

AUSTRALIA'S FOREIGN INVESTMENT OVERHAUL: A SNAPSHOT OF WHAT YOU NEED TO KNOW

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Legal Briefings

On 1 December 2015, a package of new foreign investment legislation commenced operation, representing the most significant reform of the Australian foreign investment legislative framework since it was introduced. We discuss the key changes.

SUMMARY

- On 1 December 2015, the package of new legislation bringing in significant changes to Australia's foreign investment framework commenced.
- The substantial interest threshold has been increased from 15% to 20% and reduced screening thresholds have been introduced in the agricultural sector.
- Fees will now be levied on foreign investment applications and increased criminal penalties and civil penalties have been introduced.
- Foreign government investors are now regulated under the legislation rather than through Australia's Foreign Investment Policy (as was the case previously).

On 1 December 2015, a package of new legislation bringing in significant changes to Australia's foreign investment framework commenced operation.

The substantive operative provisions of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**) were replaced¹ and a new set of regulations made.² To complement these changes, new legislation was also introduced to establish a register of foreign ownership of agricultural land operated by the Commissioner of Taxation³ and to impose fees on foreign investment applications.⁴

The changes represent the most significant reform of the foreign investment legislative framework since it was introduced. The stated purpose of the changes is to strengthen the integrity of Australia's foreign investment framework, ensuring Australia maintains a welcoming environment for foreign investment that is not contrary to Australia's national interest.

A brief overview of the key changes is set out below.

INCREASE OF THE SUBSTANTIAL INTEREST THRESHOLD

Foreign persons must generally get approval before acquiring a 'substantial interest' in an Australian entity that is valued above \$252 million.⁵

The substantial interest threshold for a single foreign person has been increased from 15% to 20%. This amendment aligns the substantial interest threshold with the takeovers regime under the *Corporations Act 2001* (Cth). The aggregate substantial interest threshold of 40% has been retained.

REGULATION OF FOREIGN GOVERNMENT INVESTORS

Investments by foreign government investors, which were previously only regulated under Australia's Foreign Investment Policy (**Policy**) (without a clear statutory basis), are now regulated by the Act and the regulations.

In line with the increase in the substantial interest threshold for a single foreign person, an entity will be a foreign government investor if a foreign government, separate government entity or other foreign government investor (together with its associates) holds an interest of 20% or more in the entity (compared to the previous 15% threshold under the Policy). The 40% interest threshold for foreign governments or separate government entities of more than one foreign country has been retained.

The Act now also provides that, with some exceptions, associates of a foreign government investor includes any other foreign government investor in relation to that country. This is a broader test than was previously applicable.

The types of investments (and the applicable thresholds) for which foreign government investors must seek approval are generally similar to those previously applicable, being the acquisition of a direct interest in an Australian entity or business (being generally 10% or the ability to influence, participate in or control), starting a new business or acquiring an interest in Australian land regardless of the value of the investment. However, there are now certain limited exemptions under the Act that apply to foreign government investors.

INVESTMENTS IN THE AGRICULTURAL SECTOR

The changes increase the scrutiny around private foreign investment proposals in the agricultural sector.⁶

Agribusiness

A \$55 million threshold (based on the value of the investment), indexed annually, was introduced for direct investments in an 'agribusiness' (being, generally, an acquisition of 10% or more in an agribusiness).⁷ An agribusiness is an entity or business where at least 25% of the assets or revenue of the entity or business is used in or derived from carrying on a business (wholly or partly) within certain classes of the Australian and New Zealand Standard Industrial Classification Codes, being certain primary production businesses and certain first stage downstream manufacturing businesses (including meat, poultry, seafood, dairy, fruit and vegetable processing and sugar, grain and oil and fat manufacturing).

Agricultural land

The threshold for review of foreign purchases of 'rural land', being land used wholly and exclusively for carrying on a business of primary production, was reduced from \$252 million to \$15 million with effect from 1 March 2015 under the Policy.⁸ This revised threshold is now contained in the Act and the concept of 'rural land' has been replaced with the broader concept of 'agricultural land', being land in Australia that is used, or that could reasonably be used, for a primary production business.

Agricultural land register

A register of foreign ownership of agricultural land which will be administered by the Commissioner of Taxation has been established and will include information about interests in Australian agricultural land held by foreign persons on or after 1 July 2015. Foreign persons (including foreign government entities) with interests in agricultural land or changes to holdings of interests in agricultural land are required to report those interests or changes, generally within 30 days.⁹

FEES

The new package of legislation provides for fees to be levied on foreign investment applications. The Treasurer is not required to take any action in relation to certain foreign investment applications before the applicable fee is paid. The Treasurer also has the power to waive the whole or part of a fee if satisfied that it is not contrary to the national interest.

The fees are indexed and are generally as follows:¹⁰

- \$5,000 for acquisition of an interest in residential land or agricultural land where the consideration is \$1 million or less (and if the consideration exceeds \$1 million, \$10,000 for each \$1 million, up to \$100,000),
- \$10,000 for acquisition of an interest in vacant commercial land, internal reorganisations and for a foreign government investor to start an Australian business, acquire an interest in a tenement or a 10% interest in a mining, production or exploration entity,
- \$25,000 for acquisitions of interests in (i) non-vacant commercial land, (ii) mining or production tenements or (iii) an Australian entity (including an agribusiness) where the consideration is \$1 billion or less,
- \$100,000 for acquisitions of interests in an Australian entity/business (including an agribusiness) where the consideration is more than \$1 billion.

PENALTIES

Previously, only divestment orders and criminal penalties applied in relation to breaches of the Act. Enforcing breaches under the criminal penalty framework was difficult as a result of the high burden of proof required. The amendments to the Act introduced civil penalties and increased the applicable criminal penalties.

Generally, the maximum criminal penalty is 750 penalty units for an individual (currently \$135,000) and the maximum civil penalty (other than for residential land) is 250 penalty units (currently \$45,000). In both cases, the amount is multiplied 5 times for a corporation.

Different civil penalties apply in relation to residential land, some of which may be calculated by reference to the market value of, or consideration for, the acquisition of the interest in residential land or the capital gain from disposing of the interest. In addition, infringement notices may be given with respect to civil penalty provisions that relate to residential land permitting action to be taken more efficiently and effectively.

The criminal penalties and civil penalties generally extend to any person who incites, procures or aids another person to commit an offence or contravene a civil penalty provision. The penalties also extend to officers of a corporation who authorise or permit the corporation to commit an offence or contravene a civil penalty provision.

RESIDENTIAL

In addition to the new fees and penalties noted above which apply in relation to residential real estate, the Treasurer has delegated his powers and functions relating to residential real estate to the Commissioner of Taxation, as is permitted by the Act. These measures are designed to enable stronger enforcement and better compliance with the rules in relation to residential real estate.

30 DAY DECISION PERIOD

The '30 day' decision period remains the same under the amended Act as it was previously, save that - an applicant may request that the Treasurer extend the period. In addition, the decision period will be extended by the amount of time it takes for an applicant to provide further information requested by the Treasurer.

Previously, if the Foreign Investment Review Board (**FIRB**) was unable to make a decision within the 30 day statutory time, it generally requested that applicants withdraw and resubmit their application. Under the Act, the onus will continue to remain on the applicant to request that the Treasurer extend the period for consideration of the application (rather than the onus being on FIRB to seek such an extension if it requires more time to consider the application).

CONCLUSION

The recent amendments do not fundamentally change the manner in which foreign investment into Australia is regulated, although the changes in relation to agriculture are potentially significant. However, the changes generally provide further certainty and clarity around the operation of the foreign investment framework, including by eliminating regulation (particularly of foreign government investors) solely through the Policy.

The new penalties imposed may also promote greater compliance with the framework, particularly in the residential sector.

This article was written by [Tony Damian](#), Partner and Malika Chandrasegaran, Senior Associate, Sydney.

End notes

1. Effective from 1 December 2015, the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) repealed and replaced the operative provisions of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).
2. *The Foreign Acquisitions and Takeovers Regulation 2015* (Cth) commenced on 1 December 2015. The former regulation, the *Foreign Acquisitions and Takeovers Regulations 1989* (Cth) was repealed by the *Foreign Acquisitions and Takeovers Amendment Regulation 2015* (Cth).
3. See the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth).
4. See the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* (Cth).
5. Different thresholds apply in relation to certain types of entities, for example, an entity which is an agribusiness. In addition, consistent with Australia's free trade agreement commitments, a \$1,094 million threshold currently generally applies to investors from Chile, Japan, Korea, New Zealand and the United States (save in respect of sensitive businesses).
6. Regulation of foreign government investments in agribusinesses and agricultural land is covered separately under the specific rules applying to foreign government investors.
7. Consistent with Australia's free trade agreement commitments, the lower \$55 million threshold in relation to 'significant actions' will not apply to investors from the United States, New Zealand and Chile (the general \$1,094 million threshold applies).
8. Consistent with Australia's free trade agreement commitments, the cumulative \$15 million threshold generally does not apply to investors from the United States, New Zealand and Chile (the general \$1,094 million threshold applies) and investors from Singapore and Thailand (a \$50 million threshold applies in relation to land used wholly and exclusively for a primary production business).
9. The Government has also agreed to establish a register of all foreign investment in water by 1 December 2016.
10. The fees are subject to the de minimis rule that, generally, where the fee would be more than 25% of the consideration for the proposed acquisition, the fee is \$1000.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



TONY DAMIAN
PARTNER, SYDNEY

+61 2 9225 5784
Tony.Damian@hsf.com

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