

An overview of Australian foreign investment regulation

The Australian Government encourages foreign investments that are consistent with the country's national interest.

The Australian foreign investment regime comprises the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), the relevant FATA regulations and the Federal Government's Foreign Investment Policies.

The Australian Federal Treasurer is ultimately responsible for making decisions under the regime and the Foreign Investment Review Board (FIRB) administers FATA and makes recommendations to the Treasurer in respect of foreign investments proposals.

FIRB approval and timing

Generally, a foreign person or persons and their associates must seek FIRB approval prior to acquiring 15% or more in an Australian corporation that has assets valued at A\$231million or more. There are exceptions to this rule of thumb. For example, there are no thresholds for:

- investment from a state owned enterprise (SOE) or a foreign government; or
- acquisition of an interest in "Australian urban land" (for example, a mining lease),

which both generally require FIRB approval regardless of the percentage interest or dollar amount. (see page 3 Acquiring 15% or more – Do you need FIRB approval?).

Obtaining FIRB approval prior to making an acquisition is compulsory in some circumstances. Where FIRB approval is not compulsory, voluntarily notifying FIRB of the proposed transaction and seeking FIRB approval protects the acquirer against the Treasurer making adverse orders in relation to the approved transaction. An adverse order could include a divestiture order.

Once FIRB has received an application seeking FIRB approval, the Treasurer usually has 30 days in which to respond. However, if the Treasurer requires more time, the usual practice is for the acquirer to withdraw and reodge the application, which extends the time for a decision by 90 days).

Guideline for state owned enterprises and foreign governments

All SOEs, foreign governments and/or their related entities must seek FIRB approval prior to making a direct investment in Australia, regardless of the value of the investment.

The Australian Government does not have a policy of prohibiting investments from SOEs and/or foreign governments, but it looks at the overall proposal to determine whether such investments may be contrary to the national interest.

Key issues

Approval and timing

Acquisitions by SOEs and foreign governments

Is FIRB approval required?

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In reviewing the investment proposal, the Australian Government may consider:

- whether the investor is pursuing a commercial goal or broader political or strategic objectives that may be contrary to Australia's national interest;
- whether the investor is operating on an arms' length and commercial basis; and
- assess whether potential control by a foreign government could be asserted e.g. through the investor's governance arrangements or through the investor's funding arrangements.

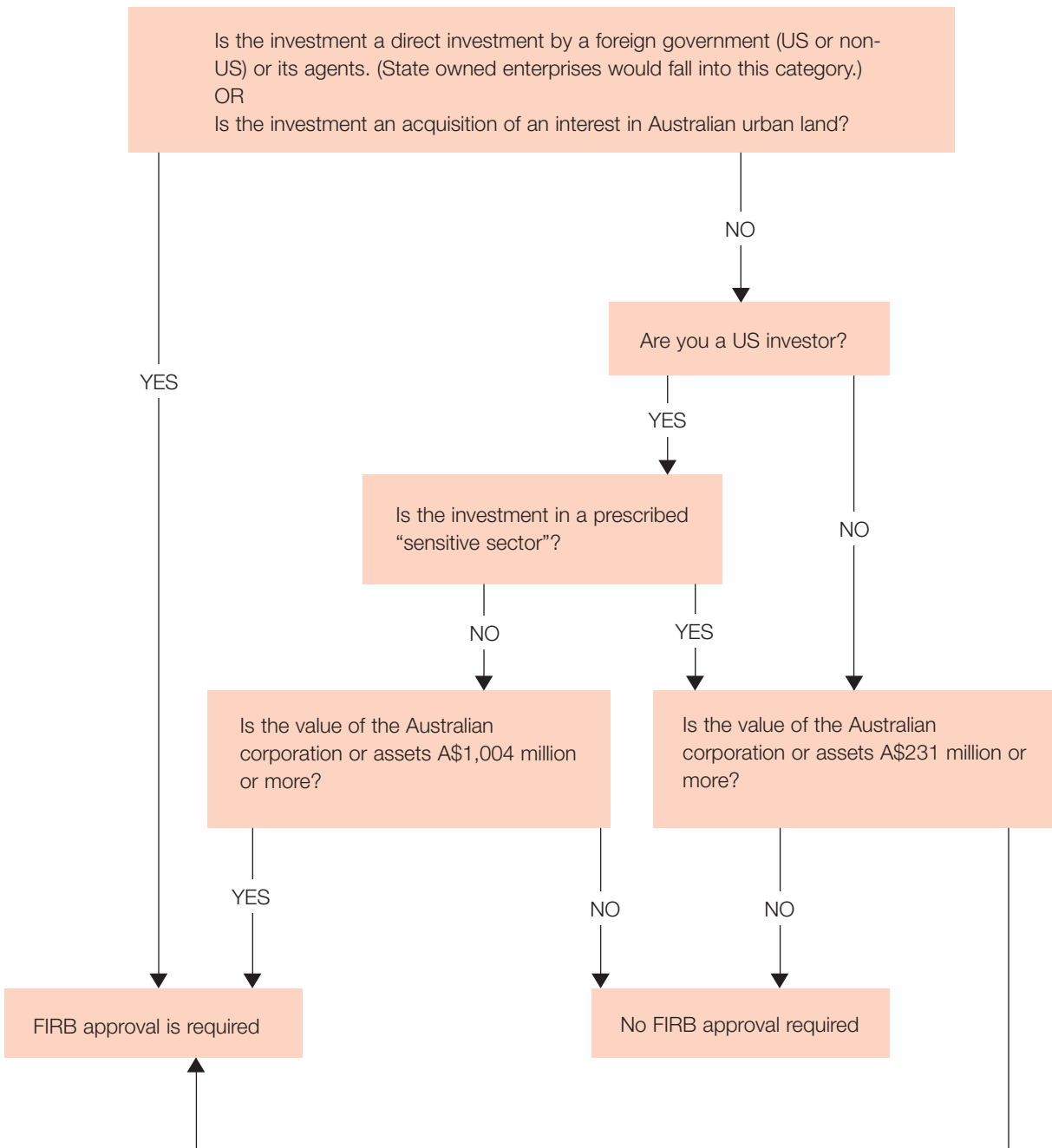
Mitigating factors that assist in determining that such proposals are not contrary to the national interest may include:

- the existence, size and nature of any external third-party partners or shareholders in the investment;
- the level of non-associated ownership interests;
- the governance arrangements for the investment;
- whether the target will be, or remain, listed on the Australian Securities Exchange or another recognised exchange; and
- the size, importance and potential impact of the proposed investments.

Some recent FIRB approvals involving proposed acquisitions by SOEs in the mining sector have been conditional on:

- the SOE acquiring less than 50% of the Australian target;
- the SOE operating Australian mines through an Australian incorporated and headquartered company, which will have a predominantly Australian management and sales team; and/or
- a gradual sell down of the SOE's holding post acquisition to a specified maximum holding.

Acquiring 15% or more - Do you need FIRB approval?



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