



## FOREIGN GOVERNMENT INVESTORS

The *Foreign Acquisitions and Takeovers Act 1975* (Act) applies to certain actions by foreign persons, which include foreign governments. There are different rules in the legislation for investments by a foreign government investor compared with private investors. Additional requirements for foreign government investors are non-discriminatory, as they apply regardless of the foreign government.

This Guidance Note outlines the specific rules relating to foreign government investors.

### THE NATIONAL INTEREST TEST

In considering whether investments by foreign government investors are contrary to the national interest, the Government will consider factors including national security; competition; other Australian Government policies such as taxation; the impact on the economy and the community; and the character of the investor (additional aspects are considered for investments in the agricultural sector).

Where a proposal involves a foreign government investor, the Government also considers aspects including the commerciality of the investment. This includes assessing whether the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives.

For further information, see Australia's Foreign Investment Policy.

### WHO IS A FOREIGN GOVERNMENT INVESTOR?

Section 17 of the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation) defines 'foreign government investor' as:

- a foreign government or separate government entity;
- a corporation or trustee of a trust in which:
  - a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest (that is, an interest of at least 20 per cent); or
  - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest (that is, an interest of at least 40 per cent);
- a general partner of a limited partnership in which:
  - a foreign government or separate government entity, alone or together with one or more associates, holds an interest of at least 20 per cent; or
  - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of 40 per cent or more;
- a corporation, trustee or general partner of a kind described in the two dot points above, assuming the references to foreign government (or foreign governments) in those dot points include references to a foreign government investor (or foreign government investors) within the meaning of those dot points.

Under section 4 of the Act:

- a ‘foreign government’ means an entity that is:
  - a body politic of a foreign country; or
  - a body politic of part of a foreign country; or
  - a part of a body politic of a foreign country or a part of a body politic of part of a foreign country;
- a ‘separate government entity’ means an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or a part of a foreign country, but not part of the body politic of a foreign country or of a part of a foreign country.

Foreign government investors (and foreign governments) are ‘foreign persons’ for the purposes of the Act (section 4 of the Act and section 18 of the Regulation). This means that the requirements imposed by the Act apply to all foreign government investors unless an exemption in the Regulation applies. Exemptions in the Regulations apply to foreign government investors unless foreign government investors have been specifically excluded from the exemption.

## Associates

Paragraph 6(1)(l) of the Act defines ‘associate’ to specifically provide that for a foreign government investor, their associates include any other person that is a foreign government in relation to that country (or part of a foreign country); any other person that is a separate government entity in relation to that country (or any part of that country); and any other foreign government investor from the same country (of any part of that country). This is in addition to other associates the foreign government investor may have due to other paragraphs of subsection 6(1) or due to subsection 6(2) of the Act. Exemptions to the meaning of associate are listed below.

The Government will not impose fines or pursue penalties or offences for breaches where it is not reasonable for a foreign government investor to know that one or more other foreign government investors from the same country already hold, or are concurrently acquiring, interests in the target entity.

The following are examples of where it would not be considered reasonable to expect a foreign government investor to know about the interests of other foreign government investors in the target entity or that a breach has occurred:

- Where public regulatory disclosures in relation to the target entity do not disclose any such holdings (for example, through a substantial holder notice or a list of the target entity’s major shareholders in the target entity’s latest financial report) and the foreign government investor is otherwise not privy to information on such holdings.
- Where such a holding in the target entity is disclosed but it is not on its face identifiable as being held by a foreign government investor, and the other foreign government investor is not otherwise privy to information that would identify the holding as being held by a foreign government investor.<sup>1</sup>

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<sup>1</sup> Foreign government investors should adopt a reasonable position with respect to monitoring public regulatory disclosures (this does not require intra-day checks). Examples of where a foreign government investor is otherwise privy to information on such holdings is where they have been provided such information by the investor, the investor makes such information freely available on their website, or the foreign government

A foreign government investor may also acquire a direct interest as a result of a lower level entity or collective investment vehicle in which it holds a substantial interest acquiring a direct interest in an Australian entity or an Australian business. For such indirect acquisitions where it is not reasonable for the foreign government investor to know that the lower level entity or vehicle is acquiring or has acquired such an interest, the Government will not impose fines or pursue penalties or offences for breaches.

An example of where it would not be considered reasonable to expect a foreign government investor to know that the lower level entity has acquired such an interest if the foreign government investor is a passive investor in a collective investment vehicle, such as a managed investment fund or a limited partnership, and the investor is not:

- in a position to influence or participate in the central management and control of the entity or business or likewise determine the policy of the entity or business;<sup>2</sup> nor
- privy to details of the underlying investments of the entity or business, including due to legal restrictions.<sup>3</sup>

The Government will not impose fines or pursue penalties or offences in respect of where it is not reasonable for an entity or a collective investment vehicle to know that foreign government investors hold interests in the entity or vehicle that would make the entity, trustee or general partner, a foreign government investor. For example, where there are legal restrictions to them knowing this.

Similarly, the Government will not impose fines or pursue penalties or offences in respect of accessorial liability where a third party (for example, an adviser, an investment fund manager, discretionary investment manager, securities lending agent, or a target entity) is dealing with a foreign government investor on an arm's length basis without knowledge of all the facts and circumstances that mean the foreign government investor is required to give notice under the Act and in respect of the breach, they neither:

- knowingly assisted; nor
- aided and abetted.

#### **Example 1: Acquisition of a direct interest in an Australian entity**

After conducting due diligence, including reading the target's reports and market announcements, foreign government investor State Corporation directly acquires a 7 per cent interest in a listed Australian entity and assesses this as not a notifiable action. Unknown to State Corporation, another foreign government investor from the same country holds a 4 per cent interest in the same target Australian entity. Under the Act this would be an

investor has access to such information through third party data services. For listed entities, the Government does not expect the foreign government investor to approach the target to inquire about foreign government investors in the target's securities register.

<sup>2</sup> Where an interest is acquired by a subsidiary of a foreign government investor, the Government considers it reasonable that holding entities (and for entities within a wholly owned group, all entities with common ownership) will be aware of actions by the other entities when managing their portfolio to ensure that none of the entities breach the Act.

<sup>3</sup> Where the entity tracks indices and this is likely to mean that the entity holds an interest of one per cent or more in another entity that the foreign government investor is otherwise considering acquiring an interest in, it would be reasonable to expect that the entity holds an interest in the other entity equivalent to that entity's weighting in the index.

acquisition of a direct interest in an Australian entity and thus, a significant action and notifiable action for State Corporation. The effect of this Guidance Note is that the Government will not impose fines or pursue penalties or offences in this circumstance as State Corporation would not know of the 4 per cent interest.

### **Example 2: Offshore acquisition in a fund that has interests in an Australian entity**

Foreign government investors from a single country hold 25 per cent of Offshore Fund, which in turn holds 20 per cent of Funds Limited Partnership (which is an incorporated limited partnership). The Limited Partnership proposes to subscribe for a 5 per cent interest in a target fund that has Australian assets. Foreign government investors from the same country as Offshore Fund propose to subscribe for a further 5 per cent. The target fund manager and investment adviser conducting the subscription are not aware of the ownership of the Limited Partnership. Under the Act, facilitating the sale such that a significant action and notifiable action takes place without notice may give rise to accessorial liability. The effect of this Guidance Note is that the Government will not impose fines or pursue penalties or offences in this circumstance where the investment adviser and fund manager would not know of the ultimate ownership of Offshore Fund.

### *Associates exemptions*

Subsection 45(5) of the Regulation provides an exemption to the meaning of associate under paragraph 6(1)(l) of the Act so that the paragraph does not apply in the following instances. Whether or not a foreign government investor can be considered an associate can have important consequences for the purposes of determining whether the Act applies in a particular situation (see the ‘meaning of associates’ in Guidance Note 32).

- A corporation or trustee of a trust in which foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest of 40 per cent or more.
- A general partner of a limited partnership in which foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of 40 per cent or more.
- Corporation, trustee or partner of a kind described in the two dot points above, assuming the references to foreign government (or foreign governments) in those dot points include references to a foreign government investor (or foreign government investors) within the meaning of those dot points.

### **Tracing rules**

#### *Substantial interests*

Section 19 of the Act provides that substantial interests and aggregate substantial interests in corporations and trusts are traced back through the ownership of relevant entities. This applies where higher entities are in a position to control the voting power, or hold interests in shares in a corporation or interests in trusts of the lower entities.

While subsection 19(3) of the Act exempts tracing for foreign persons acquiring a direct interest in an Australian entity or Australian business that is an agribusiness (for certain notifiable and significant actions), or where a foreign person acquires a substantial interest in an Australian entity (for notifiable actions), these exemptions do not apply for foreign government investors

(see section 48 of the Regulation). This means that the tracing provisions apply to foreign government investors in determining whether they are proposing to take, or have taken, a notifiable action or significant action.

### **Example 3: Offshore acquisitions of a substantial interest in an Australian entity**

Foreign government investor State Corporation acquires a substantial interest in a European holding corporation that holds its interest in a wholly-owned Australian subsidiary entity through a holding entity in Asia. Based on the tracing rules, the offshore acquisition of a substantial interest in the European holding corporation will also be an acquisition of a substantial interest in an Australian entity and thus, a significant action and notifiable action for the foreign government investor.

### **Example 4: Offshore acquisition of a direct interest in an Australian entity**

Foreign government investor GovCo acquires a substantial interest in a European holding corporation EuroCo that has a direct interest in Australian entity AusCo. Based on the application of the tracing rules, the offshore acquisition by GovCo of a substantial interest in EuroCo will also involve an acquisition of a direct interest in AusCo. Therefore, GovCo will be acquiring a direct interest in an Australian entity (AusCo) and this will give rise to a significant action and notifiable action for GovCo.

## **WHEN TO NOTIFY**

In addition to the requirements for non-government foreign investors (which are generally also applicable to foreign government investors), foreign government investors must notify the Government and get prior approval before making certain investments in Australia, regardless of the value of the investment. The following are notifiable and significant actions for foreign government investors:

- acquiring a direct interest in an Australian entity or an Australian business;
- starting a new Australian business;
- acquiring an interest in Australian land;
- acquiring a legal or equitable interest in a mining, production or exploration tenement (this applies irrespective of the duration of the tenement); and
- acquiring an interest of at least 10 per cent in securities in a mining, production or exploration entity.

See section 47 of the Act and section 56 of the Regulation.

## **WHAT IS A DIRECT INTEREST?**

A direct interest in an entity or business is defined in section 16 of the Regulation to mean:

- an interest of at least 10 per cent in the entity or business, or
- an interest of at least 5 per cent in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business, or
- an interest of any percentage in the entity or business if the person who has acquired the interest is in a position to:
  - participate or influence the central management and control of the entity or business; or
  - influence, participate or determine the policy of the entity or business.

**Example 5: Legal arrangement**

Sunset Air is an airline carrier and foreign government investor. Sunset Air proposes to acquire a 5 per cent interest in Australian Air, an Australian airline carrier. As part of the acquisition, the airline carriers also decide to enter into a legally binding strategic alliance agreement in relation to the conduct of their businesses. As the proposed interest is at least 5 per cent, and there is a proposed legal arrangement relating to the business of Australian Air, these actions are considered to involve the acquisition of a direct interest in an Australian entity and are notifiable under the Act.

Section 16(b) of the Regulation is not intended to capture ordinary goods or services provision agreements on normal commercial terms. For example, if Sunset Air was to enter into a commercial agreement with Australian Air Catering, for the provision of catering services to Sunset Air on normal commercial terms, this would not be considered a legal arrangement relating to the business for the purposes of ascertaining whether the action is a direct interest and therefore not notifiable.

**Example 6: Position to influence**

A foreign government investor is acquiring a 2 per cent interest in an Australian entity. As part of the agreement entered into with the entity, the foreign government investor will be entitled to appoint a director to the four member board. Whilst the interest acquired is less than 10 per cent, the acquisition is considered the acquisition of a direct interest as the agreement includes the ability of the foreign government investor to participate or influence the central management of the business and, therefore, the acquisition of the interest is a notifiable and significant action.

**Exceptions specific to direct interest**

Subsection 56(3) of the Regulation exempts the establishment by a foreign government investor of a new wholly-owned subsidiary from being notifiable. However, if the new wholly-owned subsidiary then takes an action to acquire a direct interest in an Australian entity, this action will still be a significant and notifiable action.

Subsection 56(4) also provides an exception for acquiring *non-material interests in businesses* that are not sensitive businesses. This exception is only applicable where the direct interest is acquired by acquiring an interest in securities in a foreign entity.

Subsection 56(5) of the Regulation provides an exception for foreign government investors who as part of a consortium initially acquire a direct interest in a *consortium entity* if the entity is established for the purposes of making a later acquisition that is a significant action and a notifiable action. The later acquisition by the consortium entity must still be notified.

**WHAT DOES STARTING A NEW BUSINESS MEAN?**

Section 10 of the Regulation provides that a foreign government investor starts an Australian business if:

- the investor starts to carry on an Australian business; or
- for a foreign government investor that already carries on an Australian business—the business starts a new activity that:
  - is not incidental to an existing activity of the Australian business; and

- is within a different Division under the *Australian and New Zealand Standard Industrial Classification Codes* (ANZSIC Codes)<sup>4</sup> from the current activities of the Australian business.

However, a foreign government investor does not start an Australian business merely because the foreign government investor establishes a new entity that:

- carries on the same Australian business; or
- to acquire interests in assets of the same Australian business.

#### **Example 7: New Australian business**

A foreign government investor is operating an agricultural business in Australia. The investor decides to create a new subsidiary to begin operating an accommodation and food services business in rural Australia. As the new subsidiary will be operating a business that is within a different Division under the ANZSIC Codes, and is not incidental to the business already being conducted, this is considered to involve a proposal for starting a new business and is a notifiable and significant action.

#### **Example 8: Foreign government investors establishing a consortium entity**

A seven member consortium has two foreign government investors as members. The foreign government investors establish an entity on behalf of the consortium to provide local bus services in a large city. The foreign government investors who are members of the consortium already carry on businesses in Australia within the Division of the ANZSIC Codes, so establishing the new entity is not treated as starting a new business and is neither a notifiable nor significant action.

### **What is starting to carry on an Australian business?**

A foreign government investor will be considered to be starting to carry on an Australian business where they take actions that are required for commencing a new business, rather than making plans or acquiring information about starting a business (for new banking businesses, see below).

Taking actions that are required for commencing a new business (thus, starting a new Australian business) includes actions such as:

- applying for an Australian Business Number,
- taking out a lease for business use,
- engaging employees,
- entering into business contracts, or
- applying for various licences or approvals that may be required – for example an exploration licence.

#### ***New banking businesses***

To start a banking business in Australia<sup>5</sup>, foreign persons need firstly to apply to the Australian Prudential Regulation Authority (APRA) and be granted, an Authorised Deposit-taking

4 Information on the ANZSIC Codes and a search function of the activity descriptors is available at [www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1292.0Search12006%20\(Revision%202.0\)?opendocument&tabname=Summary&prodno=1292.0&issue=2006%20\(Revision%202.0\)&num=&view=](http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/1292.0Search12006%20(Revision%202.0)?opendocument&tabname=Summary&prodno=1292.0&issue=2006%20(Revision%202.0)&num=&view=).

5 This includes when establishing a representative office in Australia.

Institution (ADI) authority, or a foreign bank representative office consent. The associated foreign investment application to start a new business will only be decided once the ADI authority or written consent is granted by APRA. As APRA consideration can take up to 18 months, foreign government investors are encouraged to liaise with FIRB on the lodgement timing of their new business application. Applications related to other notifiable actions, such as taking an interest in Australian land, should continue to be lodged as per the usual timeframes.

#### **Example 9: New Australian branch of a foreign bank**

A foreign bank, which is a foreign government investor, would like to establish an Australian branch to start a banking business in Australia. The investor requires an ADI authority from APRA to conduct its banking business and applied to APRA for this in February. APRA has told the investor they are likely to need a year to assess the application.

After lodging with APRA, the investor contacts the FIRB to discuss the timing of the foreign investment application for starting a new Australian business. As a decision on the ADI authority application is not expected from APRA for a significant period, FIRB advises the investor to delay lodging the foreign investment until APRA indicates its assessment is nearing completion.

Late that year, APRA advises the investor that it has all the information it needs and it expects to have a decision in a few months. On this basis, and after liaising with the FIRB again, the investor lodges its foreign investment application. A decision on the application is made after APRA approves the ADI authority.

## LAND ACQUISITIONS

All acquisitions of interests in Australian land by foreign government investors are notifiable and significant actions, regardless of value. This is also the case for all acquisitions by foreign government investors of:

- any legal or equitable interest in a mining, production or exploration tenements (acquisitions include when an existing tenement is being converted to a different tenement such as an exploration tenement being converted to a mining tenement); or
- acquiring an interest of at least 10 per cent in securities in a mining, production or exploration entity.

See section 47 of the Act and paragraph 52(1)(d) and section 56 of the Regulation.

#### **Example 10: Land acquisition from a state or territory government entity**

A foreign government investor wants to purchase land from a State Government for the purposes of property development. For private investors, an acquisition from a Commonwealth, State, Territory or local government authority would be exempt from notification requirements. However, as this exemption does not apply for foreign government investors, a notice in relation to the action seeking a no objection notification would be necessary.

## EXEMPTIONS

Exemptions are provided in Part 3 of the Regulation. These apply to foreign government investors unless foreign government investors have been specifically excluded from the exemption. The table below shows the exemptions that are applicable to foreign government investors.

<b>Part 3 of the Regulation —Exemptions</b>
<b>Division 2—Exemptions applying for all purposes</b>
27 Moneylending agreements – (however, specific requirements apply when the interest arises from the enforcement of a security interest, so that the exemption is limited in its application)
<b>Division 3—Exemptions for certain actions from being significant and notifiable actions</b>
<b>Subdivision B—General exemptions</b>
29 Will or devolution
30 Certain interests held by foreign custodian corporations
<b>Subdivision C—Significant and notifiable actions relating to entities</b>
33 Compulsory acquisitions and compulsory buy-outs
34 Convertible instruments that include a requirement for loss absorption if entity becomes non-viable
<b>Subdivision D—Significant and notifiable actions relating to Australian land etc.</b>
36 Acquisitions by funds and schemes
37 Acquisition in certain circumstances
<b>Division 4—Other exemptions relating to significant and notifiable actions</b>
<b>Subdivision A—Exemptions relating to particular notifiable actions</b>
41 Exemptions for certain acquisitions – that is, pro-rata rights issues, dividend reinvestment plans bonus share plans, distribution reinvestment plans and switching facilities
41A Exemption – foreign persons in which foreign custodian corporations have interests
<b>Subdivision B—Exemption certificates</b>
42 Exemption certificates for underwriters
43 Exemption certificates for certain interests in tenements and mining, production or exploration entities
<b>Division 5—Exemptions from other specified provisions</b>
44 Meaning of agricultural land
45 Meaning of associate—exemptions
46 Meaning of foreign person—potential voting power and future rights
47 Meaning of foreign person—disregarding small holdings of securities in primary listed entities
48 Tracing of substantial interests in corporations and trusts

An outline of the exemption certificates and select exemptions appears below. Refer to the text of the applicable section of the Regulation for other exemptions shown in the above table.

### **Exemption certificates (interests in Australian land, interests in businesses and entities and certain interests in tenements and mining, production or exploration entities)**

Foreign government investors may apply to receive an exemption certificate under section 58 of the Act. This grants upfront approval to acquire a series of interests in certain types of Australian land without the need to seek individual approvals.

Applications for such certificates will be considered on a case-by-case basis. For further information, see Guidance Note 21.

Foreign government investors may also apply for an exemption certificate under section 43 of the Regulation in relation to certain interests in tenements and mining, production or exploration entities.

Foreign government investors may apply for an exemption certificate for businesses and entities under section 42 of the Regulation.

For further information about the above exemption certificates, see Guidance Note 26.

### Exemption – security interests

Section 27 of the Regulation exempts for all purposes, the acquisition of an interest in securities, assets, a trust, Australian land or a tenement if the interest is held solely by way of security for the purposes of a moneylending agreement. This exemption is only relevant to a foreign government investor that is carrying on a moneylending business (see moneylending agreement in section 5 of the Regulation). In addition, if a foreign government investor acquires an interest by way of enforcement of a security held solely for the purposes of a moneylending agreement and:

- if the foreign government investor is regulated by the Australian Prudential Regulation Authority as an Authorised Deposit-taking Institution (ADI), 12 months have not passed since the acquisition of the interest, or, if at least 12 months have passed since the acquisition of the interest, the foreign government investor is making a genuine attempt to dispose of the interest.
- if the foreign government investor is not an ADI or a subsidiary of an ADI, 6 months have not passed since the acquisition of the interest, or, if at least 6 months has passed since the acquisition of the interest, the foreign government investor is making a genuine attempt to dispose of the interest.

These exemptions do not apply to foreign government investors who are not carrying on a moneylending business. If there is no genuine moneylending business, taking a security interest may require foreign investment approval.

### Exemption for acquisitions for diplomatic or consular purposes

Subsection 37(5) of the Regulation, exempts acquisitions of interests by foreign government investors in residential or commercial land where the land to be acquired is to be used exclusively for a diplomatic mission or consular post, or a diplomatic residence or the residence of the head of a consular post.

### FEES

The fee is payable at the time of application. Processing commences when the correct fee is paid.

For more information on the fees applying to foreign investment applications, see [Guidance Note 30](#).

### PENALTIES

Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment rules.

## FURTHER INFORMATION

Further information is available on the FIRB website at [www.firb.gov.au](http://www.firb.gov.au) or by contacting +61 2 6263 3795. Foreign government investors should contact the Foreign Investment Review Board (FIRB) if they have any doubt as to whether an investment is notifiable.

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**Important notice:** This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.