



## What restrictions apply to foreign investment in Australia?

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The Australian Government's Foreign Investment Policy (**Policy**) generally regards investment by foreigners positively, subject to certain restrictions imposed by the Foreign Investment Review Board (**FIRB**), a section of the Commonwealth Department of Treasury. *The Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) regulates non-residents acquiring interests in Australian assets.

### Foreign Investment Review Board

FATA regulates non-residents acquiring Australian assets. FATA gives the Government the power to prohibit proposals for investment in Australia in relation to the acquisition of Australian assets (or part of the assets) businesses and land, that are deemed to be contrary to the national interest. The FIRB is responsible for assessing proposals considering community concerns of the Australian people. Therefore investments in residential real estate, commercial real estate (that may be subject to heritage listing) and the media sector are more highly regulated.

### Who has to apply for approval?

Foreign persons, subject to the size of the investment must obtain approval for investment prior to making the investment. A foreign person, according to FIRB is:

- a person not ordinarily resident in Australia;
- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial 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 substantial 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.

### What investments require FIRB approval?

The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) (**the Regulations**) provide monetary thresholds below which the relevant FATA provisions do not apply, and separate thresholds apply to acquisitions by investors from the USA. The following are deemed to be **Regulated Acquisitions** that require pre-approval:

- **Businesses or corporations valued at above \$100 million** (note that higher thresholds apply for investors from the USA.) Interests are defined as:

- acquisitions of **shares** representing a **substantial interest** in the corporation;
- acquisitions of **assets** resulting in **control of the business**; or
- any other type of **arrangement which results in control** of the business/corporation.
- **Takeovers of offshore companies** whose Australian subsidiaries or gross assets exceed **\$200 million** and represent less than 50 per cent of global assets.
- **Australian real estate** (including interests that arise via a variety of methods) that involve:
  - developed **commercial real estate** (subject to heritage listing), valued at \$5 million or more where the investor is not from the USA;
  - developed **commercial real estate**, (not subject to heritage listing), valued at **\$50 million or more**, or \$953 million in the case of investors from the United States;
  - **vacant non-residential land** irrespective of value;
  - **residential real estate** irrespective of value; or
  - shares or units in Australian urban land corporations or trust estates, regardless of value; or
  - **proposals where any doubt exists** as to whether they are notifiable. (*Particularly where the funding is via hybrid instruments*).
- Other Regulated Acquisitions include:
  - **New businesses** where the total planned investment is \$10 million or more;
  - Direct investments by foreign governments; or
  - **Portfolio investments in the media sector** of 5 per cent or more and all non-portfolio investments irrespective of size.

### What investments do not need FIRB approval?

FIRB is not required to be notified of the acquisition of residential real estate by:

- Australian citizens living overseas;
- The holders of **permanent resident visas** or special category visas;
- foreign nationals who **purchase as joint tenants** with a spouse who is an Australian citizen.
- Acquisitions by temporarily residents in Australia on a relevant valid Australian visas (not including short term visitors) of:
  - single blocks of vacant land;
  - new dwellings; and
  - an existing dwelling to be used as their principal place of residence (even if it is to be redeveloped).

### Acquisitions that are not Regulated Acquisitions

- **new dwellings purchased from the developer**, (if preapproved for sale to foreigners);
- **an interest in a time share scheme** of not more than four weeks per year;
- certain residential real estate in Integrated Tourism Resorts (ITR);
- **an interest acquired by succession** (Will) or by law; or
- **an interest acquired from the any level of Government.**

## Time limits

As most investment contracts are time sensitive, care should be taken to ensure that any contract for the acquisition of a Regulated Acquisition takes into consideration the time limits imposed for approval by the FIRB. The FIRB must be notified before making a Regulated Acquisition.

Section 25 of FATA provides (among other things) that the Treasurer loses the ability to impose conditions or prohibit the investment if the parties are not notified within 10 days of the expiry of the statutory notice period. Therefore approval (or otherwise) is usually received within 30 days, however the Treasurer may extend the 30 day notice period by issuing an interim order.

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