

Appendix B:
Overview of the *Foreign
Acquisitions and Takeovers
Act 1975*

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Introduction

This appendix provides an overview of the main provisions of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) as at December 2012. The Act and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for Australia's Foreign Investment Policy (the Policy). A copy of the Act and the Regulations are available on the website at www.firb.gov.au.

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

- acquire, or to increase, a substantial interest¹ in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds; or
- acquire an interest in Australian urban land.²

The Act 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.

¹ A substantial interest is defined by the Act 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.

² 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 Act. The Act confers upon the Treasurer the power to decide in each case whether a particular proposal would be contrary to the national interest. The Policy provides guidance on national interest matters in relation to foreign acquisitions. Ordinarily a proposal that does not meet the requirements of the Policy would be regarded as being, *prima facie*, contrary to the national interest and hence subject to rejection.

The Act 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).

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 Act, but which are not subject to compulsory notification under the Act. These include offshore acquisition of interests and acquisitions of business assets.

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 from the day after receipt. 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 Act 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, and 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 can apply where control changes from Australian to a foreign person(s), as well as where control changes from one foreign person to another, or when an additional foreign person joins a controlling group.

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 Act 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 unit trusts (Australian urban land corporations and trust estates), where more than half of its assets are in the form of interests in 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 Act, 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 Act. Such transactions are of two broad types: indirect acquisitions where a foreign company acquires another foreign company 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 Act 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 Act 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 Act and also may expose the acquirer to possible prosecution and divestment action.

Foreign control

Under the Act, 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 shareholdings;

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- 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 Act.

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 Act. Failure to comply with an order made by the Treasurer constitutes an offence under section 30. The Act 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*.