
Australian foreign investment reform

6 May 2015

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In brief

The Australian Government has announced reforms to enhance the integrity of Australia's foreign investment review and compliance processes, following the Treasury consultation earlier in the year. The reforms include the imposition of significant fees for investors proposing to enter into transactions, an enhanced penalty and enforcement regime and clarification of definitions relating to agricultural land and enterprises. Legislation will be introduced to Parliament in time for a 1 December 2015 commencement.

Background

Foreign investment has played an important role in the development of the Australian economy and has been supported by successive Australian governments. Foreign investment is regulated in Australia through a screening process established under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**), associated legislation and policy, which is administered by the Foreign Investment Review Board (**FIRB**) and its secretariat within Treasury.

There has been growing community concern about the role of foreign investment in exacerbating housing affordability problems in Australian cities, as well as a perceived loss of control of rural lands. These issues were raised during the 2013 election and explored by the House of Representatives Standing Committee on Economics (**House Committee**) in 2014.

In light of the recommendations of the House Committee, the Treasury undertook a consultation process in early 2015, releasing the '*Strengthening Australia's Foreign Investment Framework*' discussion paper (**Discussion Paper**). The Discussion Paper included a range of proposals aimed at tightening the administration and compliance of the foreign investment review process and received over 192 submissions in response.

The Prime Minister and Treasurer announced on 2 May a package of measures to be introduced reflecting, in large part, the key proposals in the Discussion Paper. It is expected that legislation will be introduced into Parliament to amend the Act in the last quarter of the year, with a view to most of the new provisions commencing on 1 December.

Further to the announcement made by the Prime Minister and Treasurer, FIRB has announced that any foreign investors who voluntarily disclose possible breaches of foreign investment rules for residential real estate during the period from 2 May 2015 to 30 November 2015 are expected to receive more lenient treatment.

In detail

Key changes

The key changes that have been announced were foreshadowed in the Discussion Paper and include:

1. **Higher criminal penalties** – the maximum criminal penalties available under the Act will increase:

	Existing Criminal Penalty	New Criminal Penalty
Individual	500 penalty units (\$85,000) or 2 years imprisonment	750 penalty units (\$127,500) or 3 years imprisonment
Company	2,500 penalty units (\$425,000)	3,750 penalty units (\$637,500)

2. **Introduction of civil penalties** – civil penalties, akin to those existing in the *Corporations Act 2001 (Cth)* will be introduced to the Act, supplementing the existing criminal penalties, to provide a more graduated penalty regime to respond to different types and severity of non-compliance.

3. **Specific penalties for real estate** – in addition to criminal and civil penalties that may be available, a number of specific penalties will be introduced in relation to acquisitions of residential real estate:

- compensation orders to avoid investors profiting from non-compliance, requiring the disgorgement of gains made on sale, or a percentage of purchase price or market value;
- infringement notices for less serious breaches, which are tiered depending on whether the foreign investor voluntarily comes forward or is detected through compliance activities.

4. **Third party liability** – third parties who are involved in a breach of the Act may now be liable:

- those who 'knowingly assist' an investor to breach the Act may be subject to the same civil penalty that would apply to the primary offender – the ambit of this could conceivably include agents, service providers and professional advisors; existing criminal liability would remain;
- property developers who fail to market a development in Australia in breach of the relevant advanced off-the-plan certificate may be subject to both civil and criminal liability; and
- property developers who fail to comply with foreign investment reporting requirements may be subject to infringement notice or civil penalty.

5. **Notification fees** – Fees will now be charged for investors notifying FIRB of proposed transactions, in contrast to the historical position in which no fees have been charged. The amount of the fee will depend upon the type and value of the proposed investment and includes:

Sector	Nature of investment	Notification fee
Residential	acquisition of residential real estate	\$5,000 up to \$1 million in value, \$10,000 per million thereafter
	advanced off-the-plan certificate	\$25,000 plus fee per property sold based on above scale.
Business	acquisition of commercial business or assets in non-sensitive sector	\$25,000 up to \$1 billion in value, \$100,000 in excess of \$1 billion.
	acquisition of commercial property	\$25,000
	internal corporate reorganisation	\$10,000
Agriculture	acquisition of rural land	\$5,000 up to \$1 million in value, \$10,000 per million thereafter, capped at \$100,000

	acquisition of agribusiness	\$25,000 up to \$1 billion in value, \$100,000 thereafter
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6. **ATO to conduct compliance and enforcement functions** – the Australian Tax Office (rather than FIRB) will conduct audit, compliance and enforcement activities relating to acquisition of residential real estate, utilising the enhanced data and organisational capabilities of the ATO.
7. **Agribusiness** – a \$55 million screening threshold for investments in agribusiness will be introduced. The proposed definition of ‘agribusiness’ will include primary production businesses (generally those within Division A of the Australian and New Zealand Standard Industrial Classification Codes) and certain first stage downstream manufacturing businesses (including meat, poultry, seafood, dairy, fruit and vegetable processing and sugar, grain and oil and fat manufacturing).
8. **Agricultural land** – the screening threshold for acquisition of agricultural land was reduced to \$15 million from \$252 million through changes to the Australia’s Foreign Investment Policy. The Act will be updated to introduce a new definition of ‘agricultural land’ which goes beyond the existing definition of ‘rural land’ to include land used, or that could reasonably be used, for a primary production business.
9. **Foreign ownership land register** – an agricultural land register with information provided directly to the ATO will be established from 1 July 2015 and the Government is in negotiations with the states and territories to use their land titles data to expand the register to include all land by 1 July 2016.

What you need to do?

1. **Reporting prior breaches** – depending on individual circumstances, foreign investors who voluntarily disclose possible breaches of the Act relating to residential real estate before 30 November 2015 may be given twelve months to divest a property rather than a shorter period determined by the Treasurer and not be referred to the Commonwealth Director of Public Prosecutions for criminal prosecution.
2. **Ongoing compliance** – the reforms underline the need for foreign investors to be fully aware of their notification and clearance obligations. Investors need to factor the notification process into their timetables and seek legal advice early in the process of assessing an acquisition, to avoid delay.

Let's talk

Our legal experts advise foreign companies on all aspects of their investment in Australia, including:

- foreign investment notification requirements and clearance process
- corporate structuring and transaction design
- tax and duty issues in transaction design
- targeted due diligence in relation to target assets
- real property conveyance and leasing
- compliance with requirements in regulated industries
- employment, industrial relations and immigration.

We also bring to our clients the breadth of expertise throughout PwC, within Australia and throughout the world, notably including our corporate finance specialists and our real estate advisory team.

To find out more about how these issues might affect you, please contact your usual PwC advisor or:

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