OVERHAUL OF THE AUSTRALIAN FOREIGN INVESTMENT RULES: A SUMMARY

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If you are conducting a transaction with a foreign person or you are a foreign person investing in Australia, you need to be aware of changes to Australia's foreign investment regime.

With effect from 1 December 2015, Australia's foreign investment framework was significantly amended to modernise and simplify its provisions and strengthen its enforcement. In summary, the amendments:

- introduce application fees for foreign investment notifications and impose civil penalties and additional criminal penalties for breaking the foreign investment rules
- transfer the responsibility of regulating foreign investment in residential real estate to the Australian Taxation Office
- lower screening thresholds for investments in Australian agriculture
- establish a register of foreign ownership of land.

The main elements of the amended foreign investment rules are summarised below.

THE NEW RULES

The amended rules give the Treasurer the power to make a range of orders in respect of certain investments by foreign persons.

Foreign Persons

The amendments broaden the definition of 'foreign person' so that it now includes:

- an individual not ordinarily resident in Australia (which now captures Australian citizens residing overseas)
- a corporation or a trustee of a trust, if a foreign individual, corporation or government holds a substantial interest with associates (i.e. an interest of at least 20%) in that corporation or trust
- a corporation or a trustee of a trust, if two or more foreign individuals, corporations or governments hold an aggregate substantial interest (i.e. an interest of at least 40%) in that corporation or trust
- a foreign government or foreign government investor (see definition below).

The revised framework regulates certain acquisitions by foreign persons if the acquisition is a 'significant action' or a 'notifiable action' under the Act.

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Significant action

A significant action includes actions:

- to acquire interests in Australian securities, assets or land above applicable monetary thresholds (see below)
- to change the control of Australian corporations, unit trusts or businesses above applicable monetary thresholds
- by foreign government investors acquiring a direct interest in Australian corporations, unit trusts or businesses.

A party taking a significant action may notify the Treasurer. The Treasurer may then:

- give the party a no objection notice (with or without conditions)
- prohibit the action
- if the action has already been taken, make a disposal order, effectively "undoing" the action (unless the action is subject to a no objection notice).

The party is not required to notify the Treasurer unless the significant action is also a notifiable action. However, it is likely many foreign investors will elect to notify because they will want the certainty offered by a no objection notice.

Notifiable Action

Broadly, a notifiable action is a proposed action to acquire:

- a direct interest in (generally at least 10% or the ability to influence, participate in or control) an agribusiness
- substantial interests (i.e. at least 20% (up from 15%)), in Australian corporations or unit trusts
- an interest in Australian land (excluding interests under certain leases or licenses, interests in a profit à prendre, or interests in an agreement involving sharing profits from dealings in land), and the value of such an acquisition is above the applicable monetary threshold (see below). There does not need to be a change of control.

If a foreign person proposes to enter into an agreement to take a notifiable action, it must give notice to the Treasurer and must not enter into the agreement for a specified period unless the Treasurer grants them a no objection notice. The Treasurer has 30 days (unless the period is extended) to issue a no objection notice, impose conditions or block the action.

Thresholds

Whether an action is classified as a significant action relies on the value of the action exceeding a relevant monetary threshold. Certain relevant thresholds are set out here: Annexure 1 - Monetary Thresholds

Exemptions and Exclusions

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The new rules provide for a number of exemptions. An acquisition of an interest will not be a notifiable action or a significant action in a number of circumstances, including:

- if the interest is acquired by will or devolution
- if the interest is acquired from the Commonwealth, state and territory or local governments (other than foreign government investor acquirers)
- if the interest is acquired by investors in the business of money lending.

The Treasurer can also give exemption certificates that specify an interest is of a kind that does not give rise to a significant action or notifiable action.

Fees

Application fees have been introduced for:

- applying for an exemption certificate
- giving notice of a notifiable action
- giving notice in relation to a proposal to take a significant action
- if the Treasurer makes a decision relating to a significant action and no notice has been given.

A list of certain applicable fees can be found here: Annexure 2 - Fees

Penalties

There are a number of civil penalty provisions and criminal offence provisions that apply if a person:

- fails to notify the Treasurer of a notifiable action
- takes an action that has been notified before the end of the relevant time limit
- contravenes an order made by the Treasurer, e.g. an order prohibiting a significant action or a disposal order
- contravenes a condition in a no objection notification or an exemption certificate.

The maximum criminal penalty for the most serious offences under the new regime committed by individuals has increased to imprisonment for three years, a fine equivalent of AUD135,000, or both. A body corporate which commits an offence now faces a penalty of up to AUD675,000.

A number of civil penalty provisions have also been included and infringement officers now have the power to issue infringement notices if the officer believes on reasonable grounds that the person has contravened a civil penalty provision relating to land. The new rules also enable a charge on land to be created in certain circumstances to secure the payment of a civil penalty.

If a corporation is convicted of an offence, its officers commit an offence and contravene a civil penalty provision if the officer authorised or permitted the corporation to commit the offence. Similarly, the officer commits an offence and contravenes a civil penalty provision if the corporation is liable for a civil penalty and the officer knew that, or was reckless or negligent as to whether, the contravention would occur.

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Other Important Changes

The new regime also introduces or modifies a number of key concepts.

Foreign Government Investor

A foreign government investor is a foreign government or separate government entity, a corporation or trustee of a trust or a general partner in a limited partnership in which a foreign government or government entity (alone or with its associates) holds a substantial interest of at least 20% or which, together with other governments or government entities, holds an aggregate substantial interest of at least 40%.

Substantial Interest

A person has a substantial interest if they hold an interest of at least 20% in an entity. For trusts, a person has a substantial interest if they (together with one or more associates) hold a beneficial interest in at least 20% of the income or property of the trust.

Two or more persons hold an "aggregate substantial interest" if they hold an aggregate interest of at least 40% in the entity or an aggregate beneficial interest of at least 40% in the income or property of the trust.

Direct Interest

A direct interest in an entity or business is an interest of at least:

- 10% in the entity or business
- 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the business of the person and the entity or business. These arrangements could include strategic alliances between the investor and the investee entity or business but do not typically include ordinary commercial agreements
- any percentage interest in the entity or business if the person who acquires the interest is in a position to influence or participate in the central management and control, or to influence, participate in or determine the policy of the entity or business.

Agribusiness

The new rules also expand the definition of "agribusiness". An entity or a business is an agribusiness if at least 25% of its earnings or assets are derived from or are used for its operations in the agriculture, forestry or fishing industry, or certain food product manufacturing industries.

Mining and Production Tenements

Mining and production tenements are included in the definition of "Australian land". Acquisitions of mining and production tenements by foreign persons are notifiable actions and significant actions regardless of the value of the land (or, for persons from Chile, New Zealand and the United States, for tenements above the monetary threshold of AUD1,094 million). There is an exception if the tenement is acquired directly from an Australian government entity.

Acquisitions of exploration tenements are generally not significant actions and are not notifiable, regardless of the value of the tenement and who the tenement is acquired from. However, if the exploration tenement at the time of acquisition is reasonably likely to exceed five years (including any extension or renewal) and confers the holder

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with a right to occupy the underlying land (for example, agricultural land or commercial land), the acquisition of the interest in that land may be a notifiable action or a significant action.

RECENT FOREIGN INVESTMENT TRANSACTIONS

This revised foreign investment regime needs to be considered in light of some notable recent foreign investment decisions. In November 2015, after extensive consultation with the Foreign Investment Review Board (FIRB), the New South Wales Government awarded a 99 year lease of TransGrid, NSW's high voltage electricity transmission network, to 'NSW Electricity Networks' consortium, which is made up of Canadian, Middle Eastern and Australian investors.

In October 2015, the Northern Territory Government signed a AUD506 million agreement with a Chinese Landbridge Group to lease the port and facilities for 99 years, including the Darwin Marine Supply Base and Fort Hill wharf. This deal provided Landbridge 100% operational control of the port, and 80% ownership of the Darwin Port Land. The remaining 20% will be held by an Australian entity to ensure local ownership.

This arrangement has raised concerns about the security implications, as the port is a critical national infrastructure, and Landbridge allegedly has links to both Chinese Communist Party and the People's Liberation Army. Landbridge applied for FIRB review, however it was exempted as it was an agreement between Australian government (i.e. Northern Territory Government) and private companies (i.e. Landbridge is not a state-owned enterprise).

While the Government has allowed many Chinese companies to invest in Australia in the past, some have been denied due to defence and security concerns. For example, on 19 November 2015, Treasurer Scott Morrison prohibited the sale of S. Kidman and Co Limited to foreign investors on the basis that Kidman's landholdings represent 2.5% of Australia's agricultural land and include land located within the Woomera weapons testing range. As such, such an acquisition was considered to be 'contrary to the national interest'. As a result, there has been a strong call to review the Darwin Port deal based on security concerns. Further, the Government is considering additional amendments to the regulatory framework so that these sorts of transactions are regulated by the FIRB in the future. On 25 November 2015, the Senate referred an inquiry to the Senate Economics References Committee which will examine the foreign investment review framework with particular reference to the recent transactions (mentioned above) and the sale or lease of significant Australian assets. The deadline for the Committee to report has been extended to 8 April 2016.[1]

This raises the spectre that the recent amendments to Australia's foreign investment regime may not be the last.

HOW DO THE CHANGES IMPACT YOU?

If you are conducting a transaction with a foreign person you need to be aware of the revised foreign investment regime. Ensure that you get advice as to whether you are acquiring any interests which might give rise to a notifiable action or significant action, and seek the appropriate approvals.

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[1] Parliament of Australia 'Foreign investment review framework' (2015): accessed here.

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