Demystifying FIRB for PE houses – insights and recent learnings

Second Edition, 2024

MinterEllison.

Contents

Foreword ❯

This report seeks to demystify Australia's foreign investment regime as it applies to private equity houses. Our aim is to cut through the mystique and complexity of FIRB's rules, policies and procedures and to provide a practical overview for private equity investors transacting in the Australian market.

Australia has a longstanding policy of generally welcoming foreign investment. Consistent with that policy, foreign investment in Australia has accelerated, with foreign investors now comprising 46% of investors in Australian-based private funds, up from 18% two decades ago.[1]

North American, East and Southeast Asian and European investors are the largest contingent of foreign investors in Australia. Of all private capital asset classes in Australia, private equity remains the dominant class, with $41.7 billion (as of September 2022) in assets under management in Australia, constituting a third of total assets under management and growing at an average rate of 11% over the past five years.[2] The global private equity industry has an estimated $2.59 trillion in dry powder to deploy, according to Preqin Pro.[3]

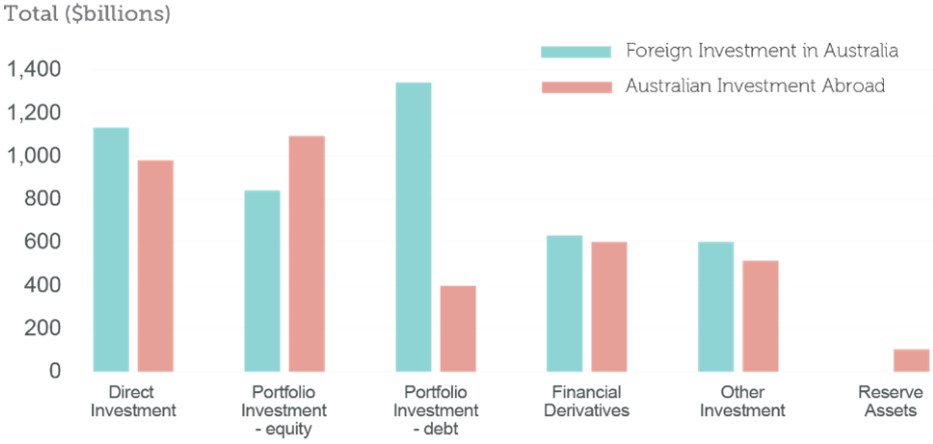
In terms of total foreign investment into Australia across all asset classes, the Australian Bureau of Statistics provides that in 2022 (2023 statistics to be published in May 2024), year on year foreign investment in Australia rose by approximately $433 billion to just under $4.6 trillion.[4] Relevantly to private equity, this was dominated by Direct Investment and Portfolio Equity Investments.[5]

Australia's foreign investment regime aims to balance the economic benefits of foreign investment with the need to protect Australia's national interest. To that end, the Australian government reviews certain foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to Australia's national interest or, in certain circumstances, its national security only.

This report focuses on Australia's foreign investment regime specifically through the lens of private equity investors, both domestic and offshore.

Australia's foreign investment regime is relevant to both, given the broad scope of the regime. For example, even if an Australian fund is acquiring an Australian target, if the fund has limited partners or upstream investors from foreign countries, it may be classified as a foreign person for the purposes of the regime and will need to be aware of its obligations under Australia's foreign investment laws.

Level of investment, by components, 31 December 2022



Signage not applied
Source: Australian Bureau of Statistics, International Investment Position, Australia Supplementary Statistics 2022
* 2023 statistics to be published in May 2024

Key topics covered in our report include:

- why private equity funds are often characterised as Foreign Government Investors (**FGIs**), and the implications of this;
- FIRB's expectations around disclosure of a fund's investors in the approval application, and different approaches to managing the disclosure of what is invariably sensitive information;
- industry sectors that are attracting heightened scrutiny from FIRB;
- ways in which the FIRB approval process can be expedited and/or pre-empted to shorten the timeframe to closing a deal;
- the interplay between FIRB, the Australian Competition and Consumer Commission (**ACCC**) and the Australian Taxation Office (**ATO**) during the approval process, and how this can be managed proactively to reduce delays;
- how target companies and vendors are increasingly seeking to allocate FIRB risks on deals;
- recent trends we are seeing in the types of conditions attached to FIRB approvals; and
- post- FIRB approval obligations which investors must comply with, including the most recently introduced reporting requirements.

Now more than ever, navigating Australia's foreign investment regime and other associated regulatory aspects of private equity transactions is critical to the success of such transactions. Although obtaining FIRB approval can sometimes be a protracted exercise, the good news is that the overwhelming majority of applications are approved – albeit increasingly subject to conditions to address any perceived national interest concerns.

Australia's foreign investment regime has become increasingly complex. In addition, as the Treasurer has total discretion to determine what is (and is not) in the national interest, there is inevitably a political dimension to Australia's foreign investment regime. Noting these complexities, this report is general in nature only. Nevertheless, we trust it provides a helpful overview and practical guidance for private equity firms transacting in the Australian market.

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By the numbers

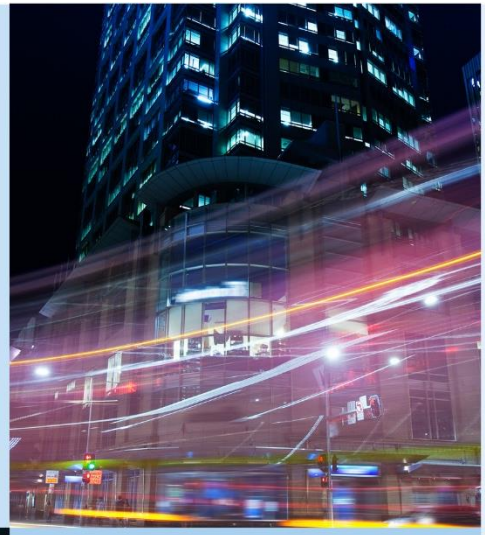
In the fourth quarter of Financial Year 2023:

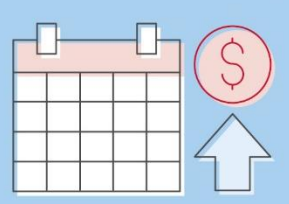
297

investment proposals approved with a value total of **$34.9 billion**.

Of these,

14 relate to national security actions.





The quarterly average value of commercial investment proposals for the financial year is

$42.9 billion

The countries with the greatest value of commercial investment proposals approved were (billions):

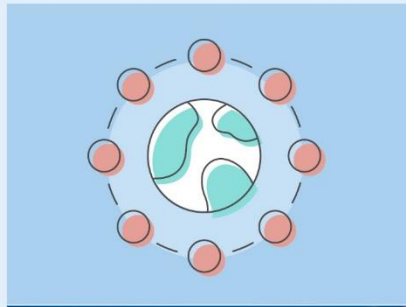
$11.7b Japan

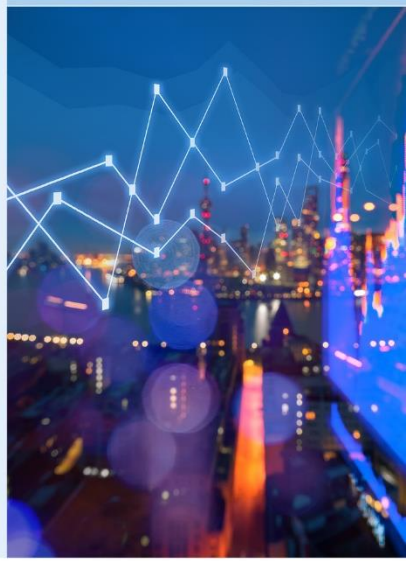
$3.6b Singapore

$3.0b United States

$1.8b Korea, Republic of (South Korea)

$1.7b Canada



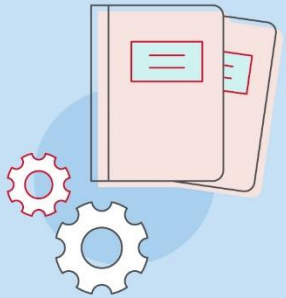


The largest target sector for proposed investment for the quarter by value was **Services**, with a total value of

$12.5 billion.

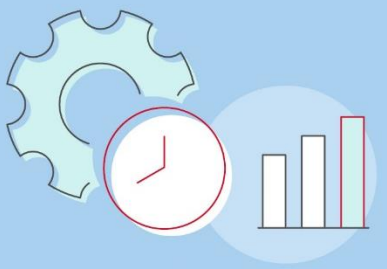
In the previous quarter, Finance and Insurance was the largest target industry with a total value of

$19.3 billion.



78%

of cases were processed in 60 days or less.



In this quarter, Treasury's median processing time for approved commercial investment proposals was

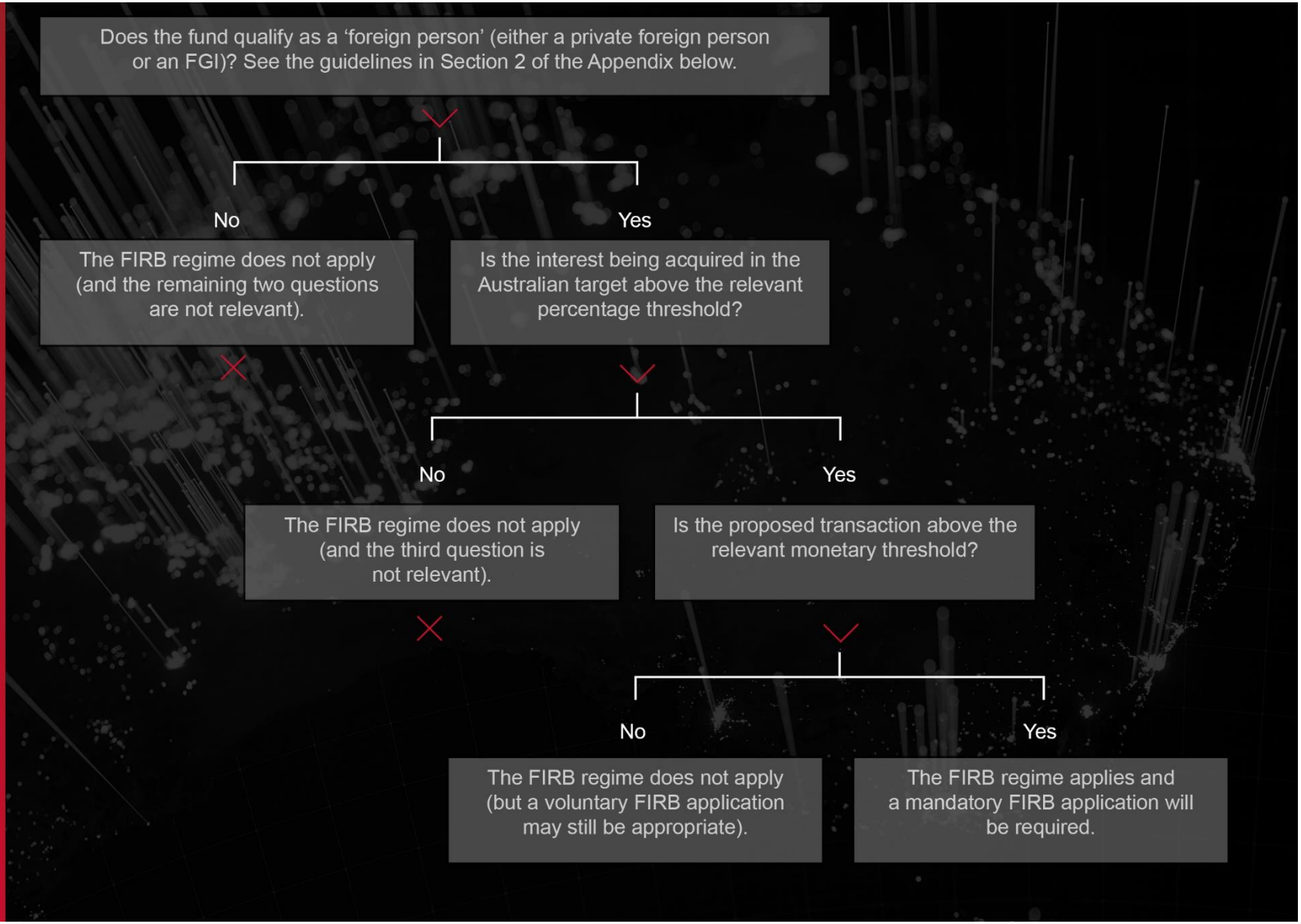
36 days

and the 2022-23 median processing time was

41 days.

Does FIRB apply to your PE transaction?

When determining whether a proposed transaction is an action that requires mandatory FIRB approval, there are three threshold questions for a private equity fund to consider:



1. Practical considerations for PE funds

1.1 Information to include in your FIRB application

A FIRB application requires a cover letter that sets out the relevant action(s) for which approval is being sought, why the proposed transaction is captured, information about the acquiring entity and target, and the details of the transaction.[6]

Acquiring entity details

The application will need to include the following details of the acquiring entity:

- the name, activities, locations and incorporation details of the acquiring entity;
- any existing Australian investments or assets of the acquiring entity, the parent entity and associated entities;
- the total global assets or assets under management for the acquiring entity and the ultimate parent entity; and
- any existing relationship of economic interests between the acquiring entity or its ultimate parent entity and the target.

The application will also need to include details of the upstream ownership of the acquiring entity including the name and percentage interest of all investors (including limited partners, shareholders and unitholders) that hold a greater than 5% interest in the acquiring entity, tracing upstream to the ultimate interest holders.

When the acquiring entity itself, or an investor in the acquiring entity, is a private equity fund, the following information must be provided:

- the ownership and control of the fund manager; and
- the name and country of establishment of the general partners for funds structured as a limited partnership.

Tracing Note: As discussed in Section 2.3 of the Appendix, substantial interests of 20% or more are traced through ownership structures to the ultimate interest holders. Details of the upstream ownership structure of the acquiring entity are used to trace interests and determine whether the applicant is a private foreign person or a foreign government investor.

FGI Note: If foreign government investors (**FGIs**) from one country together hold more than 5% of the fund, details of each investor will need to be included regardless of the percentage interest that the investor holds. The amount of upstream ownership information required by FIRB will depend on a case-by-case analysis due to the complexity of the foreign person test and the tracing provisions.

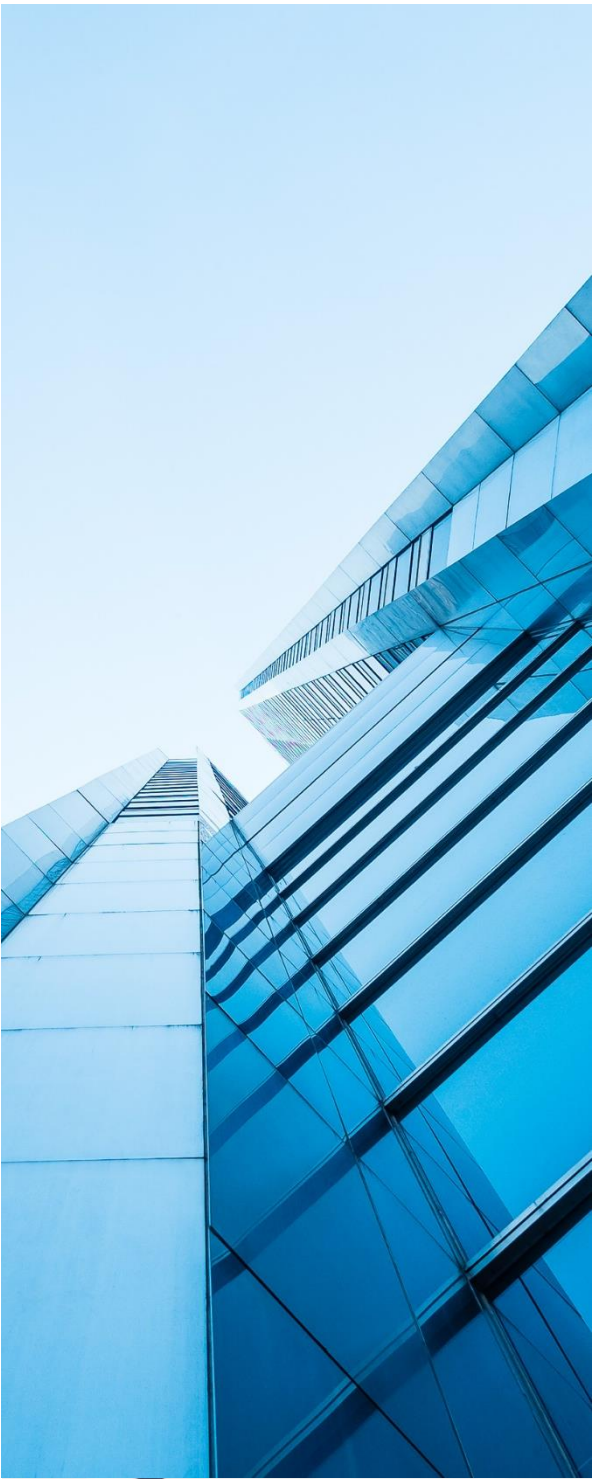
Target entity details

The application will need to provide details of the target, including:

- incorporation details, major activities (including major global and Australian customers, and any government customers) and Australian operations including the details of all Australian subsidiaries, and
- any interests in Australian land held within the target group and whether any entities within the group are considered to be national security businesses.

Repatriation of assets

As part of its assessment process, FIRB may raise a question as to whether the applicant intends to repatriate any target assets following completion, particularly if this issue is raised by an external consult partner. If any submissions are to be made on this point, the applicant may wish to be up front and make those submissions in the first instance, as part of the application letter, to get ahead of any questions that may be



raised by FIRB as part of its assessment process. Ultimately, if FIRB considers it likely that the applicant will migrate any material part of the target business offshore following completion (e.g. technology and intellectual property), FIRB may consider imposing conditions to resist this or to ensure relevant government agencies like the ATO have visibility of such actions.

Transaction details

The application will need to include a description of the interest being acquired and any associated rights, the consideration for the transaction and the source of funds. Depending on the complexity of the transaction, a step plan may also be included.

FIRB will require submissions on the commercial rationale for the transaction. This can include details of any future intentions relating to the operation of the target. If this information is not provided in the first instance, FIRB may request further details as part of its assessment process. Any such requests are likely to be directed towards whether the applicant intends to maintain the current business operations (including current employment contracts and the location of key personnel) following completion of the transaction. Responses to these requests may inform FIRB's assessment as to whether or not it will impose conditions on any FIRB approval.

Supporting documents

As part of any FIRB application, FIRB will generally require copies of the latest financial statements of the acquiring entity and the target. Corporate structure charts for the acquiring entity group and the target group are also typically requested. FIRB does not require copies of the underlying transaction documents nor the fund documents.

1.2 Disclosure of PE fund ownership

As noted above, when preparing a FIRB application, private equity firms need to disclose information about the ultimate controllers of the general partners of the funds involved in the acquisition as well as information about the specific investors in those funds. This information is required by FIRB to better understand who is ultimately benefiting from the investment for which FIRB approval is being sought.

If the fund is a limited partnership, the FIRB application should disclose the identity and country of origin of limited partners that hold **an interest of 5% or more** in the fund.[8] The upstream ownership structure of the fund will need to be assessed and disclosed at each level to the ultimate interest holders. This is because of the 'tracing provisions' under the *Foreign and Acquisitions Takeovers Act 1975 (Cth)* (**FATA**) which apply at each level up to the ultimate interest holders (both legal and beneficial – regardless of practical control). Please see Section 2.3 of the Appendix for further information on how the tracing rules operate. Therefore, a FIRB application must also include the identities and countries of origin of any investors that hold an interest of 5% or more in the limited partners. Similarly, if there are companies or unit trusts in the fund structure, information about the shareholders or unitholders will need to be disclosed in the FIRB application.

Most fund documentation includes exceptions to the starting position that the identity of the underlying fund investors will be kept confidential. One common exception is where such disclosure is required by law. However, where that exception applies, the fund documentation will typically proceed to state that the disclosure is to be confined to the minimum necessary to comply with the legal disclosure obligation. If, as is invariably the case, information surrounding the ownership of the fund is confidential, the carve out for 'disclosure required by law' could be invoked, if required, to elicit disclosure in the FIRB application from reticent

upstream owners. Equally though, they will be anxious to ensure that their information remains confidential and to limit the nature and extent of the information that is actually disclosed to FIRB.

An important point to note – but one that some private equity funds that are new to the Australian market may not appreciate – is that any FIRB application is not a publicly available document. Even the fact that an application has been filed is itself not a matter of public record (other than in very limited circumstances).[9] FIRB is a reputable Australian regulator. In our extensive experience, we have not had any instance where the confidentiality of the contents of a FIRB application has been compromised by any deliberate or inadvertent action or omission by FIRB.

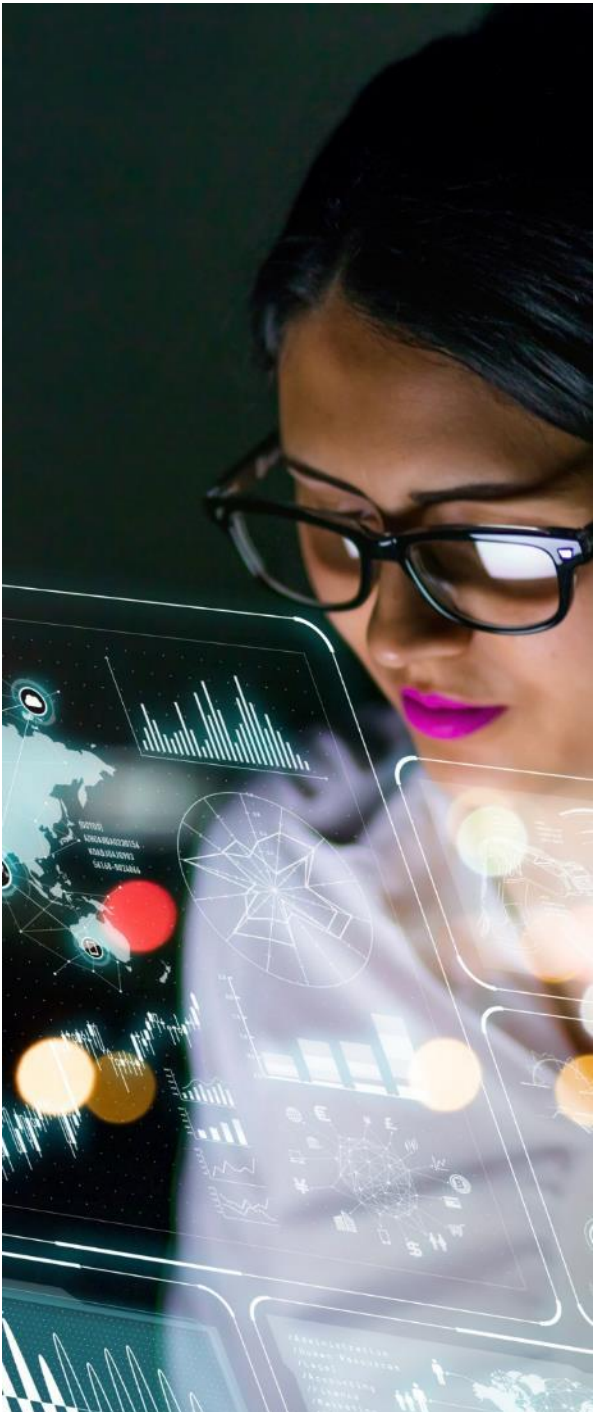
That said, what practical steps are available to manage the disclosure to FIRB of details of the general partners and limited partners of a fund?

One approach is to transparently disclose this information in the application but to do so with an accompanying express confidentiality statement emphasising to FIRB the commercially sensitive nature of the ownership information being provided. That statement would supplement an overarching confidentiality statement that applies to the entire application, which we typically include at the front end. These overarching and specific confidentiality statements can also serve to protect the application and related information from being released to third parties and exempt it to the extent legally possible from being accessed under the *Freedom of Information Act 1982* (Cth). Even if confidentiality is maintained by FIRB, this first approach has the disadvantage that both the applicant entity and its external Australian legal adviser (as the party preparing and filing the application) will be made aware of the identity of the upstream investors. Sometimes that alone creates a level of sensitivity that tests comfort levels with PE investors.

We appreciate that often the upstream investors of a fund do not play an active role in the fund's investment decision; i.e. the upstream investors (limited partners) are typically purely passive. Where possible, we will highlight this in an application to make it clear to FIRB that the upstream investors operate on a transparent, arms' length commercial basis and, therefore, they will not be involved in the management or operation of the target being acquired. On that basis, a position can be put to FIRB that no disclosure of the upstream investors is required. If FIRB does not accept that submission (which it typically does not), the next possible approach is to not provide the specific identities but rather a general, anonymised descriptor of each investor with an interest of 5% or more; for example:

Company	Hong Kong insurance provider
Country of incorporation / nationality	Hong Kong
% shares held	5%
Nature of shareholder	Private foreign person

Depending on the country of origin of the upstream investor and the sensitivity of the industry of the Australian target, FIRB may or may not accept this type of anonymised approach. If FIRB insists on full disclosure of the upstream ownership of a fund and if there is a commercial imperative for this information to be shielded from the applicant entity (but not its Australia legal adviser making the FIRB application), an alternative strategy is to redact entirely information about the fund's investors from the information included about the ownership of the applicant in the application. We will then work directly with the fund to create a confidential annexure that we will manage independently and keep separate from the applicant's FIRB application. Once the application is made, we will lodge this separate annexure with FIRB directly. The annexure can be password protected and include a



detailed confidentiality statement as discussed above.

If a fund is not comfortable liaising with us directly (i.e. if they are also uncomfortable with us as their Australian legal adviser having access to this ownership information), we will connect the fund with FIRB to open a direct, closed line of communication. The fund can then manage the information it provides to FIRB and respond to requests for further information from FIRB independently.

1.3 Timing

Please refer to Section 5 of the Appendix for an outline of the statutory timing regime that applies to a FIRB application. In practical terms, there is no hard cap or maximum statutory deadline within which FIRB must make a decision.

In the quarter 1 January – 31 March 2023, FIRB reported that the median processing time for approved commercial investment proposals was 42 days (six weeks). However, this median should not be treated as a general indicative guide to timing. In our experience, a more realistic indicative guide is eight to 12 weeks. The processing time for any application will be highly dependent on the specific details of the transaction including the country of origin of the private equity fund, the sensitivity of the target business, the transaction value (higher value deals typically take longer to approve because FIRB and the ATO will carefully scrutinise funding sources and the acquisition structure to ensure that there is no risk of improper tax leakage) and whether the filing coincides with the lead up to FIRB's annual shutdown period or with FIRB going into caretaker mode in the lead up to a Federal election (which generally occurs every three years). We give clients an expected timeframe for a decision based on the specific characteristics of their application.

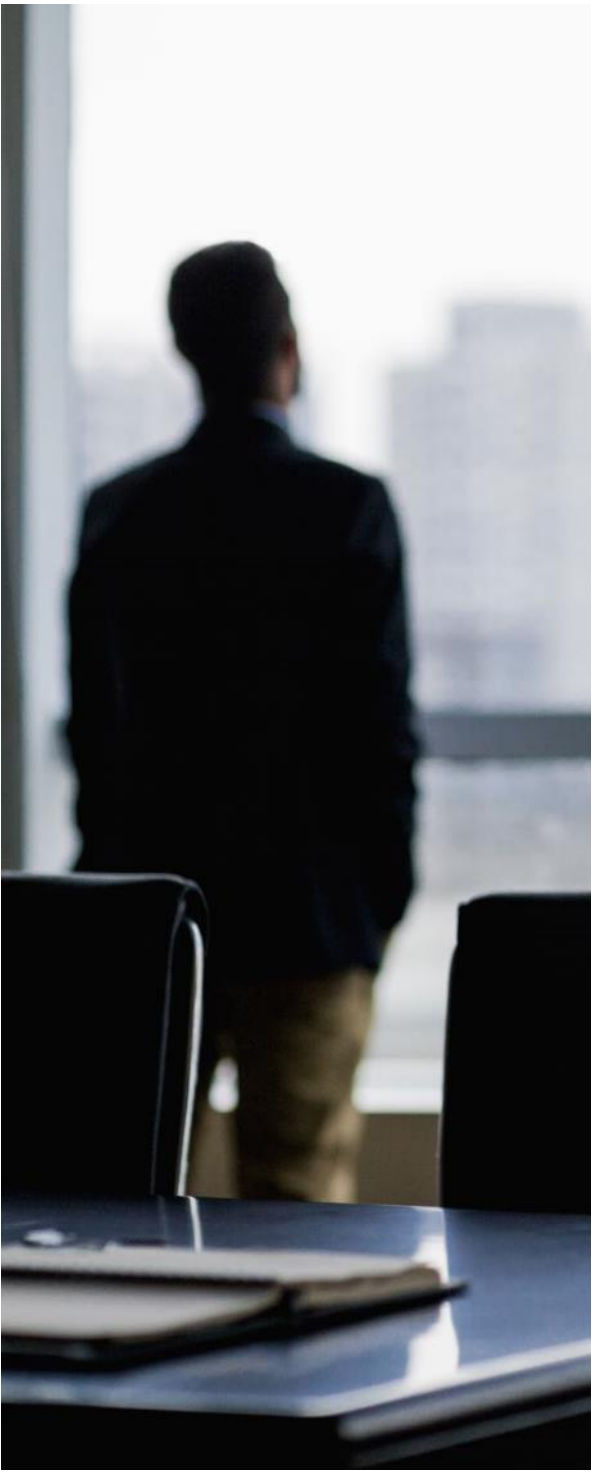
Often there will be a commercial deadline or other timing imperative for the receipt of FIRB approval. Therefore, we always include timing submissions in the FIRB application and request that the application be considered and a decision issued no later than the commercial deadline. We also include detailed submissions about the particular circumstances of the proposed transaction such as whether the transaction has been publicly announced or there has been media coverage – which are relevant considerations because there are broader stakeholders such as employees, customers and suppliers who will be aware of the announced transaction and who will naturally have an interest in the certainty that comes with an expedited decision.

1.4 Strategies for managing timing risks

Technically, timing for FIRB approval cannot be expedited. However, some practical strategies are available to manage the overall timeframe to receiving approval and, in turn, achieve closing of the transaction as expeditiously as possible.

A FIRB application can be lodged at any point in the transaction process before closing – including well before a definitive legally binding agreement is signed. This is a strategy that can be used to shorten the timetable to closing and/or to achieve a timing advantage in a competitive sale process. In that case, the FIRB application would be prepared and submitted based on the transaction parameters in the parties' non-binding indicative agreement (e.g. letter of intent, memorandum of understanding or term sheet). If there are material changes to the transaction parameters following lodgement of the application and/or material developments (including entry into a definitive legally binding agreement), FIRB will need to be kept informed.

The downside to this approach is incurring a potential sunk cost if the negotiations do not crystallise into a legally binding agreement. These costs can be significant, as the fee for



filing a FIRB application can be substantial, and this fee is generally not refunded where an applicant withdraws their application, or where approval is granted but the parties do not proceed with the transaction.

Additionally, FIRB is open to engaging in an informal dialogue ahead of an application being filed. Particularly in more complex or sensitive transactions or where an applicant has not previously filed a FIRB application (and is therefore not known to FIRB), this preliminary dialogue can be used as an opportunity to gain insights from FIRB on any potential areas of concern and what areas to focus on in a FIRB application. This in turn can reduce the nature and extent of any requests for information from FIRB after the application is filed.

In light of the uncertain timeframes associated with obtaining FIRB approval, Australian targets and sellers are increasingly seeking to contractually allocate as much of the FIRB risk as possible onto the prospective foreign acquirer. This is being done, for example, by seeking the inclusion of one or more of the following protections in the principal transaction agreement:

- a reverse break fee payable by the prospective foreign acquirer to the target if FIRB approval is ultimately declined (which means closing cannot occur);
- procedural obligations on a prospective foreign buyer to do whatever is needed to obtain FIRB approval, including agreeing to accept whatever conditions are imposed by FIRB, rather than allowing the prospective acquirer to subjectively conclude that the conditions are unacceptable to it (so-called 'hell or high water' obligations); and
- the payment of a so-called ‘ticking fee’ if FIRB approval is not received by a certain date. The ticking fee operates to increase the purchase price to compensate the seller for completion being delayed by the non-receipt of FIRB approval after a certain date. If a buyer agrees to a ticking fee, it should allow sufficient buffer in terms of the date after which the ticking fee applies.

For transactions which raise complex competition issues or concerns, a lengthy ACCC process can cause extensive delays to the FIRB process. The potential for such delay needs to be considered as part of any contractual allocation of FIRB risk.

1.5 Elevated tax disclosure and tax conditions

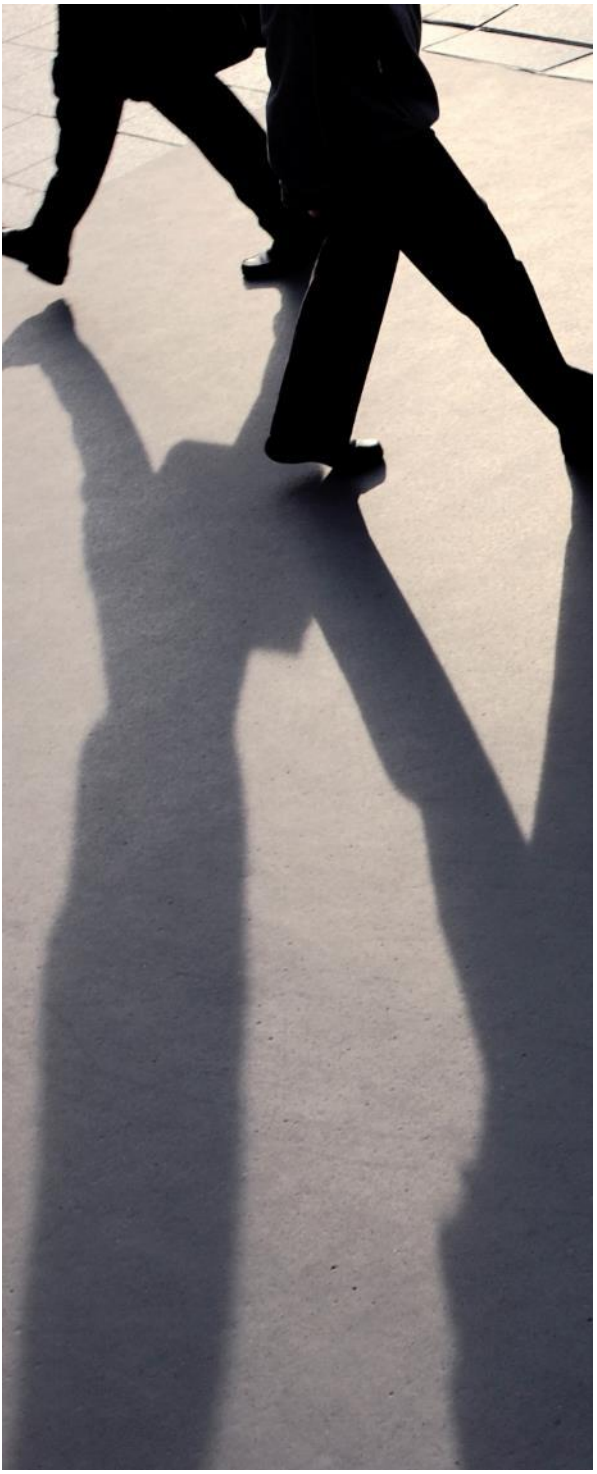
It has been reported that the Australian Treasurer, Jim Chalmers, has directed FIRB to engage in a more rigorous review of foreign private equity funds' tax arrangements when screening proposed transactions.[7] Private equity funds may now be required to provide FIRB with tax advice from Australian accountants and lawyers.

Additionally, FIRB has introduced increasingly bespoke tax conditions on FIRB approvals. These can include the requirement to disclose any contractual agreements related to the transfer of intellectual property offshore, irrespective of whether this relates to an intercompany transfer or divestment to a third party, whether before or after closing.

FIRB's focus on tax related disclosure and use of tax conditions will be a key area to watch in 2024, as the Australian Treasurer has publicly stated that he wants a 'robust and rigorous' FIRB regime to ensure there is no improper tax revenue leakage out of Australia.

1.6 Filing fees

A fee is payable to the ATO by the applicant when lodging an application. Generally, FIRB will not commence the application assessment process until payment is received. The fee



payable will depend on the type of action, the value attributable to the proposed transaction (which is generally assessed by reference to the consideration within the meaning of the FATA) and whether any special fee rules apply under the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth). The greater the value of the transaction, the greater the fee which will be payable, as outlined in Table 4 and Table 5 in the Appendix.

1.7 Voluntary FIRB filing

As noted later in this report, if a proposed foreign investment qualifies only as a 'significant action' or a 'reviewable national security action', it is at the investor's discretion to notify the Treasurer and seek FIRB approval on a voluntary basis. There are advantages and disadvantages of proceeding with a voluntary application.

The disadvantages are that:

- this could cause timing delays for the transaction noting that once an action is notified to FIRB (even on a voluntary basis) it must not complete until a decision is made by FIRB. Timeframes are subject to a number of variables and are often difficult to predict;
- engaging in the FIRB assessment process (again, even on a voluntary basis) will attract a filing fee, which could be substantial depending on the value of the transaction;
- administratively onerous conditions could be imposed on any approval, in particular conditions relating to the access, use and storage of data; and
- the FIRB assessment process will expose the prospective acquirer to questions from a broad range of Australian government agencies including the ATO and the ACCC that could (in some cases) otherwise be avoided by not making a voluntary application.

These disadvantages should be weighed against the potential benefits of making a voluntary application, which include:

- extinguishing the Treasurer's call-in power, which gives the Treasurer the ability to call in actions for review on national security grounds and then to take certain actions which may include a divestment order;
- familiarising FIRB with the parties, which may help facilitate any future FIRB approvals that the prospective acquirer may seek; and
- being able to proactively shape the Australian government's perception of the applicant and the proposed transaction – noting that FIRB monitors the global / domestic financial press and, if no FIRB application is made, we have seen instances where FIRB writes to an acquirer following press coverage to test whether FIRB approval should have been sought. If that happens, the investor is then on the back foot, having to reactively explain (and defend) why no FIRB application was made.

In addition, FIRB's published guidance currently encourages voluntary filings where a transaction involves sensitive personal information. Factors that may put a transaction at a higher risk of the Treasurer identifying a national interest concern include if the target industry is in a sensitive sector, if the prospective acquirer is an FGI and/or if the prospective acquirer would on completion have access to customer information. Ultimately, the decision as to whether or not to seek approval on a voluntary basis is a commercial one for the prospective acquirer (assuming that a filing is not otherwise mandatory).

1.8 FIRB's interaction with other Australian regulators and government agencies

ACCC

FIRB refers all transactions to Australia's competition (antitrust) regulator, the ACCC, for consultation. Seeking FIRB approval thereby triggers an ACCC review of a transaction – even where the parties have not themselves sought ACCC approval. Therefore, an application to FIRB acts as a de facto notification to the ACCC for approval.

FIRB will not provide approval unless and until the ACCC first confirms to FIRB it has no objections – i.e. until the ACCC has provided approval for a transaction. This has a suspensory effect for the FIRB process, as the parties effectively need to let the ACCC process run its course before closing (as it is illegal to close prior to FIRB approval being given).

FIRB timelines are effectively meaningless given FIRB timing is dependent on ACCC timing. Unless and until the ACCC provides approval, the FIRB case team will continue to ask the applicant to seek extensions to the FIRB timeline. This means that racing to submit a FIRB application when there has not been sufficient time to conduct an ACCC analysis and prepare an ACCC application will be unlikely to save time or secure FIRB approval quickly.

Therefore, coordination of the FIRB and ACCC workstreams for a transaction is important, as delays in the ACCC process will delay the FIRB process. To minimise delays, pro-actively submitting an application for ACCC approval (including by way of application for confidential pre-assessment) prior to or at the same time as a FIRB filing is recommended in many cases, as opposed to a 'reactive' approach.

As it is important that the ACCC analysis and ACCC approval application are ready for filing either before or at the same time the FIRB application is filed, the ACCC and FIRB workstreams are best commenced as early as possible and should run in parallel.

ATO

As with potential competition issues/ACCC aspects, investors need to consider tax aspects relevant to a FIRB application before the application is made, preferably at the same time as any FIRB analysis is being undertaken. The ATO reviews every FIRB application. There is a dedicated ATO division focused on foreign investment.

Tax is almost always an area where FIRB (via the ATO) issues requests for information and/or questions, where technical responses are required.

Unless tax is considered and properly addressed in a FIRB application, a foreign investor may be forced to accept onerous tax conditions. Tax conditions are intended to give the ATO enough information to detect any risk of tax avoidance or tax leakage.

Early consultation with our tax team is imperative. They can assist with drafting tax submissions up front, responding to tax related requests for information and annual reporting on compliance with tax conditions.

Other bodies

Depending on the nature of the transaction and the industry sector, FIRB will also consult with a range of government agencies. For example, if the transaction raises national security issues, FIRB will consult with the Department of Defence.

Frequently Asked Questions

The table below provides answers to frequently asked questions from PE houses about Australia's foreign investment regime:

Question	Answer	Further information
What transactions may be subject to Australia's foreign investment regime?	The *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) – the primary piece of legislation regulating foreign investment into Australia – categorises transactions as relating to: ■ acquisitions of direct or indirect interests in: – Australian entities (i.e. corporations or unit trusts), – Australian businesses (by way of asset purchases), – Australian land (including long-term leases, and land-rich companies or trusts), and – certain mining tenements; ■ starting a new Australian business or 'national security business'; or ■ internal re-organisations within a corporate group that involve an Australian entity, business or Australian land. Whether FIRB approval will be required for any of the above types of transactions will depend on: ■ the ownership and control details of the entity making the acquisition; ■ the type of acquisition (entity, business, land, etc.); ■ the percentage interest that will be acquired in the target and the level of control the acquirer will be able to exercise over the target; and ■ the value of the proposed transaction. If a monetary screening threshold is relevant, the threshold for most business investments is currently $310 million. Private (non-government) foreign investors from certain free trade agreement (**FTA**) partners may benefit from a higher threshold, currently $1,339 million.[10]	Appendix, Section 2, 3
Which investors need to obtain FIRB approval before proceeding with a transaction?	The FATA applies to 'foreign persons'. Foreign persons include foreign government investors (**FGIs**) and non-FGI 'private' foreign persons, with the regime applying differently to each type of investor. Broadly, a foreign person includes an entity in which: ■ an individual not ordinarily a resident in Australia, a foreign corporation or a foreign government, together with its associates, holds a direct or indirect interest of 20% or more; or	Appendix, Section 2, 3

Question	Answer	Further information
	■ multiple such persons, together with their associates, hold a direct or indirect interest of 40% or more (in aggregate). The definition of foreign person expressly includes general partners of limited partnerships in which a person not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20% or more (or multiple such persons hold an interest of 40% or more, in aggregate). An FGI is an entity controlled by a foreign government (at any level of government) or their related bodies, including corporations, trusts and limited partnerships in which: ■ a single foreign government and its associates holds a direct or indirect interest of 20% or more; or ■ multiple foreign governments and their associates hold a direct or indirect interest of 40% or more (in aggregate) – provided that the interest holders do not meet certain passive investor exemptions. There are tracing provisions under the FATA which have the effect of determining the foreign person characterisation of an entity based on the status of the ultimate legal and beneficial interest holders of the entity. For example, for managed funds the test considers the ultimate investors in each fund, as well as the relevant fund manager. The test is broad enough to capture widely held listed entities, that may be considered FGIs.	
What is the significance of a PE fund potentially qualifying as a foreign government investor?	Australia scrutinises investments by FGIs more strictly than it does investments by other foreign persons. A broader range of investments are screened when FGIs are involved. Many private equity funds, and by extension their portfolio companies, may be deemed to be FGIs as a result of the rules discussed in this report (despite the introduction of the 'passive' FGI exemption introduced specifically for investment funds). If your fund qualifies as an FGI, you will be subject to more onerous rules under Australia's foreign investment regime. In particular, FGIs are subject to a $0 monetary threshold for all acquisitions of interests in Australian land, businesses and entities. FGIs are required to seek mandatory approval for any interest of at least 10% acquired in almost all types of Australian entities or businesses (which is lower than the 'ordinary' threshold of 20% for non-FGIs). FGIs are also required to obtain approval for specific actions which would not otherwise be notifiable to FIRB if the investor was a private foreign person, namely to start a new Australian business.	Appendix Section 2.4
What sectors fall within the scope of foreign investment review? Do certain areas attract heightened screening?	Foreign investment proposals relating to all sectors of the Australian economy may require FIRB approval. Generally, investments in the defence sector will very likely require FIRB approval (whether or not the investor is an FGI). Similarly, transactions involving critical infrastructure may require FIRB approval and FIRB will closely examine such proposed investments. Critical infrastructure is defined broadly and can include business involved in the following sectors: ■ communications;	Appendix, Section 2.8

Question	Answer	Further information
	■ data storage or processing; ■ financial services and markets; ■ water and sewerage; ■ energy; ■ healthcare and medical; ■ higher education and research; ■ food and grocery; ■ transport; and ■ space technology. Finally, acquisitions of certain businesses in other so-called 'sensitive' sectors will be subject to a lower monetary screening threshold. For example, whereas investors from FTA partner countries usually benefit from higher monetary screening thresholds (meaning fewer investments require FIRB approval), these thresholds do not apply for investments in businesses and entities in sensitive sectors, which include the media, telecommunications and transport sectors, and businesses involved in the extraction of uranium or plutonium, or the operation of nuclear facilities.	
Is submitting a FIRB application mandatory or voluntary?	There are both mandatory filing obligations and voluntary filing options for foreign investors under the regime. Whether a foreign person must submit a FIRB application depends on the specifics of the proposed transaction as outlined above. If the fund or investment vehicle is a private foreign person or FGI and if the proposed acquisition exceeds the ownership interest threshold and the relevant monetary threshold, it will be mandatory for the investor to submit an application to receive FIRB approval before acquiring the interest. If a transaction does not require mandatory notification, in most cases investors may still make a voluntary notification to the Australian Treasurer (**Treasurer**) to seek approval. This report outlines some of the advantages and disadvantages of making a voluntary notification in Section 1.5. Irrespective of whether a mandatory or voluntary notification is being made, the process requires submitting an online application form through FIRB's application portal, principally accompanied by a cover letter and supporting documents. In either case, once the application has been lodged, the transaction cannot complete until the Treasurer has provided its approval.	Section 1.5 Appendix, Sections 2.7, 2.8
At what stage of a transaction should a	An application can be made by the acquiring entity to FIRB at any point in the transaction process before closing. For example, a FIRB application could be lodged as early as the signing of a memorandum of understanding, letter of intent or	Section 1.3

Question	Answer	Further information
FIRB application be made?	similar preliminary non-binding document between the parties. In that case, the FIRB application would be prepared and submitted based on the transaction parameters in the parties' non-binding document. This report outlines some of the advantages and disadvantages of this approach in Section 1.4. If there are material changes to the transaction parameters following lodgement of the application and/or material developments (including entry into a definitive legally binding agreement), FIRB will need to be kept informed. Where there has been a substantive change to the nature of the transaction (e.g. a change resulting in a new notifiable action for FIRB purposes), FIRB may require the applicant to submit a new application. However, FIRB is accustomed to receiving applications in the early stages of a transaction with supplementary information being subsequently provided throughout the assessment process.	
What happens once an application has been submitted?	Following the submission of a FIRB application, the application review process typically proceeds as follows: ■ FIRB and its consultation partners (other government agencies including the ATO and the ACCC) will review the application; ■ FIRB will often then issue written questions and/or requests for information in relation to the application; ■ the applicant will provide written responses to those questions and/or information requests, which will be considered by FIRB (and its consultation partners, as necessary); ■ FIRB will provide the wording of the proposed FIRB approval description and any proposed conditions that will be attached to the approval for the applicant's review and comment; ■ the Treasurer (or the Treasurer's delegate) will issue its decision (which in the overwhelming majority of cases is an approval). The approval notice is known as a 'no objection notification' and will include any conditions; ■ the approval notice is accompanied by a separate document outlining the foreign investor's compliance obligations which include notifying FIRB once closing has occurred (to be done within 30 days of closing occurring) and reporting conditions (see Question below – '*What happens after FIRB approval is granted?*').	NA
How long does it generally take to receive FIRB approval?	In the quarter 1 January – 31 March 2023, FIRB reported that its median processing time for approved commercial investment proposals was 42 days (six weeks). However, this median timeframe should not be treated as a general indicative guide to timing. In our experience, a more realistic indicative guide is approximately eight to 12 weeks. The length of time will be highly dependent on the specific details of the transaction including the country of origin of the PE fund, the sensitivity of the target business, and whether the filing coincides with the lead up to the annual shutdown period or a caretaker mode period where there is an upcoming Federal election (which generally occurs every three years).	Sections 1.3 and 1.4 Appendix, Section 5

Question	Answer	Further information
	In practice, the review process can take anywhere from as short as four weeks (for low value, straightforward and uncontroversial transactions) to six months or longer (for higher value, higher profile, more sensitive transactions). This report sets out some practical strategies to manage the overall timeframe to receiving FIRB approval and, in turn, achieve closing of the transaction as expeditiously as possible.	
What happens after FIRB approval is granted?	Following completion (closing) of the proposed acquisition, the applicant named in the approval notice must comply with any conditions and reporting obligations arising in connection with the FIRB approval. This may include statutory obligations as well as conditions that were imposed on the approval at the time of issue. The applicant will typically be required to notify FIRB within 30 days of closing that completion has occurred by giving a 'register notice' to the Register of Foreign Ownership of Australian Assets (**Register**). The Register commenced on 1 July 2023 and requires foreign investors to report certain investments in Australian assets and other related matters to the ATO. In some cases, an applicant may be required to provide an annual report on compliance with certain conditions. Most commonly, an applicant will be required to report on its compliance with Australia's taxation regime. Our specialist teams can assist with annual reporting on compliance with tax (and other) FIRB conditions.	Appendix, Section 7
Does FIRB request meetings with applicants? **Can applicants request meetings with FIRB?**	FIRB does not seek in-person meetings during the course of a typical assessment process. In certain cases, it may be useful for an applicant to request a meeting with FIRB during an assessment process such as when there are significant points of contention that may be resolved more efficiently through a discussion. Before filing an application, it is possible to arrange a preliminary, introductory meeting with FIRB. Although FIRB will not provide any definitive guidance during this type of preliminary meeting, it can be a useful first step to introduce an applicant who does not have any prior history with FIRB and/or to elicit general insights from FIRB as to any potential areas of sensitivity that can be addressed before finalising and filing the application.	Section 1.4
What details of the general partners and limited partners of a fund need to be disclosed to FIRB?	When preparing a FIRB application, a private equity fund manager will need to provide information about the ownership and control of the manager, and the investors in the fund vehicles. The amount of upstream ownership information that should be provided to FIRB varies. The key is to provide FIRB with sufficient information to give it visibility and confidence as to who ultimately holds a certain investment and what their country of origin is. We recognise that there will often be a high degree of sensitivity around the provision of this information to FIRB, to the applicant entity itself and even to the external law firm preparing the FIRB application. Section 1.2 of this report sets out a range of practical strategies to manage the disclosure of upstream ownership information.	Section 1.2

Question	Answer	Further information
Is there a 'standstill' provision, prohibiting a transaction from closing pending approval by the Treasurer?	Yes, there are standstill provisions that apply once an application is filed. It is an offence under the FATA to complete (close) or otherwise proceed with a proposed transaction after notification (whether on a mandatory or voluntary basis) has been made to the Treasurer. This prohibition remains in place until either a no objection notification is issued or the Treasurer becomes unable to make any order in relation to the transaction due to a lapse of time. Transaction documents may be signed prior to obtaining a no objection notification provided there is a condition to closing relating to FIRB approval, and the agreement does not become unconditional prior to receipt of that approval.	NA
What are the sanctions for closing a transaction without FIRB approval?	Proceeding with a proposed transaction prior to receipt of FIRB approval may attract penalties which can range from infringement notices and divestiture orders, to civil and criminal penalties.	Appendix, Section 8
What interaction is there between FIRB and other Australian regulators and government agencies?	FIRB refers all transactions to Australia's competition (antitrust) regulator, the ACCC, for consultation. Similarly, the ATO reviews every FIRB application. There is a dedicated ATO division focused on foreign investment. Depending on the nature of the transaction and the industry, FIRB will also consult with a range of other government agencies.	Section 1.8
What conditions could FIRB attach to its approval?	The vast majority of FIRB applications are approved. Increasingly, however, FIRB approval is being issued subject to conditions which seek to address any perceived national interest concerns. The national interest is determined at the discretion of the Treasurer as advised by FIRB. Examples of the type of conditions that may be attached to a FIRB approval include: ■ tax conditions (standard and transaction specific); ■ cybersecurity conditions; ■ data access and control conditions; ■ proximity conditions which limit the type of construction and surveillance technology that can occur on certain pieces of land; ■ board and governance conditions (for example, requiring company headquarters to be maintained in Australia or to have Australian management in key positions); ■ reporting conditions; and	Appendix, Section 6

Question	Answer	Further information
	■ a requirement to maintain production facilities and other operations in Australia without loss of employment for a specified period. An applicant will have an opportunity to negotiate the nature and scope of these conditions with FIRB to ensure that they do not pose an unduly onerous administrative burden and/or operational constraint on the target business following closing. The desire to obtain FIRB approval as quickly as possible can sometimes lead foreign investors to accept whatever conditions FIRB seeks to impose, without careful thought as to how those conditions will apply on a practical, day-to-day basis. It is important that an applicant focuses carefully on the likely practical implications of proposed conditions before they are finalised, as once the conditions are finalised as part of an approval, it is difficult (albeit not impossible) to subsequently seek a variation of the conditions to attenuate any unduly onerous aspects. In practice, some conditions that may appear to be innocuous initially (for example, certain reporting conditions), can prove challenging or burdensome to comply with.	
How are targets and vendors seeking to manage FIRB risks in deals?	Given the uncertain timeframes associated with obtaining a FIRB approval and the possibility of conditions being imposed that may not be commercially viable to a prospective acquirer, we are seeing target companies looking to contractually allocate as much of the FIRB risk as possible to the acquirer. In a competitive sale process, a prospective acquirer may need to accept some of these FIRB risk allocation mechanisms, to give its offer the best prospect of succeeding.	Section 1.4

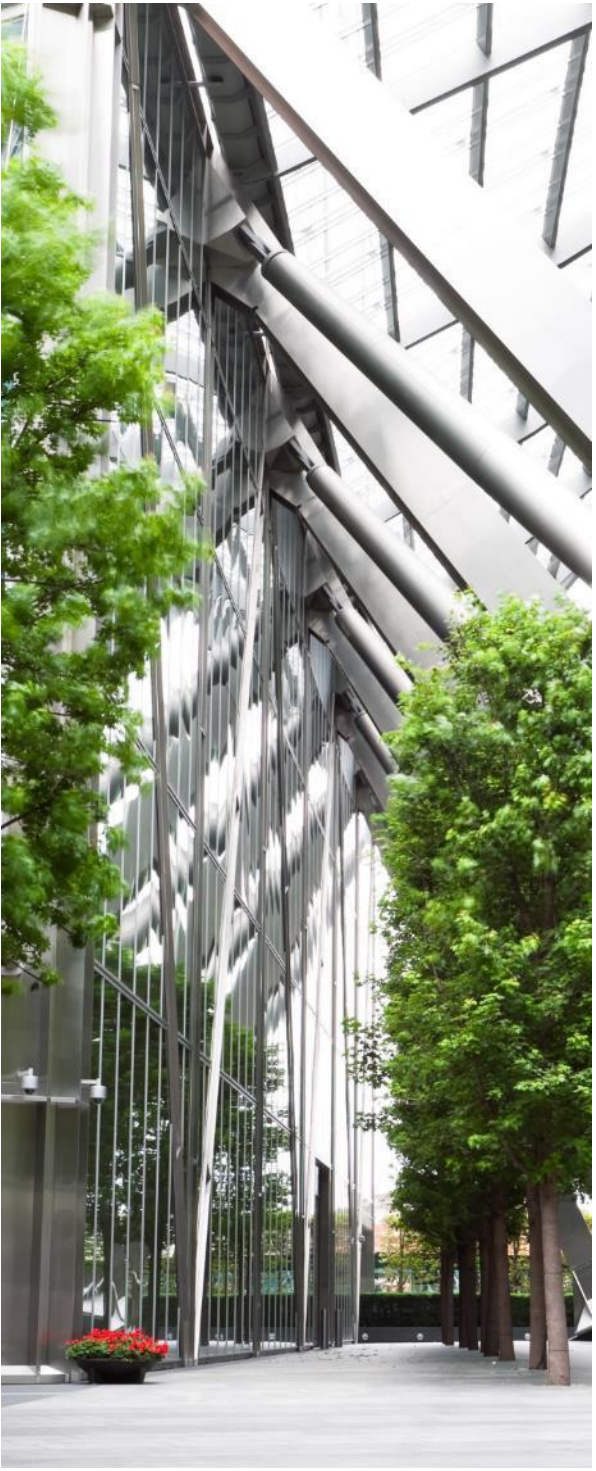
MinterEllison's full service Private Equity and FIRB capability

MinterEllison's Private Equity team has significant experience advising global and domestic private equity sponsors across the entire investment lifecycle, from fund formation and fundraisings, complex buyouts, distressed investments, bolt-on acquisitions, carve-outs, take-privates and leveraged finance, to supporting portfolio businesses through to exit via divestment or IPO. Our multi-disciplinary team has a thorough understanding of the mandates and objectives of private equity fund managers.

A Holistic Solution Across the Entire Private Equity Lifecycle

From fund formation and fundraisings, complex buyouts, distressed investments, bolt-on acquisitions, carve-outs, take-privates and leveraged finance; to supporting portfolio businesses through to exit via divestment or IPO – ***we deliver full in-house capability via our leading PE team***.

Clients value our ability to drive a transaction efficiently and to assist across the full spectrum of a private equity transaction and lifecycle, including tax-efficient structuring, risk & regulatory advice, ESG, regulatory advice, capital raises and portfolio management.



Now more than ever, navigating the regulatory aspects of private equity transactions is critical to their success. Our FIRB and broader regulatory team is one of the most prominent in Australia. Combining FIRB, ACCC and ATO expertise, MinterEllison provides an integrated and comprehensive regulatory offering.

In addition, our industry sector specialists assist clients in navigating highly regulated, sector-specific transactions including in the health, financial services, agribusiness, infrastructure and real estate sectors.

We pride ourselves on being able to identify necessary regulatory approvals as early as possible in the transaction process, and using our strong understanding of all key Australian regulators to determine the strategic options and pathways for progressing forward. We engage with regulators in a transparent and effective way to obtain approvals expeditiously.

FIRB – The foreign investment regulatory landscape is increasingly complex. As the Treasurer has total discretion to determine what is (and is not) in the national interest, there is inevitably a political dimension to Australia's foreign investment regime. MinterEllison has a dedicated team of specialists to help clients stay on top of Australia's fast-changing foreign investment regime. MinterEllison is among the firms that submit the largest number of applications to FIRB each year, and as a result we have fostered positive engagement with FIRB case officers and senior leaders. MinterEllison has seconded staff to FIRB and the current team at MinterEllison includes a former FIRB case officer.

ACCC – Proactive engagement with the ACCC is important because in many cases FIRB will, as part of its review process, consult with the ACCC. Our antitrust team has deep expertise in analysing the potential competition aspects of a transaction and engaging with the ACCC, including to secure ACCC approval to facilitate a smoother and more timely FIRB process. Our FIRB and antitrust teams routinely work together in close collaboration to meet our clients' needs in an integrated way.

ATO – Similarly, FIRB will consult with the ATO as part of the FIRB review process. The ATO's focus will be on ensuring that a transaction is not structured in a way that may cause improper tax leakage. Our tax specialists are accustomed to liaising with FIRB on tax related issues and can provide expert advice on dealing with tax conditions, which we are increasingly seeing imposed on FIRB approvals.

We understand Australia's foreign investment regime intimately - including what drives decision making within FIRB. We provide advice and solutions across the full spectrum of foreign investment and work with foreign clients to secure a successful outcome for their Australian investments that come within the FIRB regime.

Alberto Colla
Partner, Head of Foreign Direct Investment

Running a slick process with a hands-on team who properly understand our clients' key business drivers and objectives is essential to excellent deal execution. We pride ourselves in being trusted advisers to our clients by staying ahead of the curve across all aspects of a transaction, and finding pragmatic and creative solutions to complex legal issues.

Kimberley Low
Partner, Head of Private Equity

Appendix - Summary of Foreign Investment Regime

1. Overview of Foreign investment regulation in Australia

The foreign investment regime in Australia comprises:

- the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**);
- the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**);
- the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) (**Fees Act**); and
- the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth) (**Fees Regulations**).

Supplementing the above legislation is the Australian government's foreign investment policy[7] and the public guidance notes issued by FIRB on the interpretation and application of the rules.

Separate legislation (e.g. *Security of Critical Infrastructure Act 2018* (Cth)) imposes other requirements on foreign ownership in certain industries (e.g. media, aviation and banking). This report does not cover these industry specific requirements.

The FATA and the FATR give the Treasurer the power to review foreign investment proposals that meet certain criteria and to block any proposal that is assessed as being contrary to the national interest (or national security, as applicable), or apply conditions to the way a proposal is implemented, to ensure it is not contrary to the national interest (or national security, as applicable). Where risks to the national interest or national security are identified, the investment is typically approved subject to conditions designed to mitigate these risks. An investment is only prohibited if the Treasurer is satisfied that conditions cannot reduce the identified risks to an acceptable level. There have only been limited instances over the past two decades of the Treasurer prohibiting a proposed investment on the grounds of it being contrary to Australia's national interest (or national security).

Foreign investors who intend to acquire an interest in an Australian entity, business, or land, or start a new business may need to notify the Treasurer and seek clearance prior to completing the acquisition. The no objection notification issued by FIRB is commonly referred to as 'FIRB approval'.

The Treasurer is advised by FIRB, a division of the Department of Treasury. FIRB's role is to make an initial assessment of whether proposed foreign investments are contrary to Australia's national interest, based on a consideration of factors including national security, competition, taxation and the impact on the economy and community. FIRB then provides its recommendation to the Treasurer (or their delegate) to issue a formal decision. When assessing a FIRB application, FIRB will consult with relevant government departments and agencies including the ATO and the ACCC.

2. Who is captured by Australia's foreign investment regime?

2.1 Overview

Australia's foreign investment regime generally regulates foreign investment proposals by a 'foreign person'. A foreign person means:

- an individual not ordinarily resident in Australia;
- a corporation in which:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a 'substantial interest' (being at least 20%); 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 substantial interest' (at least 40%);
- the trustee of a trust where, in relation to the trust:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a 'substantial interest' (being a beneficial interest in at least 20% of the income or property of the trust); 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 substantial interest' (at least 40%);
- the general partner of a limited partnership where in relation to the limited partnership:
  - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a 'substantial interest' (being at least 20% – where 'interest' includes, relevantly, persons being entitled to distributions of capital, assets or profits of the 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 interest of 40% or more;
- a foreign government or foreign government investor (see Section 2.4 below).

Foreign holdings of less than 5%: When determining whether there is an aggregate substantial interest, if the entity has its primary listing

on the Australian Securities Exchange (**ASX**), it is not necessary to include foreign holdings that are less than 5% as these are not substantial holdings within the meaning of the *Corporations Act 2001* (Cth). That said, there are many ASX-listed entities that qualify as a private foreign person for FIRB purposes and whose day to day activities are subject to the FIRB regime.

2.2 Associates

A person holds an interest of a specified percentage in an entity, if it holds that interest alone or together with one or more 'associates' of the person. Therefore, when determining whether a particular investor holds a substantial interest, or two or more investors hold an aggregate substantial interest, consideration also needs to be taken of interests of associates of the investor. The definition of an associate is broad and includes relatives, persons acting in concert, or persons who carry on business in partnership.

Importantly for PE funds, a person is not an associate of another person if they are both partners of a limited partnership and at least one is a limited partner that does not participate in the management and control of the partnership, or of any of the general partners of the partnership. However, PE funds will often come within the definition of a foreign person due to the associate provision, when they comprise separate investment vehicles. Where a fund consists of several separate vehicles, each will be assessed individually as to whether it is a foreign person or an FGI, and the vehicles will generally be classified as associates on the basis that they are acting in concert. Therefore, decisions about the initial structure of a fund or subsequent changes to the fund's structure may have important consequences in terms of being caught under the foreign investment regime.

Foreign government entities and FGIs from the same country are deemed to be associates under the FIRB regime. In the context of PE funds, this means if several limited partners are FGIs from a single country, the general partner of the fund may be deemed to be a foreign person, if the economic interests held by FGIs from that single country in the fund aggregate to greater than 20%. FIRB acknowledges that there are circumstances where it would not be considered reasonable to expect an FGI to know that one or more other foreign government investors from the same country already hold, or are concurrently acquiring, interests in the target entity, or 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. For example, this may be the case where public regulatory disclosures in relation to the target entity do not disclose foreign government holdings or where a holding in the target entity is disclosed, but not identifiable, as being held by an FGI, and the FGI investor is otherwise not privy to this information. Similarly, there may be circumstances, including due to legal restrictions, where it is not reasonable for an entity or a collective investment vehicle to know that FGIs hold interests in the entity or vehicle that would make the entity, trustee or general partner an FGI.

2.3 Tracing interests held by upstream investors (legally and beneficially)

When assessing whether a person is a foreign person or an FGI, the ownership structure needs to be assessed and disclosed at each level upstream to the ultimate interest holders. This is because of the 'tracing provisions' under the FATA which apply at each level and upstream to the ultimate interest holders (both legal and beneficial – regardless of practical control). The effect of this is that if an upstream entity is a private foreign person or an FGI, and if that upstream entity holds a substantial interest (20% or more) in the downstream entity, the downstream entity will itself be deemed a foreign person or an FGI. For example, if an upstream FGI entity holds a substantial interest in a limited partner, the limited partner will be deemed an FGI itself. This is illustrated in **Figure 1** where the special purpose vehicle who is making the acquisition will be deemed a foreign person because of the substantial interest held by the upstream foreign corporation. The Australian fund entity will be deemed a foreign person due to the substantial interest held by the foreign corporation and in turn the special purpose vehicle will be deemed a foreign person due to the substantial interest held by the Australian fund entity.

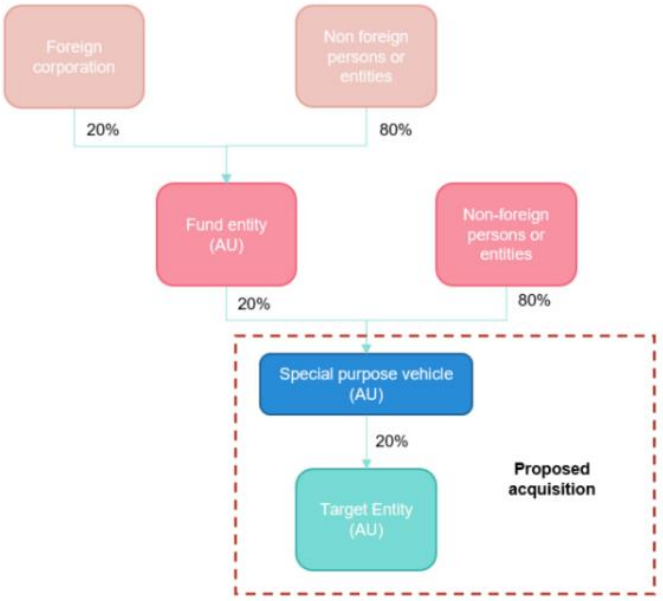


Figure 1: Tracing of substantial interests

2.4 Foreign government investors

Under the foreign investment regime, a foreign person includes a foreign government investor. Australia's FIRB regime deals with FGIs more onerously than private foreign investors. Proposed investments by FGIs in an Australian entity, business or land or a proposal by an FGI to start a new business in Australia are subject to a $0 monetary threshold. In effect, FGIs are almost always required to obtain FIRB approval for their proposed Australian investments.

This area of the regime is of particular importance to PE firms as upstream interest holders are often foreign government investors. Although these investors may be passive limited partners, the fund will be classified as an FGI if the relevant investment interest threshold is met, and the passive investor exemptions do not apply (see Section 2.5).

An investor will be a foreign government investor if it is:

- a foreign government or separate government entity;
- a corporation, or trustee of a trust, in which a foreign government or separate government entity holds a substantial interest (20% or more), alone or together with associates, or
- a corporation, or trustee of a trust, in which foreign governments or separate government entities of more than one foreign country hold an aggregate substantial interest, alone or together with associates.

If a fund is a limited partnership, the general partner will be a foreign person if either:

- 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), alone or together with any one or more associates, hold an aggregate interest of at least 40%.

FIRB takes a broad interpretation of separate government entities such that it captures state-owned enterprises, public pension funds, sovereign wealth funds and public university endowment funds.

Note: Foreign government investors 'originating' from the same country will be deemed associates regardless of whether they are related in an economic, operational or other way. As illustrated in **Figure 2**, although neither foreign entity individually hold a substantial interest, they will be deemed associates as they originate from the same country, and together they hold a substantial interest (greater than 20%) in the fund. Through tracing of substantial interests, the acquiring fund entity will be deemed a foreign government investor.

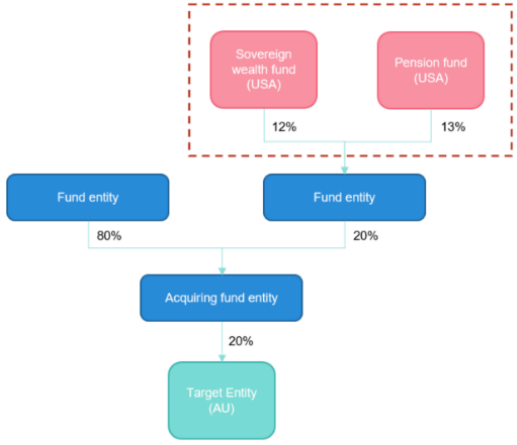


Figure 2: Onshore acquisition by a foreign government investor

Offshore ('foreign to foreign') transactions: If the transaction involves a foreign government investor acquiring an entity offshore of Australia and that target entity has one or more Australian subsidiaries, a de minimis exemption may be available (see Section 4.3).

2.5 Exemptions for passive foreign government investors

A new exception has been introduced to limit the operation of the FGI concept. In cases where FGIs from multiple countries hold an aggregate substantial interest (at least 40%) in an entity, the so-called 'passive FGI exemption' means that the entity will not be an FGI, provided that the upstream FGIs investors are only passive, and are not involved in the management of the entity. In such cases, investors have the option of obtaining a 'passive foreign government investor exemption certificate'. The result of this exemption certificate is that the investor will be treated by FIRB as being a private foreign person, and not an FGI. This means fewer investments by the entity will require FIRB approval, as it will benefit from the higher screening thresholds that apply to private foreign persons. Note that the passive FGI exemption is not available in cases where FGIs from one country hold an aggregate interest of 20% or more – even where they are not actively involved in the management of the entity.

Passive foreign government investors

Under the 'passive foreign government investor' exemption, the trustee or general partner of the fund will not be deemed an FGI if individual investors are not able to influence any individual investment decisions, or the management of any individual investments, of the corporation, trustee or general partner under the fund and do not hold any rights other than their passive investment return. This will

be the case for most PE funds that are structured according to Institutional Limited Partners Association (**ILPA**) principles. However, each investor and fund structure will need to be considered on an individual basis.

Funds may still benefit from this exemption if investors have some influence over the broad investment strategy or are able to participate in collective decision making in relation to the fund, but are not involved in individual decisions about particular investments. Examples include:

- being on an advisory committee; or
- being able to influence the broad investment strategy of the fund, e.g. requiring the fund to divest from a particular sector, or to only make investments that meet ethical investing criteria.

Passive foreign government investor exemption certificate

In situations where a fund is deemed to be an FGI because of a substantial interest held by a foreign government from one country and the passivity requirements for the exemption above are satisfied, the fund may apply for a passive foreign government investor exemption certificate (**EC**). FIRB will consider funds on a case by case basis to assess if the investors are passive. When assessing applications from investment funds which comprise investment vehicles, FIRB will consider the overall composition of the fund and its operation as a single economic entity.

2.6 Exemption certificates for bolt-on acquisitions

Exemption certificates operate as a mechanism to minimise regulatory burden. If an investor intends to complete a significant number of similar investments over a certain period of time, they may apply for an EC, which requires the investor to provide similar information to that required in support of an application for a no objection notification. An EC will allow funds to obtain approval for a series of similar investments over a set period so that FIRB approval is not required for each individual investment. ECs may be a valuable option for PE firms and their portfolio companies that are deemed to be FGIs as a result of passive upstream investors.

A key part of FIRB's assessment of applications for ECs involves considering the investor's previous acquisitions of Australian assets as well as their compliance with Australian law. The Treasurer will not typically grant an EC to funds investing in Australia for the first time. For investors being granted an EC for the first time, FIRB will normally limit the EC to a 12-month validity period. Thereafter, once an investor has been able to demonstrate compliance with Australia's foreign investment regime, they can be eligible for longer-term ECs (being up to 3 years).

When applying for an EC, in addition to the information provided in a typical FIRB application (see Section 1.1), funds need to provide details of the scope and value of the proposed acquisitions, the sectors the interests will be acquired in, the size of the proposed acquisitions relative to existing market share, and the total maximum consideration for the program of acquisitions, which will be used as a financial limit under the EC.

For bolt-on acquisitions, full details of the target entities may not be known at the time of making a FIRB application – and this is not problematic. Investors will, however, have to have a sufficiently detailed idea about the sectors in which they will invest, what the potential target entities or assets may be and the nature of the businesses in which they will acquire interests.

2.7 Mandatory versus voluntary notification

A proposed foreign investment that qualifies as a 'notifiable action', a 'notifiable and significant action' or a 'notifiable national security action' will require FIRB approval (**mandatory notification**). On the other hand, if the proposed foreign investment qualifies only as a 'significant action' or a 'reviewable national security action', it is at the investor's discretion to notify the Treasurer and seek FIRB approval (**voluntary notification**). As detailed below in Section 2.8, whether or not a proposed action will trigger a mandatory notification requirement will depend on whether the investor is a private foreign person or an FGI, and the specifics of the target interest being acquired. In the case of a proposed action that triggers only a voluntary notification, an assessment should be made as to whether the advantages of making such a notification outweigh the disadvantages. Section 1.5 above outlines some of the advantages and disadvantages of making a voluntary notification.

Proposed acquisitions that are subject to foreign investment review may be screened under a 'national interest test' or a narrower 'national security test'. Most investments are assessed under the national interest test where they meet the thresholds for a mandatory notification under the FATA.

Irrespective of whether a mandatory or voluntary notification is being made to FIRB, the process requires submitting an online application that is principally supported by way of a written covering letter. The covering letter will identify the action(s) for which approval is being sought, why the proposed transaction is captured, information about the acquiring entity and target, and the details of the transaction. When a fund is making the acquisition itself, the general partner will apply as the applicant on behalf of the fund. If the acquisition is being made

by a portfolio company or special purpose vehicle, they will be the applicant. However, details of the funds involved and their ownership structures, will still need to be provided in a FIRB application. Please see Section 1.1 for a discussion of practical considerations to keep in mind when making a FIRB application.

2.8 Types of actions that require mandatory FIRB approval

In order for a proposed investment to be classified as one of the following actions that require a mandatory FIRB notification, the economic value (consideration) for the proposed action must also be above the relevant monetary screening threshold as discussed below in Section 3.

Table 1: Types of actions that require mandatory FIRB approval

Notifiable action	A private foreign person must apply for and receive prior FIRB approval if: ■ acquiring an interest of 20% or more (a **substantial interest**) in an Australian entity; ■ acquiring an interest of 10% or more (a **direct interest**) in an Australian entity or Australian business that is an agribusiness; or ■ acquiring an interest in Australian land.
Notifiable and significant action	A foreign government investor must apply for and receive prior FIRB approval if: ■ acquiring a **direct interest** in an Australian entity or an Australian business (10% or more or the ability to influence, participate in or control the entity or business); ■ acquiring an interest in Australian land; ■ a legal or equitable interest in a mining, production or exploration tenement; or ■ starting a new Australian business.
Notifiable national security action	A foreign person (whether a private foreign person or a foreign government investor) must apply for and receive prior FIRB approval if: ■ starting a national security business; ■ acquiring a **direct interest** in a national security business (10% or more or the ability to influence, participate in or control the entity or business); ■ acquiring a **direct interest** in an entity that carries on a national security business; ■ acquiring an interest in Australian land that is national security land; or ■ acquiring a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.

National security actions

Since 1 January 2021, both private foreign investors and foreign government investors are required to obtain FIRB approval where they propose to take a notifiable national security action.

A national security business (**NSB**) is a broad concept that can capture businesses concerned with critical infrastructure, telecommunications, or defence and intelligence. A critical infrastructure asset, which is defined under the *Security of Critical Infrastructure Act 2018* (Cth), is one that is essential to the functioning of the Australian economy, society or national security.[12] It includes assets within the following sectors: communications, financial services and markets, data storage or processing, water and sewerage, transport, health care and medical, space technology, food and grocery, energy, higher education and research, and the defence industry.

The national security concept can also extend to interests in land. National security land is generally land that holds a defence premises or where it is publicly known (or could be known upon the making of reasonable enquiries) that a national intelligence agency has an interest in land.

3. Scope of application of Australia's foreign investment regime to PE firms

When determining whether a proposed transaction is an action that requires mandatory FIRB approval, there are three threshold questions for a fund to consider:

1. Does the fund qualify as a 'foreign person' (either a private foreign person or an FGI)? See the guidelines in Section 2 above.

If the answer to this first threshold question is 'No', the FIRB regime does not apply and the remaining two questions are not relevant. If the answer is 'Yes', the remaining two questions are relevant.

2. Is the interest being acquired in the Australian target above the relevant percentage threshold?

If the answer to this second question is 'No', the FIRB regime does not apply and the third question is not relevant. If the answer is 'Yes', the remaining third question is relevant.

3. Is the proposed transaction above the relevant monetary threshold?

If the answer to this third question is 'No', the FIRB regime does not apply (but a voluntary FIRB application may still be appropriate). If the answer is 'Yes', the FIRB regime applies and a mandatory FIRB application will be required.

Set out below are some high level observations on each of these threshold questions.

Does the fund qualify as a private foreign person or a foreign government investor?

This first question is central, as FIRB is only required to be notified of actions that will be taken by a private foreign person or an FGI. Ultimately, the answer to this first question is highly fact specific. A pragmatic view – that the fund is not a private foreign person or an FGI – should only be taken if there is a reasonably firm basis for that position. The legal and reputational consequences of completing an acquisition without FIRB approval, in circumstances where FIRB might reasonably conclude that it is required, can be serious. FIRB monitors media coverage and public announcements and the Treasurer has multiple enforcement tools that it can use in addition to seeking criminal and civil penalties. This can put the transaction at risk of being unwound and may significantly impact the entity's standing in the market.

Whether the acquiring entity is a private foreign person or an FGI is assessed on the basis of the identities and interests held by the investors in the fund. The ownership structure must be traced at each upstream level up to the ultimate interest holders such that an ultimately small investment in the fund can result in it being classified as a foreign person or an FGI. Many private equity funds, and by extension their portfolio companies, will be deemed to be FGIs as a result of the application of these rules.

Is the interest being acquired in the Australian target above the relevant percentage threshold?

Whether a private foreign person or a foreign government investor needs to notify FIRB of a proposed investment in an entity or business depends on the percentage interest that will be acquired in the target. The legislation uses the following terms to classify specific levels of interests: 'substantial interest', 'aggregate substantial interest' and 'direct interest' (see Table 2). An investor will only be required to seek FIRB approval if it is acquiring a sufficient level of interest in the target.

Table 2: Different types of regulated interests

Substantial interest	A person holds a substantial interest (in an entity, trust or unincorporated limited partnership) if the person holds an interest of at least 20% in the entity or partnership, or of the income or property of the trust. A person is also deemed to have a substantial interest if the person has the power to veto any resolution of the board, central management or general meeting of an entity or unincorporated limited partnership.
Aggregate substantial interest	Two or more persons hold an aggregate substantial interest in an entity or trust if they hold an aggregate interest of at least 40% in the entity, or beneficial interests in at least 40% of the income or property of the trust. Note: For limited partnerships, the term 'aggregate substantial interest' is not applied. However, to determine whether the general partner of a limited partnership is an FGI, one of the limbs of the test is whether multiple foreign persons hold an 'aggregate interest of at least 40%' in the limited partnership. Where this is so, the general partner of the limited partnership will be an FGI.
Direct interest	A direct interest is: ■ an interest of at least 10% in an entity or business; ■ an interest of at least 5% in the entity or business if the person who acquires the interest has entered into a legal arrangement[13] relating to the business of the person and the entity or business; or ■ an interest of any percentage in the entity or business if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or to influence, participate in or determine the policy of the entity or business. **Important!** Do not be misled by the term 'direct interest' – a person can, by virtue of the application of the tracing rules, acquire a 'direct interest' indirectly. Remember also that the 'interest' includes the interests of associates.

Is the proposed transaction above the relevant monetary threshold?

Assuming the investor is a foreign person and they are acquiring an interest in an entity or business above the relevant percentage threshold, the final question is whether the transaction is above the relevant monetary threshold. The concept of the monetary threshold is a means of filtering out low-value transactions from the FIRB process. In most cases, whether the monetary threshold is met is determined by ascertaining the value of the consideration for the transaction. However, for acquisitions of interests in entities (i.e., shares in corporations or units in unit trusts), whether the monetary threshold is met is assessed by reference to the higher of: (a) the total issued securities value of the target; and (b) the total asset value of the entity.

The thresholds that are applicable to common transactions involving funds are listed in Table 3.[14]

The monetary threshold for all investments by FGIs is $0. This means that PE funds which are categorised as FGIs will need to seek FIRB approval for all acquisitions of a relevant interest regardless of the consideration of the transaction or value of the target.

Table 3: Monetary thresholds (as at 1 January 2024)

Investor type	Action	Monetary threshold
All foreign investors (i.e. both private foreign investors and foreign government investors)	National security business Australian media business	$0 $0
Foreign government investors	All investments	$0
Private foreign investors from FTA country[15]	Sensitive business Non-sensitive business	$330 million $1,427 million
Private investors not from FTA country	Sensitive and non-sensitive businesses	$330 million

4. Common types of PE investment structures and FIRB

4.1 Direct investments

Foreign direct investment (**FDI**) refers to investment in an enterprise or asset where the foreign investor has control or a significant degree of influence over management. Generally, investment is considered to be 'direct' when an investor has 10 per cent or more of the voting power in the company. Direct debt investment is debt between related parties.[16]

Often, private equity funds utilising direct investment will undertake a roll-up and add on strategy whereby new smaller funds and companies are set up for acquisition purposes. These acquisitions tend to not require FIRB approval due to their small size. However, as discussed above, if the fund is classified as an FGI, most acquisitions and subscriptions for new shares in the Australian target will be notifiable actions and therefore require FIRB approval. Further, if the Australian target is a national security business, FIRB approval will be required to acquire a direct interest in the entity (regardless of its size or the value of consideration).

4.2 Portfolio investments

Foreign portfolio investment refers to the purchase of equity (such as shares) and debt securities (such as bonds), where the foreign investor does not have any controlling interest or influence in the asset or company. Private equity firms who engage in portfolio investing can often be unwittingly captured by the FGI investor restrictions. This is because FGIs include foreign governments and their affiliated agencies which include state owned enterprises, public universities, pension and wealth funds.

As discussed above, if the fund is classified as an FGI, all acquisitions regardless of the level of passivity in the fund will be notifiable events. This issue has been partially dealt with through the exemption certificate for investors who retain the requisite passive interests in a portfolio fund and meet other criteria discussed in Section 2.6.

4.3 Offshore (foreign to foreign) transactions

An offshore (or 'foreign to foreign') transaction is one in which a foreign person is directly acquiring shares in a target that is not an Australian entity but where that target nevertheless has one or more downstream Australian subsidiaries. In an offshore transaction, the tracing rules are generally 'switched off', meaning FIRB approval is not required for the acquisition of a 'traced' interest in the downstream Australian entity as a result of the offshore acquisition. Accordingly, offshore acquisitions of securities in a foreign entity may be significant actions but not notifiable actions. Funds that do not have investors that are FGIs still need to be aware of the foreign investment regime and may still submit a FIRB application on a voluntary basis to notify the Treasurer of a significant action.

In an offshore ('foreign to foreign') transaction, the tracing rules are 'switched on' only if the any of the following apply:

- the acquirer is an FGI – but note the potential availability of the de minimis exemption if the value of the Australian component of the transaction is below the asset threshold outlined below (however the de minimis exemption is not available if the Australian target is a national security business or another 'sensitive' business);
- the overseas target or any of its Australian subsidiaries is carrying on a national security business or is otherwise in a sensitive sector; or
- an Australian subsidiary of the overseas target is an 'Australian land entity'.

Funds with FGI holdings need to be aware of the applicability of the tracing provisions, as in many cases, where the target entity is an offshore entity, an acquiring entity may not know that the target entity holds securities in an Australian entity.

Note: An acquisition involving an Australian land entity (an agricultural land corporation, an agricultural land trust, an Australian land corporation or an Australian land trust) will require FIRB approval if the relevant monetary threshold is met and if after the acquisition, the foreign person, alone or together with one or more associates, holds an interest of:

- 10 per cent or more in the land entity where the land entity is unlisted; or
- 10 per cent or more in the land entity where the land entity is listed on a stock exchange; or
- any percentage in a listed or unlisted land entity and the foreign person is in a position to influence or participate in the central management and control of the land entity, or to influence, participate in or determine the policy of the land entity; or
- any percentage in an unlisted land entity if the land entity carries on a business that includes investing directly or indirectly in established dwellings.

De minimis exemption

When an FGI is acquiring a 'traced' direct interest in an Australian entity through an offshore transaction, a de minimis exemption may be available. The exemption applies if:

- the total value of the target's Australian assets is less than A$67 million;
- the total value of the target's Australian assets represents less than 5% of the value of the target's total assets; and
- none of the target's Australian assets are assets of a national security business or sensitive business.[17]

4.4 Internal reorganisations

There is no general exception under the FIRB regime for internal reorganisations within a corporate group that involve an Australian entity, business or Australian land. Further, FIRB approval may be required even where there is no change in the ultimate upstream owner. If, following completion of a proposed transaction, the foreign acquirer proposes to transfer its interest in the target to another entity wholly owned by the acquirer, this could raise a separate notifiable action for FIRB purposes. Fee relief is available where a transaction notified to FIRB qualifies as an internal reorganisation. In this case, the applicable FIRB filing fee is a flat fee of A$28,200.

Acquisitions of an interest in the securities of another entity, the assets of another entity or Australian land will be treated as an internal reorganisation where both the acquiring and disposing entities belong to the same corporate group (e.g., are subsidiaries of the same holding entity). The FIRB rules treat each entity within a group as having a separate legal identity. The practical effect of this is that each step within an internal reorganisation needs to be separately assessed for FIRB purposes, even though all or some of the steps are inter-dependent. When one entity (entity A) acquires assets of or securities in another entity (entity B) this can amount to an action for FIRB purposes (i.e., entity A acquiring an interest in entity B) even if both entities are subsidiaries of the same parent company. A mandatory FIRB filing requirement would arise where an entity is a foreign person and proposes to acquire an interest in the target over the relevant interest and monetary thresholds. For FIRB purposes, it does not matter that, at the time of internal reorganisation, the target is owned by an entity within its corporate group (although as we have noted previously, the FIRB application fee for such a transaction would be capped at A$28,200).

4.5 Filing fees

A fee is payable to the ATO by the applicant when lodging an application. Generally, FIRB will not commence the application assessment process until payment is received. The fee payable will depend on the type of action, the value attributable to the proposed transaction (which is generally assessed by reference to the consideration within the meaning of the FATA) and whether any special fee rules apply under the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth). The fee will increase in relation to the value of the proposed transaction.

Table 4: The following table is a summary of the different fee tiers for single actions involving residential land, agricultural land, commercial land, tenements, businesses and entities.

Consideration for the action			Applicable fee			
Residential land[18]	Agricultural land[19]	Commercial land, tenements, businesses and entities[20]	Fee for single action	Fee for single reviewable national security action (**RNSA**)	Fee for exemption certificate	Fee for RNSA exemption certificate
Less than $75,000	Less than $75,000	Less than $75,000	$4,200	$1,050	n/a	n/a
$1 million or less	$2 million or less	$50 million or less	$14,100	$3,525	$21,150	$7,050
$2 million or less	$4 million or less	$100 million or less	$28,200	$7,050	$42,300	$14,100
$3 million or less	$6 million or less	$150 million or less	$56,400	$14,100	$42,300	$21,150
$4 million or less	$8 million or less	$200 million or less	$84,600	$21,150	$42,300	$28,200
$5 million or less	$10 million or less	$250 million or less	$112,800	$28,200	$105,750	$35,250
…	…	…	…	…	…	…
Over $40 million	Over $80 million	Over $2 billion	$1,119,100 maximum fee	$279,775 maximum fee	$839,325 maximum fee	$279,775 maximum fee

Table 5: The following table summarises the applicable fees for some of these actions. A lower, flat fee may be available for transactions that meet certain criteria.

Kind of action	Applicable fees ($A)
Starting an Australian business (including starting a national security business)	$4,200 flat fee
Entering agreements and altering documents	$28,200 flat fee
Internal reorganisations	$28,200 flat fee
Passive foreign government investor exemption certificate	$111,800 flat fee
Residential land (new dwellings) exemption certificate	$60,600 application fee plus 6 monthly reconciliation fee based on the number of, and consideration payable for, dwellings acquired by foreign persons
Residential land (near-new dwellings) exemption certificate	

4.6 Single agreement rule

An applicant may give notice, at the same time, of multiple actions that are proposed to be taken, or have been taken, under the same agreement. The fee is calculated by treating those multiple actions as if they were a single action with a consideration equal to the total consideration of all those actions. Regardless of the number of actions taken, the fee for a single agreement is capped at $1,119,000 (or $279,775 if the single agreement only involves reviewable national security actions) and this figure is indexed each financial year.

4.7 Variation applications

A separate fee is payable for an application made to vary an existing approval. The fee payable is dependent on the materiality of the variation requested. Where a variation is not of an immaterial or minor nature the fee will be $28,200 and where a variation is of an immaterial or minor nature the fee will be $4,200. However, where an applicant is seeking to vary a notice and originally paid a lower fee when first notifying the Treasurer, the fee payable to vary that no objection notification, notice imposing conditions or exemption certificate will be capped at the lower initial application fee.

5. Timing

There is a 30-day statutory period for a decision to be made and the applicant must be notified of the decision within 10 days of it being made. The 30-day statutory timeframe will begin once the application fee is paid (see fees discussion above). However, in practice, the 30-day statutory period is rarely met.

If, as is usually the case, a decision has not been made within the 30-day statutory period, FIRB will suggest that the applicant ‘request’ an extension of time for FIRB to conclude its assessment. If the applicant does not take up this suggestion and 'request' an extension, the Treasurer has the power to issue an interim order to prohibit the proposed

transaction from occurring and give themselves (or their delegate) an additional 90 days to assess the application. These orders are made publicly available and are published in the Commonwealth Government Gazette. Therefore, in practice, an applicant will generally always accommodate FIRB's suggested extension 'request' to keep the transaction (and the fact that a FIRB application in respect of it has been made) from being made public. Multiple extensions are common. The practical effect of the statutory timing regime including the Treasurer's interim order and extension powers is that there is no hard cap or maximum deadline within which FIRB must make a decision.

In the quarter 1 January – 31 March 2023, FIRB reported that the median processing time for approved commercial investment proposals was 42 days (six weeks). However, this median should not be treated as a general indicative guide to timing. In our experience, a more realistic indicative guide is eight to 12 weeks. The processing time for any application will be highly dependent on the specific details of the transaction including the country of origin of the private equity fund, the sensitivity of the target business, the transaction value (higher value deals typically take longer to approve because FIRB and the ATO will carefully scrutinise funding sources and acquisition structure to ensure that there is no risk of improper tax leakage) and whether the filing coincides with the lead up to FIRB's annual shutdown period or with FIRB going into caretaker mode in the lead up to a Federal election (which generally occurs every three years).

6. Conditions attached to FIRB approvals

FIRB approval may be granted on an unconditional basis or subject to conditions the Treasurer deems necessary to ensure that the transaction is not contrary to Australia's national interest or national security. Whether FIRB recommends imposing conditions on any approval will depend on the outcome of the application assessment process. As part of the assessment process, FIRB will consult with external government agencies (such as the ATO, ACCC, Home Affairs, among others) and may also request additional information from the applicant as required by the external government agencies (**Consultation Process**). The responses to these requests for information will assist in informing the external government agencies' recommendation to FIRB of whether the transaction may proceed and whether conditions should be applied to FIRB's approval. The final conditions will be influenced by a range of factors including the risk profile associated with the specifics of the transaction, the acquiring entity (including the character of the investor and its upstream makeup) and the target involved.

Examples of the type of conditions that may be recommended include:

- tax conditions (standard and transaction specific);
- cybersecurity conditions;
- board and governance conditions (for example, requiring company headquarters to be maintained in Australia or to have Australian management in key positions);
- data access and control conditions;
- reporting conditions; and
- a requirement to maintain production facilities and other operations in Australia without loss of employment for a specified period.

Prior to the issue of a FIRB approval, an applicant will have an opportunity to negotiate with FIRB the nature and scope of the conditions proposed to be applied to the approval. This process is called the 'natural justice' process (**Natural Justice Process**). This process seeks to ensure that the conditions do not pose an unduly onerous administrative burden and/or operational constraint on the acquiring entity or target business after closing. It is important that an applicant uses this opportunity to carefully consider the likely practical implications of conditions before they are finalised because once conditions have been issued as part of an approval, it is difficult (albeit not impossible) to subsequently seek a variation of the conditions to attenuate any unduly onerous aspects.

Tax conditions

The most common conditions imposed on a FIRB approval are the 'standard' and 'additional' tax conditions. That is, as a condition of the applicant being allowed to proceed with a transaction subject to an approval, the acquiring entity may, among other things, be required to provide confirmation of certain aspects of their tax affairs, pay outstanding tax debts, and provide a range of information to FIRB and the ATO about the proposed transaction. These tax conditions may capture the following:

Capital gains tax	Transfer pricing	Low tax jurisdictions	Consolidations
Withholding taxes	Debt and equity risks	Thin capitalisation	Tax avoidance
Tax liabilities on future disposals	The provision of relevant information	Particular use of structures	

When imposing tax conditions, consideration will be had to the complexity of the proposed investment (including the financing and acquisition structuring arrangements), previous interactions with Australia's tax system and the level of certainty the applicant can provide in relation to the details of the action.

If following the Consultation Process and the Natural Justice Process, an action is considered a particular risk, additional tax conditions may be imposed. Examples of 'additional' tax conditions include that within 90 days of the transaction completing, the acquiring entity must:

- *'Provide a copy of the most recent audited financial statements for the target entity, or, if audited financial statements are not available, the latest financial records or unaudited financial statements.'*
- *'State if the ultimate unitholders or shareholders (either directly or indirectly via a wholly owned subsidiary or associate) propose to borrow from a third party for the purpose of financing part or all of the proposed acquisition. If yes, provide the following information for each third party loan: the lender's name, the amount, the currency used, and the rate of interest (including AUD equivalent interest rate).'*

Any tax conditions will apply to the acquiring entity (i.e. the applicant). The applicant cannot be held liable for existing tax liabilities of the target through FIRB. However, FIRB may impose a tax condition on the applicant requiring it to ensure that entities within its control group (e.g. the target post-completion) do certain things. For example, one of the 'standard' tax conditions is that:

- *the applicant use its best endeavours to ensure, and within its powers must ensure, that entities within its control group pay any outstanding taxation debt under Australian law, which is due and payable at the time of the proposed transaction.*
- *the applicant use its best endeavours to ensure, and within its powers must ensure, that entities within its control group pay any outstanding taxation debt under Australian law, which is due and payable at the time of the proposed transaction.*

FIRB has also introduced increasingly bespoke tax conditions on FIRB approvals. These can include the requirement to disclose any contractual agreements related to the transfer of intellectual property offshore, irrespective of whether this relates to an intercompany transfer or divestment to a third party, whether before or after closing. FIRB's focus on tax related disclosure and use of tax conditions will be a key area to watch in 2024, as the Australian Treasurer has publicly stated that he wants a 'robust and rigorous' FIRB regime to ensure there is no improper tax revenue leakage out of Australia.

7. Register of Foreign Ownership of Australian Assets

On 1 July 2023, the ATO introduced the Register of Foreign Ownership of Australian Assets (**Register**), which is governed by the FATA and related legislation. Foreign investors are required to report certain actions and circumstance events in relation to investments in Australian assets to the ATO. Notification is made by giving a 'register notice' and is typically required within 30 days of the date of the action or circumstance event being notified.

Prior to the Register, foreign persons were required to notify the ATO of certain water interests and agricultural or residential land interests on separate registers. The Register consolidates and replaces these registers, expands on these obligations and captures a broader range of interests acquired by foreign investors than before. The Register covers, amongst other things, the acquisition and divestment of certain interests, changes in the characterisation of the investment, and changes in investors' circumstances (for example, an investor ceasing to be a foreign person).

Table 6: Impact on private equity firms

Interests in Australian entities and businesses	Consistent with the prior system of reporting, investors must provide notification when acquiring an interest in an entity or business where the transaction was covered by a no objection notice. In addition and importantly, for private equity firms, changes in a person's interest in a business or entity of more than 5% will require notification to the Register. This extends to passive changes in interests, for example where not partaking in a capital raise may dilute a person's shareholding by 5% triggering a notifiable event. Portfolio investors therefore need to continuously monitor whether concentrating or diluting their holdings will require notice to the Register.
Interests in Australian land	For land interests, the Register goes beyond the FIRB notification requirements which existed before the commencement of the Register. The Register is broader than the FIRB reporting regime and captures certain transactions that otherwise do not require FIRB approval. Most acquisitions of interests in Australian land (other than equitable interests) within the meaning of the FATA will need to be reported to the Register, regardless of whether FIRB approval is required or not.

For more information on the Register, please see the technical update published on our website here.

8. Non-compliance with FIRB obligations

There are significant criminal and civil penalties for noncompliance with the FATA. This includes, for example, a failure to make a mandatory notification, or proceeding with a transaction prior to receiving approval (including whilst an application for approval is being assessed by FIRB. In addition, the Treasurer has a range of enforcement powers.

Table 7: Enforcement powers and penalties

Enforcement powers

Enforcement powers for noncompliance with the FATA include:	the power to impose administrative payments under an infringement notice regime;
	the power to make an order which is directed at unwinding the action by requiring disposal of the interest by the acquirer;
	access to premises with consent or by warrant to gather information in order to monitor compliance with the FATA; and
	the power to accept and enforce undertakings relating to compliance with the FATA.

Criminal penalties

The maximum criminal penalty available for non-compliance with FATA is the following:	for an individual – 10 years' imprisonment or 15,000 penalty units or both;
	for a corporation – 150,000 penalty units

Civil penalties

The maximum civil penalty available for non-compliance with FATA is the lesser of the following:	$555 million AUD; or
	the greater of the following: ■ $1.1 million AUD (or $11.1 million AUD if the person is a corporation); and ■ an amount determined by reference to the value for the action.

Endnotes

[1] See Preqin and Australian Investment Council's Yearbook 2023 available online here: https://www.aic.co/common/Uploaded%20files/Preqin/2023yearbook/AustralianPrivateCapitalMarketOverview-2023-Final.pdf.

[2] See Preqin and Australian Investment Council's Yearbook 2023 available online here: https://www.aic.co/common/Uploaded%20files/Preqin/2023yearbook/AustralianPrivateCapitalMarketOverview-2023-Final.pdf.

[3] Private equity firms face pressure as dry powder hits record $2.59 trillion | S&P Global Market Intelligence (spglobal.com).

[4] https://www.abs.gov.au/statistics/economy/international-trade/international-investment-position-australia-supplementary-statistics/latest-release

[5] https://www.abs.gov.au/statistics/economy/international-trade/international-investment-position-australia-supplementary-statistics/latest-release Direct Investment means financial transactions and positions between two parties in a direct investment relationship. A direct investment relationship exists if an investor has an equity interest in an enterprise resident in another economy of 10 percent or more of the voting power (i.e. ordinary shares or voting stock). Portfolio Equity Investments means transactions and positions in equity securities (apart from direct investment and reserve assets). In comparison with direct investment, a Portfolio Equity Investment is one where the investor is not assumed to have any influence in the operation of the enterprise.

[6] See FIRB's proposal checklist, available online here: https://foreigninvestment.gov.au/getting-started/proposal-checklist.

[7] https://www.afr.com/policy/tax-and-super/private-equity-tax-plans-in-chalmers-sights-20231123-p5emak.

[8] See FIRB's proposal checklist, available online here: https://foreigninvestment.gov.au/getting-started/proposal-checklist.

[9] For example, in the rare instances in which the Treasurer rejects a proposed investment.

[10] To be eligible for the FTA partner thresholds, the immediate acquirer must be an entity formed in an FTA partner country. An investor making an acquisition through a subsidiary incorporated in another jurisdiction will be subject to the relevant thresholds of that jurisdiction. The FTA partner countries include the United States, New Zealand, Chile, Japan, the Republic of Korea, China, Peru, Singapore, Hong Jong and the United Kingdom, as well as countries (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is in force (i.e. Canada, Mexico, Malaysia and Vietnam).

[11] See Australia's Foreign Investment Policy, available here: https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-06/AUSTRALIAS_FOREIGN_INVESTMENT_POLICY.pdf

[12] Critical infrastructure asset is defined in the Security of Critical Infrastructure Act 2018 (Cth).

[13]The term 'legal arrangement' is not defined but could include, for example, an offtake agreement.

[14] Monetary thresholds are indexed annually on 1 January and are available online: https://firb.gov.au/general-guidance/monetary-thresholds.

[15] Different monetary thresholds apply for free trade agreement countries (FTA countries) or regions including: Canada, Chile, China, Hong Kong, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, South Korea, the United States of America and Vietnam. In practice, the higher thresholds for FTA countries rarely apply because there must only be entities from the FTA country upstream from the acquiring entity. If there is an Australian SPV, normal thresholds will apply.

[16] This definition of FDI is in line with the International Monetary Fund's (IMF's) Balance of Payments and International Investment Position Manual (BPM6), which the Australian Bureau of Statistics follows in most of its national accounts and international investment statistics (ABS 1998; IMF 2009). The definition of FDI used by the IMF is based on the Organisation for Economic Cooperation and Development's (OECD's) Benchmark Definition of Foreign Direct Investment (2008). The term 'direct interest' as defined in section 16 of the FATR is consistent with the IMF's concept of FDI.

[17] Sensitive businesses include those in the media, telecommunications and transport sectors, and businesses involved in the extraction of uranium or plutonium, or the operation of nuclear facilities.

[18] Fee tiers increase every $1 million of consideration up to the maximum fee.

[19] Fee tiers increase every $2 million of consideration up to the maximum fee.

[20] Fee tiers increase every $50 million of consideration up to the maximum fee.

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