

Chapter 3

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

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Introduction

This chapter provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA) as at December 2010. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for the Government's foreign investment policy. A copy of the FATA, the Regulations and a summary of the policy are available on the FIRB website at www.firb.gov.au.

The FATA empowers the Treasurer to examine proposals by foreign persons to:

- acquire, or to increase, a substantial interest¹¹ in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds;¹² or
- acquire an interest in Australian urban land.¹³

The FATA does not provide the Treasurer with a power to 'approve' investment proposals. Rather, it empowers the Treasurer to prohibit a proposal that he decides would be contrary to the national interest (sections 18, 19, 20, 21 and 21A), or to raise no objections subject to conditions considered necessary to remove national interest concerns (section 25). It also permits the Treasurer to make orders for foreign persons to divest shares, assets or interests in urban land where the acquisition is decided to be contrary to the national interest.

11 A substantial interest is defined by the FATA as where a person, alone or together with any associate(s), is in a position to control not less than 15 per cent of the voting power or potential voting power, or holds interests in not less than 15 per cent of the issued shares or rights to issued shares, of a corporation.

An aggregate substantial interest is where two or more persons together with any associate(s), are in a position to control not less than 40 per cent of the voting power or potential voting power, or hold interests in not less than 40 per cent of the issued shares or rights to issued shares, of a corporation.

12 The thresholds were increased in September 2009 following a review of all thresholds. US investors are subject to different thresholds. The thresholds are indexed annually.

13 Australian urban land is defined as any land within Australia on which a primary production business is not being conducted. Consequently, this definition encompasses all land in Australia that is not being used for primary production, regardless of whether it is in an urban area.

The national interest, and hence what might be contrary to it, is not defined in the FATA. The FATA confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Government's foreign investment policy statements set out guidelines on national interest matters in relation to foreign acquisitions. Ordinarily a proposal that does not meet the requirements set out in the policy would be regarded as being, *prima facie*, contrary to the national interest and hence subject to rejection.

The FATA requires the prior notification of certain proposals, namely where a foreign person proposes to acquire a substantial shareholding in a prescribed Australian corporation (section 26) or certain interests in Australian urban land (section 26A).

2010 legislative amendments

The FATA was amended in 2010 to ensure that the Treasurer has the capacity to examine all substantial investment proposals that involve complex financing arrangements that could potentially raise national interest concerns. The amendments received Royal Assent on 12 February 2010.

The use of innovative and increasingly complex financing arrangements has been a growing feature of investment activity over recent years. While these types of investment arrangements may have a solid commercial basis, they can have the effect of delivering influence or control over Australian companies through a variety of ways that were not envisaged when the FATA was formulated.

The Amendments clarify the operation of the FATA by requiring foreign investors explicitly to notify the Treasurer where there is a possibility that the type of arrangement being used will deliver influence or control over an Australian company, either currently or at some time in the future. The Amendments clarify the definition of substantial interest by expanding the definition of voting power so that it covers the number of votes that could be cast if it is assumed that a future right is exercised, and by clarifying the section of the Act dealing with interests in shares.

The Regulations were also amended to coincide with the amendments to the FATA. The Regulations ensure that Australian companies are not inadvertently treated as foreign companies under the FATA by virtue of the expanded definition of substantial interest.

The changes to the Act and the Regulations applied retrospectively from 12 February 2009. This is the date that the Treasurer announced the Amendments.

Notification

Section 26 makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase a substantial shareholding in a prescribed Australian corporation where the total assets exceed, or the transaction values it above, the thresholds set under the Regulations.

Section 26A makes it compulsory for a foreign person to notify the Treasurer of a proposal to acquire or increase an interest in Australian urban land, unless the acquisition is exempt under the Regulations.

Substantial penalties apply for non-compliance with the notification provisions of sections 26 and 26A. On conviction, a natural person may be subject to a fine not exceeding 500 penalty units (currently \$110 per unit) or imprisonment for a period not exceeding two years, or both. A corporation may be subject to a fine not exceeding 500 penalty units.

Section 25 applies where the Treasurer has received a notice from a person, including those notices that are required under sections 26 and 26A. It also provides an avenue for the notification of proposals falling within the scope of the FATA or the policy, but which are not subject to compulsory notification under the FATA. These include offshore acquisition of interests, acquisitions of business assets, acquisitions of shares in prescribed Australian corporations that are less than a substantial shareholding, and investments by a sovereign government or a government-related entity.

Formal notification of a proposal under sections 25, 26 or 26A must be made in accordance with the forms prescribed in the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* (forms available at www.firb.gov.au). Receipt of a valid notice activates the commencement of the 30-day statutory examination period. If the Treasurer does not take action (under sections 18, 19, 20, 21A, 22 or 25) within this period, the power to prohibit the proposal or to impose conditions expires. A further period of 10 days is available to publish any order in the *Commonwealth of Australia Gazette* and to notify the parties. The 30-day examination period may be extended by up to a further 90 days by the issue of an Interim Order (section 22 and subsection 25(3)) which prohibits the proposal for that period.

The Treasurer's powers

The powers available to the Treasurer under the FATA in relation to foreign investment proposals are primarily contained in sections 18, 19, 20, 21, 21A and 25.

Section 18 deals with proposals involving the acquisition of shares in prescribed corporations which carry on an Australian business (unless the transaction values it, or its total assets are, below the thresholds). Where an acquisition would result in a foreign person acquiring a controlling interest, and the Treasurer concludes that this would be contrary to the national interest, it may be prohibited by the issue of an order (known as a Final Order). The Treasurer's powers under the section apply irrespective of whether the controlling interest is being acquired by a foreign person, or by an additional or different, foreign person(s).

Sections 19, 20 and 21 confer upon the Treasurer powers similar to section 18 but in respect of other types of acquisitions and arrangements. Section 19 deals with acquisitions of business assets, section 20 with arrangements relating to the

corporation's governance and operation such as board representation or alterations to constituent documents such as the articles of association, and section 21 with the leasing or hiring of assets, management agreements or profit sharing arrangements.

Section 21A deals with proposals to acquire interests in Australian urban land. It empowers the Treasurer to examine proposed acquisitions of interests in Australian urban land and make an order prohibiting those that he considers would be contrary to the national interest.

The FATA applies to acquisitions, or proposed acquisitions, of interests in 'Australian urban land' (see section 12A). Consequently, section 21A applies not only to direct purchases of Australian urban land, but also to interests in such land, for example mortgage, or certain leasehold interests. It also applies to the purchase of shares in companies and units in trusts (Australian urban land corporations and trust estates), where more than half of its assets are in the form of Australian urban land, and participation in profit sharing agreements in relation to land.

The Treasurer's powers in section 21A to take action against acquisitions of interests in Australian urban land are not limited to acquisitions of what the Treasurer considers to be a controlling interest as is the case in sections 18 to 21. Failure to notify an acquisition of an interest in Australian urban land is an offence under section 26A of the FATA, unless exempt under the Regulations.

Sections 18, 19, 20, 21 and 21A give the Treasurer the power to order the divestment or unwinding of an investment where the acquisition is subsequently found to have been contrary to the national interest.

Section 25 allows conditions to be applied which are considered necessary to remove national interest concerns that would otherwise arise. This power is available where the Treasurer can make an order under sections 18, 19, 20, 21 and 21A.

Foreign-to-foreign transactions

Transactions involving acquisitions by foreign persons of Australian businesses or assets that are already foreign-owned or controlled (referred to as 'foreign-to-foreign' transactions), are subject to the FATA. Such transactions are of two broad types: indirect acquisitions where a foreign company acquires another, or part of it, and in so doing also acquires an interest in its Australian business or assets (referred to as an 'offshore acquisition'); and direct acquisitions by a foreign person of an already foreign owned or controlled Australian business or assets.

For the FATA to apply to a foreign-to-foreign transaction, the Australian business or assets of the target company must be valued above the applicable thresholds set under the Regulations. These transactions are assessed against the policy applicable to the relevant sector of the economy. Such proposals normally do not raise issues that might make the transaction contrary to the national interest.

Prior approval for contractual arrangements

The FATA makes it an offence to acquire, or increase, a substantial shareholding or certain interests in Australian urban land without providing prior notification to the Treasurer (sections 26 and 26A). Consequently, parties proposing to enter into such transactions should ensure that the relevant agreements are conditional on foreign investment approval, or alternatively ensure they seek prior approval. This applies to situations where the acquirer intends to make an offer, tender or bid for shares or real estate. Entering an agreement that is not conditional may result in the acquisition of an interest that is in breach of the notification provisions of the FATA and also may expose the acquirer to possible prosecution and divestment action.

Foreign control

Under the FATA, a substantial interest in an Australian corporation is deemed to be a controlling interest unless the Treasurer is satisfied that the acquirer is not in a position to determine the policy of the corporation (see section 9). A variety of factors and considerations other than simply a person's share ownership may be relevant to the Treasurer's consideration of where ultimate control of a corporation lies. These factors are also relevant to sections 19, 20 and 21 which relate to control of business assets and arrangements relating to the directorate and governance of corporations. These factors and considerations include:

- voting rights attached to the various shareholdings and the rights of shareholders, including in relation to representation on the Board or controlling body;
- the distribution and composition of share holdings;
- that all rights over future shares and potential voting power are treated as having been exercised at the time the agreement is entered into, such as the issuing of convertible notes; and
- arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise a measure of control, including through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these or other factors is relevant would depend on the particular circumstances of each case. The determination of control is undertaken on a case-by-case basis as contemplated by the relevant provisions of the FATA.

Enforcement provisions

If the Treasurer raises no objections to a proposal subject to conditions and the parties do not comply with the conditions, they may commit an offence under subsection 25(1C) of the FATA. Failure to comply with an order made by the Treasurer constitutes an offence under section 30. The FATA empowers the Treasurer to make orders to prohibit schemes entered into for the purpose of avoiding its provisions

(section 38A). In addition, the provision of false or misleading information can constitute an offence under the *Crimes Act 1914* and Chapter 7 of the *Criminal Code Act 1995*.

Other aspects of foreign investment policy

Foreign investment in Australian residential real estate

It is the Government's policy that foreign investment in residential real estate should increase Australia's housing stock. All applications are considered in light of this overarching principle.

Residential real estate means all land and housing that is not commercial property or rural land. In that regard, vacant land that can be used for residential purposes, 'hobby farms' and 'rural residential' blocks are residential real estate.

Temporary Residents

Established (second-hand) dwellings

Temporary residents need to apply if they wish to buy an established dwelling. Only one established dwelling may be purchased by a temporary resident and it must be used as their residence in Australia. Such proposals are normally approved subject to conditions (such as, that the temporary resident sells the property when it ceases to be their residence).

Temporary residents cannot buy established dwellings as investment properties.

New dwellings

Temporary residents need to apply to buy new dwellings in Australia. Such proposals are normally approved without conditions.

Vacant land

Temporary residents need to apply to buy vacant land for residential development. These are normally approved subject to conditions (such as, that construction begins within 24 months).

All Other Foreign Persons

Established (second-hand) dwellings

Non-resident foreign persons cannot buy established dwellings as investment properties or as homes, except as below.

Companies that are foreign persons need to apply to buy established dwellings to house their Australian-based staff. Such proposals are normally approved subject to the company undertaking to sell or rent the property if it is expected to remain vacant for six months or more.

Non-resident foreign persons need to apply to buy established dwellings for redevelopment (that is, to demolish the existing dwelling and build new dwellings). Proposals for redevelopment are normally approved as long as the redevelopment increases Australia's housing stock (at least two dwellings built for the one demolished) or where it can be shown that the existing dwelling is derelict or uninhabitable. Approvals are usually subject to conditions.

New dwellings

Non-resident foreign persons need to apply to buy new dwellings in Australia. Such proposals are normally approved without conditions.

Vacant land

Non-resident foreign persons need to apply to buy vacant land for residential development. These are normally approved subject to conditions (such as, that construction begins within 24 months).

