



THIRD PARTY OBLIGATIONS

Third parties who knowingly assist another person to breach the civil or criminal penalty provisions of the *Foreign Acquisitions and Takeovers Act 1975* (Act) may be subject to penalties.

A third party includes those persons who might provide services to facilitate the transfer of interests such as stockbrokers, lawyers or solicitors, conveyancers, real estate agents and other advisors.

CIVIL AND CRIMINAL PENALTY PROVISIONS

The criminal and civil penalties for breaches of the Act may be imposed on third parties to whom liability is extended. The actions that may be in breach of the civil and criminal penalty provisions of the Act are:

- a foreign person takes a notifiable action and fails to give notice to the Treasurer before the action is taken (for example, a foreign person contracts to buy Australian residential land without notifying the Treasurer);
- a foreign person gives the required notice to the Treasurer, stating that a significant action is proposed to be taken and the person takes the action earlier than is allowed (for example, a foreign person notifies the Treasurer of an intention to purchase Australian residential land, but does not wait to purchase the land until the first to occur of:
 - (a) a no objection notification being provided to them;
 - (b) the period specified in an interim order (if issued) ending; or
 - (c) the day that is 10 days after the decision period has passed);
- a foreign person engages in conduct that breaches an order made by the Treasurer;
- a foreign person who is given a 'no objection notification' imposing conditions, or an exemption certificate imposing conditions, breaches one or more of the conditions;
- a foreign person who is a temporary resident holds an interest in more than one established dwelling at the same time (without satisfying one of the exceptions); or
- a foreign person who is not a temporary resident acquires an interest in an established dwelling (without satisfying one of the exceptions).

For more information, see Guidance Note 11.

THIRD PARTY LIABILITY

Civil penalty liability

The liability for third parties is established by Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014*.

A third party may be liable for a civil penalty if they knowingly assist another person to breach a civil penalty provision of the Act. A person must not:

- attempt to contravene a civil penalty provision of the Act;
- aid, abet, counsel or procure a contravention of a civil penalty provision of the Act;
- induce (by threats, promises or otherwise) a contravention of a civil penalty provision of the Act;
- be in any way, directly or indirectly, knowingly concerned in, or party to, a contravention of a civil penalty provision of the Act; or
- conspire with others to effect a contravention of a civil penalty provision of the Act.

Criminal penalty liability

The criminal liability of third parties is established by Division 11 of the *Criminal Code*. A third party may be liable for a criminal penalty if criminal responsibility is extended to them under Division 11. That division includes the laws about attempt, aiding and abetting, joint commission, commission by proxy, incitement and conspiracy.

PENALTY

If liability is extended to a person under these provisions, then they are taken to have committed the source contravention of the Act or committed the source offence. The maximum penalty a third party will be liable for is the same as if they had committed the primary contravention or offence.

A third party can be penalised regardless of whether a penalty is imposed on the foreign person for their conduct.

DEFENCES

The *Regulatory Powers (Standard Provisions) Act 2014*, the *Criminal Code* and other laws may provide defences or exceptions.

Mr Conveyancer has a busy practice and most of his clients are referred by real estate agents. Often he does not meet his clients face to face, he only corresponds with them via mail.

Example 1

Mr Conveyancer finds out two days before settlement on an existing dwelling that his client the purchaser, is a foreign person. Mr Conveyancer contacts his client to obtain details of the client's approval under the Act, however, the client tells Mr Conveyancer that they have not sought the Treasurer's approval for their proposed purchase. The foreign person advises they would like to proceed with settlement.

Mr Conveyancer proceeds with settlement, as he is confident the purchaser would have received approval from the Treasurer (i.e. a no objection notification) had they applied for it, as the purchaser is the holder of a temporary resident visa. Failure to give notice of a notifiable action is a breach of the Act (see sections 84 and 91).

As Mr Conveyancer may be a third party who knowingly participated in the purchase of Australian land by a foreign person in breach of the Act, he may be liable for a civil or criminal penalty.

Example 2

Mr Conveyancer finds out two days before settlement that the purchaser is a foreign person. Mr Conveyancer is made aware that his client has not sought and obtained approval from the Treasurer in relation to their proposed purchase.

Mr Conveyancer immediately tells his client that they cannot proceed with the purchase until they have approval from the Treasurer which they should have obtained before signing the contract. He immediately contacts the representatives for the vendor, explains the situation, and it is agreed that the settlement date will be extended to enable approval to be obtained.

The purchaser applies for approval, pays the relevant fee and receives approval (i.e. a no objection notification). Settlement is then completed. Mr Conveyancer has complied with the Act and is not liable to a penalty.

Example 3

Mr Conveyancer finds out two days after settlement that the purchaser is a foreign person. He did not know that his client was a foreign person as all correspondence was sent to a local address.

The client tells Mr Conveyancer that they did not know approval was required. Mr Conveyancer tells the client that they do require approval and they should have sought approval before signing the purchase contract. He tells them to go to the FIRB website and find out what is required or they may be subject to strict penalties.

As Mr Conveyancer did not know the purchaser was a foreign person until after the purchase was completed, he did not knowingly participate in the foreign person breaching the Act and so it is unlikely he would be subject to penalty.

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.