a part of a foreign country, and any consideration that is contingent on the occurrence or non-occurrence of a particular event.

Generally, consideration is the value set out in the agreement relating to the action (so long as the parties to the agreement are dealing at arm's length). It may also include consideration provided in related agreements that form part of the transaction. An example of an agreement where the parties are not dealing at arm's length would be if a family member proposed to gift to a relative an interest in land, such as ownership of an established dwelling, for either a nil amount or only a nominal amount (that did not reflect the market value of the interest to be transferred).

Otherwise, the consideration is based on a reasonable assessment and may include the value of any debt taken on by the purchaser as part of the transaction or that will not be repaid by the target entity prior to or on completion of the transaction. While what is a reasonable assessment of the consideration will depend on the facts and circumstances of the action, examples of what may be a reasonable assessment of consideration include:

- An assessment of consideration on a particular day if it is worked out on the basis of a price that was publicly available no more than seven days earlier. For example, a reasonable assessment of consideration:
  - for listed and unlisted public offer entities may be based on the publicly quoted daily closing price of the security, or if under a trading halt, the last quoted price.

- 
- for land, may be the price publicly advertised by, or on behalf of, the vendor.
  - for a house and land package, it would be the advertised price for the package.
  - For an acquisition of an interest in securities made under a takeover bid, paragraph 14(4)(b) provides that an assessment of consideration is reasonable if it is worked out on the basis of the first amount specified for the interest in the bidder's statement (within the meaning of the Corporations Act) or any equivalent document under a law of a foreign country or part of a foreign country.
  - For an acquisition of an interest in an agreement involving the sharing of profits or income, regard would be had to matters such as a reasonable estimate of future profits for the life of the agreement.
  - Consideration for interests related to security interests (that are not otherwise exempt under the Act):
    - For issuing of a security interest, the sum of up-front initial payments (ongoing interest payments are disregarded if reflecting a market rate of interest).
    - For interests acquired through the enforcement of a security interest, the sum of the outstanding loan balance likely to be recouped by the lender and any penalties levied on the borrower.
  - Consideration for a leasehold interest in Australian land will generally be the total of any:
    - up-front initial payments (other than taxes and regulatory charges) for the grant of the leasehold interest;
    - periodic payments for the benefit and enjoyment of the Australian land (for example, annual lease payments including amounts as increased in accordance with a formula over the term of the lease);
    - amounts likely to be paid for an extension or renewal of the lease (if prescribed under the lease agreement); and
    - the value of any interest in a wind or solar power station on the land.

When a person acquires an interest in Australian land, and it is a long term lease, licence or option, which confers a right to occupy agricultural land, commercial land or residential land that is likely to exceed 20 years, the consideration would be adjusted and apportioned to 20 years' worth of payments. This rule applies to actions taken or proposed to be taken on or after 1 January 2021. See section 14(4A) of the Regulation.

- For example, if an applicant acquires Australian land that has a 100 year lease for consideration of \$100 million, for the purposes of working out the fee applicable, the applicant would only need to account for 20 years' worth of payments, by calculating all the payments over the 100 year period and apportioning that to 20 years' worth of payments, which makes the value \$20 million.

The revised definition of 'consideration' would apply to actions taken or proposed to be taken on or after 1 January 2021.

Subsection 14(5) of the Regulation provides that for acquisitions of interests in securities of foreign entities that have an interest in an Australian entity or business, the consideration may be taken to be the number arrived at by apportioning the earnings before interest and tax of the foreign entity between the Australian entity or business and the other entities or businesses.

- Where there is more than one Australian entity or business, the consolidated earnings before interest and tax from all Australian entities or businesses should be taken into account.

#### **Total asset value - assets to be taken into account**

When determining the total asset value of an entity, the following assets of entities are taken into account:

- for an Australian entity—the total assets of the entity; and
- for a foreign entity—the total relevant Australian assets, and any other assets in Australia, of the entity.
  - Under section 4 of the Act, relevant Australian assets means Australian land, including legal and equitable interests (within the ordinary meaning of the term) in such land and securities in an Australian entity.

#### **Total asset value - the meaning based on holding or non-holding entity**

Section 20 of the Regulation prescribes the meaning of total asset value in the following circumstances:

- entities that are not holding entities, it will be the assets to be taken into account based on the entity type (see above);
- holding entities without financial statements that meet subsection 24(2) or (3) of the Regulation (that is, do not have appropriate consolidated financial statements or equivalent: see below), it is the aggregate value of the assets to be taken into account based on the entity type (as above), of the holding entity and each relevant subsidiary of the entity (disregarding any securities in those subsidiaries of the holding entity); and
- holding entities with financial statements that meet subsection 24(2) or (3) of the Regulation (that is, have appropriate consolidated financial statements or equivalent: see below), it is the aggregate value of the total assets to be taken into account as set out in the financial statements or other document.

Section 20 also prescribes that:

- for entities whose securities are stapled, the value of the assets of the stapled entity is taken to include the value of the assets of the other entity or entities that its securities are stapled to; and
- for entities operating on a unified basis (for example, under a dual listed company arrangement), the value of the assets includes the value of the assets of the other entities with which the entity is operating on a unified basis.

#### **Total asset value - entities that prepare Consolidated Financial Statements**

The value of the assets for an entity that prepares Consolidated Financial Statements is the value of the asset set out in those statements that are prepared in accordance with the International Financial Reporting Standards (the **IFRS**).

If the entity does not prepare its consolidated financial statements in accordance with the IFRS, the entity may produce a separate set of accounts that reconcile the financial statements with the relevant pronouncements of the IFRS. Where there is such a reconciliation document, the value of the assets of the entity is the value set out in that document.

#### Value of the assets of an entity or business

Section 23 of the Regulation provides that the value on a particular day of an asset of an entity or business is generally:

- if there is a most recent financial statement and an event affecting the value of the asset as shown in the financial statement has not occurred since the financial statement was most recently audited or reviewed, the value of the asset as shown in the financial statement; or
- the value of that asset as shown on that day in the accounting records of the entity.

The above does not apply if the value shown is not a reasonable value. However, values will generally be reasonable values if determined in accordance with accounting standards and related pronouncements of the Australian Accounting Standards Board or in accordance with the IFRS.

#### Total issued securities value

Under section 21 of the Regulation, the total issued securities value for an entity is the total of the class values worked out for each class of security of the entity.

- Entities may have more than one class of securities on issue, which may have differing rights or nominal values attached. For example, some classes of securities may have preferential voting rights, preferential rights to distributions, or no voting rights. To ascertain the total issued securities value requires that the class value is worked out for each class.

#### Meaning of class value for a class of security if securities in that class are being acquired or issued

For securities in a class that is being acquired, the class value is the total consideration for the acquisition of securities in that class divided by the number of securities in the class to be acquired, multiplied by the total number of issued securities in that class immediately before the acquisition. That is:

$$\frac{\text{The consideration for the acquisition or issue of that class of securities}}{\text{The number of securities in that class to be acquired or issued}} \times \text{The total number of issued securities in that class immediately before the acquisition or issue}$$

This is relevant to significant actions where a person proposes to acquire an interest in securities (for example, in an entity). This includes where the securities may be acquired including by participating to acquire securities through a share placement or a non-pro rata securities issue.

The class value for a class of security if securities in that class are being issued is worked out by dividing the total issue price of all the securities in that class to be issued by the number of securities in the class to be issued, multiplied by the total number of issued securities in that class immediately before the issue.

$$\frac{\text{The consideration for the acquisition or issue of that class of securities}}{\text{The number of securities in that class to be acquired or issued}} \times \text{The total number of issued securities in that class immediately before the acquisition or issue}$$

#### Meaning of class value for a class of security of an entity if securities in that class are not being acquired or issued

Where securities in a class are not being acquired or issued the class value for a class of security is worked out by multiplying the market value of securities in that class with the total number of issued securities in that class immediately before the acquisition or issue.

$$\text{The market value of securities in that class} \times \text{The total number of issued securities in that class immediately before the acquisition or issue of the other class or classes of securities in that entity}$$

For example, when a corporation has both preferential and ordinary shares on issue, but the acquisition is only in relation to the ordinary shares, then the class value for preferential shares must be worked out.

## L: TIME LIMITS AND EXTENSIONS

- If a decision period starts in relation to an action, the Treasurer must make an order or decision within the decision period (usually 30 days), and notify the person of the decision within a further 10 days.
- The Treasurer may extend the 30 day timeframe by up to a further 90 days by giving written notice to the specified person or registering an interim order. Specified persons can also voluntarily extend the decision period by requesting an extension in writing.
- A person must not take the action during the decision period, notification period, interim order period or until the person is given a no objection notification. If the action is taken before the end of the decision period, the Treasurer is no longer restricted by the time limits.

#### Time limit on making orders and decisions

The Treasurer generally has 30 days to make orders and decisions with respect to an application for a no objection notification (or an exemption certificate) with respect to a significant action, notifiable national security action, or a reviewable national security action<sup>8</sup>. Where a fee is

<sup>8</sup> See section 77 of the Act for decision period with respect to notice of a significant action, notifiable national security action, or a reviewable national security action (a application for no objection notification). See

payable, the 30 day timeframe starts from the day after the applicant pays the correct fee and applies in the approved manner<sup>9</sup>.

The Treasurer may 'call-in' an action for a national security review by giving a notice to the person who proposes to take or has taken the action under section 66A(4) of the Act. In this circumstance, the 30 day timeframe starts from the day after the Treasurer issues the notice (not when the fee is paid).

The decision period will end on the 30th day unless an extension applies (see below). If the 30th day falls on a weekend or a public holiday in the Australian Capital Territory (the ACT), the last day of the decision period will be the following business day.

The decision period and period specified in an interim order do not include any days from the time a section 133 notice (request for information notice) is given to the time the notice is answered.

**Example 27**

A person lodges an application on 24 August 2020 stating that a significant action is proposed to be taken, and pays the correct filing fee on the same date. Without any extension, the decision period will end on the 30th day running from the day after the correct fee is paid, which is 23 September 2020.

The Treasurer decides on 23 September 2020 to issue a no objection notification with conditions. The no objection notification must be given to the applicant before the end of 10 days after the decision is made. Running from 23 September 2020, exclusive of the day on which the decision was made, the 10th day after the decision was made is 3 October 2020. However, 3 October 2020 is a Saturday, so the final day for the giving of the no objection notification will be extended to the next day which is not on a weekend or a public holiday. 4 October 2020 will be skipped as it is a Sunday, as will 5 October 2020 as it is a public holiday in the ACT (Labour Day). The final day for the applicant to be notified of the Treasurer's decision is therefore 6 October 2020.

Time restrictions on making a decision or orders do not apply in the following circumstances:

- Where the Treasurer has not received a notice from a person stating that a significant action, notifiable national security action or reviewable national security action is proposed to be taken; or
- Where the action has already been taken; or
- Where the action was taken before the end of the decision period or notification period, or the period specified in an interim order. The notification period ends on the 10th day after the decision period or the day a no objection notification is given, whichever is earlier.

---

section 61 of the Act and section 60 of the Regulation for decision period with respect to an exemption certificate application.

9 See sections 114 and 135 of the Act.

There is also no time limit once the Treasurer has made an order (other than an interim order) within the time limits, and registered or notified it in accordance with the Act. See section 77(4) of the Act.

#### **Extensions – applications for objection notifications**

There are three ways in which the 30 day decision period can be extended with respect to an application for a no objection notification, where a national security review is initiated by the Treasurer.

#### **Treasurer publishes an interim order (section 68 of the Act)**

The Treasurer may make an interim order effectively extending the decision period by prohibiting a proposed significant action for up to 90 days. The period specified in the order commences on the day the order is registered on the *Federal Register of Legislation*.

#### **Treasurer provides written notice to applicant (section 77A of the Act)**

The Treasurer may also extend the decision period with an additional period of up to 90 days by providing the applicant with written notice of the extension before the end of the decision period. The written notice must include the reasons for the decision. The Treasurer may extend the decision period in this way more than once, however the total number of days the decision period is so extended must not exceed 90 days.

#### **Applicant requests for an extension (section 77(8)(b) of the Act)**

If an applicant considers the decision period required for the processing of their matter is insufficient, or they want to avoid an interim order being made, they can voluntarily extend the period. In order to extend the period, the applicant must write to the Treasurer and request an extension to the decision period. This request needs to be made before the end of the current decision period. On receipt of the written notification, the decision period is extended for the time specified in writing. There is no limit on the number of times the decision period can be extended in this way. However, once an interim order is made the applicant is unable to extend the decision period.

#### **Extension – applications for exemption certificates**

The time limit for making decisions on exemption certificates is also 30 days, or if the person requests in writing to the Treasurer to extend the period – the period as so extended (see section 61 of the Act and section 60 of the Regulation).

## **M: NO OBJECTIONS NOTIFICATIONS**

Under sections 74 and 75 of the Act, the Treasurer can issue a no objection notification for certain investments, if the Treasurer considers that the investment is not contrary to the national interest or national security (as the case requires). This document is what is often referred to as the ‘approval’ of an investment.

#### **Effect of a no objection notification**

Where a person has been issued a no objection notification in relation to an action, provided that the person does not contravene conditions (if any) specified in the notification, the Treasurer will not be able to issue a prohibition or disposal order in relation to that action, except in the context of the Treasurer’s last resort power under section 79A of the Act (see the *National Security Guidance Note*).

**No objection notification not imposing conditions**

Under section 75 of the Act, if the Treasurer receives a notice that a person proposes to take a significant action, a notifiable national security action or a reviewable national security action, the Treasurer may decide that the Commonwealth has no objection to the action and issue a no objection notification without imposing conditions.

The Treasurer may also issue a no objection notification without imposing conditions with respect to a reviewable national security action or a significant action that the Treasurer has decided to review under section 66A of the Act.

**No objection notification imposing conditions – national interest**

Under section 74 of the Act, the Treasurer may decide that the Commonwealth has no objection to a significant action, subject to one or more conditions being imposed that the Treasurer is satisfied are necessary to ensure that the action will not be contrary to the national interest. The Treasurer may do so for:

- a proposed significant action (whether or not a notice is given by the person proposing to take the significant action);
- a significant action that has been taken (where the Treasurer was not given a notice before the action was taken); or
- a significant action that has been taken, where the person has given the Treasurer a notice of the action before it was taken, but the action was taken before the limitation period on taking the action expired (generally the earlier of 10 days after the end of the Treasurer's decision period or the day a no objection notification was given to the person - see section 82 of the Act for further information).

**No objection notification imposing conditions – national security**

Under section 74 of the Act, the Treasurer may decide that the Commonwealth has no objection to the following actions subject to one or more conditions being imposed that the Treasurer is satisfied are necessary to ensure that the action will not be contrary to national security:

- a notifiable national security action that is not a significant action;
- a reviewable national security action that is notified to the Treasurer;
- a reviewable national security action that is not notified to the Treasurer but the Treasurer decides to review under section 66A of the Act; or
- a significant action that is not a notifiable action or a notifiable national security action, and where it is not notified to the Treasurer, but the Treasurer decides to review under section 66A of the Act.

**Content of the notification**

A no objection notification must be made in writing and specify:

- the action(s) to which the no objection notification relates;
- the foreign person(s) to which the notification relates;

- A foreign person may be identified in the no objection notification as a foreign person that is not yet incorporated or a trustee of a trust that is not yet established. It may specify the way in which the foreign person is to be incorporated or the trust is to be established and the future shareholders or unitholders.
- the time limit for the actions covered by the notification to be taken (if the foreign person proceeds with the actions).
  - The time limit is generally 12 months. A longer time period can apply if the Treasurer is satisfied that a longer period is not contrary to the national interest.
  - If the action is not completed within the allowed timeframe, a new notification must generally be provided.
- the Treasurer's last resort power to review the action(s) to which the no objection notification relates if exceptional circumstances arise.

A no objection notification is generally provided by email. See section 76 of the Act.

#### **Timelines**

A no objection notification must be given before the end of 10 days after a decision is made. Where a person has submitted a notice stating that an action is proposed to be taken, the person must not take the action before the earlier of the date 10 days after the decision period or the date the no objection notification is given to the person.

## N: VARIATIONS

The Act allows for variations to an existing foreign investment approval. A fee is payable at the time of the variation application. Broadly speaking, there are two types of variations:

1. The Treasurer may initiate a variation to an existing no objection notification (section 74 of the Act) or exemption certificate (section 62 of the Act); and
2. A foreign person may apply for a variation to an existing no objection notification (section 76 of the Act) and to an existing exemption certificate (section 62 of the Act).

The national interest test or the national security test (as the case requires) applies with respect to variation applications, for example:

Before the Treasurer can make a variation to a no objection notification (or an exemption certificate) with respect to a significant action, notifiable national security action, or a reviewable national security action the Treasurer must be satisfied that the variation is not contrary to the national interest.

Where a person applies for a variation, a fee is payable at the time of the variation application. Where a variation is initiated by the Treasurer, fees are not applicable. For further information on the applicable fees, see the *Fees Guidance Note*.

### Treasurer initiated variation

The Treasurer may vary a no objection notification or an exemption certificate by revoking a condition, imposing a new condition, varying an existing condition, or varying certain information provided in the no objection notification only if the Treasurer is satisfied that the variation is not contrary to the national interest (or national security, as the case requires) and:

- the person consents to the new condition or variation; or
- the Treasurer is satisfied that the new condition or variation does not disadvantage the person (where the conditions were imposed prior to 1 December 2015, the variation may only be done with the foreign person's consent).

### Foreign person-initiated variation

A foreign person may apply for a variation to conditions imposed in a no objection notification. A person given a no objection notification.

An application for an extension of the period specified in the no objection notification (that is, the period within which the action may be taken) must be made two months before the end of the period.

The Treasurer may vary a no objection notification or an exemption certificate by revoking a condition, imposing a new condition, varying an existing condition, or varying certain information provided in the no objection notification only if the Treasurer is satisfied that the variation is not contrary to the national interest (or national security, as the case requires).

### Variation to conditions in the context of the Treasurer's last resort power

Where the last resort power is available to the Treasurer, it may be used to revoke, vary or impose new conditions in a no objection notification that was given to a person about an

action. The variation may only be made if the Treasurer is satisfied that it is reasonably necessary to eliminate or reduce the national security risk relating to the action. See section 79G of the Act.

The Treasurer may also exercise the last resort power (when available) to impose conditions on actions that do not have an existing no objection notification by issuing a 'notice imposing conditions' under section 79H of the Act.

#### Variation to a 'notice imposing conditions'

A foreign person may apply for a variation to a section 79H 'notice imposing conditions'. An application for an extension of the period specified in the 'notice imposing conditions' (that is, the period within which the action may be taken) must be made two months before the end of the period (see section 79Q(2)). The variation may only be made if the Treasurer is satisfied that the variation is not contrary to national security and it is reasonably necessary to eliminate or reduce the national security risk relating to the action (see sections 79Q(3) and 79J).

The Treasurer, under section 79J, may also decide to vary the 'notice imposing condition' if the Treasurer is satisfied that the variation is reasonably necessary to eliminating or reducing the national security risk relating to the action. The Treasurer may only vary a notice if the person consents and he is satisfied that the variation does not disadvantage the person (see section 79P).

#### Variation to conditions in a 'notice imposing conditions'

A foreign person may apply for a variation to conditions imposed in a 'notice imposing conditions'. An application for an extension of the period specified in the no objection notification (that is, the period within which the action may be taken) must be made two months before the end of the period. The Treasurer may vary the notice if he is satisfied that the variation is not contrary to national security. See section 79Q of the Act.

The Treasurer may vary a 'notice imposing conditions' by revoking a condition, imposing a new condition, varying an existing condition, or varying certain information provided in the 'notice imposing conditions' only if the Treasurer is satisfied that the variation is not contrary to national security and:

- the person consents to the new condition or variation; or
- the Treasurer is satisfied that the new condition or variation does not disadvantage the person.

See section 79P of the Act.

#### Variation or revocation to remedy incorrect statements

From 1 January 2021, the Treasurer may vary or revoke an exemption certificate where the Treasurer is satisfied that a person has given false or misleading information or documents, or omitted a material fact or thing where this information is relevant and given before the exemption certificate is issued. Certain requirements apply before the Treasurer can exercise this power. See section 62A of the Act.

From 1 January 2021, the Treasurer may revoke a no objection notification where the Treasurer is satisfied that a person has given false or misleading information or documents, or omitted a

material fact or thing where this information is relevant and given before the no objection notification is issued. Certain requirements apply before the Treasurer can exercise this power. See section 76A of the Act.

The Treasurer will give the person an opportunity to make submissions on the matter before the Treasurer makes a revocation or variation decision in these circumstances.

The Treasurer may exercise these powers with respect to no objection notifications and exemption certificates issued before, on or after 1 January 2021.

#### Factors that will be considered for variation applications

Applications for a variation will be considered on a case-by-case basis. The Treasurer will consider all factors relevant to the national interest (or national security), including the following:

##### 1) The timing of the request

An application by a foreign person for an extension of the validity period (the period within which the action may be taken) specified in the no objection notification must be made two months before the end of the period.

Similarly, an application by a foreign person for an extension of the validity period (the period within which the action may be taken) specified in the 'notice imposing conditions' must be made two months before the end of the period.

A foreign person may apply for a variation to a condition of a no objection notification at any time (i.e. there is no time limit). Nonetheless, foreign persons are strongly encouraged to apply for a variation as soon as they are aware that they will not be able to comply with their condition(s), because delay may put them at risk of breaching the condition(s).

##### 2) The nature of the variation

Variations that are minor in nature and do not substantively change the original no objection notification or exemption certificate would generally be considered as a proposal for a variation. In contrast, a proposal that seeks to broaden the scope of the original no objection notification or exemption certificate will generally require a new application.

Requests that may be processed as a <i>variation</i>	Requests that may require a <i>new application</i>
<ul style="list-style-type: none"> <li>Fixing non-material errors e.g. a non-material typographical error.</li> <li>Changes to conditions that do not extend the scope of the original no objection notification or exemption certificate.</li> <li>Changes to conditions to align with conditions imposed on the same investor(s) in relation to a comparable later investment</li> <li>Adding to the original no objection notification or exemption certificate a new foreign person that is a wholly owned</li> </ul>	<ul style="list-style-type: none"> <li>A request for extension to the validity period (i.e. the period within which the action may be taken) of the no objection notification, exemption certificate, or s 79H 'notice imposing conditions', which is made less than two months before the expiration of the term.</li> <li>Multiple requests for an extension to the duration of a no objection notification or exemption certificate.</li> </ul>

<p>subsidiary of the original approved acquirer.</p> <ul style="list-style-type: none"> <li>Reasonable extensions to the validity period of a no objection notification or exemption certificate (i.e. the period within which the action may be taken) where the request is made at least two months before the expiration.</li> </ul>	<ul style="list-style-type: none"> <li>A request involving a new significant action, notifiable action or notifiable national security action.</li> <li>A request involving a new foreign person in an action.</li> <li>A material change in the percentage of interest being acquired.</li> <li>A request that will require the imposition of new conditions on a no objection notification that was originally issued without conditions under section 75 of the Act.</li> <li>Changes to a no objection notification or exemption certificate that has expired.</li> </ul>
---	---

**Example 28**

A foreign person was issued a no objection notification for acquiring an interest in vacant land for development, on condition that the land is developed within a specified timeframe. Due to circumstances beyond the foreign person's control, the foreign person wants to extend the timeframe for another six months. The foreign person submits a proposal for a variation. This is likely to be considered as a variation as it does not substantively change the original no objection notification, rather it provides further time to meet a condition.

**Example 29**

A foreign person was issued with an exemption certificate to cover a program of acquisitions of interests in Australian land. The foreign person wants to add another foreign person to the exemption certificate and applies for a variation to the existing certificate. As this would likely substantively change the scope of the foreign persons originally covered, to the extent it may include a foreign person not originally envisaged by the decision maker (for example, a foreign person incorporated offshore) and may impact the national interest, this would generally not be considered a variation and would require a new application.

**Example 30**

Francis applies for and receives approval to purchase a vacant residential block for development. A condition of the approval is that construction of the dwelling is completed within four years of the date of approval. However, the building company that Francis contracted to build the dwelling goes into receivership and he has to find a new builder. This is likely to delay construction by eight months beyond the date of when the dwelling is required to be completed under the conditions of the approval. To ensure he doesn't breach the conditions of the approval, Francis must apply for a variation to allow additional time to complete construction of the dwelling.

**3) Control over circumstances**

A factor which will generally be considered is whether there are unforeseeable factors beyond the foreign person's control.

#### 4) Fees

The integrity of the fee system will be considered as part of a proposal for a variation of a no objection notification or exemption certificate. For example, for actions in residential land that are subject to tiered fees, the Treasurer would consider whether the variation would result in an unexpected fee outcome that favours the person over other persons undertaking such actions. The Treasurer may also have regard to whether the variation is something that foreign persons would generally be expected to lodge a new application for and pay the applicable fee.

The level of fee is dependent on the materiality of the variation requested. For example:

- Where a variation is not of an immaterial or minor nature (i.e. standard variation), the fee will be \$12,700; or
- Where a variation is of an immaterial or minor nature, the fee will be \$2,000.

However, where an applicant paid a lower fee when the action was originally notified to the Treasurer, the fee payable to vary a no objection notification, notice imposing conditions or exemption certificate will be capped at the lower initial application fee. For information on variation fees please see the *Fees Guidance Note*.

##### **Example 31**

A foreign person was issued a no objection notification for acquiring an interest in agricultural land valued under \$1 million. The foreign person wants to vary the no objection notification to cover the same interest in agricultural land but valued over \$2 million. The Treasurer would consider whether the variation would result in an unexpected fee outcome that favours the person seeking a variation over other persons that would submit a new application. Where there is a fee discrepancy, it is likely that the Treasurer would not issue a variation, and a new application would be required.

##### **Example 32**

Oliver wants to purchase residential real estate that he expects to buy for \$900,000. Oliver pays the relevant application fee and receives approval imposing conditions allowing him to proceed with the purchase. A condition is that he may only pay \$1 million or less for the property.

If the expected price of the property increases to \$1.2 million, and Oliver has not yet entered into an agreement to purchase the property, he may apply for a variation to his approval and pay the relevant variation application fee. If Oliver had entered into an agreement, he would have breached the foreign investment laws and may be subject to penalties.

In making a decision on whether to approve a variation, the decision maker may consider the fees that have already been paid by the foreign investor. If there is a discrepancy in the outcome, the variation may not be allowed (this may occur where the fee outcome would be less than if the correct application had been made originally). In this case Oliver would be able to lodge a new application and pay the relevant fee.

#### 5) Change in circumstances

The Treasurer may consider intervening changes in circumstances since the initial assessment that may be applicable to the assessment of the national interest, such as target sector make-up, market conditions, underlying ownership of the person, and changes in legal frameworks.

#### How to apply – variations for non-residential approvals

Applications for variations to non-residential approvals can be made by submitting the request through the [Foreign Investment Review Board Application Portal](#).

#### How to apply – variations for residential approvals

All applications for variations to residential land approvals should be made to the Australian Taxation Office (ATO).

To request a variation to a previous no objection notification or exemption certificate, the applicant should submit a request using the current Residential Real Estate application form. Applicants will need to select 'variation' and complete the requested fields attaching a document outlining the variation reasons. The system will provide them with a Transaction ID, variation fee amount, and a Payment Reference Number (PRN) for making payment.

For general enquiries about variations to residential approvals, the applicant should email [FIRBresidential@ato.gov.au](mailto:FIRBresidential@ato.gov.au).

## O: ORDERS IN RELATION TO SIGNIFICANT ACTIONS, NOTIFIABLE NATIONAL SECURITY ACTIONS OR REVIEWABLE NATIONAL SECURITY ACTIONS

- The Treasurer can issue orders where the Treasurer considers a proposed significant action is contrary to the national interest or where the proposed action is a notifiable national security action, reviewable national security action or significant action that was 'called in' under section 66A and the Treasurer considers the action is contrary to national security.
- The Act enables the Treasurer to make a broad range of orders in relation to the types of actions listed above.
- The Treasurer may also extend the normal 30 day timeframe for making a decision on for a proposed action by up to a further 90 days by registering an interim order.
  - Additionally, the Treasurer has the power to extend the timeframe by up to 90 days by giving a written notice to the specified person without registering an interim order.
  - Applicants can also voluntarily extend the period in writing.

#### Interim orders

Under section 77 of the Act, the Treasurer has 30 days to consider a notice for an action and make a decision. However, where the action is a significant action, notifiable national security action or reviewable national security action, the Treasurer may extend this period by up to a further 90 days by publishing an interim order. An interim order is generally issued if a proposal is very complicated or where further information is required. The period specified in an interim order does not start until the interim order is registered on the *Federal Register of Legislation*.

There are other mechanisms where the Treasurer or the applicant can extend the 30 day timeframe without the publication of an interim order (and thus making the proposed transaction public). See 'Time Limits and Extensions' above.

### **Orders prohibiting proposed significant actions**

Under section 67 of the Act, the Treasurer may make an order which prohibits a proposed significant action, notifiable national security action or reviewable national security action if the Treasurer is satisfied that taking the action would be contrary to the national interest or national security (as applicable).

The kind of action that is being proposed will determine the conduct that the Treasurer can prohibit (for example, in some circumstances the Treasurer may make an order prohibiting entry into a proposed agreement, while in other circumstances the Treasurer may make an order prohibiting the issue of securities). The Treasurer can make an order prohibiting the whole or part of the proposal if it would be contrary to the national interest or national security (as applicable).

If the Treasurer makes an order prohibiting a proposed action, the Treasurer may also make certain additional orders. For example, if a foreign person proposes to acquire an interest in Australian land, the Treasurer may make an order directing a specified foreign person not to acquire any interests in the land or other thing concerned, or to acquire any such interests only to a specified extent.

### **Disposal orders**

Under section 69 of the Act, if the action has already been taken and the Treasurer is satisfied the result of the action is contrary to the national interest, or contrary to national security (as applicable), the Treasurer may make an order, known as a disposal order, which is directed at unwinding the action by requiring disposal of the interest by the acquirer.

A foreign person is not obliged to inform the Treasurer that they are proposing to take a reviewable national security action or significant action unless the action is also a notifiable action or notifiable national security action. However, some foreign persons will choose to notify the Treasurer of proposed reviewable national security actions or significant actions which are not notifiable actions or notifiable national security actions because the foreign person will want the certainty offered by a no objection notification. If a foreign person is given a no objection notification in relation to the action, provided the person does not contravene a condition specified in the notification, the Treasurer is not able to make a disposal order.

### **Variation and revocation of orders**

Under section 79L of the Act, the Treasurer may vary or revoke an order if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest or national security (as applicable).

### **Registration of orders**

Under section 79M of the Act, when the Treasurer makes an order (for example, an interim, prohibition or disposal order), this must be in writing and registered on the *Federal Register of Legislation* within 10 days after it is made.

### **Fees for disposal orders and prohibition orders**

Under section 113, a fee may be payable in relation to disposal orders, prohibition orders or interim orders made by the Treasurer where the person did not submit a notice to the Treasurer relating to the significant action specified in the order. The fee amount is the amount that would have been payable under the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* for the action if the person had given the Treasurer an application relating to the action.

## KEY CONCEPTS – LAND

### P: DETERMINING THE TYPE OF LAND

When acquiring an interest in Australian land (see *Section E: Meaning of ‘Land’, ‘Australian land’ and ‘Interest in Australian land’*), determining the type of land that is being acquired is an important consideration. This is important, for example, in determining if the relevant monetary threshold is met, and therefore if the proposed acquisition is a significant and notifiable action. Note that all proposed investments in Australian land by a foreign government investor are subject to a \$0 threshold and are notifiable and significant actions (subject to some exemptions).

Australian land includes: agricultural land; residential land; commercial land (vacant and developed); and mining or production tenements. Exploration tenements are generally not considered a type of Australian land, but may still require notification in certain situations.

Investors should carefully consider the definitions of each type of land and the characteristics of the land they seek to acquire to correctly identify the type of land they are investing into. This assessment is to be made on the characteristics of the land prior to the investor’s acquisition – that is, it is based on the current characteristics of the land and not on the investor’s future intended use of the land (although some exceptions may apply – see for example, the treatment of commercial accommodation facilities in section XX of the *Commercial Land Guidance Note*).

Please note, it is possible for a title of land to meet more than one definition, and thus be considered more than one type of land (see section XX Mixed Use Land). It is also possible for some land to also be considered ‘national security land’ and require notification regardless of value (see the *National Security Guidance Note*).

For the complete definitions of each type of land, please refer to the relevant Agriculture, Commercial Land, Mining, Residential and National Security Guidance Notes. In general, the different types of Australian land are:

- Agricultural land, which is land in Australia that is used, or that could reasonably be used, for a primary production business. This includes land which is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business.
- Commercial land, which is land in Australia or the seabed of the offshore area, other than land:
  - used wholly and exclusively for a primary production business;
  - on which the number of dwellings (other than commercial residential premises) that could be reasonably built is less than 10; or
  - on which there is at least one dwelling (other than a commercial residential premise).
- Residential land, which is land in Australia where there is at least one dwelling on the land, or the number of dwellings that could reasonable be built on the land is less than ten. This

does not include land used wholly and exclusively for a primary production business, or land on which the only dwellings are commercial residential premises. .

- A mining or production tenement, includes a right under a law of the Commonwealth, a State or a Territory to recover minerals (such as coal or ore), oil or gas in Australia or from the seabed or subsoil of the offshore area. This however does not include a right to recover minerals, oil or gas for the purpose of prospecting or exploring for minerals, oil or gas which is likely to be an exploration tenement.

As a rough rule of thumb, where land does not meet the definition of either agricultural land, residential land or of a mining or production tenement, it will generally be considered commercial land.

## Q: MIXED USE LAND

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

### General consideration of mixed use land

While acquisitions of interests in land are considered on a title-by-title basis, there are circumstances where different types of Australian land may coexist on the same title.

Foreign persons should consider all types of Australian land they may be seeking to acquire, as one acquisition may involve multiple significant actions, notifiable actions and/or notifiable national security actions on more than one basis. Notification and receipt of a no objection notification is only required if the relevant monetary threshold is triggered for one or more of the types of Australian land. Certain types of land have a \$0 threshold. For detailed information on the relevant monetary thresholds see the relevant *Agriculture, Commercial, Mining and/or Residential Land* Guidance Notes, as well as the Monetary Thresholds page on the FIRB website ([www.firb.gov.au](http://www.firb.gov.au)).

When considering an application to acquire an interest in mixed use land, the decision maker will have regard to the actual and intended use of the land in imposing any conditions in a no objection notification. In these cases, any conditions imposed may differ from conditions that may typically be applied to a single use land acquisition.

In addition, proposed acquisitions of mixed use land that includes residential land will generally be considered against the rules that apply to foreign investment in residential land, including eligibility to purchase established dwellings.

### Residential dwellings incidental to land used wholly and exclusively for a primary production business

Agricultural land that is used wholly and exclusively for a primary production business and that contains a residential dwelling may not be considered mixed use (agricultural and residential) land, but solely agricultural land, if the dwelling is incidental to the land use.

Land on which there is a farm may include a residential dwelling. In some situations, such land will not be treated as residential land when being purchased by a foreign person.

- Where a foreign person is proposing to acquire land from a primary production business and where there is one established dwelling used as the farmer's residence and the dwelling takes

up a small portion of the area of the land to be acquired, the established dwelling will generally be considered incidental if the land to be acquired is otherwise used wholly and exclusively for a primary production business.

- However, there may be exceptions to this. For example, proposals where the farmer has not been residing in the dwelling, there is more than one dwelling on the land, the dwelling sits on a separate title from the farm land or the dwelling takes up more than a small portion of the area of the land to be acquired will be considered on a case-by-case basis.
  - Consideration will be given to the nature and size of the dwelling(s), their existing use, and tax treatment (for example, is any rental income associated with a dwelling considered as income of the primary production business or separately).
- In the following situations, land with a dwelling on it will also be considered residential land, irrespective of whether it is also agricultural land (that is, the land cannot be considered to be used wholly and exclusively for a primary production business):
  - the vendor of the land has ceased carrying on a primary production business prior to the sale;
  - one or more of the dwellings on the land are used to carry on a business other than a primary production business (including when such use has ceased in the lead up to sale); or
  - the presence of one or more dwellings on land to be acquired is considered not incidental to a primary production business.

When considering if an acquisition would be otherwise contrary to the national interest, any conditions imposed may not be the conditions that may typically apply to a single use land acquisition.

### **Example 33**

Angelo is a foreign person who is seeking to acquire agricultural land. The land includes an established residential dwelling where the current owner of the agricultural land resides. The dwelling only takes up a small portion of the land. The land is on a single title and is not considered to be a hobby farm. The proposed acquisition of the dwelling may be considered incidental to the acquisition of the agricultural land, and Angelo would be subject to the relevant agricultural land threshold (that is, the land would be considered to be used wholly and exclusively for a primary production business and thus not considered residential land).

### **Example 34**

Bob is a foreign person who is seeking to acquire an interest in land that comprises three land types: a vineyard, a cottage for luxury short term rental accommodation, and a second dwelling used as the owner's residence. The land is likely to be regarded as agricultural and residential land because:

- one of the dwellings on the land is used to carry on a business other than a primary production business; and
- the presence of one or more dwellings on land to be acquired is considered not incidental to a primary production business.

The existence of the cottage for rental accommodation (even if it meets the definition of a 'commercial residential premise' for tax purposes) doesn't affect this conclusion, as land would only be considered developed commercial land where the only dwellings present are commercial residential premises. This is not the case here, given the existence of the second dwelling being used as the owner's residence.

### Commercial buildings or land with incidental residential dwellings (other than commercial residential premises)

Commercial land that also contains a residential dwelling may not be considered mixed use (commercial and residential) land, but solely commercial land, if certain characteristics are met.

Residential land that meets the following criteria will be considered to be developed commercial land and subject to the relevant commercial land thresholds if:

- the land has commercial buildings; and
- the area of land that is residential land (excluding any commercial residential premises) is less than 10 per cent of the total area of the land, based on a reasonable assessment; and
- the value of the land that is residential land (excluding any commercial residential premises) is less than 10 per cent of the total value of the land, based on a reasonable assessment.

For further information on commercial residential premises, see the *Commercial Land* Guidance Note.

For purposes other than thresholds (for example, when considering if the acquisition would be otherwise contrary to the national interest), in some cases the proportion of residential land to commercial land may be higher than the criteria outlined above, and still be considered incidental to the commercial land.

Similar treatment applies for aged care facilities, retirement villages and certain forms of student accommodation, as explained in the *Commercial Land* Guidance Note.

#### Example 35

Danielle is a foreign person who is seeking to acquire a highway roadhouse business that services large road trains and the general public. There is a modest residential dwelling attached to the title for the roadhouse which is being used as the business operator's residence. Danielle intends to continue to operate the business and retain the dwelling for the manager's use. The dwelling is of low value compared to the roadhouse facilities and could reasonably be assessed as less than 10 per cent of the total value of the land. However, it is of medium size and would reasonably be assessed as more than 10 per cent of the land. As such, the residential dwelling is not considered incidental and the acquisition will be subject to the residential land threshold value of \$0. So Danielle needs to notify and seek prior approval. However, when considering if the proposed acquisition of the land is contrary to the national interest, the dwelling may be considered as incidental to the commercial land and a no objection notification given (with or without conditions).

## R: AGREEMENTS FOR LEASE AND LEASES

In law, an ‘agreement for lease’ (**AFL**) creates an interest in land that is different to the interest created by a lease. Most commonly, an AFL will need to be considered in the context of an acquisition of a leasehold interest in Australian land as the entry into the AFL may itself be considered under the Act to constitute the acquisition of the leasehold interest. For further information about when entry into an AFL may constitute the acquisition of a leasehold interest in Australian land please see below under the subheading *Lease granted pursuant to an agreement for lease – when is the lease acquired?*

In rare circumstances, the AFL itself may give rise to a separate action under the Act. This issue is addressed below under the subheading *When is an agreement for lease captured as an ‘interest in Australian land’?*

### **Lease granted pursuant to an agreement for lease – when is the lease acquired?**

Under section 15 of the Act, an interest in a lease will be taken to have been acquired when a binding agreement to enter into that lease has been entered into. An AFL is commonly an agreement to which section 15 of the Act applies, meaning the interest in the lease may be acquired for the purposes of the Act at the time the AFL is entered into or at the time the AFL becomes binding and unconditional. It will ultimately turn on the facts as to when an action for the acquisition of a leasehold interest in Australian land is taken to occur under section 15 of the Act. However, in most cases, when an AFL becomes unconditional and binding, the acquisition of a leasehold interest will be taken to have occurred if: a form of lease is attached to the AFL that includes key terms such as the rent payable and the term of the lease; and the lease itself is unconditional or any conditions have been satisfied. For more information about what constitutes a binding and unconditional agreement, refer to *Interests acquired by entering agreements or acquiring options – section 15 of the Act* (Section G of this guidance note).

A foreign person must apply for approval to acquire a leasehold interest in the Australian land before entering into an AFL if:

- the AFL is an agreement to which section 15(1) of the Act applies (ie the agreement to acquire the leasehold interest is considered binding and unconditional when it is entered into);
- the lease is reasonably likely to exceed five years (if the term of the lease is reasonably likely to exceed five years it may be an interest in land within the meaning of section 12(1)(c) of the Act); and
- the consideration for the lease exceeds any applicable monetary screening threshold.

Where an AFL is conditional and it is difficult for an investor to foresee when those conditions will likely be satisfied (for example, conditions relating to development approvals or development), the investor is not required to obtain approval prior to entering into the AFL. However, if an investor in this situation wishes to obtain approval for entry into the lease, it may be possible for them to seek a longer period than 12 months for an action to be taken under their no objection notification.

### **Example 36**

Tenant Co is a foreign person and is proposing to enter into an AFL with Landlord Co for Landlord Co to build a warehouse to be used by Tenant Co on vacant commercial land. The AFL is for a period of less than 5 years and is not an interest in Australian land under the meaning of section 12 of the Act. The AFL does not have any conditions precedent within the meaning of section 15(5) of the Act. The form of the lease is annexed to the AFL and specifies key terms.

The lease, which will be in relation to developed commercial land, is anticipated to commence three years later and will have a duration of 10 years. The consideration for the lease exceeds the applicable monetary screening threshold for developed commercial land (for guidance on calculating consideration for a leasehold interest see [K: Calculating consideration, asset values and issued securities values](#)). As such, Tenant Co requires foreign investment approval to acquire the leasehold interest in developed commercial land.

For the purposes of the Act, Tenant Co will be taken to have acquired this leasehold interest in developed commercial land at the time it enters into the AFL. This is because, by operation of section 15(1) of the Act, the lease is taken to be binding when the AFL is entered into as it is an unconditional, binding agreement to acquire the leasehold interest. The relevant monetary threshold is the threshold for developed commercial land.

As such, Tenant Co must obtain a no objection notification for its acquisition of the leasehold interest in developed commercial land before it enters into the AFL. A separate no objection notification at the time the lease commences is not required, unless there is a material alteration or variation of the lease – refer to section 25 of the Act for material alterations or variations.

#### **Example 37**

The facts are the same as Example 36 except that the AFL contains a clause which provides that the terms of the AFL (including the grant of the lease) are conditional on and do not come into effect until Tenant Co obtains a no objection notification under the Act. There are no other conditions precedent within the meaning of section 15(5) of the Act.

Tenant Co is not required to obtain foreign investment approval prior to entering into the AFL. However, Tenant Co can apply for, and receive, a no objection notification for the acquisition of a leasehold interest in developed commercial land. The AFL (including the grant of the lease provisions) becomes binding and unconditional on issue of the no objection notification. The interest in the lease (in the form contemplated by the AFL) is taken to have been acquired on issue of the no objection notification and a separate no objection notification at the time the lease commences is not required, unless there is a material alteration or variation of the lease. Refer to section 25 of the Act for material alterations or variations.

#### **Example 38**

The facts are the same as Example 37 except that there are also other conditions precedent to the AFL within the meaning of section 15(5) of the Act.

Tenant Co applies for and receives a no objection notification for entry into the lease. The no objection notification specifies that the action must be taken before the end of the 12 months period from the date of the notice.

If the other conditions precedent within the meaning of section 15(5) of the Act are also satisfied within the 12 month period from the date of the notice, the AFL (including the grant of the lease provisions) becomes binding and unconditional on the last of these conditions precedent being satisfied. The

interest in the lease (in the form contemplated by the AFL) is taken to have been acquired on satisfaction of the conditions precedent and a separate no objection notification at the time the lease commences is not required, unless there is a material alteration or variation of the lease. Refer to section 25 of the Act for material alterations or variations.

If the other conditions precedent within meaning of s 15(5) of the Act are **not** satisfied within the 12 month period from the date of the notice, the action to acquire the interest in the lease has not been taken within the 12 month period and a new no objection notification would be required for the lease. Alternatively, when applying for foreign investment approval an investor may apply for a longer period than 12 months for the actions to be taken under the no objection notification.

### **Example 39**

The facts are the same as Example 38 except there are no conditions precedent to the AFL within the meaning of section 15(5) of the Act. There are conditions precedent to the lease within the meaning of section 15(5).

Tenant Co applies for and receives a no objection notification for the acquisition of the leasehold interest in Australian land.

The acquisition of the leasehold interest in Australian land will be taken when all of the conditions precedent within the meaning of section 15(5) of the Act are satisfied and the lease therefore becomes binding and unconditional.

### **When is an agreement for lease captured as an 'interest in Australian land'?**

In limited circumstances, entry into an AFL on its own may constitute the acquisition of a leasehold interest in Australian land for the purposes of the Act, meaning it may be necessary to obtain separate foreign investment approvals for entry into the AFL as well as entry into the associated lease. While this will be a matter of facts in each case, at a minimum the AFL would need to be capable of specific performance, give a right to occupy the land, and itself (that is, not including the associated lease) have a term (including any extension or renewal) that is reasonably likely, at the time the interest is acquired, to exceed 5 years. However, such instances are rare, in part because it is uncommon for an AFL to be longer than five years.

Even if it is necessary to obtain separate approval for entry into the AFL and the associated lease, a foreign person may apply for both approvals under a single no objection notification.

#### *Capable of specific performance*

For an AFL to be capable of specific performance, there must be an agreement on all essential terms of the AFL. For example, the following features must be identifiable or ascertainable:

- the parties to the lease must be identified;
- the land or premises the subject of the lease must be identified;
- the commencement and duration of the term of the lease must be able to be ascertained; and
- the rent under the lease is able to be ascertained.

An AFL may also be capable of specific performance if it provides a mechanism to determine the essential terms (such as the rent) and such mechanism does not require further agreement by the parties.

#### *Right to occupy Australian land*

It will be a matter of fact in each case whether an AFL gives the lessee a right to occupy Australian land as required by s 12(1)(c) of the Act.

#### *Term of the AFL*

For an AFL to be separately captured under the Act in addition to the lease, the term of the AFL itself (not the term of the lease granted pursuant to the AFL), including any extension or renewal, must be reasonably likely at the time of the interest in the AFL is acquired to exceed 5 years.

#### **Example 40**

Tenant Co is a foreign person and is proposing to enter into an AFL with Landlord Co for Landlord Co to build a warehouse to be used by Tenant Co. The essential elements of the AFL are agreed, the AFL is capable of specific performance and gives a right to Tenant Co to occupy the land. However, the AFL is reasonably likely to be in force for a period of two years while the warehouse is being built and fitted out. The lease annexed to the AFL is for an initial term of 10 years with two options to renew of five years each. However, the term of the AFL is reasonably likely to not exceed 5 years (including any extension or renewal) at the time the AFL is entered into and the AFL will not be an interest in Australian land under the meaning of the Act. Tenant Co's entry into the lease may still be an acquisition of an interest in Australian land and may require foreign investment approval. The timing of when the entry into the lease occurs for the purposes of the Act would depend on whether there are any conditions precedent in the AFL or the lease. Refer to *Lease granted pursuant to an agreement for lease – when is the lease acquired?* above.

#### **What type of Australian land will be acquired under the Act?**

To determine the type of Australian land that will be acquired – and therefore which threshold applies – it is necessary to first consider when the action or actions will be taken to occur under the Act. Refer to *Lease granted pursuant to an agreement for lease – when is the lease acquired?* and *When is an agreement for lease captured as an 'interest in Australian land'?* above.

The type of Australian land (for example commercial land, commercial land that is vacant, residential land or agricultural land) will depend on the nature of the land immediately before the action is taken.

#### **Example 41**

OfficeCo enters into an AFL in respect of commercial land that is vacant. The AFL itself is not a separate interest in land.

The AFL has one condition precedent within the meaning of s 15(5) of the Act and a complete form of lease is attached to the AFL. The condition precedent is for a commercial office building to be built on the vacant land. The leasehold interest is taken to be acquired when the AFL becomes unconditional.

At that point in time the land would meet the definition of commercial land in the Act and would not be considered vacant. Accordingly, the threshold for commercial land that is not vacant would apply.

## S: SUBDIVISION OR AMALGAMATION OF LAND

The subdivision or amalgamation of land will generally result in the extinguishment of the old title and the creation of a new title or titles resulting in an acquisition of a new interest in Australian land that can constitute a significant and notifiable action under the Act. This is because each acquisition of an interest in relation to a title is a separate action for the purposes of the Act<sup>10</sup>.

Accordingly, if at the time of subdivision or amalgamation, the new interest in land that would be acquired gives rise to a significant and notifiable action, the foreign person would require foreign investment approval for this new interest in land

Where a foreign person applies for foreign investment approval to purchase Australian land, and at the time anticipates subdividing or amalgamating that land post-acquisition, they are encouraged to advise the Treasurer, within their application, of this intention to ensure the no objection notification or exemption certificate covers any additional actions and appropriate conditions can be tailored accordingly. Doing so will help minimise the possibility of having to seek foreign investment approval multiple times. While the subdivision or amalgamation of land results in the acquisition of a new interest in land, the Government considers there is \$0 consideration value attached to this acquisition where the person already owned the same land immediately prior to subdivision or amalgamation.

### *Exemption certificates*

For investors in this situation, an exemption certificate rather than a no objection notification is generally the most appropriate option given the greater flexibility that exemption certificates provide to investors undertaking multiple actions.

An exemption certificate granted in these circumstances will normally require the investor to notify the Treasurer once the land has been subdivided or amalgamated, and provide relevant details including the new titles.

As above, when calculating fees for an exemption certificate that covers a potential subdivision or amalgamation of land, the consideration value that is relevant to the subdivision or amalgamation is \$0, meaning it will not form part of the financial limit permitted by the exemption certificate.

Exemption certificates are normally issued for 12 months for first time holders, meaning the investor is required to acquire the land within that period. Investors with a demonstrated compliance history with the foreign investment framework may apply for exemption certificates with a duration longer than 12 months. For further detail, see the *Commercial Land Guidance Note*.

---

<sup>10</sup> The exemption under section 31(1) of the Regulation does not apply merely on the basis that a government entity (commonly a State or Territory body) is responsible for registration of a new land title created as a result of subdivision or amalgamation. The role of a State or Territory land titles body in registering the newly created title or titles and issuing certificates of title does not mean the interest has been acquired from that body for the purposes of section 31 of the Regulation. As the interest in question is not held by a government body at any point the exemption in section 31 of the Regulation is unlikely to apply.

Regardless of the duration, where an exemption certificate is granted for land acquisitions that are intended to be subdivided or amalgamated, the investor would need to acquire and subdivide or amalgamate the land within the specified period allowed to acquire new interests in land. For example, a first-time foreign investor will need to have subdivided or amalgamated the land within the 12-month acquisition period.

Exemption certificates granted for these types of actions may also include a condition requiring the investor to commence development on the land within five years of the acquisition of the land.

### *No objection notifications*

Although an exemption certificate is generally the most appropriate option for an investor intending to acquire then subdivide or amalgamate land, in some circumstances an investor may decide to apply for a no objection notification instead. In these circumstances, the applicant would need to advise the Treasurer, in their application, that they intend to subdivide or amalgamate the land so that the no objection notification covers any additional actions to which the appropriate conditions can be applied.

A no objection notification granted in these circumstances will normally require the investor to notify the Treasurer once the land has been subdivided or amalgamated, and provide relevant details including the new titles.

While a no objection notification generally applies for a period of 12 months, an applicant can seek and may be granted a longer time period if the Treasurer is satisfied that it is not contrary to the national interest.

Where a foreign person applies for a no objections notification to acquire land and does not advise the Treasurer they are intending to subdivide or amalgamate that land, and after acquiring the land under a no objection notification decides to subdivide or amalgamate it, they may require a new foreign investment approval. Recognising the Government considers there is no consideration value where a person subdivides or amalgamates land that they already own, the fee implications of this new application are addressed in the *Fees Guidance Note*.

#### **Example 42**

Adam is a foreign person who received foreign investment approval to purchase a parcel of vacant residential land subject to development conditions. After receiving approval Adam decided to subdivide the land into three titles to build three separate houses. As the subdivision of land would extinguish the old title and create three new titles, each new title would be a significant and notifiable action under the Act, at the time the new titles are created. Since Adam did not notify the FIRB that he intended to subdivide his proposed acquisition he is required to apply for new foreign investment approvals for the three titles prior to subdividing the land.

#### **Example 43**

Helen is a foreign person who wants to undertake a program of acquisitions of Australian land (in particular, vacant commercial land) for development. At the time of applying for foreign investment approval, Helen advised that she was planning to subdivide some of the land she was proposing to acquire. Helen was granted an exemption certificate with conditions requiring Helen to acquire and

subdivide the land within three years and commence development within five years of the initial acquisition of the land.

## EXEMPTIONS

### T: OVERVIEW OF EXEMPTIONS

Certain persons and acquisitions are exempt from the requirement to notify and obtain a no objections notification under the Act. Exemptions are provided in Part 3 of the Regulation. Foreign persons should determine whether their proposed acquisition is exempt and if in doubt, seek legal advice. Significant penalties (including infringement notices, civil and criminal penalties) may apply for breaches of the law.

However, foreign investments that are not notified to the Treasurer (including as a result of one of these exemptions), or where a no objection notification or exemption certificate does not exist, may be reviewable national security actions, and may be called-in for review if the Treasurer considers that the action may pose a national security concern. A foreign person can choose to extinguish the Treasurer's ability to call the investment in for review by voluntarily notifying of a reviewable national security action. Guidance on investment areas that may raise national security concerns, and where investors are therefore encouraged to voluntarily notify are outlined in the *National Security Test Guidance Note*.

All section references below refer to those under the Regulation.

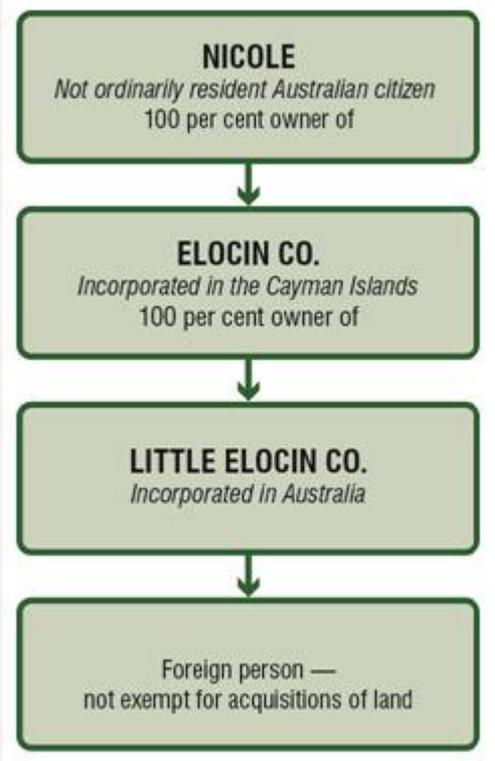
#### 1) General exemptions applying to all investment types

- certain interests under a moneylending agreement (section 27);
- certain interests acquired by devolution by operation of law (section 29);
- certain interests held by foreign custodian corporations (section 30);
- certain interests acquired from an Australian government (section 31);
- certain investments in financial sector companies (section 32);
- compulsory acquisitions and compulsory buy-outs (section 33);
- acquisitions of convertible instruments that include a requirement for loss absorption if entity becomes non-viable (section 34);
- certain interests acquired under a rights issue (section 41);
- certain interests acquired by foreign custodian corporations acting in their capacity as custodians (section 41A);
- acquisitions covered by an exemption certificate (see the Exemption certificates Guidance Note)

#### 2) General exemptions applying only to investments in Australian land (residential, commercial, agricultural, and mining/production tenements):

- acquisitions by persons with a close connection to Australia (section 35);
- : acquisitions by an Australian citizen not ordinarily resident in Australia;

- : acquisitions by an Australian corporation that would not be a foreign person if interests directly held in it by Australian citizens living abroad, Australian permanent visa holders or New Zealand citizens (who are eligible for a special category visa) were disregarded;
- : acquisitions by the trustee of a resident trust, if at the time of the acquisition, the trustee would not be a foreign person if interests directly held in it by Australian citizens living abroad, Australian permanent visa holders or New Zealand citizens (who are eligible for a special category visa) were disregarded; or
- : acquisitions by a charity operating in Australia primarily for the benefit of persons ordinarily resident in Australia.

Example 44	Example 45
<p>Lin is an Australian citizen living in Singapore. Lin owns 100 per cent of her own company, Lin Property Developments Pty Ltd, which is incorporated in Australia. Lin is seeking to acquire vacant commercial land in Australia using a wholly owned subsidiary of Lin Property Developments, Lin's Property Subsidiary, which is also incorporated in Australia. Lin's Property Subsidiary would be exempt from the requirement to notify before acquiring an interest in the land.</p>  <pre> graph TD     LIN["LIN Not ordinarily resident Australian citizen 100 per cent owner of"] --&gt; LPD["LIN PROPERTY DEVELOPMENTS Incorporated in Australia 100 per cent owner of"]     LPD --&gt; LPS["LIN PROPERTY SUBSIDIARY Incorporated in Australia"]     LPS --&gt; Exempt["Exempt for acquisitions of land"] </pre>	<p>Nicole is an Australian citizen living in Germany. Nicole owns 100 per cent of her own company, Elocin Co., which is incorporated in the Cayman Islands. Little Elocin Co. is a subsidiary of Elocin Co. that is incorporated in Australia and proposing to acquire interests in residential land. Although incorporated in Australia and ultimately owned by an Australian citizen, Little Elocin Co. would be considered to be a foreign person and be required to notify proposed acquisitions of residential land in Australia.</p>  <pre> graph TD     NICOLE["NICOLE Not ordinarily resident Australian citizen 100 per cent owner of"] --&gt; ELOCIN["ELOCIN CO. Incorporated in the Cayman Islands 100 per cent owner of"]     ELOCIN --&gt; LITTLE["LITTLE ELOCIN CO. Incorporated in Australia"]     LITTLE --&gt; Foreign["Foreign person — not exempt for acquisitions of land"] </pre>

- acquisitions by certain insurance and superannuation funds and schemes (section 36);
- acquisitions of interests of less than 10 per cent in a listed land entity, and interests of less than 5 per cent in an unlisted land entity, as long as the foreign person is not in a position to influence or participate in the central management of the land entity, or influence, participate in or determine the policy of the land entity (section 37(2) and (4)); and
- acquisitions of certain easements (section 39).

### **3) Specific exemptions applying only to investments in residential land:**

- acquisitions for diplomatic or consular purposes (section 37(5));
- acquisitions by a New Zealand citizen eligible for a special category visa (section 38(2));
- acquisitions by the holder of an Australian permanent resident visa (section 38(2));
- acquisitions by an individual purchasing land as joint tenants with their Australian citizen spouse, Australian permanent resident spouse, or New Zealand citizen spouse (who is eligible for a special category visa) (this exemption does not include purchasing property as tenants in common) (section 38(3));
- acquisitions of a time share scheme where the foreign person's total entitlement (including any entitlements held by their associates) to access the land is no more than four weeks in a year (section 38(4));
- acquisitions of land used for premises that provide for residential care, a retirement village or certain student accommodation, provided the interest is not above the relevant commercial land monetary screening threshold (section 38(5)); and
- acquisitions of certain interests in designated Integrated Tourism Resorts (see the *Residential Land Guidance Note*).

### **4) Specific exemptions applying only to investments in agricultural land:**

- acquisitions by an individual purchasing land as joint tenants with their Australian citizen spouse or Australian permanent resident spouse (this exemption does not include purchasing property as tenants in common) (sections 35(2)).

### **5) Specific exemptions applying only to investments in commercial land:**

- acquisitions for diplomatic or consular purposes (section 37(5)).

### **6) Specific exemptions applying only to investments in mining:**

- certain revenue streams from mining or production tenements (section 27A);

### **7) certain exploration tenements acquired by non-government foreign investors (section 27B); Specific exemptions applying only to agribusiness investments:**

- Certain interests acquired by private investors from the United States, New Zealand, or Chile (section 40(1)).

## U: MONEYLENDING EXEMPTION

Section 27 of the Regulation exempts certain interests relating to moneylending agreements entirely from the operation of the Act (**the moneylending exemption**). However, specific requirements apply, including when the interest arises from the enforcement of a security interest, so that the exemption is limited in its application (see Exceptions below).

Broadly, the moneylending exemption applies to the acquisition of an interest in securities, assets, a trust, Australian land or a tenement if the interest is:

- held solely by way of security for the purposes of a moneylending agreement; or
- acquired by way of enforcement of a security held solely the purposes of a moneylending agreement.

Additionally, the entity that holds or acquires the interest must be:

- the entity (lender) that entered the moneylending agreement;
- a subsidiary or holding entity of the lender;
- a person who is (alone or with others) in a position to determine the investments or policy of the lender;
- a security trustee (that is, an entity that holds various security interests created on trust for banks and other lenders) who holds or acquires the interest on behalf of the lender; or
- a receiver, or a receiver and manager, appointed in relation to one of the above persons (see section 27(1) of the Regulation).

Section 5 of the Regulation defines 'moneylending agreement' as:

- an agreement entered into in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (*a moneylending business*) of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business; and
- for a person carrying on a moneylending business, or a subsidiary or holding entity of a person carrying on a moneylending business – an agreement to acquire an interest arising from a moneylending agreement (within the meaning of paragraph (a)).

Accordingly, the exemption is only relevant to a foreign lender that is carrying on a moneylending business with respect to an interest held or acquired for the purposes of a moneylending agreement. If there is no genuine moneylending business, taking a security interest may require foreign investment approval.

### Exceptions

The moneylending exemption is subject to certain exceptions outlined below. These exceptions do not limit each other.

#### Interests relating to residential land

For an interest in residential land where the lender is not a foreign government investor, the moneylending exemption applies only if the lender or a holding entity of the lender is an Authorised Deposit-taking Institution (an **ADI**) or otherwise licensed (whether or not in Australia) as a financial institution.

- If the lending entity is not an ADI but is otherwise licensed as a financial institution, for the entity to benefit from the moneylending exemption there must be at least 100 holders of securities in that entity (the widely held test) or the entity must be listed for quotation in the official list of a stock exchange (the listed test).
  - An entity otherwise licensed as a financial institution not meeting either the widely held test or the listed test, will be subject to the Act when taking or enforcing a security interest in residential land. In such cases, taking and enforcing the security interest will be both a significant action and a notifiable action, or a notifiable national security action.
  - For clarity, an entity that is not an ADI or otherwise licensed as a financial institution will be subject to the Act when taking or enforcing a security interest in residential land. In such cases, taking and enforcing the security interest will be both a significant action and a notifiable action, or a notifiable national security action.

See section 27(2) of the Regulation.

#### **Example 46**

LendingCo, a foreign person who is not a foreign government investor, is seeking to acquire mortgage interests in Australian residential land with a value of \$30 million. LendingCo operates a moneylending business, specialising in providing home loans to purchasers of new residential real estates. However, as LendingCo is not an ADI or otherwise licensed as a financial institution, the moneylending exemption does not apply with respect to the mortgage interests it seeks to acquire. LendingCo will be taking a notifiable action and a significant action, and will need to apply for a no objection notification.

#### **Interests relating to national security land or national security business**

From 1 January 2021, the moneylending exemption does not apply to an interest of any of the following kinds acquired by way of enforcement of a moneylending agreement:

- an interest in national security land;
- an interest in an exploration tenement in respect of national security land;
- an interest in an asset of a national security business;
- an interest in securities in an entity that carries on a national security business;

In these circumstances, a foreign lender would need to notify and seek a no objection notification prior to acquiring an interest in an asset through the enforcement of security for a moneylending agreement where the acquisition amounts to a notifiable action and/or significant action, or notifiable national security action. In this context, 'acquired by way of enforcement' includes where a lender seizes or takes possession of the asset by way of an enforcement. There is no

requirement to notify and seek a no objection notification if it is a receiver (or a receiver and manager) appointed by the foreign lender (or related entity, as described in section 27(1)(b) of the Regulation) that takes possession of the asset in their capacity as a receiver (or a receiver and manager).

This exception applies to all foreign persons (including foreign government investors), and will apply to moneylending agreements entered into on or after 1 January 2021.

See section 27(2A) of the Regulation.

#### **Interests acquired by foreign government investors**

For an interest relating to national security land or national security business, a foreign government investor would be captured by the exception under section 27(2A) of the Regulation as above.

For other interests acquired by a foreign government investor by way of enforcement of a security held solely for the purposes of a moneylending agreement, the moneylending exemption applies to the interest only if:

- for a foreign government investor that is an ADI or a subsidiary of an ADI:
  - 12 months have not passed since the acquisition of the interest; or
  - at least 12 months have passed since the acquisition of the interest and the foreign government investor is making a genuine attempt to dispose of the interest;
- otherwise (that is, for a foreign government investor that is not an ADI or a subsidiary of an ADI):
  - 6 months have not passed since the acquisition of the interest; or
  - at least 6 months have passed since the acquisition of the interest and the foreign government investor is making a genuine attempt to dispose of the interest.

Whether a genuine attempt to dispose of the interest is being made will depend on the circumstances and facts of each case. Examples of the kinds of actions that may constitute a genuine attempt to dispose of an interest include deciding on the method of disposal, and complying with any requirements of a law that apply before the interest can be disposed of (such as regulatory approvals).

See section 27(3) of the Regulation.

## **V: WILL OR DEVOLUTION BY OPERATION OF LAW**

#### **Interests acquired by Will**

From 1 January 2021, a foreign person who acquires interests through a Will (for example, an interest in Australian land or a substantial interest in securities in an Australian entity) is no longer exempt from the foreign investment review framework, and therefore could be taking a notifiable action, significant action, notifiable national security action or a reviewable national security action.

In this situation, the point at which a foreign person is considered to have taken a notifiable action is generally the time at which the legal interest is acquired on completion of administration of the Will.

In some circumstances, a foreign person may not be certain they will actually receive an interest under a Will until the administration of the Will has been completed, meaning they could not be expected to seek foreign investment approval prior to acquiring the interest. In these circumstances, the foreign person is expected to submit their relevant foreign investment notification/application within 30 days after the interest has been acquired.

Foreign persons are encouraged to contact the Treasury or the Australian Taxation Office (ATO), as applicable, where they become aware of or acquire an interest under a Will. Lesser penalties will apply where foreign persons engage with Treasury or the ATO and self-disclose a potential breach.

The Executor of a Will will not generally require foreign investment approval to perform their duties as Executor, as the vesting of interests with the Executor following a death are covered by the exemption of [devolution by operation of law](#) (discussed further below).

For information on how the Government responds to instances of failing to notify, including in cases where the non-compliance is inadvertent, see:

- the [Compliance – Residential](#) Guidance Note (with respect to interests in residential land); and
- the [Compliance Framework Policy Statement](#) (with respect to all other interests).

#### **Example 47**

John is a foreign person. On 1 December 2020, his sister Mary, who is a resident of Australia dies. In her Will, Mary bequeaths to John an established residential dwelling in Sydney. The executor of Mary's estate obtains probate. The administration is completed when all the debts are satisfied and bequeaths transferred to beneficiaries. The title of the Sydney property is registered with the land titles office in John's name on 30 June 2021. John has 30 days from 30 June 2021 to submit a foreign investment application.

Alternatively, John could apply prior to 30 June 2021 if he is certain he will acquire the legal interest, for example if he is advised by the executor that administration has been completed and that he will acquire the interest, or where transfer of the interest has been executed and the only remaining step is finalisation of the registration of the signed transfer of title.

#### **Example 48**

Luke is a foreign person and is bequeathed an interest in an established dwelling in a Will. The Will has been administered and Luke is now registered as the title holder of the established dwelling. He will be required to notify of his interest in the Australian land. Luke is generally not permitted to hold an interest in an established dwelling, unless there is an exemption that applies (such as having an Australian resident spouse). Where there is no applicable exemption, conditions may be imposed on the interest, which may include requiring Luke to dispose of his interest within six months of acquiring the legal interest in the land.

**Example 49**

Ella is a foreign person and is bequeathed an interest in vacant land in a Will. The Will has been administered and Ella is now registered as the title holder of the established dwelling. She will be required to notify of her interest in the Australian land. If Ella is approved to hold the interest, this may be subject to the vacant land development conditions. See the Residential Land Guidance Note, for further information.

**Interests acquired by devolution by operation of law**

Interests acquired by devolution by operation of law (other than as a result of an arrangement under Part 5.1 or 5.3A of the *Corporations Act 2001*) are exempt from foreign investment screening.

Acquisitions of certain interests are not significant actions, notifiable actions or notifiable national security actions where the acquisitions are by devolution by operation of law, except for those arising from an arrangement under Part 5.1 of 5.3A of the *Corporations Act 2001* (see sections 28 and 29 of the Regulation).

The term 'devolution' contemplates a legal consequence flowing from an involuntary act. The essential aspect of an interest being acquired through devolution by operation of law is that it cannot be acquired by voluntary action or agreement of the parties; absence of voluntariness is essential to the concept of devolution.

The devolution by operation of law exception is intended to cover acquisitions of interests in the property of a deceased estate by personal representatives (in that capacity), where they do not have a beneficial interest in the property of a deceased estate and their control of such property is temporary.

The devolution by operation of law exemption would also likely cover interests acquired by beneficiaries of intestate estates, where the deceased persons assets are distributed according to laws of succession.

In the event of divorce proceedings, if a person acquires a property as a result of a Family Court order made under section 79 of the *Family Law Act 1975*, the acquisition would likely be by devolution by operation of law. This is because the acquisition of the property would have entirely been through the actions of the court. Since the affected person has no control over this, the acquisition would consequently have the requisite level of involuntariness. The result is that any foreign person acquiring property in this way would likely be covered by the exception in section 29 of the Regulation and the acquisition would not be a significant, notifiable or notifiable national security action for the purpose of the Act.

In contrast, the devolution by operation of law exception does not apply where the property is acquired through an arrangement reached by the parties formalised through a consent order. Unlike orders made following a contested hearing, consent orders made by the Family Court under the *Family Law Rule* include a voluntary element, namely, the parties' wishes as to how the property is divided. The consent order, if made, simply reflects the parties' wishes and would therefore not have the requisite involuntary character.

**W: ACQUISITIONS FROM GOVERNMENT**

Subsection 31(1) of the Regulation exempts the acquisition of certain interests from a government of Australia from being significant actions or notifiable actions. This means that foreign persons do not require foreign investment approval to acquire certain interests in relation to an Australian business that is carried on by, or interests in Australian land from:

- the Commonwealth, a State, a Territory or a local governing body;
- a body corporate established for a public purpose under a Commonwealth, State or Territory law; or
- an entity wholly owned by the Commonwealth, a State, a Territory or a local governing body, or the body corporate mentioned above.

This exemption is subject to exceptions under subsection 31(2) of the Regulation, detailed below.

- The exemption does not apply to *foreign government investors*. Foreign government investors acquiring interests from an Australian government will require approval if the action is a notifiable or significant action under the Act. This includes actions by a foreign government investor to acquire interests through an Australian government privatisation or asset sale process.
- The exemption does not apply to *acquisitions of infrastructure* as listed under paragraph 31(2)(b) of the Regulation, as well as acquisitions of interests in an Australian business the assets of which include such infrastructure. Acquiring such infrastructure assets from government (including where they involve the privatisation of government functions or services in those areas) may require approval if the action is a notifiable or significant action under the Act.
- The exemption does not apply to acquisitions of *national security businesses or national security land*. Acquisitions of sensitive national security businesses or land from government, including where they involve privatisation, may require approval if the action is a notifiable national security action or significant action under the Act.
- The exemption does not apply to acquisitions of Australian businesses the assets of which include exploration tenements in respect of national security land. Acquiring these interests from government will require foreign investment approval.

**Example 50**

ABC Inc is a foreign person seeking to apply for a petroleum production tenement from a State government. Normally, acquisitions of interests in a mining or production tenement by foreign persons require prior foreign investment approval (regardless of the value – that is, a \$0 threshold applies). However, because ABC Inc is acquiring the tenement directly from an Australian government, the exemption under s31(1) of the Regulation applies and ABC Inc does not need foreign investment approval. If ABC Inc was a foreign government investor, or if the production tenement was over national security land, then the section 31(1) exemption does not apply and ABC Inc may require prior foreign investment approval.

---

## OTHER

### X: SECTOR SPECIFIC LEGISLATION

In addition to the requirements under the Act, foreign investment in some sectors is also governed by specific legislation. The Treasurer considers these legislative requirements when examining investment proposals by foreign persons.

#### Banking

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

Please contact the Australian Prudential Regulation Authority on 1300 558 849 for further details on foreign ownership in the banking sector.

#### Critical infrastructure and telecommunications

The foreign investment review framework, together with the *Security of Critical Infrastructure Act 2018* (the **SOCI Act**) and the 2017 Telecommunications Sector Security reforms to the *Telecommunications Act 1997* (the **TSS reforms**) provide the Government with a framework to manage national security risks that may arise from foreign involvement in Australia's highest risk critical infrastructure sectors.

The SOCI Act and the TSS reforms are also relevant in determining what constitutes a 'national security business' under the Act.

The Critical Infrastructure Centre (located within the Department of Home Affairs) is responsible for the administration and enforcement aspects of the SOCI Act. The Centre complements the FIRB process by providing advice on national security concerns to inform the Treasurer's decisions on foreign investment proposals.

Please contact the Critical Infrastructure Centre on 1300 272 524 for further details on obligations that foreign owners, operators or service providers may have under the SOCI Act and/or TSSR reforms.

#### Transport

Aggregate foreign ownership in an Australian international airline (including Qantas) is limited to 49 per cent (see *Air Navigation Act 1920* and *Qantas Sale Act 1992*).

The *Airports Act 1996* limits foreign ownership of some airports to 49 per cent, with a 5 per cent airline ownership limit; and imposes cross-ownership limits between certain airport operator companies.

The *Shipping Registration Act 1981* requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is operated by a foreign resident under a demise charter and is exempted from the requirement to be registered during the term of the charter.

Please contact the Department of Infrastructure, Transport, Regional Development and Communications on 1800 075 001 for further details on foreign ownership in the transport sector.

### Telstra

Under the *Telstra Corporation Act 1991*, aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5 per cent.

For more information, please contact the Department of Infrastructure, Transport, Regional Development and Communications on 1800 075 001.

### Land and water register

See also the *Agriculture* Guidance Note.

Under the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*, foreign investors are required to report their existing agricultural landholdings and any acquisitions or disposals to the Australian Taxation Office regardless of the value of that land. Any new interests must be registered within 30 days of settlement.

In addition, foreign investors are required to report their holdings and any acquisitions and disposals of registrable water entitlements or contractual water rights to the Australian Taxation Office. A foreign person may register at any time during the year but no later than 30 days after the end of the financial year in which the event occurred.

## 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.