

Jurisdiction: Australia

Firm: Atanaskovic Hartnell

Author: Lawson Jepps

1. What are the main reasons foreign investors invest in your jurisdiction?

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Anecdotally, the main reasons motivating foreign investors in Australia are Australia's relatively open and stable economy, need for capital investment and predictable overall legal and political framework. Notwithstanding occasional political sensitivities generally confined to specific asset classes, Australia is generally open to foreign investment to meet shortfalls from relatively limited domestic capital markets.

According to Australia's Foreign Investment Review Board (**FIRB**), the non-statutory body established to advise the Australian Federal Treasurer (**Treasurer**) and Government on foreign investment policy:

- (a) Australia's mining sector has been the main target industry for foreign direct investment in Australia in recent times, representing over 40% of the total foreign direct investment stock in Australia at the end of 2015. Other sectors to benefit from significant foreign investment include manufacturing (representing 11.7% of that foreign direct investment stock) and real estate (at 8.7% of that stock); and
- (b) the largest source by volume of approved foreign investment in Australia in the 2015-6 financial year was China (at A\$47.3bn), followed by the United States of America (at A\$31bn).

2. What foreign investment legislation is in place in your jurisdiction (e.g. Foreign Investment Law or Foreign Investment Catalogue)? Please provide a brief overview of such legislation.

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The principal piece of generic foreign investment primary legislation in Australia is the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) which applies in all Australian States and Territories and was recently subject to the most significant overhaul in the Act's forty-year history in December 2015.

FATA is accompanied in primary legislation by:

- (a) the *Foreign Acquisitions and Takeover Fees Imposition Act 2015* (Cth) (which applied a "user-pays" model to foreign investment approval applications for the first time in Australia); and
- (b) the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* (**ROFOWAL**) (Cth) (which attempts to establish a register of foreign interests in Australian agricultural land and water rights).

Those Acts are now also supported by a range of secondary legislation, including:

- (a) the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**);
- (b) the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth); and
- (c) the *Register of Foreign Ownership of Agricultural Land Rule 2015* (Cth).

There are also other sector-specific foreign investment restrictions applicable to banking, airlines, airports, shipping and telecommunications.

3. What restrictions are placed on foreign investment? Does this differ at local levels of government?

Specific restrictions targeted uniquely at foreign investment are legislated at the federal level of Australian Government.

Australian foreign investment law pursues a distinction between “*notifiable*” and “*significant*” transactions resulting in approval notifications in circumstances described in response to question 5 below.

Despite notification requirements which can delay the speed at which foreign investment in Australia might otherwise be implemented (see response to question 5) and therefore conceivably put foreign investors at a competitive disadvantage to domestic bidders in certain circumstances, foreign investment transactions are very rarely barred outright by the Australian Government. Outside of real estate, only five major transactions have been announced by FIRB as having been rejected since 2000, although approvals subject to conditions are not uncommon.

In our experience, since foreign investors’ interest in Australian assets is relatively common, it is usually the case that sellers’ timetables for transactions are set allowing for the obtaining of relevant foreign investment approvals.

4. What are the most common business vehicles for foreign investors? How long do they take to be set up? What are the key requirements for the establishment and operation of these vehicles?

Australian law permits the establishment of a similar range of business vehicles to other common law jurisdictions, including:

- (a) companies with limited liability, either proprietary (private) with no more than 50 non-employee shareholders or public;
- (b) general partnerships of up to 20 members; and
- (c) common law trusts, including unit trusts.

As in other common law jurisdictions, the choice between these vehicles will often be driven by transaction specific taxation considerations responsive to the target asset class (e.g. the use of trusts for real estate) which are outside the scope of this guide.

Control of pre-registered shelf companies for subsequent amendment to suit the acquirer can be acquired within a working day and general partnerships and common law trusts technically only require as long to set up as it takes to draft their constitutional documents.

The key requirements for establishment and operation of:

- (a) a proprietary company are at least one company director who must ordinarily reside in Australia; and at least one shareholder (a bespoke corporate constitution is not necessary, companies can generally rely on statutory “*replaceable rules*” in its absence);
- (b) a general partnership are a partnership deed and at least two partners; and
- (c) a common law trust is a trust deed, a trustee and at least one beneficiary.

In practice, it is likely that any of those vehicles if used for investment, will also undertake the additional process of acquiring at least an Australian Business Number (ABN) for the Australian Business Register (which facilitates interaction within a variety of government entities) and a Tax File Number (TFN) (separate to the TFN for individual investors) which facilitates interaction with the Australian Tax Office (ATO).

5. Under what circumstances are foreign investments subject to government approvals? What is the process and timeline for such approvals?

Some foreign investments, known as “*notifiable transactions*”, are subject to compulsory prior notification to the Treasurer for approval. Other foreign investments, known as “*significant*”

transactions”, are not subject to compulsory prior notification to the Treasurer but are effectively subject to a *de facto* prior approval requirement given that the Treasurer can make orders requiring the action to be unwound subsequent to implementation, if the action is found to be contrary to the national interest. Such orders cannot be made if the relevant *foreign person* is given a no objection notification subsequent to compulsory or voluntary approval submission.

The rules apply to actions by *foreign persons* which can extend in its legislative definition beyond investors who would necessarily consider themselves foreign to Australia, for instance to Australian-incorporated companies in which a foreign person is deemed to hold an interest of at least 20%.

The circumstances for “*notifiable transactions*” are generally when *foreign persons* acquire:

- (a) an interest of at least 20% in an Australian entity worth at least A\$252 million;
- (b) a variety of “direct” interests in an Australian agribusiness worth at least A\$55 million or Australian agricultural land worth at least A\$15 million; and
- (c) any interest in generic Australian land worth at least A\$55 million (figures at present thresholds subject to indexation).

The additional circumstances for “*significant transactions*” are when *foreign persons* acquire any interest in an Australian entity or business worth at least A\$252 million resulting in a *change of control* of that entity or business.

Acquiring a “direct” interest in an Australian entity or business of any size or starting an Australian business is compulsorily notifiable for a *foreign government investor* which includes foreign governments but also emanations of foreign governments which might have otherwise considered themselves independent, such as sovereign wealth funds, and includes Chinese state-owned enterprises (SOEs).

The process is now by online submission for approval to FIRB. The Treasurer has thirty calendar days to make a decision whether to notify objections after receiving notice that an action is proposed to be taken, of which the investor must effectively be informed within a further ten calendar days after the decision deadline. In our experience, it is imprudent to rely on a response from FIRB ahead of the statutory deadline.

For the timetable to decision to start running, submissions need to be accompanied by the prior payment of often substantial application fees (e.g. A\$25,300 for business applications), which are not refundable in the event of an unsuccessful or withdrawn application.

The Treasurer may make orders against transactions considered to be “*contrary to the national interest*”. The national interest is not susceptible to statutory definition but some guidance is offered by Australia’s Foreign Investment Policy which suggests the Australian Government typically considers the following factors when assessing foreign investment proposals:

- (a) national security (controversially applied in the *S. Kidman & Co. Limited* 2015 rejection decision but not in the decision ultimately to approve a 99-year lease of the Port of Darwin to a Chinese company prior to that);
- (b) competition (FIRB apparently as a matter of course consults the Australian anti-trust authority, the Australian Competition and Consumer Commission on foreign investment applications);
- (c) other Australian Government policies (including tax). The potential application of conditions as to Australian taxation compliance for approved foreign investors is now subject to a specific FIRB guidance note;
- (d) impact on the economy and the community; and
- (e) character of the investor.

6. What sectors are heavily regulated or restricted in your jurisdiction, if any? Conversely, what are some of the more open or unrestricted sectors, if any?

Foreign investment in the Australian media sector is more heavily regulated under the general Australian foreign investment regime. A *foreign person* acquiring an interest of 5% or more in an entity or business of *any value* that carries on an Australian business of publishing daily newspapers or broadcasting television or radio in Australia is automatically both a *notifiable* and a *significant* transaction. The Australian agribusiness sector is also more heavily regulated (see question 5). There are also “*sensitive businesses*” for which foreign investors are deprived of the more liberal regime that would otherwise apply due to the application of Australia’s free trade agreements, including supply of military equipment and extraction of radioactive materials. There are also the sector-specific regimes referred to in response to question 2.

7. Are there any restrictions on doing business with certain countries or territories in your jurisdiction? (For example, sanctions.)

The Australian Department of Foreign Affairs and Trade maintains a list of persons subject to sanctions in accordance with the *Charter of United Nations Act 1945* (Cth) and the *Australian Autonomous Sanctions Act 2011* (Cth) – see www.dfat.gov.au/sanctions/consolidated-list.html.

8. What grants or incentives are on offer to foreign investors, if any?

A variety of grants and incentives are offered by the Australian Federal Government and individual States and Territories to support foreign investment in Australia. The first point of contact would generally be Austrade

(the Australian Trade and Investment Commission). Details of potential grants and assistance are available through the online Grant and Assistance Finder tool at the business.gov.au website.

9. Are there any free trade, special economic or industrial zones in your jurisdiction and what are their requirements?

There are no designated economic or industrial zones in Australia that are not subject to the statutory foreign investment regime.

Australia has entered into free trade or other arrangements with all of Chile, China, Japan, New Zealand, South Korea and the United States of America which liberalise to varying degrees the thresholds for approval notifications described in the response to question 5.

10. What are the main taxes that could apply to foreign investors in your jurisdiction? (For example, Personal Income Tax, Corporation Tax, Value Added Tax and Social Security Payments).

Australia imposes an income tax on the taxable income of resident and non-resident individuals. Non-resident individuals are subject to income tax on their Australian source income, which includes income from passive investments such as real property.

Companies that are resident in Australia for Australian tax purposes are liable for income tax on their Australian source taxable income and on certain foreign source income. Companies that are not tax resident in Australia are generally liable for Australian income tax only on their Australian source income.

Australia imposes a value added tax known as the Goods and Services Tax (GST) of 10% on most goods, services and other items consumed in Australia and entities are liable to pay GST on Australian taxable supplies irrespective of residence.

Payroll taxes are subject to State and Territory-specific legislation. Companies are subject to compulsory superannuation (i.e. pension) payments in respect of employees and certain contractors at the rate of 9.5% of their “ordinary time earnings”. If employers do not make the relevant contributions, those employers have to pay a “superannuation guarantee charge” of equivalent amount.

11. What are some of the employment regulations in your jurisdiction that foreign investors should be aware of? Is it possible to secure residency permits or work visas for foreign nationals under investment?

Employer/employee relations are comprehensively regulated in Australia under the *Fair Work Act 2009* (Cth) which sets out ten National Employment Standards (NES) that apply to all permanent employees with limited exceptions.

Australian workforces are relatively heavily unionized compared to other jurisdictions and the NES can often be supplemented in practice by the provisions of “modern awards” governing employment terms and conditions in particular industries or occupations or “enterprise agreements” in relation to particular workforces.

Australian employment is subject to Work Health and Safety legislation familiar in other jurisdictions which is technically State-based, but common to national standards across most States.

There are a variety of visas for foreign nationals under investment in Australia including the Business Innovation and Investment (Provisional) visa (subclass 188) (which includes investor streams with investment requirements ranging from A\$1.5m to A\$15m); the Investor visa (subclass 191) (which requires a designated investment of A\$1.5m to be maintained for four years); and the Business Innovation and Investment (Permanent) visa

(subclass 888) (which is derivative from the subclass 188 visa).

12. Can foreign investors acquire real property and land in your jurisdiction? Are there any restrictions or limitations?

There are significant foreign investment restrictions and limitations concerning Australian real property and land.

Australian land encompasses four separate categories, being:

- (a) *agricultural land* (meaning land related to a primary production business), as to which see response to question 5 above;
- (b) *residential land*, acquisitions of any interests by foreign persons in respect of which are generally notifiable actions regardless of value;
- (c) *commercial land* (defined essentially as land other than agricultural or residential land), acquisitions of any interests by foreign persons in respect of which are generally notifiable actions regardless of value if the commercial land is vacant or at least A\$55m if not vacant; and
- (d) a *mining or production tenement*, acquisitions of any interests by foreign persons in respect of which are generally notifiable actions regardless of value other than for beneficiaries of free trade agreements with Chile, New Zealand and the United States of America.

Foreign investment particularly in residential real estate remains politically sensitive in Australia and is an area subject to frequent announcements by FIRB on the effectiveness of FIRB’s efforts to enforce the foreign investment regime.

There are also now obligations under ROFOWAL of a foreign person to notify the ATO of starting to hold:

- (a) a freehold interest in *agricultural land*; or
- (b) a lease or licence of *agricultural land* reasonably likely to exceed five years.

13. Are there any processes in your jurisdiction that can block foreign investment under specific circumstances?

Yes – the Treasurer can make orders prohibiting proposed actions and ordering transactions consummated without approval to be unwound, but they are rarely exercised (see response to question 3).

14. What foreign currency or exchange controls should foreign investors be aware of?

Unlike jurisdictions such as Brazil and China, Australia does not have a general exchange control regime. However, the Australian Department of Foreign Affairs and Trade may impose exchange control rules in accordance with the sanctions regime described in response to question 7. Australia does impose withholding tax on interest paid by an Australian resident company to a non-resident lender at the rate of 10% unless the lender provides the loan in connection with a business carried on through an Australian branch or the Australian resident borrows in connection with a business it carries on through a foreign branch.

15. Are there any restrictions, approval requirements or potential penalties if a foreign investor withdraws their investment in your jurisdiction?

Per the response to Question 14, Australia does not have a general exchange control regime which would prevent divestment in the ordinary course.

16. What contract enforcement and investor protection mechanisms are in place in your jurisdiction, if any?

Contracts are enforceable by foreign investors through the courts of Australia subject to applicable governing law and jurisdiction clauses.

Australia is also a signatory to the *United Nations Convention on the Recognition and Enforcement of Arbitral Awards* 1958 (New York Convention) and enacted the *International Arbitration Act 1974* (Cth) giving effect to the 2006 version UNCITRAL Model Law on International Commercial Arbitration.

Australian courts have a demonstrable track record in enforcing agreements and awards made for the purposes of transnational arbitration, including High Court authority (the highest available) upholding the constitutional validity of application of the UNCITRAL Model Law in Australia.

17. Does your jurisdiction have any bilateral or multilateral investment protection treaties with Asia-Pacific jurisdictions that are commonly used for investing into the country?

Australia has entered into bilateral investment protection treaties with all of China; Hong Kong; Indonesia; Laos; Papua New Guinea; Philippines and Vietnam.

More significant for the purposes of the foreign investment restrictions described in response to question 5 are the free trade agreements referred to in response to question 9, which amongst other things raise the investment threshold for investors from an “agreement country” (including China, Japan, New Zealand and South Korea) to A\$1,094m.

18. What intellectual property rights protections are available in your jurisdiction to foreign investors?

Australia maintains an intellectual property regime typical of common law jurisdictions including protection for registrable patents for up to 20 years, registrable trade marks (renewable for ten year periods), registrable designs (subject to restrictions on the use of the Australian flag) and unregistered copyright protection.

19. Are there any environmental policies and regulations that (potential) foreign investors should be aware of prior to or throughout the investment process in your jurisdiction?

Australia's foreign investment policy indicates that, when examining whether foreign investment proposals in the agricultural sector are in the national interest, the Australian Government typically considers the effect of the proposal on factors including environmental factors such as "the quality and availability of Australia's agricultural resources, including water" and "biodiversity".

Most major mining development projects will require the navigation of regulation and obtaining of approvals at both State/Territory level but also at federal level, where the Commonwealth Environmental Planning and Biodiversity Act 1999 (Cth) applies wherever a project is likely to have a significant impact on a matter of national environmental significance.

20. Are there any government agencies or non-governmental bodies that (potential) foreign investors can turn to for more information on investment in your jurisdiction?

Foreign investors would be recommended to approach the Australian Trade and Investment Commission (Austrade).

21. Have there been any recent proposals for reforms or regulatory changes that will impact foreign investment in your jurisdiction?

In the 2017/18 Federal Budget, the Australian Government announced changes regarding the foreign investment framework including:

- (a) an annual vacancy charge on new foreign owners of residential land where the property is not occupied or genuinely available on the rental market for at least six months each year equivalent to the foreign

investment application fee imposed at the time the property was acquired; and

- (b) introducing from 1 July 2017 a new business exemption certificate allowing foreign investors in securities to have access to an exemption certificate allowing pre-approval for multiple investments in one application rather than having to apply separately for each investment.

22. Are there any other features regarding foreign investment in your jurisdiction or in Asia that you wish to highlight?

Given that the ultimate decision whether notified proposals are contrary to the "national interest" resides with a political appointee, the Treasurer, foreign investment approval decisions in Australia have inevitably been to some degree politicized and therefore subject to a degree of variation in political sensitivity leading to marginal unpredictability in outcomes for publicised transactions.

Equally, it is doubtful whether the political pressure leading to the technicalities of the new *agricultural land* regime was really proportionate to the facts of foreign investment on the ground, in that 99% of Australian farm businesses and 90% of Australian agricultural land were thought to be entirely Australian-owned in 2015.

Nonetheless, Australia's regime very rarely acts strictly to inhibit foreign investment and given its relatively strong economic performance since the GFC in 2008 amongst similar developed countries, the Australian Government remains fairly exceptional in its willingness to emphasise its continuing commitment to welcoming foreign investment as "essential to Australia's economic growth and prosperity".

This guide reflects the law in Australia as at 9 June 2017 and is intended to give a generic analysis of the law which is not a substitute for legal advice specific to individual circumstances.

About the Author:

Lawson Jepps

Solicitor, Atanaskovic Hartnell

E: laj@ah.com.au

W: www.ah.com.au

A: Atanaskovic Hartnell House,
75-85 Elizabeth Street,
NSW 2000, Sydney
Australia

T: +61 2 9224 7091