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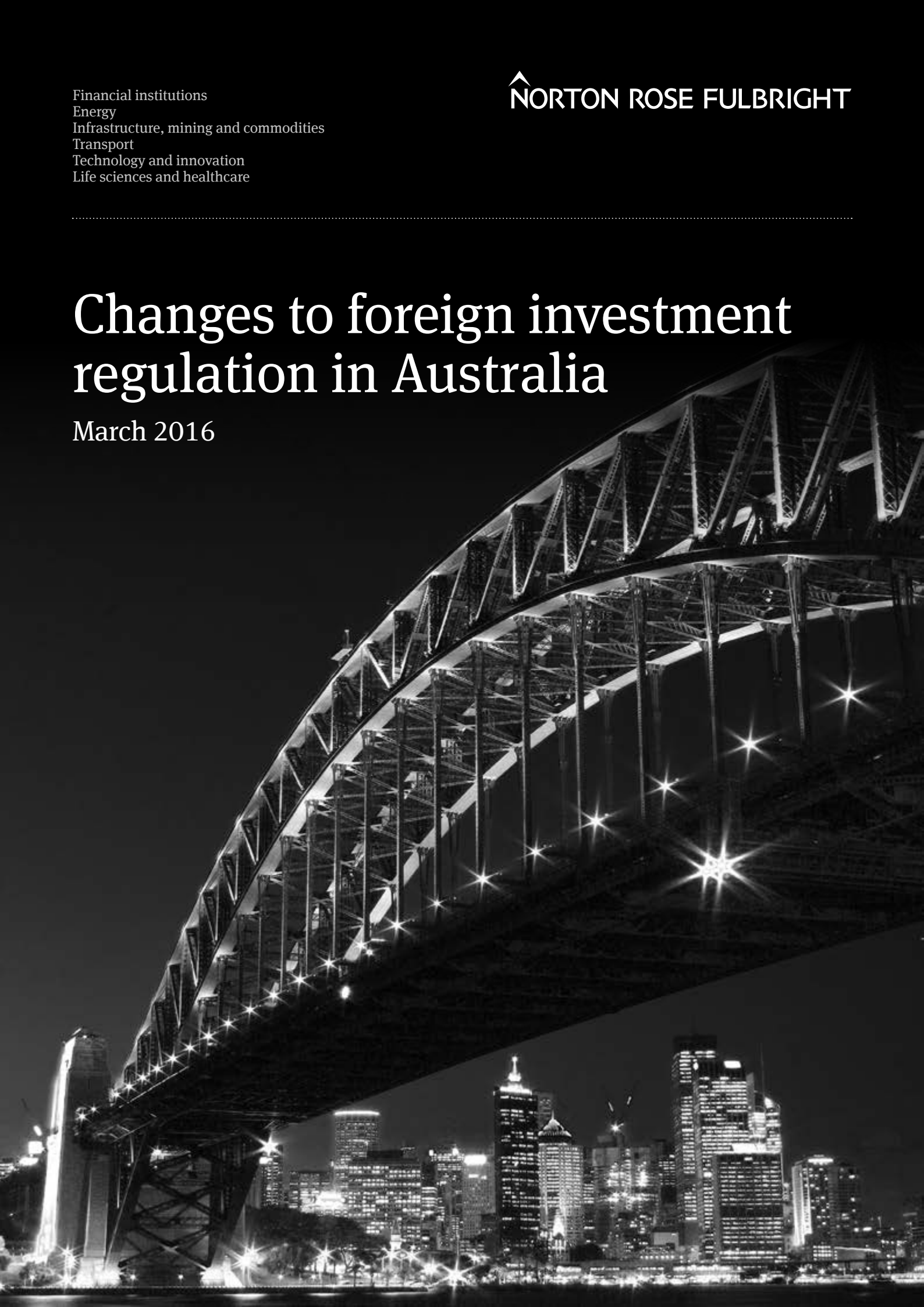
Changes to foreign investment regulation in Australia

March 2016



“We use them for their global footprint and for their commitment to understanding the different parts of our organisation, making connections between them and delivering opportunities; that is essential, and they do it well.”

Corporate M&A – Australia, Chambers Asia-Pacific 2016

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Introduction

Although media coverage and commentary might sometimes raise doubts, the Australian Government welcomes foreign investment. It understands that the many billions of dollars in foreign direct investment in Australia strengthens the local economy by providing additional capital for economic growth and healthy competition.

Statistically, Australia's record in approving foreign investments remains one of the best in developed nations with less than 0.1% of the applications received by the Foreign Investment Review Board (FIRB) rejected each year. Since 2001, only four significant business acquisition applications have been rejected by the Australian Government. The latest of these was the proposed acquisition of Kidman & Co by a Chinese agribusiness entity.

The basis of the decision in the Kidman & Co case was that around 50% of a pastoral lease for one of the properties owned by the company is located in the Woomera Prohibited Area, which is an area around a Department of Defence weapons testing facility subject to various regulations including the *Defence Act 1903* (Cth). This is not an issue that would impact most potential investments in Australia, and the outcome is in contrast to the many successful foreign investments in recent years. These include the 2012 acquisition of Australia's largest cotton farm, Cubbie Station, by a consortium led by China's Shandong RuYi Scientific and Technological Group.

The recent reforms to Australia's foreign investment regime, including the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA), came into effect on 1 December 2015. These reforms are generally to be welcomed on the basis they simplify the application process and clarify some of the ambiguities previously set out in FIRB's policies. However, the reforms also provide for some increased scrutiny with respect to acquisitions of land and in the agricultural sector, including agricultural land and agribusinesses. Additionally, the reforms formalise FIRB's ability to review acquisitions and investments by foreign government investors, entrenching FIRB's ability to continue to ensure the commercial operation of these investments in Australia.

The February 2016 announcement by the Treasurer that new tax conditions will attach to all foreign investment applications may be of some concern. Some of the new requirements, like the obligation to report all transactions that the Australian transfer pricing or anti-avoidance rules may apply to, appear to be unusually broad, and the potential penalties are also significant. As with most tax changes, the devil will be in the detail, and we are seeking further guidance from the Australian Taxation Office (ATO) and FIRB as to how foreign investors will be expected to comply with these conditions in practice.

In these circumstances, we recommend investors seek early professional advice to navigate through the process of investing into Australia.

Following is our summary of the key aspects of the recent changes to the regulation of foreign investment in Australia. We hope you find this useful. If you have any questions, please contact your usual Norton Rose Fulbright adviser, or one of the team members listed at the back of this publication.

*Amount of foreign direct investment in Australia as at 2014. Source: *Foreign Investment Reforms Factsheet: Foreign investment in Australia*, Australian Government.

Key Changes

On 1 December 2015, a number of new legislation and regulations to amend Australia's foreign investment regime came into effect. The key changes to the regime include:

- increasing the substantial interest threshold from 15% to 20%, which aligns with the threshold set out in Australia's corporate takeover rules
- simplifying the structure of the FATA, so that relevant transactions are broadly grouped into two categories: significant actions which are subject to voluntary notifications, and notifiable actions which are subject to mandatory notifications
- extending the current rules which require prior approval for acquisitions of interests in Australian urban land to all land in Australia, including agricultural land, unless an exemption applies
- increasing the screening threshold for acquisitions of interests in commercial land that is not vacant and not "sensitive", from $55 million to $252 million
- incorporating the existing rules relating to foreign government investors and acquisitions of interests in land currently set out in Australia's *Foreign Investment Policy* (2015) into the FATA so they have legislative force
- introducing civil penalties and stronger criminal penalties for serious offences, as well as providing for the issue of infringement notices for less serious offences, and
- introducing fees for applications under the FATA.

On 22 February 2016 the Australian Government announced that new tax conditions will attach to all foreign investment applications to ensure compliance with obligations imposed under Australian tax laws and timely cooperation with the Australian Taxation Office (ATO).

$252 million

new screening threshold for acquisitions of interests in commercial land that is not vacant and not "sensitive".

Monetary screening thresholds

Screening thresholds - Foreign private investors

The thresholds for foreign private investors are as follows (see table next page). It should be noted that the higher thresholds applicable to certain trade agreement partner countries (Chile, China, Japan, New Zealand, South Korea and the United States) only apply in very limited circumstances where the foreign investor is investing directly from the relevant foreign country.

In most cases where a foreign investor is seeking to invest in Australia through a separate investment vehicle, the higher threshold will not apply.

It should also be noted that for land acquisitions, the investment category is not based on the usage intended by the investor. For example, the acquisition of an interest in land with the intention of developing a wind farm may be subject to the agricultural land investment thresholds if it is land "that is used, or that could reasonably be used, for a primary production business".

Monetary screening thresholds are indexed annually on 1 January each year except for the $15 million agricultural land threshold and the $50 million agricultural land threshold for Singapore and Thailand investors, which are not indexed.

Screening thresholds - Foreign government investors

The rules for foreign government investors remain unchanged, and any foreign government investor requires prior approval under the FATA irrespective of the investment amount if they are:

- starting a business in Australia or taking any direct interest (10%, but in some circumstances less) in an Australian entity or business
- acquiring an interest in Australian land, or
- taking any interest in a tenement or a 10% or more interest in a mining, production or exploration entity.

Foreign government investors may not have to seek prior approval when making passive investments of less than 10% in Australian entities or businesses.

Screening thresholds - Foreign private investors

Investment	Area/Type	Private investor nationality	Threshold (AUD)
Australian Business	Non-sensitive sectors	Chile, China, Japan, NZ, South Korea, US	$1,094 million
		All others	$252 million
	Sensitive sectors	All	$252 million
	Media	All	$0
Agriculture	Land	US, NZ, Chile	$1,094 million
		Singapore, Thailand	$50 million
		All others	$15 million (cumulative)
	Agribusiness	US, NZ, Chile	$1,094 million
		All others	$55 million
Non-agriculture Land	Residential[1]	All	$0
	Vacant commercial land	All	$0
	Non-vacant commercial land	Chile, China, Japan, NZ, South Korea, US	$1,094 million
		All others	$252 million
	Certain sensitive land (eg, airport or port)	Chile, China, Japan, NZ, South Korea, US	$1,094 million
		All others	$55 million
	Mining and production tenements	US, NZ, Chile	$1,094 million
		All others	$0
	Interest in land to be held by Australian land corporation and trust[2]	All	$0

1. If residential land is also commercial land and not vacant, and the residential land makes up less than 10% of the total land by area and value, then the higher threshold of $252 million applies for non-agreement country investors, and of $1,094 million for agreement country investors.

2. If the total value of interests in residential land, and commercial land that is vacant, that are held by the corporation or trustee is less than 10% of the value of the total assets of the corporation or trustee, then the higher threshold of $252 million applies for non-agreement country investors, and of $1,094 million for agreement country investors.

Changes of "foreign person" definition

The definition of "foreign person" is central to the regime as the FATA only applies to the acquisition of interests in Australian entities, businesses or assets by foreign persons. The main changes to the definition of "foreign person" are:

- an Australian entity will now be deemed to be a "foreign person", and an acquisition of a minority interest in an Australian entity will in most cases only require prior FATA approval, if a foreign individual, foreign corporation or foreign government holds at least a 20% interest in the entity (increased from the previous 15%). This brings the FATA in line with the Australian corporate takeover rules, meaning that an acquisition of 20% of the shares in an Australian entity subject to the takeover rules will also trigger the application of the FATA, and
- the inclusion of a new "foreign government" definition. An entity will be a foreign government if it is a body politic of a foreign country or any part of a foreign country, being an entity established by and acting on behalf of the state of a foreign country.

Other sections of the "foreign person" definition are largely unchanged, including retaining the aggregate substantial interest threshold of at least 40% where two or more "foreign persons" are the holders.

Significant actions and notifiable actions

The FATA now categorises transactions which are subject to Australia's foreign investment framework into two broad groups – significant actions and notifiable actions.

Significant actions

Significant actions are transactions which trigger the power of the Federal Treasurer to make certain orders under the FATA. Notification to the Treasurer of significant actions is voluntary (except where the action is also a notifiable action – discussed below). Significant actions include:

- the acquisition of interests in Australian entities or businesses, or their assets
- the acquisition of interests in Australian land
- the acquisition of a direct interest (10%, but in some circumstances less) in an Australian agribusiness
- entering into certain agreements relating to the affairs of an entity or altering the constituent documents of an entity, which gives one or more foreign persons certain abilities to control senior officers of the entity, and
- entering into or terminating significant agreements with an Australian business.

Notifiable actions

The categories of notifiable actions extensively overlap with the concept of "significant actions". A foreign person who proposes to enter into an agreement to take a notifiable action must notify the Treasurer before entering into the agreement. Notifiable actions include:

- the acquisition of a direct interest in an agribusiness
- the acquisition of a substantial interest in an Australian entity
- the acquisition of an interest in Australian land
- a foreign government investor starting a business in Australia or taking any direct interest in an Australian entity or business, and
- a foreign government investor taking any interest in a tenement or a 10% or more interest in a mining, production or exploration entity.

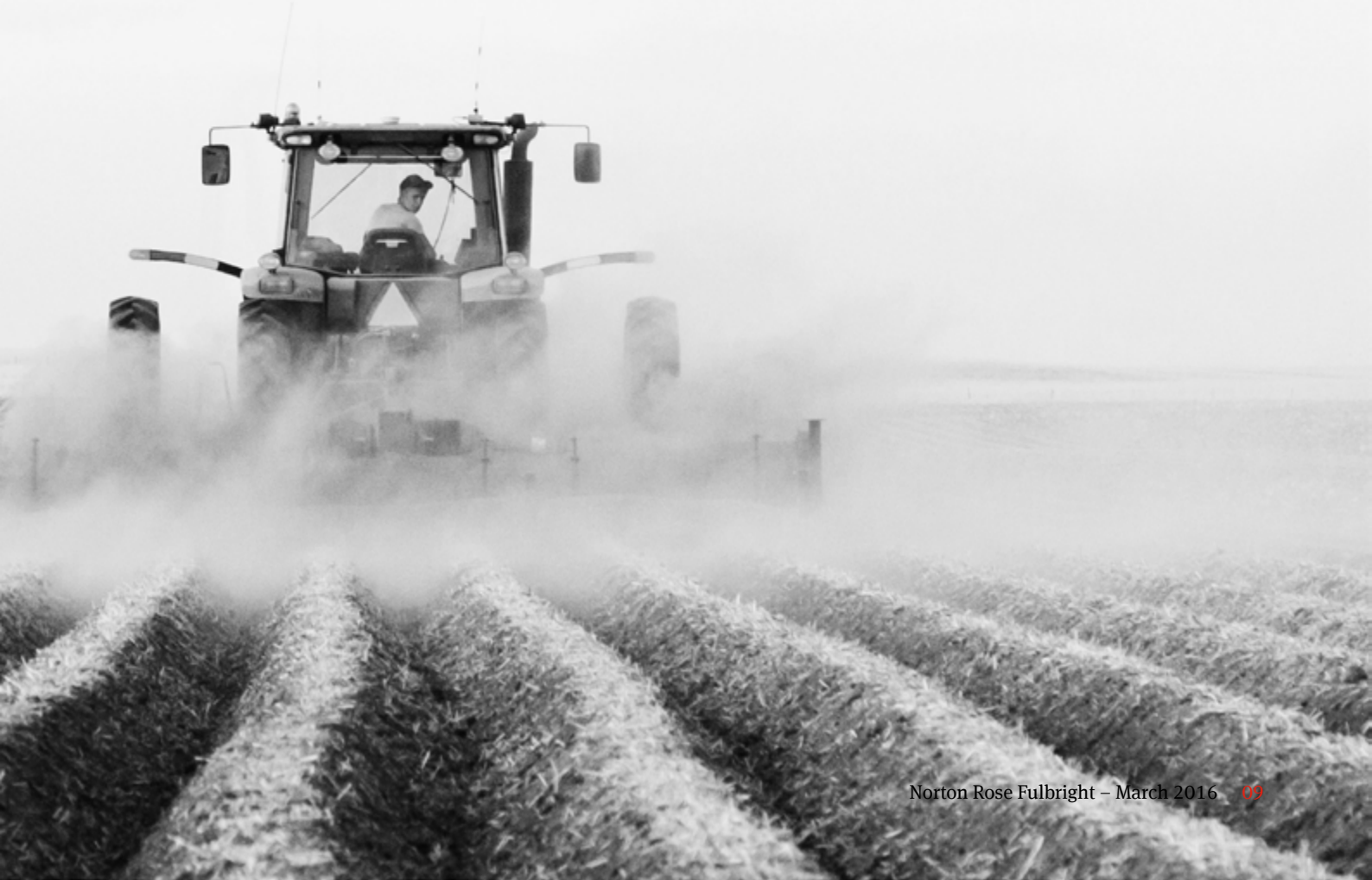
Acquisition of interests in land

The FATA now has a concept of "Australian land", which captures the previous "Australian rural land" concept and dissects the previous "Australian urban land" concept. Australian land now means agricultural land, commercial land, residential land or a mining or production tenement. Some of these categories of land are not mutually exclusive, so an area of land may fall under more than one category.

An interest in Australian land is broadly defined, and includes:

- a legal or equitable interest in Australian land (subject to certain exceptions)
- an interest in certain types of securities of the entity that owns the land which entitles the holder to occupy a dwelling
- an interest as lessee or licensee in a lease or licence that exceeds five years
- a profit à prendre, if the term of the agreement exceeds five years
- an interest in a share in an Australian land corporation or agricultural land corporation (similar to the previous concept of "urban land corporation"), and
- an interest in a unit in an Australian land trust or agricultural land trust, or an interest in the shares of the trustee of such a trust.

The acquisition of an interest in Australian land is a significant action and also a notifiable action which enlivens the powers of the Treasurer to make orders under the FATA.



New application fees

Previously, no fees or charges were payable when making an application or giving a notice under the FATA. Under the new regime, each applicant is required to pay a fee for each application made, or notice given, under the FATA. Very limited exceptions apply to application fees (see table below for some of the key thresholds).

The Australian Government has advised that generally fees will not be waived or remitted where a proposal does not get approval from the Treasurer, or the investment has been ultimately unsuccessful. For example, a foreign person will not generally receive a fee waiver or remission following an unsuccessful competitive bid process. Fees ranging between $25,000 and $100,000 also apply to applications for exemption certificates under the FATA.

Investment	Type	Threshold (AUD)	Application Fee (AUD)
Australian entity or business or agribusiness	All	Consideration is $1 billion or less	$25,000
		Consideration is more than $1 billion	$100,000
Land	Residential	Consideration is $1 million or less	$5,000
		Consideration is more than $1 million	$10,000 per $1 million
	Commercial – vacant	Any	$10,000
	Commercial – developed	Any	$25,000
	Agricultural	Consideration is $1 million or less	$5,000
		Consideration is more than $1 million	$10,000 per $1 million up to maximum of $100,000
	Mining tenements	Any	$25,000 ($10,000 for foreign government investors investing in exploration licences)
Other	Internal reorganisation	Any	$10,000
	Foreign government investor starting an Australian business	Any	$10,000
	Foreign government investor acquiring certain interests in a tenement or mining entity[3]	Any	$10,000

3. The lower application fee of $10,000 only applies if the investment by foreign government investor does not fall within any other category.

Penalties

These reforms introduce civil penalties and stronger criminal penalties for serious offences, as well as providing for the issue of infringement notices for less serious offences under the FATA.

For example, a person may be liable if the person:

- fails to notify the Treasurer before taking a notifiable action
- gives 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 which prohibits a proposed significant action, is related to a prohibition order, is an interim order or is a disposal order, or
- contravenes a condition in a no objection notification imposing conditions or an exemption certificate.

The maximum penalties for the most serious offences in the FATA have increased.

	Previous penalties	New penalties
Individuals	Imprisonment for two years, a fine of 500 penalty units[4] ($90,000), or both.	Imprisonment for three years, a fine of 750 penalty units ($135,000), or both.
Bodies Corporate	A fine of 2,500 penalty units ($450,000).	A fine of 3,750 penalty units ($675,000).

4. Penalty units are used to describe the amount payable for fines under Commonwealth laws. Fines are calculated by multiplying the value of one penalty unit (currently $180) by the number of penalty units prescribed for the offence. The value of penalty units is reviewed every three years.

Timing

Under the new regime, the 30 day period (plus a further 10 days notification period) within which the Treasurer can consider and notify foreign persons in relation to transactions remains the same. However, there are some important points to note:

- FIRB will not commence its review, and this 40 day period will not commence, until the relevant application fee has been paid.
- Under the new regime FIRB will grant a 30 day extension on request from the applicant.

In our experience, it is becoming more common that FIRB is requesting at least one 30 day extension before reaching a decision. Therefore applicants should be mindful of this and ensure that their FIRB applications are made as early as possible in the transaction process so as to avoid FIRB approval delaying completion of the transaction.

Resources sector

The changes to the regime affecting the mining and oil and gas sector have resulted in greater certainty around the types of interests which will require FIRB approval.

Under the previous legislative regime there was some uncertainty as to how the FATA applied to mining tenements in the context of Australian urban land (with urban land being all land that did not fall within the definition of rural land). FIRB's previous policy addressed this by noting that approval was required for the acquisition of interests in prospecting, exploration, mining or production tenements where the tenement conferred on the holder a right to Australian urban land for more than five years.

Under the new regime, the definition of "Australian land" specifically includes mining and production tenements (whether for minerals, oil or gas) regardless of their term, but does not make reference to exploration or prospecting tenements. FIRB's guidance note on mining investment states that generally interests in exploration tenements will not require FIRB approval. However, if an exploration tenement (at the time of its acquisition) is reasonably likely to exceed five years (including via an extension or renewal) and confers on the holder a right to occupy the underlying land, then the acquisition may be a notifiable action and a significant action, depending on the type of land and the value of the interest in land. We encourage applicants with interests that meet these criteria to liaise with their advisers prior to making an application. FIRB's guidance notes do not address prospecting tenements, however, we expect that they will be given the same treatment as exploration tenements.

However, the position is different if the foreign person is a foreign government investor. The proposed acquisition by a foreign government investor of an interest in any tenement (whether prospecting, exploration, production or mining tenement) will require prior approval under FATA. Further, the proposed acquisition by a foreign government investor of an interest of at least 10% of the securities in a mining or production or exploration entity will also require prior approval.

One of the other more significant changes under the new regime which is relevant to acquisitions in the energy and resource sector is the inclusion of monetary thresholds for the acquisition of a substantial interest in "Australian land corporations", defined as a corporation where the value of its interests in Australian land exceeds 50% of the value of its total assets.

Whereas under the previous regime acquisitions of any interest (irrespective of value) in an urban land corporation required prior approval from FIRB, under the new regime, provided that the Australian land corporation holds less than 10% of its assets by value in residential and vacant commercial land, the acquisition of a substantial interest or control of an Australian land corporation will not require prior approval if the value of the interest in the land assets used for mining operations (or other types of sensitive land, see above) of the target entity that is being acquired is below $55 million, or the value of the interest in general land assets that are being acquired is below $252 million. There is also a further exemption for the acquisition of a passive interest below 10% in a listed Australian land corporation which would facilitate general share trading by foreign investors on the Australian Securities Exchange (ASX).

Overall these changes make it easier for private foreign investors to acquire a substantial interest or control of smaller mining and resource companies in Australia.

Infrastructure sector

Given the number of large infrastructure projects currently on-going in Australia, including privatisation projects being undertaken by the State Governments in New South Wales, Victoria and Western Australia, there are a number of changes to the regime that will be relevant to foreign investors in the infrastructure sector.

In general, the changes to the regime are expected to reduce red tape for private foreign investors investing in infrastructure projects in Australia. Historically, most large-scale project work required prior FIRB approval due to the inevitable need to acquire certain land interests for building and accessing the relevant infrastructure.

The increase in the screening threshold for acquisitions of interests in non-vacant commercial land from $55 million to $252 million is welcome and will allow investments in a number of mid-sized projects to proceed without having to seek prior approval. However, it should be noted that the Australian Government has also identified certain categories of non-vacant commercial land (which covers what might broadly be described as "sensitive land") to which the lower threshold of $55 million applies to acquisitions by foreign persons other than an agreement country investor. This includes:

- land that will be leased to the Commonwealth or State Government (or their agencies)
- land under any prescribed airspace
- land on which a mining operation (which includes oil and gas operations) will operate
- a communication facility stored on land, and
- land on which public infrastructure will be located, including airport sites, ports, public transport, and any facility that will be used to provide supply of electricity, gas, water or sewage.

There continues to be a carve-out from the regime in respect of the acquisition of land interests from Commonwealth or State Governments, which may assist with privatisation transactions undertaken by government entities. However, importantly, the revised regime excluded "foreign government investors" from the carve-out, so any foreign government investor wishing to acquire land interests from a government as part of the privatisation process will still require prior approval from FIRB under the new regime.

We note that over the last twelve months, there has been significant media and public interest in foreign government investors acquiring interests in key infrastructure projects in Australia. So far, the Australian Government has not created any separate screening regime for "key infrastructure projects", although FIRB has imposed additional conditions on a case-by-case basis. For example, foreign government investors from a single country bidding in the NSW Transgrid privatisation were not allowed to acquire more than a 50% interest in the project.

In our view, this approach is likely to be limited to large-scale infrastructure projects that affect the national security of Australia as a whole. We expect FIRB will continue facilitating foreign investments in most infrastructure projects, whether the source of funding is from foreign government or private investors.

New tax conditions and reporting obligations

The Australian Government announced on 22 February 2016 that new tax conditions will generally attach to all foreign investment applications to ensure multinational companies investing in Australia comply with all obligations imposed under the tax laws and to ensure timely cooperation with the Australian Taxation Office (ATO). A set of standard tax conditions will attach to all FIRB approvals, and these generally relate to compliance with Australian taxation law, ATO directions to provide information in relation to the investment, and an obligation to advise the ATO if a foreign investor or any of its associates enter into any transactions to which the Australian transfer pricing or anti-avoidance tax measures may potentially apply.

In addition to the general conditions, additional conditions may be applied where a significant tax risk is identified in a particular transaction. These may include requiring the foreign investor to enter into advance pricing arrangements with or seek rulings from the ATO, or comply with other directions from the ATO that are specific to their circumstances. FIRB may also include a condition that foreign investors provide periodic tax forecasts to the ATO. This may include a requirement on the foreign investor to advise the ATO of, and provide an explanation for, significant variations from the forecasts provided.

Following receipt of FIRB's approval attaching the tax conditions, the foreign investor will be required to provide an annual report to FIRB on compliance with these conditions for every 12 month period. Based on our discussions with FIRB to date, we understand the annual report will generally be provided in the form of a certification signed by the foreign investor in favour of the Secretary of FIRB confirming that the tax conditions have been complied with in the past 12 months.

Some of the tax conditions (such as the requirement to comply with taxation law in Australia) appear relatively benign, and in our experience the ATO is already intimately involved in reviewing all foreign investment applications. We have been involved in a number of cross-border transactions where the ATO has required the foreign investor to enter into advance tax arrangements or rulings as part of the FIRB approval process.

What is new are the requirements on the foreign investor to provide all information required by the ATO (including information stored outside Australia) without qualification, and the obligation to report any transactions undertaken by it or its associates which the transfer pricing rules or anti-avoidance rules may potentially apply. It is unclear how broad these conditions are. For example, we assume information that is subject to legal professional privilege will fall outside the scope of these conditions but this has not been confirmed. The obligation to report all transactions the transfer pricing or anti-avoidance rules may apply to also appears to be unusually broad. We are seeking further guidance from the ATO and FIRB as to how foreign investors will be expected to comply with these conditions in practice.

A breach of any general or transaction-specific FIRB conditions will invalidate the approval received by the foreign investor and therefore result in the relevant transaction contravening the FATA rules (if the transaction is a notifiable action) and/or otherwise give the Australian Treasurer the right to make remedial orders including divestment of the asset (if the transaction is a significant action).

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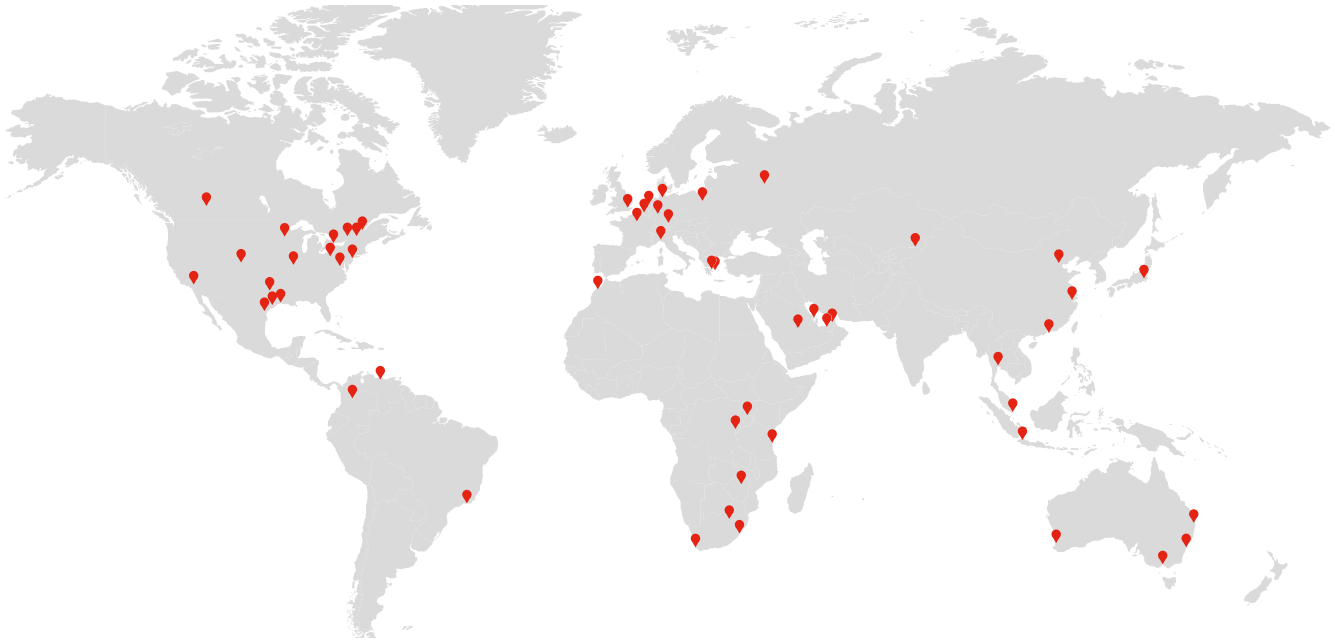
Global Resources



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1 TNB & Partners in association with Norton Rose Fulbright Australia
2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
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