

Heritage listed

Commercial developed property is heritage listed where the property, or part of the property, is listed for its heritage value by a Government (Commonwealth, State or Territory, or local), or is subject to a heritage overlay or similar designation.

Joint tenants

Two or more persons that hold property jointly so that each owns an undivided share of the whole. Should one person die, their interest would pass to the surviving co-owner or co-owners.

Media sector

The media sector refers to daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media).

New Business

A new business includes:

- starting a business in Australia; or
- if already operating a business in Australia, commencing a new primary activity that is not incidental to an existing primary activity(s) and that falls within a different Division under the Australian and New Zealand Standard Industrial Classification as published by the Australian Bureau of Statistics.

New dwellings

A dwelling that has not been previously sold by the developer and has not been previously occupied (such as, by tenants) for more than 12 months.

New dwellings include those 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.

New Zealand Investor

A New Zealand national; a New Zealand enterprise; or a branch of an entity located in New Zealand and carrying on business activities there.

New Zealand National

An individual who is a citizen, national or permanent resident of New Zealand. It does not include a person who is a national of the Cook Islands, Niue or Tokelau and is not permanently residing in New Zealand.

New Zealand Enterprise

A New Zealand enterprise is an entity constituted or organised under a law of New Zealand. 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.

Branch of an Entity Located in New Zealand

A branch may be 'carrying on business activities in New Zealand' 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 New Zealand; and by having its administration in New Zealand.

Ordinarily resident

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 Australian permanent residents and New Zealand citizens); and
- the person has actually been in Australia for 200 or more days in the previous 12 months.

Prescribed sensitive sectors

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.

Spouse

Spouse includes a 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 *Interpretation Act 1901*).

Substantial Interest (in a corporation)

A substantial interest occurs when a single foreign person (and any associates)²² has 15 per cent or more, or several foreign persons (and any associates) have 40 per cent or more, of the issued shares, issued shares if all rights were converted, voting power, or potential voting power, of a corporation.

When a person(s) has a substantial interest, they are taken to hold a *controlling interest*, unless the Treasurer is satisfied that, having regard to all the circumstances, the person(s) is not in a position to determine the policy of the corporation.

Substantial Interest (in a trust)

A substantial interest occurs when a single foreign person (and any associates)²³ has 15 per cent or more, or several foreign persons (and any associates) have 40 per cent or more, beneficial interest in the income or capital of the trust estate. Where the trustee has the power or discretion as to the distribution of the income or capital of the trust estate, each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or capital that could be distributed to them.

Temporary resident

A person that is residing in Australia and:

- holds a temporary visa which permits them to stay in Australia for a continuous period of more than 12 months (regardless of how long remains on the visa); or
- has submitted an application for permanent residency and holds a bridging visa which permits them to stay in Australia until that application has been finalised.

United States Investor

A United States national; a United States enterprise; or a branch of an entity located in the United States and carrying on business activities there.

22 See section 6 of the *Foreign Acquisitions and Takeovers Act 1975* for the list of 'associates'.

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United States National

A national of the United States of America, as defined in Title III of the Immigration and Nationality Act of the United States of America, or a permanent resident of the United States of America.

United States Enterprise

A United States 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.

Branch of an Entity Located in the United States

A branch may be 'carrying on business activities in the United States' 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; and by having its administration in the United States.

Annex 2: Policy statement: foreign investment in agriculture

Australia is a capital hungry country that has always relied on foreign investment as a driver of employment and prosperity, including in our agricultural sector. Foreign investment plays an important role in maximising food production and supporting Australia's position as a major net exporter of agricultural produce, by financing investment, and delivering productivity gains and technological innovations.

Without foreign capital inflows, investment in Australia would be limited, resulting in lower food production with potentially higher food prices, as well as lower employment, lower incomes in the sector and lower government revenue. Foreign investment in agriculture supports agricultural production, job creation and contributes to the prosperity of rural communities and the broader Australian economy.

Australia's Foreign Investment Policy strikes the right balance between attracting foreign investment into Australia to support our economy, and ensuring that investments are not contrary to the national interest. This applies to investments in all sectors of the economy, including agriculture.

Under the Government's foreign investment screening arrangements, all proposed direct investments by foreign government investors, including in agriculture, must be reviewed.

Proposed investments by private investors in agribusinesses (including those involving agricultural land) are subject to the same thresholds that apply to other foreign acquisitions of Australian companies or business assets.

In assessing any application under the Government's foreign investment screening arrangements, the Government applies a rigorous national interest test. National interest considerations include the effect of investments on national security, competition, the economy, the community and other government policies. The Government also considers the type of investor and the extent to which an investor operates independently of foreign governments.

Consistent with these principles, the Government is committed to ensuring on a case by case basis that investments do not adversely affect the sustainability of Australia's national agricultural resources, including their economic, social and environmental contribution to Australia.

In assessing foreign investment applications in agriculture, the Government typically considers the effect of the proposal on:

- 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 our trading partners;
- biodiversity; and
- employment and prosperity in Australia's local and regional communities.

In addition, all investors – both foreign and domestic – must comply with Australian law, irrespective of the value of the investment. An important example of this is the requirement for all investments to be consistent with Australia's national competition policy. The Australian Competition and Consumer Commission rigorously assesses all proposals that have the potential to raise competition concerns, including any potential competitive effects of agribusiness supply chain acquisitions by foreign investors. All potential investors must also obtain any other approvals, such as environmental approvals, that are required under Australian laws.



OVERVIEW OF
THE FOREIGN
ACQUISITIONS AND
TAKEOVERS ACT 1975

APPENDIX B

Foreign-to-foreign transactions

Transactions involving acquisitions by foreign persons of Australian businesses or assets that are already foreign-owned or controlled (referred to as 'foreign-to-foreign' transactions), are subject to the Act. Such transactions are of two broad types: indirect acquisitions where a foreign company acquires another foreign company and in so doing also acquires an interest in its Australian business or assets (referred to as an 'offshore acquisition'); and direct acquisitions by a foreign person of an already foreign owned or controlled Australian business or assets.

For the Act to apply to a foreign-to-foreign transaction, the Australian business or assets of the target company must be valued above the applicable thresholds set under the Regulations. These transactions are assessed against the policy applicable to the relevant sector of the economy. Such proposals normally do not raise issues that might make the transaction contrary to the national interest.

Prior approval for contractual arrangements

The Act makes it an offence to acquire, or increase, a substantial shareholding or certain interests in Australian urban land without providing prior notification to the Treasurer (sections 26 and 26A). Consequently, parties proposing to enter into such transactions should ensure that the relevant agreements are conditional on foreign investment approval, or alternatively ensure they seek prior approval. This applies to situations where the acquirer intends to make an offer, tender or bid for shares or real estate. Entering an agreement that is not conditional may result in the acquisition of an interest that is in breach of the notification provisions of the Act and also may expose the acquirer to possible prosecution and divestment action.

Foreign control

Under the Act, a substantial interest in an Australian corporation is deemed to be a controlling interest unless the Treasurer is satisfied that the acquirer is not in a position to determine the policy of the corporation (see section 9). A variety of factors and considerations other than simply a person's share ownership may be relevant to the Treasurer's consideration of where ultimate control of a corporation lies. These factors are also relevant to sections 19, 20 and 21 which relate to control of business assets and arrangements relating to the directorate and governance of corporations. These factors and considerations include:

- voting rights attached to the various shareholdings and the rights of shareholders, including in relation to representation on the Board or controlling body;
- the distribution and composition of shareholdings;
- that all rights over future shares and potential voting power are treated as having been exercised at the time the agreement is entered into, such as the issuing of convertible notes; and

- arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise a measure of control, including through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these or other factors is relevant would depend on the particular circumstances of each case. The determination of control is undertaken on a case-by-case basis as contemplated by the relevant provisions of the Act.

Enforcement provisions

If the Treasurer raises no objections to a proposal subject to conditions and the parties do not comply with the conditions, they commit an offence under subsection 25(1C) of the Act. Failure to comply with an order made by the Treasurer constitutes an offence under section 30. The Act also allows the Treasurer to make orders that otherwise would have been possible were it not for a scheme entered into for the purpose of avoiding the operation of the Act (section 38A). In addition, the provision of false or misleading information can constitute an offence under the *Crimes Act 1914* and Chapter 7 of the *Criminal Code Act 1995*.



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