



INFRINGEMENT NOTICES FOR BREACHES OF RESIDENTIAL REAL ESTATE OBLIGATIONS

The *Foreign Acquisitions and Takeovers Act 1975* (Act) allows for less serious breaches of the foreign investment rules around residential real estate to be punishable by way of an infringement notice.

This Guidance Note addresses the breaches of the Act in relation to residential real estate that an infringement notice may be issued for. It also addresses:

- Where it is likely that an alleged contravention will be subject to an infringement notice (rather than the Treasurer seeking a civil penalty order from a relevant court for the contravention).
- Matters related to receiving an infringement notice, including payment of the amount owing under the notice.

CONTRAVENTIONS OF THE ACT THAT CAN BE SUBJECT TO AN INFRINGEMENT NOTICE

Alleged contraventions of the Act related to residential real estate, can be subject to an amount payable under an infringement notice. These contraventions can otherwise be the subject of a civil penalty ordered by a relevant court.

An infringement notice may be issued in the following circumstances:

- A foreign person fails to notify the Treasurer before acquiring an interest in residential land.
- A foreign person notifies the Treasurer that they are proposing to acquire an interest in residential land and the foreign person acquires the residential land before the earlier of:
 - (a) being informed of the Treasurer’s decision;
 - (b) 10 days after the decision period has ended; or
 - (c) if an interim order is made – the end of the period specified in the order.
- A foreign person who is a temporary resident holds an interest in more than one established dwelling at the same time without permission.
 - However, it is not a contravention if that person is making a genuine attempt to sell an interest or interests (so that they will only hold an interest in one established dwelling as a result of the sale) and they have only held an interest in more than one established dwelling for less than six months.
- A foreign person who is not a temporary resident acquires an interest in an established dwelling without approval.
- A person who has been given a ‘no objection notification’ or an exemption certificate that relates to residential land acquisition contravenes a condition of that notification or certificate.

CIRCUMSTANCES WHERE AN INFRINGEMENT NOTICE IS LIKELY TO BE GIVEN

It is intended that infringement notices can be given in situations where the person's alleged contravention of the Act is considered to be less serious in nature. It is considered that less serious contraventions would involve circumstances where:

- if the person had given notice of their intended actions, they would have been given a no objection notification; or
- the person has inadvertently breached the no objection notification conditions or exemption certificate conditions that had been placed on them, but would have received approval had they applied to have those conditions varied.

Where a person has notified the Commonwealth of an alleged contravention of a civil penalty provision of the Act before an infringement notice was issued for the conduct, a tier 1 infringement notice may be issued. Where a person has not notified the Commonwealth of the alleged contravention of a civil penalty provision of the Act before an infringement notice is issued, a tier 2 infringement notice may be issued. Tier 2 infringement notices incur higher penalties than tier 1 infringement notices. Refer to subsection 100(6) of the Act for the amount payable under a tier 1 and a tier 2 infringement notice.

Example 1

On 15 April 2016, Peter who is a foreign person (and is not a temporary resident) acquires a new unit without obtaining foreign investment approval.

If Peter had applied for approval (and paid the relevant application fee) it is likely that he would have been approved to purchase the property.

These circumstances involve a less serious contravention of the residential real estate rules and therefore an infringement notice could be appropriate.

If Peter subsequently realised that he should have sought approval for his intended purchase of the unit, and he immediately disclosed to the ATO that he had made the purchase it is likely that a tier 1 infringement notice would be applicable. The amount payable under a tier 1 infringement notice for an individual is 12 penalty units (currently \$2,520).

If, on the other hand, the ATO through its compliance activities identified that Peter had failed to notify his intended purchase of the unit and had not come forward to disclose the purchase, it is likely that a tier 2 infringement notice may be issued. The amount payable under a tier 2 infringement notice for an individual is 60 penalty units (currently \$12,600).

The Treasurer issues a no objection notification to Peter in relation to the purchase and Peter is required to pay a fee for the no objection notification that is equivalent to the relevant application fee Peter would have been required to pay if he had applied for approval before purchasing the unit.

Example 2

On 23 January 2016, Jennie who is a foreign person received approval for her proposed acquisition of a vacant block of land on which she sought to build two units.

A condition of the approval was that the units be completed within four years.

Because Jennie had experienced some planning and financial difficulties she did not complete the units until March 2020. Therefore, she has breached the condition.

If Jennie had applied for a variation two months before the end of the four year period for further time to complete the units, it is likely that she would have been granted this extension.

These circumstances involve a less serious contravention of the residential real estate obligations and, therefore, an infringement notice may be issued.

MATTERS ASSOCIATED WITH RECEIVING AN INFRINGEMENT NOTICE- INCLUDING PAYMENT

Where an infringement officer believes on reasonable grounds that a person has contravened the Act, the officer may give the person an infringement notice for the alleged contravention. An infringement notice may only be given within 12 months of the alleged contravention taking place.

An infringement notice will set out a number of matters including:

- brief details of the alleged contravention including the provision of the Act that was allegedly contravened;
- the name and contact details of the infringement officer issuing the notice;
- the amount payable and how that amount is to be paid;
- a statement that payment of the amount does not constitute an admission of guilt or liability; and
- a statement that if payment is made within 28 days of the notice being given that it precludes court proceedings (seeking a civil penalty order) being brought against the person for the alleged contravention.

If the person pays the amount payable by the due date, any liability for the contravention of the relevant provision is discharged and proceedings to seek a civil penalty order cannot be sought for the contravention (unless the notice is withdrawn and the amount paid is refunded to the person).

A person who receives an infringement notice may seek an extension of time to pay the amount and can also apply in writing to have the notice withdrawn.

Where the amount payable by a person under an infringement notice is not paid, the Treasurer can apply to a relevant court for a civil penalty order.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting 1800 050 377 from Australia or +61 2 6216 1111 from overseas.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.