

Appendix A

Summary of Australia's Foreign Investment Policy

Summary of Australia's foreign investment policy

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 FATA) to block proposals that are required to be notified and which are determined to be contrary to the national interest.¹ The FATA and the Foreign Acquisitions and Takeovers Regulations 1989 provide monetary thresholds for the notification of individual investment proposals, with separate thresholds applying for acquisitions by United States investors.² The Act also provides legislative backing for ensuring compliance with the policy.

4. 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 Foreign Investment Review Board (FIRB) enables comments to be obtained from relevant parties and other Government

1 This Summary of Australia's Foreign Investment Policy should be considered in conjunction with the *Foreign Acquisitions and Takeovers Act 1975* and the Foreign Acquisitions and Takeovers Regulations.

2 Under the Australia-United States Free Trade Agreement (AUSFTA) which came into effect on 1 January, 2005.

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. 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 encourage foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

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 residences and is not speculative in nature. The Government's foreign investment policy 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.

7. 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 be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

PRIOR APPROVAL

8. 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, the value of whose assets exceeds \$50 million or where the proposal values the business at over \$50 million. For US investors a notification threshold of \$800 million instead applies, except for investments in prescribed sensitive sectors,³ or by an entity controlled by a US government, which are subject to a \$50 million threshold.⁴ 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* ;

3 The AUSFTA prescribed 'sensitive sectors' are set out in the attachment.

4 The US thresholds are subject to annual indexation from 2006.

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- proposals to establish new businesses involving a total investment of \$10 million or more. Proposals by US investors, except an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements;
 - 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 exceed \$50 million, or the applicable US investor threshold of either \$800 million or \$50 million;
 - direct investments by foreign governments and 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:
 - 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 \$800 million for US investors;
 - accommodation facilities irrespective of value;
 - vacant real estate irrespective of value;
 - 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.)
9. 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;
 - 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 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 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.

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.

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.⁵

Examination by sector

10. 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.

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

12. In relation to investments by foreign interests in these sectors, all proposals above certain thresholds need prior approval and therefore need to be notified with separate notification and approval arrangements applying to those sectors set out below. Notification thresholds are:

- greater than \$50 million* for acquisitions of substantial interests in all existing businesses;
- \$10 million** or more for the establishment of new businesses; and
- greater than \$50 million* for offshore takeovers.

5 A **US enterprise** is an entity constituted or organised under a law of the United States. 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, and 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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- * *For US investors an indexed threshold of \$800 million applies where the general \$50 million threshold would instead apply, except for investments in prescribed sensitive sectors, or by an entity controlled by a US government, which are subject to an indexed \$50 million threshold. The prescribed sensitive sectors applying to US investors are listed in the Attachment.*
- ** *Proposals by US investors to establish new businesses, except by an entity controlled by a US government, do not require notification but remain subject to other relevant policy requirements.*

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

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

15. The Government fully examines notifiable 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.

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

Urban Land⁶

17. 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 a 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 a trust.

6 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' available on the website at www.firb.gov.au.

18. Proposed acquisitions of real estate for development are normally approved subject to specific conditions requiring continuous substantial construction to commence within 12 months. Once construction is complete, the parties are required to provide the completion date and actual development expenditure.

19. 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 a development are sold to foreign interests.

20. 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.

21. Certain categories of foreign nationals, who will be temporarily resident in Australia continuously for 12 months, may be given approval to purchase developed residential real estate for use as their principal place of residence (that is, 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.

22. 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

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would not be eligible under this category where the property would represent a significant proportion of its assets in Australia.

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

24. 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, hostels, holiday flats and undesignated strata titled hotels or motels are examined under policy applying to the residential real estate sector.

Banking

25. 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 notification requirements of the FATA. The FSSA continues to apply.

26. 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

27. 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), unless this is contrary to the national interest.

International Services

28. 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

29. 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

30. 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

31. All direct (that is, 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

32. 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:

- a foreign person must not be in a position to exercise control of a commercial television broadcasting licence, and must not have company interests in a licence that exceed 15 per cent or 20 per cent in aggregate held by two or more foreign persons. No more than 20 per cent of directors may be foreign persons.
- a foreign person must not have company interests of more than 20 per cent in a subscription television broadcasting licence, and the aggregate interests held by foreign persons must not exceed 35 per cent.

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

Newspapers

34. 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

35. Telstra Corporation Ltd (Telstra) is predominantly owned by the Commonwealth of Australia (51.8 per cent) with the remainder of the equity in the partially privatised company held by institutional and individual investors. Aggregate foreign ownership of Telstra is restricted to 35 per cent of the privatised equity and individual foreign investors are only allowed to acquire a holding of no more than 5 per cent of the privatised equity.

APPROVAL PERIOD

36. 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.

37. 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* or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

38. 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.

39. 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.

APPLICATIONS

40. 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.

41. All applications should be addressed in writing to:

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

42. 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, 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.

43. 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 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 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 and Indigenous Affairs, the Australian Taxation Office or the Australian Federal Police.

44. The requirements set out below are supplementary to those of the notification provisions of sections 25, 26 and 26A of the FATA (for which there are prescribed forms).

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

A. Parties to the proposal

For both the purchaser and target business

- name

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- 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, including balance sheets)
- details of Australian/overseas ownership (including identity of ultimate or beneficial owners)
- 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)
- 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
- 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)
- 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
- 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)
- Financial details for the most recent year, ie total assets, together with relevant balance sheets

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

Further information on Australia's foreign investment policy may be found at the Foreign Investment Review Board's webpage, <http://www.firb.gov.au>

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

General enquiries	(02) 6263 3795
Fax	(02) 6263 2940
<i>From overseas</i>	
General enquiries	61 - 2 - 6263 3795
Fax	61 - 2 - 6263 2940
E-mail	firb@treasury.gov.au

Attachment

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.

