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The Treasury

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SUMMARY OF AUSTRALIA'S FOREIGN INVESTMENT POLICY

GENERAL[1]

The Government's approach to foreign investment policy is to encourage foreign investment consistent with community interests. In recognition of the contribution that foreign investment has made and continues to make to the development of Australia, the general stance of policy is to welcome foreign investment. Foreign investment provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.

2. The Government recognises community concerns about foreign ownership of Australian assets. One of the objectives of the Government's foreign investment policy (the policy) is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

3. The policy provides the framework for Government scrutiny of proposed foreign purchases of Australian businesses and real estate. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) to block those proposals subject to the FATA which would result in a foreign person acquiring control of an Australian corporation or business or an interest in real estate where this is determined to be contrary to the national interest. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* provide monetary thresholds below which the relevant FATA provisions do not apply, and separate thresholds for acquisitions by US investors.[2] The FATA also provides a legislative mechanism for ensuring compliance with the policy.

4. In the majority of industry sectors, smaller proposals are exempt from the FATA or notification under the policy and larger proposals are approved unless determined to be contrary to the national interest. The screening process undertaken by the Foreign Investment Review Board (the Board) enables comments to be obtained from relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

5. The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia whenever they seek to establish or acquire new business interests or purchase real estate. In this way the Government is able to

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[1] This *Summary of Australia's Foreign Investment Policy* should be considered in conjunction with the *Foreign Acquisitions and Takeovers Act 1975* and the *Foreign Acquisitions and Takeovers Regulations 1989*.

[2] Under the Australia-United States Free Trade Agreement (AUSFTA) which came into effect on 1 January 2005.

encourage foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

6. By far the largest number of foreign investment proposals involves the purchase of real estate. The Government seeks to ensure that foreign investment in residential real estate increases the supply of dwellings and is not speculative in nature. The policy seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (that is, new developments such as house and land, home units and townhouses) and brings benefits to the local building industry and its suppliers.

7. The effect of the more restrictive policy measures on developed residential real estate is twofold. Firstly, it helps reduce the possibility of excess demand building up in the existing housing market. Secondly, it aims to encourage the supply of new dwellings, many of which would become available to Australian residents, either for purchase or rent. The cumulative effect should be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

PRIOR APPROVAL

8. The types of foreign investment proposals which are subject to the FATA or the policy or both, and hence should be notified to the Government for approval, include:

- acquisitions of substantial interests in an Australian business where the value of its gross assets, or the proposal values it above, $100 million.[3] For US investors[4] different exemption thresholds apply:[5] $105 million[6] for investments in prescribed sensitive sectors[7] or by an entity controlled by a US government, or $913 million[8] in any other case;

- proposals to establish new businesses involving a total investment of $10 million or more require prior approval. Proposals by US investors, except an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements;

- portfolio investments in the media of 5 per cent or more and all non-portfolio investments irrespective of size;

- takeovers of offshore companies whose Australian subsidiaries or gross assets exceed $200 million[9] and represent less than 50 per cent of global assets. For US investors the $913 million threshold applies, except for offshore takeovers involving prescribed sensitive sectors or an entity controlled by a US government, where a $210 million threshold applies;

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3 $50 million prior to December 2006.

4 The FATA does not apply to investments by US investors in those financial sector entities which are subject to the operation of the *Financial Sector (Shareholdings) Act 1998*.

5 The US thresholds are subject to annual indexation.

6 $100 million during the calendar year 2007.

7 The AUSFTA prescribed sensitive sectors are set out in Attachment C.

8 $871 million during the calendar year 2007.

9 $50 million prior to December 2006.

- direct investments by foreign governments and their agencies irrespective of size;[10]
- acquisitions of interests in Australian urban land[11] (including interests that arise via leases, financing and profit sharing arrangements) that involve:
  - developed non-residential commercial real estate, where the property is subject to heritage listing, valued at $5 million or more and the acquirer is not a US investor;
  - developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at $50 million or more, or $913 million for US investors;
  - accommodation facilities irrespective of value;
  - vacant real estate irrespective of value;
  - residential real estate irrespective of value; or
  - shares or units in Australian urban land corporations or trust estates, irrespective of value.
- proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having quasi-equity characteristics will be treated as direct foreign investment.)

*A **substantial interest** occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of a corporation, business or trust.*

*A **'US investor'** is a national or permanent resident of the United States of America; a US enterprise;[12] or a branch of an entity located in the United States of America and carrying on business activities there.* [13]

WHO SHOULD APPLY?

9. The policy applies to such acquisitions by foreign persons. A foreign person is defined as:

- a natural person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;

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[10] The guidelines for foreign government investment proposals are provided at Attachment A, as announced in the Treasurer's media release of 17 February 2008.

[11] **Urban land** is defined as all land situated in Australia other than rural land. Rural land is land that is used wholly and exclusively for carrying on a substantial business of primary production. Further details of the urban land policy are provided in the document *Foreign Investment Policy - Urban Land (real estate)*, available on the website at www.firb.gov.au.

[12] A US enterprise is an entity constituted or organised under a law of the United States. The form in which the entity may be constituted or organised may be, but is not limited to a corporation, a trust, a partnership, a sole proprietorship, and a joint venture.

[13] A branch may be 'carrying on business activities in the United States of America' where it is doing so in a way other than being solely a representative office; and in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the United States of America; and by having its administration in the United States of America.

- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

EXAMINATION BY SECTOR

10. Below is an outline of the policy and the examination guidelines it provides in relation to particular industry sectors which are regarded as sensitive. The majority of foreign investment proposals will fall within these guidelines. Those that do not are examined on a case-by-case basis.

11. The FATA applies to most examinable proposals and provides penalties for non-compliance.

12. The Government may raise no objections to individual investment proposals or do so subject to the parties meeting conditions imposed under the FATA. Such conditions ordinarily relate to acquisitions of real estate, primarily the time period for the development of vacant land and to second hand residential real estate being used as the acquirer's principle place of residence.

AUSTRALIAN URBAN LAND[14]

13. Proposed acquisitions of residential real estate are exempt from examination in the case of:

- Australian citizens living abroad purchasing either in their own name or through an Australian corporation or a trust;
- foreign nationals who are the holders of permanent resident visas or are holders, or are entitled to hold, a 'special category visa' purchasing either in their own name or through an Australian corporation or a trust; and
- foreign nationals purchasing, as joint tenants, with their Australian citizen spouse.

14. Proposed acquisitions of real estate for development (generally vacant land) are normally approved subject to specific conditions requiring continuous substantial construction to commence within 12 months, or 5 years in the case of commercial developments not to be used for residential purposes. Once construction is complete, the parties are required to provide advice of the completion date and actual development expenditure.

15. Foreign persons are normally given approval to buy:

- **vacant land** for development, including house and land packages where construction has not commenced, subject to a condition imposed under the FATA that continuous construction commences within 12 months for residential developments, or 5 years for commercial developments not to be used for residential purposes; and

[14] This is a brief summary of the urban land policy. Further details of the urban land policy are provided in the document *Foreign Investment Policy - Urban Land (real estate)*, available on the website at www.firb.gov.au.

- **new dwellings** such as house and land packages, home units and townhouses purchased 'off-the-plan' that is under construction or newly constructed, but never occupied or previously sold. 'Off-the-plan' sales to foreigners are only permitted for new development projects or extensively refurbished commercial structures, which have been converted to residential, on condition that no more than half the dwellings in a development are sold to foreign persons.

16. Certain categories of foreign nationals, who hold a visa that permits them to reside in Australia continuously for at least the next 12 months, may be given approval to purchase **developed residential real estate** (that is, **second hand dwellings**) for use as their principal place of residence (that is, not for rental purposes) while in Australia. A condition of such purchases is that the dwelling must be sold when the foreign nationals' temporary resident visas expire, they leave Australia, or the property is no longer used as their principal place of residence.

17. Foreign companies, with an established substantial business in Australia, buying for named senior executives resident in Australia for periods longer than 12 months, may be eligible for approval provided the accommodation is sold when no longer required for this purpose. Whether a company is eligible, and the number of properties that may be acquired, will depend upon the extent of the foreign company's operations and assets in Australia. Unless there are special circumstances, foreign companies normally will not be permitted to buy more than two houses under this category. Foreign companies would not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

18. Proposals by foreign persons to acquire developed residential real estate that do not fall within the above categories are subject to the FATA but are not normally approved.

19. Proposed acquisitions of developed non-residential commercial real estate are normally approved unless they are determined to be contrary to the national interest.

20. Proposed acquisitions of residential property (both vacant land and existing dwellings) which are within the bounds of a resort that the Treasurer had designated as an 'Integrated Tourism Resort' (ITR) prior to September 1999 are exempt from examination. For resorts designated as ITRs from September 1999, the exemption only applies to developed residential property, which is subject to a long term (10 years or more) lease to the resort/hotel operator, making it available for tourist accommodation when not occupied by the owner. All other property, including vacant land for development, within the ITR would be subject to the normal foreign investment restrictions. Strict conditions must be fully met to qualify for ITR status.[15]

21. Proposed acquisitions of hotels and motels operating under one title are normally approved (unless considered contrary to the national interest) under the tourism sector policy. Proposed acquisitions of strata titled hotel accommodation may be approved in certain designated hotels. Full details of the requirements for designated hotels are contained in the *Foreign Investment Policy Urban Land (Real Estate)*. Other accommodation facilities such as guesthouses, hostels, holiday flats and undesignated strata titled hotels or motels are examined under policy applying to the residential real estate sector.

22. All contracts by foreign persons to acquire interests in Australian urban land should be made conditional upon foreign investment approval, unless approval was obtained prior to entering into the contract. Contracts should allow a minimum of **40 days from date of lodgement** for such a decision.[16] Foreign investors are in breach of the FATA if they enter an unconditional contract to acquire property before approval is granted and may be subject to significant penalties.

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[15] For the name and locations of current ITRs, refer to the document entitled *Foreign Investment Policy – Integrated Tourism Resorts*, available on the FIRB website.

[16] The 30-day statutory examination period commences upon receipt of a valid notice under section 26A; a further 10 days from the date of decision is available under the FATA to notify the parties of the decision.

BANKING

23. Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* (FSSA) and banking policy, including prudential requirements. Any proposed foreign takeover or acquisition of an Australian bank will be considered on a case-by-case basis and judged on its merits. Acquisitions of interests by US investors in financial sector companies, as defined by the FSSA, are exempt from the FATA. The FSSA continues to apply.

24. The Government will permit the issue of new banking authorities to foreign owned banks where the Australian Prudential Regulation Authority (APRA) is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with APRA's prudential supervision arrangements.

CIVIL AVIATION

Domestic Services

25. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 100 per cent of the equity in an Australian domestic airline (other than Qantas), unless this is contrary to the national interest.

International Services

26. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 49 per cent of the equity in an Australian international carrier (other than Qantas) individually or in aggregate provided the proposal is not contrary to the national interest. In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

AIRPORTS

27. Foreign investment proposals for acquisitions of interests in Australian airports are subject to case-by-case examination in accordance with the standard notification requirements. In relation to the airports offered for sale by the Commonwealth, the *Airports Act 1996* stipulates a 49 per cent foreign ownership limit, a 5 per cent airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

SHIPPING

28. The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (that is, owned by an Australian citizen, a body corporate established by or under law of the Commonwealth or of a State or Territory of Australia), unless the ship is designated as chartered by an Australian operator.

MEDIA[17]

29. All direct (that is, non-portfolio) proposals by foreign persons to invest in the media sector irrespective of size are subject to prior approval under the policy. Proposals involving portfolio shareholdings of 5 per cent or more must also be submitted for examination.

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[17] The requirements that previously applied to broadcasting and newspapers were removed following proclamation of the *Broadcasting Services Amendment (Media Ownership) Act 2006* to come into effect on 4 April 2007.

TELECOMMUNICATIONS

30. Around 83 per cent of Telstra Corporation Limited (Telstra) is owned by institutional and individual investors, with the remaining approximately 17 per cent to be transferred by the Government to the Future Fund, a fund established by the Government to fund its public service superannuation liabilities. Shares transferred to the Future Fund will be held in escrow for a two year period.

31. Aggregate foreign ownership of Telstra is restricted to 35 per cent of the privatised equity (including instalment receipts) and individual foreign investors are only allowed to acquire a holding of no more than 5 per cent of the privatised equity.

APPROVAL PERIOD

32. Approval under the policy is normally only given for a specific transaction which is expected to be completed in a timely manner. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at a later date, or if a transaction is not completed within 12 months, further approval must be sought for the transaction.

33. Approvals for share acquisitions involving a full or partial bid under the *Corporations Act 2001* only apply to the shares acquired during the bid period. For example, if approval is given for a full bid and the bidder only acquires 60 per cent of the shares, but then subsequently wishes to proceed to acquire further shares on market using the 'creep provisions' of the *Corporations Act 2001* or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

34. Where a proposal involves option agreements for the purchase of shares, assets or property, prior approval is required to acquire the options. Normally, approvals for options will also extend to the exercise of those options, provided the option is exercised within 12 months of approval. Subsequent approval for the exercise of the options may be sought on an annual basis.

35. The time period for an approval may be varied where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (for example, real estate speculation) that would be contrary to the national interest. In this situation the extended period will be stated in the approval.

CONFIDENTIALITY/PRIVACY

36. The Government recognises the commercial-in-confidence sensitivity of much of the information provided to the Board. The Government respects this confidential status and ensures that appropriate security is given to it. Where third parties outside of Government seek to obtain access to confidential information held by the Government, subject to the operation of applicable legislation, it will not be made available without the permission of the applicant, except upon the order of a court of competent jurisdiction. In this respect, the Government will pursue the defence of this policy through the judicial system.

37. In addition, the Government is obligated to respect the privacy of personal information that is provided by applicants to the Board in accordance with and subject to the requirements of the *Privacy Act 1988* and the *Freedom of Information Act 1982*. In accordance with those Acts, the Government advises that in situations where the applicant has breached, or is strongly suspected of having breached the FATA, the Board may seek the assistance of other Government agencies in its efforts to ensure applicants comply with the FATA. In seeking such assistance, the Board may pass relevant personal information to those government agencies. Most commonly these

agencies will be the Department of Immigration and Citizenship, the Australian Taxation Office or the Australian Federal Police.

APPLICATIONS

38. The information normally required to enable foreign investment proposals to be processed is set out at Attachment B. **No fees or charges** apply to applications.

39. As of January 2008, the Board has moved to electronic record keeping for all foreign investment applications (including business proposals). Please note that submitting applications electronically (via email or fax) improves processing times – it is not necessary to post originals in addition to electronic lodgement.

Email: firbapplications@treasury.gov.au
Fax: 02 6263 2940
Post: The Executive Member
Foreign Investment Review Board
c/- The Treasury
Langton Crescent
PARKES ACT 2600

40. Each individual element of the application should be submitted as separate file attachments to the email. The preferred format for attachments would be as .pdf or .doc files. Applicants are requested to avoid attaching multiple individual pages as separate picture files. The email message should also include a webpage hyperlink to the appropriate current web addresses of any other material or information relevant to the application. Separate attachments would include the following:

- covering explanatory letter;
- statutory notice form 25/26/26A; and
- other supporting documents such as company annual reports and financial statements (if applicable).

FURTHER ENQUIRIES

41. Further information on the policy may be found at the Foreign Investment Review Board's webpage, www.firb.gov.au.

42. Should you have any further enquiries please contact the Board's Executive on:

General enquiries:		*From overseas:*
Phone:	02 6263 3795	+61 2 6263 3795
Fax:	02 6263 2940	+61 2 6263 2940
Email:	firbenquiries@treasury.gov.au	firbenquiries@treasury.gov.au

ATTACHMENT A

GUIDELINES FOR FOREIGN GOVERNMENT INVESTMENT PROPOSALS

Proposed investments by foreign governments and their agencies (e.g. state-owned enterprises and sovereign wealth funds (SWF)) are assessed on the same basis as private sector proposals. National interest implications are determined on a case-by-case basis.

However, the fact that these investors are owned or controlled by a foreign government raises additional factors that must also be examined.

This reflects the fact that investors with links to foreign governments may not operate solely in accordance with normal commercial considerations and may instead pursue broader political or strategic objectives that could be contrary to Australia's national interest.

The Government is obliged under the Foreign Acquisitions and Takeovers Act 1975 to determine whether proposed foreign acquisitions are consistent with Australia's national interest. In examining proposed investments by foreign governments and their agencies, the Australian Government will typically have regard to the following six issues.

1. An investor's operations are independent from the relevant foreign government.

In considering issues relating to independence, the Government will focus on the extent to which the prospective foreign investor operates at arm's length from the relevant government.

It also considers whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government (including through the investor's funding arrangements).

Where the investor has been partly privatised, the Government would consider the size and composition of any non-government interests, including any restrictions on governance rights.

2. An investor is subject to and adheres to the law and observes common standards of business behaviour.

To this end, the Government considers the extent to which the investor has clear commercial objectives and has been subject to adequate and transparent regulation and supervision in other jurisdictions.

The Government will examine the corporate governance practices of foreign government investors. In the case of an SWF, the Government would also consider the fund's investment policy and how it proposes to exercise voting power in relation to Australian companies.

Proposals by foreign government owned or controlled investors that operate on a transparent and commercial basis are less likely to raise additional national interest concerns than proposals from those that do not.

3. An investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned.

These issues are also examined by the Australian Competition and Consumer Commission in accordance with Australia's competition policy regime.

4. An investment may impact on Australian Government revenue or other policies.

For example, investments by foreign government entities must be taxed on the same basis as operations by other commercial entities. They must also be consistent with the Government's objectives in relation to matters such as the environment.

5. An investment may impact on Australia's national security.

The Government would consider the extent to which investments might affect Australia's ability to protect its strategic and security interests.

6. An investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.

The Government would consider any plans by an acquiring entity to restructure an Australian business following its acquisition. Key interests would include impacts on imports, exports, local processing of materials, research and development and industrial relations.

The Government would also consider the extent of Australian participation in ownership, control and management of an enterprise that would remain after a foreign investment, including the interests of employees, creditors and other stakeholders.

ATTACHMENT B

SUPPORTING INFORMATION FOR APPLICATIONS FOR FOREIGN INVESTMENT APPROVAL

The requirements set out below are supplementary to those of the notification provisions of sections 25, 26 and 26A of the FATA (for which there are forms prescribed under the *Foreign Acquisitions and Takeovers (Notices) Regulations*).

Australian urban land (real estate) acquisitions

Please refer to the separate Government policy statement applying to the acquisition of interests in Australian urban land *Foreign Investment Policy - Urban Land (real estate)*.

Share and business asset acquisitions

1. Acquisitions of interests in enterprises with total assets above (or valued above) $100 million

A Parties to the proposal

For both the purchaser and target business:

- name;
- major activities and locations;
- major subsidiaries and associated companies;
- a copy of the latest financial statements, which should include total assets, net tangible assets and pre-tax profits;
- details of ownership (including identity of ultimate or beneficial owners); and
- country of ultimate control of purchaser.

B Type of proposal

- Acquisition/issue of shares:
  - the number, class and voting rights of shares, including the percentage of the total equity involved.
- Acquisition of assets:
  - description of the assets involved.
- Agreements/arrangements entered into or terminated; alteration of a constituent document:
  - full details, supported by copies of appropriate documents or relevant extracts.

C Consideration

- Amounts involved and the source of the funds.

D Reason(s) for the proposal

E Brief description of the purchaser's future intentions for the business, including amount of development expenditure proposed.

2. New business or project involving total investment (including debt) during the establishment phase of $10 million and above

A Parties to the proposal

- Name, location and major activities of the investor; and
- A copy of the latest financial statements for the investor which should include total assets, net tangible assets and pre-tax profits.

B The proposal

- Description of proposal including the total funds to be invested, the proposed location of the investment and the purpose of the investment.

C Ownership of the proposed business

- Details of proposed beneficial ownership, voting and board representation rights, and other rights concerning management and control.

D Industry information

- A description of the industry in which the new venture will be engaged.

E Other considerations

- Information should also be provided on any patents, royalty and licensing arrangements and export franchises held by the applicant which might be made available to the local firm and the basis on which these would be made available; what restrictions, if any, will be placed on the new venture together with any plans for local research and development; and
- Describe the environmental impact, if any, of the proposal, and provide details of any environmental studies undertaken.

ATTACHMENT C

PRESCRIBED SENSITIVE SECTORS UNDER THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT (AUSFTA)

For US investors subject to the AUSFTA, the prescribed sensitive sectors are:

- media;
- telecommunications;
- transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia);
- the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

Acquisitions in these sectors are subject to different thresholds under the FATA.