

Summary of Australia's Foreign Investment Policy as at December 1999

General

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 is to balance these concerns against the strong economic benefits to Australia that arise from foreign investment.

3. The foreign investment policy provides for Government scrutiny of many proposed foreign purchases of Australian businesses and properties. The Government has the power under the *Foreign Acquisitions and Takeovers Act 1975* (the Act) to block proposals that are determined to be contrary to the national interest. The Act also provides legislative backing for ensuring compliance with the policy.

4. In August and September 1999, the Government announced a number of changes to its foreign investment policy (and the Foreign Acquisitions and Takeovers Regulations), designed to reduce notification obligations on business and to streamline the administration of foreign investment policy, while continuing to ensure that foreign investment is consistent with the interests of the Australian community. These changes are outlined in the Treasurer's Press Release of 3 September 1999 which is available through the Treasury website. The changes have been incorporated in this policy statement.

5. In the majority of industry sectors, smaller proposals are exempt from notification and larger proposals are approved unless judged contrary to the national interest. The screening process undertaken by the 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.

6. The Government determines what is ‘contrary to the national interest’ by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. 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 additional properties. In this way the Government is able to put pressure on foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

7. 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 residences and is not speculative in nature. The Government’s foreign investment policy, therefore, seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (ie, new developments — house and land, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers.

8. The effect of the more restrictive policy measures on developed residential real estate is twofold. First, it helps reduce the possibility of excess demand building up in the existing housing market and 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 therefore be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

Prior Approval

9. The types of proposals by **foreign interests** to invest in Australia, which require prior approval and therefore should be notified to the Government, are as follows:

- ❖ acquisitions of **substantial interests** in existing Australian businesses with total assets over \$50 million or where the proposal values the business at over \$50 million;
 - ❖ proposals to establish new businesses involving a total investment of \$10 million or more;
 - ❖ portfolio investments in the media of 5 per cent or more and all non-portfolio investments irrespective of size;
 - ❖ takeovers of offshore companies whose Australian subsidiaries or assets are valued at \$50 million or more, or account for more than 50 per cent of the target company's global assets;
 - ❖ direct investments by foreign governments or their agencies irrespective of size;
 - ❖ acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts) that involve the:
 - acquisition of developed non-residential commercial real estate, where the property is subject to heritage listing, valued at \$5 million or more;
 - acquisition of developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at \$50 million or more;
 - acquisition of accommodation facilities irrespective of value;
 - acquisition of vacant urban real estate irrespective of value;
 - acquisition of residential real estate 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. A **foreign interest** 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 controlling interest;

Appendix A

- ❖ a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling 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 2 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.

A **substantial foreign interest** occurs when a single foreigner (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.

11. Below is an outline of the Government's foreign investment policy and the examination guidelines for the various industry sectors. The majority of proposals will fall within these guidelines. However, some may not. The latter proposals will be examined on a case-by-case basis.

Examination by sector

12. The *Foreign Acquisitions and Takeovers Act 1975* applies to most examinable proposals and provides penalties for non-compliance.

Rural Businesses and Rural Land, Agriculture, Forestry, Fishing, Resource Processing, Oil & Gas, Mining, Manufacturing, Non-Bank Financial Institutions, Insurance, Sharebroking, Tourism, Most Other Services

(Rural Land is defined as land that is used wholly and exclusively for carrying on a substantial business of primary production. Acquisitions of vacant land that has a rural zoning, 'hobby farms' and 'rural residential' blocks by foreign interests are included within the urban land category.)

13. In relation to investments by foreign interests in these sectors, all proposals above certain thresholds need prior approval and therefore need to be notified. Notification thresholds are over \$50 million for acquisitions of substantial interests in all existing businesses, \$10 million or more for the

establishment of new businesses and \$50 million or more for offshore takeovers.

14. All tourism proposals, which incorporate an accommodation facility, irrespective of value, need to be notified.

15. The Government registers, but normally raises no objections to, proposals above the notification thresholds where the relevant total assets/total investment falls below \$100 million. However, proposals in sensitive sectors or those which raise specific national interest issues may be subject to more detailed examination.

16. The Government fully examines proposals to acquire existing businesses (with total assets of \$100 million or more) or establish new businesses (with a total investment of \$100 million or more) and raises no objections to those proposals unless they are contrary to the national interest.

17. Approvals of proposals may be made subject to the parties meeting certain conditions. In practice, such conditions relate almost entirely to the time period for real estate development or to environmental requirements.

Urban Land¹

18. Proposed acquisitions of **residential real estate** are exempt from examination in the case of:

- ❖ Australian citizens living abroad purchasing either in their own name or through an Australian corporation or trust;
- ❖ foreign nationals purchasing (as joint tenants) with their Australian citizen spouse; and
- ❖ foreign nationals who are the holders of permanent resident visas or are holders, or are entitled to hold, a 'special category visa' purchasing either in their own name or through an Australian corporation or trust.

19. Proposed acquisitions of **real estate for development** are normally approved subject to a specific condition requiring continuous substantial construction to commence within 12 months. Once construction is complete,

¹ This is a brief summary of the urban land policy. Further details of the urban land policy are provided in the document '**Foreign Investment Policy — Urban Land**'.

the parties are required to provide the completion date and actual development expenditure.

20. Foreign interests are normally given approval to buy:

- ❖ **vacant residential land**, including house and land packages where construction has not commenced, (on condition that continuous construction of a dwelling is commenced within 12 months); and
- ❖ house and land packages where construction has commenced, home units, townhouses, etc **'off-the-plan'**, under construction or newly constructed but never occupied or previously sold. 'Off-the-plan' sales to foreigners are only permitted for new development projects or extensively refurbished commercial structures, which have been converted to residential, on condition that no more than half the dwellings in any one development are sold to foreign interests.

21. Proposed acquisitions of residential property (both vacant land and existing dwellings) which are within the bounds of a resort that the Treasurer had designated as an **'Integrated Tourism Resort' (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 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 Integrated Tourism Resort status.

22. Certain categories of foreign nationals, temporarily resident in Australia continuously for more than 12 months, may be given approval to purchase developed residential real estate for use as their principal place of residence (ie, not for rental purposes) while in Australia. This category includes long-stay retirees. A condition of such purchases is that the residence must be sold when the foreign nationals' temporary resident visas expire, they leave Australia, or the property is no longer used as their principal place of residence.

23. All other proposals by foreign interests to acquire **developed residential real estate** are examinable and are not normally approved, except in the case of foreign companies, with an established substantial business in

Australia, buying for named senior executives resident in Australia for periods longer than 12 months, provided the accommodation is sold when no longer required for this purpose. Whether a company is eligible, and the number of properties that may be acquired under this category, will depend upon the extent of the foreign company's operations and assets in Australia. Unless there are special circumstances, foreign companies normally will not be permitted to buy more than two houses under this category. Foreign companies would not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

24. Proposed acquisitions of **developed non-residential commercial real estate** are normally approved unless they are contrary to the national interest.

25. Proposed acquisitions of **hotels and motels** operating under one title are normally approved (unless considered contrary to the national interest) under the tourism sector policy. Proposed acquisitions of strata titled hotel accommodation may be approved in certain designated hotels. Full details of the requirements for designated hotels are contained in the Australian urban land policy summary. Other **accommodation facilities** such as guesthouses, holiday flats and undesignated strata titled hotels and motels are examined under policy applying to the residential real estate sector.

Banking

26. Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* 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.

27. 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.

Appendix A

Civil Aviation

Domestic Services

28. Foreign persons (including foreign airlines) can generally expect approval to acquire up to 100 per cent of the equity in an Australian domestic airline, unless this is contrary to the national interest.

International Services

29. Foreign airlines can generally expect approval to acquire up to 25 per cent of the equity in an Australian international carrier (other than Qantas) individually or up to 35 per cent 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.

Reform of foreign ownership rules

30. The Government announced on 3 June 1999 that it will reform foreign ownership rules for Australian airlines, to make sure they have the resources to compete effectively in a world of airline alliances.

- ❖ the Government intends that foreign persons, including foreign airlines, will be allowed to acquire up to 49 per cent of the equity in an Australian international airline, unless this is contrary to the national interest; and
- ❖ **in the case of Qantas** it was announced that the Government will retain the existing ownership restrictions which limit foreign ownership of Qantas to 49 per cent, ownership by foreign airlines in aggregate to 35 per cent, and ownership by an individual (including a foreign airline) to 25 per cent.

Airports

31. 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

32. The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (ie, 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

33. All direct (ie, non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the Government's foreign investment policy. Proposals involving portfolio share holdings of 5 per cent or more must also be submitted for examination.

Broadcasting

34. While proposals for a foreign person to acquire an interest in an existing broadcasting service or to establish a new broadcasting service are subject to case-by-case examination under foreign investment policy, the following criteria also must be satisfied. A broadcasting regulatory regime, enacted through the *Broadcasting Services Act 1992* (BSA), stipulates that:

- ❖ Foreign interests in commercial television broadcasting services continue to be limited to a 15 per cent company interest for individuals and a 20 per cent company interest in aggregate. A foreign person may not be in a position to exercise control of a commercial television broadcasting licence. No more than 20 per cent of directors may be foreign persons.
- ❖ For all subscription television broadcasting services licences, foreign interests are limited to a 20 per cent company interest for an individual and a 35 per cent company interest in aggregate.

35. There are no foreign ownership and control limits on commercial radio or on other broadcasting services under the BSA.

Newspapers

36. Foreign investment in mass circulation national, metropolitan, suburban and provincial newspapers is restricted. All proposals by foreign interests to acquire an interest of 5 per cent or more in an existing newspaper or to establish a new newspaper in Australia are subject to case-by-case examination. The maximum permitted aggregate foreign interest (non-portfolio) investment/involvement in national and metropolitan newspapers is 30 per cent with any single foreign shareholder limited to a maximum interest of 25 per cent (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5 per cent). Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50 per cent for non-portfolio shareholdings.

Telecommunications

37. Telstra Corporation Ltd (Telstra) is predominantly owned by the Commonwealth of Australia. Since October 1997, the Government has partially privatised Telstra through the sale of 49.9 per cent of its equity to institutional and individual investors. Aggregate foreign ownership of Telstra is restricted to 35 per cent of that privatised equity and individual foreign investors are only allowed to acquire a holding of no more than 5 per cent of that privatised equity.

38. Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by-case basis and will normally be approved unless judged contrary to the national interest.

Approval Period

39. Approval under the Government's foreign investment 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.

40. Approvals for share acquisitions involving a full or partial bid under Corporations Law 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 Corporations Law or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

41. 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 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.

42. 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 (eg real estate speculation) that would be contrary to the national interest. In this situation the extended period will be stated in the approval.

Applications

43. The information normally required to enable foreign investment proposals to be processed is set out below. Copies of relevant annual reports for the most recent financial year should accompany the application. There is no statutory charge for processing applications.

44. All applications should be addressed in **writing** to:

The Executive Member
Foreign Investment Review Board
C/- The Treasury
CANBERRA ACT 2600

45. The Government recognises the commercial-in-confidence sensitivity of much of the information provided to the Board. 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, 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.

46. In addition, the Government is obligated to respect the privacy of personal information that is provided by applicants to the Foreign Investment Review Board in accordance with the requirements of the *Privacy Act 1988*. In accordance with that Act, the Government advises that in situations where the applicant has breached, or is strongly suspected of having breached the *Foreign Acquisitions and Takeovers Act 1975* (FATA), the Board may seek the assistance of other Government agencies in its efforts to ensure applicants comply with the FATA. In seeking such assistance, the Board may pass relevant personal information to those government agencies. Most commonly these agencies will be the Department of Immigration and Multicultural Affairs, the Australian Tax Office or the Australian Federal Police.

47. The requirements set out below are supplementary to those of the notification provisions of sections 25, 26 and 26A of the Foreign Acquisitions and Takeovers Act (for which there are prescribed forms).

Takeovers of enterprises with total assets of (or valued at) \$100 million and over

A. Parties to the proposal

For both the purchaser and target business:

- ❖ name;
- ❖ location of major establishments;
- ❖ major activities;
- ❖ major subsidiaries and associated companies;
- ❖ financial details for the most recent year, namely, total assets, net tangible assets and pre-tax profits (with the most recent financial statements);
- ❖ details of Australian/overseas ownership (including identity of ultimate or beneficial owners); and
- ❖ country of ultimate control of purchaser.

B. Type of proposal

- ❖ Acquisition/issue of shares;
 - the number, class and voting rights of shares, including the percentage of the total equity involved.
- ❖ Acquisition of assets;
 - description of the assets involved.
- ❖ Agreements/arrangements entered into or terminated; alteration of a constituent document;
 - full details, supported by copies of appropriate documents or relevant extracts therefrom.

C. Consideration

- ❖ Amounts involved;
- ❖ Type of funds (equity/loan), source of funds (from overseas associate companies, from Australian capital market, etc).

D. Reason(s) for the proposal

- ❖ From viewpoints of the vendor, target and purchaser.

E. Brief description of the purchaser's future intentions for the business, including amount of development expenditure proposed

Takeovers of enterprises with total assets of (or valued at) less than \$100 million

A. Parties to the proposal

For both the purchaser and target business:

- ❖ name;
- ❖ location of major establishments;
- ❖ major activities;
- ❖ details of total assets (with relevant balance sheets); and

Appendix A

- ❖ country of ultimate control of purchaser.

B. Type of proposal

- ❖ describe whether it involves shares or assets of an existing business;
- ❖ if it is a reorganisation of shares/assets or other arrangements within a corporate group; and
- ❖ if it is a rural property, and, if so, the number of hectares, current and proposed use of the property.

C. Consideration and Proposed Expenditure

- ❖ Amounts involved including proposed development expenditure, if any.

New Business or Project involving total investment (including debt) during the establishment phase of \$100 million and above

A. Parties to the proposal

- ❖ Name, location, major activities and scale of each, major affiliates (Australian/overseas); and
- ❖ Financial details for the most recent year, namely, total assets, net tangible assets and pre-tax profits together with relevant balance sheets and profit and loss and trading accounts.

B. The proposal

- ❖ Description of proposal: total funds to be invested and the proportion of these to be provided as equity capital, the sources of the loan and equity capital (from overseas associates, Australian capital market, etc), the proposed location of the investment, the purpose of the investment.

C. Ownership of the proposed business

- ❖ Details of proposed beneficial ownership (identify shareholdings by associated interests) and the corresponding pattern of voting

rights held, board representation rights, and other rights concerning management and control.

D. Industry information

- ❖ A description of the industry in which the new venture will be engaged and its expected position in the industry, other significant members of the industry, their ownership and respective shares of the market.

E. Other considerations

- ❖ Information should also be provided on any patents, royalty and licensing arrangements and export franchises held by the applicant and which might be made available to the local firm and the basis on which these would be made available; what restrictions, if any, will be placed on the new venture together with any plans for local research and development;
- ❖ Describe the environmental impact, if any, of the proposal, and provide details of any environmental studies undertaken;
- ❖ Describe efforts, if any, made to obtain Australian participation in the proposal; and
- ❖ For mining proposals, describe plans, if any, for value adding activity in Australia or any value adding opportunities which may flow from the project.

New Business or Project involving total investment (including debt) during the establishment phase of less than \$100 million

A. Parties to the proposal

- ❖ name, location, major activities and scale of each, major affiliates (Australian/overseas); and
- ❖ financial details for the most recent year, ie total assets, together with relevant balance sheets.

Appendix A

B. The proposal

- ❖ Description of proposal: total funds to be invested and a description of the industry in which the new venture will be engaged.

C. Ownership of the proposed business

- ❖ Details of proposed beneficial ownership (identify shareholdings by associated interests).

Urban Real Estate Acquisitions

Please refer to the separate summary of the policy applying to the acquisition of interests in Australian urban land.

Further Enquiries

Should you have any further enquiries contact please contact the Executive on:

General enquiries (02) 6263 3795

Fax (02) 6263 2940

From overseas

General enquiries 61 - 2 - 6263 3795

Fax 61 - 2 - 6263 2940

E-mail firb@treasury.gov.au

Further information on Australia's foreign investment policy may be found at <http://www.treasury.gov.au/firb>