

FOREIGN INVESTMENT IN AUSTRALIA

2020

1 INTRODUCTION

Australia generally welcomes foreign investment. The Australian government screens certain foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest. This brochure explains some of the rules governing the screening process. However, Australia's foreign investment rules are complex, and legal advice should be sought.

The kinds of proposals examined include both business investment proposals across all sectors of the economy and investment in land. Offshore transactions can be captured.

2 WHAT LAWS GOVERN FOREIGN INVESTMENT?

The main laws that regulate foreign investment in Australia are:

- + the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Foreign Acquisitions and Takeovers Regulation 2015 (FATR). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals that are contrary to the national interest, or apply conditions to the way such proposals are implemented, to ensure they are not contrary to the national interest; and
- + the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of foreign ownership in certain industries.

3 WHO IS REGULATED

The legislation regulates foreign investment proposals by a 'foreign person'. A foreign person means:

- + an individual not ordinarily resident in Australia;
- + a corporation in which:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
 - 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- + the trustee of a trust in which:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
 - 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- + the general partner of a limited partnership in which:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of 20% or more; or
 - 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation, or a foreign government, hold an interest of 40% or more;
- + a foreign government or foreign government investor.

A person holds a **substantial interest** if (in relation to a corporation or unit trust) the person holds an interest of at least 20%, or if in relation to a trust, the person holds a beneficial interest in at least 20% of the income or property of the trust. The definition of "aggregate substantial interest" is similar but considers the holding of 2 or more persons and the threshold is 40%.

INTEREST OF A SPECIFIED PERCENTAGE AND TRACING RULES

The concept of an interest of a specified percentage is an important one for purposes of determining whether a person is a foreign person and whether an action is a 'significant action' or 'notifiable action' (see section 4). It counts shares or units:

- + that a person or its associate owns; or
- + over which the person or its associate has voting control; or
- + that a person or its associate would own or over which the person or its associate would have voting control, if a person exercised rights that it has (such as exercising an option).

In addition, for certain purposes under FATA, if a person has the power to veto any resolution of the board, central management or general meeting of an entity, the person is deemed to have an interest of 20% or more.

A person is taken to acquire an interest of a specified percentage if they already hold that percentage, and then increase it.

Tracing rules operate up through chains of ownership of 20% or more, so that if an entity (first entity) has an interest of 20% or more in another entity (second entity), the first entity is taken to hold so much of any entity that the second entity holds. This test operates through multiple chains of ownership and applies at each level irrespective of whether there is any practical control. These rules can operate to cause an Australian entity to be deemed to be a foreign person. In addition, in some cases, the tracing rules can operate to cause an offshore transaction to be a 'significant action' or event a 'notifiable action' (see section 4).

The interests that are counted include the interests of a person's associates. The associates of a person (first person) include (among other things) the first person's relatives; any person with whom the first person is acting in concert in relation to an action to which FATA applies; partners in a partnership; any entity of which the first person is a senior officer (and vice versa); and a corporation or trustee of a trust in which the first person holds an interest of 20% or more (and vice versa). These are subject to fairly narrow exceptions.

4 TYPES OF TRANSACTIONS THAT ARE REGULATED

Under FATA, a 'significant action' is the universe of transactions over which the Treasurer has the power to make orders if she or he determines the action is contrary to the national interest. Notifying a significant action and obtaining a notice of no objection cuts off this power.

A 'notifiable action' is a subset of significant actions which must be notified to the Treasurer. Failure to notify is an offence under the law.

4.1 Notifiable actions

Notifiable actions include the following. See section 5 for information about temporary changes to the applicable monetary threshold in response to the COVID-19 crisis (Temporary Measures):

Type of acquisition	Important notes
Acquisition by a foreign person of an interest of 20% or more in Australian entities	A foreign person must notify and seek a statement of no objection for any acquisition of substantial interest in an Australian company or unit trust valued above the then current monetary thresholds. See Section 3 and “Interest of a specified percentage and tracing rules” on page 3.
Acquisition by a foreign person of a “direct interest” in an Australian entity or Australian business that is an agribusiness	<p>A foreign person must notify and seek a statement of no objection for any acquisition of a direct interest in an Australian agribusiness where the investment (together with all prior investments of the acquirer and its associates in the target) is valued above the then current monetary thresholds.</p> <p>A direct interest includes:</p> <ul style="list-style-type: none"> + an acquisition of an interest of 10% or more in the entity or business; + an acquisition of an interest of 5% or more in the entity or business if the person who acquires the interest has entered into a legal arrangement relating to the businesses of the person and the entity or business; and + an interest of any percentage in the entity or business if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or business or to influence, participate in or determine the policy of the entity or business. <p>See the text box “Interest of a specified percentage and tracing rules” on page 3.</p>

Type of acquisition	Important notes
Acquisition of an interest in Australian land	<p>A foreign person must notify and seek a statement of no objection for any acquisition of an interest in Australian land where the interest is valued above the then current monetary thresholds.</p> <p>Australian land includes commercial land, agricultural land, residential land and mining and production tenements. Interests include among other things:</p> <ul style="list-style-type: none"> + a freehold interest; + a lease or license that is reasonably likely to exceed 5 years; + an interest in an income or profit sharing venture relating to land (which includes royalty arrangements) that is reasonably likely to exceed 5 years; and + an interest in a share or unit of an entity where Australian land makes up more than 50% of the assets of the entity.
Acquisition of an interest of 5% or more in an Australian media business	<p>A foreign person must notify and seek a statement of no objection for any acquisition of an interest of 5% or more in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value.</p> <p>See the text box “Interest of a specified percentage and tracing rules” on page 3.</p>
Acquisition by a foreign government investor of a direct interest in an Australian company, unit trust or business	<p>A foreign government investor must notify and seek a statement of no objection for any acquisition of a direct interest (defined above) in an Australian company, unit trust or business, regardless of value.</p> <p>This includes offshore transactions, subject to very limited exceptions. See text box “Offshore Transactions” on page 6. See also section 6.</p>
A foreign government investor starting a new business	<p>A foreign government investor must notify and seek a statement of no objection to start any new business in Australia, regardless of value.</p> <p>See Section 6.</p>
Acquisition by a foreign government investor of a direct interest in certain mining entities	<p>A foreign government investor must notify and seek a statement of no objection to acquire a legal or equitable interest in a tenement (including tenements that would not be classified as land) or an interest of at least 10% in securities in an entity where the value of the tenements exceeds 50% of the total asset value of the entity.</p> <p>See the text box “Interest of a specified percentage and tracing rules” on page 3. See also Section 6.</p>

4.2 Other significant actions

Aside from the notifiable actions described above, significant actions include change of control transactions in relation to entities and businesses where the relevant Australian assets are valued above the then current monetary thresholds. From a practical perspective, the most important transactions that are captured as significant (but not notifiable) actions are asset deals and many offshore acquisitions, where the value of the Australian business is in excess of relevant monetary thresholds. See section 5 for applicable thresholds.

OFFSHORE TRANSACTIONS

Transactions that occur outside of Australia can be significant actions if the relevant Australian assets of the target are valued above the then current monetary thresholds. However, most of those will not also be notifiable actions, subject to a few exceptions:

- + an offshore acquisition by a foreign government investor will be a notifiable action if it results (via the tracing rules) in the acquisition of a direct interest (defined in section 4.1) in an Australian entity (1) unless the acquisition is of foreign securities, the relevant Australian assets are valued below A\$55m and constitute less than 5% of the target's global gross assets, and none of the assets taken into account in working out the total asset value are assets of a sensitive business; or (2) an interest of 20% or more in an Australian entity;
- + an offshore acquisition by a foreign person will be a notifiable action if the foreign target is itself an Australian land entity or it results (via the tracing rules) in the acquisition of an interest in an Australian land entity valued above the then current monetary thresholds (subject to certain exceptions for small stakes in land entities) (see section 5 for applicable thresholds); and
- + an offshore acquisition by a foreign person will be a notifiable action if it results (via the tracing rules) in the acquisition of an interest of 5% or more in an Australian media business.

5 MONETARY THRESHOLDS

5.1 Post 29 March

As a result of the Temporary Measures, as of 10:30pm AEST on 29 March 2020 (**Announcement Time**), all monetary thresholds for transactions entered into after the Announcement Time have been reduced to zero. Importantly, and as noted in section 4, the monetary threshold is only one of a number of criteria that need to be met for something to be considered to be a significant action (including notifiable action).

However, there are still a number of important consequences. Some of the most important include:

- + Any commercial lease by a foreign person with a term that is reasonably likely to exceed 5 years is a notifiable action, regardless of the value of that lease.
- + Most offshore transactions with downstream Australian subsidiaries will now be caught as significant actions (and may be notifiable actions).
- + As a result of the expected influx of applications, processing times are expected to increase (see section 8).

5.2 Pre-29 March

For transactions entered into prior to the Announcement Time, the system of monetary thresholds is complex. Both the way that the threshold is calculated, and the dollar value of the monetary threshold, differs for different kinds of transactions.

The monetary thresholds are affected by Australia's treaty obligations, so different thresholds may apply for investors from countries with which Australia has entered into free trade agreements. Not all free trade agreements contain the same thresholds. The thresholds are indexed annually for inflation.

The following table describes the threshold for different kinds of acquisitions and explains how it is calculated.

Type of transaction	How threshold is measured	Acquirer	Monetary threshold (A\$)*
Business acquisitions			
Acquisition of shares or units	Higher of the value of the gross assets of the target entity and the value implied by the consideration paid for the shares or units. Consideration may be apportioned in offshore transactions based on EBIT	Non-foreign government investors from Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, Vietnam, the United States and any future TPP-II countries	Sensitive businesses \$275m
		All others that are not foreign government investors	Non-sensitive businesses \$1192m
			\$275m
Change of control transactions (other than as listed above)	Gross assets of the target entity	Non-foreign government investors from Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, Vietnam, the United States and any future TPP-II countries	Sensitive businesses \$275m
		All others that are not foreign government investors	Non-sensitive businesses \$1192m
			\$275m
Acquisition of assets	Consideration for the acquisition	Non-foreign government investors from Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, Vietnam, the United States and any future TPP-II countries	Sensitive businesses \$275m
		All others that are not foreign government investors	Non-sensitive businesses \$1192m
			\$275m
Acquisition of agribusiness	Consideration for the acquisition	Chilean, New Zealand and United States investors that are not foreign government investors	\$1192m
	Consideration paid for the investment plus the value of all other investments in that agribusiness held by the acquirer and its associates	All others that are not foreign government investors	\$60m (cumulative with prior investments in that agribusiness)
Acquisition by foreign government investors	N/A	Any foreign government investor	\$0
Acquisition of Australian media businesses	N/A	Any foreign person	\$0

* As of 1 July 2020

Type of transaction	How threshold is measured	Acquirer	Monetary threshold (A\$)*
Land acquisitions			
Acquisition of developed commercial land	Value of the land interest	Non-foreign government investors from Canada, Chile, China, Japan, Mexico, New Zealand, Singapore, South Korea, Vietnam, the United States and any future TPP-II countries (see below for Hong Kong and Peru)	\$1192m
		Non-foreign investors from Hong Kong and Peru	Normal - \$1192m Low threshold land - \$60m
		All others that are not foreign government investors	Normal - \$275m Low threshold land - \$60m
		Foreign government investors	\$0
Acquisition of vacant commercial land	Value of the land interest	Any acquirer	\$0
Acquisition of agricultural land	Consideration for the land being acquired	Chilean, New Zealand and United States investors that are not foreign government investors	\$1192m
		Thai investors that are not foreign government investors	Where land is used wholly and exclusively for a primary production business \$50 million (otherwise the land is not agricultural land)
	Consideration for the land being acquired plus the value of all other Australian agricultural land held by the acquirer and its associates	All other investors that are not foreign government investors	\$15m (cumulative)
	N/A	Foreign government investors	\$0
Acquisition of residential land	N/A	Any acquirer	\$0
Acquisition of mining tenements	Value of the land interest	For Chilean, New Zealand and United States investors that are not foreign government investors	\$1192m
		All other investors	\$0

* As of 1 July 2020

SENSITIVE BUSINESSES AND SENSITIVE LAND

A business is a sensitive business if:

- + the business is carried on wholly or partly in the media, telecommunications or transport sectors (including business relating to infrastructure for those sectors); or
- + the business is wholly or partly:
 - the supply of training or human resources to, the manufacture of military goods, equipment or technology for, or the supply of military goods, equipment or technology to, the Australian Defence Force or other defence forces; or
 - the manufacture or supply of goods, equipment or technology able to be used for a military purpose; or
 - the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; or
 - the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of a nuclear facility.

Sensitive land is land:

- + that is commercial land that is not vacant;
- + where the interest in the land being acquired gives a right to occupy the land or to be involved in the central management and control of the entity that holds the land;
- + where any one or more of the following applies at the time the interest in the land is acquired:
 - the land will be leased to the Commonwealth, a State, a Territory or a Commonwealth, State or Territory body;
 - the land will be fitted out specifically for a sensitive business or a business providing storage of bulk data;
 - the land will be fitted out specifically to store, handle or dispose of biological agents on the List of Security Sensitive Biological Agents (within the meaning of the National Health Security Act 2007);
 - an authorisation under a law of the Commonwealth, a State or a Territory will allow materials that are regulated under that law to be produced or stored on the land;
 - the land would be under prescribed airspace (within the meaning of section 181 of the Airports Act 1996);
 - a mining operation will operate on the land;
 - a stored communication (within the meaning of the Telecommunications (Interception and Access) Act 1979) will be stored on the land;
 - the failure of part of a network unit (within the meaning of the Telecommunications Act 1997) on the land will result in telephony or internet services not being provided on other land;
 - servers critical to an ADI (within the meaning of the Banking Act 1959) or a stock exchange in Australia will be located on the land; and
 - public infrastructure will be located on the land.

6 SPECIAL RULES FOR FOREIGN GOVERNMENT INVESTORS

Australia scrutinises a broader range of investments by ‘foreign government investors’ than it does investments by other foreign persons.

A ‘foreign government investor’ includes:

- + a foreign government;
- + an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a ‘separate government entity’);
- + a corporation, trustee of a trust or general partner of a limited partnership in which (1) a foreign government, separate government entity or foreign government investor from one country holds a 20% or more interest, or (2) foreign governments, separate government entities or foreign government investors from more than one country hold a 40% or more interest. This definition is recursive so that it includes foreign government investors captured by prior applications and this paragraph.

The definition of foreign government investor captures not only state-owned enterprises and sovereign wealth funds but also things like public sector pension funds, the investment funds into which state-owned enterprises, sovereign wealth funds and public sector pension funds invest and, due to tracing rules, portfolio companies for such investment funds. Many private equity funds will be deemed to be foreign government investors.

7 NATIONAL INTEREST TEST

In determining whether a foreign investment proposal is contrary to the national interest, the Treasurer is able to examine any factors that he or she considers appropriate. Typically, these factors include the impact of the foreign investment proposal on:

- + national security;
- + data security;
- + competition (noting that this is a different test to the test applied by the Australian Competition and Consumer Commission in examining merger clearances);
- + the economy and the community (such as the investor’s plans to restructure the business in Australia after the acquisition); and
- + other government policies such as tax and the environment.

Particularly where an investment is made by a foreign government investor, the Treasurer will also consider the character of the investor.

Some kinds of foreign investment proposals give rise to more specific concerns, which the Australian government takes into consideration (in addition to those described above) when examining those proposals:

- + for agricultural investment proposals, the Australian government typically considers the effect of the proposal regarding the quality and availability of Australia’s agricultural resources, including water; land access and use; agricultural production and productivity; Australia’s capacity to remain a reliable supplier of agricultural production, both to the Australian community and Australia’s trading partners; biodiversity; and employment and prosperity in Australia’s local and regional communities;

- + for residential real estate investment proposals, the overarching principle is that the proposal should increase Australia's housing stock (by creating at least one new additional dwelling); and
- + where a foreign investment proposal involves a foreign government investor (defined in section 6), the Australian government considers if the proposed investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

WHAT DOES THE TREASURER HAVE POWER TO DO?

Before an action that is a significant action (including a notifiable action) has been taken, the Treasurer has the power to prohibit the action if she or he considers it to be contrary to the national interest. The Treasurer may also determine that she or he has no objection to an action, or no objection subject to certain conditions.

Once an action has been taken, the Treasurer has the power to make divestment orders in relation to the business or asset acquired, if she or he considers that the action was contrary to the national interest.

An action is deemed to have been taken an agreement to take the action is entered into, unless the agreement provides that it is not binding until such time as a particular condition is met.

8 PROCEDURE

The Treasurer has the ultimate power to decide whether a transaction is contrary to the national interest.

When making foreign investment decisions, the Treasurer is advised by the Foreign Investment Review Board (FIRB), which examines foreign investment proposals and advises on the national interest implications. FIRB is a non-statutory advisory body.

FIRB is supported by a secretariat located in Treasury and by the Australian Taxation Office (ATO) (which has primary responsibility for assessing certain applications). In addition, most applications are referred to other relevant government departments for input, including the ATO and the Australian Competition and Consumer Commission (ACCC). The Critical Infrastructure Centre coordinates the national security review for proposals that involve critical infrastructure, as well as certain other sensitive sectors including health, food and grocery, transport and banking and finance.

The procedure for securing approval for a foreign investment proposal that is a notifiable action or a significant action is that the applicant must lodge an application with FIRB online. The online application requires basic information about the transaction: names and addresses of the parties, the kind of transaction and information relevant to calculating the monetary threshold for the transaction and the application fee. The applicant is expected to attach a cover letter that explains the transaction in detail, including reasons for the transaction, the acquirer's intentions for the target and addressing the national interest test.

Each application attracts filing fees. The filing fees vary depending on the kind of application. For business applications, most transactions attract a A\$26,200 filing fee, except that transactions valued over A\$1 billion attract a A\$105,200 filing fee*. The application is not considered to be lodged until payment is made.

Once the application is lodged, the case officer assigned to the application may contact the applicant to ask questions. More complex transactions may result in an ongoing dialogue between Treasury and FIRB and the applicant regarding the imposition of conditions.

From a statutory perspective, the review process consists of a 30-calendar-day examination period and a 10-calendar-day notification period. The examination period can be extended on request by the applicant or by the Treasurer issuing an interim stop order, which gives the Treasurer an additional period of up to 90 calendar days to examine the application. In practice, the length of time is affected by the time of year, the extent to which the application is being reviewed by other Government departments, the election cycle and general levels of busyness, and voluntary extensions by the applicant are routine.

As a result of the Temporary Measures, it is common for FIRB to request extensions of up to 6 months, although this request does not mean that the review will take that long and urgent cases are able to be processed more quickly.

* Fees as of May 2020

9 PENALTIES

For any notifiable action, it is an offence to fail to notify the foreign investment proposal. For a significant action (including a notifiable action) that is notified, it is an offence to proceed with the foreign investment proposal until a statement of no objection is received or the Treasurer's power to make a decision in relation to the proposal expires.

The penalties for failing to comply are:

- + for individuals, up to 3 years imprisonment or a fine of up to A\$157,500 or both; and
- + for companies, a fine of up to A\$787,500.

Civil penalties for less serious breaches include:

- + for individuals, a fine of up to A\$52,500; and
- + for companies, a fine of up to A\$262,500.

Officers of companies commit an offence or may be liable for civil penalties if the corporation is convicted of the offence or is the subject of a civil penalty order and the person authorised or permitted the commission of the offence or the contravention of the civil penalty provision by the corporation.

Third parties who knowingly assist a breach may also be subject to civil and/or criminal penalties.

WHAT IS COMING IN JANUARY 2021?

The Treasurer has announced changes to the foreign investment legislation which are currently expected to be legislated in time to come into effect on 1 January 2021.

The key takeaway from the announced changes are:

- + many investments in a new category of businesses called "sensitive national security businesses" (such as telecommunications, electricity, gas, infrastructure, defence and potentially that handle sensitive data) which are otherwise below the normal (pre-29 March) monetary thresholds will now be screened by FIRB under a new national security screening regime;
- + the government will have new "call in" and "last resort review" screening powers to assess national security risks;
- + the government will have new powers to enforce compliance with the Foreign Acquisitions and Takeovers Act 1975 (FATA) in a more targeted way;
- + there will be an exemption from the definition of 'foreign government investor' for certain investors that have foreign-government ownership but are privately controlled. This is welcome news for private equity funds and institutional investors that are otherwise captured in the current definition of 'foreign government investor' and screened by FIRB;
- + other reforms to close out gaps in the existing legislation.

Further details will become available once the legislation is enacted.

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