

Regulation of foreign investment in Australia

March 2011

The following information provides a general guide to regulation of foreign investment in Australia. Regulatory arrangements can change from time to time so potential investors should seek professional advice and consult the website of the Foreign Investment Review Board (www.firb.gov.au) before entering any commitment based on this information.

The Australian Government welcomes foreign investment. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity. It supports existing jobs and creates new jobs, it encourages innovation, it introduces new technologies and skills, it brings access to overseas markets and it promotes competition amongst our industries.

The Government's foreign investment framework is implemented through the *Foreign Acquisitions and Takeovers Act 1975* (the Act) and the Government's foreign investment policy. The Deputy Prime Minister and Treasurer is responsible for the foreign investment framework. Under the Act, the Treasurer reviews investment proposals on a case-by-case basis to decide if they are contrary to Australia's national interest. This maximises investment flows, while protecting Australia's interests. When making such decisions, the Treasurer relies on advice from the Foreign Investment Review Board (FIRB). FIRB will work with an applicant to ensure the national interest is protected. But, if ultimately it is determined that a proposal is contrary to the national interest, it will not be approved. Proposals may also be approved subject to conditions or undertakings.

Who needs to apply?

The policy applies to foreign persons. This includes a natural person not ordinarily resident in Australia, a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation has a controlling (substantial) interest, and the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation has a substantial interest.

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

In addition, all foreign governments and their related entities should notify the Government and get prior approval before making an investment in Australia, regardless of the value of the investment.

What proposals need approval?

Proposals requiring approval vary by investor type.

Foreign Governments and their Related Entities - All foreign governments and their related entities should notify the Government and get prior approval before making a direct investment in Australia, regardless of the value of the investment. They also need to notify the Government and get prior approval to start a new business or to acquire an interest in Australian urban land (except when buying land for diplomatic or consular requirements).

Privately-Owned Foreign Investors – Business Acquisitions - Foreign persons should notify the Government before acquiring an interest of 15 per cent or more in an Australian business or corporation that is valued above A\$231 million, or an offshore company whose Australian subsidiaries or gross assets are valued above A\$231 million. Notification requirements also apply where an acquisition by a foreign person would result in foreign persons holding an aggregate interest of 40 per cent or more in such Australian businesses or corporations. An A\$1,005 million threshold applies to US investors as defined under the Policy.



Australian Government
Australian Trade Commission



The above monetary values listed above are those for 2011. Thresholds are index annually on 1 January. Investors are advised to confirm notification requirements and relevant thresholds with the FIRB at the time of investment.

Australia signed an Investment Protocol with New Zealand on 16 February 2011. Once implemented (date to be advised) New Zealand investors will be subject to the same thresholds that apply to US investors.

All foreign persons, including US investors, need to notify the Government and get prior approval to make investments of 5 per cent or more in the media sector, regardless of the value of the investment.

Also, proposals where the applicant has any doubt as to whether the acquisition is notifiable, should be notified.

Privately-Owned Foreign Investors – Real Estate - Foreign persons should notify the Government and get prior approval to acquire an interest in certain types of real estate. An 'interest' includes buying real estate, obtaining or agreeing to enter into a lease, or financing or profit sharing arrangements.

Regardless of value, foreign persons generally need to notify the Government to take an interest in residential real estate, vacant land or to buy shares or units in Australian urban land corporations or trust estates.

Foreign persons also need to notify if they want to take an interest in developed commercial real estate that is valued at \$50 million or more – unless the real estate is heritage listed, then a A\$5 million threshold applies. An exception for developed commercial real estate applies to US investors, where a A\$1,005 million threshold applies instead.

National interest

Assessing the national interest allows the Government to balance potential sensitivities against the benefits of foreign investment.

The Government determines national interest concerns case-by-case. We look at a range of factors and the relative importance of these can vary depending upon the nature of the target enterprise. The Government typically considers the following factors when assessing foreign investment proposals: national security; competition; other Australian Government Policies (including tax); impact on the economy and the community; and character of the investor.

For more information on national interest considerations, see Australia's Foreign Investment Policy, which is available on the FIRB website.

How long before a decision is made?

Under the Act, the Treasurer has 30 days to consider your application and make a decision. However, the Treasurer may extend this period by up to a further 90 days by publishing an interim order, which is normally issued if a proposal is very complicated or if insufficient information has been provided.

Applicants are informed of the Treasurer's decision within 10 days of it being made. The decision will either raise no objections, allowing the proposal to go ahead; impose conditions, which will need to be met; or prohibit the proposal.

There is no time limit for applications made under the Policy only. However, the Government also aims to consider these proposals within 30 days, where possible.

Industry specific regulations

Foreign persons should also be aware that separate legislation includes other requirements and/or imposes limits on foreign investment in the following instances:

- Foreign investment in the banking sector must be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* and banking policy;
- Total foreign investment in Australian international airlines (including Qantas) is limited to 49 per cent;
- The *Airports Act 1996* limits foreign ownership of airports offered for sale by the Commonwealth to 49 per cent, with a 5 per cent airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports;
- The *Shipping Registration Act 1981* requires a ship to be majority Australian-owned if it is to be registered in Australia; and
- Aggregate foreign ownership of Telstra is limited to 35 per cent of the privatised equity and individual foreign investors are only allowed to own up to 5 per cent.

Who is exempt?

You do not need Government approval to buy *commercial or residential real estate* if you are an Australian citizen (living at home or overseas) or you are 'ordinarily resident' in Australia. You are ordinarily resident if:

- Your continued presence in Australia is not subject to any limitation as to time imposed by law (that is, you are permitted to stay in Australia indefinitely, such as Australian permanent residents and New Zealand citizens); and
- You have actually been in Australia for 200 or more days in the previous 12 months.

For other available exemptions, see Australia's Foreign Investment Policy, which is available on the FIRB website.

Useful websites

The Foreign Investment Review Board www.firb.gov.au
Australian Prudential Regulation Authority www.apra.gov.au
Australian Securities and Investment Commission www.asic.gov.au

About Austrade

The Australian Trade Commission – Austrade – is the Australian Government's trade and investment development agency.

Through Austrade's global network, we assist Australian companies to succeed in international business and attract productive foreign direct investment into Australia.

Austrade is the first national point-of-contact for all investment inquiries. Working in partnership with business and government, Austrade can provide your company with the information needed to establish or expand a business in Australia.

Austrade can also help by connecting you with the right industry and government contacts as well as providing information on investment regulations and government assistance programs.

For more information email info@austrade.gov.au or visit austrade.gov.au

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