

COVID-19 – Australia

Temporary blanket rules for foreign investment

MinterEllison

What has happened?

With the Treasurer's recent announcement on Sunday 29 March 2020 that monetary screening thresholds have been reduced for all foreign investors, our team takes you through what this means for potential transactions.

The information set out is current as at **27 April 2020** though the situation remains fluid and more guidance may be released. Specific advice should be sought for your transaction.

Who is foreign?

A private foreign investor is an entity which is not a foreign government investor and in which a foreign person, together with its associates, holds a direct or indirect interest of 20% or more or multiple foreign persons, together with their associates, hold a direct or indirect interest of 40% or more (in aggregate).

A foreign government investor is an entity controlled by a foreign government (at any level of government) or their related bodies, including corporations in which a single foreign government and its associates has a direct or indirect interest of 20% or more, or multiple foreign governments and their associates have a direct or indirect interest of 40% or more (in aggregate).

Associate is broadly defined and foreign government investors may be regarded as associates if they are from the same country.

There are tracing provisions in the FATA which have the effect that the foreign person characterisation of an entity is determined by the status of the ultimate legal and beneficial interest holders of the entity.

There are also citizenship and residency tests for individuals.

Does this apply to my deal?

As noted in FIRB's guidance issued on 24 April 2020, despite the monetary threshold being lowered, the other thresholds and exemptions in the Australian foreign investment rules remain. The table below takes you through a few typical scenarios.

The rules aggregate interests with associates, and once the threshold is exceeded additional interests can still be caught. Convertible notes, intra-group transfers, establishment of new companies, and reorganisations can all potentially be caught. There are some additional though limited exemptions that may also be available depending on the circumstances. Mere incorporation of companies is not caught though establishment of unit trusts may be caught.

DEAL TYPE	FOREIGN GOVERNMENT INVESTOR	PRIVATE FOREIGN PERSON
Less than 5% in an Australian company	Does not require FIRB clearance unless the investor has some influence or control over the central management of the company	Does not require prior FIRB clearance; though this may trigger the voluntary filing regime.
Between 5% and 10% in an Australian company	Does not require FIRB clearance unless there is a legal arrangement relating to the businesses of the investor and target. FIRB clearance may be required if the investor is also providing debt as part of the same overall transaction.	Does not require prior FIRB clearance; though this may trigger the voluntary filing regime.
Between 10% and 20% in an Australia company	Requires prior FIRB clearance.	Does not require prior FIRB clearance; though this may trigger the voluntary filing regime.
20% or more in an Australian company	Requires prior FIRB clearance.	Requires prior FIRB clearance
Interest in an offshore company that has downstream Australian assets	Requires FIRB clearance if 20% or more of the offshore entity. Lower amounts may be caught depending on whether any exemptions are available.	Does not require prior FIRB clearance; though this may trigger the voluntary filing regime (assuming no land and no other tests apply)
Agribusiness	Requires prior FIRB clearance to acquire 10% or more. The rules for interests below 5% as flagged above can still apply.	Requires prior FIRB clearance to acquire 10% or more. The rules for interests below 10% as flagged above for foreign government investors can still apply to private foreign persons.
Media	Requires prior FIRB clearance to acquire 5% or more. If less, this may trigger the voluntary filing regime.	Requires prior FIRB clearance to acquire 5% or more. If less, this may trigger the voluntary filing regime.
REITs with 50%+ Australian assets	All acquisitions of interests in REITs requires prior FIRB clearance unless 'passive investor' exemption available. That is, <5% in an unlisted REIT or <10% in a listed REIT, with no influence or control. For unlisted REITs, there must not be any residential land.	All acquisitions of interests in REITs requires prior FIRB clearance unless 'passive investor' exemption available. That is, <5% in an unlisted REIT or <10% in a listed REIT, with no influence or control. For unlisted REITs, there must not be any residential land.
Real estate	All acquisitions of interests in land require prior FIRB clearance. This includes leases/licences of 5 years or more including options. It also includes corporate transactions with downstream 'Australian land entities' – entities with more than 50% of the value of their assets as interests in land.	All acquisitions of interests in land require prior FIRB clearance. This includes leases of/licences of 5 years or more including options. This also includes corporate transactions with downstream 'Australian land entities' – entities with more than 50% of the value of their assets as interests in land.
Tenements	All tenement (including exploration tenements) acquisitions require prior FIRB clearance.	All secondary transfers of mining and production tenements require prior FIRB clearance.
Taking and enforcing security	Requires prior FIRB clearance unless the 'money lending' exemption applies (must be in business of lending money and arrangement must be on ordinary commercial arm's length terms)	Requires prior FIRB clearance unless the 'money lending' exemption applies (must be in business of lending money and arrangement must be on ordinary commercial arm's length terms)

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When do the temporary changes start and end?

FIRB have advised that the implementing legislation will provide that transactions that were otherwise outside the FIRB regime that were entered into but not completed prior to 10.30pm AEST on 29 March 2020 will not now be caught by the FIRB regime.

This is regardless of whether those deals remain conditional or not. That is, where there are legally binding agreements in place in respect of a transaction prior to 10.30pm AEST, 29 March 2020 the new rules will not apply.

There is no specific end date in place. However, it is currently anticipated that these measures will be in place for at least 6 months.

What about urgent transactions?

The review process has now been extended to up to 6 months. As businesses find themselves in need of capital, steps can be taken to facilitate the process for those that will now require FIRB clearance. However, if a transaction is not urgent – that is, it is not directly needed to support and protect Australian businesses and jobs – it will take longer to screen and for capital to flow.

While the FIRB can urgently screen transactions of national economic significance as needed during this crisis, its finite resources and the challenges of working during increasing lock-down means that it simply may not be able to process all applications as quickly as may otherwise be needed. Specifically, a zero threshold for screening transactions will significantly increase the case load for FIRB. While the extension of time to up to six months as opposed to the previous 30 days, (although rarely met, it was substantially less than six months) for non-urgent transactions may help to free up resources to review more urgent transactions, this will simply be too long for many of the transactions that are now caught by the FIRB regime.

Our foreign investment team is ready to assist you in crafting appropriate urgency submissions.

What is the voluntary process compared with the mandatory process?

Transactions caught by the FIRB rules can be classified as both 'significant actions' and 'notifiable actions'. If an action meets both of these requirements, then it must be notified to FIRB and it cannot proceed until FIRB clearance is obtained. It is an offence not to do so.

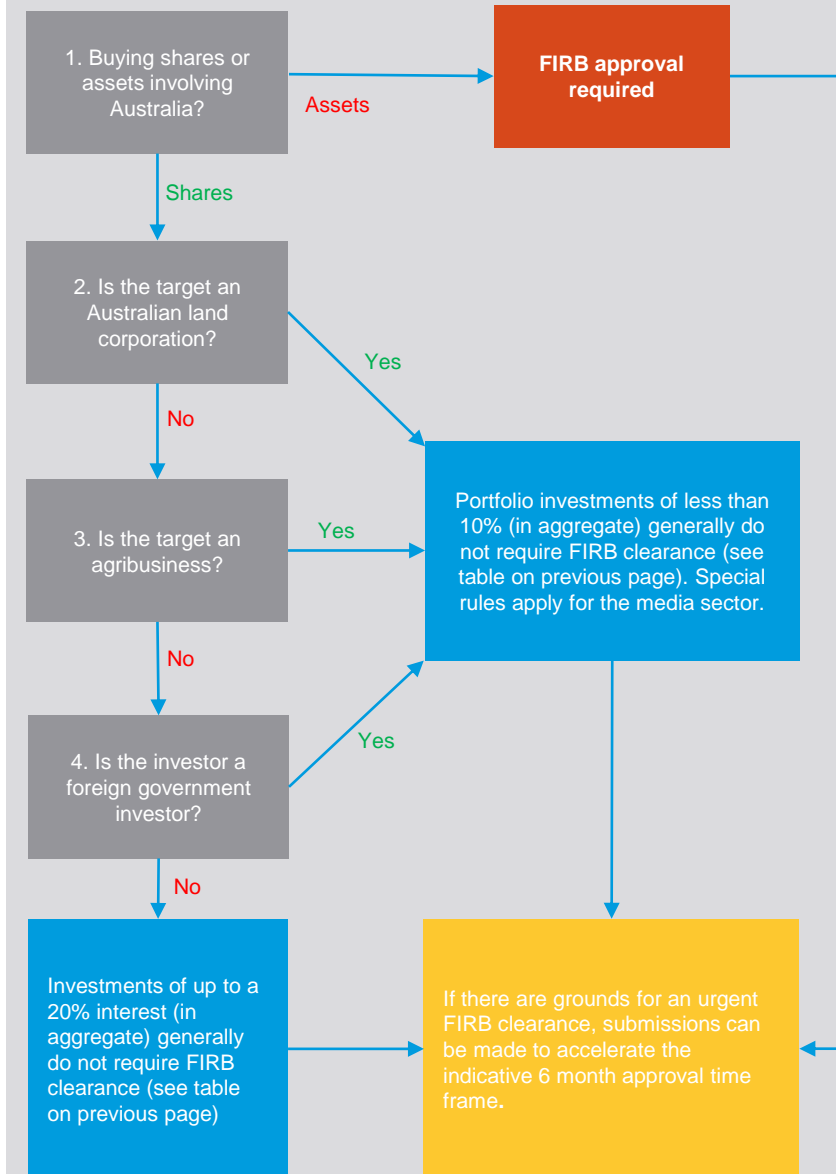
If a transaction is a 'significant action' but not a 'notifiable action', then a voluntary filing regime applies. That is, a transaction may proceed without notification to FIRB. However, if the Treasurer subsequently forms the view that the transaction was contrary to Australia's national interest he retains powers to make orders (such as disposal orders). Seeking and obtaining prior FIRB clearance precludes the Treasurer from exercising his powers.

There are also certain types of actions that are 'notifiable actions' but not 'significant actions'. In this case, a notification must be made to FIRB, however, the transaction may proceed and Treasurer has no power to make orders in respect of that transaction. It is an offence not to make the notification.

What does the process involve?

The process involves the disclosure of information about the investor and transaction to FIRB. FIRB will consult with a number of government agencies including the Australian Competition and Consumer Commission and the Australian Taxation Office. Once the consultation period is over, the Treasurer or his delegate will make a decision approving the transaction either conditionally or unconditionally. In rare instances, the transaction may be blocked.

Does this apply to my deal?



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