



Australian Government
Foreign Investment Review Board

FOREIGN
INVESTMENT
REVIEW BOARD

—
ANNUAL REPORT
13/14

**Foreign Investment
Review Board**

**Annual Report
2013-14**

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27 April 2015

The Hon Joe Hockey MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

I am pleased to present the annual report of the Foreign Investment Review Board for the year ended 30 June 2014. This report has been prepared in accordance with the Board's responsibility to advise the Government on foreign investment matters. It outlines the activities of the Board, provides a summary of the year's foreign investment proposals, contains an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* and includes a copy of Australia's Foreign Investment Policy.

The Board examines significant foreign investment applications and advises on potential national interest concerns. In 2013-14, the Board examined a range of high profile investment applications, including Archer Daniels Midland Company's proposed acquisition of GrainCorp Limited which was determined to be contrary to the national interest on 29 November 2013.

Real estate and services related applications accounted for around 76 per cent of the value of approvals in 2013-14. China was the largest investor in 2013-14 in terms of the value of all approvals (17 per cent of the total value), followed by the United States and Canada. The Board considered and monitored applications from a wide range of countries and noted the continuing increased investment interest in Australia by sovereign funds from North America, Europe, the Middle East and Asia, demonstrating Australia's ongoing competitiveness as an investment destination.

Foreign investment in agriculture and residential real estate continue to attract significant public and political interest. The Board monitored developments in these areas and contributed to Government and Parliamentary considerations of the issues involved. For example, the Board participated in the House of Representatives Standing Committee on Economics Inquiry into Foreign Investment and Residential Real Estate.

The Board has built on previous efforts to enhance awareness and understanding of Australia's foreign investment arrangements with additional engagement activities in Australia and overseas. For instance, the Executive Member of the Board and I visited China again in May 2014 to further the Board's engagement with officials and potential investors. The visit included a focus on broadening our constructive investment dialogue into regions not previously visited such as Western China, allowing for a more extensive appreciation of Chinese investors, their investment prospects and their understanding of our foreign investment regime.

The Board has continued its long standing practice of examining the consistency of proposals with Australian corporate governance standards and commercial practices. The Board maintains factsheets on corporate governance, corporate law, market activity, directors' duties, competition and consumer law and taxation obligations on its website and investors are directed to this information when they receive foreign investment approval.

The past year has also seen changes to the membership of the Board. On 9 December 2014, Mr Hamish Douglass' term expired after five years of service. On behalf of all members of the Board, I would like to take this opportunity to thank Hamish for the valuable contribution that he made to deliberations of the Board.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brian Wilson', with a long, sweeping flourish extending to the right.

Brian Wilson
Chairman

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Glossary

| | |
|-------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Act | <i>The Foreign Acquisitions and Takeovers Act 1975.</i> |
| Aggregate substantial interest in a corporation | Where two or more persons, together with any associate(s), are in a position to control not less than 40 per cent of the voting power or potential voting power, or hold interests in not less than 40 per cent of the issued shares or rights to issued shares, of a corporation (section 9 of the Act). |
| Applications approved (/approvals) | Comprise all foreign investment proposals approved either with or without conditions. |
| Applications considered | Comprise all foreign investment proposals finalised (that is, approved, rejected, withdrawn or exempt). |
| Applications decided | Comprise all foreign investment proposals approved or rejected (that is, excluding proposals withdrawn or exempt). |
| Applications rejected | Comprise all foreign investment proposals that are either rejected under the Policy or subject to a Final Order or a Divestiture Order under the Act. |
| Australian rural land | Refers to land that is used wholly and exclusively for carrying on a primary production business. |
| Australian urban land | Refers to all other land in Australia that is not Australian rural land. It includes all seabed within Australia's Exclusive Economic Zone. |
| Australian urban land corporations and trusts | A corporation or trust that has interests in Australian urban land which make up more than 50 per cent of the value of its total assets (sections 13C and 13D of the Act). |
| Corporate reorganisations | Corporate reorganisations encompass a wide range of transactions including corporate restructures and transfers of assets or shares within a corporate group. |
| Divestiture Order | An Order that requires an interest already acquired to be disposed of. |
| Final Order | An Order that prohibits a proposed acquisition. |

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|---------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Foreign government investors | <p>Foreign government investors include:</p> <ul style="list-style-type: none">• a body politic of a foreign country;• entities¹ in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more;• entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 per cent or more; or• entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group. |
| Foreign Investment Review Board (the Board) | <p>A non-statutory body established in 1976 to advise the Treasurer on the Policy and its administration.</p> |
| Foreign person | <ul style="list-style-type: none">(a) a natural person not ordinarily resident in Australia;(b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;(c) 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;(d) 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(e) 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. <p>(Section 5 of the Act)</p> |
| Interim Order | <p>An Order that extends the available statutory examination period and prohibits a proposed acquisition for up to 90 days.</p> |

1 Entities include companies, trusts and limited partnerships.

| | |
|---------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Offshore takeover | Where an offshore company (or a foreign person) that holds Australian assets or conducts a business in Australia is acquired by another foreign person, and the Australian assets or businesses of the target company are valued above the relevant thresholds. |
| Off-the-plan | An acquisition of a dwelling under construction or completed that has not been lived in for 12 months or more, or previously sold (that is, the dwelling is purchased from the developer). |
| Policy | Australia's Foreign Investment Policy. |
| Proposed investment | Proposed investment associated with foreign investment proposals comprises the aggregate of acquisition costs and development expenditure in the case of existing businesses, and the aggregate of establishment costs and development expenditure in the case of new businesses. |
| Secretariat (or the Division) | Treasury's Foreign Investment and Trade Policy Division. |
| Substantial interest in a corporation | Where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power or potential voting power, or holds interests in not less than 15 per cent of the issued shares or rights to issued shares, of a corporation (section 9 of the Act). |
| Regulations | The <i>Foreign Acquisitions and Takeovers Regulations 1989</i> . |
| Threshold | Monetary figure under either the Policy or the Act at or above which foreign persons are expected or required to notify an investment proposal to the Treasurer. |

Main points

- In 2013-14, 24,102 proposals received foreign investment approval, compared with 12,731 in 2012-13 (the sectoral breakdown below excludes 89 reorganisations).
 - The real estate sector had a significant increase in approvals with 23,428 approvals in 2013-14, compared with 12,025 approvals in 2012-13.
 - Other sectors decreased in approvals with 585 approvals in 2013-14, compared with 622 approvals in 2012-13.
- Approvals in 2013-14 were given for \$167.4 billion of proposed investment. This represented a 23.4 per cent increase on the \$135.7 billion in proposed investment approved in 2012-13.
 - In real estate, approved proposed investment was \$74.6 billion in 2013-14, compared with \$51.9 billion in 2012-13. Proposed investment in commercial real estate increased, from \$34.8 billion in 2012-13 to \$39.9 billion in 2013-14. Proposed investment in residential real estate also increased, from \$17.2 billion in 2012-13 to \$34.7 billion in 2013-14.
 - In other sectors, approved proposed investment in 2013-14 was \$92.8 billion, an increase of 10.7 per cent compared with the \$83.8 billion approved in 2012-13.
- In 2013-14, three proposals were rejected (compared with no rejected proposals in 2012-13). Of the three proposals rejected, two related to residential real estate and the other related to the rejection in November 2013 of Archer Daniel Midlands Company's proposed takeover of GrainCorp Limited.
- The real estate sector was the largest destination by value, with approvals in 2013-14 of \$74.6 billion (an increase of \$22.7 billion from 2012-13). In 2013-14, the other major sectors were: services (excluding tourism), with approved proposed investment of \$53.4 billion (an increase of \$27.5 billion); and mineral exploration and development, with approved proposed investment of \$22.4 billion (a decrease of \$23.1 billion).
- For the first time China (\$27.7 billion) was the largest source country for approved proposed investment in 2013-14, overtaking the United States (\$17.5 billion). Other major source countries of approved proposed investment in 2013-14 were Canada (\$15.4 billion), Malaysia (\$7.2 billion) and Singapore (\$7.1 billion).



FOREIGN
INVESTMENT
REVIEW BOARD

CHAPTER 1

Foreign Investment Review Board

The Foreign Investment Review Board (the Board) is a non-statutory body established in 1976 to advise the Treasurer and the Government on Australia's Foreign Investment Policy (the Policy) and its administration. The Foreign Investment Review Board annual reports, which are not statutorily mandated, provide information on the operation of Australia's foreign investment review arrangements. This chapter covers the role of the Board and administration of these arrangements.

The Board's functions are advisory only. Responsibility for making decisions on the Policy and proposals rests with the Treasurer. The Treasury's Foreign Investment and Trade Policy Division (the Division) provides secretariat services to the Board and is responsible for the day-to-day administration of the arrangements. The Division also provides advice to the Treasury portfolio ministers on foreign investment matters.

The role of the Board, including through its secretariat, is to:

- examine proposed investments in Australia that are subject to the Policy, the *Foreign Acquisitions and Takeovers Act 1975* (the Act) and supporting legislation, and to make recommendations to the Treasurer and other Treasury portfolio ministers on these proposals;
- advise the Treasurer on the operation of the Policy and the Act;
- foster an awareness and understanding, both in Australia and abroad, of the Policy and the Act;
- provide guidance to foreign persons and their representatives or agents on the Policy and the Act;
- monitor and ensure compliance with the Policy and the Act; and
- provide advice to the Treasurer on the Policy and related matters.

A copy of the Policy and information on the operation of the Act are provided in Appendices A and B.

Board membership

The Board comprised five part-time Members and a full-time Executive Member in 2013-14.



Mr Brian Wilson was appointed to the Board on 10 December 2009 and appointed Chairman on 16 April 2012. He is also Deputy Chancellor of University of Technology, Sydney, a non-executive director of Bell Financial Group and a member of the Payments System Board of the Reserve Bank of Australia. He was a member of the Commonwealth Government Review of Australia's Superannuation System and of the Specialist Reference Group on the Taxation of Multinational Enterprises in Australia and is currently a member of the ATO

Superannuation Reform Steering Committee. Mr Wilson retired in 2009 as a Managing Director of the global investment bank Lazard, after co-founding the firm in Australia in 2004 and was previously a Vice-Chairman of Citigroup Australia and its predecessor companies.



Mr Hamish Douglass was appointed to the Board on 10 December 2009. He has extensive experience in global foreign investment and in the origination and execution of corporate finance transactions and in particular, public company mergers and acquisitions. He has extensive experience in corporate finance transactions in the mining industry. He is the Chief Executive Officer of Magellan Financial Group, a specialist global fund management group that is listed on the Australian Securities Exchange. He was previously

Co-Head of Global Banking for Deutsche Bank AG in Australia and New Zealand and prior to that he was Head of Mergers and Acquisitions. He was a member of the Australian Government's Takeovers Panel, a member of the Young Global Leaders (a forum of the World Economic Forum) and a member of the Financial Literacy Board. Mr Douglass' term ended on 9 December 2014.



Ms Anna Buduls was appointed to the Board on 15 July 2010. Through her corporate advisory work and 21 years of non-executive company directorships, Ms Buduls has gained wide commercial experience across a broad range of companies and industries, including the agriculture sector. She is currently owner and Chairman of a travel software group and is a non-executive director of the listed company SAI Global Ltd (since October 2003). Ms Buduls was also one of the three Australian members on the APEC Business Advisory Council for

three years to the end of 2014.



Mr Michael D'Ascenzo AO was appointed to the Board with effect from 2 January 2013. Mr D'Ascenzo is recognised internationally for his leadership and expertise in taxation, administration, governance and policy. Mr D'Ascenzo was Commissioner of Taxation from January 2006 to December 2012. In January 2010 he was appointed an Officer of the Order of Australia for service to public administration and in 2012

he was awarded the Chartered Accountants' Federal Government Leader of the Year. Mr D'Ascenzo is currently also a non-executive director of Australia Post and a member of the Clean Energy Regulator, as well as an adjunct professor at UNSW and a professorial fellow at Melbourne University.



Mr Patrick Secker, appointed on 17 December 2013, brings extensive agricultural sector experience to the Board. He was a primary producer, agricultural retailer and company director before entering politics as the member for the rural South Australian electorate of Barker. Mr Secker has a degree in economics and has participated in a number of parliamentary agricultural committees over many years. His parliamentary career included serving positions as Opposition Whip and Deputy Speaker of the House of Representatives.

Mr Jonathan Rollings served as Executive Member of the Board during 2013-14. The position of Executive Member is held by the General Manager of Treasury's Foreign Investment and Trade Policy Division. The Executive Member provides the link between the Board and the Division, which provides secretariat support to the Board.

Mr Rob Donnelly commenced as Executive Member of the Board on 15 September 2014.

The role of Treasury's Foreign Investment and Trade Policy Division

The Foreign Investment and Trade Policy Division provides advice on foreign investment issues and leads the department's work on trade policy. The Division provides Secretariat support for the Board and an important part of the division's work is assessing foreign investment proposals and providing advice and recommendations on these proposals to the Board and Treasury ministers. This involves engagement across government agencies, within Treasury and also as a contact point for foreign investors and their representatives or agents.

The Board provides advice on the application of the Policy and the Act across the range of proposals received by the Division and on foreign investment policy issues. It provides specific advice on the more significant applications received and also reviews the general handling of other applications. The Board performs this role with the benefit of weekly reports prepared by the Division on proposals received and through regular meetings and discussions with the Executive Member and Divisional officers. Formal Board meetings are generally held monthly, with telephone discussions taking place in the intervening weeks. The Board members draw on their considerable collective and individual professional and commercial experience in discharging their advisory role.

Administration of the Policy

Information, advice and education

In keeping with the Board's role of fostering awareness and understanding of Australia's foreign investment review arrangements and the Policy, the Division regularly engages with potential foreign investors, their representatives or agents and Australian businesses to provide information on the operation of the Policy and the Act and their application, including to specific proposals.

The Division also provides:

- a telephone inquiry line, +61 2 6263 3795, an email address, firbenquiries@treasury.gov.au, and a website, www.firb.gov.au, for people seeking information or advice on the Policy and the Act;
- an online notification system for residential real estate proposals; and
- a compliance hotline, 1800 050 377 and an email address, FIRBCompliance@treasury.gov.au, for people wanting to raise potential compliance issues.

Consideration timeframe

The Act provides a 30-day statutory period for a decision to be made on proposals lodged under the Act, with up to a further 10 days after the day of the decision to advise the applicant of the decision. The statutory period commences from the day after the receipt of a completed notice under section 25, section 26 or section 26A. The Act also provides for the issue of an Interim Order, which extends the available examination period and prohibits the proposal for up to 90 days. Interim Orders are usually issued to allow the applicant additional time to provide adequate information for assessing the proposal. Proposals subject to the Policy but not the Act are decided (where possible) within a 30-day period.

The approach taken to the examination is guided by these timeframes and by other factors, such as the complexity of a proposal and commercial factors that may be relevant. The examination process, including consultation on proposals, is assisted where applicants provide complete and accurate information about their proposal at the time of lodgement.

The Treasurer has provided an authorisation (effectively a delegation) to the Executive Member and other senior Division staff to make decisions on foreign investment proposals that are consistent with the Policy or do not involve issues of special sensitivity. Just over 96 per cent of proposals, mostly real estate, were decided under this authorisation in 2013-14. These arrangements streamline the approval process and facilitate a timely decision on applications.

Examination and approval process

Proposals are initially examined by the Division in its role as Board secretariat, with the Board's direct and early involvement in significant applications. Applicants may also be contacted to provide further information or to discuss their proposal.

The Division also undertakes associated compliance work. Proposals are examined to determine whether they conform with the requirements of the Policy and the Act, including the proponent's fulfilment of any conditions attached to past approvals. While the overwhelming majority of proposals proceed without objection, the Treasurer has powers under the Act to prohibit proposals that are contrary to the national interest or to raise no objections to them subject to conditions that are considered necessary to address national interest concerns.

Where a proposal raises national interest concerns that could lead to prohibition or conditional approval (where these conditions are not standard), the Board and the Division work with the applicant to determine how these concerns may be mitigated and managed. The applicant is provided with a fair opportunity to comment on such matters.

Decisions are advised in writing to the applicants or their representatives or agents and applicants will generally have 12 months from notification to implement their proposal. Should a proposal materially change after a decision is made then a further notification would be required. Where the Treasurer makes a decision on a significant proposal, he may also issue a media release.

Consultation arrangements

In examining significant proposals, consultations are undertaken by the Board's secretariat with Australian, state and territory government departments, national security agencies and authorities with responsibilities relevant to the proposals. Advice and comments provided by such agencies are important in assessing the implications of proposals and in particular, in determining whether they raise any national interest issues. Such consultations are undertaken on a strictly confidential basis to protect the information provided by the applicants. The Board regards this liaison with key stakeholders as an integral part of the administration of the Policy. The Board may also receive unsolicited submissions from third parties.

National interest

The Act empowers the Treasurer to prohibit an acquisition if he is satisfied it would be contrary to the national interest. However, the general presumption is that foreign investment proposals will serve the national interest. This reflects the positive stance of successive Australian governments towards foreign investment, given the important role it plays in our economy and Australia's national development.

The national interest, and hence what would be contrary to it, is not defined in the Act. Instead, the Act confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest.

In preparing the Board's advice, consideration is also given to whether an investment is consistent with the Policy and the national interest (see the Board's website at www.firb.gov.au. This website also contains information on Australia's foreign investment screening arrangements and on national interest matters, especially relating to real estate and other sectors with specific requirements).

The Policy outlines the types of real estate that foreign persons may buy and whether they need Government approval to do so, including whether an approval is generally subject to conditions. All residential real estate applications are considered in light of the overarching principle that foreign investment in residential real estate should increase Australia's housing stock.

For business acquisitions, assessing the national interest allows the Government to balance potential sensitivities against the benefits of foreign investment. The Government typically considers the following factors when assessing foreign investment proposals in any sector:

- national security;
- competition;
- impact on other Government policies (including taxation);
- impact on the economy and the community; and
- the character of the investor.

The Policy provides guidance on the above factors, as well as guidance on consideration of proposals involving foreign government investors. Annex 2 of the Policy provides guidance on factors that are typically considered in assessing foreign investment applications involving the agricultural sector.

Handling of commercially sensitive and personal information

The Board recognises that much of the information required to assess a proposal will be commercially sensitive or of a private or confidential nature. Consequently, appropriate procedures are in place to ensure that confidentiality is protected.

Moreover, the Government is required to respect the privacy and confidentiality of personal and commercial information that is provided by applicants in accordance with relevant legislation, including the *Privacy Act 1988* and the *Public Service Act 1999*. However, in accordance with this legislation, in order to provide whole-of-government advice to the Treasurer on applications or where the applicant may have breached the

Act or the Policy, other government agencies may be consulted and relevant information may be provided to those agencies. Those agencies include relevant national security agencies, the Department of Immigration and Border Protection and the Australian Taxation Office.

In the event that access to confidential information is sought for other purposes, it will not be made available unless the release of that information is required or authorised by law, or the person who provided it has given their consent. In some circumstances, this may be through the operation of the *Freedom of Information Act 1982*.

In 2013-14, the Division received 28 freedom of information applications (20 in 2012-13) concerning foreign investment matters. The *Freedom of Information Act 1982* provides criteria to determine whether particular documents or parts of documents are available or exempt from release. These include, for example, that the document contains commercially sensitive information where its release would cause harm to its provider. In line with the provisions of the *Freedom of Information Act 1982*, the Division may consult with the parties to a proposal about documents they provided which are the subject of a freedom of information request, to seek their views on the possible release of documents to a freedom of information applicant.

2013-14 Outcomes

Cost of the Board's operations

Total Board expenses in 2013-14 were \$328,048 (\$257,501 in 2012-13). Remuneration of Board members was around 90 per cent of total Board expenses, with the remainder expended on travel, car hire and incidentals. Board members' fees are determined by the Remuneration Tribunal.

Total expenses of the Division for 2013-14 were \$3.9 million (\$4.0 million in 2012-13). These expenses mainly comprised employee salary (including superannuation and accruing leave entitlements) and administrative costs. Over the course of 2013-14, the Division employed an average of 28 staff.

Consideration of proposals and enquiries

In 2013-14, a total of 25,005 applications for foreign investment approval were considered, with 24,102 approved, three rejected, 719 withdrawn and 181 exempt as not subject to the Policy or the Act. Of the 24,105 applications decided in 2013-14 (that is, those approved or rejected but not those withdrawn or exempt), 23,205 were decided within the Division under the Treasurer's authorisation and 900 were decided by another Treasury minister.

In 2013-14, eight non-real estate related Interim Orders were published in the Commonwealth of Australia *Gazette*.² Three Final Orders were made. Final Orders are issued where a proposal, assessed in terms of the Policy, is considered to be contrary to the national interest. No Divestiture Orders were made. Divestiture Orders are issued where an acquisition has already occurred and is subsequently assessed, in terms of the Policy, as being contrary to the national interest.

The Board and the Division endeavour to ensure that all foreign investment proposals are dealt with in a timely and efficient manner and every effort is made to avoid any unnecessary delays to business decision-making.

Of the 24,105 applications decided in 2013-14 (that is, those approved or rejected but not those withdrawn or exempt), over 99 per cent of proposals were decided within 30 days. Proposals that take more than 30 days to decide are generally delayed by a lack of sufficient information from the parties, or because the application involved significant complexity or sensitivity.

Monitoring and compliance activity

The Act provides wide-ranging powers to enforce the decisions made, including the ability to:

- order the unwinding or divestment (by requiring the parties to sell shares, assets or property) of transactions that have gone ahead, without prior foreign investment approval having been obtained, where that purchase was contrary to the national interest;
- prosecute a foreign person (including a natural person or a company) that failed to obtain prior approval;
- prosecute a foreign person that failed to comply with an order to sell shares, assets or property; and
- prosecute a foreign person that failed to comply with conditions attached to any approval granted under the Act.

The Act empowers the Treasurer to make orders to prohibit schemes entered into for the purpose of avoiding its provisions (section 38A). In addition, the provision of false

2 The Act provides the Treasurer with the power to make orders prohibiting an acquisition (an Interim Order or a Final Order) or having the effect of requiring an interest to be disposed (a Divestiture Order). While the prohibition under a Final Order is not subject to any time limitations, an Interim Order prohibits the acquisition proceeding during the period from gazettal until the earlier of up to 90 days, or until a decision has been made. The Act also provides the Treasurer with the power to revoke an Order that has been made.

or misleading information can constitute an offence under the *Crimes Act 1914* and Chapter 7 of the *Criminal Code Act 1995*.

In examining proposals, the applicant's compliance with any conditions relating to past proposals is taken into account. Instances of failure to comply with conditions may result in future proposals being rejected. It is general policy to report potential breaches of the Act to the Department of Immigration and Border Protection, the Australian Taxation Office, the Australian Federal Police, national security agencies and other government agencies as appropriate.

Compliance and monitoring work includes the following activities:

- educating and providing information to individuals and organisations affected directly and indirectly by the Policy. Activities include presenting at industry forums and seminars, providing information such as the Guidance Notes and the Investor Obligations – Fact Sheets (which are available on the Board's website); responding to written enquiries and providing information through the general enquiries helpline and the compliance hotline;
- monitoring to ensure that foreign persons are complying with the conditions of their approvals. This involves cooperation with relevant members of the business community, local government authorities, the legal profession and on occasions, the general public;
- systemic investigations of compliance performance, including through data analysis and interpretation of trends using internal as well as external information sources. These investigations include analysis of retrospective case histories, reviews of shareholding structures among listed Australian companies and regular monitoring of property market leasing activity;
- interagency cooperation and liaison with a range of government agencies including relevant national security agencies, the Department of Immigration and Border Protection, the Australian Taxation Office, the Australian Securities and Investments Commission and the Australian Federal Police; and
- case investigations triggered by information received from members of the public.



FOREIGN
INVESTMENT
PROPOSALS

CHAPTER 2

Foreign investment proposals

This chapter provides an overview and statistical information on applications considered in 2013-14. It provides information on proposed investments that fall within the scope of Australia's Foreign Investment Policy (the Policy) and the *Foreign Acquisitions and Takeovers Act 1975* (the Act). The Policy and the Act can be accessed through the Board's website, www.firb.gov.au.

The term 'proposed investment' is used widely throughout this report. The value of proposed investment is the aggregation of the following estimates at the time of the approval:

- acquisition costs (including shares, real estate or other assets);
- development costs following some acquisitions; and
- costs of both establishment and development in the case of new businesses.

Features of the Foreign Investment Review Board statistics

Methodological and data caveats

While this chapter provides a useful source of data on proposed foreign direct investment in Australia, the Board urges particular caution in the use of these statistics, including when making comparisons with earlier years.

- The statistics contained in this chapter do not measure total foreign investment made in any year, nor do they measure changes in net foreign ownership levels in Australia. They reflect investor intentions (not actual purchases) to acquire Australian assets. They are inherently irregular and can be skewed due to very large investment proposals and multiple proposals for the same target.
- There are also substantial differences between these statistics on proposed investments and actual investment flows. The latter are more reliably captured by Australian Bureau of Statistics data, which seeks to reflect more comprehensively investment transactions between residents of Australia and non-residents.
- Data capture and reporting methodologies change over time.
- Data presented for earlier years may also have been revised since last published.
- Proposed investment amounts for earlier years are not adjusted for inflation or currency movements.
- The figures are based on the assumption that investment funds will be sourced from overseas. The extent to which approved investment proposals will actually be

funded from outside of Australia and result in foreign capital inflows depends not only upon whether they are implemented, but also upon the proportion that is financed from foreign sources. Some (and in some cases all) of the proposed funds to be invested may be contributed by Australians, for example, where they are in partnership with foreign interests, or where the investment is financed from existing Australian operations.

- The source of proposed investment identified in the Board's statistics does not necessarily reflect the country of control. For example, the source may be attributed to a company's single substantial shareholder, or if a company's shares are widely held, the country of domicile or incorporation may be recorded.
- The data does not necessarily reflect a change in foreign ownership as, in some cases, both the target and the purchaser are foreign persons.
- The proposed investment of an approved proposal is the amount advised by the applicants or the best estimate based on the available information. It represents an estimate of the expected proposed investment in the 12 months from the approval unless the approval is granted for a longer period (if the proposal is in fact implemented).
 - Where an approved acquisition is a part of an offshore acquisition, the proposed investment figure is calculated based on the share attributable to the approved acquisition.
 - Where amounts are in a foreign currency, this is converted to Australian dollars based on the exchange rate at the time of the decision.
 - There are some approved proposals for which proposed investment is treated as nil. Examples of this include corporate reorganisations, financing arrangements and where foreign government investor lenders take security interests, but do not have approval to retain ownership after any enforcement of such security interests.
- The statistics may include some transactions that do not actually proceed. They include:
 - proposals that are approved in a given year but which are not actually implemented in that year or at all;
 - approvals for multiple potential acquirers of the same target (including for potential consortium participants that are yet to determine their final maximum percentage interest); and
 - approvals for shares or units where only a portion of the intended shares or units may be acquired.
- Acquisitions of diversified company groups are classified into a single industry sector according to the major activity of the group, such as in a diversified mining company with interests in various minerals. Acquisitions of real estate to be used

for purposes incidental to the main business activity of the purchaser are classified according to that activity.³

Policy scope and changes

The breadth of the data reflects the requirements of the Policy at the time. The data does not cover foreign investments below the various monetary and percentage thresholds that apply under the Policy and the Act. Nor does the data cover follow-on investments to expand the capital stock of existing foreign-owned businesses (both in existing areas and into related areas). See the Board's website (www.firb.gov.au) for the current thresholds.

Furthermore, policy and legislative change can have a considerable impact on the continuity of data. For instance, changes in the Policy that have occurred since the mid-1980s have affected the number of some types of proposals, limiting comparability over time. These changes include:

- the increase in the general asset threshold in 1999 from \$5 million to \$50 million, and, again, in December 2006 from \$50 million to \$100 million;
- the increase in the offshore takeovers threshold in December 2006 from the general asset threshold (then at \$50 million) to \$200 million;
- the introduction of the higher \$800 million threshold (indexed on 1 January each year) for United States investors from 1 January 2005;
- the harmonisation in 2009 of the four lowest thresholds for private business investment to a single threshold of \$219 million (indexed on 1 January each year);
- the abolition in 2009 of the requirement for private investors to notify when establishing a new business valued above \$10 million;
- the introduction of indexation in 2012 for the general monetary threshold for commercial developed real estate that is not heritage listed;
- the extension of the higher monetary thresholds available to United States investors to New Zealand investors as of 1 March 2013;
- the revised definition of foreign government investor introduced in March 2013;
- the introduction of changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate;

3 Data has been compiled by reference to the *Australian and New Zealand Standard Industrial Classification* (ANZSIC 1993), except: newspaper printing and publishing are allocated to the services industry sector (ANZSIC 1993 classifies these under manufacturing); some manufacturing activities have been grouped together as the resource processing sector (see footnote 7); and tourism is recorded as a separate industry sector rather than being included with the other service industries.

- the reclassification in 2009 for screening purposes of accommodation facilities from residential real estate to commercial developed real estate;
- the removal of foreign ownership restrictions in the media sector in April 2007; and
- changes in immigration policies that control the number of temporary resident visa holders, which largely determines the level of foreign investment in established (second-hand) residential dwellings.

Administrative practices

Changes in administrative practice (for example, data collection and recording practices) and application requirements have also impacted on data comparability. Examples of this include the following:

- The implementation of a new case management system in December 2005 significantly improved data collection accuracy. The system allows a more detailed analysis of proposed foreign investment, as reflected in improvements to the statistics presented from the 2005-06 Annual Report onwards.
- Reporting procedures for proposals involving financing arrangements were amended in 2005-06. Although they continue to be included in the statistics (in the number of approvals), the proposed acquisition cost and development expenditure are not recorded for proposals such as lending arrangements where there is not expected to be an equity investment flow into Australia.⁴ This has affected the value attributed to proposed investment in the finance and insurance industry.
- Prior to 2005-06, proposals involving share acquisitions were recorded as conditionally approved on the basis that the proposed acquisition was to proceed within 12 months. Now, such proposals are no longer recorded as conditionally approved.⁵

Applications considered

This section analyses all investment proposals that were finalised (approved, rejected, withdrawn or exempt) during 2013-14, irrespective of the date they were submitted. Corporate reorganisations are included here (89 in 2013-14), whereas they are excluded from the analysis of approved investment provided later in this chapter.⁶ Corporate reorganisations occur across a range of sectors, including real estate.

⁴ This is similar to the existing practice for corporate reorganisations.

⁵ Applicants are required to reapply if the transaction has not taken place and they wish to proceed after the 12 month period has passed, unless they were granted approval for an extended period.

⁶ The proposed acquisition costs and development expenditure are not recorded for corporate reorganisations.

The number of applications considered during 2013-14 was 25,005. Table 2.1 provides a breakdown of the number of applications considered over the past six years, according to the outcome of proposals.

- Of the 24,102 applications **approved** in 2013-14, 12,307 were approved subject to conditions and 11,795 without conditions being imposed. All but three conditional approvals were in the real estate sector.
 - Real estate conditions ordinarily imposed at that time include those relating to the period during which development must commence, requiring temporary residents to reside in and then sell established dwellings when they cease to reside in them, and reporting requirements.
- Three proposals were **rejected** in 2013-14 (compared with no rejections in 2012-13), representing less than 0.1 per cent of all proposals considered. Of the three proposals rejected, two related to residential real estate, and the other related to the rejection in November 2013 of Archer Daniels Midland Company's proposed takeover of GrainCorp Limited.
- In 2013-14, 719 proposals were **withdrawn** by the applicants. Of these, around 39 per cent involved real estate proposals. Many of the real estate related withdrawals resulted from applicants submitting concurrent or a series of applications (often for properties that were to be auctioned and for which they intended to bid), and once one property had been purchased, subsequently withdrawing the remaining applications. In other cases, proposals were withdrawn because the investment was deferred or the applicant decided not to proceed for commercial reasons.
 - In some circumstances, business proposals may be withdrawn and resubmitted in order to extend the statutory deadline, particularly if there are concerns about the issuing of an Interim Order, the details of which would be published in the Commonwealth of Australia *Gazette*.
- During 2013-14, 181 proposals were determined to be **exempt** compared with 145 in 2012-13. Some applications received were determined to be outside the scope of the Policy or the scope of the Act, because they were exempt under the *Foreign Acquisitions and Takeovers Regulations 1989*. The existence of these particular applications reflects advice in the Policy that foreign investors submit proposals if they have any doubt as to whether the proposals are notifiable.

**Table 2.1: Applications considered: 2008-09 to 2013-14
(number of proposals)**

| Outcome | 2008-09 No. | 2009-10 No. | 2010-11 No. | 2011-12 No. | 2012-13 No. | 2013-14 No. |
|--------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Approved unconditionally | 2,266 | 2,672 | 4,606 | 4,900 | 5,535 | 12,307 |
| Approved with conditions | 3,086 | 1,729 | 5,687 | 5,803 | 7,196 | 11,795 |
| Total approved | 5,352 | 4,401 | 10,293 | 10,703 | 12,731 | 24,102 |
| Rejected | 3 | 3 | 43 | 13 | - | 3 |
| Total decided | 5,355 | 4,404 | 10,336 | 10,716 | 12,731 | 24,105 |
| Withdrawn | 341 | 167 | 390 | 534 | 446 | 719 |
| Exempt | 125 | 132 | 139 | 170 | 145 | 181 |
| Total considered | 5,821 | 4,703 | 10,865 | 11,420 | 13,322 | 25,005 |

Note: Figures include corporate reorganisations (89 in 2013-14).
The 2008-09 and 2009-10 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Applications decided

This section analyses all proposals that were approved (either with or without conditions), or rejected during 2013-14, irrespective of the date they were submitted. Corporate reorganisations are included.

The introduction of changes in 2009 and 2010 to the screening arrangements for temporary residents purchasing residential real estate has significantly impacted the comparability of the data across years in this section. Table 2.2 provides a breakdown of proposed investment according to the outcome of applications decided for the corresponding period provided in Table 2.1.

**Table 2.2: Applications decided: 2008-09 to 2013-14
(value of proposed investment)**

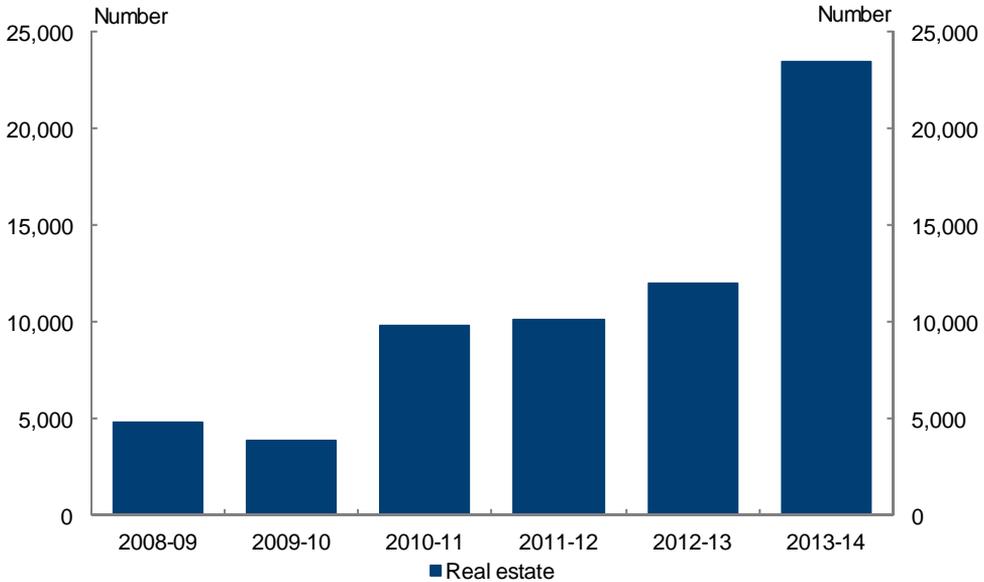
| Outcome | 2008-09 \$b | 2009-10 \$b | 2010-11 \$b | 2011-12 \$b | 2012-13 \$b | 2013-14 \$b |
|--------------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| Approved unconditionally | 135.9 | 125.3 | 145.7 | 137.5 | 108.7 | 125.3 |
| Approved with conditions | 45.5 | 14.2 | 31.0 | 33.2 | 27.0 | 42.1 |
| Total approved | 181.4 | 139.5 | 176.7 | 170.7 | 135.7 | 167.4 |
| Rejected | 0.0 | 0.0 | 8.8 | 0.2 | - | 2.2 |
| Total decided | 181.4 | 139.5 | 185.5 | 170.8 | 135.7 | 169.6 |

Note: Totals may not add due to rounding.
'0.0' indicates a figure of less than \$50 million.
Including corporate reorganisations (89 in 2013-14, including 22 in the real estate sector).
The 2008-09 and 2009-10 figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Charts 2.1 and 2.2 display the figures from Table 2.1 to show the difference over the past six years between applications decided within the real estate and non-real estate sectors (other sectors) by number of proposals and value of proposed investment.

Chart 2.1 shows that, by number, most of the applications decided were within the real estate sector. Chart 2.3 shows that, by value, more of the proposed investment occurred in non-real estate sectors.

Chart 2.1: Real estate applications decided: 2008-09 to 2013-14 (number of proposals)



Note: Real estate includes number of proposals decided for commercial and residential real estate.

Chart 2.2: Non real estate applications decided: 2008-09 to 2013-14 (number of proposals)

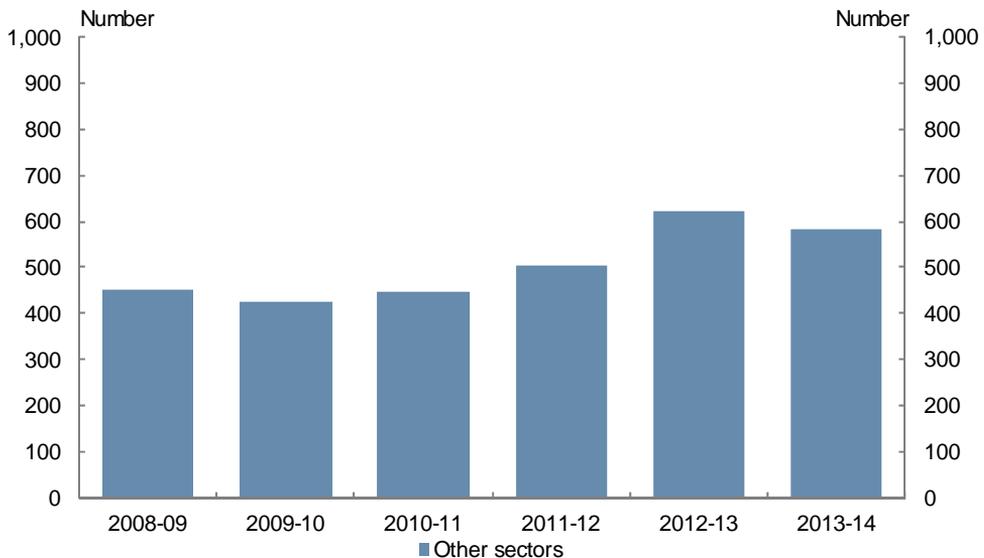
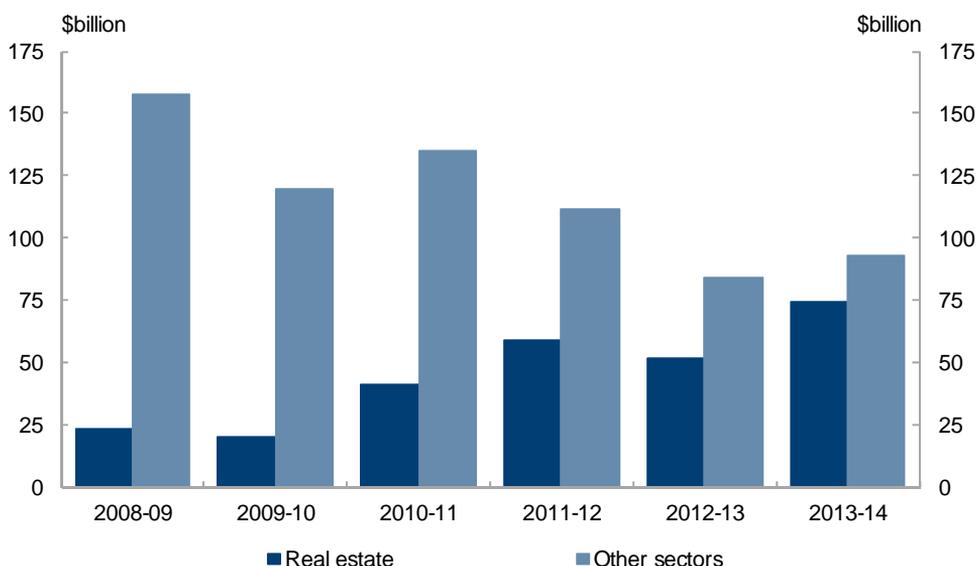


Chart 2.3: Applications decided: 2008-09 to 2013-14 (value of proposed investment)



Note: The 2008-09 and 2009-10 real estate figures were impacted by changes to the screening arrangements for residential real estate, as announced in December 2008 and April 2010.

Approvals by value

This section analyses applications approved during 2013-14 (excluding corporate reorganisations). Table 2.3 shows approvals over the past four years by the value of proposed investment.

The overwhelming majority of approvals in the categories below \$50 million relate to real estate (because of the screening thresholds). There has been a significant 94 per cent increase in real estate approvals in 2013-14.

Table 2.3: Total approvals by value and number: 2010-11 to 2013-14

| Value of proposal | 2010-11 | | 2011-12 | | 2012-13 | | 2013-14 | |
|-----------------------------------|---------------|--------------|---------------|--------------|---------------|--------------|---------------|---------------|
| | No. | \$b | No. | \$b | No. | \$b | No. | \$b |
| < \$1 million | 8,417 | 4.45 | 8,770 | 4.43 | 10,458 | 5.42 | 19,696 | 10.74 |
| ≥ \$1 million & < \$50 million | 1,400 | 7.2 | 1,421 | 8.3 | 1,793 | 9.4 | 3,884 | 13.35 |
| ≥ \$50 million & < \$100 million | 108 | 7.7 | 126 | 9.0 | 159 | 11.1 | 159 | 11.47 |
| ≥ \$100 million & < \$500 million | 218 | 49.7 | 229 | 51.8 | 188 | 40.9 | 200 | 43.55 |
| ≥ \$500 million & < \$1 billion | 36 | 23 | 44 | 28.3 | 31 | 22.2 | 38 | 24.45 |
| ≥ \$1 billion & < \$2 billion | 24 | 32.2 | 24 | 34.3 | 12 | 18.7 | 23 | 26.28 |
| ≥ \$2 billion | 16 | 52 | 8 | 35 | 6 | 28 | 13 | 37.55 |
| Total | 10,219 | 176.7 | 10,622 | 170.7 | 12,647 | 135.7 | 24,013 | 167.39 |

Note: Totals may not add due to rounding.
Excludes corporate reorganisations (89 in 2013-14).

Approvals by sector

Table 2.4 shows applications approved in 2013-14 by industry sector. Chart 2.3 shows the sectoral distribution of approved proposed investment in 2013-14. Corporate reorganisations are excluded (89 in 2013-14).

- The 2013-14 period was marked by a significant reduction in investments into the mining sector (down by \$23.1 billion), which were more than offset by increases in investments into the services sector (up by \$27.5 billion).
- There was an increase in the value of investment in 2013-14 when compared to 2012-13 in services; agriculture, forestry and fishing; manufacturing; tourism and real estate.
- Sectors where there was a decrease in the value of investment in 2013-14 when compared to 2012-13 were; mineral exploration and development; finance and insurance and resource processing.
- In 2013-14, real estate remained the largest industry sector by value of approvals.

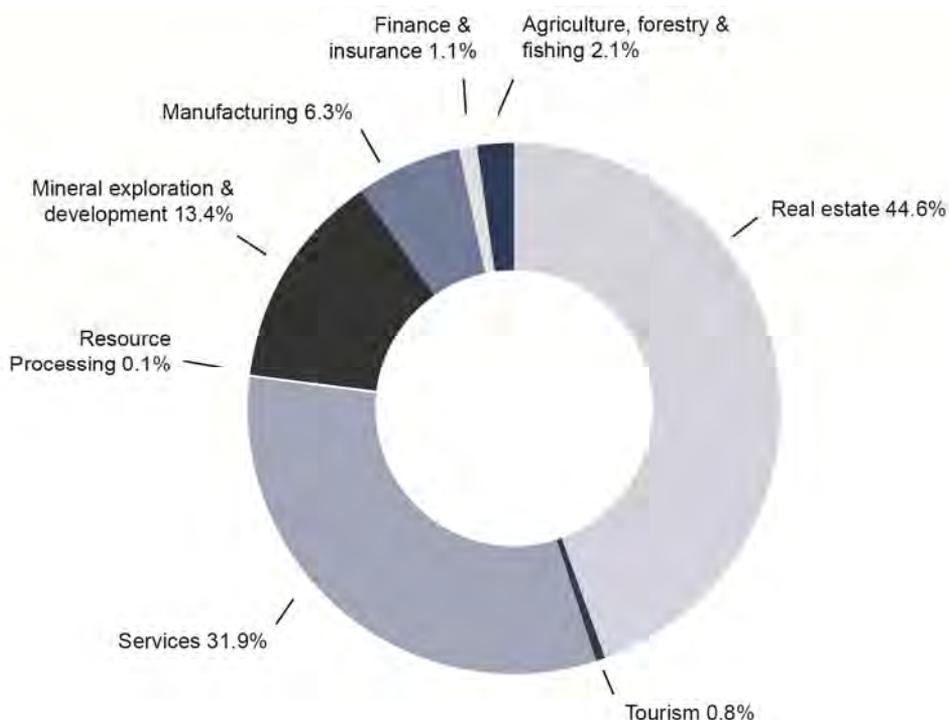
Table 2.4: Total approvals by industry sector in 2013-14

| Industry | Number of approvals | Proposed investment \$b |
|-----------------------------------|---------------------|-------------------------|
| Agriculture, forestry & fishing | 58 | 3.43 |
| Finance & insurance | 22 | 1.72 |
| Manufacturing | 56 | 10.47 |
| Mineral exploration & development | 248 | 22.41 |
| Resource processing | 3 | 0.07 |
| Services | 195 | 53.44 |
| Tourism | 3 | 1.27 |
| Real estate(a) | 23,428 | 74.59 |
| Total | 24,013 | 167.39 |

(a) Proposed investment includes off-the-plan approvals provided to real estate developers and approvals for annual programs. Further details are provided in the section on real estate starting on page 26.

Note: Totals may not add due to rounding.
Excludes corporate reorganisations (89 in 2013-14).

Chart 2.4: Total approvals by value by industry sector in 2013-14 (value of proposed investment)



Note: Totals may not add due to rounding.

Agriculture, forestry and fishing

Proposed investment in the agriculture, forestry and fishing sector increased by value from \$2.9 billion in 2012-13 to \$3.4 billion in 2013-14, and the number of proposals decreased from 91 to 58 proposals. This represents around two per cent of the total value of approved investment in 2013-14. The two largest source economies of investment by value in this sector were Canada and Hong Kong (\$0.6 billion), followed by the United States (\$0.58 billion). Over the last five years, the average level of foreign investment in the sector has been just under \$2.6 billion. Investment proposals in this sector are inherently irregular and can be skewed by large transactions with several competing bidders.

Finance and insurance

During 2013-14, 22 proposals were approved in the finance and insurance sector compared to the 36 proposals approved in this sector in 2012-13. Proposed investment decreased from \$2.9 billion to \$1.7 billion.

Manufacturing

The manufacturing sector saw an increase in both the number and in the value of proposals approved in 2013-14. There were 56 proposals (44 proposals in 2012-13) and proposed investment of \$10.5 billion (\$6.5 billion in 2012-13).

Table 2.5: Manufacturing sector approvals in 2013-14

| Industry | Number of approvals | Proposed investment \$b |
|-------------------------------------|---------------------|-------------------------|
| Chemical, petroleum & coal products | 3 | 3.00 |
| Electricity & gas | 21 | 4.21 |
| Food, beverages & tobacco | 12 | 2.27 |
| Other(a) | 20 | 0.99 |
| Total | 56 | 10.47 |

(a) Includes: basic metal products; fabricated metal products; miscellaneous-manufacturing; non-metallic mineral products; paper and paper products; transport equipment; and wood, wood products and furniture.

Note: Totals may not add due to rounding.

Mineral exploration and development

Proposed investment in the mineral exploration and development sector decreased from \$45.1 billion in 2012-13 to \$22 billion in 2013-14. The number of approved proposals decreased from 289 to 248 proposals.

Table 2.6: Mineral exploration and development sector approvals: 2009-10 to 2013-14

| Industry | 2010-11 | | 2011-12 | | 2012-13 | | 2013-14 | |
|--------------------|------------|--------------|------------|--------------|------------|--------------|------------|--------------|
| | No. | \$b | No. | \$b | No. | \$b | No. | \$b |
| Coal | 66 | 22.95 | 47 | 17.13 | 54 | 21.24 | 39 | 2.24 |
| Metallic minerals | | | | | | | | |
| - Bauxite | 1 | 0.01 | 2 | 0.65 | 1 | 0.45 | 1 | 0.22 |
| - Copper-gold | 42 | 13.74 | 61 | 9.25 | 68 | 5.08 | 48 | 3.39 |
| - Iron ore | 29 | 3.22 | 35 | 8.08 | 29 | 2.56 | 45 | 7.63 |
| - Nickel | 2 | 0.29 | 3 | 0.25 | 3 | 0.01 | 3 | 0.12 |
| - Uranium | 15 | 4.54 | 9 | 1.47 | 8 | 0.51 | 9 | 0.08 |
| - Zinc-lead-silver | 4 | 1.87 | 4 | 0.41 | 12 | 0.13 | 6 | 0.05 |
| - Other | 14 | 1.21 | 10 | 1.37 | 23 | 0.14 | 18 | 0.44 |
| Oil & gas | 37 | 4.56 | 45 | 11.21 | 67 | 11.08 | 55 | 6.34 |
| Other(a) | 12 | 2.51 | 25 | 1.83 | 24 | 3.95 | 24 | 1.51 |
| Total | 222 | 54.90 | 241 | 51.65 | 289 | 45.14 | 248 | 22.04 |

(a) Includes: services to mining and exploration; and other non-metallic minerals.

Note: Totals may not add due to rounding.

Resource processing

Proposed investment in the resource processing sector⁷ decreased from \$0.4 billion in 2012-13 to less than \$0.1 billion in 2013-14, and the number of approvals decreased, from seven to three.

⁷ The sector includes activities that, through processing, value add to natural resources. For example, cotton ginning, flour and sugar milling, smelting and refining of mineral resources, abattoirs and wood chipping.

Services

Proposed investment by number of approvals and value in the services sector increased from 2012-13. The number of approvals increased from 154 to 195 and proposed investment increased from \$26 billion to \$53 billion.

Table 2.7: Services (excluding Tourism) sector approvals: 2010-11 to 2013-14

| Industry | 2010-11 | | 2011-12 | | 2012-13 | | 2013-14 | |
|------------------------------|------------|--------------|------------|--------------|------------|--------------|------------|--------------|
| | No. | \$b | No. | \$b | No. | \$b | No. | \$b |
| Construction (a) | 12 | 18.94 | 5 | 0.31 | 19 | 0.74 | 13 | 2.83 |
| Communications | 26 | 3.51 | 31 | 6.63 | 38 | 6.98 | 36 | 3.72 |
| Health | 17 | 6.79 | 12 | 1.97 | 18 | 2.57 | 24 | 7.38 |
| Property & business services | 10 | 1.65 | 15 | 4.38 | 14 | 0.78 | 22 | 1.87 |
| Trade(b) | 6 | 2.29 | 6 | 1.45 | 15 | 4.72 | 33 | 4.15 |
| Transport(c) | 30 | 11.68 | 31 | 5.46 | 44 | 9.36 | 58 | 32.11 |
| Other(d) | 16 | 2.65 | 9 | 0.83 | 6 | 0.77 | 9 | 1.38 |
| Total | 117 | 47.50 | 109 | 21.02 | 154 | 25.91 | 195 | 53.44 |

(a) Includes: construction; and special trade construction.

(b) Includes: retail and wholesale trade.

(c) Includes: air transport; rail transport; road transport; water transport; other transport; and services to transport.

(d) Includes: storage (grain and cold storage); entertainment and recreation services; other community services; and education, museum and library services.

Note: Totals may not add due to rounding.

Tourism

Proposed investment in the tourism sector⁸ in 2013-14 was \$1.27 billion, up from \$0.02 billion in 2012-13. The number of approved proposals increased from one to three.

Real estate

Proposals in real estate in 2013-14

Approved investment in real estate was \$74.6 billion in 2013-14 (compared with \$51.9 billion in 2012-13).

⁸ As of 2009, hotels, motels, hostels and guesthouses have been treated as developed commercial property. For reporting, acquisitions of:

- direct interests in such accommodation facilities are included in acquisitions of existing commercial property at Table 2.9; and
- indirect interests in such accommodation facilities, through for example the acquisition of a substantial interest in an Australian hotel business, are classified as tourism sector.

Residential real estate

Developed

The category of developed residential real estate consists primarily of temporary residents in Australia acquiring one existing residential property for use as their residence in Australia.⁹

For development

Acquisitions of **residential real estate for development** include a number of categories.

The *vacant land* category consists primarily of individual blocks of land purchased for single dwelling construction. These are normally approved subject to conditions (such as, that construction begins within 24 months). It also includes broadacre land for residential subdivision and multiple-dwelling residential developments (such as townhouses and units).

The *new dwellings* and *off-the-plan* category consists of applications by individuals to acquire newly constructed dwellings directly from developers and applications by developers to sell up to 100 per cent of new residences in a development to foreign interests (the developer is also required to market the dwellings locally). Applications from individuals are normally approved without conditions. If a developer is given approval, individuals need not apply for approval. Foreign persons may purchase new residences in such developments over a number of years.

The approved investment figures for off-the-plan approvals for developers and annual programs overstate the likely extent of actual foreign purchases. The value of investment reported against annual program approvals represents the maximum amount foreign persons may acquire under the program.

Developed property for *redevelopment* involves the acquisition of existing property for the purpose of demolition and construction of new residential dwellings. These are normally approved as long as the redevelopment increases Australia's housing stock (at least two dwellings built for the one demolished) or where it can be shown that the existing dwelling is derelict or uninhabitable. Approvals are usually subject to conditions (such as, that construction begins within 24 months).

⁹ Also includes a small number of approvals relating to foreign persons that operate a substantial Australian business acquiring existing residential property to house their Australian based staff.

Table 2.8: Investment in residential real estate by type of approval and number of proposals approved: 2010-11 to 2013-14

| | 2010-11 | | 2011-12 | | 2012-13 | | 2013-14 | |
|------------------------------------|--------------|--------------|--------------|--------------|---------------|--------------|---------------|--------------|
| | No. | \$b | No. | \$b | No. | \$b | No. | \$b |
| Residential | | | | | | | | |
| Developed | | | | | | | | |
| - existing residential property | 3,881 | 3.57 | 3,952 | 2.87 | 5,091 | 5.42 | 7,915 | 7.17 |
| - annual programs | 4 | 0.20 | 5 | 1.30 | 10 | 0.94 | 5 | 0.35 |
| <i>Sub-total 'Developed'</i> | <i>3,885</i> | <i>3.77</i> | <i>3,957</i> | <i>4.18</i> | <i>5,101</i> | <i>6.36</i> | <i>7,920</i> | <i>7.51</i> |
| For development | | | | | | | | |
| - vacant land | 1,514 | 2.33 | 1,518 | 0.68 | 1,821 | 1.39 | 3,150 | 1.74 |
| - new dwellings | | | | | | | | |
| - individual purchases | 3,911 | 2.46 | 4,022 | 2.54 | 4,499 | 2.91 | 11,338 | 7.72 |
| - developer 'off-the-plan' | 65 | 10.08 | 70 | 10.92 | 50 | 5.73 | 103 | 16.38 |
| <i>Sub-total 'new dwellings'</i> | <i>3,976</i> | <i>12.54</i> | <i>4,092</i> | <i>13.46</i> | <i>4,549</i> | <i>8.64</i> | <i>14,591</i> | <i>25.85</i> |
| - redevelopment | 171 | 0.45 | 191 | 0.50 | 189 | 0.36 | 534 | 0.79 |
| - annual programs | 10 | 1.83 | 10 | 0.89 | 8 | 0.41 | 9 | 0.57 |
| <i>Sub-total 'For development'</i> | <i>5,671</i> | <i>17.15</i> | <i>5,811</i> | <i>15.52</i> | <i>6,567</i> | <i>10.80</i> | <i>15,134</i> | <i>27.20</i> |
| Total residential | 9,556 | 20.92 | 9,768 | 19.70 | 11,668 | 17.16 | 23,054 | 34.72 |

Note: Totals may not add due to rounding.

Commercial real estate

Developed

Foreign persons acquiring an interest in **developed commercial** real estate (for example, shopping centres, office buildings, warehouses, hotels and motels) that is valued at more than the applicable monetary threshold are required to notify and get prior approval before purchasing.¹⁰

For development

Foreign persons need to apply to buy or take an interest in **commercial land for development**, regardless of the value of the land. Such proposed investment is normally approved subject to conditions (such as, that construction begins within five years).

Annual programs

The '**annual program**' arrangements allow foreign persons to apply for an annual approval for real estate acquisitions up to a specified global monetary limit. Such an approval relieves them of the requirement to seek separate approvals for individual

¹⁰ As of 2009, hotels, motels, hostels and guesthouses have been treated as developed commercial property. For reporting, acquisitions of:

- direct interests in such accommodation facilities are included in acquisitions of existing commercial property at Table 2.9; and
- indirect interests in such accommodation facilities, through for example the acquisition of a substantial interest in an Australian hotel business, are classified as tourism sector at page 26.

real estate acquisitions within the approved value and the approval year. Approvals are subject to the condition that applicants subsequently report on the actual acquisitions completed and any associated development. Applicants are also required to comply with the standard requirements that would apply under the Policy for the type of property that is to be purchased. For example, for vacant land acquisitions construction must begin within the required timeframe.

Table 2.9: Investment in commercial real estate by type of approval and number of proposals approved: 2010-11 to 2013-14

| | 2010-11 | | 2011-12 | | 2012-13 | | 2013-14 | |
|------------------------------------|------------|--------------|------------|--------------|------------|--------------|------------|--------------|
| | No. | \$b | No. | \$b | No. | \$b | No. | \$b |
| Commercial | | | | | | | | |
| Developed | | | | | | | | |
| - existing commercial property | 114 | 9.65 | 241 | 22.44 | 248 | 19.24 | 237 | 31.65 |
| - annual programs | 8 | 3.50 | 18 | 10.75 | 14 | 7.31 | 10 | 3.48 |
| <i>Sub-total 'Developed'</i> | <i>122</i> | <i>13.15</i> | <i>259</i> | <i>33.19</i> | <i>262</i> | <i>26.55</i> | <i>247</i> | <i>35.13</i> |
| For development | | | | | | | | |
| - vacant commercial property | 79 | 2.09 | 80 | 4.96 | 85 | 7.04 | 119 | 2.86 |
| - annual programs | 14 | 5.35 | 11 | 1.27 | 10 | 1.16 | 8 | 1.89 |
| <i>Sub-total 'For development'</i> | <i>93</i> | <i>7.44</i> | <i>91</i> | <i>6.23</i> | <i>95</i> | <i>8.20</i> | <i>127</i> | <i>4.75</i> |
| Total commercial | 215 | 20.59 | 350 | 39.42 | 357 | 34.75 | 374 | 39.88 |

Note: Totals may not add due to rounding.

Real estate by location of investment

Table 2.10 provides details of proposed investment in the real estate sector, according to the state and territory location of the proposed investment.

Table 2.10: State and Territory distribution of proposed investment in real estate in 2013-14

| Location | Number of approvals | Residential | | Commercial | | Total |
|--------------|---------------------|-------------|-----------------|--------------|-----------------|--------------|
| | | Developed | For development | Developed | For development | |
| | | \$b | \$b | \$b | \$b | |
| Various(a) | 90 | 0.26 | 0.54 | 17.45 | 1.93 | 20.18 |
| ACT | 165 | 0.03 | 0.28 | 0.30 | 0.02 | 0.63 |
| NSW | 7,814 | 2.83 | 10.39 | 8.74 | 0.72 | 22.67 |
| NT | 46 | 0.02 | 0.55 | 0.00 | 0.00 | 0.57 |
| Qld | 2,940 | 0.72 | 2.81 | 0.73 | 0.49 | 4.76 |
| SA | 693 | 0.31 | 0.10 | 0.05 | 0.04 | 0.51 |
| Tas | 66 | 0.02 | 0.01 | 0.01 | 0.00 | 0.03 |
| Vic | 10,042 | 3.59 | 10.41 | 6.14 | 1.25 | 21.40 |
| WA | 1,572 | 0.53 | 1.32 | 1.70 | 0.29 | 3.85 |
| Total | 23,428 | 8.30 | 26.41 | 35.13 | 4.75 | 74.59 |

(a) Includes approved proposals where the proposed investment is to be undertaken in more than one state or territory.

Note: Totals may not add due to rounding.

'-' indicates a figure of zero.

Table 2.11 provides details of proposed investment in the residential real estate sector, according to the state and territory location of the proposed investment.

Table 2.11: State and Territory distribution of proposed investment in residential real estate by industry subtype in 2013-14

| Location | New Dwelling | | Existing Property | | Redevelopment | | Vacant land | | Developer [^] | |
|--------------|---------------|-------------|-------------------|-------------|---------------|-------------|--------------|-------------|------------------------|--------------|
| | approvals | \$b | approvals | \$b | approvals | \$b | approvals | \$b | approvals | \$b |
| Various(a) | 0 | - | 0 | - | 0 | - | * | - | 0 | - |
| ACT | 84 | 0.04 | 44 | 0.03 | 0 | - | 29 | 0.02 | * | 0.23 |
| NSW | 4,676 | 3.77 | 2,353 | 2.52 | 135 | 0.27 | 496 | 0.29 | 30 | 6.33 |
| NT | * | 0.01 | 27 | 0.02 | 0 | - | * | - | * | 0.54 |
| QLD | 1,344 | 0.71 | 921 | 0.61 | 39 | 0.06 | 566 | 0.39 | 16 | 1.68 |
| SA | 155 | 0.07 | 391 | 0.29 | 28 | 0.01 | 108 | 0.03 | 0 | - |
| TAS | * | - | 44 | 0.02 | 0 | - | 15 | - | 0 | - |
| VIC | 4,613 | 2.85 | 3,483 | 3.20 | 302 | 0.38 | 1,536 | 0.79 | 45 | 6.78 |
| WA | 451 | 0.27 | 652 | 0.47 | 30 | 0.06 | 394 | 0.21 | * | 0.84 |
| Total | 11,338 | 7.72 | 7,915 | 7.17 | 534 | 0.79 | 3,150 | 1.74 | 103 | 16.38 |

(a) Includes approved proposals where the proposed investment is to be undertaken in more than one state or territory.

Note: Totals may not add due to rounding.

Excludes annual programs and corporate reorganisations.

[^] Developer includes off-the-plan approvals provided to real estate developers. Further details are provided in the section on real estate starting on page 26.

^{*} indicates a figure of zero or a figure less than \$10 million.

^{**} indicates between 1 and 9 approvals.

Approvals by country of investor

Proposed investment in 2013-14 by selected country, disaggregated by sector, is shown in Table 2.12. For the first time, China was the largest source of proposed foreign investment in Australia, mainly driven by a large increase in residential real estate approvals. The other major sources of proposed investment were the United States, Canada, Malaysia, and Singapore. Malaysia and Singapore replaced Switzerland and the United Kingdom in the top five sources of investment.

Table 2.12: Approvals by country of investor by industry sector in 2013-14

| Country(a) | Number of approvals (f) | Agriculture | | Finance | | Mineral | | Real estate | Resource processing | Services | Tourism | Total |
|----------------------|-------------------------|--------------------|--------------|---------------|---------------------------|---------------|------------|---------------|---------------------|----------------|---------|-------|
| | | forestry & fishing | insurance | Manufacturing | exploration & development | estate | processing | | | | | |
| | | \$m | \$m | \$m | \$m | \$m | \$m | \$m | \$m | \$m | \$m | \$m |
| China (b) | 14,716 | 32 | 51 | 3,298 | 5,656 | 12,406 | 43 | 6,163 | - | 27,650 | | |
| USA | 350 | 584 | 1,255 | 825 | 1,716 | 6,135 | - | 6,942 | - | 17,457 | | |
| Canada | 225 | 602 | - | 453 | 2,200 | 2,945 | - | 9,236 | - | 15,442 | | |
| Malaysia | 1,542 | - | - | - | 68 | 2,038 | - | 5,116 | - | 7,232 | | |
| Singapore | 975 | 197 | 80 | 40 | 292 | 4,303 | - | 2,144 | - | 7,062 | | |
| Netherlands | 66 | - | - | 55 | 1,038 | 1,720 | 11 | 3,071 | - | 5,895 | | |
| Japan | 148 | - | - | 601 | 3,299 | 426 | - | 1,324 | - | 5,651 | | |
| Hong Kong | 619 | 600 | - | 26 | 190 | 1,279 | - | 3,370 | - | 5,466 | | |
| Switzerland | 49 | - | 74 | 2,864 | 528 | 697 | - | 785 | - | 4,947 | | |
| Spain | 24 | - | - | - | 30 | 286 | - | 4,002 | - | 4,318 | | |
| South Africa | 206 | - | - | - | 828 | 986 | - | 2,213 | - | 4,027 | | |
| UK | 1,443 | - | 111 | 90 | 177 | 1,795 | - | 616 | - | 2,792 | | |
| Kuwait | 11 | - | - | - | 1,754 | 318 | - | 556 | - | 2,628 | | |
| United Arab Emirates | 33 | 150 | - | 32 | 643 | 30 | - | 963 | 745 | 2,563 | | |
| Germany | 135 | - | - | 164 | - | 1,169 | - | 748 | - | 2,084 | | |
| Sth Korea | 206 | 65 | 50 | 323 | 200 | 1,083 | - | 254 | - | 1,975 | | |
| Thailand | 59 | 350 | - | 865 | 43 | 496 | - | 15 | - | 1,768 | | |
| NZ | 49 | - | - | - | 47 | 1,362 | - | 230 | - | 1,640 | | |
| Other (c) | 3,333 | 440 | 90 | 544 | 2,552 | 4,203 | 11 | 1,623 | 20 | 9,483 | | |
| Developer AOTP (d) | 103 | - | - | - | - | 16,380 | - | - | - | 16,380 | | |
| Sub-total | 24,292 | 3,027 | 1,721 | 10,182 | 21,262 | 60,057 | 66 | 49,373 | 775 | 146,461 | | |
| Australia (e) | 528 | 405 | - | 292 | 1,144 | 14,533 | - | 4,064 | 490 | 20,928 | | |
| Total | 24,820 | 3,433 | 1,721 | 10,474 | 22,406 | 74,590 | 66 | 53,437 | 1,265 | 167,390 | | |

Note: Totals may not add due to rounding.

'-' indicates a figure of \$10 million or less.

Notes applying to Table 2.12

- (a) Includes overseas territories.
- (b) China excludes Special Administrative Regions and Taiwan.
- (c) Other comprises all other countries not in the largest 18 countries based on total proposed investment approved, as well as proposed investment approved which cannot be attributed to a country.
- (d) One advanced off the plan certificate equates to one approval in terms of the number of approvals but the entire value of the proposed development is included in the value columns. Further details are provided in the section on real estate starting on page 26.
- (e) Comprises proposals where an Australian controlled investment manager acting on behalf of an investor operates independently of the interest holders in the investor, or an Australian investor(s) jointly intends to make a proposed investment with a foreign investor, or jointly establish a new business with a foreign government investor.
- (f) These figures indicate the total number of proposals in which investors from the particular country have an interest. Those involving investment originating from more than one country count as one proposal for each of the countries concerned.



AUSTRALIA'S
FOREIGN
INVESTMENT
POLICY

—
APPENDIX A

Australia's Foreign Investment Policy[#]

Our approach

The Government welcomes foreign investment. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity.

Foreign investment brings many benefits. It supports existing jobs and creates new jobs, it encourages innovation, it introduces new technologies and skills, it brings access to overseas markets and it promotes competition amongst our industries.

The Government reviews foreign investment proposals against the national interest case by case. We prefer this flexible approach to hard and fast rules. Rigid laws that prohibit a class of investments too often also stop valuable investments. The case by case approach maximises investment flows, while protecting Australia's interests. Our Foreign Investment Review Board (FIRB) will work with an applicant to ensure the national interest is protected. But, if we ultimately determine that a proposal is contrary to the national interest, we will not approve it.

The Government also recognises community concerns about foreign ownership of certain Australian assets. The review system allows the Government to consider these concerns when assessing Australia's national interest.

The national interest test also recognises the importance of Australia's market-based system, where companies are responsive to shareholders and where investment and sales decisions are driven by market forces rather than external strategic or non-commercial considerations.

[^] This version of Australia's Foreign Investment Policy was first released in June 2010.

[#] The Policy is also available in Bahasa, Japanese and Mandarin. In the event of any inconsistency between the English version and a foreign language version, the English version prevails.

Foreign Investment Review Framework

The foreign investment policy and the legislation

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides the legislative framework for our screening regime. The Act allows the Treasurer or his delegate to review investment proposals to decide if they are contrary to Australia's national interest.

The Treasurer can block proposals that are contrary to the national interest or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest. When making such decisions, the Treasurer relies on advice from FIRB.

Australia's Foreign Investment Policy (the Policy) provides guidance to foreign investors to assist understanding of the Government's approach to administering the Act. The Policy also identifies investment categories that need to be notified to the Government for prior approval, even if the Act does not appear to apply.

Who needs to apply?

1. Foreign Government Investors

All foreign government investors¹ must notify the Government and get prior approval before making a direct investment in Australia, regardless of the value of the investment.

Foreign government investors also must notify the Government and get prior approval to start a new business or to acquire an interest in land, including any interest in a prospecting, exploration, mining or production tenement (except when buying land for diplomatic or consular requirements). This is consistent with the Government's longstanding practice.

1 Definitions are provided in Annex 1.

Foreign government investors should also notify for review, if they have any doubt as to whether an investment is notifiable.²

Further guidance for foreign government investors is provided under Further Information for Business Acquisitions and, in particular, the section titled Foreign Government Investors.

2. Privately-owned foreign investors — business acquisitions

Foreign persons should notify the Government and get prior approval before acquiring a substantial interest in a corporation or control of an Australian business that is valued above \$248 million.³ They also need to notify for prior approval if they wish to acquire a substantial interest in an offshore company whose Australian subsidiaries or gross assets are valued above \$248 million.⁴

The exception is for New Zealand investors and United States investors,⁵ where the \$248 million threshold applies only for investments in prescribed sensitive sectors. A \$1,078 million⁶ threshold applies to New Zealand and United States investment in other sectors.

To calculate the value of a business or corporation, for share acquisitions you need to consider the value of the total issued shares of the corporation or its total gross assets, whichever is higher.⁷

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

2 Foreign government investors that are regulated by the Australian Prudential Regulation Authority as Authorised Deposit taking Institutions do not need to notify the Government when they take security over an asset(s) as part of a lending agreement. Notification and prior approval is not required if the security is enforced and the asset(s) is sold. However, the investor must notify the Government and get approval if the security is enforced, and the investor gains control over the asset(s) and retains it for more than 12 months.

A lending agreement is an agreement entered into in good faith in the ordinary course of carrying on a business of lending money. It does not include an agreement dealing with any matter unrelated to the carrying on of a lending business, such as one that allows a degree of influence or control over the borrower, their business activities or assets (other than the usual terms for such a security). Such an agreement may include separate contracts.

3 The threshold is indexed annually on 1 January.

4 The threshold is indexed annually on 1 January.

5 The *Foreign Acquisitions and Takeovers Act 1975* does not apply to investments by New Zealand investors and United States investors in financial sector companies. Financial sector companies have the same meaning as in the *Financial Sector (Shareholdings) Act 1998*.

6 The threshold is indexed annually on 1 January.

7 For arrangements and other non-real estate acquisitions, see section 13B of the *Foreign Acquisitions and Takeovers Act 1975*.

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

- foreign ownership in the banking sector must be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* and banking policy;
- aggregate foreign ownership in an Australian international airline (including Qantas)⁸ is limited to 49 per cent;
- the *Airports Act 1996* limits foreign ownership of some airports to 49 per cent, with a 5 per cent airline ownership limit; and cross ownership limits⁹ between Sydney airport (together with Sydney West) and either Melbourne, Brisbane, or Perth airports;
- the *Shipping Registration Act 1981* requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
- aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5 per cent.

Foreign persons should also notify for review, if they have any doubt as to whether an investment is notifiable.

Further guidance is provided under Further Information for Business Acquisitions.

3. Privately-owned foreign investors — real estate

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

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

Foreign persons also need to notify for prior approval if they want to take an interest in developed commercial real estate that is valued at \$54 million¹⁰ or more — unless

8 Individual holdings in Qantas are also limited to 25 per cent and aggregate ownership by foreign airlines is limited to 35 per cent.

9 The cross ownership provisions in the *Airports Act 1996* apply when a foreign person has more than a 15 per cent stake in the Sydney airport (together with Sydney West) airport operator company and one of the Perth, Brisbane, or Melbourne airport operator companies. Also for stakes of 15 per cent or less, the Minister may declare practical control.

10 The threshold is indexed annually on 1 January.

the real estate is heritage listed, then a \$5 million threshold applies. An exception for developed commercial real estate applies to New Zealand investors and United States investors, where a \$1,078 million¹¹ threshold applies instead.

Foreign persons should also notify for review if they have any doubt as to whether an investment is notifiable.

The specific real estate rules are explained in further detail under 'Further Information About Buying Real Estate'.

When should you apply?

You should lodge an application in advance of any transaction, or you should make your purchase contract conditional on foreign investment approval. A transaction should not proceed until the Government advises you of the outcome of its review.

The Government encourages potential investors to engage with FIRB prior to lodging applications on significant proposals to allow timely consideration of the proposal. The Government will treat proposals in-confidence (as outlined further in the section titled Confidentiality/Privacy).

Applications will be accepted as proposals under the Act when they contain sufficient detail. This includes information about the parties, the proposed investment (including its nature, methods of acquisition, the value of the investment, timetables and whether the investment is public), a statement of the investor's intentions (immediate and ongoing) and how the proposed investment may impact on the national interest.¹²

Applications should also include applicable statutory notices (although please note that there is no statutory form for applications made under the Policy only). Applications to acquire interests that will not be substantially completed within 12 months will generally not be accepted.

Please refer to FIRB's website www.firb.gov.au for further information and forms.

No fees or charges apply to applications.

What is the Government looking for?

The Government is making sure investments are not contrary to the national interest. If an investment is contrary to the national interest, the Government will intervene. This occurs infrequently.

11 The threshold is indexed annually on 1 January.

12 See National Interest Considerations under Further Information for Business Acquisitions.

What is contrary to the national interest cannot be answered with hard and fast rules. Attempting to do so can prohibit beneficial investments and that is not the intention of our regime. Australia's case by case approach maximises investment flows while protecting Australia's national interest.

To assist applicants, we provide more guidance on what we are looking for under Further Information for Business Acquisitions.

How long before a decision is made?

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

You will be informed of the Treasurer's decision within 10 days of it being made. That decision will either raise no objections, allowing the proposal to go ahead; impose conditions, which will need to be met; or block the proposal. If the Treasurer has no objections, you will receive an email or letter to this effect from the FIRB Secretariat on the Treasurer's behalf.

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

Confidentiality/privacy

The Government may share your application with government departments and agencies for consultation purposes, including Australian State and Territories. However, the Government respects any 'commercial-in-confidence' information it receives and ensures that appropriate security is provided.

The Government will not provide your application to third parties outside of the Government unless it has your permission or it is ordered to do so by a court of competent jurisdiction. The Government will defend this policy through the judicial system if needed.

The Government also respects the privacy of personal information provided by applicants, as per the requirements of the *Privacy Act 1988* and the *Freedom of Information Act 1982*.

Further enquiries

Further information on the Policy may be found at FIRB's website www.firb.gov.au. Should you have any further enquiries please contact FIRB on:

General enquiries:

Phone: 02 6263 3795

Fax: 02 6263 2940

Email: firbenquiries@treasury.gov.au

From overseas:

+61 2 6263 3795

+61 2 6263 2940

firbenquiries@treasury.gov.au

Compliance hotline:

Phone: 1800 050 377

Email: FIRBCompliance@treasury.gov.au

From overseas:

+61 2 6263 3795

FIRBCompliance@treasury.gov.au

Further information for business acquisitions

National interest considerations

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

The Government determines national interest concerns case by case. We look at a range of factors and the relative importance of these can vary depending upon the nature of the target enterprise. Investments in enterprises that are large employers or that have significant market share may raise more sensitivities than investments in smaller enterprises. However, investments in small enterprises with unique assets or in sensitive industries may also raise concerns.

The impact of the investment is also a consideration. An investment that enhances economic activity – such as by developing additional productive capacity or new technology – is less likely to be contrary to the national interest.

The Government typically considers the following factors when assessing foreign investment proposals in any sector. Further guidance on how these apply to agriculture related proposals is provided in Annex 2.

National Security

The Government considers the extent to which investments affect Australia's ability to protect its strategic and security interests. The Government relies on advice from the relevant national security agencies for assessments as to whether an investment raises national security issues.

Competition

The Government favours diversity of ownership within Australian industries and sectors to promote healthy competition. The Government considers whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia. For example, the Government will carefully consider a proposal that involves a customer of a product gaining control over an existing Australian producer of the product, particularly if it involves a significant producer.

The Government may also consider the impact that a proposed investment has on the makeup of the relevant global industry, particularly where concentration could lead to distortions to competitive market outcomes. A particular concern is the extent to which an investment may allow an investor to control the global supply of a product or service.

The Australian Competition and Consumer Commission also examines competition issues in accordance with Australia's competition policy regime. Any such examination is independent of Australia's foreign investment regime.

Other Australian Government Policies (Including Tax)

The Government considers the impact of a foreign investment proposal on Australian tax revenues. Investments must also be consistent with the Government's objectives in relation to matters such as environmental impact.

Impact on the Economy and the Community

The Government considers the impact of the investment on the general economy. The Government will consider the impact of any plans to restructure an Australian enterprise following an acquisition. It also considers the nature of the funding of the acquisition and what level of Australian participation in the enterprise will remain after the foreign investment occurs, as well as the interests of employees, creditors and other stakeholders.

The Government considers the extent to which the investor will develop the project and ensure a fair return for the Australian people. The investment should also be consistent with the Government's aim of ensuring that Australia remains a reliable supplier to all customers in the future.

Character of the Investor

The Government considers the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision. The Government also considers the corporate governance practices of foreign investors. In the case of investors who are fund managers, including sovereign wealth funds, the Government considers the fund's investment policy and how it proposes to exercise voting power in relation to Australian enterprises in which the fund proposes to take an interest.

Proposals by foreign owned or controlled investors that operate on a transparent and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Foreign Government Investors

Where a proposal involves a foreign government investor, the Australian Government also considers if the 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. This includes assessing whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government (including through the investor's funding arrangements). Proposals from foreign government investors operating on a fully arm's length and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Where the potential investor is not wholly foreign government owned, the Government considers the size, nature and composition of any non-government interests, including any restrictions on the exercise of their rights as interest holders.

The Government looks carefully at proposals from foreign government investors that are not operating on a fully arm's length and commercial basis. The Government does not have a policy of prohibiting such investments but it looks at the overall proposal carefully to determine whether such investments may be contrary to the national interest.

Mitigating factors that assist in determining that such proposals are not contrary to the national interest may include: the existence of external partners or shareholders in the investment; the level of non-associated ownership interests; the governance arrangements for the investment; ongoing arrangements to protect Australian interests from non-commercial dealings; and whether the target will be, or remain, listed on the Australian Securities Exchange or another recognised exchange. The Government will also consider the size, importance and potential impact of such investments in considering whether or not the proposal is contrary to the national interest.

Further information about buying real estate

General

The Government has decided that some types of investment in real estate are contrary to the national interest. This section outlines these prohibitions as well as the types of real estate that foreign investors may buy and whether they need Government approval to do so.

If you are intending to buy real estate in Australia, you should make your purchase contracts conditional on foreign investment approval, unless you already have approval or you are exempt from the *Foreign Acquisitions and Takeovers Act 1975*. Significant penalties may apply to ineligible owners of real estate.

Rules for buying residential real estate

It is the Government's policy that foreign investment in residential real estate should increase Australia's housing stock. All applications are considered in light of this overarching principle.

Residential real estate means all land and housing that is not commercial property or rural land. In that regard, 'hobby farms' and 'rural residential' blocks are residential real estate.

Temporary residents

Established (second-hand) dwellings

Temporary residents need to apply if they wish to buy an established dwelling. Only one established dwelling may be purchased by a temporary resident and it must be used as their residence in Australia. Such proposals are normally approved subject to

conditions (such as, that the temporary resident sells the property when it ceases to be their residence).

Temporary residents cannot buy established dwellings as investment properties, but can buy established dwellings for redevelopment (see below).

New dwellings

Temporary residents need to apply to buy new dwellings in Australia. Such proposals are normally approved without conditions.

Vacant land

Temporary residents need to apply to buy vacant land for residential development. These are normally approved subject to conditions (such as, that construction begins within 24 months).

All other foreign persons

Established (second-hand) dwellings

Non-resident foreign persons cannot buy established dwellings as investment properties or as homes, except as below.

Foreign persons that operate a substantial Australian business need to apply to buy established dwellings to house their Australian based staff. Such proposals are normally approved subject to conditions (such as, that the foreign person sells the property if it is expected to remain vacant for six months or more).

Non-resident foreign persons need to apply to buy established dwellings for redevelopment (that is, to demolish the existing dwelling and build new dwellings). Proposals for redevelopment are normally approved as long as the redevelopment increases Australia's housing stock (at least two dwellings built for the one demolished) or where it can be shown that the existing dwelling is derelict or uninhabitable. Approvals are usually subject to conditions.

New dwellings

Non-resident foreign persons need to apply to buy new dwellings in Australia. Such proposals are normally approved without conditions.

Vacant land

Non-resident foreign persons need to apply to buy vacant land for residential development. These are normally approved subject to conditions (such as, that construction begins within 24 months).

Who is Exempt?

You **do not** need Government approval to buy residential real estate if you are:

- an Australian citizen (living at home or overseas) or you are ordinarily resident in Australia;
- a New Zealand citizen;
- a foreign national who holds an Australian permanent resident visa; or
- a foreign national buying a property as joint tenants with their Australian citizen spouse.

Regardless of your citizenship or residency, you **do not** need Government approval for:

- new dwellings bought from a developer that has pre-approval to sell them to foreign persons;
- an interest in a time share scheme that allows you (and any associates)¹³ to use it for up to four weeks per year;
- certain residential real estate in Integrated Tourism Resorts – see below;
- an interest acquired by will or devolution by operation of law; or
- an interest acquired from a Government in Australia (Commonwealth, State or Territory, or local) or a statutory corporation formed for a public purpose.

Other exemptions may apply¹⁴ if you are:

- a company, trust or managed investment scheme (primarily) for the benefit of individuals ordinarily resident in Australia;
- an Australian corporation that is owned by individuals who are exempt¹⁵ or an Australian trust for the benefit of such individuals;
- a corporation that is providing custodian services; or
- buying shares in certain Australian urban land corporations that are publicly listed on an Australian Stock Exchange, or units in certain Australian urban land trusts.

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

14 See regulation 3 of the *Foreign Acquisitions and Takeovers Regulations 1989*.

15 You are an exempt individual if you are an Australian citizen (living at home or abroad), a New Zealand citizen, or a foreign national who holds an Australian permanent resident visa.

Residential real estate in Integrated Tourism Resorts

You **do not** need the Government's approval to buy residential property that is within the bounds of a resort designated as an Integrated Tourism Resort prior to September 1999.

For resorts designated from September 1999, the exemption only applies to developed residential property that is subject to a lease of 10 years or more to the resort operator and that is available as tourist accommodation when it is not occupied by the owner. The normal foreign investment rules apply to all other property within the resort, including vacant land for development. Conditions must be met to qualify for designation.

Rules for buying commercial real estate

Commercial real estate includes vacant and developed property that is not for residential purposes, such as offices, factories, warehouses, hotels and shops. It may also include land that does not meet the definition of rural land, such as mining operations.

All Foreign Persons

Vacant Land

Foreign persons need to apply to buy or take an interest in land for commercial development (including to start a forestry business), regardless of the value of the land. However, if the land is currently being used as rural land, then other rules apply (see Rural Land). Such proposals are normally approved subject to development conditions.

Developed Commercial Property

Foreign persons need to apply to buy or take an interest in developed commercial real estate valued at \$54 million or more – unless the real estate is heritage listed, then a \$5 million threshold applies. New Zealand investors and United States investors only need to apply for developed commercial real estate valued at \$1,078 million or more. Such proposals are normally approved without conditions.

Developed commercial property includes hotels, motels, hostels and guesthouses, as well as individual dwellings that are a part of these properties. A unit in a hotel that is owner occupied or rented out privately (that is, it is not part of the hotel business) is considered to be residential property.

Mining Tenements

Foreign persons need to apply to buy or take an interest in prospecting, exploration, mining or production tenements where:

- they provide the right to occupy Australian urban land and the term of the lease or licence (including extensions) is likely to exceed five years; or
- they provide an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land.

If the mining tenement applies to land currently being used as rural land, then other rules apply (see Rural Land).

Where a mining tenement is developed to an operational mine, it will then be considered developed commercial property (see above).

Forestry

Established forestry businesses are treated as rural land.

Who is exempt?

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

Regardless of your citizenship or residency, you **do not** need Government approval for:

- an interest acquired by will or devolution by operation of law;
- an interest acquired from the Government (Commonwealth, State or Territory, or local) or a statutory corporation formed for a public purpose;
- an interest in developed commercial property (regardless of value) where the property is to be used immediately and in its present state for industrial or non-residential commercial purposes (the acquisition must be wholly incidental to the purchaser's proposed or existing business activities); or
- an interest in developed commercial property valued below \$54 million generally or \$5 million for heritage listed properties (or \$1,078 million for New Zealand investors and United States investors).

Other exemptions **may** apply¹⁶ if you are:

- a company, trust or managed investment scheme (primarily) for the benefit of individuals ordinarily resident in Australia;
- a corporation that is providing custodian services; or
- buying shares in certain Australian urban land corporations that are publicly listed on an Australian Stock Exchange, or units in certain Australian urban land trusts.

Rural land¹⁷

Rural land is land used wholly and exclusively for carrying on a business of primary production. To be a business of primary production, the business must be substantial and have a commercial purpose or character.¹⁸

A foreign person needs approval to buy an interest in a primary production business where the total assets of the business exceed \$248 million (or \$1,078 million for New Zealand investors and United States investors).

All foreign government investors must notify the Government and get prior approval before acquiring any interest in rural land.

16 See regulation 3 of the *Foreign Acquisitions and Takeovers Regulations 1989*.

17 See also Annex 2.

18 The definition of a primary production business is taken from the *Income Tax Assessment Act 1997*. It refers to production resulting from the cultivation of land; animal husbandry/farming; horticulture; fishing; forestry; viticulture or dairy farming. Primary production for the purpose of the rural land definition does not include hobby farms, 'rural residential' blocks or land used for stock agistment or mining.

Annex 1: Definitions

Australian urban land

Australian urban land is any land in Australia that is not rural land. It includes all seabed within Australia's Exclusive Economic Zone (EEZ).

Australian urban land corporation or trust

A corporation or trust that has interests in Australian urban land which makes up more than 50 per cent of the value of its total assets.

Direct investment

Direct investment in Australia by foreign government investors must be notified regardless of the value of the investment.

Australia's foreign investment regime is concerned with investments that provide the investor with potential influence or control over the target (entity or asset(s)), including any offshore acquisition providing this over an Australian business or asset(s).

Any investment of an interest of 10 per cent or more is considered to be a direct investment.

Investments that involve interests below 10 per cent may also be considered direct investments if the acquiring foreign government investor is building a strategic stake in the target, or can use that investment to influence or control the target. In particular, an investment of less than 10 per cent which includes any of the following is considered to be a direct investment and must be notified:

- preferential, special or veto voting rights;
- the ability to appoint directors or asset managers;
- contractual agreements including, but not restricted to, agreements for loans, provision of services and off take agreements; or
- building or maintaining a strategic or long-term relationship with a target entity.

Retaining an interest of 10 per cent or more following the enforcement of a security interest¹⁹ is also considered a direct investment.

Foreign Government Investors

Foreign government investors include:

- a body politic of a foreign country;
- entities²⁰ in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more;
- entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 per cent or more; or
- entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.

Foreign person

A foreign person is:

- a natural person not ordinarily resident in Australia;²¹
- 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.

19 If a foreign government investor that is regulated by the Australian Prudential Regulation Authority as an Authorised Deposit taking Institution, see footnote 2.

20 Entities include companies, trusts and limited partnerships.

21 This may include some Australian citizens living abroad, except when they are acquiring Australian urban land.

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'.

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

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

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

Introduction

This appendix provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) as at 30 June 2014. The Act and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for Australia's Foreign Investment Policy (the Policy). A copy of the Act and the Regulations are available on the website at www.firb.gov.au.

The Act empowers the Treasurer to examine proposals by foreign persons to:

- acquire, or to increase, a substantial interest¹ in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds; or
- acquire an interest in Australian urban land.²

The Act does not provide the Treasurer with a power to 'approve' investment proposals. Rather, it empowers the Treasurer to prohibit a proposal that he decides would be contrary to the national interest (sections 18, 19, 20, 21 and 21A), or to raise no objections subject to conditions considered necessary to remove national interest concerns (section 25). It also permits the Treasurer to make orders for foreign persons to divest shares, assets or interests in urban land where the acquisition is decided to be contrary to the national interest.

¹ A substantial interest is defined by the Act as where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power or potential voting power, or holds interests in not less than 15 per cent of the issued shares or rights to issued shares, of a corporation.

An aggregate substantial interest is where two or more persons together with any associate(s), are in a position to control not less than 40 per cent of the voting power or potential voting power, or hold interests in not less than 40 per cent of the issued shares or rights to issued shares, of a corporation.

² Australian urban land is defined as any land within Australia on which a primary production business is not being conducted. Consequently, this definition encompasses all land in Australia that is not being used for primary production, regardless of whether it is in an urban area.

The national interest, and hence what might be contrary to it, is not defined in the Act. The Act confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Policy provides guidance on national interest matters in relation to foreign acquisitions. Ordinarily a proposal that does not meet the requirements of the Policy would be regarded as being, *prima facie*, contrary to the national interest and hence subject to rejection.

The Act requires the prior notification of certain proposals, namely where a foreign person proposes to acquire a substantial shareholding in a prescribed Australian corporation (section 26) or certain interests in Australian urban land (section 26A).

Notification

Section 26 makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase a substantial shareholding in a prescribed Australian corporation where the total assets exceed, or the transaction values it above, the thresholds set under the Regulations.

Section 26A makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase an interest in Australian urban land, unless the acquisition is exempt under the Regulations.

Substantial penalties apply for non-compliance with the notification provisions of sections 26 and 26A. On conviction, a natural person may be subject to a fine not exceeding 500 penalty units (currently \$170 per unit³) or imprisonment for a period not exceeding two years, or both. A corporation may be subject to a fine not exceeding 2,500 penalty units. Also, officers of the corporation may be held personally liable for an offence committed by their corporation and on conviction, are subject to the same maximum penalties under the applicable offence provision in the Act.

Section 25 applies where the Treasurer has received a notice from a person, including those notices that are required under sections 26 and 26A. It also provides an avenue for the notification of proposals falling within the scope of the Act, but which are not subject to compulsory notification under the Act. These include offshore acquisition of interests and acquisitions of business assets.

Formal notification of a proposal under sections 25, 26 or 26A must be made in accordance with the forms prescribed in the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (forms available at www.firb.gov.au). Receipt of a valid notice activates the commencement of the 30-day statutory examination period from the day after receipt. If the Treasurer does not take action (under sections 18, 19, 20, 21A, 22 or 25) within this period, the power to prohibit the proposal or to impose conditions expires. A further period of 10 days is available to publish any order in the *Commonwealth of Australia Gazette* and to notify the parties. The 30-day examination period may be extended by up to a further 90 days by the issue of an Interim Order (section 22 and subsection 25(3)) which prohibits the proposal for that period.

3 For the value of a penalty unit, see section 4AA of the *Crimes Act 1914*.

The Treasurer's powers

The powers available to the Treasurer under the Act in relation to foreign investment proposals are primarily contained in sections 18, 19, 20, 21, 21A and 25.

Section 18 deals with proposals involving the acquisition of shares in prescribed corporations which carry on an Australian business (unless the transaction values it, and its total assets are, below the thresholds). Where an acquisition would result in a foreign person acquiring a controlling interest, and the Treasurer concludes that this would be contrary to the national interest, it may be prohibited by the issue of an order (known as a Final Order). The Treasurer's powers under the section can apply where control changes from Australian to a foreign person(s), as well as where control changes from one foreign person to another, or when an additional foreign person joins a controlling group.

Sections 19, 20 and 21 confer upon the Treasurer powers similar to section 18 but in respect of other types of acquisitions and arrangements. Section 19 deals with acquisitions of business assets, section 20 with arrangements relating to the corporation's governance and operation such as board representation or alterations to constituent documents such as the articles of association, and section 21 with the leasing or hiring of assets, management agreements or profit sharing arrangements.

Section 21A deals with proposals to acquire interests in Australian urban land. It empowers the Treasurer to examine proposed acquisitions of interests in Australian urban land and make an order prohibiting those that he considers would be contrary to the national interest.

The Act applies to acquisitions, or proposed acquisitions, of interests in 'Australian urban land' (see section 12A). Consequently, section 21A applies not only to direct purchases of Australian urban land, but also to interests in such land, for example mortgage, or certain leasehold interests. It also applies to the purchase of shares in companies and units in unit trusts (Australian urban land corporations and trust estates), where more than half of its assets are in the form of interests in Australian urban land, and participation in profit sharing agreements in relation to land.

The Treasurer's powers in section 21A to take action against acquisitions of interests in Australian urban land are not limited to acquisitions of what the Treasurer considers to be a controlling interest as is the case in sections 18 to 21. Failure to notify an acquisition of an interest in Australian urban land is an offence under section 26A of the Act, unless exempt under the Regulations.

Sections 18, 19, 20, 21 and 21A give the Treasurer the power to order the divestment or unwinding of an investment where the acquisition is subsequently found to have been contrary to the national interest.

Section 25 allows conditions to be applied which are considered necessary to remove national interest concerns that would otherwise arise. This power is available where the Treasurer can make an order under sections 18, 19, 20, 21 and 21A.

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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