Australian Government

Foreign Investment Reforms Factsheet: Legislative overview

The reforms to strengthen the foreign investment framework have been implemented through a package of legislation that includes the:

- **Foreign Acquisitions and Takeovers Amendment Act 2015**
  - This Act amends the *Foreign Acquisitions and Takeovers Act 1975* to facilitate Australian Taxation Office (ATO) administration of residential real estate and provides new penalties, application fees and lower agricultural thresholds. It has also modernised and simplified the Act's operation, and has included consequential amendments, primarily related to information sharing.
- **Foreign Acquisitions and Takeovers Fee Imposition Act 2015**
  - This Act is required because section 55 of the Constitution requires that legislation imposing tax deal only with imposing tax (application fees are a tax).
- **Register of Foreign Ownership of Agricultural Land Act 2015**
  - This Act has established the ATO administered agricultural land register.
- **Foreign Acquisitions and Takeovers Regulation 2015 and the Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015**
  - The Regulations provide various exemptions, fees, monetary thresholds and key provisions such as the definition of agribusiness, definitions and rules around foreign government investors and the carve outs for FTA partner countries.

Overview of the Foreign Acquisitions and Takeovers Amendment Act 2015

Part 1 – Preliminary

- All substantive provisions in the existing Act has been repealed (although many of the key definitions and concepts have been carried over to the new Act).

Parts 2, 3 and 4 – Notification requirements, the Treasurer's powers and exemption certificates

- The Act imposes a range of obligations on 'foreign persons'. In broad terms, the following persons may fall within the definition of a foreign person:
  - an individual not ordinarily resident in Australia;
  - a corporation or a trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest with associates (that is, an interest of at least 20 per cent in the corporation or trust);
  - a corporation or a trustee of a trust in which two or more persons, each of whom is either an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest with associates (that is, an interest of at least 40 per cent in the corporation); or
  - a foreign government.

- The Act enables the Treasurer to make a broad range of orders in relation to a 'significant action' that a person is proposing to take or has already taken. Broadly, a significant action is an action to acquire interests in securities, assets or land, or otherwise take action in relation to corporations and unit trusts. An action will generally only be a significant action if it meets the applicable percentage interest and monetary thresholds (if such thresholds apply to the action) and the action results in either a change in control involving a foreign person or the action is taken by a foreign person.
  - When the Treasurer is notified that a person is proposing to take a significant action, the Treasurer may:
    - : decide to not object;
    - : allow the action to proceed provided the person complies with one or more conditions; or
    - : decide that taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.
  - If the significant action has already been taken which the Treasurer is satisfied is contrary to the national interest, the Treasurer may make an order, known as a disposal order, which unwinds the action. The Act allows the Treasurer to impose legally enforceable conditions in such circumstances as an alternative to a disposal order (the previous Act did not allow for this).
- A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action (that is, only certain significant actions are also notifiable actions). If a foreign person is given a no objection notification in relation to the significant action, the Treasurer will not be able to subsequently make a disposal order if the action is implemented as expected.
  - In broad terms, a notifiable action is a proposed action:
    - : to acquire a direct interest in an agribusiness;
    - : to acquire substantial interests in Australian entities; or
    - : to acquire an interest in Australian land.
  - Generally, the action is only notifiable if the entity, business or land meets the threshold test (provided in the Regulations). Foreign government and media investments will also be notifiable actions.
  - Actions to acquire interests in Australian land that are specified in an exemption certificate are generally not notifiable actions. An exemption certificate is a certificate given by the Treasurer that specifies an interest is not a significant action or notifiable action (e.g. advanced-off-the-plan certificates, annual programs and the new temporary resident certificate to bid at auctions for one established dwelling).
- A foreign person must not enter into the agreement for a specified period unless given a no objection notice. The Act defines this decision period to be 30 days from the day the Treasurer receives a notice from a person stating that a significant action is proposed to be taken.

Part 5 – Offences and civil penalties

- A person may commit an offence or contravene a civil penalty provision if the person:
  - fails to notify the Treasurer before taking a notifiable action;
  - if a foreign person notifies, they undertake a significant action prior to the end of applicable time limit (for example, prior to receiving a no objections notification);
  - contravenes an order made by the Treasurer which prohibits a proposed significant action, an interim order or a disposal order; or
  - contravenes a condition in a no objection notification or an exemption certificate.
- A foreign person who fails to comply with the obligations imposed by this Act in relation to residential land may also be liable to an infringement notice.

Part 6 – Fees

- The Act includes supporting provisions that facilitate the imposition of fees through the Foreign Acquisitions and Takeovers Fee Imposition Act 2015.
- Fees will generally be payable by any person who makes an application under the Act. The Treasurer may waive or remit the whole or part of a fee if the Treasurer is satisfied that it is not contrary to the national interest to waive or remit the fee. Notices and applications are not considered given or made until the applicable fee has been paid or the fee has been waived or remitted.

Parts 7 – Confidentiality of information

- Much of the information needed to assess whether a significant action or a notifiable action is contrary to the national interest is commercial in confidence or private information. The Act makes it an offence for a person to use or disclose information for an unauthorised purpose.
- The Act also provides a legislative basis for inter government consultations on cases, which previously relied on applicant consent.

Part 8 (Miscellaneous), Transitional Provisions and Consequential Amendments

- The Act allows the Treasurer to delegate his powers to Treasury and the ATO and provides wide-ranging regulation making powers. It also contains transitional provisions to deal with cases that straddle 1 December 2015.
- The Act also makes consequential amendments to other Commonwealth legislation (e.g. *Taxation Administration Act 1953*) to facilitate data-matching by the ATO.