
Shake up of Australia's Foreign Investment Laws – Draft Bills Released

31 August 2015

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In brief

On 20 August 2015, the Federal Treasurer introduced three Bills to Parliament as part of the Government's reform of foreign investment laws first announced earlier this year. The three Bills include:

- *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015*
- *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015*
- *Register of Foreign Ownership of Agricultural Land Bill 2015*

The Bills are intended to modernise and strengthen the current rules around foreign investment into Australia and are planned to take effect from 1 December 2015. The announcement of the Bills follows the recent media and political focus on Australia's foreign investment laws, particularly in connection with the increase in property prices in our major cities over the last couple of years. In this LegalTalk Alert we look at some of the key changes proposed by the Bills.

In detail

Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (FATL Bill)

The FATL Bill represents a major overhaul of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (Act), which has not been significantly amended since its original enactment. The FATL Bill will introduce stricter provisions and higher penalties for contraventions of the Act, enable the transfer of responsibility for regulating foreign investment in residential real estate to the Australian Taxation Office (ATO) and lower the screening threshold for investments in Australian agriculture, among other key changes.

Lower threshold for acquiring a "substantial interest"

Under the existing Act, foreign persons are generally required to obtain prior approval from the Foreign Investment Review Board (FIRB) if they intend to acquire a "substantial interest" in a corporation or trust and the relevant monetary thresholds are reached. Currently, a substantial interest is an interest of 15 per cent or more in a corporation or trust. Under the FATL Bill, the substantial interest threshold will be increased to 20 per cent. This means that some acquisitions

previously caught by the Act will no longer require FIRB approval. According to the Government's accompanying press release, this change is intended to align with other corporate approval thresholds, in particular, the takeover rule under the *Corporations Act 2001* (Cth) (Corporations Act). Subject to certain exceptions, the takeover rule under the Corporations Act provides that a takeover offer must be made once a person holds more than 20 per cent of the voting shares in a listed company, or an unlisted company with more than 50 members.

Investments in Agricultural Land

Under the existing Act, a foreign person is required to notify the Treasurer of a proposal to acquire or increase an interest in "Australian urban land", unless an exemption applies. The Treasurer can make an order prohibiting the acquisition if it is against national interests or to impose conditions.

The FATL Bill introduces a new definition of "Australian land" that replaces the "Australian urban land" concept. The definition of Australian land includes agricultural land as well as commercial land, residential land or a mining or production tenement. Importantly, agricultural land is defined as land in Australia that is used, or that could reasonably be used, for a primary production business. It will be sufficient if the land is only partially used, or could be partially used, for primary production.

The effect of this will mean that the current requirements applying to Australian urban land will apply to all land in Australia (including agricultural land) unless below the threshold, exempt, or specific rules apply. This change should simplify the operation of some of the existing provisions of the Act as it will remove the existing distinction between urban and rural land. Specific rules already exist for proposed acquisitions of agricultural land by non-government investors which is subject to a screening threshold of \$15 million calculated on a cumulative basis.

New Screening Threshold for Investment in Agribusiness

The FATL Bill includes a new \$55 million screening threshold for non-government investments in agribusiness from 1 December 2015. The FATL Bill does not specifically define agribusiness, but rather provides that the term has the meaning given under the Regulations to the Act. The Explanatory Memorandum states that the definition of agribusiness remains subject to consultation but is intended to capture certain downstream activities with links to primary production and will include, among other things, agriculture, forestry and food product manufacturing. All proposed direct investments by foreign government investors, including in agriculture, will continue to be reviewed regardless of value.

Increased Penalties

The FATL Bill provides for new and increased penalties for contraventions of the foreign investment rules. Currently, only divestment orders and criminal penalties apply for breaches of the Act and no civil penalty regime applies.

Criminal penalties for individuals and companies will be increased to \$135,000 and \$675,000 respectively. New civil penalties will apply for certain offences including fines of up to \$45,000 for individuals and \$225,000 for companies. In addition, foreign investors who breach rules relating to real estate may face civil penalties that are calculated with reference to a percentage of the purchase price, market value or capital gain made on divestment of the property.

The FATL Bill also includes a new civil penalty regime for third parties who knowingly assist in a breach for which the penalty will be equal to the penalty for the primary offence. This might catch, for example, real estate agents or advisers acting on a transaction if they knowingly facilitated the breach. The fact that a civil penalty regime now exists for third party conduct means a lower burden

of proof applies. This may lead to more prosecutions against third parties who facilitate breaches of the Act.

For less serious breaches of the residential real estate rules, an infringement officer will have the power to issue an infringement notice if the officer believes on reasonable grounds that the person has contravened a civil penalty provision relating to land.

Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 (Imposition Bill)

The Imposition Bill introduces fees on all foreign investment applications. Currently FIRB does not impose any such fees. The change is intended to shift the cost of reviewing FIRB applications from taxpayers onto foreign investors and provide for additional resources for Treasury and the ATO. The Treasurer will have the power to waive the whole or part of a fee provided that it is not contrary to national interests.

Fees will vary depending upon the type and value of the investment and will start at \$5,000 for residential and agricultural properties valued at \$1 million or less. For business or agricultural investments valued at more than \$1 billion, fees will be \$100,000. Fees will be indexed on 1 July each year based on CPI.

Register of Foreign Ownership of Agricultural Land Bill 2015 (Register Bill)

The Register Bill provides the legislative framework for the Agricultural Land Register which has already been set up by the ATO and is referred to in FIRB's latest Foreign Investment Policy issued in June 2015. The Register Bill formally establishes the register of foreign ownership of agricultural land operated by the ATO. As noted above, agricultural land is defined as land in Australia that is used, or that could reasonably be used, for a primary production business. The ATO will be required to publish the statistical part of the Register on a website and provide regular reports to the responsible Minister. Broad ranging investigatory powers will be granted to the ATO to ensure compliance with the legislation.

Foreign persons with interests in agricultural land or changes to holdings of interests in agricultural land (as well as agricultural landholders and leaseholders whose foreign person status changes) will be required to report those interests or changes to the ATO. Notifications generally need to be made to the ATO within 30 days. The registration obligations apply to acquisitions on or after 1 July 2015.

The takeaway

The Bills have been referred to the Senate Economics Legislation Committee for report on the provisions by 12 October 2015, before going back to Parliament. The public may make submissions to the Committee until 18 September 2015. Subject to any further amendments following the consultation process, the Bills are intended to come into force on 1 December 2015.

Any foreign person, including foreign government investors, that may be considering any investment (whether direct or indirect) in Australia should be aware of the proposed new rules and take appropriate action.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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