

Summary of Australia's Foreign Investment Policy as at December 1998

General

The Government's approach to foreign investment policy is to encourage foreign investment consistent with the interests of the community. Overall the general stance of policy is welcoming, in recognition of the contribution that foreign investment has made and continues to make to the development of Australia, providing scope for higher rates of economic activity and employment than could be achieved on the basis of domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.

The Government recognises community concerns about foreign ownership of Australian assets. One of the objectives of the Government's foreign investment policy is to balance these concerns against the strong economic benefits to Australia from foreign investment.

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

In the majority of industry sectors, smaller proposals are exempt and larger proposals are approved unless judged contrary to the national interest. The screening process undertaken by the Foreign Investment Review Board enables comments to be obtained from relevant parties and other Government agencies in considering whether larger or more sensitive foreign investment proposals are contrary to the national interest.

The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians.

Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia, whenever they seek to establish or acquire new business interests, or purchase additional properties. In this way the Government is able to put pressure on foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia.

By far the largest number of foreign investment proposals involve the purchase of real estate. The Government seeks to ensure that foreign investment in residential real estate improves the supply of residences and should not be speculative in nature. The Government's foreign investment policy, therefore, seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (ie, new developments — house and land, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers.

The effect of the more restrictive policy measures on developed residential real estate is twofold. First, it helps reduce the possibility of excess demand building up in the existing housing market and secondly, it aims to encourage the supply of new dwellings, many of which would become available to Australian residents, either for purchase or rent. The cumulative effect should therefore be to maintain greater stability of house prices and the affordability of housing for the benefit of Australian residents.

Prior Approval

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

- ❖ acquisitions of **substantial interests** in existing Australian businesses with total assets over \$5 million (over \$3 million for rural properties);
- ❖ plans to establish new businesses involving a total investment of \$10 million or more;
- ❖ portfolio investments in the media of 5 per cent or more and all non-portfolio investments irrespective of size;

- ❖ direct investments by foreign governments or their agencies irrespective of size;
- ❖ acquisitions of interests in urban land (including interests that arise via leases, financing and profit sharing arrangements and the acquisition of interests in urban land corporations and trusts) that involve the:
 - acquisition of developed non-residential commercial real estate valued at \$5 million or more;
 - acquisitions of accommodation facilities irrespective of value;
 - acquisitions of vacant urban real estate irrespective of value;
 - acquisitions of residential real estate irrespective of value; and
- ❖ proposals where any doubt exists as to whether they are notifiable. (Funding arrangements that include debt instruments having **quasi-equity** characteristics will be treated as direct foreign investment.)

A **foreign interest** is defined as:

- ❖ a natural person not ordinarily resident in Australia;
- ❖ a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest;
- ❖ a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- ❖ the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- ❖ the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

A **substantial foreign interest** occurs when a single foreigner (and any associates) has 15 per cent or more of the ownership or several foreigners (and any associates) have 40 per cent or more in aggregate of the ownership of any corporation, business or trust.

Examination by Sector

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

Rural Properties, Agriculture, Forestry, Fishing, Resource Processing, Oil & Gas, Mining, Manufacturing, Non-Bank Financial Institutions, Insurance, Sharebroking, Tourism (Hotels and Resorts), Most Other Services

In relation to investments by foreign interests in these sectors, all proposals above certain thresholds need prior approval and therefore need to be notified. Notification thresholds are, over \$3 million for purchases of rural properties, over \$5 million for acquisitions of substantial interests in other existing businesses, \$10 million or more for the establishment of new businesses and \$20 million or more for offshore takeovers.

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

The Government registers, but normally raises no objections to, proposals above the notification thresholds where the relevant total assets/total investment falls below \$50 million.

The Government examines proposals to acquire existing businesses (with total assets of \$50 million or more) or establish new businesses (with a total investment of \$50 million or more) and raises no objections to those proposals unless they are contrary to the national interest. Offshore takeovers do not generally raise national interest issues.

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

Real Estate¹

Proposed acquisitions of **residential real estate** are exempt from examination in the case of Australian citizens living abroad and foreign nationals who are the holders of permanent resident visas or are holders, or entitled to hold, a ‘special category visa’.

Proposed acquisitions of **real estate for development** (within 12 months) are normally approved subject to a specific condition requiring continuous construction to commence within 12 months. Once construction is completed, parties are required to provide the completion date and actual development expenditure.

Foreign interests are normally given approval to buy **vacant residential land** (on condition that continuous construction of a dwelling is commenced within 12 months) and to buy home units, townhouses, etc ‘**off-the-plan**’, under construction or newly constructed but never occupied. ‘Off-the-plan’ sales to foreigners are only permitted for new development projects or extensively refurbished commercial structures which have been converted to residential, on condition that no more than half of the dwellings in any one development is sold to foreign interests.

Proposed acquisitions of residential property (both vacant land and existing dwellings) which are within the bounds of a resort that the Treasurer has designated as an ‘**Integrated Tourism Resort**’ are exempt from examination. Strict conditions must be fully met in order to qualify for Integrated Tourist Resort status.

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

All other proposals by foreign interests to acquire **developed residential real estate** are examinable and are not normally approved, except in the

¹ Detailed information on real estate policy is available in the document ‘Foreign Investment Policy – Urban Land’. This document is available on request or from the Treasury website.

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

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

Proposed acquisitions of **hotels and motels** operating under one title are normally approved (unless considered contrary to the national interest) under the tourism sector policy. Other **accommodation facilities** such as guest houses, holiday flats, strata titled hotels and motels are examined under policy applying to the residential real estate sector.

Banking

Foreign investment in the banking sector needs to be consistent with the *Banking Act 1959*, the *Financial Sector (Shareholdings) Act 1998* and banking policy, including prudential requirements. Any proposed foreign takeover or acquisition of an Australian bank will be considered on its merits on a case by case basis.

The Government will permit the issue of new banking authorities to foreign owned banks where the Australian Prudential Regulation Authority (APRA) is satisfied the bank and its home supervisor are of sufficient standing, and where the bank agrees to comply with APRA's prudential supervision arrangements.

Civil Aviation

Domestic Services

Foreign airlines flying to Australia can generally expect approval to acquire up to 25 per cent of the equity in a domestic carrier individually or up to 40 per cent in aggregate provided the proposal is not contrary to the national interest. In special circumstances the Government is prepared to consider foreign equity proposals in excess of these guidelines provided the proposal is not contrary to the national interest. All other foreign investors (including those which do not operate an airline service to Australia) may acquire up to 100 per cent of a domestic carrier, or establish a new aviation business, unless judged contrary to the national interest.

International Services

Foreign airlines can generally expect approval to acquire up to 25 per cent of the equity in an Australian international carrier (other than Qantas) individually or up to 35 per cent in aggregate provided the proposal is not contrary to the national interest. In the case of Qantas, total foreign ownership is restricted to a maximum of 49 per cent in aggregate, with individual holdings limited to 25 per cent and aggregate ownership by foreign airlines limited to 35 per cent. In addition, a number of national interest criteria must be satisfied, relating to the nationality of Board members and operational location of the enterprise.

Airports

Foreign investment proposals for acquisitions of interests in Australian airports are subject to case by case examination in accordance with the standard notification requirements. In relation to the airports offered for sale by the Commonwealth, the *Airports Act 1996* stipulates a 49 per cent foreign ownership limit, a 5 per cent airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

Shipping

The *Shipping Registration Act 1981* requires that, for a ship to be registered in Australia, it must be majority Australian-owned (ie, owned by an Australian citizen, a body corporate established by or under law of the Commonwealth or of a State or Territory of Australia), unless the ship is designated as chartered by an Australian operator.

Media

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

Broadcasting

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

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

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

Newspapers

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

Telecommunications

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

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

Approval Period

Approval under the Government's foreign investment policy is normally only given for a specific transaction which is expected to be completed in a timely manner. If an approved transaction does not proceed at that time and/or the parties enter into new agreements at a later date, or if a transaction is not completed within 12 months, further approval must be sought for the transaction.

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Approvals for share acquisitions involving a full or partial bid under Corporations Law only apply to the shares acquired during the bid period. For example, if approval is given for a full bid and the bidder only acquires 60 per cent of the shares, but then subsequently wishes to proceed to acquire further shares on market using the creep provisions of Corporations Law or to acquire the balance of the shares through a subsequent bid, further prior approval must be sought.

Where a proposal involves option agreements for the purchase of shares, assets or property, prior approval is required to acquire the options. Normally approvals for options will also extend to the exercise of those options, provided the option is exercised within 12 months of approval. Subsequent approval for the exercise of the options may be sought on an annual basis.

The time period for an approval may be varied where it can be shown that an extended period is fundamental to the success of a proposal and that extending the timing of the proposal does not involve an activity (eg real estate speculation) that would be contrary to the national interest. In this situation the extended period will be stated in the approval.