



Telephone: 02 6263 3795  
Overseas: +61 2 6263 3795  
Facsimile: 02 6263 2940  
Website: [www.firb.gov.au](http://www.firb.gov.au)

**Australian Government**  
**The Treasury**

Foreign Investment Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

**September 2009**

# **AUSTRALIA'S FOREIGN INVESTMENT POLICY<sup>1</sup>**

## **GENERAL<sup>2</sup>**

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.<sup>3</sup> 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 (FIRB) 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. For example, reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and in the residential real estate area. 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.

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<sup>1</sup> This document should be considered in conjunction with the [Foreign Acquisitions and Takeovers Act 1975](#) and the [Foreign Acquisitions and Takeovers Regulations 1989](#).

<sup>2</sup> Definitions of relevant terms are provided at [Attachment D](#).

<sup>3</sup> Under the Australia-United States Free Trade Agreement (AUSFTA) which came into effect on 1 January 2005.

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 support foreign investment in the housing sector 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.

## WHO SHOULD APPLY?

8. The FATA and the policy apply to certain 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 [substantial interest](#);
- 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 substantial 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](#).

## PRIOR APPROVAL

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

- acquisitions of interests in an Australian business or corporation which is valued above, or the proposal values it above, \$219 million.<sup>4</sup> For 'US investors'<sup>5</sup> a threshold of \$953 million<sup>6</sup> applies, except for investments in [prescribed sensitive sectors](#) where the standard \$219 million<sup>7</sup> threshold applies. Acquisitions of interests may include:
  - acquisitions of shares (including options and other instruments which may be converted to shares) representing a [substantial interest](#) in the corporation;

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<sup>4</sup> \$100 million prior to 22 September 2009. Replacement threshold of \$219 million is subject to annual indexation.

<sup>5</sup> 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*.

<sup>6</sup> \$913 million during the calendar year 2008. Subject to annual indexation.

<sup>7</sup> \$105 million prior to 22 September 2009. Subject to annual indexation.

- acquisitions of assets resulting in control of the business; or
  - any other type of arrangement which results in control of the business/corporation;
  - takeovers of offshore companies whose Australian subsidiaries or gross assets exceed \$219 million<sup>8</sup>. For [US investors](#) a threshold of \$953 million applies, except for offshore takeovers involving [prescribed sensitive sectors](#) where the standard \$219 million threshold applies;
  - acquisitions of interests in [Australian real estate](#) (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 \$953 million for [US investors](#);
    - vacant non-residential land irrespective of value;
    - residential real estate irrespective of value;<sup>9</sup> or
    - shares or units in [Australian urban land corporations or trust estates](#), irrespective of value; or
  - 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.)
10. The types of foreign investment proposals which are subject to the policy and hence should also be notified to the Government for prior approval include:
- direct investments by foreign governments and their agencies irrespective of size, including proposals to establish new businesses;<sup>10</sup> or
  - portfolio investments in the media sector of 5 per cent or more and all non-portfolio investments irrespective of size.

## STATUTORY NOTICES

11. Acquisitions which are subject to the FATA require a statutory notice to be submitted in accordance with the relevant form as prescribed under the [Foreign Acquisitions and Takeovers \(Notices\) Regulations 1975](#).

- Statutory notices are not applicable to proposals which are not subject to the FATA.

12. Submitting a statutory notice activates a time clock and, if the Treasurer does not take action within 30 days and notify the parties of this action within a further 10 days, the Treasurer loses the

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<sup>8</sup> \$200 million prior to 22 September 2009. Replacement threshold of \$219 million is subject to annual indexation.

<sup>9</sup> Some exemptions apply – refer to [Acquisitions not requiring notification](#) under [Residential real estate](#).

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

ability to either prohibit the proposal or to impose conditions. The normal 30 day examination period may be extended by up to a further 90 days by the issue of an interim order.

## EXAMINATION BY SECTOR

13. The real estate sector (especially residential real estate) is regarded as sensitive and hence the policy outlines specific eligibility criteria relating to acquisitions of interests in specific categories of real estate.

14. There are no specific eligibility criteria applicable to acquisitions in non-real estate sectors; proposals are examined on a case-by-case basis and are normally approved unless determined contrary to the national interest.

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

16. Proposals submitted for consideration will be either:

- 'approved', if the Government raises no objections;<sup>11</sup>
- 'conditionally approved', if the Government raises no objections subject to the parties meeting legally binding 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; or
- prohibited, if the Government determines it to be contrary to the national interest.

## Real Estate Sector

17. All contracts by foreign persons to acquire interests in Australian real estate should be made conditional upon foreign investment approval, unless approval was obtained prior to entering into the contract or the acquisition does not require notification. Foreign persons are in breach of the FATA if they enter an unconditional contract to acquire property (or if their conditional contract becomes unconditional) before approval is granted and may be subject to significant penalties.

## RESIDENTIAL REAL ESTATE

18. Residential real estate means all Australian residential land and housing other than commercial properties (such as, offices, factories, warehouses, hotels, restaurants and shops) and [rural properties](#) (that is, land that is used wholly and exclusively for carrying on a substantial business of primary production).<sup>12</sup> Acquisitions of 'hobby farms' and 'rural residential' blocks by foreign interests are considered to be residential real estate.

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<sup>11</sup> Under the FATA, the Treasurer's responsibility is to determine whether or not to raise any objections to specific proposals in consideration of the national interest, rather than to technically 'approve' proposals.

<sup>12</sup> Additional information regarding rural land is provided at [Attachment B](#).

## Acquisitions not requiring notification

19. Acquisitions of residential real estate by the following persons do not require notification:

- 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' (that is, New Zealand citizens) 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](#).

20. Certain acquisitions by foreign nationals [temporarily resident](#) in Australia on a relevant valid Australian visa (not including short term visitors such as those who come to Australia for tourist or business purposes or medical procedures), purchasing either in their own name or through an Australian corporation or a trust, do not require notification. These acquisitions are:

- single blocks of vacant land;
- new dwellings; and
- an established (second hand) dwelling to be used as their principal place of residence (including if it is going to be demolished first and then redeveloped).

21. Acquisitions of certain types of property do not require notification regardless of the citizenship or residency status of the purchaser:

- new dwellings purchased from the developer, where the developer has pre-approval to sell those dwellings to foreign persons;<sup>13</sup>
- an interest in a time share scheme which does not permit more than four weeks entitlement per year;
- certain residential real estate in [Integrated Tourism Resorts](#) (ITR);
- an interest acquired by will or devolution by operation of law; or
- an interest acquired from the Government (Commonwealth, State or Territory, or local).

## Acquisitions requiring notification — eligibility criteria

22. If an acquisition is not listed above as exempt, foreign purchaser(s) **must notify** the Government **prior** to acquiring the interest. Proposals by foreign persons to acquire residential real estate that do not meet the eligibility requirements (outlined below) are subject to the FATA but are **not normally approved**.

### Vacant Land

23. Proposed acquisitions of vacant land for residential development are normally approved subject to development condition(s) imposed under the FATA.

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<sup>13</sup> It is the intention that such pre-approvals will no longer be issued to developers, but current pre-approvals remain valid.

- Acquisitions of **single blocks** of vacant land (that is, land which is zoned to permit the construction of no more than **one** residential dwelling per block of land) for the purpose of building a single residential dwelling on each block are normally approved subject to the following condition:
  - continuous substantial construction must commence within 24 months.
- Acquisitions of **other** vacant land (not single blocks) for the purpose of building multiple residential dwellings are normally approved subject to the following conditions:
  - continuous substantial construction must commence within 24 months; and
  - at least 50 per cent of the acquisition cost or the current market value of the land (whichever is higher) must be spent on development.

### New Dwellings

24. New dwellings acquired 'off the plan' (before construction commences or during the construction phase) or after construction is complete are normally approved where the dwellings:

- have not previously been sold (that is, they are purchased from the developer); and
- have not been occupied for more than 12 months.

25. There are no restrictions on the number of such dwellings in a new development which may be sold to foreign persons, provided that the developer markets the dwellings locally as well as overseas (that is, the dwellings cannot be marketed exclusively overseas).

26. This category includes dwellings that are part of extensively refurbished buildings where the building's use has undergone a change from non-residential (for example, office or warehouse) to residential. It does not include established residential real estate that has been refurbished or renovated.

### Established (Second Hand) Dwellings

27. This category includes **all** residential dwellings which are not new dwellings (that is, they have been previously owned and/or they have been occupied for more than 12 months).

28. Foreign persons are prohibited from acquiring established dwellings for investment purposes (that is, they cannot be purchased to be used as a rental or holiday property), irrespective of whether they are [temporary residents](#) in Australia or not.

29. Foreign persons who are [temporary residents](#) in Australia do not require approval to acquire a second-hand dwelling which is to be used as their principal place of residence.

30. Proposals by foreign owned companies to acquire second-hand dwellings for the purpose of providing housing for their Australian-based staff are normally approved subject to the following condition:

- the company undertakes to sell or rent the property if it is expected to remain vacant for six months or more.

### Redevelopment of Established (Second Hand) Dwellings

31. Established dwellings may be acquired for the purpose of redevelopment (that is, to demolish the existing dwelling and build new dwellings). This does not include refurbishing the existing dwelling. Proposals for redevelopment are normally approved subject to the following conditions:

- the proposal must provide for an increase in the housing stock, that is, an increase in the number of dwellings;
- the existing residence cannot be rented out prior to demolition and redevelopment; and
- the existing dwelling must be demolished and continuous substantial construction of the new dwellings must commence within 24 months.

32. A redevelopment proposal which does not increase the number of dwellings may be approved where it can be shown that the existing dwelling is at the end of its economic life (that is, derelict or uninhabitable), since constructing a new dwelling would effectively increase the housing stock. To demonstrate that the property is uninhabitable and must be demolished, a valuation of the existing structures by a licensed valuer and/or a builder's report is generally required. Photographs and other forms of evidence may also be required. Approval of such proposals would be subject to the same conditions outlined above.

### **Time Share Schemes**

33. The acquisition of an interest in a time share scheme where the entitlement of the foreign person (and any of that person's associates) is greater than 4 weeks in any year must be notified and will normally be approved according to the eligibility requirements for the relevant category of property outlined above.

### **Residential Real Estate in Integrated Tourism Resorts (ITR)**

34. Proposed acquisitions of *any* residential property which are within the bounds of a resort that the Treasurer had designated as an 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 it is 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.

## **COMMERCIAL REAL ESTATE**

35. Commercial real estate includes vacant and developed property which is not for residential purposes – such as offices, factories, warehouses, hotels, restaurants and shops. It does not include [rural land](#), but may include rural property which does not fall within the definition of rural land (that is, it is not used wholly and exclusively for carrying on a substantial business of primary production), such as vacant land for forestry plantation or mining operations.

### **Acquisitions not requiring notification**

36. Acquisitions of commercial real estate by Australian citizens living abroad purchasing either in their own name or through an Australian corporation or a trust do not require notification.

37. Acquisitions of certain types of property do not require notification, regardless of the citizenship or residency status of the purchaser:

- an interest acquired by will or devolution by operation of law;
- an interest acquired from the Government (Commonwealth, State or Territory, or local);
- an interest in developed commercial property valued at less than \$50 million or \$953 million (indexed annually) for US investors, or \$5 million for heritage listed properties where the acquirer is not a US investor; or

- an interest in developed commercial property where the property is to be used immediately and in its present state for industrial or non residential commercial purposes. The acquisition must be wholly incidental to the purchaser's proposed or existing business activities.

### Acquisitions requiring notification — eligibility requirements

38. If an acquisition is not listed above as exempt, the foreign purchaser(s) **must notify** the Government **prior** to acquiring the interest. Proposals by foreign persons to acquire commercial real estate are normally approved unless they are determined to be contrary to the national interest.

#### Developed Commercial Property

39. This category includes acquisitions of hotels, motels, hostels and guesthouses. It also includes acquisitions of individual dwellings within these properties, where they are part of the hotel, motel, hostel or guesthouse (not just physically located within the property). For example, the acquisition of a hotel room in a strata titled hotel where that room is managed by the hotel operator (that is, it is part of the hotel) is considered to be developed commercial property, but the acquisition of a unit in a hotel building where that unit is owner-occupied or rented out privately by the owner (that is, it is **not** part of the hotel) is considered to be *residential* property.

40. Proposed acquisitions of developed non-residential commercial real estate valued above the relevant thresholds are normally approved unless they are determined to be contrary to the national interest.

#### Vacant Land

41. Proposed acquisitions of real estate for commercial development (not to be used for residential purposes) are normally approved subject to the following development conditions imposed under the FATA:

- continuous construction commencing within 5 years; and
- a minimum amount equivalent to 50 per cent of the acquisition cost or current market value of the land (whichever is higher) being spent on development.

#### Mining Tenements

42. The acquisition of a mineral right, mining lease, mining tenement or production licence will require foreign investment approval if it involves acquiring an interest in Australian urban land as defined by section 12A of the FATA, including:

- an interest in a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years (s12A(1)(c)); or
- an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land (s12A(1)(d)).

43. Approval is not required if the lease or licence is acquired from the Commonwealth, a State or Territory, or a local governing body (s12A(7)).

#### Forestry

44. A forestry business is a primary production business. Acquisitions of existing forestry businesses are treated in similar fashion to acquisitions of other Australian businesses.

45. Where a foreign person wishes to acquire land for the establishment of a forestry business approval is required. These proposals are normally approved subject to:



- continuous development/planting on the land commencing within 12 months;
- a minimum amount equivalent to 50 per cent of the acquisition cost or current market value of the land (whichever is higher) being spent on the development of the business;
- compliance with relevant State codes of practice for the industry; and
- the foreign person agreeing to on-sell the land and any related dwellings to Australian or other eligible purchasers when the forestry operations cease.

## Non-Real Estate Sectors

46. There are no specific eligibility criteria applicable to acquisitions in non-real estate sectors; proposals are examined on a case-by-case basis and are normally approved unless determined contrary to the national interest.

47. There are various other Government policies and regulations which impose additional requirements on certain sectors. These additional requirements are administered by the relevant Department(s) and do not form part of the foreign investment policy. However, foreign investment proposals involving these sectors will be examined with regard to these additional requirements to determine whether they are contrary to the national interest. The sectors which are subject to additional requirements are outlined below.

### Banking

48. 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.

49. 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

50. 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 – see below), unless this is contrary to the national interest.

#### International Services

51. 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

52. 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

53. 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<sup>14</sup>

54. 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.

## Telecommunications

55. 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.

56. 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

57. 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.

58. 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.

59. 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

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<sup>14</sup> The requirements that previously applied to broadcasting and newspapers were removed following proclamation of the *Broadcasting Services Amendment (Media Ownership) Act 2006* which came into effect on 4 April 2007.

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.

60. 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

61. The Government recognises the commercial-in-confidence sensitivity of much of the information provided to FIRB. 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.

62. In addition, the Government is obligated to respect the privacy of personal information that is provided by applicants 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 relevant personal information may be passed to other government agencies, such as the Department of Immigration and Citizenship, the Australian Taxation Office or the Australian Federal Police.

## APPLICATIONS

63. Please refer to FIRB's website [www.firb.gov.au](http://www.firb.gov.au) or the relevant [How to Apply](#) guide for further details. **No fees or charges** apply to applications.

## FURTHER ENQUIRIES

64. Further information on the policy may be found at the FIRB's website [www.firb.gov.au](http://www.firb.gov.au).

65. Should you have any further enquiries please contact FIRB's Executive on:

*General enquiries:*

Phone: 02 6263 3795

Fax: 02 6263 2940

Email: [firbenquiries@treasury.gov.au](mailto:firbenquiries@treasury.gov.au)

*From overseas:*

+61 2 6263 3795

+61 2 6263 2940

[firbenquiries@treasury.gov.au](mailto:firbenquiries@treasury.gov.au)

## ATTACHMENT A

### GUIDELINES FOR FOREIGN GOVERNMENT INVESTMENT PROPOSALS

Proposed investments by foreign governments and their agencies (for example, 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 contrary to 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

### RURAL LAND

Rural Land is land that is used wholly and exclusively for carrying on a substantial business of primary production. The definition of primary production is taken from the *Income Tax Assessment Act 1997* and refers to production resulting directly from the cultivation of land; animal husbandry/farming; horticulture; fishing; forestry; viticulture or dairy farming. Primary production for the purpose of the rural land definition does not include vacant land (even if zoned 'rural'), hobby farms, 'rural residential' blocks or land used for stock agistment or mining.

To constitute a business of primary production, it must be substantial and have a commercial purpose or character and not merely be carried on as a hobby or for recreation purposes. A number of factors are considered in determining a business' commercial purpose or character, including:

- operating as a significant commercial activity, and not a recreation or hobby;
- the intention of the business is to make a profit from the activity;
- repetition and regularity of activity;
- activity organised and carried on in a businesslike manner with associated business records and reports;
- reasonably large scale operation; and
- commercial scale of sales of product.

A primary production business should also meet the following criteria:

- the value of the business' Australian urban land should be less than 50 per cent of its total assets; and
- the land on which the business is being conducted should be zoned rural and not residential.

The acquisition of an interest in a primary production business where the total assets of the business do not exceed \$219 million, or \$953 million for US investors, is exempt from the need for foreign investment approval (that is, the same monetary thresholds that apply to other acquisitions of Australian companies or business assets).

## 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.

## ATTACHMENT D

### DEFINITIONS

- Under the FATA, a person is **ordinarily resident** if:
  - their continued presence in Australia is not subject to any limitation as to time imposed by law (that is, they are permitted to stay in Australia indefinitely, such as NZ citizens and permanent residents); and
  - the person has actually been in Australia during 200 or more days in the previous 12 months.
- **Spouse** includes de facto partner (whether of the same sex or a different sex) – that is, although they may not be legally married, they have a relationship as a couple and live together on a genuine domestic basis (sections 22A and 22B of the *Acts Interpretation Act 1901*).
- A **substantial interest** occurs when a single foreigner (and any associates)<sup>15</sup> 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 person is a **temporary resident** if they are living in Australia and:
  - they hold a temporary (that is, non-permanent) visa which permits them to stay in Australia for a continuous period of more than 12 months; or
  - they have submitted an application for permanent residency, and they hold a bridging visa which permits them to stay in Australia until that application has been finalised.
- An **Australian urban land corporation or trust** is a corporation or trust whose assets consist primarily Australian urban land – that is, the value of its eligible land assets exceeds 50 per cent of the value of its total assets (see sections 13C and 13D of the FATA).
- A '**US investor**' is a national or permanent resident of the United States of America; a US enterprise; or a branch of an entity located in the United States of America and carrying on business activities there.
  - A **US enterprise** is an entity constituted or organised under a law of the United States of America. 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, or a joint venture.
  - 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.

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<sup>15</sup> See section 6 of the FATA for the list of 'associates'.