

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 2006. The FATA and the *Foreign Acquisitions and Takeovers Regulations 1989* (the Regulations) provide legislative support for the Government's foreign investment policy (the policy). A copy of the FATA is at Appendix D, the Regulations at Appendix E and a summary of the policy at Appendix A.

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

- acquire, or to increase, a substantial shareholding¹ in, or acquire a controlling interest in the assets of, a prescribed Australian corporation valued above the relevant thresholds;² or
- acquire an interest in Australian urban land.³

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

1 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 centum of the voting power or holds interests in not less than 15 per centum of the 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 centum of the voting power or hold interests in not less than 40 per centum of the issued shares, of a corporation.

2 The thresholds were increased in late 2006 following a review arising from the Australia-United States Free Trade Agreement. US investors are subject to different thresholds which are indexed annually. For current thresholds see Appendix A.

3 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.

to divest shares, assets or interests in urban land where the acquisition is decided to be contrary to the national interest.

The national interest, and hence what might be contrary to it, is not defined in the FATA. Instead it 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 real estate and other industry sectors regarded as sensitive. 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 also 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 an interest 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 FATA or the policy, but which are not subject to compulsory notification under the FATA. These include offshore takeovers, acquisitions of business assets, acquisitions of shares in prescribed Australian corporations that are less than a substantial shareholding, the establishment of a new business involving an investment of \$10 million or more, 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 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 types: indirect acquisitions where a foreign company acquires another and in so doing also acquires its Australian business or assets 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.

Under the FATA, certain foreign-to-foreign transactions are subject to a higher monetary threshold of \$200 million and are referred to as an 'offshore takeover'. This threshold only applies to indirect foreign-to-foreign transactions that is, where an offshore company that conducts a business or holds assets in Australia is acquired by another foreign person and where the target's Australian business or assets represent less than 50 per cent of its total assets. If the Australian business or assets are valued at or above 50 per cent of total assets then the general \$100 million threshold applies. The general threshold also applies to foreign-to-foreign transactions where the Australian business or assets are to be acquired directly by the foreign person.

Prior approval for contractual arrangements

The FATA makes it an offence to acquire, or increase, a substantial shareholding or an interest 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). However, a variety of factors 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 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; 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 factors is relevant would depend on the particular circumstances of each case and therefore the determination of control is undertaken on a case-by-case basis.

Enforcement provisions

If the Treasurer raises no objections to a proposal subject to conditions and the parties do not comply with the conditions, the parties 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 portfolio shareholdings

Under the FATA, a substantial interest in a corporation is deemed to be a controlling interest unless the Treasurer is satisfied to the contrary.

An interest less than a substantial shareholding could be regarded as being a controlling shareholding under foreign investment policy. This is because it may still permit control of, or allow the holder to exert material influence over, the company. This is considered on a case by case basis. The considerations would include:

- A person with less than a substantial interest is able to exert a measure of control through representation on the board of the company and/or is able to influence its

policy or operations through other means, for example, the provision of technology, finance or marketing links. Such shareholdings may be taken into account in calculating the level of foreign ownership of the company. Other arrangements affecting control of the company may also come within the scope of the FATA.

- Foreign shareholdings (including portfolio shareholdings) aggregate to 40 per cent or more in a company or venture, which the FATA defines to be a controlling interest unless the Treasurer is satisfied to the contrary.
- More than half the assets of a company or trust are in the form of Australian urban land (that is, it is an Australian urban land corporation or trust estate), any proposed acquisition by foreign persons is subject to the FATA.

Foreign government investment in Australia

Special considerations can arise in respect of proposals by foreign governments or their agencies to invest in Australia. Where such investments are not subject to the FATA, the parties are still required under the policy to notify and seek approval of direct investments, irrespective of the size of the proposed investment.

Reflecting these additional issues, such investments are considered on a case by case basis having regard to principles publicly released by the Treasurer on 18 February 2008. In addition to the usual considerations, the investment is evaluated having regard to whether:

- an investor's operations are independent from the relevant foreign government;
- an investor is subject to and adheres to the law and observes common standards of business behaviour;
- an investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;
- an investment may impact on Australian Government revenue or other policies;
- an investment may impact on Australia's national security; and
- an investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community.

Taxation

Consistent with its general welcoming view on foreign investment, Australia's tax laws are designed to ensure they do not provide an unjustifiable disincentive to investing in Australia. The Government requires that commercial investments by foreign governments or government related agencies be structured in a manner that enables all normal taxes and charges to be levied, and avoids questions of sovereign immunity arising. However, this is necessarily balanced by tax measures to prevent cross-border tax avoidance and evasion and to ensure that financing arrangements associated with foreign investment reflect normal commercial practice.

Further information regarding the application of Australia's tax laws is available on the Australian Taxation Office website, which can be accessed at www.ato.gov.au.

