



SCHEMES AND ANTI-AVOIDANCE

The *Foreign Acquisitions and Takeovers Act 1975* (Act) gives the Treasurer powers in relation to persons involved in a scheme to avoid the application of the Act. This Guidance Note outlines the Treasurer's powers in relation to anti-avoidance.

WHAT IS A SCHEME?

Section 4 of the Act defines a scheme as an agreement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable by legal proceedings and any scheme, plan, proposal, action or course of action or conduct – unilateral or otherwise.

ORDERS

Under section 78 of the Act, the Treasurer can make an order to prohibit a proposed significant action or an order requiring disposal of certain interests if satisfied that one or more persons has entered into or carried out a scheme to avoid the application of the Act, and that the scheme has achieved, or would achieve that purpose.

If the Treasurer is satisfied that a person or persons are involved in anti-avoidance, the Treasurer can make:

- **Orders prohibiting proposed significant actions (section 67).** The Treasurer can make an order which prohibits a significant action which is proposed to be taken if the Treasurer is satisfied that taking the significant action would be contrary to the national interest and if the action has not already been taken. For example, if a foreign person is proposing to acquire interests in shares in a corporation and it is a significant action, the Treasurer could make an order prohibiting whole or part of the proposed acquisition.
- **Disposal orders (section 69).** If a significant action has been taken and the Treasurer considers that it is contrary to the national interest, the Treasurer may make an order directing the person to dispose of certain interests, or to refrain from doing specific acts. For example, if a person acquired shares in a corporation, the Treasurer may make an order directing that the shares be disposed of within a specified period.
 - In relation to orders to refrain from doing specific acts regarding agreements and constituent documents of an entity, an order may be made to restore control in the entity or business as it was before the significant action was taken, or to prevent the change in control of the entity or business.

The Treasurer can vary and revoke an order if satisfied that it is not contrary to the national interest. An order made by the Treasurer must be made in writing and registered on the *Federal Register of Legislation* within 10 days after it is made.

Orders made under subsection 67(3) (additional orders) or section 69 (disposal orders) commence on the day specified in the order that is at least 30 days after the order is registered. Other orders commence on the day the order is registered.

OFFENCES

A person may commit an offence or contravene a civil penalty provision if they contravene an order which prohibits a proposed significant action. They may also commit an offence if they fail to comply with a disposal order.

If a person does not comply with an order, the Treasurer can apply for an order from a court to achieve the purpose for which the Treasurer's order was made. For example, a court may require the person to comply with the disposal order.

ASSOCIATES

Under section 79 of the Act, the Treasurer can make an order specifying persons involved in avoidance to be taken as associates of each other. This order must specify a period during which the order is in force. This order is not registered on the *Federal Register of Legislation*. For further information, see Guidance Note 32.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting +61 2 6263 3795.

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.