

FOREIGN INVESTMENT REGULATION IN AUSTRALIA

While the Australian Government generally welcomes foreign investment, certain types of investment proposals may be susceptible to review or require prior approval.

On 1 December 2015 a new inbound foreign investment regime came into force which repealed and replaced the former regime in its entirety. A number of important amendments have also been made to the rules since that time. This briefing explains the key elements of the current regime.

OVERVIEW OF THE REGIME

In broad terms, the Australian foreign investment regime deals with certain actions by foreigners to acquire interests in Australian securities, entities, assets, land and mining and production tenements and the taking of actions in relation to businesses that have a connection to Australia. Some of these actions (called **notifiable actions**) must be notified prior to being undertaken. Other actions (called **significant actions**) are subject to potential regulatory review, but are not subject to compulsory notification requirements. Some parties may, however, elect to notify significant actions to provide commercial certainty.

Notification of foreign investment proposals are lodged with the Foreign Investment Review Board (**FIRB**). The Australian Treasurer (an elected federal representative), acting (usually through a delegate) on the advice of FIRB, has the power (among other things) to determine whether the Government has no objection to an action, should impose conditions on the action, should prohibit the action or (if it has already been undertaken) should require an action to be undone (for example, by requiring divestment). The determination which the Treasurer makes is based on an assessment of whether or not the relevant action is contrary to the national interest (the **national interest test**).

Offences, civil penalties and other orders may be imposed if notifiable actions are taken without prior notification to FIRB or where a person fails to comply with an order made or condition imposed by the Treasurer.

As discussed in this briefing, the inbound foreign investment notification triggers depend on the type of action being undertaken, the nature of the

Key issues

- Foreign investors looking to invest in Australia need to assess whether the proposed investment requires notification under the foreign investment regime.
- Whether or not an investment is notifiable depends on the nature and value of the investment and the identity of the investor.
- Notification of foreign investment proposals are determined by the Australian Treasurer (on advice from the Foreign Investment Review Board), based on an assessment of whether the proposal is contrary to the national interest.
- Criminal, civil penalties or other orders may be imposed on foreign investors who breach the rules, as well as any persons who knowingly assist a contravention.

investment and the identity of the foreign investor. In some cases, different and more stringent rules and thresholds apply to foreign investors who are classified as foreign government investors. These concepts are discussed in more detail below.

THE REGULATORY FRAMEWORK

The key sources for Australian foreign investment regulation are:¹

- the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**);
- the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**Regulations**);
- the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (Cth) (**Water Rights and Agricultural Land Register Act**) and related rules; and
- the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) (**Fee Act**) and related regulations made thereunder.

The Act sets out the main framework for the foreign investment regime, including the criteria for notifiable actions and significant actions. It also gives the Treasurer a range of powers in connection with foreign investment proposals, sets out a penalty regime for contraventions (including criminal and civil liability) and contains confidentiality and record-keeping obligations.

The Regulations contain provisions central to the interpretation and application of the Act. Importantly, they include definitions for key terms used in the Act, specify the monetary thresholds applicable under the Act and set out a number of exemptions to the rules and definitions in the Act.

The Water and Agricultural Land Register Act requires all foreign persons with certain interests in registrable water rights or agricultural land to register those interests on the Water Register or Agricultural Land Register (as the case may be) which are each maintained by the Australian Taxation Office (**ATO**).

The Fee Act is a standard tax imposition bill which imposes filing fees for the submission of foreign investment notifications with FIRB.

In addition to the legislative package, the Government also issues Australian foreign investment policy (**Policy**)². The Policy provides useful guidance to foreign investors on the Government's approach to administering the legislative regime, including the considerations which the Treasurer will take into account when applying the national interest test. FIRB also publishes a range of guidance notes which address specific topics.

TO WHOM DOES THE REGIME APPLY?

The Australian inbound foreign investment regime concerns investment by foreign persons. Under the Act, a **foreign person** means:

- an individual not ordinarily resident in Australia;

¹ Foreign investors should be aware that industry specific legislation may also impose restrictions on investment in certain sectors. For example, foreign ownership in the banking sector must be consistent with the *Banking Act 1959* (Cth), the *Financial Sector (Shareholdings) Act 1998* (Cth) and banking policy. The *Shipping Registration Act 1981* (Cth) requires that ships registered in Australia be majority Australian owned, unless designated as chartered by an Australian operator. The *Airports Act 1996* (Cth) limits foreign ownership of some airports to 49% and imposes limits and cross-ownership rules of some major Australian airports. Aggregate foreign ownership in Australian international airlines (such as Qantas) is also limited to 49% (see: *Air Navigation Act 1920* (Cth) and *Qantas Sale Act 1992* (Cth)). Aggregate foreign ownership of Telstra is also limited to 35%, with individual foreign investors only allowed to hold up to 5%. This briefing focuses only on the general foreign investment regulation under the Act and associated legislation and does not deal with industry-specific ownership limitations.

² The latest version of the Policy was released on 1 January 2018.

- a corporation or trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government³ holds a *substantial interest* (discussed below); or
- a corporation or trustee of a trust in which 2 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* (discussed below);
- foreign governments and foreign government investors;⁴
- a general partner of a limited partnership, where (i) an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20% in the limited partnership; or (ii) 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an aggregate interest of at least 40% in the limited partnership; and
- any other person that meets the conditions, prescribed by the Regulations.

The concepts of substantial interest and aggregate substantial interest are central to the interpretation of the Act and determining what transactions are notifiable or otherwise subject to review. Relevantly, tracing rules in the Act mean that these interests can usually be achieved by direct or indirect (including offshore) acquisitions.

A person holds a **substantial interest** in an entity or trust if:

- for an entity — the person holds a legal or beneficial interest of at least 20% in the entity (in this regard, a person will be deemed by the Act to hold the 20% if the person (alone or together with its associates) is in a position to control at least 20% of the voting power or potential voting power in the entity, or holds interests in at least 20% of the issued securities in the entity); or
- for a trust (including a unit trust) — the person (together with any one or more associates) holds a beneficial interest in at least 20% of the income or property of the trust.

The Act provides that 2 or more persons hold an **aggregate substantial interest** in an entity or trust if:

- for an entity — the persons (together with their associates) hold an aggregate interest of at least 40% in the entity; or
- for a trust (including a unit trust) — the persons (together with any one or more associates of any of them) hold, in aggregate, beneficial interests in at least 40% of the income or property of the trust⁵.

Accordingly, the regime captures (and can deem an investor to be a foreign person) based on minority foreign interests which may not ordinarily be considered to convey control.

³ A **foreign government** is an entity that is any whole or part of a body politic of a foreign country or part of a foreign country.

⁴ Prior to 1 December 2015, the new rules relating to inbound investment by foreign governments and foreign government investors were contained in the Policy and were not captured within the legislative regime. Inclusion of the foreign government investor rules within the legislative regime was a major outcome of the 2015 reforms. The definition of foreign government investor is discussed later in this briefing.

⁵ The Regulations provide that small holdings of less than 5% in companies with their primary listing on an Australian stock exchange may be disregarded for the purposes of determining aggregate substantial interests in corporations and trusts when applying the foreign person definition.

The Act contains an extremely broad definition of **associates**. For instance, it includes (among other things and in addition to the usual categories covered under the previous iteration of the Act):

- any person with whom a person *is acting or proposes to act* in concert in relation to an action to which the Act may apply; and
- any person with whom a person carries on a business in partnership⁶.

Despite this and unlike the previous Act, the Act does not make any person who is an associate under the existing provision, an associate of any other person who is an associate of the person. There are a number of exemptions to the associate rules contained in the Regulations, including for certain consortium partners and passive limited partnership investors.

What is notifiable?

Broadly speaking and subject to the applicable exemptions, an acquisition of any of the following interests will, if undertaken by a foreign person, be a notifiable action for the purposes of the Act and subject to mandatory notification:

- a direct interest⁷ in an Australian agribusiness⁸;
- a substantial interest in Australian entities;
- an interest in Australian land⁹,

in each case where the value of the acquisition exceeds the applicable monetary thresholds (which are zero in some cases); and

- an interest of at least 5% in an entity or business that wholly or partly carries on an Australian media business.

Additionally, it is a notifiable action for a foreign government investor (only) to:

- acquire a direct interest in an Australian entity or business;
- start an Australian business; or
- acquire a legal or equitable interest in a mining, production or exploration tenement or an interest of at least 10% of the securities in a mining, production or exploration entity.

The definition of notifiable action does not exclude intra-group re-organisations and accordingly, even internal restructures may be notifiable if they include one of the above actions.

A foreign person must not enter into an arrangement to undertake a notifiable action unless the person has been given a no objection notification from the Treasurer (although certain agreements conditional on foreign investment approval are permissible (as discussed below). Offences, civil penalties or other orders (discussed further below) may apply if a notifiable action is undertaken without a notice of no objection having been given by the Treasurer or the time period in which a no objection notice can be given without the Treasurer objecting to the investment.

⁶ The Act and Regulations provide carve outs to the associate test for (among other things) professional advisors, consortium partners holding less than substantial interests in consortium vehicles, professional service partnerships, passive limited partners and offers made under a takeover bid.

⁷ The term **direct investment** is defined in the legislation and is discussed below.

⁸ This is prescribed to be both a notifiable action and a significant action. Other significant actions are discussed below.

⁹ This is prescribed to be both a notifiable action and a significant action. Other significant actions are discussed below.

Each of the types of notifiable interests, the key definitions underpinning their application and the thresholds applicable to each are discussed below. The Regulations may from time to time prescribe other actions to be notifiable (and/or significant) actions.

The annexure to this briefing note contains a summary table setting out the various monetary thresholds (current at the time of writing) applicable to the various actions discussed below.

Direct interests in agribusiness

It is a notifiable action for a foreign person to acquire a direct interest in an Australian entity¹⁰ or Australian business¹¹ that is an agribusiness, where the total value for the acquisition (together with other interests held by the foreign person and its associates in the entity or business) exceeds A\$57 million.¹²

Unlike the monetary thresholds applicable to other types of acquisitions, the A\$57 million threshold for direct investments in agribusinesses is cumulative and based on the consideration for the acquisition (together with other interests held by the foreign person and its associates in the entity or business), rather than the underlying value of the agribusiness itself.

Agribusiness is defined with reference to classes of business carried out wholly or partly in specified Australian and New Zealand Standard Industrial Classification (**ANZSIC**) Codes. Generally speaking, these cover primary production industries (such as agriculture, forestry and fishing) as well as certain secondary or downstream processing or manufacturing of agricultural products (such as grain or seed processing).¹³

For an Australian entity or business to be an agribusiness, the value of the assets used in that type of business must also exceed 25% of its total assets. An Australian entity will also be an agribusiness if the amount of earnings (before interest and tax) from that business exceeds 25% of the amount of its total earnings.

A **direct interest**¹⁴ in an entity or business is defined broadly and comprises:

- an interest of at least 10% in the business or entity;
- an interest of at least 5% if the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity or business; or
- *any* percentage interest where the person who acquired the interest is in a position to:
 - influence or participate in the central management and control of the entity or business; or

¹⁰ An **Australian entity** means an Australian corporation or an Australian unit trust.

¹¹ An **Australian business** is a business that is carried on wholly or partly in Australia in anticipation of gain or profit.

¹² Pursuant to subsisting free trade arrangements, United States, New Zealand and Chilean non-government investors will continue to require approval only if acquiring a substantial interest in an agribusiness valued above A\$1,134 million. The proposed agribusiness threshold applies to all other countries, including those to which free trade agreements apply. The A\$57 million threshold is subject to annual indexation.

¹³ The relevant classes of business under the ANZSIC Codes are:

- any of the classes in Division A (agriculture, forestry and fishing);
- any of the classes in Subdivision 11 of Division C (food product manufacturing), *other than* any of the following:
 - (i) class 1113 (cured meat and small-goods manufacturing);
 - (ii) class 1132 (ice cream manufacturing);
 - (iii) class 1162 (cereal, pasta and baking mix manufacturing);
 - (iv) a class in group 117 (bakery product manufacturing);
 - (v) class 1182 (confectionery manufacturing); or
 - (vi) a class in group 119 (other food product manufacturing).

¹⁴ This definition is also relevant for notifiable actions arising from actions taken by foreign government investors, described on page 8 (below).

- influence, participate in or determine the policy of the entity or business.

A direct interest is not limited to a direct acquisition in the literal sense and may arise from a direct or indirect (i.e. upstream) interest being acquired.

Substantial interests in Australian entities

It is a notifiable action for a foreign person to acquire a substantial interest¹⁵ in an Australian entity having a total asset value of greater than, or whose issued securities exceed, A\$261 million.

A higher threshold of A\$1,134 million applies to certain private, non-foreign government investors (**agreement country investors**) from countries (**agreement countries**) with which Australia has implemented free trade agreements (**FTAs**), except where the investment concerns a sensitive business, in which case the usual threshold of A\$261 million applies.¹⁶

The Regulations prescribe **sensitive businesses**, which broadly speaking, currently comprise businesses carried out wholly or partly:

- in the media, telecommunications or transport sectors (including a business relating to infrastructure for those sectors);
- in relation to certain military, defence, encryption or security activities; or
- in relation to the extraction of uranium or plutonium or the operation of nuclear facilities.

Interests in Australian Land

It is a notifiable action for a foreign person to acquire an interest in Australian land, where the value of the land exceeds the monetary thresholds (if any) specified in the Regulations in relation to the type of land being acquired.

Australian land means:

- **agricultural land** – this is defined as being land that is used, *or that could reasonably be used*, for a primary production business.¹⁷ The definition includes land which is partially used for a primary production business or land where only part of the land could reasonably be used for a primary production business. Whether land could reasonably be used for a primary production business depends on the facts and circumstances of the land.¹⁸ The Regulations exempt certain categories of land from being classified as agricultural land;¹⁹
- **residential land** – this includes land where there is at least one dwelling (or land on which the number of dwellings that could reasonably be built does not exceed 10), excluding land used wholly and exclusively for

¹⁵ Relevantly aggregate substantial interests are not covered a notifiable action.

¹⁶ The agreement countries currently comprise the United States, New Zealand, Chile, Singapore, Japan, the Republic of Korea and China.

¹⁷ The definition of primary production business is taken from the *Income Tax Assessment Act 1997* (Cth) and currently includes cultivating or propagating plants, maintaining animals for the purpose of selling them or their bodily produce, conducting operations relating directly to taking or catching fish and certain other marine animals, planting or tending trees in a plantation or forest that are intended to be felled or felling trees in a plantation or forest. Given that the definition of agricultural land includes land which *could reasonably be used*, for a primary production business, it is significantly broader than the previous concept of Australian rural land under the former, pre-December 2015 rules (which was defined to mean land situated in Australia that is used *wholly and exclusively* for carrying on a business of primary production). Accordingly, land which could not be characterised as Australian rural land under the old regime may meet the definition of agricultural land under the new regime.

¹⁸ The Explanatory Memorandum to the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) contains guidance on the factors that may indicate that land could (or could not) reasonably be used for a primary production business. These may include the primary uses and zoning of the land, land use history, its characteristics (for example, climate, crop yield, land size, remoteness, soil quality, stock holding capacity, topography, vegetation and water availability) and any lease or licence conditions or limitations.

¹⁹ The categories include (among others) land which is used wholly or predominantly for mining (including mining infrastructure or waste storage), land which is used for environmental protection or as a sanctuary, land within an approved industrial estate, land having an area of one hectare or less and land used (or authorised to be used) wholly or predominantly for a solar or wind power station.

primary production or land on which the only dwellings are commercial residential premises²⁰;

- **mining and production tenements** – this generally includes a right (however described) under a law of the Commonwealth, a State or a Territory to recover minerals, oil, or gas in Australia, but excludes prospecting or exploration licences; or
- **commercial land** – the definition of commercial land contains a catch-all provision to capture all land not falling into the other categories set out above. Commercial land may be developed or vacant (different monetary thresholds apply to each).

An **interest in Australian land** is defined very broadly under the Act and includes not only freehold, but other legal and equitable interests in land, such as rights under a lease, licence or profit à prendre, or interests in agreements relating to the sharing of profits in, or income from the use of, or dealings in Australian land, where the term of the arrangement is (on acquisition) reasonably likely to exceed five years (including any extension or renewal). An interest in Australian land also includes an interest in a share or unit in any corporation or trust which holds more than 50% of its total gross assets in Australian land (known as **Australian land corporations** and **Australian land trusts**, respectively). Similarly, an interest in Australian land includes an interest in a share or unit in any corporation or trust which holds more than 50% of its total gross assets in agricultural land (known as **agricultural land corporations** and **agricultural land trusts**, respectively). Acquiring an interest in a share of a corporate trustee of an Australian land trust or an agricultural land trust is also captured.

An overview of the monetary thresholds applicable to different categories of land are set out in the annexure to this briefing note.

Media business

It is a notifiable action²¹ to acquire an interest (legal or equitable) of at least 5% in an entity or business that wholly or partly carries on an Australian media business, regardless of value.

An **Australian media business** is an Australian business of publishing daily newspapers, or broadcasting television or radio, in Australia (including websites from which those newspapers or broadcasts may be accessed).

Foreign government investors

As mentioned above, there are additional, more stringent rules which apply to foreign government investors. It is also a notifiable action²² for a foreign person who is also a foreign government investor to:

- acquire a direct interest in an Australian entity or business;
- start an Australian business;
- acquire a legal or equitable interest in a mining, production or exploration tenement; or

²⁰ Since July 2017, residential premises that have a commercial use (such as student accommodation or retirement villages) will be screened as commercial residential premises.

²¹ This is prescribed to be both a notifiable action and a significant action. Other significant actions are discussed below.

²² This is prescribed to be both a notifiable action and a significant action. Other significant actions are discussed below.

- acquire an interest of at least 10% of the securities in a mining, production or exploration entity,

in each case *irrespective of value* (that is, no monetary thresholds apply). Given that the definition of direct interest can include acquisition of any percentage interest in some cases, even *de minimus* changes in shareholdings (upstream or downstream) may trigger notification requirements for foreign government investors.

Since July 2017, an exemption to the acquisition of direct interests by foreign government investors came into force which permits acquisitions in offshore entities where the Australian assets of the offshore entity are less than 5% of the global firm's total assets and have a value of A\$55 million or less.

A person is a **foreign government investor** if the person is:

- a foreign government²³;
- a corporation, trust, or trustee of a trust in which one or more (as applicable) foreign governments or separate government entities,²⁴ alone or together with one or more associates, holds a substantial interest, or an aggregate substantial interest;
- a partner of a limited partnership in which one or more (as applicable) foreign governments or separate government entities, alone or together with one or more associates, holds an interest of at least 20% or an aggregate interest of 40%; or
- a corporation, trustee, partner or partnership of a kind described above, assuming the references to foreign government (or foreign governments) in those paragraphs included references to a foreign government investor within the meaning of any of the foregoing paragraphs.

Similar to the definition of foreign person, an entity can be considered a foreign government investor even if foreign government interests in the entity comprise only a minority stake.

SIGNIFICANT ACTIONS

Distinction between significant and notifiable actions

In addition to notifiable actions, the foreign investment regime also regulates **significant actions**. Significant actions are susceptible to regulatory review, but are *not* subject to compulsory notification. A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action.

If a person proposes to take or has already taken a significant action, the Treasurer has power to determine whether (having regard to the national interest test, which is discussed below) the Government has no objection to the action, to impose conditions on the action, to prohibit the action or to require the action to be undone (for example, by requiring divestment). In this sense, significant actions are reviewable. However, if a foreign person notifies FIRB of the significant action, is given a no objection notification in relation to it and complies with any conditions set out in that notice, the Treasurer generally is not able to review the transaction at a later date or make a divestment

²³ Refer to footnote 3.

²⁴ A **separate government entity** is an individual, corporation or corporation sole that (a) is an agency or instrumentality of a foreign country or a part of a foreign country and (b) is not part of the body politic of a foreign country or of a part of a foreign country.

order. If a foreign person elects to notify FIRB that a significant action is proposed to be taken, the action must not be taken before the end of the applicable determination period (the application process is discussed below).

Given that significant transactions are susceptible to review, some investors may elect to voluntarily give notice of a significant action (even where the action is not a notifiable action) to take advantage of the commercial certainty offered by obtaining a no objection notification. In other cases, investors may decide not to notify the action, where they have comfort that it would not raise any significant national interest concerns which would justify the Treasurer making any adverse orders.

What are significant actions?

Whether an action is a significant action depends on the type of action being proposed, whether the action is proposed to be undertaken in respect of an entity, a business or Australian land, and the value of the underlying Australian interests. Each transaction needs to be assessed on its own merits against the prescribed criteria.

In general terms, it will be a **significant action** to:

- acquire interests in securities in any entity that carries on an Australian business (or which is the holding entity of such an entity) and which entity is valued above A\$261 million (or A\$1,134 million for agreement country investors);
- enter into an agreement relating to the affairs of an Australian entity valued above A\$261 million (or A\$1,134 million for agreement country investors) pursuant to which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person);
- alter a constituent document of an Australian entity valued above A\$261 million (or A\$1,134 million for agreement country investors) as a result of which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person);
- acquire interests in assets of an Australian business where the value of the consideration is more than A\$261 million (or A\$1,134 million for agreement country investors);
- enter into or terminate a significant agreement²⁵ with an Australian business, where the assets of the business exceed A\$261 million (or A\$1,134 million for agreement country investors),

in each case where there would be (or has been) a **change of control**²⁶ of the entity or business (as applicable) as a result of the action.

The Act also provides that additional significant actions may be prescribed in the Regulations.²⁷

²⁵ A **significant agreement** with an Australian business is an agreement relating to: (a) the leasing of, the letting or hire of, or the granting of other rights to use, assets of the business; or (b) the participation by a person in the profits or central management and control of the business.

²⁶ For further details refer to the section on the concept of control, below.

²⁷ As mentioned in certain footnotes above, some notifiable actions are also significant action under the regime. Given that such actions are notifiable in any case, the fact that they are also significant actions is of little practical consequence.

Concept of control

The Act provides that a person controls an entity or business if the person (whether alone or together with one or more associates) is in a position to:

- determine the policy of the entity or business in relation to *any* matter (this may occur if the person does not generally control but has a veto right over certain matters relating to the entity or business); or
- without limiting the foregoing, in relation to the acquisition of, or an issue of interests in, securities in an entity:
 - the person holds a substantial interest (20%) in the entity; or
 - the person is one of two or more persons who hold an aggregate substantial interest (40%) in the entity.

For the purposes of determining whether an action is a significant action, a change of control will generally occur if:

- one or more foreign persons would begin, or have already begun, to control the entity or business (whether alone or together with any associates of any of those persons); or
- where one or more foreign persons already control or controlled the entity or business:
 - another foreign person would become, or has become, a person who controls the entity or business; or
 - a person would cease, or has ceased, to be a person who controls the entity or business.

The concept of control and change of control do not exclude intra-group re-organisations (which the Government has reserved the right to review). As such, even internal restructures may be significant actions (assuming they meet the foregoing conditions).

OPTIONS AND CONDITIONAL AGREEMENTS

The Act deems a person to have acquired an interest in a security, asset, trust or Australian land if the person enters into an option to acquire the interest, or has a right to acquire or have that interest transferred to it or to an associate. This is the case even if the option or right is not presently exercisable and may only be exercisable on a future condition (which may or may not occur).

For this reason, the taking of certain security interests, which may effectively amount to acquisition of an option to acquire an interest on the occurrence of a future condition (such as a default event occurring under a loan), come within the ambit of the foreign investment rules. Issues relating to taking security and the money lending exemption are discussed further below.

Despite the foregoing, the Act also provides that if a person proposes to acquire an interest in a security, asset, trust or Australian land, and the provisions of an agreement relating to the acquisition of that interest do not become binding until one or more conditions are met, the person will only be taken to have acquired the interest when the provisions become binding. Accordingly, a foreign person will not contravene a requirement to notify FIRB of a notifiable action if they enter into an agreement which provides that the acquisition of the interest is wholly conditional on the required foreign investment clearance. To meet the requirements of the Act, such a condition

should be expressed as a true condition precedent to the acquisition (and not a condition to completion of the acquisition).

EXEMPTIONS TO NOTIFICATION

The Act and Regulations prescribe a number of actions to which the substantive provisions of the Act (including the provisions relating to significant actions and notifiable actions) do not apply. Some exemptions do not apply or apply differently to foreign government investors. The main exemptions are discussed below.

Exemption certificates

Ordinarily under the foreign investment regime, each proposed acquisition which is notifiable must be separately notified. An exemption certificate is a certificate given by the Treasurer that specifies one or more kinds of interests that, if acquired by a foreign person, do not give rise to a significant action or a notifiable action. An exemption certificate can therefore relieve the regulatory burden on investors or low risk transactions (of a kind that would not raise national interest concerns) by covering a number of similar types of acquisitions. An exemption certificate would generally specify the maximum value of interests that can be acquired and also the period during which acquisitions can be made (usually 12 months, but may depend on the circumstances).

Exemption certificates may be applied for in respect of the following categories of interests:

- **New and near-new dwellings** – Exemption certificates for new and near-new dwellings are usually applied for by a developer or other vendor to enable disposal of residential units off the plan to foreign persons.
- **Established dwellings** – This type of exemption certificate may be applied for by a foreign person directly to enable them to acquire (including to bid at auction) on established residential properties. Such certificates enable a purchaser to make bids on different properties during the term (usually 6 months) and subject to any conditions in the certificate. In the absence of such a certificate, foreign persons bidding at auctions would need a no objection notification for each auction that they intend on bidding at because bids at auction normally have to be unconditional, whereas under the Act, it is an offence to fail to notify before an acquisition becomes unconditional.²⁸
- **Other interests in Australian land** – These types of certificates may be applied for by a foreign person in relation to any other type of land and operate similarly to annual land program approvals under the previous pre-2015 regime. They may be used to cover a number of small acquisitions of a nature and kind set out in the certificate (and may be subject to a specified value or time limitation). This type of certificate may be used to cover a series of acquisitions (such as freehold, easements or licences) to provide corridor buffers or support access to an infrastructure asset, mine or other commercial enterprise. They could also be used cover a fund which proposes to make a series of similar property acquisitions within specified parameters.

²⁸ Because the fees for exemption certificates escalate in accordance with the value of the property being obtained, the consideration which a foreign person can pay for an established dwelling for which an exemption certificate has been obtained will be capped by the application fee paid for the exemption certificate. For instance, if a person obtains an exemption certificate to which a A\$5,500 fee had been paid, the consideration payable would be capped at A\$1 million. This is discussed further below in section headed *Fees*.

- **Interests in business or entities** – These types of certificates (referred to as "Business ECs") allow foreign investors to seek broad pre-approval for a program of investments or acquisitions in securities over the period and for the value specified in the certificate.²⁹ Business ECs may be useful and suited to large investment funds, particularly those with low risk, passive investors.

The Regulations may prescribe other types of exemption certificates, and currently include provision for exemption certificates for underwriting and for certain interests in tenements and mining, production or exploration entities.

FIRB has published guidelines on when exemption certificates would ordinarily be granted, as well when they would not be granted and the conditions which would usually apply to certain types of exemption certificates. Ordinarily, periodic reporting conditions (where an applicant would report to FIRB on the acquisitions made under the certificate) will apply.

Recent amendments to FIRB's guidance in early 2018 indicates that an exemption certificate can only be used where a foreign person is acquiring land that has been offered for sale publicly and marketed widely for a minimum of 30 days. Accordingly, unless applicants are acquiring land that has been subject to an open and transparent sales process, an exemption certificate could not be used to cover that particular acquisition. Additionally, guidance indicates that businesses designated as sensitive businesses, acquisitions of critical infrastructure assets or agribusinesses or in sectors which may raise competition issues would be unlikely to be the subject of a Business EC approval.

If a person applies for an exemption certificate the Treasurer must decide whether to grant the application before the end of the period prescribed in the Regulations (usually 30 days from receipt of the relevant filing fee) or, if the person requests in writing that the Treasurer extend the period, the period as extended. Decisions to grant exemption certificates are made on a case-by-case basis having regard to, among other things, the identity of the applicant and its compliance history.

If the Treasurer grants the exemption, the exemption certificate containing any conditions which the Treasurer requires must be given to the person. If the Treasurer does not make a decision regarding the exemption within the prescribed period (as may be extended), the Treasurer is taken to have granted the exemption without conditions.

The Treasurer may vary or revoke an exemption certificate if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest.

The moneylending exception

Broadly speaking, the Regulations exempt from the provisions of the Act any interest in securities, assets, trusts, Australian land, or a mining, production or exploration tenement that is either:

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

²⁹ Prior to July 2017, such certificates were only available for underwriting. The more general certificate would allow for a broader range of securities acquisitions.

- This is known as the **moneylending exception**, which is commonly used to exempt banks and other lenders from the need to notify when they take or enforce security interests. The moneylending exception applies generally (provided the criteria for its application are met), save for certain interests in relation to residential land and interests which are acquired by foreign government investors – these cases are discussed further below. The effect of the moneylending exception is that transactions which fall within it are not significant actions or notifiable actions and may be disregarded for other purposes, including whether a party holds a substantial interest in an entity.

A **moneylending agreement** is defined to mean:

- an agreement entered into in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (a **moneylending business**) of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business; and
- for a person carrying on a moneylending business, or a subsidiary or holding company of such a person, – an agreement to acquire an interest arising from a moneylending agreement (within the meaning of the paragraph above)³⁰.
- Accordingly, investors (including foreign government investors) who do not conduct a moneylending business or do not enter into the arrangement as part of carrying on a moneylending business will not be able to rely on this exemption. Accordingly non-lenders and SPV vehicles with no business history would usually be precluded from accessing this exemption.

In addition, in order for the moneylending exception to apply, the entity that holds or acquires the interest must be:

- the entity (**first entity**) that entered into the moneylending agreement (i.e. the lender);
- a subsidiary or holding entity of the first entity;
- a person who is (alone or together with others) in a position to determine the investments or policy of the first entity;
- the security trustee who holds or acquires the interest on behalf of the first entity; or
- a receiver, or a receiver and manager, appointed in relation to one of the above.

As mentioned above, the moneylending exception applies differently in connection with residential land and interests acquired by foreign government investors.

- *Interests in residential land*: for an interest in residential land, where the first entity is not a foreign government investor, the exception applies only if:
 - *ADIs*: an entity (the **key entity**) that is the first entity or a holding entity of the first entity either is an authorised deposit-taking institution (**ADI**)³¹

³⁰ This limb of the definition (which was added as part of the reform package) appears to be aimed at enabling a person carrying on a moneylending business to enter an agreement to acquire an interest in a moneylending agreement through secondary trading.

³¹ A list of ADIs are available on the Australian Prudential Regulation Authority website at: <http://www.apra.gov.au/adi/pages/adilist.aspx>.

or otherwise licensed (whether or not in Australia) as a financial institution; or

- *Non-ADIs*: where the key entity is not an ADI, there are at least 100 security holders in the key entity, or it is listed for quotation in the official list of a stock exchange (whether in Australia or not).
- *Interests (including residential land) acquired by foreign government investors*: foreign government investors who are ordinarily in the business of lending money do not need approval to enter into or to take security. However, the moneylending exception will apply to foreign government investors on enforcement of their security if:
 - *ADIs*: the foreign government investor is an ADI and the asset is sold within 12 months, or, if 12 months have passed since enforcement of the security, the investor is making a genuine attempt to dispose of the interest; or
 - *Non-ADIs*: the foreign government investor is not an ADI and the asset is sold within six months, or, if six months have passed since enforcement of the security, the investor is making a genuine attempt to dispose of the interest.

Other exemptions

Other key exemptions to the application of the Act include:

- acquisitions by will or devolution by operation of law;
- acquisitions of certain interests held by foreign custodian companies or interests acquired by companies which become foreign persons by virtue of their foreign custodian holdings;
- acquisitions of Australian land or an Australian business from the Commonwealth, a State, a Territory, or a local government;³²
- investments in shares in a financial sector company;³³
- compulsory acquisitions and compulsory buy outs (where the acquirer already holds over 90%);
- acquisitions of Australian land or mining, production or exploration tenements by certain life companies, insurers, super funds, responsible entities or managed investment schemes;
- acquisitions of certain passive interests in Australian land corporations and trusts;
- acquisitions of residential land for diplomatic purposes or by certain visa holders;
- certain interests in easements;³⁴
- acquisitions by agreement country investors where a higher or alternative threshold applies under FTAs; and
- certain interests acquired under rights issues and under dividend reinvestment plans.

³² This exemption does not apply to foreign government investors or private investors acquiring certain critical infrastructure assets. Notably, only acquisitions of land and business – but not securities or other interests - from a Commonwealth, a State, a Territory, or a local government are not covered as an exemption.

³³ This exemption does not apply to foreign government investors.

³⁴ This exemption applies differently for foreign government investors.

THE NATIONAL INTEREST TEST

As mentioned above, determinations which the Treasurer makes under the Act are based on an assessment of whether or not the relevant action (be it a significant action voluntarily notified or a notifiable action subject to mandatory notification) is contrary to the national interest.

The concept of national interest appears in a range of Australian legislation but is never specifically defined. The courts have held that the exercise of the discretion is a matter for the relevant minister or other decision-maker (in this case, the Treasurer).

In the context of foreign investment, the Treasurer has a practice of publishing reasons for decisions on significant transactions which have attracted public interest, which sheds some light on how the national interest test is applied in relation to certain foreign investments. In addition, the Policy sets out guidance for investors on the matters which will be considered when assessing the national interest in relation to investment proposals. Typically these comprise:

- national security;
- competition;
- other Australian government laws and policies (including tax and environmental impact);
- the economy and the community; and
- the character of the investor.

The Policy, as well as FIRB's published guidance notes also set out a number of additional criteria which the Government will typically consider in assessing foreign investment applications, in particular for:

- agriculture;
- agricultural land;
- residential land,

and in connection with proposals made by foreign government investors.

For example, recent changes to FIRB guidance on agricultural land investments prescribes that, as part of the national interest test (and subject to limited exceptions), the decision-maker will ordinarily not grant approval for the acquisition of any agricultural land that was not offered for sale publicly and marketed widely for a minimum of 30 days. The purpose of the requirement is to ensure that Australians have had sufficient opportunity to bid in any sales process for agricultural land. The onus would be on the applicant to provide information about the sales process.

APPLICATION PROCESS

Investors should comply with the inbound foreign investment notification and approval requirements of the Act and Policy before completing a transaction. As discussed above, in practice, acquisitions are often executed on a conditional basis and expressed to be wholly subject to inbound foreign investment approval.

Form and content

Notifications are usually made via an online notification system maintained by FIRB. FIRB's published various guidance notes and checklists contain an overview of the type of information which (in addition to the information required by the online notification system) it expects to be submitted in connection with foreign investment notifications.

Timing

The Treasurer has 30 days (now benchmarked from receipt by FIRB of the relevant filing fee) to consider an application and make a decision. The Treasurer may also extend this period by up to a further 90 days to allow additional time to consider the exercise of the Treasurer's powers. This may occur if the proposal raises particular concerns, insufficient information has been provided or where FIRB case-load requires that they be given more time to consider the application. Investors may also voluntarily extend the period by providing their written consent. Applicants are usually informed of the Treasurer's decision within 10 days of it being made. Accordingly, determinations are usually confirmed within 30-40 days (from receipt of the relevant filing fee), however, given the Treasurer's ability to extend the time period, this should not be regarded as a hard deadline.

Fees

Since 1 December 2015, foreign investment applications have attracted filing fees, meaning that Australian taxpayers are no longer required to fund the administration of the Act.

Once a foreign investment application is lodged online, applicants will receive a filing receipt and (separately) a fee invoice email with details and payment options. Once the fee has been paid, applicants will receive a notification which will include details of the statutory timeline for assessment. Applications will only be assessed (and the statutory time period for assessment will only commence) following receipt of the requisite filing fee payable for the notification.

The fee payable depends on the type and value of the action being undertaken. If an application falls within a number of categories, the category with the highest filing fee will apply. Filing fees are indexed annually³⁵ and apply on a scale basis, depending on the value of the transaction. Most commercial transactions (including internal reorganisations) usually carry fees in the order of A\$10,100 (for re-organisations or variations to existing approvals) or A\$25,300 (for transactions valued at over A\$2 billion and under A\$1 billion). For acquisitions valued at greater than A\$1 billion, a filing fee of A\$101,500 will apply. Transactions under A\$2 million usually carry a A\$2,000 fee. Exemption certificate applications carry a fee of A\$35,000. Fees of A\$10,100 also apply to applications for or variation of exemption certificates.

The Act permits the Treasurer to waive or remit a fee in certain cases. FIRB has published guidance on the limited circumstances where a fee waiver or remission is likely to be granted. A filing fee is not ordinarily remitted if an applicant does not proceed with a transaction or is unsuccessful in a competitive process.

³⁵ The fees described in this briefing are current at the time of writing.

Determination

Generally, unless a notification submitted under the Act is rejected by the Treasurer within the statutory time period, the Treasurer will lose the right to object to the transaction. A decision by the Treasurer on a particular application may confirm that the Treasurer has no objection to allowing the proposal to proceed (either with or without conditions). In this case a letter of no objection will be provided. Alternatively, the Treasurer may block the proposal on nation interest grounds. FIRB may provide an opportunity to an investor to withdraw their application before a formal rejection is issued.

Conditions

Foreign investment applications and grants of exemption certificates are usually given subject to conditions. In relation to most entity or business acquisitions, standard conditions for large commercial transactions usually include:

- that the transaction be implemented within 12 months and in accordance with the structure notified to FIRB (any significant changes may require further approval); and
- that the applicant provide undertakings to comply with Australian taxation laws and annual reporting against those conditions.

The standard tax conditions are published by FIRB and available on its website.

CONFIDENTIALITY

The Government respects any 'commercial-in-confidence' information it receives and ensures that appropriate confidentiality is provided. In addition, new provisions introduced into the Act from 1 December 2015, require that information obtained for the purposes of the Act may only be disclosed for authorised purposes and a person who discloses such information in contravention of the Act may be guilty of an offence. Such information may also be protected by the requirements of the *Privacy Act 1988* (Cth) and the *Freedom of Information Act 1982* (Cth).

That said, information contained in applications may be shared by FIRB with other Government departments and agencies, including the Australian Competition and Consumer Commission and the ATO for consultation purposes. The Government has the ability to cross reference its own data with third party sources, including FIRB, immigration, the Australian Transaction Reports and Analysis Centre (Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit) and State and Territory land title offices. The ATO has enhanced compliance and enforcement capabilities and will use its data matching systems to detect and penalise non-compliant investors.

The Government will not provide information contained in applications to third parties outside of the Government unless it has the permission of the applicant or it is ordered to do so by a court of competent jurisdiction.

RECORD-KEEPING

Since 1 December 2015, the Act requires people to make and keep records relating to foreign investment of every act, transaction, event or circumstance

relating to the matters shown and for the length of time specified in the table below. Failure to keep such records is an offence and may result in fines.

Action, transaction, event or circumstance	Length of time the record must be kept
Significant actions, notifiable actions, and actions specified in exemption certificates.	Five years after the action is taken by the person.
Compliance with conditions in a no objection notification and an exemption certificate.	Two years after the condition ceases to apply to the person.
The disposal of an interest in residential land if the acquisition of the interest by the person was a significant action or notifiable action, or would have been a significant or notifiable action if the action had not been specified in an exemption certificate.	Five years after the interest is disposed of by the person.

The records must be kept in English, or readily accessible and easily convertible into English, so that the records can be translated if necessary. Records may be kept in hard copy or electronic form.

PENALTIES AND ANTI-AVOIDANCE

New penalty regime

Prior to 1 December 2015, only divestment orders and criminal penalties applied to contraventions of the Act.

The changes to and strengthening of the penalty regime under the new Act ensures that regulatory action can be taken in response to an alleged contravention which is commensurate with the seriousness of the alleged contravention. To this end, the Act now provides for the imposition of criminal and civil penalties, as well as the issuing of infringement notices (in place of a civil penalty) for less serious offences relating to contraventions involving land. Additionally, a charge on land can be automatically created to secure the payment of a civil penalty.

Generally speaking, a person may commit an offence or be liable to a civil penalty if the person:

- fails to notify the Treasurer before taking a notifiable action;
- gives a notice to the Treasurer stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken and takes the action before the end of the applicable time limit;
- contravenes an order made by the Treasurer; or
- contravenes a condition in a no objection notification imposing conditions or contravenes an exemption certificate.

Persons who contravene the foreign investment rules may be liable for criminal penalties of up to 750 penalty units³⁶ (A\$157,500) or 3 years imprisonment for individuals or 3,750 penalty units (A\$787,500) for corporations. In relation to residential real estate, civil penalties may be

³⁶ **Penalty unit** is defined as section 4AA of the Crimes Act 1914 (Cth). From 1 July 2017, a penalty unit is A\$210. Penalty units are subject to indexation every 3 years.

calculated with reference to the greater of any capital gain or a percentage of the consideration or market value for the relevant property.

Accessory and third party liability

Where a person is an officer of a corporation and that corporation is convicted of an offence against, or contravenes a civil penalty provision of the Act, that person also commits an offence or contravenes a civil penalty provision if the person authorised or permitted the commission of the offence or contravention by the corporation. The maximum penalty is the maximum penalty that could be imposed if the officer contravened the same provision the corporation contravened.

Civil and criminal liability also extends under Australian law to third parties who knowingly assist another person to contravene the provisions of the Act. Third parties may include (without limitation) brokers, lawyers, conveyancers, real estate agents, tax advisors and other professional advisors who facilitate a transaction. The maximum civil and criminal penalties for knowing assistance contraventions are the same as for the primary offence.

Anti-avoidance

The Act applies to all proposals, regardless of how they are structured. For example, as discussed above, quasi-debt (such as convertible notes) is treated as equity for foreign investment purposes and options to acquire (including by way of security, subject to applicable exemptions) will be treated as acquisitions, regardless of whether the option is exercisable on the occurrence of conditions.

The Act also contains anti-avoidance and tracing provisions directed at schemes implemented to avoid operation of the foreign investment rules.

Under the Act, the Treasurer can make an order to prohibit a proposed action or an order requiring disposal of certain interests if satisfied that one or more persons has entered into, begun to carry out, or carried out a scheme, and did so for the sole or dominant purpose of avoiding the application of the Act, and that all or part of the scheme has achieved, or would achieve that purpose. A **scheme** is defined widely as any agreement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable by legal proceedings and any scheme, plan, proposal, action or course of action or conduct, whether unilateral or otherwise.

WATER AND AGRICULTURAL LAND REGISTERS

An important aspect of the recent package of foreign investment reform was the giving of legal effect to the Government's previous policy requirement that all foreign investors holding certain interests in agricultural land register those interests (regardless of value) on the Agricultural Land Register maintained by the ATO.

The obligations on foreign investors in relation to registration of agricultural land interests was the subject of separate Clifford Chance briefing notes.³⁷

It is expected that the ATO's registers will be expanded over time to include residential land.

³⁷ See: http://www.cliffordchance.com/briefings/2015/11/the_new_agriculturalallandregisterwhatforeign.html. Investors in any type of land (not only agricultural land) located in Queensland should also note that the Foreign Ownership of Land Register Act 1988 (Qld) establishes a separate State-based registration regime which may require interests in land located in Queensland to be registered.

Additionally, in December 2016 the Government passed amending legislation requiring foreign person to also register certain registrable water rights and contractual water rights on a Water Register maintained by the ATO from 1 December 2017.

The obligations on foreign investors in relation to registrations of water rights was the subject of a separate Clifford Chance briefing note.³⁸

OTHER DEVELOPMENTS

In December 2017, the Australian Government introduced the following two new bills which may impact foreign investment into Australia:

- *Security of Critical Infrastructure Bill 2017 (Cth)* - This seeks to manage the complex and evolving national security risks of sabotage, espionage and coercion posed by foreign involvement in Australia's critical infrastructure. If passed, it would implement a critical infrastructure assets register, reporting requirements for operators of critical infrastructure and a ministerial last resort power. Clifford Chance has published a separate briefing note on the proposed bill.³⁹
- *Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017(Cth)* - Among other things, this proposed bill would, if passed, require foreign persons to register certain information about their company interests in Australian media companies, where the company interests exceed a specified threshold (proposed at 2.5%). The new foreign-owned media register would allow increased scrutiny of foreign investment in Australian media companies and transparency on the levels and sources of foreign investment in such companies.

Neither bill has been enacted at the time of writing.⁴⁰

FURTHER INFORMATION

Guidance on aspects of the Australian foreign investment regime is also available on the FIRB website at www.firb.gov.au. If you would like any information, please contact a member of the Clifford Chance Australia team.

³⁸ See: https://www.cliffordchance.com/briefings/2017/01/legislation_passedforregisterofforeig.html

³⁹ See: https://www.cliffordchance.com/briefings/2017/10/security_of_criticalinfrastructurebill.html

⁴⁰ Further information is available at www.aph.gov.au.

ANNEXURE – MONETARY THRESHOLDS⁴¹

Business (non-land) proposals

Investor	Action	Threshold – more than:
Privately owned agreement country investors (from FTA partner countries that have the higher threshold) ⁴²	Acquisitions in non-sensitive businesses	A\$1,134 million
	Acquisitions in sensitive businesses	A\$261 million
	Media sector	\$0
	Agribusinesses	For Chile, New Zealand and United States: A\$1,134 million For China, Japan, Korea and Singapore: A\$57 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Other investors	Business acquisitions (all sectors)	A\$261 million
	Media sector	\$0
	Agribusinesses	A\$57 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Foreign government investors	All direct interests in an Australian entity or Australian business	\$0
	Starting a new Australian business	\$0

⁴¹ All thresholds (other than the A\$15 million cumulative threshold for agricultural land and the A\$50 million threshold for agricultural land applicable to Thai investors) are subject to indexation annually on 1 January using the GDP implicit price deflator. The thresholds apply to both notifiable actions and significant actions.

⁴² Agreement country investors are Chilean, Chinese, Japanese, New Zealand, Singaporean, South Korean and United States investors, except foreign government investors. Separate rules apply to Thailand as set out in the table.

Land proposals

Includes direct acquisition of interests in land and investments in Australian land corporations or trusts and agricultural land corporations or trusts.

Investor	Action	Threshold – more than:
All investors	Residential land	\$0
Privately owned agreement country investors (from FTA partner countries that have the higher threshold)	Agricultural land	For Chile, New Zealand and United States: A\$1,134 million For China, Japan, Korea and Singapore: A\$15 million cumulative (based on the total value of the agricultural land to be acquired, together with all other interests in agricultural land held by the investor and its associates)
	Vacant commercial land	\$0
	Developed commercial land	A\$1,134 million
	Mining and production tenements	For Chile, New Zealand and United States: A\$1,134 million For others: \$0
Other privately owned investors (including investors from non-FTA countries that do not have the higher threshold)	Agricultural land	For Thailand, where land is used wholly and exclusively for a primary production business: A\$50 million Others: \$15 million cumulative (based on the total value of the agricultural land to be acquired, together with all other interests in agricultural land held by the investor and its associates)
	Vacant commercial land	\$0
	Developed commercial land	A\$261 million
	Lower threshold ("sensitive") commercial land ⁴³	A\$57 million
	Mining and production tenements	\$0
Foreign government investors	Any interest in land	\$0

⁴³ The Regulations creates a category of "lower threshold" or "sensitive" developed commercial property. Land will fall into this category if it is developed commercial land that gives a right to occupy the land or be involved in the central management and control of the entity that holds the land and any one or more of a number of conditions are satisfied. The conditions include, among others, that the land will be leased to a Commonwealth, State or Territory government or body, that the land will be used to store sensitive substances, particular communications networks or servers for ADIs or will be used for a mining operation or public infrastructure.

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