



7 WAYS AUSTRALIA'S NEW FOREIGN INVESTMENT LAWS IMPACT JAPANESE INVESTORS

The Australian Government has introduced wide ranging reforms to Australia's foreign investment framework which took effect on **1 December 2015**. In this update, we look at 7 ways the new framework affects Japanese investors¹

1. APPLICATION FEES NOW APPLY

For most application types, Japanese investors must now pay an application fee between **A\$10,000** and **A\$100,000**. The fee varies by sector, land usage and proposed investment size.

Fees are payable when making an application to the Australian Foreign Investment Review Board (**FIRB**) and are **not refundable**, although the fees do not increase if the review, for example, is prolonged or requires considerable input from FIRB. If multiple investment categories apply to a proposed investment, the higher of the fees for each of those categories is payable.

Worked examples of fees payable for different categories of investment can be found on the FIRB website.

2. AGRICULTURAL LAND AND AGRIBUSINESSES – STRICTER NOTIFICATION REQUIREMENTS APPLY

Japanese investors are now required to notify FIRB of proposed investments in "agricultural land" if after completing a proposed investment the **cumulative** value of all that investor's agricultural land exceeds **A\$15 million** (indexed annually). "Agricultural land" is land in Australia that is, or that could reasonably be, used for a primary production business.

Japanese investors must now also notify FIRB of proposed investments in "agribusiness" where the value of the investment will exceed **A\$55 million** (indexed annually).

"Agribusiness" is a new concept that includes primary production businesses (namely agriculture, forestry and fishery businesses) and some first stage downstream manufacturing businesses including the processing of meat, poultry, seafood, and fruit and vegetables, and the manufacturing of dairy products, sugar, grain, and oil and fats.

An important threshold to note in this context is that an Australian business or entity will be considered an agribusiness if more than 25% of the total assets, revenue or profits (as applicable) of the business or entity are used for or derived from carrying on an agribusiness.

3. EARLY ENGAGEMENT WITH FIRB IS INCREASINGLY IMPORTANT

Japanese investors should engage with FIRB prior to lodging a formal application for large scale investments, particularly in the food and agricultural sectors. Early consultation with FIRB can assist investors to understand both national interest concerns FIRB may hold about a particular proposal and conditions that might be imposed on the proposal should it be approved, and enable those investors to take steps to address them at the outset.

If a proposed investment is subject to a competitive sale process, an investor that does not actively engage with FIRB early in the sale process may be placed at a competitive disadvantage to bidders who open a dialogue with FIRB from the outset or those who may not require foreign investment approval at all.

4. INVESTORS WILL NEED TO DEAL WITH GREATER COMPLEXITY

One of the aims of the reforms to Australia's 40 year old foreign investment framework is to simplify the legal structure and minimise uncertainty around how the framework applies.

Unfortunately, although the foreign investment framework is now **clearer**, it is also **more complex**. Australia now has **22** different foreign investment screening thresholds and categories, which vary depending on the value and type of investment and the nationality of the investor; and 33 different levels and categories of application fees, ranging from **A\$5,000** to **A\$100,000** (although the minimum application fee payable by Japanese investors for most types of applications is **A\$10,000**).

¹ In this update, "Japanese investor" refers to a Japanese business that is not a "foreign government investor" – a non-Australian government or an entity in which a non-Australian government holds an interest above certain thresholds. Foreign government investors have additional notification obligations under the framework.



5. AUSTRALIAN SUBSIDIARIES OF JAPANESE INVESTORS ARE STILL SUBJECT TO STRICTER NOTIFICATION THRESHOLDS

Changes to the framework to reflect the 2014 Japan Australia Economic Partnership Agreement (commonly known as "JAPEA") have resulted in an anomaly which means that, in general:

- investments that are not sensitive sector, media sector, agribusiness or land related investments by an investor incorporated or organised in Japan need only be notified if the proposed investment value exceeds **A\$1,094 million** (indexed annually); however
- the same investment by a wholly owned Australian subsidiary of an investor incorporated or organised in Japan must be notified if the proposed investment value exceeds **A\$252 million** (indexed annually), because the entity making the investment is incorporated in Australia and is not "constituted or organised under a law of Japan".

This anomaly existed prior to 1 December 2015 but was not rectified in the recent reforms. Japanese investors should be aware of the different thresholds when structuring a potential investment in Australia.

6. ALL INTERESTS IN AGRICULTURAL LAND MUST BE REGISTERED

The Australian Taxation Office (ATO) has been given responsibility for administering certain aspects of foreign investment regulation, including maintenance of the agricultural land register. Accordingly, all Japanese investors holding existing or new

interests in agricultural land must register those interests with the ATO, even if the original acquisition itself did not require approval from FIRB.

All existing holdings needed to be registered with the ATO by **31 December 2015** and any new interests or changes to holdings on or after 1 December 2015 must be registered **within 30 days**. Administrative penalties under existing Australian taxation law will apply for any failure to register from **1 December 2015**.

Anonymous statistical information held on the register will be publically accessible from the first half of 2016. Information on the register identifying each investor and their interests held will not be publically accessible but may be disclosed to Ministers responsible for agriculture, industry policy, investment promotion, taxation policy and foreign investment in Australia.

It is also contemplated that a new register for ownership of water entitlements by foreign investors will be introduced in 2016.

7. HARSHER PENALTIES APPLY FOR NONCOMPLIANCE

Increased penalties apply to investors who contravene the foreign investment framework. Significantly, the penalties extend to company officers and third parties who knowingly assist in contraventions. Maximum criminal penalties of **A\$135,000** and/or 3 years imprisonment for individuals and **A\$675,000** for companies apply.

NEXT STEPS

If you would like further information or to discuss the possible implications of the reforms for your business, please contact us.

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