

In making a preliminary decision on the sale of S. Kidman & Co to a Chinese consortium, the Treasurer Scott Morrison has shed some light on what the government defines as being in the “national interest”. He describes the Chinese bid as being [contrary to Australia's national interest](#), because:

“the form in which the Kidman portfolio has been offered as a single aggregated asset, has rendered it difficult for Australian bidders to be able to make a competitive bid.”

The decision was rationalised not on any of the pre-existing national interest test provisions, but rather the fact that Australian companies had struggled to make a competitive bid.

By doing this, the Treasurer has articulated a new policy objective, not previously part of the national interest test: that an Australian firm should have a substantial stake in the bidding process.

### How is national interest defined?

The consortium bid for Kidman, the largest private land holding in Australia, was subject to approval by the Treasurer and the Foreign Investment Review Board (FIRB). All investments which are screened by the FIRB are subject to a “national interest test”.

The specific content of this test is not legislatively defined, and is decided on a case-by-case basis according to the judgement of the Treasurer. However, the FIRB does provide investors a [set of “guidelines”](#), which outline five factors that are usually considered. These include: national security, competition policy, other Australian government policies and regulations (including environment and tax), the impact on the economy and community as a whole and the character of the investor.

There are also an additional set of six guidelines for the agricultural sector, which cover issues relevant for this industry such as land access, biodiversity, productivity and employment.

## Morrison's ruling on Kidman Co sale redefines the national interest test

Written by The Conversation

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These guidelines were most recently re-issued in December 2015. However, they have remained relatively unchanged since the last major revision by the Rudd government in 2008, which was made in the wake of [Chinalco's intervention into a proposed BHP-Rio Tinto takeover](#). Significantly, none of these provisions express a requirement for local ownership in the agricultural sector.

In recent years, the overwhelming majority of investment applications assessed by the FIRB have passed the national interest test. In the relatively rare cases of rejection, it has consistently been for one of the above reasons. Examples include the ADM bid for GrainCorp ([rejected in 2013 on competition policy grounds](#)), and the Singapore Stock Exchange's attempted merger with the ASX ([rejected in 2011 on financial regulatory grounds](#)).

However, Scott Morrison's preliminary decision to oppose Dakang Australia's bid for S. Kidman and Co. fundamentally reinterprets these guidelines. Despite the fact the sale process was found to be open and commercially sound, it has been rejected.

The clear message is that sale process now needs to be re-run – with the assets disaggregated – to ensure less-competitive local companies can win at least some of the assets.

This is akin to moving the goalposts when the outcome is not what you desired. It is also inherently protectionist. It rewards Australian firms who will now get a second chance to pick up a part of the Kidman portfolio.

In essence, the Kidman decision is a de facto introduction of a local ownership policy for agricultural land. Outside of sensitive sectors (such as media), Australia has not maintained any formal local ownership rules since 1992. This makes the Kidman rejection was of the most significant foreign investment decisions made in several decades.

It is clear that the Treasurer sees Australian bidders as crucial to ensuring national interests are looked after, what is still not clear is definition of "foreign interest."

### How is foreign interest defined?

The Kidman decision comes as a senate inquiry examining the [effectiveness of the Foreign Investment Review Framework](#) finishes. The [final](#) and [supplementary](#) reports from the inquiry point to a lack of consistency and transparency of foreign investment decision making between the states and the commonwealth, particularly regarding sales of agricultural land to foreign interest.

At the moment [the Foreign Acquisition and Takeovers Act 1975](#) deals with any foreign people or corporations that are seeking to acquire or to merge with a whole or a part of an Australian business. If a transaction exceeds a certain limit (different limits are applied to different industries) it's reviewed by the [Foreign Investment Review Board](#) (FIRB).

However this Act doesn't have a definition of foreign interest. This is crucial because since 1975, the picture of the world has dramatically changed.

According to ABS, until late 1980s, Australia's investing partners were [mostly persons and companies from developed market economies](#). Therefore, there could be little concern that Australia's foreign counterparts were different to investing domestic entities.

These companies were either seeking profit or also seeking company control as direct investors and usually didn't report to or take directives from any government on commercial decisions.

In late 1980s, new market economies emerged in place of both former communist countries, and reforming and rapidly growing third world nations. In some of those nations, such as most countries that replaced the former USSR, as well as in China, different forms of mixed private and public ownership in companies have been established with different roles and powers of

governments in companies' decision making.

Despite of large scale privatisation, state and mixed ownership is still important and increasingly so [in Russia](#) . By 2014 [China has become the 7th largest foreign investor](#) in Australia, ahead of such countries as Germany, New Zealand, France. Meanwhile, [ownership is rarely straight forward in China](#) ; and the countries' 500 global companies are mostly [state-owned](#)

However, the 1975 Act does not require that the FIRB to look into the proportion of foreign government's ownership in a company; involvement of a foreign government in company's decision making (particularly, through government's representation on the board of directors); government's orders that limit company's commercial independence; or compliance with legislation beyond that which normally regulates commercial activities.

This issue could be addressed by including foreign interest independence test into the FIRB process. Such a test needs to deal with the magnitude of sovereign ownership and sovereign involvement in foreign company's decision making.

The idea of such a test was suggested one [one of the submissions](#) to the review, but did not find it's way to the report.

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