

LegalTalk Alert

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PRICEWATERHOUSECOOPERS 



Corporate & Commercial Alert

Amendments to the Foreign Acquisitions and Takeovers Act

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On 12 February 2010, the Foreign Acquisitions and Takeovers Amendment Act 2010 received Royal Assent. This Act amends the Foreign Acquisitions and Takeovers Act 1975 (FATA) and expands Australia's foreign investment regime to cover foreign investments that have the potential, whether now or in the future, to provide some measure of influence or control over the businesses or assets of Australian companies.

Under the FATA, the Treasurer must be notified when a foreign person, either alone or together with its associates, proposes to acquire a substantial interest in an Australian company and the acquisition would exceed the applicable monetary thresholds.

Under the old law, a person was taken to hold a substantial interest if that person, alone or together with any associates, held at least 15 per cent or more of the:

- voting power in an Australian company, or
- interests in the issued shares in an Australian company.

Under the amended law, a person is taken to hold a substantial interest if that person, alone or together with any associates, holds at least 15 per cent or more of the:

- voting power in an Australian company
- potential voting power in an Australian company
- interests in the issued shares in an Australian company, or
- rights to the issued shares in an Australian company.

The term 'interest in a share' has also been clarified under the amended law to make it clear that a right to a share includes a right to acquire a share or have a share transferred under an instrument, agreement or arrangement, whether that right is exercisable now or in the future and whether or not such right is subject to the satisfaction of any conditions.

These amendments ensure that proposals by foreign investors involving financing arrangements such as convertible notes, special warrants or other instruments which involve an element of control or influence over Australian companies will need to be notified to the Treasurer.

Application of new rules

These amendments apply from 12 February 2009, being the date of the Treasurer's original announcement. Due to the retrospective nature of these amendments, transitional arrangements apply in relation to the transitional period from 12 February 2009 to the date of Royal Assent to ensure that foreign investors are not adversely affected.

Under the transitional arrangements, foreign investors have **30 days** from the date of Royal Assent to notify the Treasurer if, during the transitional period, they entered into a transaction of the type covered by the amendments and have not already provided such notification to the Treasurer. While the Treasurer will still have the power to impose conditions upon transactions notified within this 30-day period, criminal penalties will only apply where any conditions are not complied with or if foreign investors fail to notify the Treasurer within this 30-day period.

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