



# Overview of Australia's Foreign Investment Approval (FIRB) Regime

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# 1. Who is regulated under foreign investment legislation?

The principal regime is set out in the following legislation:

- Foreign Acquisitions and Takeovers Act 1975 (Cth) (the FATA);
- Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (the FATR); and
- Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and the accompanying Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Cth).

The legislation generally regulates foreign investment proposals by a 'foreign person'. Under section 4 of the Act, a **foreign person** means:

(1) an individual not ordinarily resident in Australia;

(2) a corporation in which, or the trustee of a trust where in relation to the trust:

- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

- 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;

(3) the general partner of a limited partnership where in relation to the limited partnership:

- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

- 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation, or a foreign government, hold an interest of 40% or more;

(4) a foreign government or foreign government investor (see 'Special Rules for Foreign Government

The interests that are counted include the interests of a person's **associates**. The associates of a person (first person) include the first person's relatives; any person with whom the first person is acting in concert in relation to an action to which FATA applies; partners in a partnership; any entity of which the first person is a senior officer (and vice versa); and a corporation or trustee of a trust in which the first person holds an interest of 20% or more (and vice versa) (section 6 of the Act).

## 2. Key definition

Key term	Definition	Section of the Act
<b>Australia land</b>	Includes agricultural land, commercial land, residential land or a mining or production tenement	4
<b>Agricultural land</b>	Land in Australia that is used, or that could reasonably be used, for a primary production business. This includes land which is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business.	4
<b>Residential land</b>	Land in Australia where there is at least one dwelling on the land, or the number of dwellings that could reasonable be built on the land is less than ten. This does not include land used wholly and exclusively for a primary production business, or land on which the only dwellings are commercial residential premises.	4
<b>Commercial land</b>	Land in Australia or the seabed of the offshore area, other than land: <ul style="list-style-type: none"> <li>- used wholly and exclusively for a primary production business;</li> <li>- on which the number of dwellings (other than commercial residential premises) that could be reasonably built is less than 10; or</li> <li>- on which there is at least one dwelling (other than a commercial residential premise).</li> </ul>	4
<b>Mining or production tenement</b>	A right under a law of the Commonwealth, a State or a Territory to recover minerals (such as coal or ore), oil or gas in Australia or from the seabed or subsoil of the offshore area. This however does not include a right to recover minerals, oil or gas for the purpose of prospecting or exploring for minerals, oil or gas which is likely to be an exploration tenement.	4
<b>Sensitive commercial land</b>	Land leased to a government body; land fitted out for a defence or military related business; land hosting servers for telecommunications or banking; mines; and land hosting public infrastructure (for example, an airport or a port).	52(6)
<b>Land entity</b>	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.	13

### 3. What types of foreign investment transactions are regulated under FATA?

Types of actions	Definition	Explanation
<b>1. Significant actions</b>	<ul style="list-style-type: none"> <li>- An action relating to entities will generally require a monetary threshold test to be met and a change in control (however, certain actions do not require a change in control e.g. actions relating to an agribusinesses, or certain actions taken by a foreign person who already controls the entity or business) (section 40 and 41 of the Act).</li> <li>- An action relating to Australian land has only two conditions that must be met to be a significant action. They are that the action is for a foreign person to acquire an interest in Australian land and the monetary threshold is met (section 43 and 52 of the Act)</li> </ul>	The acquirer is not legally obliged to notify FIRB but the Treasurer has the power to make orders in relation to these kinds of transactions (including to block them, or to order divestments) if he considers the transaction to be contrary to the national interest.
<b>2. Notifiable actions</b>	<p>Under section 47 of the Act, a notifiable action is a proposed action by a foreign person:</p> <ul style="list-style-type: none"> <li>- to acquire a direct interest in an Australian entity or Australian business that is an agribusiness;</li> <li>- to acquire a substantial interest (usually more than 20%) in an Australian entity; or</li> <li>- to acquire an interest in Australian land (includes residential land, commercial land, agricultural land and mining and production tenements)</li> </ul> <p>The action is only a notifiable action under the Act if the entity, business or land meets the threshold test.</p>	The acquirer is legally obliged to notify FIRB and cannot proceed until a notice of no objection is obtained.
<b>3. Notifiable national security actions</b>	<p>An action is a notifiable national security action if the action is taken, or proposed to be taken, by a foreign person and the action is any of the following (section 55B of the Act):</p> <ul style="list-style-type: none"> <li>- to start a national security business;</li> <li>- to acquire a direct interest in a national security business;</li> <li>- to acquire a direct interest in an entity that carries on a national security business;</li> <li>- to acquire an interest in Australian land that, at the time of acquisition, is national security land; or</li> <li>- to acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.</li> </ul>	The acquirer is legally obliged to notify FIRB and cannot proceed until a notice of no objection is obtained. The Treasurer has the power to make orders in relation to these kinds of transactions (including to block them, or to order divestments) if he considers the transaction to be contrary to national security.
<b>4. Reviewable national security actions</b>	<ul style="list-style-type: none"> <li>- There are broadly nine scenarios where a reviewable national security action may arise. In all scenarios an action will not be a reviewable national security action if it is otherwise a significant action, notifiable action or notifiable national security action.</li> <li>- Reviewable national security actions are actions expected to give foreign persons potential influence and rights, such as the ability to influence or participate in the central management or policy of an entity or business, or the right to occupy Australian land. This includes instances where a foreign person is already in a position to influence or participate in the central management or control of the entity, but as a result of the reviewable national security action gains further power to influence or participate (section 55D of the Act).</li> </ul>	The acquirer is not legally obliged to notify FIRB but these transactions, together with significant actions for which approval is not sought, are subject to the Treasurer’s “call in” powers, as described in section 5.4, for a period of 10 years.

## 4. Monetary threshold

### 4.1 For private investors from Free Trade Agreement (FTA) partners

Free Trade Agreement partners are: Chile, China, Hong Kong, Japan, New Zealand, Peru, Singapore, South Korea and the United States of America, and any other countries not otherwise listed (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018 is in force (i.e., Canada, Mexico and Vietnam).

Types of transaction	Is FIRB approval required?	Threshold
<b>1. Acquiring residential land</b>	Yes, regardless of its value	\$0
<b>2. Acquiring vacant commercial land</b>	Yes, regardless of its value	\$0
<b>3. Acquiring developed land and building</b>	Yes, when the monetary threshold is met	\$1,216 million (For Hong Kong and Peru, \$61 million where the land is sensitive)
<b>4. Acquiring interests in Australian entity (Business only)</b>	Yes, when: (1) a foreign person acquire a substantial interest (usually more than 20%) in the entity; and (2) the monetary threshold is met	\$1,216 million ((\$281 million where the business is sensitive))
<b>5. Acquiring interests in Australian land entity</b>	Yes, when: (1) a foreign person acquire 10% or more in a listed land entity, or 5% or more in an unlisted land entity; and (2) the monetary threshold is met	\$0 where the entity holds: - national security land; or - 10% or more of its assets in the form of residential land, vacant commercial land and/or mining or production tenements \$1,216 million where the entity holds less than 10% of its assets in the form of residential land, vacant commercial land and/or mining or production tenements (For Hong Kong and Peru, \$61 million where the entity holds interests in sensitive land)

### 4.2 For other private investors from non-FTA partners

Types of transaction	Is FIRB approval required?	Threshold
<b>1. Acquiring residential land</b>	Yes, regardless of its value	\$0
<b>2. Acquiring vacant commercial land</b>	Yes, regardless of its value	\$0
<b>3. Acquiring developed land and building</b>	Yes, when the monetary threshold is met	\$281 million ((\$61 million where the land is sensitive))
<b>4. Acquiring interests in Australian entity (Business only)</b>	Yes, when: (1) a foreign person acquire a substantial interest (usually more than 20%) in the entity; and (2) the monetary threshold is met	\$281 million
<b>5. Acquiring interests in Australian land entity</b>	Yes, when: (1) a foreign person acquire 10% or more in a listed land entity, or 5% or more in an unlisted land entity; and (2) the monetary threshold is met	\$0 where the entity holds: - national security land; or - 10% or more of its assets in the form of residential land, vacant commercial land and/or mining or production tenements \$281 million (or \$61million for sensitive land) where the entity holds less than 10% of its assets in the form of residential land, vacant commercial land and/or mining or production tenements

## 5. Fees

Consideration for the action			Applicable fee	
Residential land	Agricultural land	Commercial land, tenements, businesses and entities	Fee for single action	Fee for single Reviewable national security action
Less than \$75,000	Less than \$75,000	Less than \$75,000	\$2,000	\$500
\$1 million or less	\$2 million or less	\$50 million or less	\$6,350	\$1,587.50
\$2 million or less	\$4 million or less	\$100 million or less	\$12,700	\$3,175
\$3 million or less	\$6 million or less	\$150 million or less	\$25,400	\$6,350
\$4 million or less	\$8 million or less	\$200 million or less	\$38,100	\$9,525
\$5 million or less	\$10 million or less	\$250 million or less	\$50,800	\$12,700
...	...	...	...	...
Over \$40 million	Over \$80 million	Over \$2 billion	\$503,000 maximum fee	\$125,750 maximum fee

## 6. Land and water register

A foreign person who has invested in the following must register their **acquisition, disposal or change in status** on the Land and water register:

- Australian residential real estate - your acquisition must be recorded within 30 days of settlement;
- Australian agricultural land - your initial acquisition must be recorded with us within 30 days of the date of purchase and any further events must also be recorded with us within 30 days of the event;
- Interests in registrable water entitlements and contractual water rights, and certain changes in those interests. You must register no later than 30 days after the end of the financial year in which the event occurred

Change in status includes:

- Becoming or ceasing to be foreign person;
- Becoming or ceasing to be either agricultural land or residential real estate

No cost involved in registering.

The form to register is: <https://www.ato.gov.au/General/Foreign-investment-in-Australia/Land-and-water-register-and-instructions/>

## 7. Notification requirement

A person will be required to notify the registrar of the occurrence of any of various events, within 30 days after the event occurs, including:

- the person is a foreign person who acquires or ceases to hold an interest (other than an equitable interest) in Australian land or exploration tenement (in each case irrespective of whether FIRB approval was required for the acquisition of the interest);
- the person is a foreign person who acquires or ceases to hold an interest in an Australian water entitlement;
- the person is a foreign person who takes an action in relation to an entity or business where the action is: a notifiable action, a notifiable national security action, a significant action that has been notified to or called in for review by the Treasurer, or a reviewable national security action that has been notified to or called in for review by the Treasurer;
- the person is a foreign person of the type described above and ceases to be a foreign person;
- the person becomes a foreign person while holding an interest of the type, or resulting from an action of the type, described above; and
- any change of five percentage points or more in a previously disclosed interest in an Australian entity or business.

No cost involved in notifying.

The form to notify is: <https://firb.gov.au/compliance-reporting/notification-actions-form>