

The logo for Dentons, consisting of the word "DENTONS" in a bold, white, sans-serif font, enclosed within a white arrow-shaped graphic pointing to the right. The background of the entire page is a close-up photograph of a fern frond with water droplets, overlaid with a large purple shape that forms the background for the text.

**DENTONS**

# **Foreign investment in Australia**

Grow | Protect | Operate | Finance

**2024**

# Foreign investment in Australia

## 1. Regulatory framework

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth)

(**FATA**), and its related regulations. The Australian Federal Treasurer administers FATA, assisted by the Foreign Investment Review Board (**FIRB**).

The Treasurer has the authority to refuse proposals for certain foreign investments in Australia, impose conditions on proposals and make a range of other orders, if the Treasurer considers the proposal to be contrary to the Australian national interest.

The Australian government regularly states that it recognises the substantial contribution foreign investment makes to Australia's economic growth and prosperity, and that it welcomes foreign investment that is consistent with Australia's national interest.

Certain foreign investment proposals require notification to FIRB and the Treasurer's approval before being implemented. In recent years, new laws have been enacted to cover the review of proposed investments in relation to critical infrastructure and the services that support it, and to ensure such investments are not against Australia's national security interests.

On 1 May 2024, the Treasurer announced reforms to streamline and strengthen Australia's foreign investment framework, in order to deliver a stronger, faster and more transparent approach to foreign investment. On the same day, the Treasurer released an updated Australia's Foreign Investment Policy, which aims to "focus foreign investment scrutiny on high-risk investments to protect our national interest, while streamlining low-risk investments to bring in the capital Australia needs quickly". A copy of the updated policy can be accessed [here](#).

## 2. Foreign investors

FATA and FIRB Policy apply to foreign investors who are considered 'foreign persons'. For these purposes, a 'foreign person' includes foreign person, corporations, trusts, governments and partnerships.

An individual is a foreign person if they are not ordinarily resident in Australia (including expatriate Australian citizens).

Generally, a corporation, trust or partnership is a foreign person if:

- at least 20 per cent is held by a single foreign person, foreign corporation or foreign government, or
- at least 40 per cent is held by investors made up of foreign person, foreign corporations or foreign governments.

All foreign government investors are also foreign persons (see section 2.6).

## 3. Significant actions and notifiable actions

The Treasurer can make a range of orders in relation to 'significant actions' and 'notifiable actions'.

The Treasurer's key concern will be transactions that negatively impact on the national interest (see section 2.7).

Foreign persons are not required to inform the Treasurer of proposed significant actions unless they are also notifiable actions, however they may choose to notify the Treasurer of a significant action to receive the benefit of the Treasurer's response prior to undertaking a significant action to protect against any subsequent "call-in" review by the Treasurer.

## Significant actions

Actions by a foreign person that may be a 'significant action' include:

- Acquisition of Australian land
- Acquisition of a direct interest in Australian agribusiness
- Acquisition of an interest in Australian business assets resulting in a change of control in the business
- Entering into a 'significant agreement' with an Australian business resulting in a change of control in the business
- Actions relating to the acquisition of interests in or issue of securities in an entity
- Certain other actions, such as alterations to constituent documents, that result in the company coming under the control of a foreign person (or a foreign person's associate)

These will only be significant actions where the investment exceeds the prescribed monetary threshold. The regulations also prescribe certain other investments in Australian businesses as significant actions.

There are various exemptions that exclude certain actions from being significant actions.

## Notifiable actions

Actions by a foreign person that are notifiable actions include:

- The acquisition of a direct interests in an agribusiness
- The acquisition of a substantial interests (>20 per cent by one foreign person or >40 per cent aggregate interest held by two or more foreign persons) in Australian entities or businesses
- The acquisition of any interest in Australian land that exceed the prescribed monetary thresholds

The regulations also prescribe acquiring an interest in sensitive industries or a direct interest (>10 per cent) national security businesses as notifiable actions.

A foreign person who proposes to take a notifiable action must give a notice to the Treasurer before taking the action.

## Notifiable national security action

A 'notifiable national security action' includes any of the following actions by a foreign person:

- To start a national security business
- To acquire a direct interest in a national security business
- To acquire an interest in national security land
- To acquire an interest in an exploration tenement in respect of national security land

A foreign person who proposes to take a notifiable national security action must give a notice to the Treasurer before taking the action.

## Thresholds

Monetary thresholds are indexed annually.

Investors from countries that have entered into free trade agreements with Australia (including the US, New Zealand, Japan, China and Chile) or who are parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership enjoy higher monetary thresholds in most instances.

A direct comparison of Foreign Direct Investment (**FDI**) rules between Australia and 9 other jurisdictions can be viewed via the **Dentons FDI Global Tracker**. The tracker specifies when the FDI rules are applicable, when a notification is mandatory and when it is voluntary; it sets out relevant review periods, sanctions and other implications for the merger and acquisition.

## 4. Foreign investment in entities and businesses

### Businesses and entities

The relevant monetary threshold for non-land investment is subject to certain exceptions:

- A\$1.427 billion for US, New Zealand, and Chilean investors and investors from other free trade agreement countries where the investment is not in a prescribed sensitive sector, or
- for all other foreign persons, A\$330 million.

An acquisition of a substantial interest in an Australian entity is also a notifiable action where the entity is an Australian unit trust or carries on an Australian business.

It is also a significant action and a notifiable action where, regardless of value:

- a foreign government investor acquires a direct interest in an Australian entity or business, or starts an Australian business, or
- a foreign person acquires an interest of five per cent or more in an Australian media entity or business.

### National Security Business

A foreign person acquiring a direct interest (>10 per cent) in a 'national security business' will need to notify and obtain FIRB approval prior to the making the acquisition, regardless of the value of the investment. A business is a national security business if, among other things, it:

- Is a responsible entity for a critical infrastructure asset
- Is a direct interest holder (>10 per cent) in relation to a critical infrastructure asset
- Stores or has access to classified information
- Develops, manufactures or supplies critical goods or critical technology that are, or are intended to be, for a military use, or intelligence use

Critical infrastructure assets are defined in the Security of Critical Infrastructure Act 2018 (see further at section 2.11).

Under the national security business guidelines foreign persons who obtain a direct interest in a service provider and supplier to a critical infrastructure asset are encouraged to obtain FIRB approval. The Treasurer has 10 years to review (Call-in) a transaction and review if it actually offended national security interests.

### Agribusiness

Foreign persons must apply for approval to acquire a direct interest (>10 per cent) in an agribusiness where the value exceeds A\$71 million. This is a significant action and a notifiable action.

Investors from Chile, the US and New Zealand have a higher threshold of A\$1.427 billion before being subject to notification and approval requirements.

### Exemption certificates

Exemption certificates may be applied for in certain circumstances, such as when a foreign person is planning to undertake a series of related and similar investments. This provides the convenience of not needing to obtain FIRB approval for each of the contemplated investments.

## 5. Foreign investment in land

### Who needs FIRB approval?

In most instances, foreign persons must obtain FIRB approval when acquiring an interest in Australian land.

### What is Australian land?

Australian land includes:

- Residential land
- Agricultural land
- Vacant commercial land
- Developed commercial land
- Mining and production tenements

### Residential real estate

Depending on whether the foreign person is a temporary resident in Australia or is a non-resident, there are different rules around who is allowed to acquire residential real estate and the nature of the residential real estate.

Generally, and regardless of the value, foreign persons must obtain approval for an interest in Australian residential real estate unless an exemption applies.

Foreign persons can apply to purchase established dwellings for the purposes of residential redevelopment, provided that FIRB approval is obtained. The approval may be granted with restrictions and conditions. The acquisition of second hand residential real estate for purposes other than development is generally prohibited except in limited circumstances.

Australian states impose significant surcharge purchase duty and surcharge land tax on residential land acquired and held by foreign persons and non-resident permanent residents.

### **Agricultural land**

Generally, foreign persons must obtain approval for an interest in agricultural land where the cumulative value of the agriculture land owned by the foreign person (and any associates) is more than A\$15 million. Foreign government investors require approval for all acquisitions of agricultural land, regardless of their cumulative holdings or the consideration of the proposed investment.

Critically, a foreign purchaser must be able to demonstrate that agricultural land at a value of greater than A\$15m for most non-government investors has been openly and transparently marketed in Australia in accordance FIRB's published requirements so that local buyers have had an opportunity to acquire.

### **Vacant commercial land**

Generally, and regardless of the value of the vacant commercial land, all foreign persons must obtain approval before acquiring an interest in vacant commercial land.

### **Developed commercial land**

Foreign persons must obtain approval for an interest in developed commercial land if the interest exceeds A\$310 million, unless the land is classified as sensitive developed commercial land in which case, the threshold is A\$67 million. Investors from certain free trade agreement partners enjoy a higher monetary threshold of A\$1.339 million, regardless of whether the land is sensitive. Foreign government investors require approval for all acquisitions of commercial land, regardless of whether the land is sensitive or vacant or its value.

### **Mining and production tenements**

Under the foreign investment framework, a mining or production tenement is a type of Australian land for which acquisitions of interests generally require approval regardless of the value of the tenement. A higher monetary threshold applies for private investors from certain free trade agreement partners. However, the acquisition of an interest in a mining or production tenement that is national security land has a A\$0 threshold for all foreign investors.

Exploration tenements are distinct from mining or production tenements and are treated differently under the framework. Acquisitions of interests in exploration tenements generally do not require foreign investment approval, except by foreign government investors or if the tenement is over national security land.

Foreign persons may need to notify the Treasurer and obtain approval before acquiring an interest in Australian land intended to be used for mining operations. This will generally depend on the type of land proposed to be acquired. Foreign persons must give notice of certain actions relating to Australian land (including mining or production tenements) and exploration tenements to the Registrar of the Register of Foreign Ownership of Australian Assets.

### **Australian land entities**

Section 13 of the *Foreign Acquisitions and Takeovers Regulation 2015* prescribes the meaning of land entities as generally an entity where the interests in Australian land held by the entity exceeds 50 per cent of the value of the total assets of the entity.

Foreign persons may require approval where they acquire 10 per cent or more in a listed or unlisted Australian land entity, that is valued above the relevant monetary threshold. Where the foreign person is a foreign government investor, additional rules apply.

## 6. Foreign government investors

All foreign government investors must obtain approval, irrespective of the value of the investment or asset, before:

- Making a direct investment in an Australian entity or business
- Establishing a new Australian business
- Obtaining an interest in Australian land
- Obtaining any interest in a prospecting, exploration, production or mining tenement

## 7. National interest

A wide range of factors are considered when determining if a foreign investment proposal is contrary to Australia's national interest. These factors are in addition to the national security business tests and include the nature of the target entity or asset, the effect the proposal has on national security and a competitive market, the impact of the proposal on the economy and tax revenue, and the transparency and character of the investor.

## 8. When to apply

A foreign investor may apply for FIRB approval before they enter into an agreement to purchase, lease or license Australian land, an agreement to buy shares or units in an Australian land corporation or trust or otherwise they must ensure that completion of the transaction is conditional on receipt of FIRB approval.

## 9. Fees

Application fees apply for all foreign investment applications and are payable at the time of application.

## 10. Penalties

Failure to apply for FIRB approval may result in a divestment order, civil and criminal penalties and/or prohibition of the proposal.

## 11. Critical infrastructure

Australia has broad laws which regulate certain critical infrastructure assets in a wide range of sectors.

The Security of Critical Infrastructure Act 2018 (**SOCI Act**) outlines eleven critical infrastructure sectors and regulates responsible entities for, as well as entities who have a direct interest in, critical infrastructure assets.

The relevant critical infrastructure sectors and asset classes captured under the SOCI Act are:

- Communications
  - critical telecommunications assets
  - critical broadcasting assets
  - critical domain name systems
  - Data storage or processing
- Defence industry
  - critical defence industry assets
- Energy
  - critical electricity assets
  - critical gas assets
  - critical energy market operator assets
  - critical liquid fuel assets
- Financial services and markets
  - critical banking assets
  - critical superannuation assets
  - critical insurance assets
  - critical financial market infrastructure assets
- Food and grocery
  - critical food and grocery assets
- Health care and medical
  - critical hospitals

- Higher education and research
  - critical education assets
- Space technology
- Transport
  - critical ports
  - critical public transport assets
  - critical aviation assets
- Water and sewerage
  - critical water assets

Under the SOCI Act, the Critical Infrastructure Centre was established with the aim of safeguarding Australia's critical infrastructure from national security risks of sabotage, espionage, coercion or foreign involvement in Australia's critical infrastructure.

The Critical Infrastructure Centre complements the Foreign Investment Review Board (**FIRB**) through advising the FIRB on foreign investment proposals.

Determining whether a foreign person needs to notify FIRB in advance of its investment requires an assessment of the type of investor and investment, the nature of the underlying investment and the value of the proposed investment.

Australia's Treasurer can block foreign investment proposals which are contrary to Australia's national interest or national security, or the Australian Treasurer can condition approvals of acquisitions.

A foreign person proposing to acquire a direct interest over a certain threshold in a national security business or an entity that carries on a national security business, or proposing to start a national security business, is a notifiable national security action and FIRB approval must be granted before taking the action. A business is a national security business if it is publicly known, or could be known by making reasonable inquiries, that the business is, amongst other criteria, the responsible entity for, or holds a direct interest in a critical infrastructure asset under the SOCI Act.

Notification thresholds also apply to proposed acquisitions by foreign persons of businesses in other sensitive sectors, such as media, telecommunications, transport, defence/military related industries, encryption and securities technologies and communication systems, and extraction of uranium and plutonium or the operation of nuclear facilities.

Foreign persons should lodge applications with FIRB in advance of notifiable transactions.

If regulated by the SOCI Act, there may be obligations to assist the Australian Government and comply with their intervention and directions. Additionally, some entities may have additional enhanced security obligations. It is complex to assess applicability of the SOCI Act to entities and so a case-by-case analysis is needed. Some entities may be subject to multiple regulatory regimes and regulators.

\*All monetary thresholds are indexed annually. The figures included in this Chapter were effective as of 1 January 2024.

## **ABOUT DENTONS**

Across over 80 countries, Dentons helps you grow, protect, operate and finance your organization by providing uniquely global and deeply local legal solutions. Polycentric, purpose-driven and committed to inclusion, diversity, equity and sustainability, we focus on what matters most to you.

**[www.dentons.com](http://www.dentons.com)**

This publication has been prepared by Dentons Australia Limited. Every effort has been made to ensure accuracy, however no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases. No responsibility for any loss occasioned to any person acting or refraining from action as a result of material in this publication is accepted by individual authors or Dentons Australia. If advice concerning individual problems or other expert assistance is required, the services of a competent professional adviser should be sought.

Dentons is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organisations, reference to a “partner” means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an “office” means an office of any such law firm. Dentons Australia is a member law firm.

### **© Dentons 2024. All rights reserved.**

This publication is copyright. Apart from any fair dealing for the purposes of study or research permitted under applicable copyright legislation, no part may be reproduced or transmitted by any process or means without prior written permission of Dentons Australia. The law is stated as at July 2024 unless otherwise indicated.

© 2024 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. Please see [dentons.com](http://dentons.com) for Legal Notices.