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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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FOREIGN ACQUISITIONS AND TAKEOVERS LEGISLATION AMENDMENT  
BILL 2015  
FOREIGN ACQUISITIONS AND TAKEOVERS FEE IMPOSITION BILL 2015  
REGISTER OF FOREIGN OWNERSHIP OF AGRICULTURAL LAND BILL 2015

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EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Treasurer, the Hon J. B. Hockey MP)



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ABS	Australian Bureau of Statistics
Act	<i>Foreign Acquisitions and Takeovers Act 1975</i>
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AML Act	<i>Anti-Money Laundering and Counter-Terrorism Financing Act 2006</i>
APS	Australian Public Service
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ATO	Australian Taxation Office
Bill	Foreign Acquisition and Takeovers Legislation Amendment Bill 2015
Commissioner	Commissioner of Taxation
DIBP	Department of Immigration and Border Protection
FATA (as amended)	<i>Foreign Acquisitions and Takeovers Act 1975</i> as would be amended by the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015
Federal Circuit Court	Federal Circuit Court of Australia
Federal Court	Federal Court of Australia
FIRB	Foreign Investment Review Board
Foreign Acquisitions Bill	Foreign Acquisition and Takeovers Legislation Amendment Bill 2015
Gazette	<i>Commonwealth of Australia Gazette</i>

<i>Abbreviation</i>	<i>Definition</i>
Guide	<i>A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i> , September 2011, Australian Government
ICCPR	<i>International Covenant on Civil and Political Rights</i>
Imposition Bill	Foreign Acquisitions and Takeovers Fees Imposition Bill 2015
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Options Paper	<i>Options Paper 'Strengthening Australia's foreign investment framework'</i> (25 February 2015)
Policy	<i>Australia's Foreign Investment Policy</i>
Register	Register of Foreign Ownership of Agricultural Land
Register Bill	Register of Foreign Ownership of Agricultural Land Bill 2015
Regulations	<i>Foreign Acquisitions and Takeovers Regulations 1989</i>
Regulatory Powers Act	<i>Regulatory Powers (Standard Provisions) Act 2014</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

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## ***General outline and financial impact***

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### **Strengthening the foreign investment framework**

This package of Bills makes changes 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.

The Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Bill) makes substantial changes to the *Foreign Acquisitions and Takeovers Act 1975* (Act) to modernise the rules and strengthen the enforcement of the foreign investment system.

- The Bill introduces civil penalties and additional and stricter criminal penalties to ensure foreign investors and intermediaries do not profit from breaking the rules.
- The Bill enables the transfer to the Australian Taxation Office (ATO) of responsibility for regulating foreign investment in residential real estate, which will further enable stronger enforcement and better compliance with the existing rules.
- The Bill also enables the lowering of screening thresholds for investments in Australian agriculture to ensure significant investments in this sector are scrutinised.

The Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 (Imposition Bill) introduces fees on all foreign investment applications. Fees on foreign investment applications will ensure Australian taxpayers are no longer funding the administration of the system, while providing additional resourcing to the Treasury and the ATO to improve service delivery for investors.

The Register of Foreign Ownership of Agricultural Land Bill 2015 (Register Bill) complements these changes by establishing a register of foreign ownership of agricultural land operated by the ATO. Foreign persons are required to register information about their existing holdings and subsequent acquisitions and disposals of Australian agricultural land, providing greater transparency around the levels of foreign ownership of agricultural land.

***Date of effect:*** The amendments apply from 1 December 2015.

**Proposal announced:** Proposals included in the Bills were announced by the Prime Minister, the Treasurer and the Minister for Agriculture in the joint Media Release titled *Government tightens rules on foreign purchases of agricultural land* of 11 February 2015; the Prime Minister and the Treasurer in the joint Media Release titled *Government to strengthen Australia's foreign investment framework* of 25 February 2015; and the Prime Minister and the Treasurer in the joint Media Release titled *Government strengthens the foreign investment framework* of 2 May 2015 and in the modernisation package agreed by the Government as released on the Foreign Investment Review Board site.

**Financial impact:** It is expected that this package of Bills will result in a \$667.2 million increase to consolidated revenue over four years.

The introduction of application fees on foreign investment applications from 1 December 2015 is estimated to raise \$735.0 million in revenue over the forward estimates period.

The 2015-16 Budget included additional funding for the Treasury (\$19.7 million over four years), the ATO (\$47.5 million over four years) and the Department of Agriculture (\$0.6 million over four years) to support additional screening and compliance activities associated with the reforms.

**Human rights implications:** The package of Bills raises human rights issues. For the Bill and the Imposition Bill see Chapter 13 *Statement of Compatibility with Human Rights*. The Bill and the Imposition Bill are compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. For the Register Bill, see Chapter 14, paragraphs 14.49 to 14.70. The Register Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Compliance cost impact:** Low. Screening of an additional 125 agricultural proposals per annum involves compliance costs of an estimated \$1.25 million for foreign persons whose acquisitions would not previously have required foreign investment screening. The introduction of fees on foreign investment applications and the registration of the ownership of agricultural land also involves minor regulatory costs associated with the process of payments and registration. Offsetting these costs are changes to modernise and streamline the Act, reducing around \$1.5 million of associated costs and providing greater certainty for investors.



## Summary of regulation impact statement

### Regulation impact on business

**Impact:** Small. Foreign persons will benefit from the reduced cost of complying with a modernised and streamlined foreign investment framework and will incur a cost from the imposition of fees for the processing of applications, additional screening of agricultural investments, and for the registration of foreign ownership of agricultural land.

**Main points:**

- The measures have a small overall regulatory impact of \$0.05 million.
- Changes to modernise and streamline the Act remove around \$1.5 million of associated costs.
- The lower screening thresholds for agricultural land and agribusiness means around 125 additional proposals per annum require screening, at an estimated average cost of \$10,000 per proposal.
- The introduction of fees on foreign investment applications involves a total estimated regulatory cost of around \$117,000 per annum for around 21,000 applications (or on average less than \$6 per application). Under the Government's regulatory framework, the cost of filling out the application is considered regulatory while the application fee is not.
- The registration of foreign ownership of agricultural land also has a minor regulatory impact on foreign persons.



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# Chapter 1

## Background

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### Context of amendments

1.1 The Australian Government welcomes foreign investment because it plays an important and beneficial role in the Australian economy. Foreign investment provides additional capital for economic growth, creates employment opportunities, improves consumer choice and promotes healthy competition while increasing Australia's competitiveness in global markets. It can also help deliver improved productivity by introducing new technology, providing much needed infrastructure, allowing access to global supply chains and markets, and enhancing Australia's skills base.

1.2 While recognising that foreign investment provides significant economic benefits to Australia, it is necessary to regulate certain kinds of foreign investment to ensure that these proposals are not contrary to Australia's national interest. Foreign investment is primarily regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Act), the *Foreign Acquisitions and Takeovers Regulations 1989* (Regulations) and *Australia's Foreign Investment Policy* (Policy).<sup>1</sup>

1.3 In very broad terms, the Act currently requires foreign persons who are planning to invest in certain interests to notify the Treasurer. Consistent with the Government's approach to welcoming foreign investment, in most cases, the Treasurer is satisfied that the proposal is not contrary to the national interest and does not object to the proposal. However, the Treasurer may also decide not to object to a particular proposal provided that the person complies with specified conditions that are considered necessary so that the proposal would not be contrary to the national interest. If the Treasurer considers that the proposal is contrary to Australia's national interest the Treasurer may make an order prohibiting the proposed transaction or, if the transaction has already taken place, direct the person to dispose of their interest.

1.4 The question of whether a particular investment is contrary to the national interest is a matter for the Treasurer. While each proposal is considered on a case-by-case basis, the factors that are typically

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<sup>1</sup> The Policy is available at [www.firb.gov.au/content/policy.asp](http://www.firb.gov.au/content/policy.asp).

considered by the Treasurer when considering any non-residential proposal include the impact of the proposed investment on Australia's national security, the economy and the community, competition, other Government policies (including taxation), and the character of the investor. When considering an application to acquire an interest in residential land, the overarching consideration is whether the proposed acquisition would add to Australia's housing stock.

1.5 The Policy assists foreign investors and their advisers by providing guidance on how the Australian Government interprets and administers the Act and Regulations. The Policy also sets out additional requirements that certain foreign investors such as foreign governments are expected to comply with.

1.6 The Act has remained largely unchanged since it came into effect and includes obsolete provisions, as well as provisions that do not promote investor certainty or consistency in the application of the foreign investment review framework. Further, the Act has not been amended to take into account major changes in other corporate regulatory frameworks such as the *Corporations Act 2001*, or developments in investment structures.

1.7 Schedule 1 to this Bill, comes into effect on 1 December 2015 and strengthens Australia's foreign investment review framework by:

- promoting greater transparency and confidence in Australia's foreign investment framework by providing a statutory basis for the requirements that apply to foreign government investors;
- facilitating the Commissioner of Taxation's role in administering aspects of the Act, particularly in relation to residential land;
- promoting compliance with the framework by increasing the penalties that can be imposed for offences under the Act;
- increasing the enforcement options available by making it possible for a court to issue a civil penalty order and for certain officers to issue infringement notices;
- increasing scrutiny around foreign investment proposals in the agricultural sector; and
- requiring application fees to be paid. The introduction of fees improves service delivery and ensures that Australian

taxpayers no longer have to fund the cost of administering the framework.

## Summary of new law

### Who does the Bill regulate?

1.8 The Bill imposes a range of obligations on ‘foreign persons’. In broad terms, the following persons may fall within the definition of a foreign person:

- an individual not ordinarily resident in Australia;
- a corporation or a trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest with associates (that is, an interest of at least 20 per cent in the corporation or trust);
- a corporation or a trustee of a trust in which two or more persons, each of whom is either an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest with associates (that is, an interest of at least 40 per cent in the corporation); or
- a foreign government.

### Regulated acquisitions

1.9 The Bill enables the Treasurer to make a broad range of orders in relation to a ‘significant action’ that a person is proposing to take or has already taken. Broadly, a significant action is an action to acquire interests in securities, assets or land, or otherwise take action in relation to corporations and unit trusts. An action is generally only a significant action if it meets the applicable interest and monetary thresholds (if such thresholds apply to the action) and the action results in either a change in control involving a foreign person or the action is taken by a foreign person.

1.10 If the Treasurer is notified that a person is proposing to take a significant action, the Treasurer may:

- decide that they do not object to the action and give the person a no objection notification not imposing conditions;

- decide that they do not object to the action provided the person complies with one or more conditions and give the person a no objection notification imposing conditions; or
- decide that taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

1.11 If the significant action has already been taken which the Treasurer is satisfied is contrary to the national interest, the Treasurer may make an order, known as a disposal order, which is directed at unwinding the action. For example, the Treasurer could order a person to dispose of their shares by a specified time. This Bill also allows the Treasurer to impose legally enforceable conditions in such circumstances as an alternative to a disposal order.

1.12 A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action (that is, only certain significant actions are also notifiable actions) - this concept is explained below. However, it is anticipated that some foreign persons will choose to notify the Treasurer because they will want the certainty offered by a no objection notification. If a foreign person is given a no objection notification in relation to the significant action, provided the person does not take any action which is not specified by the notification, the Treasurer generally is not able to make a disposal order.

1.13 A foreign person who proposes to enter an agreement to take a notifiable action must notify the Treasurer before entering into the agreement.

1.14 In broad terms, a notifiable action is a proposed action:

- to acquire a direct interest in an agribusiness;
- to acquire substantial interests in Australian entities; or
- to acquire an interest in Australian land.

1.15 Generally, the action is only notifiable if the entity, business or land meets the threshold test.

1.16 A foreign person who gives a notice must not enter into the agreement for a specified period (generally 40 days) unless the person is given a no objection notification.

1.17 Actions to acquire interests in Australian land that are specified in an exemption certificate are generally not notifiable actions. An exemption certificate is a certificate given by the Treasurer that specifies an interest, or an interest of a kind, is not a significant action or notifiable action. Currently exemption certificates are issued under the Regulations and includes certificates for an annual program of acquisitions of Australian urban land (this alleviates the need for a foreign person to notify and seek a no objection notification (imposing conditions) in relation to each covered acquisition during the period) and a pre-approval certificate that allows developers to sell new dwellings in a development to foreign persons, without the foreign person having to notify and seek a no objection notification not imposing conditions.

## **Administration and enforcement**

### *Fees*

1.18 Fees are generally payable by any person who makes an application under this Act. The Treasurer may waive or remit the whole or part of a fee if the Treasurer is satisfied that it is not contrary to the national interest to waive or remit the fee. Notices and applications are not considered given or made until the applicable fee has been paid or the fee has been waived or remitted. The amounts of the fees are found in the *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015*.

### *Offences*

1.19 A person may commit an offence or contravene a civil penalty provision if the person:

- fails to notify the Treasurer before taking a notifiable action;
- takes an action that has been notified, before the end of the applicable time limit;
- contravenes an order made by the Treasurer which prohibits a proposed significant action, an interim order or a disposal order; or
- contravenes a condition in a no objection notification imposing conditions or an exemption certificate.

1.20 A foreign person who fails to comply with the obligations imposed by this Act in relation to residential land may also be liable to a civil penalty.

1.21 Each civil penalty provision in this Act is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).

1.22 An infringement officer may issue an infringement notice if the infringement officer believes on reasonable grounds that the person contravened a civil penalty provision relating to residential land. The framework for the use of infringement notices created by the Regulatory Powers Act applies to infringement notices given for suspected contraventions of this Act.

### ***Confidentiality of information***

1.23 Much of the information needed to assess whether a significant action or a notifiable action is contrary to the national interest is personal information within the meaning of the *Privacy Act 1988* or commercial-in-confidence. To assess whether a significant action or a notifiable action may be contrary to the national interest it is often necessary for officers assisting the Treasurer to perform the Treasurer's functions under this Act to consult with officers in a range of Commonwealth, State and Territory departments and agencies.

1.24 Recognising that the unauthorised use or disclosure of information that is collected under or for the purposes of the Act could cause significant harm to the affected person, the Bill makes it an offence for a person to use or disclose information provided under the Act for an unauthorised purpose. The Bill also specifies the purposes for which information may be disclosed and the classes of people to whom it may be disclosed.

### ***Other matters***

1.25 All substantive provisions in the existing Act will be repealed.

## **Comparison of key features of new law and current law**

<b><i>New law</i></b>	<b><i>Current law</i></b>
The definition of <b><i>foreign person</i></b> is extended so that it applies to foreign governments. This means that the requirements imposed by the Act apply to all foreign government investors unless an exemption in the Act or regulations applies.	The definition of <b><i>foreign person</i></b> does not apply to foreign governments.



<i>New law</i>	<i>Current law</i>
The substantial interest threshold is 20 per cent.	The substantial interest threshold is 15 per cent.
Fees are payable. The fee to be made for each application or notice is specified in the <i>Foreign Acquisitions and Takeovers Fees Imposition Bill 2015</i> . The Treasurer can waive the whole or part of a fee if it would not be contrary to the national interest to do so.	No fees are payable.
The requirements that currently apply to Australian urban land apply to all land in Australia (including agricultural land) unless below the threshold, exempt, or specific rules apply.	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 has the power to make an order prohibiting the proposed acquisition if he or she considers that it would be contrary to the national interest, or to impose conditions.
In addition to enabling the Treasurer to require a person to give information or produce documents, the Act enables officers from the Australian Taxation Office (ATO) to exercise broad ranging investigatory powers.	The Treasurer can monitor compliance with the Act and Regulations and investigate alleged contraventions of the Act and the Regulations by requiring a person to give information or provide documents.
In addition to the enforcement options provided for in the existing Act, the Bill makes it possible for civil penalty orders to be made and infringement notices to be issued. The Bill also significantly increases the maximum penalties for some offences.	Only divestment orders and criminal penalties apply to breaches of the Act. The maximum penalty that can be imposed for an offence under the Act is a fine of 500 penalty units (currently \$90,000), imprisonment for two years, or both.
The circumstances in which information collected under or for the purposes of this Act may be used and disclosed are specified and it is a criminal offence to use information collected under the Act for an unauthorised purpose.	The general provisions in the <i>Privacy Act 1988</i> , <i>Freedom of Information Act 1982</i> , <i>Public Service Act 1999</i> , the <i>Public Service Regulations 1999</i> and the <i>Crimes Act 1914</i> that govern the handling of information apply.

1.26 The Bill forms part of a package of legislation which includes:

- the *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015*; and

- the *Register of Foreign Ownership of Agricultural Land Bill 2015*.

1.27 It is also anticipated that the Regulations and the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* will be repealed and a new regulation made which will come into effect on 1 December 2015.

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## **Chapter 2**

### ***Preliminary provisions***

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#### **Outline of chapter**

2.1 This chapter explains the preliminary provisions of the Bill, including:

- the short title and commencement;
- the simplified outlines;
- the definitions of key terms used in Schedule 1 to this Bill, which includes the main amendments to the *Foreign Acquisitions and Takeovers Act 1975* (Act); and
- the constitutional basis and application of the Bill.

#### **Detailed explanation of new law**

##### **Short title**

2.2 If the Bill is enacted it may be cited as the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*. [Section 1]

##### ***Commencement***

2.3 The various provisions in the Bill commence on the day specified in the table to section 2.

2.4 Sections 1 to 3 of this Bill (which concern the formal aspects of the Act), as well as anything in the Act not elsewhere covered by the table, commence on the day on which the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* receives Royal Assent.

2.5 Schedules 1, 3 and 4 to this Bill commence on 1 December 2015. Schedule 2 commences immediately after Schedule 1 to the *Acts and Instruments (Framework Reform) Act 2015* comes into effect. [Section 2]

### ***Schedules***

2.6 Each Act specified in a Schedule to the Foreign Acquisitions and Takeovers Legislation Amendment Act 2015 is amended or repealed as set out in the applicable items in the Schedule and any other item in a Schedule has effect according to its terms. This is a technical provision which gives operational effect to the amendments contained in the Schedules. *[Section 3]*

### ***Repeal of sections of the Act and amendment to the long title of the Act***

2.7 If enacted, the Bill would repeal all the substantive provisions in the existing Act. It would also amend the long title of the Act so that it becomes An Act relating to the foreign acquisition of certain land interests and to the foreign acquisition and foreign control of certain business enterprises and mineral rights. *[Schedule 1, items 1 to 3]*

### ***Simplified outlines***

2.8 To assist the reader the Bill includes a number of simplified outlines. However, the outlines are not intended to be comprehensive and it is intended that the reader will rely on the substantive provisions. *[Schedule 1, item 3, section 3; Schedule 1, item 4, sections 38, 39, 46, 50, 56, 66, 80, 83, 112, 116 and 131]*

### ***Definitions***

2.9 The dictionary provides definitions of terms used in the Bill. In some cases the definitions are signposts to other provisions in the Bill or that meanings will be prescribed in the regulations to the Act, or refer to definitions of terms in other Acts in which the meaning of the term is given. *[Schedule 1, item 3, section 4]*

### ***‘Foreign person’***

2.10 The term foreign person is central to the Bill. It means:

- an individual not ordinarily resident in Australia. An Australian citizen who is living overseas may therefore be a ‘foreign person’ for the purposes of the Act;
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign

corporation or a foreign government, hold an aggregate substantial interest;

- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
- the trustee of a trust in which two or more persons, each of whom is either an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- a foreign government; or
- any other person, or any other person that meets the conditions, prescribed by the regulations.

2.11 The terms aggregate substantial interest, foreign corporation, foreign government and substantial interest are each defined.

2.12 A person holds a **substantial interest** in an entity if the person holds an interest of at least 20 per cent in the entity. In the case of a trust (including a unit trust), a person holds a substantial interest if they, together with any one or more associates, hold a beneficial interest in at least 20 per cent of the income or property of the trust.

2.13 Two or more persons hold an **aggregate substantial interest** in an entity if the persons hold an aggregate interest of at least 40 per cent in the entity. In the case of a trust, two or more persons, together with any one or more associates of any of them hold, in the aggregate, beneficial interests in at least 40 per cent of the income or property of the trust.

2.14 In determining if a person holds a substantial interest, or two or more persons hold an aggregate substantial interest, interests of associates of the person or persons are also taken into account.

2.15 **Foreign corporation** refers to a foreign corporation to which paragraph 51(xx) of the Constitution applies.

2.16 **Foreign government** refers to an entity (within the ordinary meaning of the word) that is a body politic (or part of a body politic) of a foreign country or a body politic (or part of a body politic) of part of a foreign country. [*Schedule 1, item 3, section 4*]

***Meaning of ‘ordinarily resident’***

2.17 An individual who is not an Australian citizen is ordinarily resident in Australia at any particular time if:

- the individual has been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and
- at that time, the individual is in Australia and the individual’s continued presence in Australia is not subject to any limitation as to time imposed by law; or
- if the individual is not in Australia, immediately before the individual’s most recent departure from Australia the individual’s continued presence in Australia was not subject to any limitation as to time imposed by law. An individual’s continued presence in Australia is subject to a limitation as to time imposed by law if the individual is an unlawful non-citizen within the meaning of the *Migration Act 1958*.

2.18 This provision substantially re-enacts section 6 of the current Act. [*Schedule 1, item 3, section 5*]

***Meaning of ‘associate’***

2.19 The term associate is defined broadly. However, unlike the current Act, it does not make any person who is an associate under the existing provision, an associate of any other person who is an associate of the person (including a person who is an associate of the person by another application or other applications of this rule). In the Bill, the following people are associates of a person:

- a person’s ‘relative’ within the meaning given by the *Income Tax Assessment Act 1997* (ITAA 1997), which is explained below;
- any person with whom the person is acting, or proposes to act, in concert in relation to an action to which this Act may apply;
- any person with whom the person carries on a business in partnership;
- any entity of which the person is a senior officer (the meaning of the term ‘senior officer’ is explained below);

- if the person is an entity, any holding entity and any senior officer of the entity;
- any entity whose senior officers are accustomed to or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person, or, if the person is an entity, the senior officers of the person;
- an entity if the person is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the entity or the senior officers of the entity;
- any corporation in which the person holds a substantial interest;
- if the person is a corporation, a person who holds a substantial interest in the corporation;
- the trustee of a trust in which the person holds a substantial interest;
- if the person is a trustee of a trust, a person who holds a substantial interest in the trust;
- if the person is a foreign government, a separate government entity (a term which is explained below) or a foreign government investor (a term which will have the meaning prescribed by the regulations, but for the associates definition it is intended to exclude through the regulations foreign government investors who are only foreign government investors due to an 'aggregate substantial interest' from two or more foreign countries) of a foreign government of a foreign country:
  - any other person that is a foreign government in relation to that country (or any part of that country);
  - any other person that is a separate government entity in relation to that country (or any part of that country); or
  - any other foreign government investor in relation to that country (or part of that country).

*[Schedule 1, item 3, section 6]*

2.20 New section 79 provides the Treasurer with an order power to declare persons involved in avoidance to be taken to be associates if the Treasurer is satisfied that not making an order under the section is contrary to the national interest. Such an order may take such persons to be associates of each other for the purposes of this Act or for specified purposes. The order specifies the duration that it will apply. *[Schedule 1, item 4, section 79]*

2.21 The term associate has a wider meaning for an action taken relating to an interest in residential land. In this context, the following people are also an associate of a person:

- an entity that is not listed for quotation in the official list of a stock exchange if the person's relative holds a substantial interest in the entity or is a senior officer of the entity; or
- if the person is an entity (referred to in the Bill as the first entity), another entity if:
  - an individual holds a substantial interest in the first entity or is a senior officer of the first entity; and
  - the individual's relative holds a substantial interest in the second entity or is a senior officer of the second entity; and
  - neither the first entity nor the second entity are listed for quotation in the official list of a stock exchange, or are a subsidiary of an entity listed for quotation in the official list of a stock exchange or the trustee of an entity that is listed for quotation in the official list of a stock exchange.

2.22 The Bill excludes certain persons from the definition of associate. A person is not an associate of another merely because:

- one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship;
- one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products to acquire financial products on the client's behalf in the ordinary course of that business;
- one has sent, or proposes to send, to the other an offer under a takeover bid for securities held by the other;



- one has appointed the other, otherwise than for valuable consideration (within the ordinary meaning of the term) given by the other or by an associate of the other, to vote as a proxy or representative;
- one is providing independent services as a trustee of a trust to the other who is a beneficiary of the trust if the trustee is licensed to provide those services under a law of the Commonwealth, a State, a Territory, a foreign country, or a part of a foreign country;
- one holds a substantial interest in a managed investment scheme (within the meaning of the Corporations Act) and the other is the responsible entity of the scheme; or
- both are partners of one of certain kinds of partnerships, namely a partnership of actuaries or accountants; medical practitioners; patent attorneys; sharebrokers or stockbrokers; trademark attorneys; a partnership that has as its primary purpose collaborative scientific research, and includes at least one university and one private sector participant; architects; pharmaceutical chemists or veterinary surgeons; or legal practitioners.

*[Schedule 1, item 3, section 6]*

2.23 The regulations may also provide that persons are not associates of other persons. *[Schedule 1, item 3, section 37]*

**Meaning of ‘relative’**

2.24 Section 995-1 of the ITAA 1997 currently defines the term ‘relative’ of a person to mean an individual’s:

- spouse. ‘Spouse’ is currently defined by section 995-1 of the ITAA 1997 to include:
  - another individual (whether of the same or different sex) with whom the individual is in a relationship that is registered under a State law or a Territory law prescribed for the purposes of section 2E of the *Acts Interpretation Act 1901* as a kind of relationship prescribed for that purpose; and
  - another individual who, although not married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple;

- the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent or adopted child of that person, or of that person's spouse; and
- the spouse of a person referred to immediately above.

***Meaning of 'senior officer'***

2.25 A senior office of an entity means an officer of an entity:

- for a corporation, a director of the corporation;
- for a unit trust, if the trustee is an individual, the trustee. If the trustee is not an individual, a director. It also includes any other individual involved in the central management and control of the trust;
- a person who is, or a person in a group of persons who are, in a position to determine the investments or policy of the entity or the trustee of the entity;
- a person who makes, or participates in making, decisions that affect the whole, or a substantial part of, the business of the entity; and
- a person who has the capacity to affect significantly the financial standing of the entity.

2.26 An independent director is not a senior officer if they or the entity they are a director of meets the requirements set out in new section 7. *[Schedule 1, item 3, section 4]*

***Meaning of 'separate government entity'***

2.27 The term 'separate government entity' of a foreign country means an individual, a corporation or a corporation sole that is an agency or instrumentality of the foreign country and is not part of the body politic of a foreign country or of a part of a foreign country. *[Schedule 1, item 3, section 4]*

***Meaning of 'independent director'***

2.28 Only directors that are directors of listed entities or entities with a close relationship to a listed entity are independent directors if they meet the requirements of new section 7. *[Schedule 1, item 3, section 7]*

2.29 For a director of a listed entity, the director is independent if they meet the criteria to be considered independent of the listing stock exchange. If the stock exchange does not have its own criteria incorporated in its listing rules, a director can satisfy director independence criteria recognised by the listing exchange. Such criteria could be based on the law of the jurisdiction where the stock exchange is located and may also be non-binding. *[Schedule 1, item 3, subsection 7(1)]*

### **Example 2.1**

While the Australian Securities Exchange (ASX) listing rules do not include criteria for director independence, a director of an ASX listed entity where the entity considers one or more of their directors to be independent directors based on their assessment that the director meets the criteria in the ASX Corporate Governance Principles and Recommendations, would satisfy the requirements of new section 7. The entity's assessment that one or more directors are independent directors would be supported by their public announcements and reports such as their annual reports including statements of this.

2.30 For a listed unit trust with a corporate trustee, the status of the directors of the trustee corporation is considered. In such cases, if directors of the trustee meet the criteria for director independence of the stock exchange on which the unit trust is listed, such directors are independent directors. *[Schedule 1, item 3, subsection 7(1)]*

### **Example 2.2**

Turtle unit trust is listed on a stock exchange that includes criteria for director independence in the listing rules of the stock exchange. Its trustee, the unlisted Turtle trustee corporation, has a board of ten directors three of which meet the independence criteria of the stock exchange on which the Turtle unit trust is listed. These three directors are independent directors under new section 7.

2.31 Subsection 7(2) includes a special rule for entities whose securities are stapled. Such entities are often referred to as stapled entities or members of stapled groups. Such entities can include corporations and unit trusts. The securities of such entities are treated as stapled securities where the securities in an entity can only be transferred together with securities in one or more other entities. However, it is common that only one of the two or more entities whose securities are stapled is listed on a stock exchange. For the purpose of new subsection 7(2), if the listed entity whose securities are stapled to the securities of one or more other entities has a director that meets the requirements of new subsection 7(1) and the director is also a director of an unlisted entity whose securities are stapled to the securities of the

listed entity, the director is also taken to be an independent director of the unlisted entity. *[Schedule 1, item 3, subsection 7(2)]*

***Meaning of ‘Australian business’***

2.32 ***Australian business*** means a business that is carried on wholly or partly in Australia in anticipation of profit or gain. A person who has an interest in a ‘mining or production tenement’ is taken to carry on a business in Australia of exploiting the tenement in anticipation of profit or gain, and the tenement is taken to be an asset of that business *[Schedule 1, item 3, section 8]*. The term ‘mining or production tenement’ is defined by new section 4.

***Meaning of ‘agribusiness’***

2.33 The regulations will prescribe certain kinds of businesses to be an ‘agribusiness’. It is anticipated that the regulations will prescribe an agribusiness to be a business that is carried on, wholly or partly, in any of certain classes of the Australian and New Zealand Standard Industrial Classification Codes as in force from time to time, published by the Australian Bureau of Statistics (ABS), and which is published on the ABS website and available free of charge.<sup>2</sup>

2.34 It is anticipated that the regulations will prescribe an Australian business to be an agribusiness if the value of the assets of the business used in carrying on an agribusiness is at least the prescribed percentage of the value of the total assets of the business.

2.35 It is anticipated that the regulations will prescribe an Australian entity to be an agribusiness if it meets at least one of the following criteria:

- the value of assets used in carrying on an agribusiness is at least the percentage prescribed by the regulations; or
- the revenue or profits derived from carrying on an agribusiness is at least the prescribed percentage by the regulations.

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<sup>2</sup> Specifically, it is anticipated that the following classes will be prescribed: all classes in Division A (agriculture, forestry and fishing) and any of the classes in Subdivision 11 of Division C (food product manufacturing), other than class 1113 (cured meat and smallgoods manufacturing); class 1132 (ice cream and manufacturing); class 1162 (cereal, pasta and baking mix manufacturing); a class in group 117 (bakery product manufacturing); class 1182 (confectionary manufacturing) and a class in group 119 (other food product manufacturing).

*[Schedule 1, item 3, section 4]*

***Meaning of ‘interest’ in a ‘security’***

2.36 ***Security*** is defined to mean a share in a corporation or a unit in a unit trust. ***Share*** of a corporation is defined to mean a share in the share capital of the corporation and includes stock into which all or any of the share capital has been converted and includes (except in relation to new section 9) an interest in such a share or in such stock. *[Schedule 1, item 3, section 4]*

2.37 A person holds or acquires an ***interest*** in a security if the person has any legal or equitable interest in that security. In determining whether a person holds or acquires an interest in a security it is immaterial that the interest cannot be related to a particular security.

2.38 For the purposes of this Act a person is considered to hold or acquire an interest in a security in an entity if the person is not the registered holder of the security, if the person is entitled to exercise or control the exercise of a right attached to the security (other than because the person was appointed as a proxy or representative to vote at a general meeting of the entity or a class of members or unit holders of the entity).

2.39 A person holds or acquires an ***interest*** in the issued shares in a corporation if all or part of the share capital of the corporation consists of stock and the person holds an interest in that stock. The issued shares are taken to have the same nominal amount as the amount of that stock and the same rights attached to them as are attached to that stock. *[Schedule 1, item 3, section 9]*

***Meaning of ‘asset’ and ‘interest’ in an asset***

2.40 ***Asset*** includes an interest in an asset *[Schedule 1, item 3, section 4]*. A person holds or acquires an ***interest*** in an asset if the person holds any legal or equitable interest in that asset *[Schedule 1, item 3, section 10]*.

***Meaning of ‘interest’ in a trust***

2.41 A person holds or acquires an interest in a trust if the person holds or acquires a beneficial interest in the income or property of a trust or the person holds an interest in a unit in a unit trust. *[Schedule 1, item 3, section 11]*

***Meaning of ‘land’, ‘Australian land’ and ‘interest in Australian land’***

2.42 The definition of ***land*** includes a building (including a new dwelling or an established dwelling) or part of a building and the subsoil of land. ***Australian land*** means agricultural land, commercial land, residential land or a mining or production tenement. [*Schedule 1, item 3, section 4*]

2.43 ***Agricultural land*** is defined to mean land in Australia that is used, or could reasonably be used, for a primary production business within the meaning of the ITAA 1997. The definition of ‘primary production business’ in the ITAA 1997 currently includes cultivating or propagating plants; maintaining animals for the purpose of selling them or their bodily produce; conducting operations relating directly to taking or catching fish and certain other marine animals; planting or tending trees in a plantation or forest that are intended to be felled; or felling trees in a plantation or forest.

2.44 The definition of agricultural land includes land which is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business. An example of the latter is where part of the land is subject to an environmental protection zone that does not allow primary production activities within the zone. Agricultural land also includes land which may, from time to time, be covered by water.

2.45 Whether land could reasonably be used for a primary production business depends on the facts and circumstances of the land. Factors that may provide a reasonable indicator that the land could (or could not) reasonably be used, either alone or together with other factors, could include:

- *The primary uses allowed on the land under its zoning:* These are likely to provide a reasonable indicator of if the land could reasonably be used for a primary production business. For example, if zoning allowed for primary production activities to be undertaken without the further approval of the local regulatory body, this would likely indicate that the land could reasonably be used for a primary production business. However, land within a rural residential zone, where zoning requirements either explicitly do not allow for primary production activities, or would only be approved in special circumstances, is unlikely to be land that could reasonably be used for a primary production business.
- *Land use history:* If the land has been used in a primary production business in recent years, this is likely to indicate

that the land again could reasonably be used for a primary production business, unless there has been one or more significant changes in the land in the meantime (for example, significant permanent environmental degradation, water depletion or pollution, or removal or loss of the earlier primary production business infrastructure). However, even though the land has not been used in a primary production business in recent years does not necessarily mean that it could not reasonably be used for a primary production business in the future. Examples of this could include if the land is not being used in a primary production business due to:

- an extended extreme climatic event, such as a long term drought;
- a recent natural disaster, such as bushfire or floods; or
- other activities, such as mineral exploration and development on the land after which expected, or legally required, land remediation works would mean that the land in whole or part again could reasonably be used for a primary production business.

### Example 2.3

Raoul Co, a foreign person, has an interest in leasehold land in Australia. There is currently a mining operation being conducted on the leasehold land and the land could not reasonably be used for a primary production business. However, when the mining lease ends, which is expected to be in twenty years, the land will be rehabilitated at which time a primary production business will be able to be conducted on the property. After rehabilitation, the land is agricultural land.

- *Land characteristics (for example, climate, crop yield, land size, remoteness, soil quality, stock holding capacity, topography, vegetation and water availability):* While relevant to if the land could reasonably be used for a primary production business, a single characteristic such as land size, in isolation may be insufficient to make a reasonable assessment. It is also not necessary that the land be of sufficient size to allow for the operation of a stand-alone primary production business in some or all cases within the site. Remoteness of the land from goods transport and other infrastructure, as well as key agricultural service providers, is likely to mean that land could not reasonably be used for a

primary production business, until such infrastructure and/or services became available to the locality.

- *Lease or licence conditions or limitations:* Where there is a right to occupy agricultural land under a lease or licence whose term (including any extension or renewal) is reasonably likely to exceed five years, there may be land use conditions or restrictions attaching to the lease or licence:
  - Where these explicitly allow for primary production activities to be undertaken, the land could reasonably be used for a primary production business, irrespective of the lessee or licence holder's intention during the lease or licence term.
  - Where these do not permit use for a primary production business by the lessee or licence holder, this in isolation should not be taken as meaning the land could not reasonably be used for a primary production business. Other factors, such as those outlined above and the rationale for such a restriction on the lease or licence would be relevant to an assessment. For example, if a lessor has retained adjacent land on which they are operating a primary production business and has restricted the uses of the lessee so that they can incorporate the land back into their operations should they decide to so at the end of the lease term (after the land has been left fallow to raise productivity), then the land could reasonably be used for a primary production business.

2.46 **Commercial land** is defined to mean land in Australia or the seabed of the offshore area (that is, the exclusive economic zone of Australia or the continental shelf of Australia). It does not include land used wholly and exclusively for a primary production business; land on which there is at least one dwelling (except 'commercial residential premises' within the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999*); or land on which the number of dwellings (except commercial residential premises) could reasonably be built is less than the number prescribed for the purposes of subparagraph (a)(ii) of the definition of 'residential land'.

2.47 The term 'commercial residential premises' is currently defined by section 195-1 of A New Tax System (Goods and Services Tax) Act to mean:

- a hotel, motel, inn, hostel or boarding house;



- premises used to provide accommodation in connection with a school;
- a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire;
- a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport;
- a marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences;
- a caravan park or a camping ground; or
- any other premises similar to the ones described above, other than premises to the extent they are used to provide accommodation to students in connection with an education institution that is not a school.

2.48 **Residential land** means land in Australia on which there is at least one dwelling, or on which the number of dwellings that could be reasonably built on the land is less than the number prescribed in the regulations (which is anticipated to be 10). It does not include land used wholly and exclusively for a primary production business or land on which the only dwellings are commercial residential premises.

2.49 **Mining or production tenement** means:

- a right under a law of the Commonwealth, a State or a Territory to recover minerals (such as coal or ore), oil or gas in Australia or from the seabed or subsoil of the offshore area, or a right to preserve such a right, but does not include a right to recover minerals, oil or gas for the purposes of prospecting or exploring for minerals, oil or gas;
- a right which includes a right mentioned in the first dot point;
- a lease under which the lessee has a right mentioned in the first dot point; or
- an interest in a right mentioned above or a lease mentioned above.

2.50 The definitions of agricultural land, commercial land, residential land or a mining or production tenement are not intended to be mutually exclusive.

- 2.51 A person has an *interest* in Australian land if the person has:
- a legal or equitable interest in Australian land. However, it does not include an interest under a lease, a licence, a unit in a unit trust, an interest in an agreement given a right (known as a profit à prendre) to take something off another person's land, or to take something out of the soil of that land, or an interest in an agreement involving the sharing of profits or income from the use of or dealings in, Australian land;
  - an interest in a security in an entity that owns Australian land, being a security that entitles the holder to a right to occupy a dwelling of a kind known as a flat or home situated on the land;
  - an interest as lessee or licensee in a lease or licence giving rights to occupy Australian land if the term of the lease or licence (including any extension or renewal) is reasonably likely, at the time the interest is acquired, to exceed five years;
  - an interest in an agreement giving a right known as a profit à prendre if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed five years. For example, in New South Wales, a forestry right is considered a profit à prendre;
  - an interest in an agreement involving the sharing of profits or income from the use of, or dealings in, Australian land if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed five years;
  - an interest in a share in an Australian land corporation or an agricultural land corporation. *Australian land corporation* and *agricultural land corporation* have the meanings prescribed by the regulations;
  - an interest in a unit in an Australian land trust or agricultural land trust. *Australian land trust* and *agricultural land trust* have the meanings prescribed by the regulations; or
  - if the trustee of an Australian land trust or agricultural land trust is a corporation, an interest in a share in that corporation.

2.52 The Bill clarifies that a person is considered to acquire an interest in land even if the person already has an interest in Australian land and the person increases their interest. *[Schedule 1, item 3, section 12]*

***Interests that are remote or subject to restraint***

2.53 A person holds or acquires an interest in a security, asset, trust or Australian land despite its remoteness, the manner in which it arose, or the fact that the exercise of a right conferred by the interest is or is capable of being made subject to restraint or restriction. *[Schedule 1, item 3, section 13]*

***Interests held or acquired jointly***

2.54 A person holds or acquires an interest in a security, asset, trust or Australian land even if the person holds or acquires the interest jointly with one or more other persons. *[Schedule 1, item 3, section 14]*

***Interests acquired by entering into agreements or acquiring options***

2.55 A person is taken to acquire an interest in a security (that is, a share in a corporation or a unit in a unit trust), asset, trust or Australian land if the person:

- enters an agreement to acquire the interest;
- in relation to an interest in a security, asset or trust, the person has a right to acquire such an interest under an option;
- in relation to an interest in Australian land, the person acquires an option to acquire such an interest; or
- has a right, other than by reason of having an interest under a trust, to have such an interest transferred to himself or herself or to his or her order.

2.56 It is irrelevant whether or not the right or option is presently exercisable or exercisable in the future, or whether the agreement, right or option requires the fulfilment of a condition.

2.57 However, for some purposes of this Act, if the provisions of an agreement to acquire or sell an interest in a security, asset, trust or Australian land do not become binding on a person until one or more conditions are met, the person is taken to have entered the agreement, and to have acquired or sold the interest, only when the provisions become binding. This exception applies for the purposes of new Part 4 (notice of notifiable action), new Part 5 (offences and civil penalties) to

the extent that it relates to Part 4, and any other provision of the Act to the extent that it relates to new Part 4 or Part 5. This ensures that persons who notify a notifiable action prior to the related agreement entered into becoming binding have not committed an offence and are not subject to a civil penalty. *[Schedule 1, item 3, section 15]*

***Meaning of ‘proposes’ to take certain action***

2.58 Without limiting the meaning of ‘propose’, a person proposes to acquire an interest in securities (that is, shares in a corporation or a unit trust), assets or Australian land if:

- the person makes an offer to acquire the interest;
- the person makes or publishes a statement that expressly or impliedly invites a person who holds an interest in securities, assets or Australian land to dispose of that interest; or
- the person takes part in, or proposes to take part in, negotiations with a view to acquiring an interest in securities, assets or Australian land.

2.59 A person proposes to enter into or terminate an agreement if the person takes part in, or proposes to take part in, negotiations with a view to entering or terminating the agreement. *[Schedule 1, item 3, section 16]*

***Meaning of ‘interest’ and ‘aggregate interest’ of a specified percentage in an entity***

2.60 A person holds an interest of a specified percentage in an entity if the person, alone or together with any one or more associates of the person:

- is in a position to control at least that percentage of the voting power or potential voting power of the entity; or
- holds interests in at least that percentage of the issued securities of the entity, or would hold at least that percentage of such interests, if securities in the entity were issued as the result of the exercise of certain other specified kinds of rights, such as the right to acquire an interest in shares under an option.

**Example 2.4**

Finland Co is the trustee of the Finco Unit Trust. There are 100 units in the Finco Unit Trust as at 1 July 2015. Menfem Co, a foreign person,

holds 24 units in Finco Unit Trust, which gives it a beneficial interest in the Finco Unit Trust of at least 20 per cent. This means that Menfem Co has a substantial interest in Finco Unit Trust. Thus Finland Co, as the trustee of the Finco Unit Trust, is a foreign person under the Act.

2.61 Two or more persons (not being associates of each other) hold an aggregate interest of a specified percentage in an entity if they, together with any one or more associates of them:

- are in a position to control at least that percentage of the voting power or potential voting power in the entity; or
- hold interests in at least that percentage of the issued securities in the entity, or would hold at least that percentage of such interests, if securities were issued as a result of the exercise of specified kinds of rights.

2.62 In determining the percentage of voting power or potential voting power that a person is in a position to control in an entity, any votes that the person controls as a proxy are disregarded. This does not affect the voting power of the person who has appointed the proxy or representative. *[Schedule 1, item 3, section 17]*

### ***Rules relating to determining percentages of interests in entities***

#### *Exercise of future rights*

2.63 In determining the percentage of the interests in the issued securities in an entity that a person holds, or would hold at a particular time, it should be assumed that:

- if a person has a right which would result in the person holding an interest in an issued security in an entity, the right is exercised at that time; or
- if it cannot be determined at that time whether the right could be exercise, the right is exercised at that time.

#### *Discretionary trusts*

2.64 If the terms of a trust confer on a trustee a power or discretion to distribute the income or property of a trust to one or more beneficiaries, for the purposes of this Act each beneficiary is taken to hold a beneficial interest in the maximum percentage of income or property of the trust that the trustee is permitted to distribute to that beneficiary. *[Schedule 1, item 3, section 18]*

### **Example 2.5**

Jakarta Co is the trustee of the Ronson Discretionary Trust. Pursuant to the Trust Deed, the trustee has discretion to distribute up to 25 per cent of the income of the trust each financial year to each of four beneficiaries Able, Brian, Cain and Donna (all of whom are individuals not ordinarily resident in Australia).

The trustee did not distribute income to any of the beneficiaries from commencement of the trust in the 2012 and 2013 income years. However in the 2014 income year the trustee distributed 25 per cent of the income to each of Able, Brian and Cain but there was no distribution to Donna. Even though Donna has not received a distribution, for the purposes of the Act she is taken to hold a beneficial interest to the maximum percentage the trustee is permitted to distribute to her being 25 per cent. The same applies to Able, Brian and Cain and Donna for the trust from commencement. Thus Jakarta Co, as the trustee of the Ronson Discretionary Trust, is a foreign person under the Act.

### ***Tracing of substantial interests in corporations and trusts***

2.65 The Bill provides for substantial interests in a corporation or trust to be traced back through the ownership of relevant entities.

2.66 The tracing rules do not apply for the purposes of determining, under new subsection 47(2) (which concerns the meaning of notifiable action) whether a foreign person acquires a direct interest in an Australian entity or Australian business that is an agribusiness or a foreign person acquires a substantial interest in an Australian entity. This ensures that acquisitions that occur offshore and are remote from Australia (such as an acquisition by a French Group of a United Kingdom parent entity of a multinational group that has an Australia business as part of its global operations) are not notifiable actions, although it may still be a significant action where the Treasurer may have powers available should the acquisition be considered contrary to the national interest.

2.67 The tracing rules also do not apply when determining if a foreign person acquires a direct interest in an Australian entity or Australian business that is an agribusiness is a significant action. This means that if the Australian agribusiness was owned by a United States parent entity that was acquired by a French Group, it would not be a significant action specific to an Australian agribusiness (this does not necessarily exclude it from being a significant action - entities if the conditions are met for it to be a significant action to acquire a substantial interest in an entity). *[Schedule 1, item 3, sections 19 and 42]*

***Meaning of ‘acquire’ an interest of a specified percentage in an entity***

2.68 A person **acquires** an interest of a specified percentage in an entity if the person:

- starts to hold an interest of that percentage in the entity; or
- would start to hold an interest of that percentage in the entity on the assumption that the person held interests in securities that the person has offered to acquire or held rights to votes that might be cast at a meeting of the entity that are rights the person has offered to acquire; or
- with respect to a person who already holds an interest of that percentage in the entity, the person:
  - begins to be in a position to control more of the voting power or potential voting power in the entity;
  - starts to hold additional interests in the issued securities in the entity; or
  - would start to hold additional interests in the issued securities in the entity, if securities in the entity were issued as a result of the exercise of all rights of a kind mentioned in new paragraph 15(1)(b) or (c).

*[Schedule 1, item 3, section 20]*

***Meaning of ‘subsidiary’ and ‘holding entity’***

2.69 An entity (described in the Bill as the ‘lower entity’) is a subsidiary of another entity (described in the Bill as the ‘higher entity’) if the higher entity is in a position to control more than half the voting power in the lower entity; holds more than half the issued securities in the lower entity; or the lower entity is a subsidiary of an entity that is the higher entity’s subsidiary. The Bill provides that certain securities held or powers exercisable by various persons are to be disregarded for the purposes of determining whether a lower entity is a subsidiary of a higher entity.

2.70 An entity (the higher entity) is a holding entity of another entity if the lower entity is a subsidiary of the higher entity. *[Schedule 1, item 3, section 21]*

***Meaning of ‘voting power’ and ‘potential voting power’***

2.71 The ***voting power*** in an entity refers to the maximum number of votes that might be cast at a general meeting of the entity [*Schedule 1, item 3, subsection 22(1)*]. The term ‘general meeting’ is defined by new section 4.

2.72 The ***potential voting power*** in an entity refers to the voting power in an entity calculated on the basis that the votes that might be cast at a general meeting include each vote that might come into existence in the future because of the exercise of a right, and, if it came into existence, might be cast at a meeting of the entity.

2.73 For the purposes of assessing how much of the ***potential voting power*** in an entity a person is in a position to control at a particular time, if a right exists that, if exercised, would result in the person being in a position to control more of the potential voting power in the entity and it cannot be determined at that time whether the right would be exercised, it should be assumed that the right would be exercised at that time.

2.74 If a person is in a position to veto any resolution of the board or a general meeting of the entity, then (except for the purposes of new subsection 47(2)(b) (meaning of notifiable action) and subsection 54(4) (meaning of control)) the person is taken to be in a position to control 20 per cent of the potential voting in the entity. [*Schedule 1, item 3, section 22*]

***Meaning of ‘controls’ the voting power***

2.75 A person ***controls*** the voting power in an entity if the person controls the power directly or indirectly, including as a result or by means of agreements or practices, regardless of whether the agreements or practices have legal or equitable force or are based on legal or equitable rights. [*Schedule 1, item 3, section 23*]

***Meaning of ‘determines the policy’ of a business of exploiting a mining or production tenement***

2.76 Without limiting the meaning of ***determines the policy***, a person determines the policy of a business of exploiting a mining or production tenement if the person determines questions relating to the disposal of an interest in the tenement. [*Schedule 1, item 3, section 24*]



***Meaning of ‘enters’ an agreement***

2.77 Without limiting the meaning of the term, the Bill provides that a person ***enters*** an agreement if the person enters any formal or informal scheme including by creating a trust, entering into a transaction, or acquiring an interest in a security, asset, trust or Australian land. A person is also taken to enter an agreement if the agreement is materially altered or varied. *[Schedule 1, item 3, section 25]*

2.78 A material alteration or variation would include an alteration or variation that increases the percentage that a person holds or would hold in an entity. A variation to the way that consideration is worked out is not material. *[Schedule 1, item 3, Note 2 in section 25]*

2.79 ‘Scheme’ is broadly defined by the Act and includes any agreement, understanding, promise or undertaking, express or implied, regardless of whether this is legally enforceable. *[Schedule 1, item 3, section 4]*

***Meaning of ‘sensitive business’***

2.80 A business that meets the conditions specified in the regulations made under the Act is a ***sensitive business***. The regulations may prescribe sensitive businesses generally, or different sensitive businesses for different kinds for foreign persons and different conditions for different kinds of sensitive businesses. *[Schedule 1, item 3, section 26]*

2.81 Businesses that may be prescribed as a sensitive business include if:

- the business is carried on wholly or partly in the media, telecommunications and transport sectors (including a business relating to infrastructure for those sectors); or
- the business is wholly or partly:
  - the supply of training or human resources to, the manufacture of military goods, equipment or technology for, or the supply of military goods, equipment or technology to, the Australian Defence Force or other defence forces;
  - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;

- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; or
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

***Regulations to provide in relation to valuing assets***

2.82 Regulations may be made in relation to valuing the assets of an entity, trust or business. *[Schedule 1, item 3, section 27]*

***Acts done by agents***

2.83 Any act done or proposed to be done by an agent on behalf of his or her principal is taken to be done or proposed to be done by his or her principal. *[Schedule 1, item 3, section 28]*

***Application of this Act to individuals and entities***

2.84 The Act and any regulations made under it apply to all individuals, irrespective of whether they are resident in Australia or Australian citizens; all corporations, whether or not formed or carrying on business in Australia; and all unit trusts, regardless of whether they are Australian unit trusts. *[Schedule 1, item 3, section 29]*

***Extension to external Territories***

2.85 The Bill and any regulations made under it apply to every external Territory. ‘External Territory’ has the meaning given by section 2B of the *Acts Interpretation Act 1901*. *[Schedule 1, item 3, section 30]*

***Extraterritorial application***

2.86 The Bill and any regulations made under it apply both within and outside Australia. *[Schedule 1, item 3, section 31]*

***Extension to exclusive economic zone and continental shelf***

2.87 The Bill applies to matters relating to the exercise of Australia’s sovereign rights in the exclusive economic zone or the continental shelf. *[Schedule 1, item 3, section 32]*

### ***Act binds the Crown***

2.88 The Commonwealth, State and Territory Governments are bound by the Act. In line with normal practice, the Crown is not liable to a pecuniary penalty or to be prosecuted for an offence. *[Schedule 1, item 3, section 33]*

### ***Effect of Act on other laws***

2.89 The Bill and any regulations made under it are not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with it. *[Schedule 1, item 3, section 34]*

### ***Severability***

2.90 The Bill provides for continued operation of the Act (or provisions of the Act) in the event of a successful constitutional challenge. It sets out the various constitutional heads of power upon which the Act can draw if its operation is expressly confined to apply to persons under those constitutional powers. This gives the Bill the widest possible operation consistent with Commonwealth constitutional legislative power. *[Schedule 1, item 3, sections 35 and 36]*

### ***Regulations providing for exemptions***

2.91 Regulations may be made that provide that this Act, or specified provisions of this Act, do not apply to:

- acquisitions of the kind or in the circumstances prescribed by the regulations;
- interests of the kind or in the circumstances prescribed by the regulations;
- Australian businesses of the kind or in the circumstances prescribed by the regulations; or
- foreign persons if the kind or in the circumstances prescribed by the regulations.

2.92 In addition, the regulations may provide that:

- land of a specified kind is not agricultural land; or
- specified foreign persons who take action in relation to interests in Australian land may disregard the fact that the land is agricultural land for all or specified purposes.

*[Schedule 1, item 3, section 37]*



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## **Chapter 3**

# ***Powers of the Treasurer in relation to acquisitions***

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### **Outline of chapter**

3.1 This chapter explains the powers of the Treasurer to make orders and decisions under new Part 3 of the Act in relation to any significant action taken or proposed to be taken.

3.2 This chapter also explains the circumstances in which a foreign person must notify the Treasurer before taking a notifiable action. The concepts of significant action and notifiable action are defined by new Part 2 of the Act.

### **Summary of new law**

3.3 The Bill enables the Treasurer to make a broad range of orders in relation to a significant action that a person is proposing to take or has already taken. Broadly, a significant action is an action to acquire specified interests in securities, assets or interests in land, or otherwise take action in relation to entities (that is, corporations and units trusts) and businesses, that have a connection to Australia. An action is generally only a significant action if it meets the applicable monetary threshold test and the action results in either a change in control involving a foreign person or the action is taken by a foreign person.

3.4 If the Treasurer is notified that a person is proposing to take a significant action, the Treasurer may:

- decide not to object to the action and give the person a no objection notification not imposing conditions;
- decide not to object to the action provided that one or more conditions are complied with and give the person a no objection notification imposing conditions; or
- decide that the person taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

3.5 If a significant action has already been taken which is contrary to the national interest, the Treasurer may make an order, known as a disposal order, which is directed at unwinding the action. For example, the Treasurer could order a person to dispose of their shares by a specified time. This Bill also allows the Treasurer to impose legally enforceable conditions in such circumstances as an alternative to a disposal order.

3.6 A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action (this concept is explained below, but only certain significant actions are also notifiable actions). However, a foreign person may choose to notify the Treasurer before taking a significant action for the certainty offered by a no objection notification. If a foreign person is given a no objection notification in relation to the significant action, and provided the person does not take any action which is not authorised by the Act, the Treasurer is not able to make a disposal order.

3.7 A foreign person who proposes to enter an agreement to take a notifiable action must notify the Treasurer before entering the agreement. In broad terms, a notifiable action is a proposed action:

- to acquire a direct interest in an agribusiness;
- to acquire substantial interests in Australian entities; or
- to acquire an interest in Australian land.

3.8 Generally, the action is only notifiable if the entity, business or land meets the threshold test.

3.9 A foreign person must not enter into the agreement for a specified period (generally 40 days) unless the person is given a no objection notification.

3.10 Actions to acquire interests in Australian land that are specified in an exemption certificate are generally not notifiable actions. An exemption certificate is a certificate given by the Treasurer that specifies an interest, or an interest of a kind, is not a significant action or notifiable action. Existing examples of exemptions certificates under the Act are certificates for an annual program of acquisitions of Australian urban land (known as, annual program certificates) and the certificate that allows developers to sell new dwellings in a development to foreign persons.

## **Detailed explanation of new law**

### **Meaning of significant action**

3.11 The criteria for determining whether an action is a significant action depend on whether the action is in respect of an entity, a business or Australian land.

#### ***Meaning of significant action - entities***

3.12 An action in relation to an entity (that is, a corporation or a unit trust) is a significant action if it meets four conditions. These conditions concern:

- the kind of action;
- whether the action meets the threshold test;
- the kind of entity; and
- except in the case of an agribusiness, whether there has or would be a change in the control of the entity. In the case of an agribusiness, the fourth condition is satisfied if the action in question is taken by a foreign person.

#### ***Kinds of action***

3.13 The *first* condition concerns the kind of action. An action satisfies the first condition if it involves:

- an acquisition of a direct interest in an entity that is an agribusiness. The terms ‘agribusiness’ and ‘direct interest’ will be defined by the regulations;
- an acquisition of interests in securities in an entity;
- the issuing of securities in any entity;
- the entry into an agreement in relation to the affairs of the entity under which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity, or an associate of such a person; or
- the alteration of a constituent document of the entity as a result of which one or more senior officers of the entity will

be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity, or an associate of such a person. ‘Constituent document’ of an entity means any rules or other document constituting or establishing the entity or governing its activities. In the case of a corporation, the corporation’s constitution will be a constituent document. In the case of a unit trust, the trust deed will be a constituent document.

*[Schedule 1, item 3, section 4]*

*Threshold test*

3.14 The *second* condition is that the threshold test is met in relation to the entity. In order for the threshold test to be met, a certain value must be above a threshold prescribed by the regulations. The value tested depends on the action taken - see new section 51, which is discussed in more detail below.

*Kinds of entities*

3.15 The *third* condition is that the entity is:

- in relation to an acquisition of interests in shares or an issue of shares, a corporation that is a relevant entity that carries on an Australian business (a business carried on wholly or partly in Australia in anticipation of profit or gain), either alone or together with one or more other persons or the holding entity of such a corporation. In general terms, a corporation is a ‘relevant entity’ if it is a corporation formed in Australia; a foreign corporation that holds relevant Australian assets (that is, Australian land) or is a holding corporation of one or more Australian corporations; or a holding entity of such a foreign corporation or a unit trust;
- for any other action in relation to a corporation, a corporation formed within Australia that carries on an Australian business, whether alone or together with one or more other persons or the holding entity (other than a foreign corporation) of such a corporation; or
- an Australian unit trust or a holding entity of an Australian unit trust. A unit trust is an ‘Australian unit trust’ for the purposes of this Act if:
  - the trustee of the trust holds relevant Australian assets;



- the trustee of the trust carries on an Australian business;
- the central management and control of the trust is in Australia;
- one or more persons who are ordinarily resident in Australia hold more than 50 per cent of the beneficial interests in the income or property of the unit trust; or
- it is listed for quotation in an official stock exchange in Australia.

*Actions results in change of control or, in the case of acquiring a direct interest in an agribusiness, the action is taken by a foreign person*

3.16 The *last* condition, other than in the case of acquiring a direct interest in an Australian agribusiness, is that the action would or has resulted in a change in control of the entity. The term ‘change in control’ has the meaning given by Subdivision C of Division 4 of Part 2, which is discussed below.

3.17 An agribusiness meets the *last* condition if the action is or is to be taken by a foreign person. [*Schedule 1, item 3, section 4; Schedule 1, item 4, section 40*]

#### ***Meaning of significant action - businesses***

3.18 An action in relation to a business is a significant action if it meets three conditions. These conditions concern:

- the kind of action;
- whether the action meets the threshold test; and
- whether the action results in a change in control, or, in the case of an agribusiness, the action is taken by a foreign person.

#### ***Kinds of action***

3.19 The *first* condition is that the action is one of the following:

- an acquisition of a direct interest in an agribusiness. The terms ‘agribusiness’ and ‘direct interest’ will be defined by the regulations;
- an acquisition of an interest in the assets of an Australian business; or

- entering into or terminating a significant agreement with an Australian business. The term ‘significant agreement’ with an Australian business is defined to mean an agreement relating to the leasing of, the letting on hire of, or the granting of any other right to use assets of the business or the participation by a person in the profits or management of the business.

*Threshold test*

3.20 The *second* condition is that the threshold test is met in relation to the Australian business. In order for the threshold test to be met, a certain value must be above a threshold prescribed by the regulations. The value tested depends on the action taken - see new section 51, which is discussed below.

*Action results in change of control, or, in case of acquiring a direct interest in an agribusiness, the action is taken by a foreign person*

3.21 Other than in the case of acquiring a direct interest in an Australian agribusiness, the third condition is that there would be or has been a change in control of the business. The term ‘change in control’ has the meaning given by Subdivision C of Division 4 of Part 2, which is discussed below.

3.22 In the case of an agribusiness, the third condition is that the action is or is to be taken by a foreign person. [*Schedule 1, item 4, section 41*]

*Action taken in relation to agribusinesses*

3.23 New section 42, for the avoidance of doubt, makes it explicit that actions (other than a direct interest in an Australian agribusiness) relating to an Australian entity or Australian business that is an agribusiness that meet the conditions to be a significant action, will still be significant actions where the necessary conditions for the applicable significant action are met. [*Schedule 1, item 4, section 42*]

*Meaning of significant action - land*

3.24 The acquisition of an interest in Australian land by a foreign person is a significant action if the threshold test is met in relation to the land. The threshold amount will be prescribed in regulations. [*Schedule 1, item 4, section 43*]

*Meaning of significant action - actions prescribed by the regulations*

3.25 The Bill permits regulations to be made that provide that a specified action is a significant action for the purposes of this Act

[Schedule 1, item 4, section 44]. For example, it is anticipated that regulations will prescribe the following actions to be significant actions:

- the acquisition by a foreign person of an interest of at least 5 per cent in an entity or business that wholly or partly carries on an Australian media business;
- the acquisition by a foreign government investor of a direct interest in an Australian entity or Australian business; and
- the starting an Australian business by a foreign government investor.

### **Actions that are not significant actions**

3.26 The Bill carves out several kinds of acquisitions in Australian land that would otherwise be a significant action for the purposes of this Act.

3.27 First, an acquisition is not a significant action if:

- a foreign person acquires an interest in a new dwelling that will be, is being or has been built on another interest in Australian land;
- the acquisition was from a person specified in an exemption certificate given under new section 57;
- the development interest was specified in the certificate;
- the specified person gave the foreign person a copy of that certificate before the foreign person acquired the interest; and
- any conditions specified in the certificate were met.

3.28 ***New dwelling*** means a dwelling (other than commercial residential premises) that will be, is being, or has been built on residential land and has:

- either not been previously sold as a dwelling; and
- has not been previously occupied; or

- if the dwelling is contained in a development<sup>3</sup> (which, in general terms, means one or more multi storey buildings that are or were under one development approval where the number of independent self-contained dwellings (other than townhouses) that the building or buildings contain or will contain at least the number prescribed by the regulations) and the dwelling was sold by the developer of the development, has not been previously occupied for more than 12 months in total.

*[Schedule 1, item 3, section 4]*

3.29 The above provides for the existing certificate that allows developers holding a certificate to sell new dwellings in a development to foreign persons. The effect of the certificate is that foreign persons acquiring interests in new dwellings in developments covered by a certificate are exempt from the requirement under the Act to notify and receive a no objection notification prior to proceeding with the purchase.

3.30 Secondly, an acquisition is not an interest in Australian land if a foreign person who makes the acquisition is specified in an exemption certificate given under new sections 58 or 59; the interest is of a kind specified in the certificate; and any conditions specified in the exemption certificate were met. *[Schedule 1, item 4, subsection 45(2)]*

3.31 New section 58 certificates allow for a program of acquisitions of Australian urban land (this relieves the foreign person of the requirement to notify and seek a no objection notification for each individual acquisition with the period). This reflects an existing longstanding type of certificate known as annual program certificates that are given on a 12 month basis. Where a foreign person is given such a certificate, they are required to comply with the standard requirements that would apply under the *Australia's Foreign Investment Policy* (Policy) for the type of property that is to be purchased. For example, for vacant land acquisitions construction must begin within the required timeframe. Such certificates include a requirement to report on acquisitions made and any associated required development of vacant land purchased.

3.32 The new section 59 certificate for established dwellings allows a foreign person to bid at multiple auctions over a specified period (such as six months) while only paying one application fee. In the absence of such

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<sup>3</sup> 'Development' is defined to mean one or more multi-storey buildings that are (or were) under one development approval and contain at least the prescribed number of independent self-contained dwellings (other than townhouses).

a certificate, foreign persons bidding at auctions would need prior foreign investment approval because bids at auction normally have to be unconditional. Only one property will be allowed to be purchased under each certificate and it will be a condition of the certificate that the foreign person notifies the Australian Taxation Office (ATO) once they have purchased a property. The highest bid that the foreign person granted the certificate can make at an auction will be limited by the application fee that they have paid (as a tiered fee structure based on the consideration of the property to be purchased is proposed for acquisitions of interests in residential land).

## **Meaning of notifiable action**

### *Meaning of notifiable action - general*

3.33 An action is a notifiable action if four conditions are met. These conditions concern:

- the kind of action;
- whether the action meets the threshold test;
- the kind of entity; and
- the action is or is to be taken by a foreign person.

### *Kinds of action*

3.34 The *first* condition is that the action is any of the following:

- the acquisition of a direct interest in an agribusiness;
- the acquisition of a substantial interest (that is, an interest of at least 20 per cent in the entity, or, in the case of a trust, a beneficial interest in at least 20 per cent of the income or property of the trust) in a corporation formed in Australia or an Australian unit trust; or
- the acquisition of an interest in Australian land.

### *Thresholds*

3.35 The *second* condition is that the threshold test is met in relation to the entity, business or land. In order for the threshold test to be met, a certain value must be above a threshold prescribed by the regulations. The value tested depends on the action taken - see new sections 51 to 53, which are discussed below.

*Kinds of entities covered*

3.36 The *third* condition is that the action in relation to an entity is:

- an Australian corporation that carries on an Australian business, whether alone or together with one or more other persons or an Australian entity that is the holding entity of such a corporation; or
- an Australian unit trust or an Australian corporation that is the holding entity of an Australian unit trust.

*Action taken by a foreign person*

3.37 An action meets the *fourth* condition if the action is or is to be taken by a foreign person. [*Schedule 1, item 4, section 47*]

***Actions prescribed by the regulations to be a notifiable action***

3.38 The regulations may prescribe that a specified action is a notifiable action. [*Schedule 1, item 4, section 48*]

***Actions that are not notifiable actions***

3.39 The Bill carves out several kinds of acquisitions in Australian land that would otherwise be a notifiable action for the purposes of this Act.

3.40 First, the acquisition of an interest in Australian land by a foreign person is not a notifiable action if the action would not be a significant action under new section 45.

3.41 Secondly, the acquisition of an interest in a new dwelling by a foreign person is not a notifiable action if:

- the interest (referred to in the Bill as the development interest) was acquired from a person who is specified in an exemption certificate given under new section 57;
- the development interest was specified in the certificate and the foreign person was given a copy of the certificate before the foreign person acquired the development interest; and
- one or more conditions specified in the certificate have not been met but the foreign person is not, at the time of the action, aware that the conditions have not been met.

3.42 This ensures that foreign persons who acquire interests in new dwellings (off-the-plan) that are part of a development from a developer do not have a notifiable action, subject to the above conditions being met. This reflects the current practice with off-the-plan developer certificates, where a developer has pre-approval to sell the new dwellings to foreign persons and the foreign person purchasing from the developer in such situations does not need to individually apply for approval (that is, the purchase by the foreign person is treated as exempt based on the certificate).

3.43 The regulations may also prescribe that other actions are not a notifiable action. *[Schedule 1, item 4, section 49]*

### **Threshold test and change in control**

#### ***The threshold test for entities and businesses***

3.44 The threshold value to be tested depends on the kind of action in question. The following table shows the threshold value for each kind of significant action in relation to an entity or business. *[Schedule 1, item 4, section 51]*

<i>Significant action</i>	<i>Value</i>
Acquiring a direct interest in an Australian entity or Australian business that is an agribusiness.	The sum of the value of the consideration for the acquisition and the value of the other interests held by the person, alone or together with one or more associates, in the entity or the business.
Acquiring interests in securities in an entity, or issuing securities in an entity.	The total asset value for the entity or the total issues securities value for the entity (whichever is higher).
Entering into an agreement, or altering a constituent document.	The total asset value for the entity.
Acquiring interests in the assets of an Australian business.	The value of the consideration for the acquisition.
Entering into or terminating a significant agreement with an Australian business.	The value of the total assets of the business.

#### ***The threshold test for land***

3.45 The threshold test for land distinguishes between three kinds of land - land of a kind that is prescribed by the regulations; agricultural land; and land that is neither prescribed nor agricultural land.

3.46 There will be no threshold for land that is prescribed for the purposes of new subsection 52(1). It is anticipated that residential land, vacant commercial land, mining or production tenements, and land acquired by a foreign government investor will be prescribed for the purpose of this provision.

3.47 The threshold test for agricultural land is met if the total value of all interests in agricultural land held by the foreign person and the consideration for the acquisition of the interest in the land is more than value prescribed by the regulation for the purposes of new paragraph 52(2)(b). It is anticipated that the prescribed value will be \$15 million.

3.48 The threshold test for land is met in relation to land that has neither been prescribed for the purposes of new subsection 52(1) nor is agricultural land if the value of the interest in the land is more than the value prescribed for the purposes of new paragraph 52(3)(b). [*Schedule 1, item 4, section 52*]

***The threshold test in relation to actions of more than one kind***

3.49 If an action in relation to an entity, business or land is covered by an agreement, the action is taken to be a significant action if the threshold is met in relation to the entity, business or land even if the threshold test is not met for another action covered by the agreement.

**Example 3.1**

A foreign person has entered an agreement that includes a share acquisition and a land acquisition from the same vendor. While the share acquisition is not a significant action due to it not meeting the conditions to be a significant action - entities, the land acquisition does meet the conditions to be a significant action - land.

3.50 If a single action is of more than one kind, the threshold test is met in relation to the single action if the test is met in relation to any one of the kinds of action or land.

**Example 3.2**

Aus Co is a foreign person due to Hong Kong Co, a foreign corporation, holding 25 per cent of the issued securities in Aus Co. Aus Co is neither a foreign government investor nor an investor from an agreement country.

Aus Co is proposing to acquire 25 per cent of the issued shares in Land Estate Co, an unlisted Australian incorporated corporation. The



consideration for the 25 per cent interest, which will be acquired from a number of existing Aus Co shareholders, will be \$60 million.

Aus Co intends to complete the acquisition in December and in September gives the Treasurer a notice in writing using the manner approved. Aus Co also pays the required fee on the same day so the notice is taken to have been given.

The target entity, Land Estate Co, which is not a holding entity, is an Australian corporation that carries on a business in Australia, but it is not an agribusiness. It released its latest audited financial accounts in August. The balance sheet shows a reasonable value for the interests in land held by Land Estate Co. Such interests exceed 50 per cent of the value of its total assets, thus Land Estate Co is an Australian Land Corporation. Land Estate Co does not carry on an agribusiness.

Upon receipt, the proposal is assessed against significant action - entities and significant action - land.

The *first* and *third* conditions for a significant action - entities are met as Aus Co proposes to acquire a substantial interest in an Australian corporation that carries on an Australian business. However, as the consideration for the shares values Land Estate Co at \$240 million (based on the \$60 million consideration for the proposed 25 per cent interest), which is below the 2015 indexed monetary threshold of \$252 million, the action is not a significant action - entities because the *second* condition is not met. As the *second* condition has not been met, the *fourth* condition has also not been considered.

However, the two conditions for significant action - land (that is, the action is for a foreign person to acquire an interest in Australian land and the threshold test is met in relation to the land) are satisfied and thus the proposal is a significant action - land.

The assessment of the significant action - land does not raise any national interest concerns so the Treasurer decides within the decision period that the Commonwealth has no objection to the action and notifies Aus Co in writing (the no objection notification) of the decision before the end of the 10 days after the decision is made.

#### *Agribusinesses that do not meet the threshold*

3.51 If an entity or business that is not an agribusiness does not meet the threshold test in relation to the entity or business the Act applies to the entity or business as if it were not an agribusiness. [*Schedule 1, item 4, section 53*]

***Change in control***

3.52 For the purposes of determining whether an action is a significant action, the Treasurer may only be satisfied that there is a change in control of an entity if the Treasurer is satisfied that the action would have, or has had, any of the following results:

- one or more foreign persons would begin, or have begun, to control the entity or business (whether alone or together with any associate of any of those persons); or
- if one or more foreign persons already control the entity or business:
  - another foreign person would become, or has become, a person who controls the entity or business; or
  - a person would cease, or has ceased, to be a person who controls the entity or business.

3.53 A person is considered to control an entity or business if:

- in relation to the acquisition of interests in securities in an entity or an issue of securities in an entity:
  - the person holds a substantial interest in the entity;
  - or the person is one of two or more persons who hold an aggregate substantial interest in the entity; or
- the person (whether alone or together with one or more associates) is in a position to determine the policy of an entity or business in relation to any matter.

3.54 However, a person holding a substantial interest in an entity or an aggregate substantial interest in the entity together with other persons is not considered to control the entity if the Treasurer is satisfied that, having regard to all the circumstances, the person together with any one or more associates of that person is not in a position to determine the policy of the entity.

3.55 If the Treasurer is satisfied that one or more foreign persons together with one or more associates control an entity or business, then, in relation to an action taken relating to the entity or business, a reference to a foreign person is taken, for the purposes of new Part 3, to include a reference to those associates, even if those associates are not foreign persons. *[Schedule 1, item 4, section 54]*

### ***Regulations***

3.56 Without limiting the regulations that could be made for new Part 2 of the Act, the Bill provides that regulations may be made that prescribe values or amounts of nil, different values or amounts for different kinds of entities, business or land, different values or amounts for different kinds of foreign persons, and different values or amounts for sensitive sectors generally or different sectors for different foreign persons.

3.57 The Bill also expressly provides that the Act does not limit subsection 33(3A) of the *Acts Interpretation Act 1901*. In general terms, subsection 33(3A) of the Acts Interpretation Act provides that where an Act confers a power to make an instrument of a legislative or administrative character with respect to particular matters, the power is to be interpreted as including a power to make such an instrument with respect to only some of those matters or with respect to a particular class or particular classes of those matters and to make different provision with respect to different matters or different classes of matters. [*Schedule 1, item 4, section 55*]

### **Exemption certificates**

#### ***Exemption certificates for new dwellings***

3.58 A person may apply for an exemption certificate if the person or any other person proposes to acquire or has acquired an interest in Australian land and the person or other person proposes to dispose to a foreign person new dwellings that will be, are being or have been constructed on that interest. The exemption is limited to new dwellings because it is the Commonwealth's policy that foreign investment in residential land should increase Australia's housing stock.

3.59 The term 'new dwelling' is defined to mean:

- a residential dwelling on residential land that has not been previously sold and has either not been previously occupied; or
- if the dwelling is part of a development and the person who sold the dwelling is the developer of the development, the dwelling has not been previously occupied in total for more than 12 months.

3.60 The Treasurer may give an exemption certificate if the Treasurer is satisfied that the disposal of new dwellings to foreign persons is not contrary to the national interest.

3.61 If the Treasurer gives such a certificate it must state the person to whom the certificate relates and the interest to which the certificate applies. *[Schedule 1, item 3, section 4; Schedule 1, item 4, section 57]*

3.62 This reflects the existing certificate that allows developers holding a certificate to sell new dwellings in a development to foreign persons. The effect of the certificate is that foreign persons acquiring interests in new dwellings in developments covered by a certificate are exempt from the requirement under the Act to notify and receive a no objection notification prior to proceeding with the purchase.

***Exemption certificates for foreign persons***

3.63 A foreign person who proposes to acquire one or more kinds of interest in Australian land may apply for an exemption certificate. This provision may be used to reduce the regulatory burden on developers who would otherwise have to make separate applications in relation to each residential and commercial development they propose to make within a 12 month period. Provided the Treasurer is satisfied that the proposed developments are not contrary to the national interest the Treasurer could grant a single certificate. This reflects an existing longstanding type of certificate known as annual program certificates.

3.64 Where a foreign person is given such a certificate, they are required to comply with the standard requirements that would apply under the Policy for the type of property that is to be purchased. Such certificates are currently issued under paragraph 3(h) of the Regulations.

3.65 If the Treasurer grants a certificate it must specify the person to whom the certificate relates and the kinds of interests in Australian land to which the certificate relates. *[Schedule 1, item 4, section 58]*

***Exemption certificates for established dwellings***

3.66 A foreign person may apply for an exemption certificate if the foreign person or any other foreign person proposes to acquire an interest in an established dwelling. ‘Established dwelling’ means any dwelling that is not a new dwelling. *[Schedule 1, item 3, section 4]*

3.67 The Treasurer may give such a certificate if the Treasurer is satisfied that an acquisition of that kind by that foreign person is not contrary to the national interest. If the Treasurer gives such a certificate the certificate must specify the person to whom the certificate is to apply and the kinds of interests in Australian land to which the certificate relates. *[Schedule 1, item 4, section 59]*

3.68 This certificate allows a foreign person to bid at multiple auctions over a specified period (such as six months) while only paying one application fee. In the absence of such a certificate, foreign persons bidding at auctions would need a no objection notification for each auction that they intend on bidding at because bids at auction normally have to be unconditional, whereas under the Act, it is an offence to fail to notify before an acquisition becomes unconditional.

3.69 Only one property will be allowed to be purchased under each certificate and it will be a condition of the certificate that the foreign person reports back to the ATO once they have purchased a property. The highest bid that the foreign person granted the certificate can make at an auction will be limited by the application fee that they have paid (as a tiered fee structure based on the consideration of the property to be purchased is proposed for acquisitions of interests in residential land).

***Other matters specified by an exemption certificate***

3.70 An exemption certificate may specify one or more conditions; a period during which the certificate is in force; and any other matter. An exemption certificate may deal with more than one interest or kind of interest in Australia. *[Schedule 1, item 4, section 60]*

***Time limit for making decisions on exemption certificates***

3.71 If a person applies for an exemption certificate the Treasurer must make a decision about whether to grant the application before the end of the period prescribed in the regulations or, if the person requests the Treasurer to extend the period, the period as extended.

3.72 If the Treasurer grants the application the exemption certificate must be given to the person before the end of 10 days after the decision is made.

3.73 If the Treasurer does not make a decision about an application for an exemption certificate within the period referred to above the Treasurer is taken to have granted the application without conditions. *[Schedule 1, item 4, section 61]*

***Variation or revocation of exemption certificates***

3.74 The Treasurer may vary or revoke an exemption certificate if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest. The Treasurer may exercise this power on the Treasurer's own initiative or at the request of the affected person. *[Schedule 1, item 4, section 62]*

***Regulations may provide for additional kinds of exemption certificates***

3.75 Regulations may be made which provide for additional kinds of exemption certificates. *[Schedule 1, item 4, section 63]*

**Entities whose securities are stapled and entities operating on a unified basis**

3.76 In general terms, an entity whose securities are stapled to the securities of another entity and an entity that operates on a unified basis with another entity are to be treated as entities of the same kind for the purposes of the Bill in certain circumstances. As a result, an action taken in relation to those entities may be a significant action or a notifiable action for the purposes of this Act.

3.77 Two entities are taken to be of the same kind if:

- the securities in an entity are stapled to the securities in one or more other entities; or
- an entity has entered an agreement with one or more other entities resulting in the entities being under a legal obligation to operate on a unified basis (for example, entities in a dual listed company arrangement); and
- a person takes an action in relation to an entity whose securities are stapled or any entity that is under a legal obligation to operate on a unified basis (which is referred to in the Bill as the target); and
- the target is not an Australian entity, an entity carrying on an Australian business or the holding entity of such an entity; and
- the securities of the target are stapled to an entity that is an Australian entity, an entity carrying on an Australian business or the holding entity of such an entity or the target is under a legal obligation to operate on a unified basis with an Australian entity, an entity carrying on an Australian business or the holding entity of such an entity (the related entity).

*[Schedule 1, item 4, section 65]*

## **Powers of the Treasurer**

### ***Orders prohibiting proposed significant actions***

3.78 The Treasurer may make an order which prohibits a significant action which is proposed to be taken if the Treasurer is satisfied that taking the significant action would be contrary to the national interest. The kind of significant action proposed determines the conduct that the Treasurer can prohibit.

### **Example 3.3**

If a foreign person is proposing to acquire interests in shares in a corporation and it is a significant action - entities which would be contrary to the national interest, the Treasurer could make an order prohibiting the whole or a part of the proposed acquisition.

3.79 If the Treasurer makes an order prohibiting a proposed significant action the Treasurer may also make certain additional orders. For example, if a foreign person proposes to acquire an interest in Australian land, the Treasurer may make an order directing a specified foreign person not to acquire any interests in the land or other thing concerned, or to acquire any such interests only to a specified extent. *[Schedule 1, item 4, section 67]*

3.80 A person may commit an offence or contravene a civil penalty provision if they engage in conduct that contravenes an order which prohibits a proposed significant action. *[Schedule 1, item 4, sections 86 and 93]*

### ***Interim orders***

3.81 It may sometimes not be possible for the Treasurer to decide whether to make an order prohibiting a proposed significant action within the statutory time limit (which is 30 days after the day that a person notifies the Treasurer that the person is proposing to take a significant action unless the person agrees otherwise - see new section 77). To ensure there is adequate time the Treasurer may make an order of the kind the Treasurer could make under new section 67 of the Act, the Treasurer may make an interim order. An interim order cannot be made for a period of more than 90 days and the additional period specified in the order commences once the order is published in the *Commonwealth of Australia Gazette* (Gazette) *[Schedule 1, item 4, section 68]*. This reflects the existing interim order practice under section 22 of the existing Act. An interim order may only be made once in relation to a significant action.

### ***Disposal orders***

3.82 If the Treasurer is satisfied that a significant action has been taken and the result is contrary to the national interest, the Treasurer may make an order that requires the person to dispose of the interest. The precise scope of the Treasurer's power to make such an order depends on the kind of significant action taken. For example, if the person acquired shares in a corporation, the Treasurer may make an order directing that the person who acquired the interest in the shares to dispose of those interests within a specified period to any one or more persons approved in writing by the Treasurer. *[Schedule 1, item 4, section 69]*

3.83 A person may commit an offence if they fail to comply with a disposal order *[Schedule 1, item 4, section 86]*. The Treasurer could also apply for an order from a court which requires the person to comply with the disposal order *[Schedule 1, item 4, section 132]*.

3.84 This reflects existing practice under the Act.

### ***Limitation on making disposal orders***

3.85 The Treasurer is generally not permitted to make a disposal order in relation to an action that is specified in a no objection notification imposing conditions or a no objection notification unless:

- the person is convicted of the offence of engaging in conduct that contravenes a condition of a no objection notification imposing conditions (see new section 87) or an order is made under section 19B of the *Crimes Act 1914* (which allows a court to discharge a person without proceeding to conviction even though the court was satisfied that the charge was proved) in respect of such an offence; or
- a civil penalty order is made against the person under the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) in relation to a contravention of new sections 93 (contravening the conditions in a no objection notification), 96 (contravening conditions in a no objection notification relating to residential land) or 97 (contravening the condition in a no objection notification that the person notify the Treasurer when the person acquires or disposes of an interest in residential land) relating to a condition included in the notification.

*[Schedule 1, item 4, section 70]*



***Variation and revocation of orders***

3.86 The Treasurer may vary or revoke an order prohibiting a proposed significant action, an interim order or a disposal order at any time if the Treasurer is satisfied that the variation or revocation is not contrary to the national interest. In the case of a variation, the person must either consent to the variation or the Treasurer must be satisfied that the person will not be disadvantaged by the variation. *[Schedule 1, item 4, section 71]*

***Publication and commencement of orders***

3.87 Any prohibition order, interim order, disposal order or variation or revocation of such an order must be in writing, signed by the Treasurer, and published in the Gazette within 10 days after the order is made.

3.88 An order generally commences on the day the order is published except in the case of an additional order or a disposal order, in which case the order commences on the day specified in the order, which must be at least 30 days after the order is published in the Gazette. *[Schedule 1, item 4, section 72]*

3.89 This reflects existing practice under the Act.

***Actions of more than one kind***

3.90 If a single action is covered by more than one provision, the Treasurer may make any of the orders under new Subdivision A of Division 2 that he or she could make in relation to the single action. For example, if a notifiable action was both a significant action - entities and a significant action - land, the Treasurer may make orders that can be made in either case. *[Schedule 1, item 4, section 73]*

***No objection notification imposing conditions***

3.91 The Treasurer may decide that the Commonwealth has no objection to a proposed significant action if one or more conditions are imposed, being a condition or conditions which the Treasurer is satisfied is necessary to ensure the action, if taken, will not be contrary to the national interest.

3.92 The Treasurer may also decide that the Commonwealth has no objection to a significant action that has been taken if one or more conditions are imposed, being a condition or conditions that the Treasurer is satisfied are necessary to ensure that the action is not contrary to the national interest.

3.93 A no objection notification that is subject to conditions must be given no later than the end of 10 days after the decision is made.

3.94 The Treasurer may revoke a condition at any time if the Treasurer is satisfied that to do so is not contrary to the national interest. The Treasurer may also vary a notification at any time by imposing a new condition or varying an existing condition if the Treasurer is satisfied that to do so is not contrary to the national interest and the person either consents to the new condition or the variation, or the Treasurer is satisfied that the new condition or variation does not disadvantage the person. The Treasurer may decide to vary a notification on the Treasurer's own initiative or in response to a written application made by the person.

3.95 If the Treasurer gives a person a no objection notification in relation to more than one significant action and the Treasurer is satisfied that the actions would result in a change in control of the entity or business, but not all the actions are taken, the person may give the Treasurer a later notice relating to a later action that is proposed to be taken in relation to the entity or business. If the person does give the Treasurer a later notice the Treasurer may determine that there has been a change in control of the entity or business as a result of the later action.  
*[Schedule 1, item 4, section 74]*

#### **Example 3.4**

The foreign person Singapore Co (who is not a foreign government investor) receives a no objection notification imposing conditions in relation to its proposed significant action - entities to acquire 60 per cent of the Australian corporation, Parts Co. In this case, the action would have to result in a change in control to be a significant action. All conditions for it being a significant action were met and the Treasurer considered that significant action would be contrary to the national interest if conditions were not imposed. Thus, Singapore Co received a no objection notification imposing conditions.

Subsequently, Singapore Co did not fully implement the proposed significant action. It only acquired a 25 per cent interest in the shares of Parts Co.

Two years after the original no objection notification imposing conditions, Singapore Co gives another notice of notifiable action in relation to Parts Co as it proposed to make a full takeover. At the time of its notice, Singapore Co has no nominees on the board of Parts Co (whereas under its earlier proposal it had indicated that it would seek a majority on the Board once it acquired a simple majority stake of greater than 50 per cent of the shares of Parts Co). There are some other large shareholders in Parts Co (their stakes had been expected to significantly decrease as Singapore Co moved to 60 per cent).

In light of the circumstances that have eventuated as Singapore Co did not fully implement its earlier significant action, the Treasurer is able to consider if the latest notifiable action would meet the conditions to be a significant action, including the requirement for the action to result in a change in control.

The Treasurer is satisfied that the notifiable action is a significant action and that the action would be contrary to the national interest if conditions were not imposed. Thus, Singapore Co received a no objection notification imposing conditions.

3.96 If a person who is given a no objection notification imposing conditions in relation to significant action engages in conduct that contravenes a condition in a no objection notification imposing conditions the person may commit an offence or be liable to a civil penalty.  
*[Schedule 1, item 4, sections 87 and 93]*

***No objection notification not imposing conditions***

3.97 If the Treasurer receives a notice that a person proposes to take a significant action and the Treasurer is satisfied that the proposed action would be a significant action within the meaning of the Act, the Treasurer may decide that the Commonwealth has no objection to the action. The Treasurer must then give a no objection notification of the decision to the person, which must be given before the end of 10 days after the decision is made.

3.98 A no objection notification in relation to an action taken in relation to an entity or business does not prevent the Treasurer from determining later whether there has been a change in control of the entity or business. *[Schedule 1, item 4, section 75]*

***Content of notification***

3.99 A no objection notification must specify the one or more significant actions to which the notification relates; the one or more foreign persons to which the notification relates; and a requirement that the significant actions to which the notification relates be taken before the end of the specified period.

3.100 A no objection notification may identify a foreign person by specifying a foreign person that is not yet incorporated or a trustee of a trust that is not yet established and specifying the way in which the foreign person is to be incorporated or the trust is to be established. This reflects that depending on the nature of what is to be acquired, business practice is often to establish a special purpose vehicle for the acquisition.

### **Example 3.5**

A foreign person is participating in a tender to purchase a large shopping centre. The shopping centre seller has made it a requirement that all bids are unconditional, so to participate in the tender the foreign person needs to give a notice of notifiable action to avoid otherwise committing an offence under the Act.

As the foreign person does not know if it will be successful in the tender, it does not want to bear the cost of incorporating a new wholly owned subsidiary to make the acquisition prior to having the Treasurer consider the significant action and knowing the outcome of the tender.

The Treasurer being able to include a yet to be incorporated subsidiary in the no objection notification caters to the business reality. Should the Treasurer consider the place of incorporation relevant to if the acquisition could be contrary to the national interest, the Treasurer is able to limit this to a particular jurisdiction such as Australia.

3.101 It is envisaged that if a no objection notification identified a foreign person that is not yet incorporated, the notification will specify that the corporation must be a wholly owned subsidiary of the person who applied for the no objection notification. The notification may also limit where the subsidiary can be incorporated or the trust may be established. Moreover, if the foreign person is ultimately not incorporated or the trust is not established, in the way specified in the notification, the notification will be taken not to specify the foreign person. *[Schedule 1, item 4, section 76]*

### **Example 3.6**

The no objection notification specified a foreign person that was yet to be incorporated and that the foreign person was to be incorporated in Australia (consistent with what was requested in the notice given of a notifiable action). However, the significant action was taken by Foreign Co, a foreign person that was neither specified in the no objection notification, nor newly incorporated in Australia.

In this case, Foreign Co who took the significant action does not get the benefit of the no objection notification. As the significant action was also a notifiable action, Foreign Co prima facie has failed to notify a notifiable action and may have committed an offence or exposed itself to civil penalties. The Treasurer's powers in relation to the significant action taken would also likely be available should the Treasurer consider the significant action taken to have been contrary to the national interest.

#### ***Time limit on making orders and decisions***

3.102 If a person notifies the Treasurer that a significant action is proposed to be taken the Treasurer can only make a prohibition order or

give a no objection notification imposing conditions during the ‘decision period’ provided the person has not taken the action by the end of the decision period.

3.103 The decision period is usually 30 days after the day the Treasurer was notified that a significant action is proposed to be taken, unless, before the end of that period, the person requests in writing that the Treasurer extend the period. However, if a person is given a notice under new section 133 (which requires the person to give information or produce documents), the decision period does not include any day in the period beginning on the day the notice is given and ending on the day the person gives the information or produces the document in accordance with the notice.

3.104 If the Treasurer makes an interim order in relation to the significant action, the Treasurer is not able to make a prohibition order or a disposal order, or give a no objection notification (imposing or not imposing conditions) in relation to the action if, by the time the interim order ends, the person has not taken the action by the end of the period. *[Schedule 1, item 4, section 77]*

#### ***Anti-avoidance***

3.105 The Treasurer may exercise the anti-avoidance powers in new subsection 78(2) (anti-avoidance powers) if:

- one or more persons enter into, begin to carry out, or carry out a scheme (a term which is broadly defined by new section 4);
- the Treasurer is satisfied that any of the persons who entered into, began to carry out or carried out all or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision in this Act; and
- all or part of scheme has achieved, or would have achieved were it not for the anti-avoidance powers, the purpose of the scheme.

3.106 This provision establishes an objective test, which means that the Treasurer may infer the purpose of the participant or participants from their conduct.

3.107 If the pre-conditions for the exercise of the anti-avoidance powers are satisfied, the Treasurer may make any order or decision under new Division 2 of Part 3 of the Act that the Treasurer would have been able to make if all or part of the scheme had not achieved that purpose.

However, the Treasurer cannot make an order prohibiting a person from doing anything the person has already done before the order is made.

3.108 This provision substantially re-enacts section 38A of the existing Act. *[Schedule 1, item 4, section 78]*

***Persons involved in avoidance taken to be associates***

3.109 New section 79 allows the Treasurer to declare persons involved in avoidance to be taken to be associates if the Treasurer has made an order under section 78 (anti-avoidance) in relation to more than one person and is satisfied that not making an order under the subsection 79(2) is contrary to the national interest. Such an order may take some or all of such persons to be associates of each other for the purposes of this Act, or for specified purposes. The order must specify the duration that it is in force and has effect according to its terms. To assist the reader the Bill explicitly provides that an order made under this provision is not a legislative instrument. Such an order would have an administrative, and not a legislative, character. *[Schedule 1, item 4, section 79]*

**Compulsory notice of notifiable actions and limitation on taking significant actions after notice given**

3.110 A foreign person who proposes to enter an agreement to take a notifiable action must give notice to the Treasurer before entering the agreement *[Schedule 1, item 4, section 81]*. A foreign person who gives a notice to the Treasurer stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken must not take that action until the earliest of the following:

- 10 days after the ‘decision period’ (that is, 30 days after the day the Treasurer receives a notice from the person about the proposed significant action which is a notifiable action unless the person requests in writing that the Treasurer extends the period);
- if an interim order is made - the day specified in the order; and
- the day a no objection notification is given to the person.  
*[Schedule 1, item 4, section 82]*

**Reviewability of decisions**

3.111 The Act does not currently provide for any decision to be reviewed on its merits and all decisions are excluded from the operation of

the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) by Schedule 1 to that Act. However, judicial review is available under section 39B of the *Judiciary Act 1903*.

3.112 Like the existing Act, the Bill does not provide for merits review of any decision and decisions remain excluded from review under the ADJR Act, although judicial review remains available under the Judiciary Act.

3.113 The Bill does not provide for the review of decisions on their merits because the decisions under the Act involve complex questions of government policy that can have broad ranging implications for persons other than those immediately affected by the decision. For example, when making a decision under the Act it may be proper for the Treasurer to take into account a broad range of factors, including national security, competition, Australian Government policies (including tax), impacts on the economy and the community, and character of the foreign investor. It is therefore not appropriate for decisions that have such a high political content to be subject to merits review. The provision of merits review might also result in applicants being less willing to provide sensitive information which is relevant to the decision if they believe there is a risk that such information may be disclosed during such proceedings.





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## **Chapter 4**

### **Offences and civil penalties**

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#### **Outline of chapter**

4.1 To promote compliance with the obligations imposed by the legislation a number of offences and civil penalty provisions are included in new Part 5 of the Act.

#### **Summary of new law**

4.2 The Bill ensures that regulatory action can be taken in response to an alleged contravention which is commensurate with the seriousness of the alleged breach. To this end, the Bill provides for the imposition of criminal and civil penalties, as well as the issuing of infringement notices for less serious offences.

4.3 A person may commit an offence or be liable to a civil penalty if the person:

- fails to notify the Treasurer before taking a notifiable action;
- gives a notice to the Treasurer stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken and takes the action before the end of the applicable time limit;
- contravenes an order made by the Treasurer which prohibits a proposed significant action, is related to a prohibition order, is an interim order or is a disposal order; or
- contravenes a condition in a no objection notification imposing conditions or an exemption certificate.

4.4 A foreign person who fails to comply with the obligations imposed by this Act in relation to residential land may also be liable to a civil penalty.

4.5 Each civil penalty provision in this Act is enforceable under Part 4 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act).

4.6 An infringement officer may issue an infringement notice if the infringement officer believes on reasonable grounds that the person contravened a civil penalty provision relating to land. The framework for the use of infringement notices created by the Regulatory Powers Act applies to infringement notices given for suspected contraventions of this Act.

### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
The maximum penalty for an individual who commits any of the most serious offences in the Act is imprisonment for three years, a fine equivalent to 750 penalty units, or both. If a body corporate commits any of these offences the maximum penalty is 3,750 penalty units.	The maximum penalty for an individual who commits any of the most serious offences under the Act is a fine not exceeding 500 penalty units, or imprisonment for two years, or both. The maximum penalty for a body corporate who commits any of the most serious offences under the Act is a fine not exceeding 2,500 penalty units.
Creates a number of civil penalty provisions (Part 5, Division 3 of the Bill). The level of civil penalties reflects the seriousness of the contraventions and provides clear and strong disincentives for non-compliance.	No equivalent provisions.
Each civil penalty provision is enforceable under Part 4 of the Regulatory Powers Act (new section 99).	No equivalent provision.
An infringement notice may be issued by an infringement officer if the officer believes on reasonable grounds that the person has contravened a civil penalty provision relating to land. The framework for the use of infringement notices in Part 5 of the Regulatory Powers Act applies to the issuing of infringement notices (new section 100).	No equivalent provision.
A charge on land is created in specified circumstances to secure the payment of a civil penalty (new Part 5, Division 4, Subdivision C).	No equivalent provisions.

## Detailed explanation of new law

### Offences and civil penalties

#### *Failing to give notice*

4.7 A foreign person may commit an offence or contravene a civil penalty provision if the person takes a notifiable action without first notifying the Treasurer. If a person takes an action by entering an agreement, the agreement is entered into when the agreement becomes binding. *[Schedule 1, item 4, sections 84, 91 and 94]*

4.8 The maximum penalty for an individual who commits this offence is imprisonment for three years, a fine equivalent to 750 penalty units<sup>4</sup> (currently \$135,000), or both *[Schedule 1, item 4, section 84]*. If a body corporate is found guilty of this offence subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine equivalent to 3,750 penalty units (currently \$675,000).<sup>5</sup>

4.9 For actions which do not relate to residential land, if the relevant court is satisfied that an individual has contravened the civil penalty provision, it could order the person to pay a pecuniary penalty equivalent to 250 penalty units (currently \$45,000). By virtue of paragraph 82(5)(a) of the Regulatory Powers Act the maximum pecuniary penalty that could be imposed on a body corporate that contravenes the provision is 1,250 penalty units (currently \$225,000). *[Schedule 1, item 4, section 90 and 91]*

4.10 For actions which relate to residential land there are additional civil penalties which are considered below.

#### *Entering agreements before end of time period*

4.11 If a foreign person gives a notice to the Treasurer stating that they propose to take a significant action (including a significant action that is a notifiable action) and the action is taken before the applicable day specified in new section 82, the person may commit an offence or be liable to a civil penalty. If a person takes an action by entering an agreement, and if a provision in an agreement does not become binding on a person until one or more conditions are met, the person is taken to

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<sup>4</sup> The value of one penalty unit is currently \$180.

<sup>5</sup> Subsection 4B(3) of the Crimes Act provides that the maximum penalty that can be imposed on a body corporate is five times higher than the penalty that can be imposed on a natural person.

have entered into the agreement only when the provisions become binding.

4.12 If an individual commits this offence the maximum penalty is imprisonment for three years, a fine equivalent to 750 penalty units (currently \$135,000), or both. If a body corporate is found guilty of this offence subsection 4B(3) of the Crimes Act allows a court to impose a fine equivalent to 3,750 penalty units (currently \$675,000). [*Schedule 1, item 4, section 85*]

4.13 For actions which do not relate to residential land, if a civil penalty order is sought and the relevant court is satisfied that an individual has contravened the provision the court could order the person to pay a pecuniary penalty equivalent to 250 penalty units (currently \$45,000). By virtue of paragraph 82(5)(a) of the Regulatory Powers Act, the maximum pecuniary penalty that could be imposed on a body corporate who contravenes this provision is 1,250 penalty units (currently \$225,000). [*Schedule 1, item 4, sections 90 and 92*]

4.14 For actions which relate to residential land there are additional civil penalties which are considered below.

#### ***Contravening orders under Part 3***

4.15 A person may commit an offence or contravene a civil penalty provision if the person engages in conduct that contravenes an order made by the Treasurer under new Part 3.

4.16 If an individual commits this offence the maximum penalty is imprisonment for three years, a fine equivalent to 750 penalty units (currently \$135,000), or both. If a body corporate is found guilty of this offence subsection 4B(3) of the Crimes Act allows a court to impose a fine equivalent to 3,750 penalty units (currently \$675,000). [*Schedule 1, item 4, section 86*]

4.17 If the relevant court is satisfied that an individual has contravened the civil penalty provision it could order the person to pay a pecuniary penalty equivalent to 250 penalty units (currently \$45,000). By virtue of paragraph 82(5)(a) of the Regulatory Powers Act the maximum pecuniary penalty that could be imposed on a body corporate that contravenes the provision is 1,250 penalty units (currently \$225,000). [*Schedule 1, item 4, section 89*]

#### ***Contravening conditions***

4.18 A person may commit an offence or contravene a civil penalty provision if the person engages in conduct that is contrary to a condition

included in a no objection notification imposing conditions or an exemption certificate.

4.19 The maximum penalty that may be imposed on an individual who commits this offence is imprisonment for three years, a fine equivalent to 750 penalty units, or both. If a body corporate is found guilty of this offence subsection 4B(3) of the Crimes Act allows a court to impose a fine equivalent to 3,750 penalty units (currently \$675,000). *[Schedule 1, item 4, section 87]*

4.20 For actions which do not relate to residential land, a person who fails to comply with a condition included in a no objection notification imposing conditions or imposed on an exemption certificate given by the Treasurer contravenes a civil penalty provision. If the relevant court is satisfied that an individual has contravened the provision the court could order the person to pay a pecuniary penalty equivalent to 250 penalty units (currently \$45,000). By virtue of paragraph 82(5)(a) of the Regulatory Powers Act, the maximum pecuniary penalty that could be imposed on a body corporate who contravenes this civil penalty provision is 1,250 penalty units (currently \$225,000). *[Schedule 1, item 4, sections 90 and 93]*

4.21 For actions which relate to residential land there are additional civil penalties which are considered below.

#### ***Failing to advertise new dwellings***

4.22 In general terms, new section 57 enables the Treasurer to give a certificate to a property developer who is proposing to sell to foreign persons new dwellings that will be, are being, or have been constructed on land the property developer has an interest in. It is envisaged that such a certificate will generally include a condition imposed under new section 60 that requires the person to whom the certificate applies to advertise the new dwellings in Australia. A developer may commit an offence or contravene a civil penalty provision if the developer disposes of an interest in the dwelling to a foreign person without advertising the dwelling in accordance with the condition.

4.23 The maximum penalty that may be imposed on an individual who is found guilty of this offence is imprisonment for three years, a fine equivalent to 750 penalty units (currently \$135,000), or both. If a body corporate is found guilty of this offence subsection 4B(3) of the Crimes Act allows a court to impose a fine equivalent to 3,750 penalty units (currently \$675,000). These penalties are justified because of the importance of maximising the supply of residential properties that are available for purchase by Australians. *[Schedule 1, item 4, section 88]*

4.24 If the relevant court is satisfied that an individual has contravened the civil penalty provision it could order the person to pay a pecuniary penalty equivalent to 250 penalty units (currently \$45,000). By virtue of paragraph 82(5)(a) of the Regulatory Powers Act the maximum pecuniary penalty that could be imposed on a body corporate that contravenes the provision is 1,250 penalty units (currently \$225,000). [*Schedule 1, item 4, paragraph 97(2)(b)*]

***Fine or imprisonment ratios for certain offences***

4.25 The fine or imprisonment ratio for these offences differs from the standard ratio of one year imprisonment or 60 penalty units (or five penalty units or one month imprisonment), which is the ratio generally recommended in the Australian Government's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide).<sup>6</sup> This departure is necessary because the maximum fine that can be imposed for the most serious contraventions must be sufficient to counter the potential financial gain that may be obtained by a person who commits the offence. However, if the ratio were maintained the maximum term of imprisonment that could be imposed for these offences would be twelve and a half years imprisonment - a punishment which would be disproportionate to the seriousness of the proscribed conduct. The ratio is also consistent with the ratio in current the Act.

**Additional civil penalty provisions — residential land**

4.26 There are different civil penalties for contraventions which involve residential land.

***Acquisition of interests in residential land***

4.27 A foreign person who takes a notifiable action relating to a residential land acquisition without notifying the Treasurer is liable to a civil penalty. A foreign person who gives notice of a significant action relating to a residential land acquisition but takes that action before the time calculated in accordance with new section 82 is also liable to a civil penalty.

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<sup>6</sup> *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, 40, available at [www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx](http://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx), last accessed on 21 June 2015.

4.28 An individual who contravenes this civil penalty provision is liable to a pecuniary penalty the equivalent of whichever is the greater of the following:

- 10 per cent of the consideration for the acquisition of the interest; or
- 10 per cent of the market value of the interest.

4.29 The penalty is fixed to the value of the interest so that it will have the same impact on any gain made regardless of the value of the interest. For that reason, if a body corporate contravenes the provision there is no provision that the person pay five times the penalty that could be imposed on an individual. *[Schedule 1, item 4, section 94 and subsection 99(4)]*

#### ***Acquisition of interests in established dwellings***

4.30 A temporary resident (a term defined by new section 4) who holds an interest in more than one established dwelling at the same time contravenes a civil penalty provision. However, a person is not in contravention of a civil penalty provision if:

- the temporary resident is making a genuine attempt to dispose of one or more of the interests;
- if those interests were disposed of, the temporary resident would not have been holding an interest in more than one established dwelling; and
- the person has been holding an interest in more than one established dwelling for less than six months.

*[Schedule 1, item 4, section 95]*

4.31 An individual who contravenes this civil penalty provision is liable to a pecuniary penalty the equivalent of whichever is the greater of the following:

- the amount of the capital gain;
- 25 per cent of the consideration for the acquisition of that interest; or
- 25 per cent of the market value of that interest.

4.32 The Bill explains how the amount of capital gain that was made or would have been made is to be calculated. *[Schedule 1, item 4, section 98]*

4.33 The penalty is fixed to the gain or value of the interest so that it has the same impact on any gain made regardless of the gain or value of the interest. For that reason, if a body corporate contravenes the provision there is no provision that the person pay five times the penalty that could be imposed on an individual. *[Schedule 1, item 4, subsection 99(4)]*

#### ***Contravening conditions in relation to residential land***

4.34 A person who fails to comply with a condition imposed on a no objection notification imposing conditions given under new section 74 relating to residential land is liable to a civil penalty. The maximum pecuniary penalty that could be imposed by a court on an individual who contravenes this civil penalty provision is whichever is the highest of the following:

- the amount of the capital gain that was made or would be made on the disposal of that interest;
- 25 per cent of the consideration for the acquisition of that interest; or
- 25 per cent of the market value of the interest.

*[Schedule 1, item 4, section 96]*

4.35 The Bill explains how the amount of capital gain that was made or would have been made is to be calculated. *[Schedule 1, item 4, section 98]*

4.36 The penalty is fixed to the gain or value of the interest so that it has the same impact on any gain made regardless of the gain or value of the interest. For that reason, if a body corporate contravenes the provision there is no provision that the person pay five times the penalty that could be imposed on an individual. *[Schedule 1, item 4, subsection 99(4)]*

### **Miscellaneous matters — liability of persons and enforcement**

#### ***Liability of officers of corporations***

4.37 An officer of a corporation that is convicted of an offence against the Act or the regulations commits an offence and contravenes a civil penalty provision if the person authorised or permitted the commission of the offence by the corporation. The maximum penalty is



the maximum penalty that could be imposed if the officer contravened the same provision the corporation contravened. [*Schedule 1, item 4, section 102*]

4.38 It is appropriate that extended accessorial liability applies to officers of corporations given the importance of ensuring compliance with the obligations imposed by this Act is taken seriously by those ultimately responsible for the conduct of those corporations that engage in activities regulated by this Act. Liability is not being imposed simply because the person is an office holder at the relevant time, but because the officer was personally responsible for the corporation's non-compliance with this Act. This approach ensures fairness and some protection to the individuals involved.

4.39 The officer might also be liable for an offence as a result of Part 2.4 of the *Criminal Code*.

#### ***Extended criminal liability***

4.40 The provisions in Part 2.4 of the *Criminal Code* extend criminal liability to a person who may not directly or individually commit an offence against this Act, but who:

- attempts to commit an offence;
- is an accomplice to the commission of an offence;
- jointly commits an offence;
- procures the commission of an offence by an agent;
- incites the commission of an offence; or
- conspires with another person to commit an offence.

#### ***Civil penalties for officers of corporations***

4.41 An officer of a corporation is liable to a civil penalty if the corporation contravenes a civil penalty provision and the officer knew that, or was reckless or negligent as to whether, the contravention would occur. However, the officer is only be liable to a civil penalty if he or she is in a position to influence the conduct of the corporation in relation to the contravention and the officer failed to take all reasonable steps to prevent it. [*Schedule 1, item 4, section 103*]

4.42 An officer is **reckless** as to whether the contravention would occur if the officer is aware of a substantial risk that the contravention

would occur and, having regard to the circumstances known to the officer, it was unjustifiable to take that risk. An officer is **negligent** as to whether the contravention would occur if the officer's conduct involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the contravention would occur that the conduct merits the imposition of a pecuniary penalty.

4.43 The terms reckless and negligent are defined because the provision is a civil penalty provision and the required standard of conduct should be made clear to enable corporate officers to comply with the law.

#### ***Enforcement of civil penalty provisions***

4.44 Each civil penalty provision in the Act is enforceable under Part 4 of the Regulatory Powers Act, which sets out a framework for the use of civil penalties to enforce civil penalty provisions created by other Acts. An application for an order that a person has contravened a civil penalty provision must be made within four years of the alleged contravention (subsection 82(2) of the Regulatory Powers Act).

4.45 Part 4 of the Regulatory Powers Act permits an authorised applicant to apply to a relevant court for an order that a person who is alleged to have contravened a civil penalty provision to pay the Commonwealth a pecuniary penalty. The Treasurer is an authorised applicant and the Federal Court of Australia (Federal Court), Federal Circuit Court of Australia (Federal Circuit Court) and a Supreme Court of a State or Territory are relevant courts. *[Schedule 1, item 4, section 99]*

4.46 Criminal proceedings may be commenced against a person for conduct that is the same, or substantially the same, as conduct that would constitute a contravention of a civil penalty provision even if a civil penalty order has been made against the person in relation to the contravention (section 90 of the Regulatory Powers Act). However, a relevant court cannot make a civil penalty order against a person for a contravention of a civil penalty provision if the person has been convicted of an offence constituted by the conduct that is the same, or substantially the same, as the conduct constituting the contravention (section 88 of the Regulatory Powers Act).

#### ***Ancillary contravention of a civil penalty provision***

4.47 The effect of subsection 92(1) of the Regulatory Powers Act is that conduct ancillary to the contravention of a civil penalty provision in this Act is considered to be a contravention of the provision itself. Ancillary conduct includes any attempt to contravene a provision that

does not succeed, aiding or inducing a contravention of a civil penalty provision, and any conspiracy to contravene a civil penalty provision. This means, for example, that if a person aids a foreign person who is not a temporary resident to purchase an established dwelling (see new section 95), that person may also be liable to a civil penalty.

### **Infringement notices**

4.48 An infringement notice may be given by an infringement officer with respect to the civil penalty provisions that relate to residential land [*Schedule 1, item 4, subsection 100(1)*]. Infringement notices allow action to be taken against those who engage in less serious contraventions of this Act more efficiently and effectively than through court action alone, and provide the potential for a speedier resolution of matters than may be possible through the courts.

4.49 The framework for the use of infringement notices created by Part 5 of the Regulatory Powers Act applies to these infringement notices. The Secretary may specify in writing that an individual is an infringement officer for the purposes of Part 5 of the Regulatory Powers Act. The Secretary may only appoint an individual who is an employee performing the duties of an APS 6 position under the *Public Service Act 1999*, or an equivalent or higher position, within the Department or in the Australian Taxation Office (ATO). [*Schedule 1, item 4, subsections 100(2) and (3)*]

4.50 Under Part 5 of the Regulatory Powers Act, an infringement officer may give a person an infringement notice if the infringement officer believes on reasonable grounds that a person has contravened a provision subject to an infringement notice. An infringement notice must be given within 12 months after the day on which the contravention is alleged to have taken place.

4.51 A person who is given an infringement notice can choose to pay the amount specified in the notice as an alternative to having court proceedings brought against the person for a contravention of a provision subject to an infringement notice under Part 5 of the Act. Payment of the amount is not an admission of guilt or liability. However, if the person fails to pay the infringement notice the person is exposed to the risk that the Secretary may apply to a court for an order that the person pay a civil penalty. If the person pays the penalty then any liability that person has for the contravention of the relevant civil penalty provision is discharged and proceedings cannot be brought against the person for the contravention.

4.52 The Secretary of the Department is the relevant chief executive for the purposes of Part 5 of the Regulatory Powers Act. Under Part 5 of

the Regulatory Powers Act the relevant chief executive may grant an extension to pay the amount specified in an infringement notice if a person to whom an infringement notice is given applies in writing for an extension before the period. A relevant chief executive may also withdraw an infringement notice given to a person in response to written representations from that person (section 106 of the Regulatory Powers Act).

4.53 The amount to be specified in an infringement notice for the alleged contravention of a civil penalty provision depends on whether the infringement notice is given for a ***tier 1 infringement notice*** or a ***tier 2 infringement notice***. The amount payable for a tier 1 infringement notice is 60 penalty units (currently \$10,800) if it is given to a body corporate and 12 penalty units (currently \$2,160) if it is given to any other person. The amount payable for a tier 2 infringement notice is 300 penalty units (currently \$54,000) if the notice is given to a body corporate, and 60 penalty units (currently \$10,800) if given to any other person. *[Schedule 1, item 4, subsection 100(6)]*

4.54 An infringement notice is a ***tier 1 infringement notice*** if the notice relates to an alleged contravention of a civil penalty provision by a person who is discovered because the person informed the Commonwealth of the conduct that constituted the alleged contravention. An infringement notice is a ***tier 2 infringement notice*** if the Commonwealth discovers the conduct through some other means, such as information provided by a member of the public or by undertaking data-matching. *[Schedule 1, item 4, section 101]*

4.55 The amount payable under an infringement notice departs from the maximum that is generally recommended in the Guide (which is one fifth of the maximum penalty that a court could impose on a person, but not more than 12 penalty units for an individual and not more than 60 penalty units in the case of a body corporate).<sup>7</sup> This departure is necessary because the maximum penalty that could be imposed by a court is not fixed and the amount payable must be an adequate deterrent.

## Recovering unpaid penalties

4.56 Where pecuniary penalties are ordered against a foreign person, recovery of debts will be difficult if the person is not in or has few assets in Australia. Subdivision C of Division 4 of Part 5 seeks to

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<sup>7</sup> *The Guide*, 59.

minimise the risk that proceeds are not available for payment of penalties.

4.57 If a person a court finds that a person has contravened Division 3 of Part 5 and a pecuniary penalty is imposed, the penalty is a debt that is due and payable. In addition, the Treasurer may in specified circumstances declare that a charge applies in relation to Australian land the person has an interest in to secure the payment of the penalty, and the charge has priority over any other interest in the land. A declaration made by the Treasurer must specify the period during which the declaration is in force and the land to which it applies. To assist readers the Bill expressly provides that a declaration made under subsection 105(1) or 105(2) is not a legislative instrument. Such a declaration is of an administrative character. *[Schedule 1, item 4, sections 104 and 105]*

4.58 The charge remains in force until the interest in the land is sold or all of the following are paid:

- the penalty is paid;
- any costs incurred by the Commonwealth in relation to the proceedings for the offence or civil penalty order; and
- any costs incurred by the Commonwealth in relation to recovering the penalty.

The charge on the land is not affected by any change in ownership of the land. The Treasurer has power, on behalf of the Commonwealth, to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the charge on a land register, including executing any instrument that is required to be executed or signing any certificate that states that a charge is created on land and specifies the land on which the charge is created. *[Schedule 1, item 4, section 106]*

If a charge is created under new section 104 and it is still in force three months after the pecuniary penalty was imposed on the person (or any longer period determined by the Treasurer or the court), the person's interest in Australian land vests in equity in the Commonwealth and vests in the Commonwealth at law once all applicable registration requirements have been complied with. The Commonwealth is entitled to be registered on a land register as the owner of the property. However, new subsections 107(1) to (3) do not apply if at the end of the three month period (or any longer period determined by the court or the Treasurer), a restraining order is in force in relation to the land under Part 2-1 of the *Proceeds of Crime Act 2002*; a forfeiture order is in force in relation to the land under Part 2-2 of that Act; or an order of a kind

prescribed by the regulations is in force in relation to the land under a law of the Commonwealth, a State or a Territory. *[Schedule 1, item 4, section 107]*

The Treasurer, and persons acting on the Commonwealth's behalf, can generally dispose of, or otherwise deal with, a person's interest in Australian land that vests under new section 107 only after the later of:

- if the period provided for lodging an appeal against the finding that the person contravened a provision in Division 3 of Part 5 of the Act has expired without such an appeal having been filed, the end of that period; or
- if an appeal is lodged against the finding that the person contravened a provision in Division 3 of Part 5 of the Act, the appeal lapses or is finally determined.

4.59 However, the Treasurer or other people on behalf of the Commonwealth could dispose or otherwise deal with the land at any earlier point in accordance with the leave of a court and in accordance with the directions of a court. *[Schedule 1, item 4, section 108]*

4.60 If the Treasurer sells the interest in the land, the Treasurer may give full and effective title to the land free of all other interests. This extinguishes all other interest in the land, allowing the purchaser to have full title. The Treasurer may make and execute any instruments or documents necessary for the purposes of selling the interest in the land such as the transfer of title documents and contracts of sale. *[Schedule 1, item 4, section 109]*

4.61 The Treasurer may apply the proceeds of the sale against:

- the relevant penalty and any other penalty that is due and payable to the Commonwealth under this Act by the former owner of the land;
- any costs incurred by the Commonwealth in relation to the proceedings for the offence or civil penalty order; and
- any costs incurred by the Commonwealth in relation to recovering the penalty.

4.62 The provision sets out those to whom the Treasurer must pay the remainder *[Schedule 1, item 4, subsection 109(6)]*. No stamp duty or other tax or fee is payable under a law of a State or Territory in respect of a vesting of an interest in Australian land under new section 107, or anything connected with the vesting of that interest, if the Treasurer

declares that the interest in the land has vested under new section 107 in an instrument which specifies the interest in the land. To assist the reader the Bill explicitly provides that an instrument made under new section 110 is not a legislative instrument. Such an instrument is of an administrative character, rather than a legislative character [*Schedule 1, item 4, subsection 110*].

4.63 If the operation of Subdivision C of Division 4 of Part 5 would result in an acquisition of property from a person otherwise than on just terms (within the meaning of section 51(xxxi) of the Constitution), the Commonwealth is liable to pay a reasonable amount of compensation to the person. [*Schedule 1, item 4, section 111*]





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## **Chapter 5**

### **Fees**

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#### **Outline of chapter**

- 5.1 Part 6 of the Bill specifies:
- when certain fees are payable;
  - the Treasurer is not required to take any action in relation to certain applications or notices before the applicable fee is paid; and
  - the Treasurer may waive the whole or part of a fee if the Treasurer is satisfied that it is not contrary to the national interest to waive or remit the fee.

#### **Context of amendments**

5.2 Currently, no fees or charges are payable when making an application or giving a notice under the Act. The imposition of fees helps fund the costs of considering applications, the introduction of a specialised investigative and enforcement area within the Australian Taxation Office (ATO), improvements in the collection of data about foreign investment in Australia, and an increase in the resources dedicated to the investigation of alleged breaches of the Act. The introduction of fees is also consistent with the Australian Government's policy that the full cost of regulating a particular sector should generally be recovered from that sector.

#### **Detailed explanation of new law**

##### ***When are fees payable?***

5.3 A person who applies for an exemption certificate, gives notice of a notifiable action, or gives a notice in relation to a proposal to take a significant action that is not a notifiable action must pay a fee when the notice is given or an application made. A fee is also payable if the Treasurer makes a decision or order under new Part 3 of the Act relating to a significant action and a person has not notified the Treasurer. A fee

payable under this Act that does not relate to an application made or a notice given by the person may be recovered by the Treasurer, on behalf of the Commonwealth, as a debt due to the Commonwealth. *[Schedule 1, item 4, section 113]*

5.4 To comply with section 55 of the Constitution, a fee imposed under new Part 6 is imposed as a tax by the *Foreign Acquisition and Takeovers Fees Imposition Bill 2015*. The imposition of fees ensures that those who undertake activities regulated by this Act rather than the general community bear the costs relating to the administration of the Act, including the costs of monitoring compliance with the legislation, investigating alleged breaches and commencing enforcement proceedings in appropriate cases.

***Requirement for fees to be paid before Treasurer exercises powers***

5.5 Where a fee is payable for making an application or giving a notice, a person is taken not to have given the notice or made the application until the fee has been paid or the fee has been waived. *[Schedule 1, item 4, section 114]*

***Waiver and remissions of fees***

5.6 The Treasurer may waive or remit the whole or a part of a fee that is payable under this Act if the Treasurer is satisfied that it not contrary to the national interest to waive or remit the fee. *[Schedule 1, item 4, section 115]*

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## **Chapter 6**

# **Record keeping and confidentiality of information**

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### **Outline of chapter**

6.1 New Part 7 of the Act requires certain records to be made and kept. New Part 7 also seeks to ensure that information provided under this Act is not disclosed unnecessarily or put to unauthorised use.

### **Context of amendments**

6.2 To support the operation of the Act and regulations, people must make and keep records to record and support their compliance with their obligations under the legislation.

6.3 In examining significant proposals, the Treasurer and departmental officers frequently consult with Commonwealth, State and Territory government departments, agencies and authorities with responsibilities relevant to the proposals. The advice and comments provided by such agencies are important in assessing whether they raise any national interest issues.

### **Detailed explanation of new law**

#### **Record keeping**

6.4 A person must make and keep records of every action, transaction, event or circumstance relating to the matters shown for the length of time shown in the table below.

<i>Action, transaction, event or circumstance</i>	<i>Length of time record must be kept</i>
A significant action or notifiable action that is relevant to an order made or decision made under new Part 3.	Five years after the action is taken by the person.
An action taken by a person that is specified in an exemption certificate.	Five years after the action is taken by the person.

<i>Action, transaction, event or circumstance</i>	<i>Length of time record must be kept</i>
The person's compliance with a condition in a no objection notification imposing conditions or an exemption certificate.	Two years after the condition ceases to apply to the person.
The disposal of an interest in residential land if the acquisition of the interest by the person was a significant action or notifiable action or would have been a significant action or a notifiable action if the action had not been specified in an exemption certificate.	Five years after the interest is disposed of by the person.

6.5 The records must be in English or readily accessible so that they can be translated into English if necessary. Records may be kept in hard copy or electronic form. *[Schedule 1, item 4, section 119]*

6.6 A person who fails to make and keep records in accordance with the Act may be guilty of an offence unless the Treasurer notified the person that they do not need to make or keep the record. The maximum penalty for this offence is 30 penalty units (currently \$5,400). *[Schedule 1, item 4, section 119]*

6.7 The offence is one of strict liability. In general terms, this means that it is only necessary for the prosecution to prove the alleged action, inaction or state of affairs - the person's intention is irrelevant. It is considered appropriate for this offence to be one of strict liability because it would be difficult for the prosecution to prove the person's intention and the maximum penalty is a fine rather than a period of imprisonment.

## Confidentiality of information

### *Disclosure of protected information for a purpose not authorised by the Act or regulations is an offence*

6.8 It is an offence for a person to record, disclose or otherwise use protected information unless the making of the record, disclosure or use is authorised by new Part 7 of the Act or an exception applies. *[Schedule 1, item 4, section 128]*

6.9 **Protected information** is defined by new section 120 to mean information that is obtained under, in accordance with, or for the purposes of the Act and regulations. The definition of 'protected information' excludes information specified in an exemption certificate

for new dwellings or an exemption certificate provided for by the regulations. That is so that there is transparency where necessary. For example, buyers will be able to confirm whether an exemption certificate is valid. It also excludes information that is obtained by a person engaged under the *Public Service Act 1999* who is employed in the Australian Taxation Office (ATO) who obtained the information under, in accordance with or for the purposes of this Act as a result of a delegation or subdelegation under new subsection 138, or as a result of a request by the Treasurer that the Commissioner of Taxation (Commissioner) exercise his or her powers under this Act. That is because such information will become subject to the information protection regime in the *Taxation Administration Act 1953* (TAA 1953). [Schedule 1, item 4, section 120]

6.10 The penalty for this offence is imprisonment for two years, a fine equivalent to 120 penalty units (currently \$21,600), or both. If a body corporate is found guilty of this offence, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 600 penalty units. These penalties are appropriate because of the damage that could be done to a person as the result of an unauthorised use or disclosure of information about that person.

***Exception for use of information in good faith***

6.11 The offence relating to protected information does not apply if the person makes a record of, or discloses or otherwise uses protected information in good faith in performing, or purportedly performing, his or her functions or duties under this Act, or in exercising or purportedly exercising his or her powers under this Act. [Schedule 1, item 4, section 129]

6.12 In any prosecution, the defendant bears the evidential burden with respect to this exception. This is justified because in many cases it is within the defendant's knowledge as to why the person used or disclosed the protected information. The effect is that the defendant must adduce or point to evidence that suggests a reasonable possibility that one of the exceptions applies. Once this is done, the prosecution must refute this beyond reasonable doubt to obtain a conviction (see section 13.3 of the *Criminal Code*).

***Authorisation of disclosures of protected information for the purposes of this Act***

6.13 To assess whether a particular foreign investment or proposed foreign investment may be contrary to the national interest it is often necessary for the official assisting the Treasurer to perform his or her functions under this Act to consult with a number of Commonwealth, State and Territory government agencies. The Bill therefore authorises a

person to disclose protected information if it is for the purpose of performing the person's functions or duties under the Act or regulations and the disclosure is to a person who is:

- a Minister, an officer or an employee of the Commonwealth, a State, the Australian Capital Territory or the Northern Territory;
- an officer or employee of a Commonwealth, State or Territory body; or
- a person appointed by the Commonwealth for the purposes of this Act (for example, a member of the Foreign Investment Review Board, a non-statutory body established to advise the Treasurer on foreign investment, including applications made under this Act). *[Schedule 1, item 4, subsection 121(1)]*

6.14 A person who obtains protected information under new subsection 121(1) is also permitted to make a record of disclose or otherwise use the information for the purposes for which the information was disclosed to the person. The person may also disclose the protected information for the purposes for which it was disclosed, but only to:

- a Minister, an officer or an employee of the Commonwealth, a State, the Australian Capital Territory or the Northern Territory;
- an officer or employee of a Commonwealth, State or Territory body; or
- a person appointed by the Commonwealth for purposes of this Act. *[Schedule 1, item 4, subsection 121(2)]*

***Other circumstances in which protected information may be recorded, used or disclosed***

6.15 In broad terms, a person is authorised to record, disclose or use protected information if:

- the information is disclosed to a Minister responsible for the administration of specified Commonwealth statutes, or the accountable authority of a Commonwealth entity that deals with the administration of any of those Acts, for the purposes of administering those Acts; *[Schedule 1, item 4, subsection 122(1)]*
- the information is disclosed to a Minister responsible for agriculture, industry policy, investment promotion, taxation

policy or foreign investment in Australia for the purpose of enabling the Minister to discharge that responsibility; *[Schedule 1, item 4, subsection 122(2)]*

- the information is disclosed to the Secretary of a Department administered by a Minister responsible for agriculture, industry policy, investment promotion, taxation policy or foreign investment in Australia for the purposes of assisting that Minister to discharge their responsibilities; *[Schedule 1, item 4, section 122(3)]*
- the information is disclosed to an enforcement body<sup>8</sup> within the meaning of the *Privacy Act 1988* if the person reasonably believes it is reasonably necessary for one or more enforcement related activities<sup>9</sup> within the meaning of the *Privacy Act* conducted by an enforcement body; *[Schedule 1, item 4, section 123]*
- the information specifies matters prescribed by the regulations for the purposes of reporting on the administration of this Act and the information does not identify, nor is reasonably capable of being used to identify, a person; *[Schedule 1, item 4, section 124]*
- the protected information disclosed is already in the public domain (other than as a result of the contravention of new Division 3 of Part 7); *[Schedule 1, item 4, section 125]*
- the record, disclosure or use is in accordance with the written consent of the person to whom it relates; or *[Schedule 1, item 4, section 126]*
- the disclosure is to a court or tribunal, or in accordance with an order of a court or tribunal, for the purposes of proceedings if the Commonwealth is a party to the

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<sup>8</sup> The definition of ‘enforcement body’ in the *Privacy Act* currently includes the Australian Federal Police; a police force or service of a State or Territory; the Office of the Director of Public Prosecutions or a similar body established under a law of a State or Territory; the Australian Crime Commission; Customs; the Australian Prudential Regulation Authority; and the Australian Securities and Investment Commission.

<sup>9</sup> The definition of ‘enforcement related activity’ in the *Privacy Act* currently includes (among other activities) the prevention, detection, investigation, prosecution or punishment of criminal offences or breaches of a law imposes a penalty or sanction; the conduct of surveillance activities; intelligence gathering activities or monitoring activities and the protection of public revenue.

proceeding and the Treasurer is satisfied that it is not contrary to the national interest. *[Schedule 1, item 4, section 127]*

***No requirement to provide information***

6.16 The unauthorised release of protected information could cause significant harm, particularly where it is highly commercially sensitive. For that reason a person cannot be required to produce any document in his or her possession or to disclose any matter or thing of which she or he had notice to a court, tribunal, authority or person having power to require the production of documents or answering questions. *[Schedule 1, item 4, section 130]*



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## **Chapter 7**

### **Miscellaneous**

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#### **Outline of chapter**

- 7.1 New Part 8 of the Bill:
- invests the Federal Court of Australia (Federal Court), the Federal Circuit Court of Australia (Federal Circuit Court) and the Supreme Court of a State or Territory with the power to enforce certain orders made by the Treasurer;
  - permits the Treasurer to require a person to give information or produce documents relating to matters relevant to the exercise of the Treasurer's powers under this Act;
  - clarifies that a failure to comply with the Act or regulations does not invalidate an action;
  - enables the Secretary to specify the method that must be used by a person making an application or giving a notice;
  - permits the Treasurer and the Secretary to delegate their functions and powers under this Act to certain officers, including the Commissioner of Taxation (Commissioner);
  - enables the Commissioner to exercise certain information gathering and other investigatory powers when exercising delegated powers or performing functions under this Act or at the request of the Treasurer; and
  - confers a general regulation making power.

#### **Summary of new law**

- 7.2 New Part 8 builds on Part III of the existing Act.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Federal Court, the Federal Circuit Court and the Supreme Court of a State or Territory may make a broad range of orders if a person has contravened an order made under new Part 3 or contravened a condition of a no objection notification imposing conditions. A court may make such an order regardless of whether the offender has been convicted of an offence or a civil penalty order has been made, and regardless of whether other proceedings relating to the contravention have been or are to be instituted (new section 132).	The Treasurer may apply to the Supreme Court of a State or Territory to make a broad range of orders if a person has failed to comply with an order made under Part II of the Act (which permits the Treasurer to prohibit certain proposals if they are contrary to the national interest, such as an order prohibiting a proposed acquisition of shares) (section 35).
The Treasurer can require a person to give the Treasurer any information or produce any documents relating to matters that are relevant to the exercise of the Treasurer's powers under the Act or regulations. Failure to do so is a criminal offence and the maximum penalty for this offence is a fine equivalent to 30 penalty units, imprisonment for 6 months, or both (new section 133).	The Treasurer can require a person to give the Treasurer any information or produce any documents relating to matters that are relevant to the exercise of the Treasurer's powers under the Act or any regulations made under it. Failure to do so is a criminal offence and the maximum penalty for this offence is a fine equivalent to 20 penalty units, imprisonment for 12 months, or both (section 36).
The Treasurer and the Secretary may delegate their powers under this Act, including to the Commissioner (new section 137).	No equivalent provision. However, the Treasurer has made a written instrument which authorises certain senior officials in the Treasury and the Australian Taxation Office (ATO) to exercise various powers under the Act and the Regulations.
The Commissioner can exercise a broad range of investigatory powers for the purposes of administering a function or power delegated to the Commissioner or at the request of the Treasurer (new section 138).	No equivalent provisions.

## Detailed explanation of new law

### *Powers of courts to enforce Treasurer's orders*

7.3 If a person (the offender) fails to comply with an order made by the Treasurer under new Part 3 of the Act or a condition of a no objection notification imposing conditions, the Treasurer may apply to the Federal Court, Federal Circuit Court or the Supreme Court of any State or Territory to make such order or orders as the court thinks fit for the purpose of giving effect to the order or condition imposed by the Treasurer. *[Schedule 1, item 4, subsection 132(1)]*

7.4 The Bill includes a non-exhaustive list of the kinds of orders that might be made by a court *[Schedule 1, item 4, subsection 132(3)]*. A court may also make an order directing any person to do or refrain from doing a specified act for the purposes of securing compliance with any other order made under new section 132 as well as an order containing such ancillary or consequential provisions as the court thinks fit. *[Schedule 1, item 4, subsection 132(4)]*

7.5 A court may rescind, vary or discharge an order it has made under new section 132. A court may suspend the operation of an order made by it under new section 132. *[Schedule 1, item 4, subsection 132(6)]*

7.6 For the avoidance of doubt, the Bill clarifies that a court may make such an order regardless of whether the offender has been convicted of an offence or a civil penalty order has been made in relation to the contravention; the contravention is continuing or other proceedings relating to the contravention have been or are to be instituted. *[Schedule 1, item 4, subsection 132(2)]*

7.7 These provisions provide additional enforcement options to achieve the objects of the Act. For example, where a civil penalty order is sought, the Treasurer may also seek an order restraining any dealings in property connected to the alleged breach so that the property is available to satisfy payment of a civil penalty order.

7.8 The Bill clarifies that the powers conferred on a court under new section 132 of the Bill are in addition to, and not instead of, any other powers of the court conferred by the Act or otherwise. *[Schedule 1, item 4, subsection 132(7)]*

### *Treasurer may require information*

7.9 The Treasurer may require a person to give information or to produce documents if the Treasurer has reason to believe that the person is capable of giving information or producing documents relating to

matters that are relevant to the exercise of the Treasurer's powers under the Act and regulations. The notice given by the Treasurer must specify a period (of at least 14 days) within which the information must be given or documents produced and manner in which the person must give the information or produce the documents. The Treasurer may extend, or further extend, the period within which the information must be given or the documents produced if the Treasurer is satisfied that it is reasonable to do so.

7.10 It is an offence not to comply with such a notice, and the maximum penalty that can be imposed under the provision is a fine equivalent to 30 penalty units (currently \$5,400), imprisonment for six months, or both.

7.11 A person does not commit an offence if the person complies with the notice to the extent to which the person is capable of doing so. It is appropriate to include this matter in a defence (rather than specifying it as an element of the offence) because it is a matter that is peculiarly within the defendant's knowledge and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

7.12 The effect of sections 137.1 and 137.2 of the *Criminal Code* is that a person might commit an offence if they provide information or documents that are false or misleading.

7.13 A person is required to comply with the notice even if giving the information or producing the document might tend to incriminate him or her. Whilst the privilege against self-incrimination is abrogated in relation to this provision, the Bill provides individuals with the protection that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in any criminal proceedings or in proceedings for the recovery of a civil penalty (other than proceedings under this Act or sections 137.1 or 137.2 of the *Criminal Code*) or indirectly to gather other evidence against the person. These exceptions are commonly referred to as a 'use and derivative use' immunity. However, the information could be used against a third party.

7.14 The removal of the privilege, subject to a use or derivative use immunity, assists the Treasurer and the Commissioner to monitor and enforce compliance with this Act and thereby assist in the effective administration of this Act. That is in circumstances where information may be held offshore and information necessary to administer the Act may not otherwise be available. The effective administration of this Act is vital to ensuring that the Australian public continues to have confidence in the way foreign investment is regulated in Australia.

7.15 The Bill does not abrogate the right of a person to claim legal professional privilege. This means that a person has the right to refuse to give information or produce a document on the ground that the information or document could be subject to legal professional privilege. *[Schedule 1, item 4, section 133]*

***Validity of acts done in contravention of Act***

7.16 An act is not invalidated simply because it constitutes an offence against or contravention of a civil liability provision in the Act or regulations. *[Schedule 1, item 4, section 134]*

***Method of notification and application***

7.17 A notice given, or an application made, under the Act or regulations made has no legal effect unless it is given using the method approved by the Secretary of the Department. For example, the Secretary might require applications to be made and notices given using an online portal. *[Schedule 1, item 4, section 135]*

***Withdrawal of applications and notices***

7.18 An application or notice that is withdrawn has no effect *[Schedule 1, item 4, section 136]*. This makes clear that if a person does not wish to proceed with an application, or significant action, the Treasurer does not need to make a decision to avoid the consequences which would otherwise flow from an application having been made (for example, under section 82).

***Delegation of powers or functions***

7.19 The Treasurer may generally delegate any of his or her powers or functions under this Act to the Secretary of the Treasury (Department), the Commissioner, or a person who is engaged under the *Public Service Act 1999* who is employed in the Department or the ATO.

7.20 The Secretary may delegate any of his or her powers or functions under this Act to the Commissioner or a public servant employed in the Department or the ATO. If a power or function is delegated to the Commissioner, the Commissioner may subdelegate the power or function to a person engaged under the *Public Service Act* who is employed in the ATO. *[Schedule 1, item 4, section 137]*

7.21 It is anticipated that the Treasurer will delegate his powers and functions relating to residential land under this Act to the Commissioner.

7.22 The delegations powers included in the Bill are broad. This is appropriate because the decisions to be made under this Act range from those that involve only a limited exercise of discretion and which may give rise to a high volume of decisions. Other decisions under the Act involve weighing competing considerations including Australia's national security and Australia's relationship with other countries, which would generally be made by the Treasurer personally.

#### ***Extension of the Commissioner's powers***

7.23 The Commissioner is already permitted to access premises and gather documents and other information, whether held domestically or in foreign jurisdictions. The Commissioner can exercise these powers in relation to any 'taxation law'. To enable the Commissioner to exercise most of his or her powers in relation to any taxation law with respect to any power or function under a provision in this Act that is delegated to the Commissioner, the Bill provides that the Commissioner has the general administration of this Act to the extent of administering the provision. *[Schedule 1, item 4, subsections 138(1) and (2)]*

7.24 Enabling the Commissioner to apply the Commissioner's existing access and information gathering powers, including those in sections 353-10 and 353-15 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), helps to minimise costs for both regulated persons and the ATO. This is because in many situations where information is required to administer this Act that same information is also be required to administer taxation laws. For example, if a foreign investor has acquired an interest in a property, in addition to questions about whether the person has complied with this Act, there may also be questions as to whether that property has been used for income producing purposes and, if so, how that income has been treated for taxation purposes.

7.25 The Commissioner can also exercise his or her powers under section 353-10 or 353-15 in Schedule 1 to the TAA 1953 with respect to a certain matter if requested in writing to do so by the Treasurer. This means, for example, that the Commissioner can investigate an alleged contravention of this Act if requested to do so by the Treasurer. If the Commissioner does receive such a request from the Treasurer, the Commissioner (or an individual authorised by the Commissioner) may exercise his or her powers under sections 353-10 or 353-15 as if a reference in those sections to a taxation law included a reference to this Act to the extent that it relates to the matter. *[Schedule 1, item 4, subsections 138(3) and (4)]*

### **Regulations**

7.26 The Governor General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for the purposes of carrying out or giving effect to the Act. This includes providing a method for indexing a value or an amount prescribed for the purposes of this Act. *[Schedule 1, item 4, subsections 139(1) and (2)]*

7.27 The regulations may provide in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. This provision overrides subsection 14(2) of the *Legislative Instruments Act 2003* which provides that a legislative instrument may not make provisions in relation to any matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time unless the contrary intention appears. *[Schedule 1, item 4, subsection 139(3)]*

7.28 It is anticipated that this power will be used to define the meaning of the term ‘agribusiness’ to be a business that is carried on, wholly or partly, in any of certain classes of the *Australian and New Zealand Standard Industrial Classification Codes* as in force from time to time, published by the Australian Bureau of Statistics (ABS), and which is published on the ABS website and available free of charge.

7.29 It is also anticipated that a regulation will be made that defines the term ‘US national’ to mean a national of the United States of America, as defined in Title III of the *Immigration and Nationality Act of the United States of America*. Defining the meaning of the term US national in this way ensures consistency with the terms of the Australia-United States Free Trade Agreement. A number of websites provide access to this statute free of charge, including the Legal Information Institute.<sup>10</sup>

7.30 The Government will continue to assist people to comply with their obligations under this Act, including by taking steps to draw the attention of stakeholders to any relevant changes to any document which is incorporated by reference in the regulations, including by publishing information on the internet. However, it is not anticipated that a regulation would incorporate by reference any document which is frequently amended.

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<sup>10</sup> The Legal Information Institute’s website is at: <http://www.law.cornell.edu>.





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## **Chapter 8**

# ***Amendments contingent on the Acts and Instruments (Framework Reform) Act 2015***

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### **Outline of chapter**

8.1 Schedule 2 to this Bill provides for a number of consequential amendments to be made to the Act immediately after the *Acts and Instruments (Framework Reform) Act 2015* comes into effect.

8.2 In broad terms, the amendments made by Schedule 2 amends those provisions in the Act as amended by Schedule 1 which require certain orders to be published in the *Commonwealth of Australia Gazette* (Gazette) by instead requiring the orders to be registered on the new Federal Register of Legislation. For ease of reference this chapter assumes that the Act is amended in accordance with Schedule 1 to this Bill.

### **Context of amendments**

8.3 The *Acts and Instruments (Framework Reform) Act 2015* makes a number of significant amendments to the *Legislative Instruments Act 2003* which is to be renamed the *Legislation Act 2003*. Most relevantly to the provisions in Schedule 2, the *Legislation Act 2003* establishes a new category of instruments called notifiable instruments, which will be able to be registered in authoritative form. The new category of notifiable instruments is designed to encompass instruments that are not appropriate to register as legislative instruments, but for which public accessibility and centralised management is desirable.

8.4 Notifiable instruments will be published in a register known as the Federal Register of Legislation, which will also incorporate the existing Acts database established under the *Acts Publication Act 1905* and the existing Federal Register of Legislative Instruments.

## **Detailed explanation of new law**

### ***Section 3***

8.5 Section 3 provides a simplified outline of the Act. The amendment to this provision reflects that once Schedule 2 comes into effect an interim order will be registered in the Federal Register of Legislation rather than published in the Gazette. *[Schedule 2, item 1]*

### ***Section 66***

8.6 Section 71 provides a simplified outline of Part 3 of the Act. The amendment to this provision reflects that once Schedule 2 comes into effect an interim order will be registered in the Federal Register of Legislation rather than published in the Gazette. *[Schedule 2, item 2]*

### ***Subsections 67(1) and (3) and 68(1)***

8.7 Subsection 67(1) of the Act permits the Treasurer to make an order in accordance with the table in subsection 67(2) if the Treasurer is satisfied that a significant action is proposed to be taken and that taking the significant action would be contrary to the national interest. As a result of the amendment to subsection 67(1) such an order must be made by notifiable instrument.

8.8 Subsection 67(3) of the Act permits the Treasurer to make additional orders where the Treasurer makes an order under subsection 67(2) of the Act. As a result of the amendment to subsection 67(3) such additional orders must also be made by notifiable instrument.

8.9 Section 68 of the Act permits the Treasurer to make an interim order. As a result of the amendment to subsection 68(1) any interim order must be made by notifiable instrument. *[Schedule 2, item 3]*

### ***Subsection 68(2) (note)***

8.10 Subsection 68(2) of the Act includes a note which in general terms explains that the period during which an interim order has effect does not start until the order is published in the Gazette. The Bill amends the note so that it instead explains that the period during which the interim order has effect does not start until the order is registered in the Federal Register of Legislation. *[Schedule 2, item 4]*

***Subsection 69(1)***

8.11 Subsection 69(1) of the Act permits the Treasurer to make a disposal order if the Treasurer is satisfied that a significant action has been taken and the result of taking the significant action is contrary to the national interest. As a result of the amendment to subsection 69(1) any such order must be made by notifiable instrument. *[Schedule 2, item 5]*

***Section 72 (heading)***

8.12 This amendment would repeal the heading ‘Publication and commencement of orders’ in section 72 of the Act and substitute ‘Registration and commencement of orders’. This amendment is necessary because once Schedule 2 comes into effect an order made by the Treasurer must be registered in the Federal Register of Legislation instead of being published in the Gazette. *[Schedule 2, item 6]*

***Subsection 72(1) (heading)***

8.13 This amendment would repeal the heading ‘Publication of orders’ and substitute ‘Registration and commencement of orders’. This amendment is necessary because once Schedule 2 comes into effect an order made by the Treasurer must be registered in the Federal Register of Legislation instead of being published in the Gazette. *[Schedule 2, item 7]*

***Paragraph 72(1)(b)***

8.14 Under paragraph 72(1)(b) of the Act an order made by the Treasurer under Subdivision A of Division 2 of Part 3 of the Act must be published in the Gazette within 10 days after it is made. As a result of the amendment to paragraph 72(1)(b) any such order made by the Treasurer must be registered in the Federal Register of Legislation within 10 days after it is made. *[Schedule 2, item 8]*

***Paragraphs 72(2)(a) and (b)***

8.15 Paragraphs 72(2)(a) and (b) explain when certain orders commence by reference to when they are published in the Gazette. As a result of the amendments the orders commence by reference to when an order is registered. *[Schedule 2, item 9]*

***Subparagraph 77(2)(c)(ii)***

8.16 The effect of subsection 77(2) of the Act is that the Treasurer must not make certain orders or decisions in the circumstances set out in that provision, including where the Treasurer does not publish the order

in the Gazette. As a result of the amendment made to subparagraph 75(2)(c)(ii) of the Act the Treasurer will not be able to make certain orders or decisions if the order is not registered in the Federal Register of Legislation. *[Schedule 2, item 10]*

***Paragraph 77(3)(b) and subparagraph 77(3)(d)(i)***

8.17 The effect of subsection 77(3) of the Act is that there are time limits on making certain orders or decisions after an interim order is made. Paragraph 77(3)(b) and subparagraph 77(3)(d)(i) are amended so that the orders referred to in those provisions will be registered in the Federal Register of Legislation rather than published in the Gazette. *[Schedule 2, items 11 to 12]*

***Section 80***

8.18 Section 80 provides a simplified outline of Part 4 of the Act. The amendment to section 80 reflects that an interim order must be registered in the Federal Register of Legislation rather than published in the Gazette. *[Schedule 2, item 13]*

***Subsection 139(3)***

8.19 The reference to the *Legislative Instruments Act 2003* is amended to the *Legislation Act 2003*. *[Schedule 2, item 14]*

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## **Chapter 9**

# **Application and transitional provisions for Schedules 1 and 2 and Fees Imposition Act**

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### **Outline of chapter**

9.1 Schedule 3 to this Bill sets out various provisions that are necessary to provide for a smooth transition from the Act as it stands immediately before the provisions included in Schedule 1 come into effect and the provisions in the Act which come into effect immediately after the provisions included in Schedule 1 commence.

### **Detailed explanation of new law**

#### **Definitions**

9.2 The provisions in Schedule 3 to the Bill rely on the definitions of the following terms: *new provisions*, *old provisions*, *Policy* and *transitional period*.

9.3 The term *old provisions* is defined to mean the Act as in force immediately before Schedule 1 to this Bill commences. *New provisions* is defined to mean the Act as in force immediately after Schedule 1 to this Bill commences. The term *Policy* refers to Australia's Foreign Investment Policy, which provides guidance to foreign investors to assist understanding of the Government's approach to administering the Act, as well as identifying certain other investments that the Treasurer must be informed of. *Transitional period* is defined to mean the period beginning on 1 March 2015 and ending on 30 November 2015.  
*[Schedule 3, item 1]*

#### **Notices given before commencement**

9.4 The following table explains how notices given under the old provisions are treated once the new provisions come into force.  
*[Schedule 3, item 2]*

<i>Notice given under old provision or Policy...</i>	<i>...is taken to be</i>
Notice given under section 25 of the old provisions or the Policy.	A notice that a significant action (that is not a notifiable action) is to be taken (except in relation to new section 113 (fees)).
Sections 26 or 26A.	Given under section 81 (except in relation to new section 113 (fees)).
Section 36.	Section 133 (However, subsections 77(5) (effect of notice on time limits) and 133(7) and (8) (self-incrimination) apply only in relation to notices given under section 133 of the new provisions after commencement).

***Notices given during the transitional period in relation to actions relating to rural land***

9.5 A notice given under sections 25 or 26 of the old provisions or the Policy during the transitional period in relation to rural land is taken, after commencement, to be a notice given under section 81 of the new provisions in relation to agricultural land. ‘Australian rural land’ is defined by old section 5 to mean land situated in Australia that is used wholly and exclusively for carrying on a business of primary production. The time limits on making orders and decisions specified in new section 77 apply to such a notice.

9.6 A notice given by the Treasurer in accordance with the Policy during the transitional period in relation to an acquisition or proposed acquisition of Australian rural land binds the Commonwealth after commencement. *[Schedule 3, item 3]*

***Actions taken during transitional period in relation to Australian rural land***

9.7 A foreign person who acquires an interest in Australian rural land during the period beginning on 1 March 2015 and ending on 30 November 2015 must notify the Treasurer in accordance with section 135 of the new provisions unless the person has already notified the Treasurer of the acquisition or proposed acquisition.

9.8 The Bill makes it an offence for a foreign person to acquire an interest in Australian rural land during the transitional period if the person fails to notify the Treasurer of the acquisition during the transitional period or within 30 days of commencement. The maximum penalty for an individual who commits this offence is imprisonment for

three years, a fine equivalent to 750 penalty units (currently \$135,000), or both. If a body corporate commits this offence the maximum penalty that may be imposed is a fine equivalent to 3,750 penalty units (currently \$675,000).

9.9 A person who fails to comply with these requirements may also be liable to a civil penalty. The maximum penalty for the contravention is a pecuniary penalty of 250 penalty units. [*Schedule 3, item 4*]

**Orders, advices and decisions**

9.10 The following table explains how an order or advice given, or a decision made, under the old provisions are taken to have been given or made under the new provisions.

<b><i>Column 1 – old provisions</i></b>	<b><i>Column 2 – new provisions</i></b>
Order given under: <ul style="list-style-type: none"> <li>• subsection 18(2) (order prohibiting proposed acquisition of shares);</li> <li>• subsection 19(2) (order prohibiting proposed acquisition of assets of Australian business by prescribed corporation);</li> <li>• subsection 20(2) (order prohibiting agreement in relation to affairs of a corporation or altering a constituent document of the corporation);</li> <li>• subsection 21(2) (order prohibiting arrangements relating to control of an Australian business); and</li> <li>• subsection 21A(2) (order prohibiting acquisition of Australian land).</li> </ul>	Subsection 67(2) (order prohibiting proposed significant actions).
Order given under: <ul style="list-style-type: none"> <li>• subsection 18(3) (additional orders about control of a corporation);</li> <li>• subsection 19(3) (additional orders about acquisition of interests in an Australian business); and</li> <li>• subsection 21A(3)(additional orders about the acquisition of interests in Australian urban land).</li> </ul>	Subsection 67(3) (additional orders).

<b><i>Column 1 — old provisions</i></b>	<b><i>Column 2 — new provisions</i></b>
Order given under: <ul style="list-style-type: none"> <li>• subsection 18(4) (order directing person to dispose of shares);</li> <li>• subsection 19(4) (order directing person to dispose of assets of an Australian business);</li> <li>• subsection 20(3) (order directing person to restore control of the corporation);</li> <li>• subsection 21(3) (order directing person to restore control of Australian business); and</li> <li>• subsection 21A(4) (order directing person to dispose of interest in Australian urban land).</li> </ul>	Subsection 69(2) (powers of Treasurer to require disposal of interests).
Order given under section 22 (interim orders).	Section 68 (interim orders).
Decision made under subsection 25(1A) where conditions have been imposed.	Subparagraph 74(2)(a) (no objection notification imposing conditions necessary to ensure that action, if taken, is not contrary to the national interest).
Decision made under subsection 25(1A) where conditions have been imposed.	Subparagraph 74(2)(a) (no objection notification imposing conditions necessary to ensure action already taken is not contrary to national interest).
Advice given under subsection 25(1B) where conditions have been imposed.	Paragraph 74(2)(b) (no objection notification imposing conditions).
Decision under subsection 25(1A) where conditions have not been imposed.	Paragraph 75(2)(a) (decide that the Commonwealth has no objection).
Advice given under subsection 25(1B) where conditions have not been imposed.	Paragraph 75(2)(b) (give a no objection notification not imposing conditions).

9.11 The new provisions apply, after commencement, in relation to orders and advices mentioned in column 1 of the table as if subparagraph 71(1)(ii) and paragraph 74(6)(b) does not apply. Paragraph 71(1)(i) of the new provisions permits the Treasurer to vary an order made under Subdivision A of Division 2 of Part 3 of the new provisions at any time if the Treasurer is satisfied that that the variation does not disadvantage the person. Paragraph 74(6)(b) of the new provisions enables the Treasurer to vary a no objection notification given to a person by imposing a new condition or varying an existing condition if the Treasurer is satisfied that the new condition or variation does not disadvantage the person. The purpose of providing that subparagraph 71(1)(ii) and paragraph 74(6)(b) do not apply to orders made or given under the old provisions is to ensure that the operation of old orders is certain.



9.12 If an order is published in the *Commonwealth of Australia Gazette* (Gazette) before the *Acts and Instruments (Framework Reform) Act 2015* comes into effect and the period referred to in section 25 of the old provisions has not ended by that commencement, the new provisions apply as if a reference to the registration of a notifiable instrument were a reference to publication in the Gazette. *[Schedule 3, item 5]*

### ***Disposal orders***

9.13 Section 69 of the new provisions enables the Treasurer to make a wide range of orders if the Treasurer is satisfied that a significant action has been taken and the result of taking that action is contrary to the national interest. The Treasurer may also make an order under section 74 of the new provisions in relation to:

- any significant action taken before commencement if the Treasurer would have had the power to make an order under subsections 18(4), 19(4), 20(3), 21(3) or 21A(4) of the old provisions in relation to the action;
- any acquisition of an interest in Australian rural land taken during the transitional period; or
- any significant action taken after commencement. *[Schedule 3, item 6]*

### ***Anti-avoidance***

9.14 Section 78 of the new provisions, which in general terms permits the Treasurer to make an order with respect to a scheme carried out for the sole or dominant purpose of avoiding the application of this Act, applies to any scheme whether entered into before or after the commencement of Schedule 1. *[Schedule 3, item 7]*

### ***Certificates***

#### ***Certificates given before commencement***

9.15 Except for the purposes of section 113 of the new provisions (which specifies when fees are payable), a certificate given under paragraph 3(e) or (r) of the *Foreign Acquisitions and Takeovers Regulations 1989* (Regulations) before commencement is taken after commencement to have been given under section 57 of the new provisions (exemptions certificates for new dwellings).

9.16 Except for the purposes of section 113 of the new provisions (which specifies when fees are payable), a certificate given under paragraph 3(h) of the Regulations before commencement is taken, after

commencement, to have been given under section 58 of the new provisions (exemptions certificates for foreign persons).

*Applications for certificates made before commencement*

9.17 The Treasurer may give a certificate under sections 57 or 58 of the new provisions to a person if the person made an application for a certificate under paragraph 3(e), (h) or (r) of the Regulations before commencement and a decision on the application has not been made at that time. *[Schedule 3, item 8]*

***Offences and civil penalties***

9.18 With the exception of sections 102 (liability for officers of corporations) and 103 (civil penalties for officers of corporations), Part 5 of the new provisions apply in relation to any conduct engaged in after commencement.

9.19 Sections 102 and 103 of the new provisions apply in relation to any conduct engaged in after the commencement of Schedule 1 by an officer of a corporation if the corporation is convicted of an offence against this Act or a civil penalty provision is made against the corporation after commencement. *[Schedule 3, item 9]*

***Fees***

9.20 Section 113 (when fees are payable) of the new provisions applies in relation to:

- applications made after commencement under the new provisions;
- orders and notices given after commencement in relation to action taken in relation to rural land during the transition period; and
- orders and notices given after commencement in relation to action taken after commencement. *[Schedule 3, item 10]*

***Record keeping***

9.21 Division 2 of Part 7 of the new provisions (which imposes record keeping requirements) applies in relation to:

- any action taken by the person that is a significant action or a notifiable action that relates to an order or decision made

under Part 3 of the new provisions after the commencement of Schedule 1;

- any action, transaction, event or circumstance that relates to whether a person is complying with a condition in a no objection notification imposing conditions or an exemption certificate that occur after commencement taken by the person that is specified in an exemption certificate after the commencement of Schedule 1 (regardless of whether the notice or certificate is given before or after the commencement of Schedule 1); and
- disposals of residential land that occur after the commencement of Schedule 1. *[Schedule 3, item 11]*

### ***Confidentiality***

9.22 Division 3 of Part 7 of the new provisions apply in relation to records, disclosures and uses or protected information made after commencement, regardless of whether the protected information was obtained before or after that time. *[Schedule 3, item 12]*

### ***Transitional rules***

9.23 The Treasurer may make rules prescribing matters of a transitional nature (including prescribing any saving or application provisions) relating to the amendments or repeals made by this Act. However, the rules may not create an offence or civil penalty; provide powers of arrest or detention or entry, search or seizure; impose a tax; set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act or directly amend the text in this Act. *[Schedule 3, item 13]*



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## **Chapter 10**

### ***Amendments of confidentiality provisions***

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#### **Outline of chapter**

10.1 Schedule 4 to the Bill makes a number of consequential amendments to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). These amendments support the effective administration of the Bill and the Register of Foreign Ownership of Agricultural Land Bill 2015, which provides for the establishment of a Register of Foreign Ownership of Agricultural Land (Register) to be administered by the Commissioner of Taxation (Commissioner). Schedule 4 to the Bill also makes several other amendments that will assist the Australian Taxation Office (ATO) to perform its functions more effectively by allowing it to share information with the Australian Securities and Investments Commission (ASIC) and the Department of Immigration and Border Protection (DIBP) in a broader range of circumstances than is currently the case.

#### **Context of amendments**

10.2 Division 355 of Schedule 1 to the TAA 1953 prohibits the disclosure of information about the tax affairs of a particular entity except in specified circumstances. Consequential amendments to this Division are required to take account of the change in circumstances from one where the Commissioner is providing information to the Treasury (the Department) and the Minister to one where the Commissioner becomes a co-regulator. These amendments ensure that the provisions about confidentiality of information in the Bill and the TAA 1953 are consistent.

#### **Detailed explanation of new law**

##### ***Anti-Money Laundering and Counter-Terrorism Financing Act 2006*** ***(AML Act)***

10.3 The effect of subsection 125(1) of the AML Act is that the Commissioner and any taxation officer is entitled to access Australian Transaction Reports and Analysis Centre (AUSTRAC) information for

any purpose relating to the facilitation of the administration or enforcement of a taxation law.

10.4 The Bill will repeal subsection 125(1) and substitute a provision which enables the Commissioner and any taxation officer to access AUSTRAC information for any purpose relating to the facilitation of the administration of a taxation law or the Act, if the Commissioner or officer is accessing the information because of a delegation to the Commissioner under new section 138 of the Act. *[Schedule 4, item 1]*

10.5 The amendment to section 125 of the AML Act applies in relation to the access of information on or after the commencement of Schedule 4, regardless of whether the information was obtained before, on or after the commencement of Schedule 4. *[Schedule 4, subitem 12(1)]*

***Income Tax Assessment Act 1997 - definition of 'property right or interest'***

10.6 The Bill inserts a definition of the term 'property right or interest' in subsection 995-(1) of the *Income Tax Assessment Act 1997*. The term is defined to have the meaning given by subsection 354-5(2) in Schedule 1 to the TAA 1953 (that is, a legal or equitable interest in the property or a right, power or privilege in connection with the property, whether present or future and whether vested or contingent). *[Schedule 4, item 2]*

***New Division 354 in Schedule 1 to the TAA 1953 - power to obtain information about rights or interests in property***

10.7 A person who has a legal interest in any real or personal property may be given a written notice by the Commissioner which requires the person to give the Commissioner any information the person has about any other property right or interest in the property that the Commissioner requires for the purposes of the administration or operation of a taxation law. 'Property right or interest' means a legal or equitable interest in the property or a right, power or privilege in connection with the property.

10.8 The information a person may be required to give the Commissioner includes details about that person's interest in the property; details (including the name and address) of each other person who has a property right or interest in the property; details of any class of person who has a property right or interest in the property; and details of each property right or interest in the property, including the nature and extent of the right or interest and the circumstances giving rise to the right or interest. If the person does not have the information required by

the notice, the person must make all reasonable efforts to obtain the information if another person has the information.

10.9 The notice must give the person at least 14 days to produce the information, unless the Commissioner is satisfied that a short period is necessary, in which case the person must give the information within that shorter period. *[Schedule 4, item 3]*

10.10 This gives the Commissioner a means to identify the beneficial owners of a property, which in some circumstances is difficult to identify by other means.

10.11 A person who fails to comply with a notice given under this provision may be guilty of an offence against subsection 8C(1) of the TAA 1953. In general terms, a person who refuses or fails, when as required under or pursuant to a taxation law to (among other things) give any information or document to the Commissioner or to give the person information to the Commissioner in the manner in which it is required under a taxation law to be given, the person may be guilty of an offence against subsection 8C(1) of the TAA 1953. Subsection 8C(1) of the TAA 1953 is an offence of absolute liability.

10.12 The penalty for an offence against subsection 8C of the TAA 1953 is generally a fine not exceeding 20 penalty units, although in specified circumstances may be higher.<sup>11</sup>

***Subsection 355-55(1) in Schedule 1 to the TAA 1953 - disclosure of information contained in the Register to certain Ministers***

10.13 Section 355-25 in Schedule 1 to the TAA 1953 makes it an offence for a taxation officer to disclose tax information that identifies any entity, or is reasonably capable of being used to identify an entity, except in certain specified circumstances (the offence provision). Subsection 355-55(1) of Schedule 1 to the TAA 1953 provides that the offence provision does not apply if a taxation officer discloses certain classes of information to a Minister for various specified purposes. The Bill amends this provision so that the offence provision does not apply if a taxation officer discloses information contained in the Register to a Minister responsible for agriculture, industry policy, investment promotion, taxation policy or foreign investment in Australia for the purpose of enabling that Minister to discharge that responsibility. *[Schedule 4, item 4]*

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<sup>11</sup> See section 8E of the TAA 1953.

***Subsection 355-65(4) in Schedule 1 (table items 1-4) - disclosure of information to ASIC***

10.14 In broad terms, the effect of section 355-65 in Schedule 1 to the TAA 1953 is that the offence provision does not apply if a taxation officer discloses particular classes of information to specified individuals for various government purposes.

10.15 The effect of items 1 to 4 in Table 3 in section 355-65 is that the offence provision does not apply if a taxation officer discloses information to ASIC for various specified purposes, including for the purpose of investigation or enforcement activities relating to a provision of a law that is administered by ASIC and imposes a pecuniary penalty or creates an offence. The Bill repeals items 1 to 4 in Table 3 and substitutes an item which has the effect that the offence provision does not apply if a taxation officer discloses information to ASIC for the purposes of performing any of its functions or exercising any of its powers. This allows the ATO to provide information to ASIC that will enable ASIC to undertake data-matching, thereby further enhancing ASIC's ability to proactively assess whether persons are complying with laws administered by ASIC. *[Schedule 4, item 5]*

***Subsection 355-65(4) in Schedule 1 (table item 7) - disclosure of information for the purposes of the Foreign Acquisitions and Takeovers Act 1975 (Act)***

10.16 The effect of item 7 in Table 3 in section 355-65 is that the offence provision does not apply if a taxation officer discloses information to the Secretary for the purpose of briefing the Minister in relation to a decision that the Minister may make under the Act; briefing the Minister in relation to a decision that the Minister may make in accordance with *Australia's Foreign Investment Policy* (Policy); or briefing an officer of the Department who is authorised by the Minister to make a decision under the Act or the Policy.

10.17 The Bill provides that compliance and investigation functions may be undertaken by the Commissioner for Taxation, while general administration of the Act remains with the Treasurer. For that reason the Bill repeals item 7 of the table in subsection 355-65(4) and replaces it with an item that authorises information to be disclosed to the Secretary of the Department for the purpose of administering the Act. *[Schedule 4, item 6]*



***Subsection 355-65(8) in Schedule 1 (table items 3 and 4) - disclosure of information to the Immigration Secretary or the Australian Border Force Commissioner***

10.18 The effect of subsection 355-65(8) in Schedule 1 to the TAA 1953 is that the offence provision does not apply to a taxation officer who discloses particular classes of information to specified individuals for a range of purposes. The ATO is currently able to disclose information to the ‘Immigration Secretary’ (that is, the Secretary to the ‘Immigration Department’ which in turns is defined to mean the Department administered by the Minister administering the *Migration Act 1958*) for the purposes of assisting in locating persons who are unlawfully in Australia and information relating to a holder (or former holder) of a visa or an approved sponsor (or former approved sponsor) for certain narrowly defined purposes.

10.19 The effect of the amendment is that the offence provision does not apply to a taxation officer who discloses information to the ‘Immigration Secretary’ or the Australian Border Force Commissioner for the purpose of administering any functions or exercising any of the powers administered by the Minister administering the Immigration Department. This amendment enables the ATO and the DIBP to cooperate more effectively in areas of mutual concern, including detecting people who are working in Australia illegally. [*Schedule 4, item 7*]

***Subsection 355-65(8) in Schedule 1 (after table item 6) - disclosure of information in the Register to the Secretary of certain departments***

10.20 The effect of subsection 355-65(8) in Schedule 1 to the TAA 1953 is that the offence provision does not apply to a taxation officer who discloses particular classes of information to specified individuals for a range of purposes. The effect of the amendment is that the offence provision does not apply to a taxation officer who discloses information contained in the Register to the Secretary of a Department administered by a Minister responsible for agriculture, industry policy, investment promotion, taxation policy or foreign investment in Australia. [*Schedule 4, item 8*]

***Section 355-75 in Schedule 1 - limits on disclosure to courts and tribunals***

10.21 The effect of existing section 355-75 in Schedule 1 to the TAA 1953 is that a taxation officer cannot be required to disclose to a court or tribunal protected information that was acquired by the person as a taxation officer except where it is necessary to do so for the purpose of carrying into effect the provisions of a taxation law.

10.22 Because taxation officers have duties, functions and powers under the Bill, the effect of the amendment to this provision is to make the TAA 1953 provision consistent with the Bill. Where a taxation officer has acquired protected information because of the exercise of duties and functions under the Bill, the taxation officer can be required to disclose that information to a court or a tribunal where it is necessary to do so for the purpose of carrying into effect the provisions under a taxation law or the Act. *[Schedule 4, item 9]*

***Paragraph 355-155(b) of Schedule 1 – on-disclosure***

10.23 In general terms, under section 355-155 of Schedule 1 to the TAA 1953 it is an offence for an entity to record information or to disclose information to another entity (sometimes referred to as an ‘on-disclosure’) if the information was acquired by the entity under certain exceptions in Subdivision 355-B and Subdivision 355-C of Schedule 1 to the TAA 1953. The effect of the amendment to paragraph 355-155(b) of Schedule 1 is that the prohibition on ‘on disclosure’ does not apply to information disclosed to the Secretary of the Department for the purpose of administering the Act. This is because the Secretary may disclose the information for the purposes authorised by new Division 3 of Part 7 of the Act. *[Schedule 4, item 10]*

***Section 355-205 in Schedule 1 - limits on on-disclosure to courts or tribunals***

10.24 The Bill repeals section 355-205 in Schedule 1 to the TAA 1953 and substitutes a new provision. Broadly, section 355-205 currently provides that an entity is not to be required to ‘on disclose’ protected information to a court or tribunal except where it is necessary to do so for the purposes of carrying into effect the provisions of a taxation law. The new section 355-205 in Schedule 1 is identical to the current provision except that because information is disclosed for the administration of the Act, the limit on on-disclosure to courts or tribunals would not apply for the purposes of carrying into effect the provisions of a taxation law or if the entity has or had duties, functions or powers under the Act. *[Schedule 4, item 11]*

***Application***

10.25 The amendments to Division 355 in Schedule 1 to the TAA 1953 made by Schedule 4 to this Bill apply in relation to records and disclosures of protected information made on or after the commencement of Schedule 4, whether the information became protected information before, on or after the commencement of Schedule 4. *[Schedule 4, subitem 12(2)]*

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## Chapter 11

### Finding table

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#### Outline of chapter

11.1 This Chapter contains a finding table to help you locate which provision in the ‘new law’ (that is, Schedule 1 to the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015) broadly correspond to a provision in the current law (that is, the *Foreign Acquisitions and Amendment Takeovers Act 1975* as it stands immediately before Schedule 1 to the Bill comes into effect).

11.2 In the finding table ‘omitted’ means that the provision will not be re-enacted.

**Table 11.1: Finding table — current law to new law**

<i>Current law</i>	<i>New law</i>
1	1
2	2
3	<i>Omitted</i>
4	35 and 36
5(1)	4
5(2)	24
5(3)	16
5(4)	25
5(5)	25
5(6)	28
5(8)	<i>Omitted</i>
5A	5
6	6
7	8
8	23
9(1)	4 (definition of ‘substantial interest’)
9(1A)	4 (definition of ‘aggregate substantial interest’)
9(1B)	18(1) and (2)
9(1C)	18(1) and (2)

<i>Current law</i>	<i>New law</i>
9(2)	54(4) and (5)
9A	4 (definition of ‘substantial interest’), 18(3)
10	21
11	9, 13, 14, and 15(1)-(3)
12	10, 13, 14 and 15
12A	12, 14 and 15
12B	11, 13, 14 and 15
12C	19
13	<i>Omitted</i>
13A	<i>Omitted</i>
13B	<i>Omitted</i>
13C	4 (definition of ‘Australian land corporation’)
13D	4 (definition of ‘Australian land trust’)
14	22
15	<i>Omitted</i>
16	30 and 31
17	29
17A	<i>Omitted</i>
17B	<i>Omitted</i>
17C	<i>Omitted</i>
17D	<i>Omitted</i>
17E	<i>Omitted</i>
17F	4 (definition of ‘foreign government investor’)
17G	<i>Omitted</i>
17H	26
18	40, 54 and 67-69
19	41, 54, 67, 69 and 59
20	40(2)(e), 67(2) and 69(2)
21	41(2)(c), 54 and 67-69
21A	43, 67 and 69
22	68
23	71
24	72

<i>Current law</i>	<i>New law</i>
25	70, 74 and 87
26	81 and 84
26A	81 and 84
27	135
28	74(7) and 75(4)
30	86
31	102
35	132
36	133
37	34
38	135
38A	78
39	139



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## **Chapter 12**

# ***Foreign Acquisitions and Takeovers Fees Imposition Bill 2015***

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### **Outline of chapter**

12.1 Part 6 of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Foreign Acquisitions Bill) specifies that:

- the Treasurer is not required to take any action in relation to certain applications or notices before the applicable fee is paid; and
- the Treasurer may waive the whole or part of a fee if the Treasurer is satisfied that it is not contrary to the national interest to waive or remit the fee.

12.2 This Chapter explains the operation of the Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 (Imposition Bill), which imposes fees in relation to certain applications and actions that are made under the Foreign Acquisitions Bill.

### **Context of amendments**

12.3 Currently, no fees or charges are payable when making an application or giving a notice under the Act. The imposition of fees will cover the costs of considering applications, the introduction of a specialised investigative and enforcement area within the Australian Taxation Office (ATO), improvements in the collection of data about foreign investment in Australia, and an increase in the resources dedicated to the investigation of alleged breaches of the Act.

12.4 The imposition of fees will ensure that those who undertake activities regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Act) rather than the general community bear the costs relating to the administration of the Act, including the costs of monitoring compliance with the legislation, investigating alleged breaches and commencing enforcement proceedings in appropriate cases.

## Summary of new law

12.5 The Imposition Bill imposes fees in relation to applications and actions that are made under the Foreign Acquisitions Bill. The Imposition Bill also sets out the rates of the fees that apply and provides a power for regulations to prescribe the rate of the fee, subject to a maximum amount set out in the Imposition Bill. The rates of the fees are also subject to annual indexation.

## Detailed explanation of new law

### When are fees payable?

12.6 A person who applies for an exemption certificate, gives notice of a notifiable action, or gives a notice in relation to a proposal to take a significant action that is not a notifiable action must pay a fee when the notice is given or an application is made. *[Schedule 1, item 4, section 113, Foreign Acquisitions Bill]*

12.7 To comply with section 55 of the Constitution, fees are imposed as a tax by the Imposition Bill and the rates and indexation mechanism are also included in that Bill. *[Section 5, Imposition Bill]*

### Fee amounts imposed by Imposition Bill

12.8 The fee amounts are as follows:

**Table 12.1: Fee for exemption certificates**

<i>Provision reference</i>	<i>Fee category</i>	<i>*Fee amount</i>
Table item 1 subsection 6(1)	<b>New dwellings – developer application</b> An application for an exemption certificate for new dwellings under section 57 of the Foreign Acquisitions Bill.	\$25,000.



<i>Provision reference</i>	<i>Fee category</i>	<i>*Fee amount</i>
Table item 2 subsection 6(1)	<p><b>Interest in Australian land</b></p> <p>An application by a foreign person for an exemption certificate under section 58 of the Foreign Acquisitions Bill, where the consideration specified in the application for the proposed acquisitions is:</p> <p>(A) \$1 billion or less; or (B) more than \$1 billion.</p>	<p>(A) \$25,000 (B) \$100,000.</p>
Table item 3 subsection 6(1)	<p><b>Established dwellings</b></p> <p>An application by a foreign person for an exemption certificate for an interest in an established dwelling under section 59 of the Foreign Acquisitions Bill, where the consideration specified in the application for the proposed acquisition is:</p> <p>(A) \$1 million or less; or (B) more than \$1 million.</p>	<p>(A) \$5,000 (B) see explanation in paragraphs 12.11 to 12.13 below.</p>
Table item 4 subsection 6(1)	<p><b>Exemption certificate prescribed by regulations</b></p> <p>An exemption certificate prescribed by regulations under section 63 of the Foreign Acquisition Bill.</p>	<p>The amount not exceeding \$25,000, that is prescribed by regulations, or worked out using the method prescribed by regulations, made for the purposes of this item.</p>
Table item 5 subsection 6(1)	<p><b>Exemption certificate variation</b></p> <p>A variation of an exemption certification under section 62 of the Foreign Acquisitions Bill not contrary to the national interest.</p>	<p>\$5,000.</p>

*[Subsection 6(1), Imposition Bill]*

\*The fee amounts and maximum thresholds are subject to indexation each financial year from 1 July 2016.

**Table 12.2: Fees for giving notices of notifiable actions**

<i>Provision reference</i>	<i>Fee category</i>	<i>*Fee amount</i>
Table item 1 subsection 7(1)	<p><b>Interests in Australian businesses or entities</b></p> <p>One of the following notifiable actions:</p> <p>(a) to acquire a direct interest in an Australian entity or Australian business that is an agribusiness; or</p> <p>(b) to acquire a substantial interest in an Australian entity where the consideration for the acquisition is;</p> <p>(A) \$1 billion or less; or</p> <p>(B) more than \$1 billion.</p>	<p>(A) \$25,000</p> <p>(B) \$100,000.</p>
Table item 2 subsection 7(1)	<p><b>Residential or agricultural land</b></p> <p>To acquire an interest in residential land or agricultural land, where the consideration for the acquisition is:</p> <p>(A) \$1 million or less; or</p> <p>(B) more than \$1 million.</p>	<p>(A) \$5,000</p> <p>(B) see explanation in paragraphs 12.11 to 12.13 below.</p>
Table item 3 subsection 7(1)	<p><b>Commercial land (not vacant)</b></p> <p>To acquire an interest in commercial land (other than commercial land that is vacant).</p>	\$25,000.
Table item 4 subsection 7(1)	<p><b>Vacant commercial land</b></p> <p>To acquire an interest in commercial land that is vacant.</p>	\$10,000.
Table item 5 subsection 7(1)	<p><b>Mining and production tenements</b></p> <p>To acquire an interest in a mining or production tenement.</p>	\$25,000.
Table item 6 subsection 7(1)	<p><b>Prescribed notifiable actions</b></p> <p>To take a notifiable action prescribed by regulations under section 48 of the Foreign Acquisitions Bill.</p>	The amount not exceeding \$100,000, that is prescribed by regulations, or worked out using the method prescribed by regulations, made for the purposes of this item.

*[Subsection 7(1), Imposition Bill]*

\* The fee amounts and maximum thresholds are subject to indexation each financial year from 1 July 2016.

### Other fees

12.9 The table below sets out the fees for:

- a person (each table item in subsection 8(1)) for:
  - an order made by the Treasurer under Subdivision A of Division 2 of Part 3 of the Act in relation that person; or
  - a no objection notification given to that person;
- giving a notice of a proposal to take an action that is not a notifiable action (table items 1, 2 and 4 of the table in subsection 8(1)).

**Table 12.3: Other fees**

<i>Provision reference</i>	<i>Fee category</i>	<i>*Fee amount</i>
Paragraphs 8(1)(a) and (b) and table item 1 of subsection 8(1)	<p><b>Issue securities, acquire businesses</b></p> <p>(a) to acquire less than a substantial interest in securities in an entity;</p> <p>(b) to issue securities in an entity; or</p> <p>(c) to acquire interests in assets of an Australian business;</p> <p>where the consideration for the issue or acquisition is:</p> <p>(A) \$1 billion or less; or</p> <p>(B) more than \$1 billion.</p>	<p>(A) \$25,000</p> <p>(B) \$100,000.</p>
Paragraphs 8(1)(a) and (b) and table item 2 of subsection 8(1)	<p><b>Enter or terminate agreements</b></p> <p>(a) to enter an agreement mentioned in paragraph 46(2)(d) of the Foreign Acquisitions Bill;</p> <p>(b) to alter a constituent document of an entity mentioned in paragraph 46(2)(e) of the Foreign Acquisitions Bill; or</p> <p>(c) to enter or terminate a significant agreement with an Australian business.</p>	\$25,000.

<i>Provision reference</i>	<i>Fee category</i>	<i>*Fee amount</i>
Paragraph 8(1)(b) and Table item 3 of subsection 8(1)	<b>Significant and notifiable action</b> To take a significant action that is also a notifiable action.	The amount that would have been payable under the Imposition Bill for an action if a notice relating to the action had been given by the person.
Paragraphs 8(1)(a) and (b) and table item 4 subsection 8(2)	<b>Prescribed significant action non-notifiable</b> To take a significant action that is prescribed by regulations under section 49 of the Foreign Acquisitions Bill and that is not a notifiable action.	The amount not exceeding \$100,000, that is prescribed by regulations, or worked out using the method prescribed by regulations, made for the purposes of this item.

*[Subsection 8(1), Imposition Bill]*

\* The fee amounts and maximum thresholds are subject to indexation each financial year from 1 July 2016.

*Fee for variation or revocation of no objection notification*

12.10 If a person applies under subsection 76(6) of the Foreign Acquisitions Bill for a variation of a no objection notification imposing conditions then the amount of the fee is:

- \$5,000, if the action contained in the notification is an acquisition of an interest in Australian land; and
- otherwise \$10,000.

*[Subsection 8(2), Imposition Bill]*

*Established dwellings and residential and agricultural land exceeding \$1 million*

12.11 A calculation is used to determine the fee payable for the following actions:

- an application for an exemption certificate for an established dwelling under section 59 of the Foreign Acquisitions Bill

where the consideration for the proposed acquisition is more than \$1 million; and

- acquiring an interest in residential land or agricultural land, where the consideration for the acquisition is more than \$1 million.

***[Subsections 6(2) and 7(2), Imposition Bill]***

12.12 The fee payable in both of the above circumstances is determined by first dividing the proposed consideration for the proposed acquisition by \$1 million, and rounding the result down to the nearest whole number. The result of that calculation (the purchase price number) is then multiplied by \$10,000 to determine the fee payable.

***[Subsections 6(2) and 7(2), Imposition Bill]***

12.13 For agricultural land, the fee payable cannot exceed \$100,000 as indexed each financial year. ***[Subsection 7(3), Imposition Bill]***

***Six monthly fees for developers***

12.14 A further fee is payable by developers in addition to the fee for applications by developers for exemption certificates for new dwellings. The further fee applies if, during the six month period after the developer is given an exemption certificate (and subsequent six month periods), foreign persons have acquired from the developer one or more dwellings covered by the certificate. In this instance, at the end of that six month period the developer must pay a fee equal to the total of the amounts for those new dwelling acquisitions by foreign persons. The amount of the fee payable is the amount that would have been payable at the time of each acquisition, if:

- each acquisition had been treated as an acquisition of residential land; and
- assuming the acquisition had been a notifiable action.

***[Schedule 1, item 4, subsections 113(2), (3), and (4), Foreign Acquisitions Bill, subsection 6(3), Imposition Bill]***

***Internal reorganisation***

12.15 If a fee is payable by a person under the Foreign Acquisitions Bill in relation to one or more actions that constitute an internal reorganisation, then the fee is \$10,000. An internal reorganisation is an acquisition by an entity (first entity) of:

- an interest in securities in another entity where the first entity and the other entity are subsidiaries of the same holding entity or the other entity is a subsidiary of the first entity;
- an interest in an asset or Australian land from another entity if;
  - both entities are subsidiaries of the same holding entity;
  - the other entity is the holding entity of the first entity; or
  - the other entity is a subsidiary of the first entity.

*[Section 4, definition of ‘internal reorganisation’, section 10, Imposition Bill]*

***Tie breaker rules if multiples fees could apply***

12.16 If one agreement covers more than a single action for which a fee is payable, a separate fee is payable for each acquisition of an interest in residential land covered by the agreement. This ensures that the fees cannot be reduced for multiple acquisitions by including them in a single agreement. *[Paragraph 9(1)(a), Imposition Bill]*

12.17 Further, if, apart from acquisitions of interests in residential land, the agreement covers more than one other action, then the fee payable is the highest of the fees for those actions. *[Paragraph 9(1)(b), Imposition Bill]*

12.18 If a single action is either or both:

- more than one of the following kinds of actions:
  - a significant action in relation to an entity (under subsection 40(2) of the Foreign Acquisitions Bill);
  - a significant action in relation to a business (under subsection 41(2) of the Foreign Acquisitions Bill);
  - the acquisition of an interest in Australian land by a foreign person (under paragraph 43(a) of the Foreign Acquisitions Bill);
  - to take a significant action that is prescribed for the purposes of section 44 of the Foreign Acquisitions Bill;

- a single action relating to land that satisfies more than one subsection in section 52 of the Foreign Acquisitions Bill (agricultural or other land with a value above the threshold and land which is prescribed);

then the fee payable in relation to the single action is the highest of the amounts that apply.

***[Subsection 9(2), Imposition Bill]***

12.19 This provides a tie breaker rule to remove doubt about the relevant fee that applies if multiple fees could apply.

***Indexation of fees***

12.20 The amounts of the fees set out in the Imposition Bill and any fee amounts prescribed in regulations under a regulation making power in the Imposition Bill are subject to annual indexation. This includes both fees for which a dollar amount is included in the Imposition Bill and fees that are calculated by reference to a formula such as fees for acquiring an interest in residential land or agricultural land, where the consideration for the acquisition is more than \$1 million.

***[Subsections 12(1) and (2) and paragraph 12(9)(b), Imposition Bill]***

12.21 The purchase price number used to determine the fees for acquisition of interests in residential land or agricultural land is not a fee and accordingly is not itself subject to indexation. Similarly, the threshold amounts for consideration of \$1 billion, \$1 million and the amount of \$10,000 to which the purchase price number applies are not indexed. This ensures that indexation applies only once to the fee amount for acquisitions of residential or agricultural land. The maximum cap on the fees for prescribed exemption certificates, prescribed notifiable actions and prescribed significant actions that are not notifiable actions are also subject to annual indexation. The maximum cap on the fee payable for an acquisition of an interest in agricultural land is also subject to annual indexation. ***[Subsection 12(9), Imposition Bill]***

12.22 Indexation applies each financial year commencing with the 2016-17 financial year. ***[Schedule 3, subitem 10(2), Foreign Acquisitions Bill, subsections 12(2) and (3), Imposition Bill]***

12.23 The indexed amount of fees for later financial years is calculated by multiplying the Base amount of the fee by the Indexation factor for the financial year. The indexation factor reflects the change in the CPI index numbers for each quarter for the 12 month period ending on 31 March before the relevant financial year compared to the index numbers for each quarter for the 12 month period ending on 31 March

immediately before the base financial year for the base amount.  
*[Subsections 12(2), (3) and (8), Imposition Bill]*

12.24 The CPI index numbers (index number) used for determining the indexation factor refer to the original series of the eight capital cities weighted average All Groups Consumer Price Index number. Where a revised index number is published, the index number used is the most recently published index number provided that the index number is not published more than two weeks after the first date of publication for that number. An index number published more than two weeks after original publication is only used if it includes changes to the index reference period. *[Subsections 12(5) and (8), Imposition Bill]*

12.25 The indexation factor is rounded to three decimal places (rounded up if the result of the calculation for the fourth decimal place is five or more). The indexed fee that is calculated is then rounded down to the nearest multiple of \$100. No indexation applies if applying indexation would result in a reduction in fees. Indexation instead occurs in later financial years once the indexation calculation results in an increase in the fee amounts. *[Subsections 12(4), (6) and (7), Imposition Bill]*

12.26 A regulation making power is included in the Imposition Bill to enable a lower amount of fees (including a nil amount) to be prescribed, or for a method of working out that lower amount to be prescribed. This provides flexibility to reduce fee levels if required or to remove a fee that is imposed under the Imposition Bill. *[Subsection 11(1), Imposition Bill]*

12.27 Where the amount of a fee is specified as payable in certain circumstances, the regulations may prescribe an amount or method in relation to only some of those specified circumstances. *[Subsection 11(2), Imposition Bill]*

12.28 The Imposition Bill includes a number of definitions for the purposes of the Bill, including indexed amount, index number, base amount and quarter for the purposes of indexation. The Imposition Bill also ensures that definitions in the Bill or regulations prescribed under a regulation making power under the Bill have the same meaning. *[Section 4, Imposition Bill]*

### **Example 12.1 Indexation of fees**

The fee payable for an exemption certificate for a new dwelling payable under section 57 of the Foreign Acquisitions Bill for the 2017-18 financial year is calculated as follows (assuming a lower fee amount has not been prescribed under regulations):



The fee for the 2015-16 financial year of \$25,000 is multiplied by an indexation factor worked out by dividing the sum of the four index numbers for the quarters of the 12 month period ending on 31 March 2017 by the sum of the four index numbers for the quarters of the 12 month period ending on 31 March 2015. The indexation factor is rounded to three decimal places and the indexed fee amount calculated is the rounded down to the nearest multiple of \$100.

***General regulation making power***

12.29 The Imposition Bill includes a general regulation making power to prescribe matters required or permitted by the Bill or necessary or convenient to give effect to the Bill. *[Section 13, Imposition Bill]*

12.30 The Imposition Bill extends to all Australian external territories. *[Section 3, Imposition Bill]*

***Requirement for fees to be paid before Treasurer exercises powers***

12.31 Where a fee is payable for making an application or giving a notice, a person is taken not to have given the notice or made the application until the fee has been paid or the fee has been waived. *[Schedule 1, item 4, section 114, Foreign Acquisitions Bill]*

***Waiver and remissions of fees***

12.32 The Treasurer may waive or remit the whole or a part of a fee that is payable if the Treasurer is satisfied that it is not contrary to the national interest to waive or remit the fee. *[Schedule 1, item 4, section 115, Foreign Acquisitions Bill]*

**Application provisions**

12.33 Fees apply from the later of:

- the day after Royal Assent of the Imposition Bill; and
- 1 December 2015.

*[Table item 2 in Subsection 2(1), Imposition Bill]*

12.34 However, if the Foreign Acquisitions Bill does not receive Royal Assent then fees do not apply. This ensures that all related legislation must be enacted before fees can apply.

*[Subsection 2(1), table item 2, Imposition Bill]*



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## **Chapter 13**

# **Statement of Compatibility with Human Rights**

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**Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

***Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and Foreign Acquisitions and Takeovers Fees Imposition Bill 2015***

13.1 These Bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview**

13.2 The Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Bill) makes the most far-reaching changes to Australia's foreign investment framework since the *Foreign Acquisitions and Takeovers Act 1975* (Act) was enacted. Australia welcomes foreign investment because of the important role it plays in the development of the economy. However, it is necessary to have a robust and flexible legal framework which permits the Treasurer to block or modify any proposed investment that is contrary to the national interest or to impose conditions on the way a proposal is, or an acquisition has been, implemented to ensure it is not contrary to the national interest. The framework provided by the Bill will increase the community's confidence in foreign investment in Australia while at the same time providing a predictable and welcoming environment for foreign investors.

#### ***Who is regulated by the Bills?***

13.3 The main amendments to the Act, which are in Schedule 1 to the Bill, primarily apply to certain actions taken by a foreign person. 'Foreign person' is relevantly defined by new section 4 of the Act to include an individual who is 'not ordinarily resident in Australia' as well as a trustee (who may be an individual) of certain trusts.

13.4 An individual who is not an Australian citizen is considered to be 'ordinarily resident in Australia' at a particular point in time if:

- the individual has been in Australia during 200 or more days in the preceding 12 months; and
- at the particular point in time the individual is in Australia and the individual's continued presence is not subject to any limitation as to time imposed by law; or
- if the individual is not in Australia at the particular point in time but immediately before the individual's most recent departure from Australia the individual's continued presence in Australia was not subject to any limitation as to time imposed by law (see new section 5).

### ***Regulated acquisitions***

13.5 A foreign person must not take certain actions without first notifying the Treasurer (new section 81). These actions are called 'notifiable actions'. The acquisition of certain interests in an agribusiness, an Australian entity, or an interest in Australian land, are all notifiable interests. Generally, an action is only a notifiable action if the entity, business or land meets the applicable monetary threshold (new section 47).

13.6 The Bill also gives the Treasurer certain powers over actions that are referred to as 'significant actions'. Broadly, a significant action is an action to acquire interests in securities, assets or Australian land, or otherwise an action in relation to entities (that is, corporations and unit trusts) and businesses that have the requisite connection with Australia. An action in relation to an entity or business will only be a significant action if the action results in a change in control involving a foreign person or to be taken by a foreign person, unless an action related to an agribusiness or land (new section 40 to 43 and 51 to 54).

13.7 If the Treasurer is notified that a person is proposing to take a significant action, the Treasurer may:

- decide to not object to the action and give the person a no objection notification not imposing conditions;
- decide not to object to the action provided the person complies with one or more conditions and give the person a no objection notification imposing conditions; or
- decide that taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

13.8 If a significant action has already been taken which the Treasurer is satisfied is contrary to the national interest, the Treasurer may make an order under new section 69, known as a disposal order, which is directed at undoing the action. For example, the Treasurer could order a person to dispose of their shares by a specified time. Alternatively, the Treasurer could impose conditions.

13.9 A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action. However, it is anticipated that some foreign persons will choose to notify the Treasurer because they will want the certainty offered by a no objection notification. Under new section 70, if a foreign person is given a no objection notification in relation to the significant action, provided the person does not take any action which is not specified by the notification, the Treasurer will generally not be able to make a disposal order.

13.10 The question of whether a particular investment is contrary to the national interest will be a matter for the Treasurer. While each proposal will be considered on a case-by-case basis, the factors that may be relevant to the Treasurer's decision will include the impact of the proposed investment on Australia's national security, the economy and the community, competition, other Government policies (including taxation), and the character of the investor. When considering an application to acquire an interest in residential land, generally consideration will also be given to whether the proposed investment would add to Australia's housing stock.

### ***Fees***

13.11 Fees will be payable in relation to applications made and orders made, and notices and notifications given. The amounts of the fees are specified in the Foreign Acquisitions and Takeovers Fees Imposition Bill 2015 (Imposition Bill). Fees are payable to ensure that foreign persons and others who take action regulated by the Act bear the costs relating to the administration of the Act.

### ***Offences***

13.12 A person may commit an offence or contravene a civil penalty provision if they fail to comply with certain obligations created by the new Act. An infringement notice may be given in relation to certain civil penalties. Most of the offences and all the civil penalty provisions created by the Bill are in new Part 5 of the Act.

### ***Record keeping and confidentiality***

13.13 New Part 7 of the Act seeks to ensure that information provided under this Act is not disclosed unnecessarily or put to unauthorised use. New Part 7 also requires certain records to be made and kept.

13.14 Information that is obtained for the purposes of this Act, which is called ‘protected information’, may be disclosed only for authorised purposes. New Division 3 of Part 7 of the Act sets out the circumstances in which information may be disclosed. A person who obtains, uses or discloses protected information other than as authorised by this Act may commit an offence.

### ***Confidentiality requirements in other Acts***

13.15 The Bill envisages that the Commissioner of Taxation (Commissioner) will exercise particular powers and functions under the Act. Schedule 4 to the Bill makes a number of consequential amendments to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). These amendments support the effective administration of the Bill and the *Register of Foreign Ownership of Agricultural Land Bill 2015*, which provides for the establishment of a Register of Foreign Ownership of Agricultural Land (Register) to be administered by the Commissioner.

13.16 Schedule 4 to the Bill also makes several other amendments that will assist the Australian Taxation Office (ATO) to perform its functions more effectively by allowing it to share information with the Australian Securities and Investments Commission (ASIC) and the Department of Immigration and Border Protection (DIBP) in a broader range of circumstances than is currently the case.

## **Human rights implications**

13.17 This Bill engages the following human rights and freedoms:

- the right to be presumed innocent until proved guilty according to law;
- the right to a fair and public hearing;
- the right not to be compelled to testify against oneself or to confess guilt;
- the right to protection from unlawful or arbitrary interferences with an individual’s privacy;

- the right to freedom of expression; and
- the right to freedom from discrimination on prohibited grounds.

### ***Assessment of civil penalties***

13.18 *Practice Note 2: Offence provisions, civil penalties and human rights*<sup>12</sup> observes that civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR), regardless of the distinction between criminal and civil penalties in domestic law. This is because the word ‘criminal’ has an autonomous meaning in international human rights law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a ‘criminal’ penalty for the purposes of the Articles 14 and 15 of the ICCPR.

13.19 The civil penalty provisions in the Bill (which are in new Division 3 of Part 5 of the Bill) should not be considered ‘criminal’ for the purposes of international human rights law. While the civil penalty provisions included in the Bill are intended to deter people from not complying with the obligations imposed by the Act, none of the civil penalty provisions carry a penalty of imprisonment and there is no sanction of imprisonment for non-payment of any penalty. In addition, the maximum pecuniary penalty that may be imposed on an individual for contravening a civil penalty provision is generally lower than maximum pecuniary penalty that may be imposed for the corresponding criminal offence. The statement of compatibility therefore proceeds on the basis that the civil penalty provisions in the Bill do not create criminal offences for the purposes of Articles 14 and 15 of the ICCPR.

### ***Presumption of innocence***

13.20 Paragraph 2 of Article 14 of the ICCPR protects the right of a person charged with a criminal offence to be presumed innocent until proven guilty according to law. The presumption of innocence is also a fundamental principle of the common law. As the Human Rights Committee has observed, the presumption of innocence ‘imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable

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<sup>12</sup> Parliamentary Joint Committee on Human Rights, *Practice Note 2: Offence provisions, civil penalties and human rights*, December 2014, is available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources), last accessed on 30 July 2015.

doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle'.<sup>13</sup> The presumption of innocence generally requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

*Offence provisions which carry an evidential burden*

13.21 Any offence provision which requires a defendant to carry an evidential burden may be considered to engage the right to the presumption of innocence. New sections 129 and 133 of the Act engage the right to the presumption of innocence because a defendant bears an evidential burden in relation to matters in those provisions. In addition, Schedule 4 to the Bill relies on an absolute liability offence to enforce an obligation created by new section 354-1 of Schedule 1 to the TAA 1953. Each of these provisions is considered in turn.

13.22 The effect of new section 129 is that new section 128 of the Act (which makes it an offence for a person to record, use or disclose protected information for a purpose not authorised by new Part 7) does not apply if the person records, discloses or otherwise uses protected information in good faith in performing, or purportedly informing, his or her functions under this Act. An evidential burden applies to this defence. The imposition of an evidential burden is justified because the reason why a defendant used or disclosed protected information will generally be a matter that is peculiarly within the defendant's knowledge. Moreover, the effect of the limitation is that the defendant must merely adduce or point to evidence that suggests a reasonable possibility that he or she disclosed the information in good faith. Once this is done, the prosecution must refute this beyond reasonable doubt to obtain a conviction (see section 13.3 of the *Criminal Code*). As a result, the risk that a person may be found guilty of an offence against new section 128 of the Act despite there being reasonable doubt about the person's guilt is considered to be low. Accordingly, to the extent this provision might be considered to limit the presumption of innocence, the limitation is reasonable in all the circumstances.

13.23 New subsection 133(1) permits the Treasurer to issue a notice if the Treasurer has reason to believe that a person can give information or produce documents relating to matters that are relevant to the exercise by the Treasurer of his or her powers under this Act. A person who fails to comply with such a notice may be guilty of an offence which has a

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<sup>13</sup> Human Rights Committee, *General Comment No 43 Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007, [30].



maximum penalty of imprisonment for six months, 30 units or both. However, this offence does not apply if the person complies with the notice to the extent to which the person is capable of complying with it. An evidential burden applies to this defence. This is appropriate because it is a matter that will be peculiarly within the defendant's knowledge and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. Once the person has adduced or pointed to evidence which suggests there is a reasonable possibility that the person has complied with the notice to the extent possible, the prosecution must refute this beyond reasonable doubt in order to obtain a conviction. For this reason it is again considered that the risk of a person being found guilty of an offence against subsection 133(5) of the Act is low, and to the extent this provision might be considered to limit the presumption of innocence the limitation is reasonable in all the circumstances.

13.24 New section 354(1) of Schedule 1 to the TAA 1953, which is inserted by item 3 of Schedule 4, is similar to new section 133 of the Act. A person who receives a notice under new section 354(1) of Schedule 1 to the TAA 1953 may be guilty of an offence against subsection 8C(1) of the TAA 1953. However, the effect of subsection 8C(1B) is that a person does not commit an offence to the extent to which the person is not capable of complying with the obligation. A defendant bears an evidential burden in relation to this matter. This is appropriate because generally only the defendant will know the reason why she or he will was unable to fully comply with the notice. For these reasons, to the extent this provision might be considered to limit the presumption of innocence the limitation is reasonable in all the circumstances.

### ***Strict liability and absolute liability offences***

13.25 Strict liability and absolute liability offences engage and limit the presumption of innocence because they allow for the imposition of criminal liability without the need to prove fault. The difference between strict and absolute liability is that strict liability allows a defence of honest and reasonable mistake to be raised, whereas an offence of absolute liability does not.

13.26 The Bill creates one strict liability offence and relies on an absolutely liability offence to enforce an obligation created by new section 354-1 of Schedule 1 to the TAA 1953.

13.27 New section 128 makes it an offence if a person fails to make and keep a record under Division 2 of Part 7 of the Act unless the Treasurer has notified the person that they do not need to make or keep the record. As the offence is one of strict liability it is only necessary for

the prosecution to prove the person's alleged inaction — the person's intention is irrelevant. It is reasonable for this offence to be one of strict liability because the requirement is uncomplicated and easily satisfied, and the information is within the person's control. The compliance burden would otherwise be high where it cannot be known if records exist and against this the penalty is low. The maximum penalty is a fine not exceeding 30 penalty units rather than a fine and or a period of imprisonment.

13.28 A person who fails to comply with a notice given under new section 354(1) of Schedule 1 to the TAA 1953 may be guilty of an offence against section 8C of the TAA 1953 which is an offence of absolute liability. The maximum penalty is generally a fine of 20 penalty units. However, in the case of a person who has two or more relevant convictions, the maximum penalty is a fine of 50 penalty units or 12 months imprisonment or both. The notice requirement is uncomplicated, readily understood and limited to a narrow class of information which is readily available to the person. It is necessary because it may otherwise not be possible to obtain information about complex and opaque offshore corporate and business structures and ownership arrangements. These are matters purely within the knowledge of those involved and about which they can be expected to have knowledge. Noting that a person need only comply to the extent they are capable of doing so, it is appropriate to rely on an offence of absolute liability to enforce this obligation.

### ***Right to a fair and public hearing***

13.29 Article 14 of the ICCPR ensures that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

13.30 New section 100 of the Act might be considered to engage the right to a fair and public hearing because it permits an infringement notice to be given by an infringement officer if the officer believes on reasonable grounds that the person contravened a civil penalty provision relating to residential land. However, the right of a person to fair and public hearing by a competent, independent and impartial hearing is not limited by the Bill because the provisions in Part 5 of the *Regulatory Powers (Standard Powers) Act 2014* (Regulatory Powers Act) allow a person to elect to have the matter heard by a court rather than pay the amount specified in the infringement notice. Moreover, the Regulatory Powers Act requires that this right must be stated in any infringement notice given to the person. For these reasons the Bill is not considered to limit the right to a fair and public hearing.

***Right not to be compelled to testify against oneself or to confess guilt***

13.31 Paragraph 3(g) of Article 14 of the ICCPR guarantees the right of an individual not to be compelled to testify against oneself or to confess guilt. The privilege against self-incrimination is recognised by the common law and applies unless it is expressly abrogated.

13.32 This right is engaged by new section 133 of the Act because it permits the Treasurer to give a person a written notice that requires the person to give information or documents to the Treasurer or a specified person acting on the Treasurer's behalf. An individual is not excused from giving information or producing a document on the ground that to do so might tend to incriminate him or her. A person who fails to comply with a notice given under new section 133 may be guilty of an offence and liable to a maximum penalty of imprisonment for six months, or 30 penalty units, or both.

13.33 These limitations on the right to freedom from self-incrimination are reasonable because of the safeguards that have been included. Specifically, new section 133 provides that, in the case of an individual, the information given or documents produced is not admissible against the individual in any criminal proceedings or in proceedings for the recovery of a civil penalty, other than proceedings under this Act or section 137.1 or 137.2 of the *Criminal Code* (use immunity). In addition, any information, document or thing obtained as a direct or indirect consequence of the individual giving the information, answer, document or thing is not admissible against the individual in any criminal proceedings or in proceedings under or in proceedings for the recovery of a civil penalty, other than proceedings under this Act or section 137.1 or 137.2 of the *Criminal Code* (derivative use immunity). The provision therefore strikes a reasonable balance between the competing interest of obtaining information relevant to the administration of this Act and protecting an individual's rights and is considered to be reasonable in all the circumstances.

***Right to protection from unlawful or arbitrary interference with an individual's privacy, family, home or correspondence***

13.34 Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with an individual's privacy, family, home or correspondence. It also provides that everyone has the right to the protection of the law against such interference or attacks.

13.35 The Human Rights Committee has interpreted the term 'unlawful' to mean that no interference can take place except in cases envisaged by a law which comply with the provisions, aims and objectives of the ICCPR. The Human Rights Committee has also

indicated that an interference will not be considered to be ‘arbitrary’ if it is provided for by law and is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.<sup>14</sup>

13.36 The following provisions in Schedule 1 to the Bill engage the rights protected by Article 17 of the ICCPR:

- new Division 3 of Part 7 of the Act permits information to be recorded, used or disclosed in specified circumstances; and
- new section 133 allows the Treasurer to require any individual to give information or documents (including information about a member of an individual’s family) relating to matters that are relevant to the exercise of the Treasurer’s powers under the Act.

13.37 Schedule 4 also engages the rights protected by Article 17 of the ICCPR because it allows the ATO to disclose information about individuals in a broader range of circumstances than is currently the case.

*Protected information that may be collected, used or disclosed under new Division 3 of Part 7 of the Act*

13.38 New Division 3 of Part 7 of the Act authorises the disclosure of protected information in a range of specified circumstances. However, to the extent these provisions authorise the disclosure of protected information about individuals or identifiable individuals, any interference with an individual’s privacy is not arbitrary because the interference is necessary to achieve a legitimate public purpose. The purpose of each of these provisions is briefly considered.

Disclosure for the purposes of this Act

13.39 New section 121 of the Act permits a person to record, disclose or otherwise use protected information for the purposes of this Act. In order to properly advise the Treasurer or his or her delegate about whether one of the actions regulated by this Act may be contrary to the national interest, it will generally be necessary for department officers to disclose protected information in order to consult with officers in other Commonwealth departments and agencies. Protected information about particular applications is also given to the States and

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<sup>14</sup> *General comment No. 16: Article 17 (Right to privacy), Thirty second session (1988) at [3]-[4].*

Territories to enable them to provide comments about an application. The advice and comments provided by other agencies and departments directly informs the decision about whether a particular action is contrary to the national interest.

13.40 Under new subsection 121(2) of the Act a person who receives protected information under the Bill because they are consulted about a particular application under the Act is also permitted to record, disclose or otherwise use the information for the purposes for which the information was disclosed to the person. The person may also disclose the protected information for the purposes for which it was disclosed, but only to:

- a Minister, an officer or an employee of the Commonwealth, a State, the Australian Capital Territory or the Northern Territory;
- an officer or employee of a Commonwealth, State or Territory body; or
- a person appointed by the Commonwealth for purposes of this Act.

13.41 This provision permits a person who obtains protected information for the purposes of this Act to consult with a colleague if it is necessary to do so in order to provide advice or comments about a particular application.

Other circumstances in which protected information may be recorded, used or disclosed

13.42 New subsection 122(1) of the Act permits a person to disclose protected information to the Minister responsible for administering specified Commonwealth statutes as well as the accountable authority of a Commonwealth entity that deals with the administration of any of those Acts.

Disclosures for the purposes of administering statutes that also impose restrictions on foreign ownership

13.43 Several statutes include provisions which impose supplementary or alternative requirements relating to foreign investment. Specifically,

- foreign ownership of some airports is limited by the *Airports Act 1996*;

- foreign investment in the banking sector must be consistent with requirements in the *Banking Act 1959* and the *Financial Sector (Shareholdings) Act 1998*;
- aggregate foreign ownership in Qantas Airways Limited is limited by the *Qantas Sale Act 1992*; and
- aggregate foreign ownership of Telstra Corporation Limited is limited by the *Telstra Corporation Act 1991*.

13.44 There are occasions when the disclosure of protected information to the Minister administering the above Acts or the accountable authority of a Commonwealth entity that deals with the administration of those Acts would assist those persons to perform their functions efficiently and effectively.

#### Disclosures to security agencies

13.45 An officer who is performing functions or exercising powers under this Act may occasionally collect information for the purposes of performing powers and functions under this Act that should be disclosed to intelligence agencies, or law enforcement agencies, relating to Australia's national security and criminal activities such as organised crime. The Bill therefore enables protected information to be disclosed to the relevant Commonwealth Minister or the accountable authority that deals with the administration of the *Australian Crimes Commission Act 2002*, *Australian Security Intelligence Organisation 1979*, the *Inspector-General of Intelligence and Security Act 1986*, the *Intelligence Services Act 2001*, and the *Proceeds of Crimes Act 2002*.

#### Disclosures for the purposes of the administration of the Migration Act 1958

13.46 From time to time it may appear to a person who is performing functions or exercising powers under this Act that an individual has not complied with the conditions imposed on their visa. The Bill permits such information to be disclosed to the Commonwealth department responsible for the administration of the Migration Act (currently DIBP).

#### Disclosures for the purposes of the administration of a taxation law

13.47 The Bill allows protected information to be disclosed for the purposes of a taxation law within the meaning of section 995-1 of the *Income Tax Assessment Act 1997*. This will allow information to be disclosed for the purpose of protecting public revenue, as well as for the purposes of administering the Register of Foreign Ownership of Agricultural Land Act 2015.

Disclosures to corporate regulators

13.48 The Bill allows protected information to be disclosed for the purposes of administering the *Australian Prudential Regulation Authority Act 1998*, the *Australian Securities and Investment Commission Act 2001*, and the *Corporations Act 2001*. Such information will usually relate to bodies corporate rather than individuals. However, the ability to disclose information about individuals, such as directors and security holders, can assist the relevant regulator to efficiently and effectively administer particular provisions in these Acts (for example, the takeover provisions in Chapter 6 of the *Corporations Act*).

Disclosures for the purposes of assisting certain Ministers to perform their responsibilities

13.49 Subsections 122(2) and (3) permit a person to disclose protected information to a Commonwealth Minister responsible for agriculture; industry policy; investment promotion; taxation policy; and foreign investment in Australia. A person may also disclose protected information to the Secretary of a department administered by a Minister responsible for one of these areas for the purposes of assisting the Minister to discharge his or her responsibilities.

13.50 Ministers responsible for these areas sometimes receive representations from persons who are proposing to invest in Australia or who have invested in Australia and want to discuss their investment. The Bill therefore allows information to be disclosed for the purposes of briefing the relevant Minister. The disclosure of protected information will also contribute to the development of well-informed policy proposals.

Authorisation of disclosures for the purposes of law enforcement

13.51 New section 123 of the Act permits a person to disclose protected information to an enforcement body (within the meaning of the *Privacy Act 1988*) if the person reasonably believes that the disclosure is reasonably necessary for one of more enforcement related activities conducted by or on behalf of that body.

13.52 An officer who is performing functions or exercising powers under this Act may occasionally obtain information which suggests that an individual may have committed a criminal offence and it is in the public interest that officers can disclose this information to the appropriate law enforcement body.

#### Authorisation to use information for purposes of proceedings

13.53 A person who obtains protected information may disclose that information to a court or tribunal, or in accordance with an order made by a court or tribunal (for example, a subpoena) if the Commonwealth is a party to the proceeding and the Treasurer is satisfied that it is not contrary to the national interest. A person who receives protected information in these circumstances (for example, staff in the relevant court or tribunal) is permitted by new section 127 of the Act to make a record of, or disclose or otherwise use, the information for the purposes for which the information was disclosed.

13.54 This provision will ensure that where the Commonwealth is involved in proceedings of any kind relevant information and documents may be provided to a court or tribunal. This includes where a person applies for judicial review or where it would assist a tribunal to have evidence about the administration of the Act.

#### *Safeguards*

13.55 The Bill includes two safeguards that will minimise the risk of information about individuals being misused. First, a person who records, discloses or uses protected information for a purpose that is not authorised by new Part 7 of the Act may be guilty of an offence against new section 128 of the Act and liable to imprisonment for two years, 120 penalty units, or both. Secondly, new section 130 of the Act provides that a person must not, except for the purposes of this Act, be required to produce any document or give any information to a court, tribunal, authority or person having the power to require the production of documents or the answering of questions.

#### *Conclusion*

13.56 These provisions do not limit Article 17 because they do not permit an unlawful or arbitrary interference with an individual's privacy. The Division ensures that there is an appropriate balance between an individual's right to information privacy whilst at the same time ensuring that information can be shared with other government departments and agencies for the legitimate purposes outlined above. The restrictions are also 'lawful' in the sense that the Bill adequately specifies the circumstances in which interferes with a person's right to privacy will be permissible. Accordingly these provisions are compatible with Article 17 of the ICCPR.

#### *Requirement to provide information or documents*

13.57 New section 133 of the Act confers on the Treasurer the power to require a person to provide documents or give information, and this



power could be exercised to incidentally require the provision of information about identified or identifiable individuals. A person who fails to comply with such a notice may be liable to a criminal offence that carries a penalty of imprisonment for six months, 30 penalty units, or both. Such a provision is needed to enable information to be gathered for the purpose of monitoring and enforcing compliance with the obligations imposed by the Act. However, the provision does not authorise an arbitrary interference with an individual's privacy because the power can only be exercised by the Treasurer or the Treasurer's delegate if they have reason to believe that the person can give information or produce documents relevant to the exercise of the Treasurer's powers under the Act. The circumstances in which information may be collected and are clearly defined by the Bill and consequently any interference with an individual's right to privacy is lawful.

13.58 The power conferred by this provision could also be exercised for the purpose of requiring a person to provide specified information or documents that might incriminate a close family member, including a person's spouse, parent or child. A person is not able to object to the notice on the basis that they are being asked to provide information about a member of their family. In contrast, the *Evidence Act 1995* provides that a person who is the spouse, de facto partner, parent or child of a defendant in a criminal proceeding may object to being required to give evidence, or to give evidence of a communication between the person and the defendant, as a witness for the prosecution.<sup>15</sup> However, in circumstances where arrangements about actions may be informal and impossible to otherwise discover, being able to obtain accurate information about the extent to which this Act is being complied with is considered to be of paramount importance. Moreover, the circumstances in which the discretion could be lawfully exercised is sufficiently clear from the provision. Accordingly this provision does not arbitrarily interfere with an individual right to privacy or family life.

*Information that may be collected, used or disclosed under Schedule 4 to the Bill*

Disclosure of information contained in the Register to certain Ministers

13.59 Section 355-25 in Schedule 1 to the TAA 1953 makes it an offence for a taxation officer to disclose tax information that identifies an entity, or is reasonably capable of being used to identify an entity, except in certain specified circumstances (the offence provision).

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<sup>15</sup> Evidence Act section 18.

13.60 Subsection 355-55(1) of Schedule 1 to the TAA 1953 provides that the offence provision does not apply if a taxation officer discloses certain classes of information to a Minister for various specified purposes. This provision will be amended by item 4 of Schedule 4 so that the offence provision does not apply if a taxation officer discloses information contained in the Register to a Minister responsible for agriculture, industry policy, investment promotion, taxation policy or foreign investment in Australia for the purpose of enabling that Minister to discharge that responsibility. It is anticipated that this provision will enable officers at the ATO to disclose information about identified or identifiable individuals for the purposes of briefing these Ministers about issues raised by investors and potential investors. It will also enable officers to disclose information that is needed to develop well-informed public policy.

#### Disclosure of taxpayer information to ASIC

13.61 Subsection 355-65(4) of Schedule 1 to the TAA 1953 provides that the offence provision does not apply if a taxation officer discloses certain classes of information to certain entities (including ASIC) for purposes relating to corporate regulation, business research, or policy. Specifically, the ATO can give information to ASIC for the purpose of investigation or enforcement activities relating to a provision that is administered by ASIC and imposes a pecuniary penalty or creates an offence. A taxation officer can also disclose information to ASIC about information that was obtained under or in relation to the *Superannuation (Unclaimed Money and Lost Members) Act 1999* for the purpose of ASIC performing any of its functions or exercising any of its power.

13.62 However, the ATO is not permitted to disclose information to ASIC for the purpose of enabling ASIC to undertake general data-matching. This is because ASIC needs to suspect a breach before it can receive information from the ATO, rather than using the relevant ATO information for data-matching to proactively assess and manage compliance risks.

13.63 The limited information sharing provision has also prevented the ATO and ASIC from co-operating in other areas where they co-regulate. For example, the ATO holds information that may better inform ASIC in its consideration of class order relief and other exemptions from filing statutory accounts in Australia, but the ATO cannot share this information unless there is evidence that an offence may have been committed or ASIC has commenced an investigation. To overcome these limitations the item 5 of Schedule 4 to the Bill enables a taxation officer to disclose information to ASIC for the purpose of performing any functions or exercising any powers under any Act or

instrument (or part of any Act or instrument) of which ASIC has general administration.

#### Disclosure of taxpayer information to DIPB

13.64 The effect of subsection 355-65(8) in Schedule 1 to the TAA 1953 is that the offence provision does not apply to a taxation officer who discloses particular classes of information to specified individuals for a range of purposes. Relevantly, the offence provision does not apply to a taxation officer who discloses information to the ‘Immigration Secretary’ for the purposes of assisting in locating persons who are unlawfully in Australia and information relating to a holder (or former holder) of a visa or an approved sponsor (or former approved sponsor) for certain narrowly defined purposes.

13.65 Schedule 4 to item 7 of the Bill will allow taxpayer information to be disclosed to the ‘Immigration Secretary’ or the Australian Border Force Commissioner for the purpose of administering any functions or exercising any of the powers administered by the Minister administering the Immigration Department. This will improve the effectiveness of the ATO’s data-matching.

#### Limits on disclosure to courts and tribunals

13.66 The effect of existing section 355-75 in Schedule 1 to the TAA 1953 is that a taxation officer cannot be required to disclose to a court or tribunal protected information that was acquired by the person as a taxation officer except where it is necessary to do so for the purpose of carrying into effect the provisions of a taxation law.

13.67 Because taxation officers have duties, functions and powers under the Bill, the effect of the amendment to this provision made by item 9 of Schedule 4 is to make the TAA 1953 provision consistent with the Bill. Where a taxation officer has acquired protected information because of the exercise of duties and functions under the Bill, the taxation officer can be required to disclose that information to a court or a tribunal where it is necessary to do so for the purpose of carrying into effect the provisions under a taxation law or the Act.

#### Limits on on-disclosure to courts and tribunals

13.68 Item 11 of Schedule 4 to the Bill repeals section 355-205 in Schedule 1 to the TAA 1953 and substitutes a new provision. Broadly, section 355-205 currently provides that an entity cannot be required to ‘on disclose’ protected information to a court or tribunal except where it is necessary to do so for the purposes of carrying into effect the provisions of a taxation law. The new section 355-205 in Schedule 1 to the TAA 1953 is identical to the current provision except that because

information is disclosed for the administration of the Act, the limit on on-disclosure to courts or tribunals would not apply for the purposes of carrying into effect the provisions of a taxation law or if the entity has or had duties, functions or powers under the Act.

### *Conclusion*

13.69 None of the provisions in Schedule 4 limit Art 17 because they do not permit an unlawful or arbitrary interference with an individual's privacy. The Schedule ensures that information can be shared with other government departments and agencies for the legitimate purposes outlined above. The restrictions are also 'lawful' in the sense that the Bill adequately specifies the circumstances in which interferes with a person's right to privacy will be permissible. Accordingly these provisions are compatible with Art 17 of the ICCPR.

### *Right to freedom of expression*

13.70 Paragraph 2 of Art 19 of the ICCPR requires States parties to guarantee the right of everyone to freedom of expression, including the 'freedom to seek, receive and impart information and ideas of all kinds'. The right to freedom of expression includes the right *not* to impart information. New section 133 of the Act and item 3 in Schedule 4 to the Bill engage this right.

13.71 New section 133 engages the right to freedom of expression because it allows the Treasurer to require a person to provide information or produce documents. This restriction is necessary for the legitimate purpose of ensuring that the Treasurer can obtain the information and documents needed relating to his or her functions under the Act. There is a rational and proportionate connection between the purpose of the provision and the limitation of the right.

13.72 New section 354-5 in Schedule 1 to the TAA 1953 engages the right to freedom of expression in a very similar fashion because it enables the Commissioner to give a person a notice which requires the recipient of the notice to provide information the person has about any legal or equitable interest in the property or a right, power or privilege in connection with the property. The information a person may be required to give includes details about each other person who has a property right or interest in the property and information about the right or interest in the property.

13.73 The information available to the ATO suggests that obscure ownership arrangements are sometimes used to purchase property. The purpose of giving the Commissioner the power to issue such a tracing notice is to give the Commissioner another tool to find out who may

have a beneficial interest in property. In addition to assisting the ATO to monitor compliance with this Act, the power would also be used in circumstances where the ATO believes that property has been purchased as a means of laundering money. The only other way the Commissioner could discover each person who has a beneficial interest in a property would be to undertake an intensive information gathering and audit process. Such a process is time-consuming and there is a risk that the process may not be completed before the person transfers their beneficial interest. Accordingly, while the provision limits the right to freedom of information, the limitation is reasonable because it will help ensure that the ATO has the legal powers it needs to investigate persons who may not be complying with their obligations under Australia's taxation laws.

*Right to be free from discrimination on prohibited grounds*

13.74 Article 26 of the ICCPR recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin. However, the Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>16</sup>

13.75 The Bill also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'. Under Article 2(a)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation'. Under Article 5 of International Convention on the Elimination of All Forms of Racial

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<sup>16</sup> General Comment No 18: Non-discrimination at [13].

Discrimination States Parties ‘undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law’ in the enjoyment of civil, political, economic, social and cultural rights, including the ‘right to own property alone as well as in association with others’.

13.76 The Bill limits Article 26 of the ICCPR and Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Bill only apply to a ‘foreign person’. While an Australian citizen who is not ordinarily resident in Australia may be a ‘foreign person’ for the purposes of this Act, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.

13.77 Perhaps the most significant impact of the framework on foreign persons who are individuals is that they are generally not permitted to purchase existing residential real estate, although they may purchase real estate off-the-plan or a newly constructed residential dwelling. This reflects the Government’s policy that any foreign investment in residential real estate should be directed to increasing Australia’s housing stock. However, it is anticipated that the effect of this restriction will be ameliorated by the practice that permits temporary residents to buy one established dwelling for use as their residence in Australia.

13.78 While the Bill, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Bill. Accordingly those limitations are reasonable, necessary and proportionate.

## **Conclusion**

13.79 The Bills are compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

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## **Chapter 14**

# **Register of Foreign Ownership of Agricultural Land Bill 2015**

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### **Outline of chapter**

14.1 The Register of Foreign Ownership of Agricultural Land Bill 2015 (Register Bill) establishes a Register of Foreign Ownership of Agricultural Land (Register) to be administered by the Commissioner of Taxation (Commissioner). The Register Bill provides for the collection of information, and publication of statistics, about foreign interests in agricultural land in Australia. It allows increased scrutiny of foreign investment in agricultural land and increased transparency on the levels of foreign ownership of agricultural land in Australia.

### **Context of amendments**

14.2 This measure was announced by the Prime Minister, the Treasurer and the Minister for Agriculture in the joint Media Release titled *Government tightens rules on foreign purchases of agricultural land* of 11 February 2015. The Government further announced on 2 May 2015 that it would strengthen Australia's foreign investment framework through a range of measures. The announcement followed public consultation on the Options Paper titled *Strengthening Australia's Foreign Investment Framework* of February 2015.

14.3 The announced changes will primarily be enacted through the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and the Register Bill.

- The Foreign Acquisitions and Takeovers Legislation Bill 2015, if enacted, would substantially rewrite and modernise the *Foreign Acquisitions and Takeovers Act 1975* (Act).

14.4 The Register Bill establishes a Register from 1 July 2015 to allow increased scrutiny of foreign investment in agricultural land and increased transparency on the levels of foreign ownership in Australian agricultural land. The Register will contain a record of foreign persons with interests in Australian agricultural land. It will also contain statistics about foreign interests in agricultural land which will be

published on a website. The Commissioner will provide to the Minister for presentation to Parliament statistics derived from the Register as soon as practicable after the end of each financial year.

14.5 Outside of Queensland, there is currently no comprehensive collection of foreign ownership of land information at any level of government. All the States and Territories collect a significant amount of relevant data as part of the land title transfer process. However, there is a lack of consistency on the type of data that States and Territories collect on land title transfers. The Register Bill provides a timely and effective solution for implementing a foreign ownership register for agricultural land in Australia.

## **Summary of new law**

14.6 The Register Bill establishes the Register, which will be maintained by the Australian Taxation Office (ATO). The Register will include information about interests in Australian agricultural land held by foreign persons on or after 1 July 2015. While foreign persons are only required to report such interests in agricultural land to the ATO on or after 1 December 2015, if a person notifies the ATO of their interest before this, it is anticipated that the ATO would treat them as having complied with the requirement to give notice under the Register Bill. The Register Bill sets out what interests in agricultural land must be reported to the ATO, by whom and by when.

14.7 The Register will have two separate parts, a basic part (the full record) and the statistical part. The latter will be published by the Commissioner on a website. In addition, the Commissioner will derive statistics from the basic part of the Register on at least an annual basis to report to the Minister (in this case, the Treasurer). An annual report on the operation of the Act, including the statistics derived from the Register, will be presented to the Parliament by the Minister.

## **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Establishes the Register.	No equivalent.
The ATO is required to maintain the Register. The Register will contain two parts: the basic part and the statistical part. The Commissioner can add and correct information in the basic part.	No equivalent.



<i>New law</i>	<i>Current law</i>
The ATO is required to publish the statistical part of the Register on a website and provide regular reports to the Minister.	No equivalent.
Foreign persons with interests in agricultural land or changes to holdings of interests in agricultural land and agricultural landholders and leaseholders whose foreign person status changes, are required to report those interests or changes to the ATO, generally within 30 days. However, interests held between 1 July 2015 and 30 November 2015 are not required to be reported to the ATO until on or after 1 December 2015. However, foreign persons are able to notify the ATO from 1 July onwards and it is anticipated that this will be taken as having complied with the requirement to give notice under the Register Bill.	No equivalent.
The Commissioner has the general administration of the Act. This makes it a taxation law within the meaning of the <i>Taxation Administration Act 1953</i> (TAA 1953). This means various provisions of the TAA 1953 apply to the Register Bill. This includes provisions about the uniform penalty regime, access and information gathering powers, confidentiality of taxpayer information and approved forms.	

## Detailed explanation of new law

### 14.8 The Register Bill:

- establishes the Register (including the Commissioner's obligation to publish on a website statistics derived from the information contained in the Register);
- sets out what interests in agricultural land must be reported to the ATO, by whom and by when;

- sets out other circumstances that must be reported to the ATO, by whom and by when, such as a registered landholder ceasing to be a foreign person, or registered agricultural land ceasing to be agricultural land;
- provides for the general administration of the Register; and
- provides other provisions.

## **Establishment of the Register**

14.9 The Register Bill requires the Commissioner to keep the Register. The Register must be kept in two parts: a basic part, and a statistical part. *[Sections 12 and 13, and subsection 14(1)]*

14.10 The basic part must contain all information notified to the Commissioner by persons with foreign holdings of agricultural land held on or after 1 July 2015. The Commissioner can add information to the basic part of the Register which he or she otherwise obtains about holdings, or changes to holdings, of agricultural land by foreign persons. The Commissioner can add such information to the Register even if it was obtained by the Commissioner before the commencement of the Register Bill. The Commissioner may also correct or update information in the basic part of the Register. For example, the Commissioner may become aware of updated contact details for a person whose details are on the Register (because the person has updated those details, for example through the lodgement of their income tax return) and the Commissioner will also be able to update those contact details for the Register. *[Section 12, subsection 14(2), and sections 15 and 16]*

14.11 The statistical part of the Register must contain statistics derived from information in the basic part of the Register. The Commissioner may correct or update information in the statistical part of the Register. The Commissioner must periodically publish the statistical part of the Register on a website. In addition, the Commissioner must annually report to the Minister on the operation of the Act including statistics derived from the basic part of the Register. Rules may require the Commissioner to report to the Minister more than once a year. As announced by the Prime Minister, and the Treasurer in the joint Media Release titled *Government strengthens the foreign investment framework* of 2 May 2015, the Government expects that the Commissioner will publish in the first half of 2016 aggregate data from the initial stocktake in 2015. *[Section 12, subsection 14(3), and sections 16, 17, 31 and 34]*

## Reporting of interests in agricultural land

### What interests must be reported

14.12 Foreign persons with certain interests in agricultural land held on or after 1 July 2015 must report those interests to the ATO.  
*[Sections 18, 19 and 20]*

#### Example 14.1

Phil is an individual who is not ordinarily resident in Australia. He owns 20 per cent of the shares in the Australian incorporated Raoul Cheeses Co, which means that he holds a substantial interest in Raoul Cheeses Co. So although Raoul Cheeses Co is Australian incorporated, Raoul Cheeses Co is a foreign person.

### Meaning of agricultural land

14.13 *Agricultural land* is land in Australia that is used, or that could reasonably be used, for a primary production business. This includes land which is partially used for a primary production business, or land where only part of the land could reasonably be used for a primary production business. An example of the latter is where part of the land is subject to an environmental protection zone that does not allow primary production activities within the zone. *[Section 4]*

14.14 Agricultural land also includes land which may, from time to time, be covered by water. However, agricultural land does not include a right to occupy areas of waterways, estuaries and bays, for purposes such as fish farming or oyster beds.

#### Example 14.2

Following on from Example 14.1, Raoul Cheeses Co has a freehold interest in land in Australia which it uses for a primary production business. This business is maintaining dairy cows. The dairy cows are used to produce milk which is then used to produce cheese. Not all of the land is, or could reasonably be, used for a primary production business because a portion of the land is partially submerged by a large swamp and is therefore fenced off to prevent injuries to the dairy cows. Despite the fact that part of the land could not reasonably be used for a primary production business, it is still agricultural land because it is partially used for a primary production business.

14.15 Whether land could reasonably be used for a primary production business depends on the facts and circumstances of the land. Factors that may provide a reasonable indicator that the land could (or could not) reasonably be used, either alone or together with other factors, could include:

- *The primary uses allowed on the land under its zoning:* These are likely to provide a reasonable indicator of if the land could reasonably be used for a primary production business. For example, if zoning allowed for primary production activities to be undertaken without the further approval of the local regulatory body, this would likely indicate that the land could reasonably be used for a primary production business. However, land within a rural residential zone, where zoning requirements either explicitly do not allow for primary production activities, or would only be approved in special circumstances, is unlikely to be land that could reasonably be used for a primary production business.
- *Land use history:* If the land has been used in a primary production business in recent years, this is likely to indicate that the land again could reasonably be used for a primary production business, unless there has been one or more significant changes in the land in the meantime (for example, significant permanent environmental degradation, water depletion or pollution, or removal or loss of the earlier primary production business infrastructure). However, even though the land has not been used in a primary production business in recent years does not necessarily mean that it could not reasonably be used for a primary production business in the future. Examples of this could include if the land is not being used in a primary production business due to:
  - an extended extreme climatic event, such as a long term drought;
  - a recent natural disaster, such as bushfire or floods; or
  - other activities, such as mineral exploration and development on the land after which expected, or legally required, land remediation works would mean that the land in whole or part again could reasonably be used for a primary production business.

- *Land characteristics (for example, climate, crop yield, land size, remoteness, soil quality, stock holding capacity, topography, vegetation and water availability):* While relevant to if the land could reasonably be used for a primary production business, a single characteristic such as land size, in isolation may be insufficient to make a reasonable assessment. It is also not necessary that the land be of sufficient size to allow for the operation of a stand-alone primary production business in some or all cases within the site. Remoteness of the land from goods transport and other infrastructure, as well as key agricultural service providers, is likely to mean that land could not reasonably be used for a primary production business, until such infrastructure and/or services became available to the locality.
- *Lease or licence conditions or limitations:* Where there is a right to occupy agricultural land under a lease or licence whose term (including any extension or renewal) is reasonably likely to exceed five years, there may be land use conditions or restrictions attaching to the lease or licence:
  - Where these explicitly allow for primary production activities to be undertaken, the land could reasonably be used for a primary production business, irrespective of the lessee or licence holder's intention during the lease or licence term.
  - Where these do not permit use for a primary production business by the lessee or licence holder, this in isolation should not be taken as meaning the land could not reasonably be used for a primary production business. Other factors, such as those outlined above and the rationale for such a restriction on the lease or licence would be relevant to an assessment. For example, if a lessor has retained adjacent land on which they are operating a primary production business and has restricted the uses of the lessee so that they can incorporate the land back into their operations should they decide to so at the end of the lease term (after the land has been left fallow to raise productivity), then the land could reasonably be used for a primary production business.

14.16 **Land** includes a building or a part of a building. However, a building or a part of buildings that do not have any direct connection with land that is used or that could reasonably be used for a primary production business are not included within the meaning of agricultural land. For example, an administrative office for a primary production

business that is on a strata title in an office block in a city centre is not included within the definition of agricultural land. It is also not generally expected that dwellings within city limits would be considered to be on land that could reasonably be used for a primary production business, although it may be feasible or legal for small scale intensive primary production activities, or administrative activities related to a primary production business to occur on such land in some cases. However, such land is agricultural land if non-ancillary activities of a primary production business are carried out on the land. For example, market gardens or propagating plants as part of a plant nursery. *[Section 4]*

14.17 ***Australia***, when used in a geographical sense, includes the external territories. The Act applies both within and outside Australia. *[Sections 4, 7 and 8]*

14.18 ***Primary production business*** has the same meaning as in the *Income Tax Assessment Act 1997* (ITAA 1997). Subsection 995-1(1) of the ITAA 1997 defines a primary production as a business of:

- cultivating or propagating plants, fungi or their products or parts (including seeds, spores, bulbs and similar things), in any physical environment;
- maintaining animals for the purpose of selling them or their bodily produce (including natural increase);
- manufacturing dairy produce from raw material that you produced;
- conducting operations relating directly to taking or catching fish, turtles, dugong, bêche de mer, crustaceans or aquatic molluscs;
- conducting operations relating directly to taking or culturing pearls or pearl shell;
- planting or tending trees in a plantation or forest that are intended to be felled;
- felling trees in a plantation or forest; or
- transporting trees, or parts of trees, that you felled in a plantation or forest to the place where they are first to be milled or processed or from which they are to be transported to the place where they are first to be milled or processed.

*[Section 4]*

14.19 Despite land falling within the definition of agricultural land, rules made by the Minister may specify that land is not agricultural land. Such rules must be made via a legislative instrument and would be subject to Parliamentary disallowance. As this allows the rules to reduce (but not broaden) the scope of the term 'agricultural land', such rules would generally decrease the regulatory burden. Generally, rules may be made by the Minister where necessary or convenient to carry out or give effect to the Register Bill. *[Sections 4, 5, 31 and 35]*

### Meaning of foreign person

14.20 **Foreign person** has the same meaning as in the *Foreign Acquisitions and Takeovers Act 1975* as amended by the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* (FATA (as amended)). Section 4 of the FATA (as amended) defines a foreign person as:

- an individual not ordinarily resident in Australia;
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest;
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest;
- a foreign government; or
- any other person, or any other person that meets the conditions, prescribed by the regulations to the FATA.

*[Section 4]*

14.21 Where the Register Bill uses the term ‘person’ it is intended that ‘person’ be read in light of the definition of ‘foreign person’. ‘Person’ would therefore include an individual, a corporation, the trustee of a trust, a foreign government and any other person, or any other person that meets the conditions, prescribed by the regulations.

14.22 Section 5 of the FATA (as amended) defines when an individual who is not an Australian citizen is ordinarily resident in Australia. Under Section 4 of the FATA (as amended), a person holds a substantial interest in an entity (which is defined in section 4 of the FATA (as amended) as a corporation or a unit trust) or trust if the person holds:

- for an entity - holds an interest of at least 20 per cent in the entity, alone or together with one or more associates of the person; or
- for a trust (including a unit trust) - holds a beneficial interest, together with any one or more associates, in at least 20 per cent of the income or property of the trust.

14.23 Aggregate substantial interest requires that two or more persons hold an aggregate interest of at least 40 per cent in the entity or beneficial interests in at least 40 per cent of the income or property of the trust. Section 17 of the FATA (as amended) provides the meaning of interest and aggregate interest, including that interests of associates of the person are taken into account when calculating the person’s interest. Section 18 sets out rules relating to determining interests in such entities. Therefore, the foreign person definition would take into account indirect interests that make a corporation or trustee a foreign person.

### **Example 14.3**

Menfem Co has a freehold interest in land in Australia. It uses the land for a primary production business of tending and felling trees in a plantation. The land is therefore agricultural land.

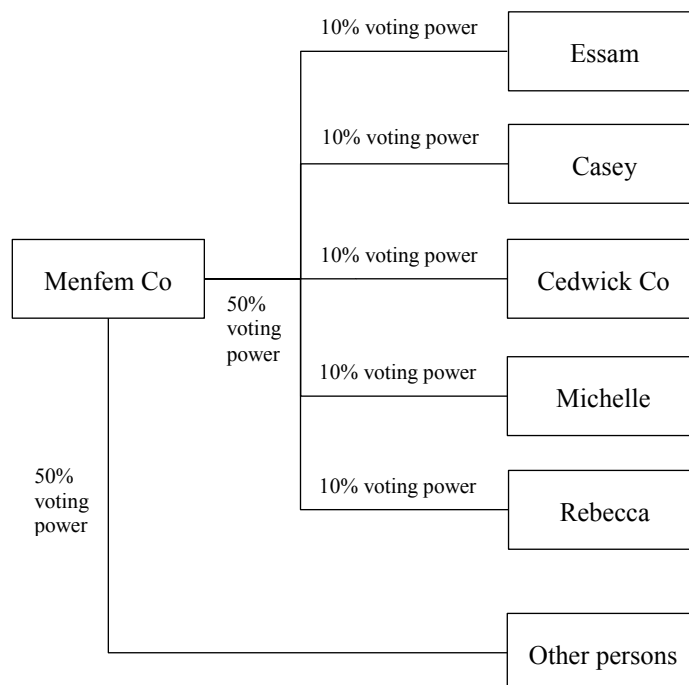
Because of its ownership structure, Menfem Co is a foreign person as two or more persons (for example, individuals not ordinarily resident in Australia or foreign corporations) hold an aggregate substantial interest in Menfem Co (that is, because of its ownership structure paragraph (c) of the definition of foreign person in section 4 of the FATA (as amended) is relevant in working out if Menfem Co is a foreign person). Two or more persons hold an aggregate substantial interest in Menfem Co as they, together with any associates of any of them, are in a position to control at least 40 per cent of the voting power in Menfem Co (see section 4 and subsection 17(2) of the FATA (as amended)).



Essam and Casey each are in a position to control 10 per cent of the voting power in Menfem Co. They are not associates of one another and are both not ordinarily resident in Australia.

Cedwick Co is a foreign corporation which also has an interest in Menfem Co. Cedwick Co is in a position to control 10 per cent of the voting power. In addition, Michelle and Rebecca, who are both not ordinarily resident in Australia and are not associates, also are each in a position to control 10 per cent of the voting power in Menfem Co.

Essam, Casey, Cedwick Co, Michelle and Rebecca together control 50 per cent of the voting power in Menfem Co. Menfem Co is therefore a foreign person.



### What types of interests in agricultural land must be reported

14.24 There are two types of interests, or changes to interests, in agricultural land that a foreign person must report:

- freehold interests, and
- rights to occupy agricultural land under a lease (including a sublease) or licence where the term of the lease or licence (including any extension or renewal) is reasonably likely to exceed five years.

*[Subsection 19(1) and sections 21, 22, 23, 24, 25 and 26]*

14.25 A **freehold interest** in land means a legal interest in an estate in fee simple that the person holds alone, as a tenant in common or as a joint tenant. The term ‘hold’ takes its ordinary meaning and encompasses direct legal interests in freehold interests in land or rights to occupy land. Where the agricultural land that a foreign person takes a freehold interest in, or holds rights to occupy over, is on more than one legal title, as can be the case with a farm and other primary production businesses, the freehold or leasehold interest in each title that is agricultural land is its own reporting event. *[Section 4]*

**Example 14.4**

This means that, having regard to the facts in Example 14.3, even though Menfem Co is a corporation, under the Register Bill it is a foreign person and has any relevant reporting obligations for the Register in relation to the land on which the primary production business is being conducted because it is the legal owner of the land.

14.26 A person starts to hold a freehold interest in land or a right to occupy land even if they:

- start to hold it with one or more persons, or
- they already hold or have previously held such an interest or right in other land.

*[Section 4 and subsection 6(1)]*

14.27 A person ceases to hold a freehold interest in, or right occupy, agricultural land even if they continue to hold another freehold interest in or right to occupy other land. *[Section 4 and subsection 6(2)]*

14.28 It should be noted that, while the Register Bill provides these clarifications about instances of where interests are starting or ceasing to be held, these instances are not limiting. Therefore there can be other circumstances in which a person may start or cease to hold an interest in land. *[Subsection 6(3)]*

**What events which must be reported?**

14.29 The Register Bill creates two distinct reporting obligations.

- First, Register Bill requires foreign persons who held interests in agricultural land on 1 July 2015 to notify the Commissioner, in the approved form, following commencement of the Register Bill.

- Second, the Register Bill requires foreign persons (and persons who have since ceased to be foreign persons) to notify the Commissioner of certain events involving agricultural land that occur on or after 1 July 2015.

*[Sections 18, 19 and 20]*

14.30 The events that must be notified if they occur on or after 1 July 2015 are:

- a foreign person starts to hold:
  - a freehold interest in land that is agricultural land, or
  - right to occupy land that is agricultural land under a lease or licence whose term (including extensions and renewals) is reasonably likely to exceed five years after the person starts to hold the right an example of a lease that is reasonably likely to exceed five years could be a lease with a term of three years with a three year renewal option that is likely to be exercised;

*[Sections 4 and 21]*

- a foreign person ceases to hold a:
  - freehold interest in land that is agricultural land, or
  - right to occupy land that is agricultural land under a lease or licence whose term (including extensions and renewals) was reasonably likely to exceed five years after the latest of when the person started to hold it, when the person became a foreign person, when the land became agricultural land, and the start of 1 July 2015;

*[Sections 4 and 22]*

- a person becomes a foreign person while holding a:
  - freehold interest in agricultural land, or
  - right to occupy agricultural land under a lease or licence whose term (including extensions and renewals) is reasonably likely to exceed five years after the person became a foreign person;

*[Section 23]*

- a person ceases to be a foreign person while holding a:
  - freehold interest in agricultural land, or
  - right to occupy land under a lease or licence whose term (including extensions and renewals) was reasonably likely to exceed five years after the latest of when the person started to hold the right, when the person became a foreign person, when the land became agricultural land and the start of 1 July 2015;

*[Sections 4 and 24]*

- land becomes agricultural land while a foreign person holds a:
  - freehold interest in the land, or
  - right to occupy the land under a lease or licence whose term (including extensions and renewals) is reasonably likely to exceed five years from the time the land becomes agricultural land; and

*[Section 25]*

- land ceases to be agricultural land while held by a foreign person as a:
  - freehold interest in the land, or
  - right to occupy the land under a lease or licence whose term (including extensions and renewals) is reasonably likely to exceed five years from the latest of when the person started to hold the right, when they became a foreign person, when the land became agricultural land, and the start of 1 July 2015.

*[Sections 4 and 26]*

## **Who must report or may report**

14.31 Generally, the person with the direct legal interest is required to notify the ATO of their interest in agricultural land. That is, the person who holds the freehold interest (alone, as a tenant in common or a joint tenant) or the right to occupy land under a lease (including a sublease) or licence. Where there are multiple foreign persons with a legal interest in agricultural land, each foreign person has an obligation

to report their interest. However, an agent may give notice on their behalf. *[Sections 4, 19, 20 and 29]*

14.32 If a natural person is required to give notice but dies before doing so, the executor or administrator of their estate must give the notice, even if the person dies before 1 December 2015. *[Sections 18 and 27]*

14.33 If a corporation is required to give notice but is wound up before it gives notice, then the liquidator of the corporation must give the notice, even if the corporation is wound up before 1 December 2015. In the case where a corporation is under administration, but still in existence, the corporation continues to have a reporting obligation. This could be discharged by the administrator (or another person) as an agent. *[Sections 18, 28 and 29]*

14.34 Rules made by the Minister may provide that all persons, or some persons, are not required to give the Commissioner information about foreign holdings of agricultural land. These rules may not impose additional reporting obligations. They must be made via legislative instrument and would be subject to Parliamentary disallowance. These rules could reduce the regulatory burden by exempting certain persons from notifying of changes to foreign holdings of agricultural land. *[Sections 18, 30, 31 and 35]*

## **When interests in agricultural land must be reported**

### **Interests held on 1 July 2015**

14.35 Foreign persons with interests in agricultural land held on 1 July 2015 must give notice of those interests to the ATO in the approved form by 30 December 2015, or within a deferred time approved by the Commissioner (see section 388-55 of Schedule 1 to the TAA 1953). The Commissioner can determine the content of an approved form and the manner in which it is given to the Commissioner, including by electronic means (see section 388-50 of Schedule 1 to the TAA 1953). *[Sections 19 and 32]*

14.36 If a foreign person notifies the ATO of their interests in agricultural land before the Register Bill commences, it is anticipated that the ATO would treat them as having complied with the requirement to give notice under the Register Bill. The Commissioner would be able to make additions to the Register to take into account the matters reported prior to the commencement of the Register Bill, because the

Commissioner's ability to make additions to the Register is not restricted to matters that are required to be reported under Part 3. *[Section 15]*

### **Changes to interests after 1 July 2015**

14.37 A person who is required to notify of a change to a holding of an interest in agricultural land after the start of 1 July 2015 must give notice to the ATO in the approved form by the later of 30 December 2015, or within 30 days of the event occurring for which notice must be given. The Commissioner may provide further time to notify (see section 388-55 of Schedule 1 to the TAA 1953). As noted in paragraph 13.36, the Commissioner can determine the content of an approved form and the manner in which it is given to the Commissioner, including by electronic means (see section 388-50 of Schedule 1 to the TAA 1953). *[Sections 20 and 32]*

### **General administration**

14.38 The Commissioner has the general administration of the Act. This means the Act is a taxation law for the purposes of the TAA 1953. The TAA 1953 defines a taxation law by reference to the ITAA 1997. The ITAA 1997 defines a taxation law in subsection 995-1(1) to include an Act of which the Commissioner has the general administration and legislative instruments made under such an Act. *[Sections 31 and 32]*

14.39 The effect of the Act being a taxation law is that existing provisions in the TAA 1953 apply for the purposes of the Act. This includes the:

- approved form provisions in Subdivision 388B of Schedule 1;
- powers to obtain information and evidence in Division 353 of Schedule 1;
- confidentiality of taxpayer information provisions in Division 355 of Schedule 1 (which imposes strict obligations on the handling of confidential taxpayer information and specifies the circumstances in which the ATO may disclose information to certain recipients, for example, the Secretary of the Treasury and certain Ministers); and
- administrative penalties such as:

- the administrative penalties for statements in Division 284 of Schedule 1;
- penalties for failing to lodge documents on time in Division 286 of Schedule 1; and
- the miscellaneous administrative penalties in Division 288 of Schedule 1; and
- offence provisions such as:
  - the offence in section 8C for failing to comply with requirements under a taxation law; and
  - the offences in section 8D for refusing or failing to answer questions, produce a document, or take an oath or make an affirmation when attending before the Commissioner.

*[Section 32]*

## **Other provisions**

### **Simplified outline of the Act**

14.40 The simplified outline of the Act provides an overview of the Act and the simplified outlines of Parts 2 to 4 provide an overview of the respective Parts. While simplified outlines are included to assist readers to understand the substantive provisions, they are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions. *[Sections 3, 12, 18 and 31]*

### **Binding on the Crown**

14.41 The Commonwealth, State and Territory Governments are bound by the Act. In line with normal practice, the Crown is not liable to a pecuniary penalty or to be prosecuted for an offence. *[Section 9]*

### **Access powers and information gathering**

14.42 As noted at paragraph 13.39, because the Act is a taxation law, the Commissioner could use the access and information gathering powers in sections 353-10 and 353-15 of Schedule 1 to the TAA 1953 for the purpose of administering the Register. Those provisions apply to a broad range of persons, including government entities and those who

may be, or may have been, required to register interests in agricultural land. Section 353-10 allows the Commissioner to require the production of information or documents or attendance to give evidence.

Section 353-15 allows the Commissioner (or a person authorised by the Commissioner) to access land, premises or places in Australia for the purpose of a taxation law. *[Section 32]*

14.43 Section 264A of the *Income Tax Assessment Act 1936* (ITAA 1936) is being modified so that it applies for the purposes of the Register Bill. This allows the Commissioner to require a person to provide information or documents which the Commissioner has reason to believe is held offshore, for the purposes of determining whether that person has, or had, an obligation to notify the Commissioner of an interest (or change to an interest) in agricultural land, and/or whether a person has complied with such an obligation. *[Sections 31 and 33]*

14.44 Where a notice for offshore information issued by the Commissioner is not complied with, the information or documents requested may not be admissible as evidence in proceedings before a court or the Administrative Appeals Tribunal in which the person disputes an obligation to notify the Commissioner of an interest in agricultural land, or a change to an interest in agricultural land. *[Sections 31 and 33]*

#### **Example 14.5**

Matt Co has a freehold interest in agricultural land in Australia of which it has not notified the ATO. It has shareholders overseas. The ATO has reason to believe it is a foreign person because of its overseas shareholding and that information or documents about that shareholding are held offshore. The ATO issues Matt Co with an offshore information notice, requiring it to produce information and documents about its foreign shareholding so that the ATO can determine whether it has an obligation to notify the ATO of its interest in agricultural land.

#### **Constitutional provisions**

14.45 For the purposes of section 109 of the Constitution, the Register Bill is not intended to limit the operation of a law of a State or Territory which is capable of operating concurrently with the Register Bill. *[Section 10]*

14.46 The Register Bill is enacted on the basis that it is supported by the Commonwealth's statistics power in paragraph 51(xi) of the Constitution. Nevertheless, the Register Bill provides for the continued operation of the Act (or provisions of the Act) in the event of a



successful constitutional challenge. It sets out the various constitutional heads of power upon which the Act can draw if its operation is expressly confined to persons under those constitutional powers. This gives the Register Bill the widest possible operation consistent with Commonwealth constitutional legislative power. *[Sections 11 and 17, and paragraph 34(1)(b)]*

14.47 In relation to the places power, the Register Bill also has the effect it would have if each reference to land was expressly confined to land within a Territory. *[Subsection 11(6)]*

## **Application and transitional provisions**

14.48 The Register Bill commences on 1 December 2015 but applies to interests in agricultural land in Australia held by foreign persons on or after 1 July 2015. *[Sections 2, 18, 19 and 20]*

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

### **Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

#### **Register of Foreign Ownership of Agricultural Land Bill 2015**

14.49 The Register Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

14.50 The Register Bill establishes a Register to be administered by the Commissioner. The Register will include information about the interests held by foreign persons in agricultural land in Australia, thereby allowing increased scrutiny of foreign investment in agricultural land and increased transparency of the levels of foreign ownership of agricultural land in Australia. ‘Agricultural land’ is defined by section 4 to refer to land in Australia that is used, or that could reasonably be used, for a primary production business within the meaning of the ITAA 1997.

14.51 Section 14 provides that the Register will have two parts — a basic part, which comprises the full record, and the statistical part. The statistical part must not identify, or be reasonably capable of being used to identify, a person.

14.52 The Commissioner is required by section 17 to publish the statistical part of the Register on the internet.

14.53 Under section 34, the Commissioner is required, on an at least annual basis, to give the Minister a report for presentation to the Parliament, on the operation of this Act which includes statistics from the basic part of the Register.

14.54 The Commissioner has the general administration of the Act. This means the Act will be a taxation law for the purposes of the TAA 1953. The effect of the Act being a taxation law is that existing provisions in the TAA 1953 will apply for the purposes of the Act. Most relevantly, this includes the provisions which regulate the confidentiality of taxpayer information in Division 355 of Schedule 1 to the TAA 1953.

## **Human rights implications**

14.55 The Register Bill engages the following human rights and freedoms:

- the right to protection from unlawful or arbitrary interferences with an individual's privacy;
- the right to freedom of expression; and
- the right to be free from discrimination.

### ***Right to privacy***

14.56 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful or arbitrary interferences with a person's privacy, family, home or correspondence. It also provides that everyone has the right to the protection of the law against such interference or attacks. The Human Rights Committee has interpreted the term 'unlawful' to mean that no interference can take place except in cases envisaged by law, which itself must comply with the provisions, aims and objectives of the ICCPR. The Human Rights Committee has also indicated that an interference will not be considered to be 'arbitrary' if it is provided for by law and is in accordance with the provisions, aims

and objectives of the ICCPR and is reasonable in the particular circumstances.<sup>17</sup>

14.57 Privacy is a concept which is broad in scope and includes a right to information privacy. The Register Bill directly engages the right to privacy under Article 17 of the ICCPR because it requires the provision of information by and authorises the use and disclosure of certain information about individuals for inclusion in the Register. Specifically, the Bill provides that the following persons must give notice in the approved form to the Commissioner if:

- on 1 July 2015 a foreign person held a freehold interest in agricultural land or a right to occupy agricultural land under a lease or licence whose remaining term (including any extension or renewal) was (on 1 July 2015) reasonably likely to exceed five years (section 19);
- on or after 1 July 2015 a foreign person starts to hold a freehold interest in agricultural land or a right to occupy agricultural land under a lease or a licence whose term (including any extension or renewal) after the person starts to hold the right is reasonably likely to exceed five years (sections 20 and 21);
- a foreign person ceases to hold a freehold interest in agricultural land under a lease or licence whose term (including any extension or renewal) after the person starts to hold the right is reasonably likely to exceed five years (sections 20 and 22);
- a person becomes a foreign person while holding a freehold interest in agricultural land or a right to occupy agricultural land under a lease or licence whose term (including any extension or renewal) after the registration trigger time<sup>18</sup> was reasonably likely to exceed five years (sections 20 and 23);
- a person ceases to be a foreign person while holding a freehold interest in agricultural land or a right to occupy

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<sup>17</sup> *General comment No. 16: Article 17 (Right to privacy), Thirty-second session (1988) at [3]-[4].*

<sup>18</sup> Section 4 of the Register Bill defines ‘registration trigger time’, in relation to a right held by a person to occupy land under a lease or licence, to mean the latest of the following times: the time the person started to hold the right; the time the person became a foreign person; the time the land became agricultural land; or 1 July 2015.

agricultural land under a lease or licence whose term (including any extension or renewal) after the registration trigger time was reasonably likely to exceed five years(sections 20 and 24);

- land becomes agricultural land while the person holds an interest in the land or a right to occupy the land under a lease or licence whose term (including any extension or renewal) after the time the land becomes agricultural land is (at that time) reasonably likely to exceed five years (sections 20 and 25); and
- land ceases to be agricultural land while a foreign person holds a freehold interest in the land or right to occupy the land under a lease or licence whose term (including any extension or renewal) after the registration trigger time was (at that time) reasonably likely to exceed five years (sections 20 and 26).

14.58 It is anticipated that the approved form will require an individual who is or was a foreign person to provide the Commissioner with their name, contact details, information about the land (including the location of the land, land title details and its market value) and the purposes for which the land is currently used or intended to be used. If a person who is required to give notice to the Commissioner dies before giving the notice, section 27 requires that the executor of that person's estate must instead give the required notice.

14.59 The Commissioner may also collect information about an individual by serving an offshore information notice on an individual. The effect of section 33 is that the Commissioner may give an offshore notice to a person if the Commissioner has reason to believe that information or documents that may be relevant to determining whether a person has or had an obligation to notify the Commissioner of an interest (or change in interest) in agricultural land.

14.60 If a person fails to comply with obligations under the Act the person may be liable to an administrative penalty under subsection 286-75(1) of Schedule 1 to the TAA 1953. The amount of that penalty would be worked out in accordance with subsection 286-80, but would not be more than five penalty units in any circumstance.

14.61 The information collected under this statute may only be used or disclosed for the purposes authorised by this Act or under a taxation law. Taxation officers must comply with Division 355 of Schedule 1 to the TAA 1953. In general terms, Division 355 makes it an offence for information about the tax affairs of a particular entity to be disclosed

except in circumstances specified in detail by that Division. The maximum penalty for this offence is imprisonment for two years. In addition, information about individuals must also be handled in accordance with the obligations imposed by the *Privacy Act 1988*. This minimises the risk of information about identified or identifiable individuals being used or disclosed for an unauthorised purpose.

14.62 The circumstances in which information may be collected and used are clearly defined by the Bill and are therefore a lawful interference with the right to privacy. Moreover, as it would not be possible to achieve the objectives of the statute without collecting some information about identifiable individuals, these limitations on the right to privacy are reasonable in the circumstances and do not interfere with the right to privacy of those individuals more than is necessary to achieve the legitimate objective of allowing the Government to scrutinise over time the levels of foreign ownership of agricultural land in Australia.

#### ***Right to freedom of expression***

14.63 Paragraph 2 of Article 19 of the ICCPR requires States parties to guarantee the right of everyone to freedom of expression, including the ‘freedom to seek, receive and impart information and ideas of all kinds’. The right to freedom of expression includes the right not to impart information.

14.64 Divisions 2 and 3 of Part 3 of the Register Bill engage paragraph 2 of Article 19 of the ICCPR because they require individuals to provide information in the approved form. There is no less restrictive means of achieving the legitimate purpose the limitation seeks to achieve. Moreover, to the extent the Register Bill interferes with the right to freedom of expression the interference is relatively minor and has a clear legal basis. These limitations are therefore reasonable, necessary and proportionate.

#### ***Right to be free from discrimination***

14.65 The Register Bill generally engages Article 26 of the ICCPR, which recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. While the ICCPR does not define the term ‘discrimination’ nor indicate what constitutes discrimination, the Human Rights Committee believes that in the context of the ICCPR it:

should be understood to imply any distinction, exclusion, restriction, or preferences which is based on race, colour, sex, language, religion, political or other opinion, national or social

origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>19</sup>

14.66 The Human Rights Committee has observed that '[n]on-discrimination, together with equality before the law and equal promotion of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights'.<sup>20</sup> However, the Human Rights Committee has also recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>21</sup>

14.67 The Register Bill also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'. Under Article 2(1)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation'. Under Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination States Parties 'undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law' in the enjoyment of civil, political, economic, social and cultural rights.

14.68 The Register Bill limits Article 26 of the ICCPR and Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Register Bill only apply to a 'foreign person'. If the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 is

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<sup>19</sup> *General Comment No. 18: Non-discrimination, Thirty-seventh session (1989)* at [7].

<sup>20</sup> *Ibid* at [1].

<sup>21</sup> *Ibid* at [13].

enacted, the term ‘foreign person’ will include an individual not ordinarily resident in Australia. While an Australian citizen who is not ordinarily resident in Australia may be a ‘foreign person’ for the purposes of this Bill, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.

14.69 While the Bill, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Bill. Given that the Bill only requires individuals who are foreign persons to provide certain information, and the Register Bill does not interfere with the rights of citizens from countries other than Australia more than to the extent possible to achieve the objective of the Register Bill, these limitations are considered reasonable and proportionate.

## **Conclusion**

14.70 The Register Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.





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## Chapter 15

# Regulation impact statement

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### Introduction

15.1 The Government welcomes foreign investment because it plays an important and beneficial role in the Australian economy. It has helped build Australia's economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity.

15.2 Foreign investment provides additional capital for economic growth, creates employment opportunities, improves consumer choice and promotes healthy competition, while increasing Australia's competitiveness in global markets. The Financial System Inquiry found that 'ongoing access to foreign funding has enabled Australia to sustain higher growth than it otherwise could'.<sup>22</sup>

15.3 It can also help deliver improved competitiveness and productivity by introducing new technology; providing much needed infrastructure; allowing access to global supply chains and markets; and enhancing Australia's skills base.

15.4 Notwithstanding the benefits of foreign investment to the community, there is a need to review foreign investment proposals to ensure proposals are consistent with Australia's interests.

15.5 Consequently, the Government reviews foreign investment proposals against the national interest on a case-by-case basis. This flexible approach maximises investment flows, while protecting Australia's interests and providing assurance to the community.

15.6 The Government has already commenced the process of strengthening the foreign investment framework. On 11 February 2015 the Government announced.<sup>23</sup>

- the screening threshold for foreign purchases of agricultural land has been lowered from \$252 million to a cumulative total of \$15 million. The new \$15 million screening threshold

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<sup>22</sup> *Financial System Inquiry Final Report*, November 2014, page 2.

<sup>23</sup> *Government tightens rules on foreign purchases of agricultural land*, 11 February 2015, the Hon Joe Hockey MP media release, <http://jbh.ministers.treasury.gov.au/media-release/005-2015/>.

applies to the cumulative value of agricultural land owned by the foreign person, including the proposed purchase. The new threshold has applied since 1 March 2015; and

- a foreign ownership register of all land was established. From 1 July 2015 the Australian Taxation Office started collecting information on all foreign interests in agricultural land regardless of value.

15.7 In addition, compliance and enforcement activities for residential real estate began transferring from Treasury to the Australian Taxation Office from 4 May 2015.

## Current screening arrangements

15.8 Australia's foreign investment review framework consists of the *Foreign Acquisitions and Takeovers Act 1975* (Act), its associated regulations, and *Australia's Foreign Investment Policy* (Policy). The framework fits within Australia's overall approach towards foreign investment, ensuring significant foreign investments are considered in a timely, holistic and consistent manner while maintaining some flexibility to consider foreign investment proposals on a case-by-case basis. It is designed to maximise investment flows while serving to protect Australia's national interest.

15.9 The Act provides the legislative framework to review foreign investment proposals and provides the Treasurer with a range of powers, including the ability to order divestments of assets, block proposals, or apply conditions to proposals to ensure that they are not contrary to Australia's national interest.

- The national interest test is a negative test – foreign investment proposals have to be contrary to the national interest to be prohibited.
- Three business proposals have been rejected since 2001: Shell's proposed acquisition of further shares in Woodside Petroleum; Singapore Exchange Limited's proposed acquisition of the Australian Securities Exchange; and Archer Daniels Midland's proposed acquisition of GrainCorp.

15.10 Under the Act a 'foreign person' includes all individuals who are not ordinarily resident in Australia. To be ordinarily resident in Australia a person has to have resided in Australia for 200 or more days in the preceding 12 months and be able to stay in Australia indefinitely.

- This includes temporary residents, who hold a valid temporary visa permitting them to stay in Australia for a continuous period of more than 12 months (irrespective of how much time is remaining until that visa expires), or have submitted an application for permanent residency and hold a bridging visa which permits them to stay in Australia until their permanent residency application has been finalised.

15.11 A foreign person also includes:

- a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest (15 per cent or more);
- a corporation in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest (40 per cent or more);
- the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest (15 per cent or more); or
- the trustee of a trust estate in which two or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest (40 per cent or more).

15.12 The Policy provides guidance to foreign persons to assist their understanding of the review process. It also identifies a number of investment categories that need approval even if the Act does not apply. For example, requirements for foreign government investors to seek prior approval before making direct investments in Australia or the requirement on foreign persons to seek prior approval to make investments of 5 per cent or more in the media sector. These non-legislative requirements in the Policy are administered in the same way as those in the Act.

15.13 The Foreign Investment Review Board (FIRB), a non-statutory advisory body, is responsible for examining proposals and advising on the national interest implications of investment proposals. The Treasurer retains responsibility for making decisions.

15.14 Factors typically considered in assessing the national interest for business acquisitions include: national security, competition and other government policies such as taxation; the impact on the economy and the community; and the investor's character. Where a proposal

involves a foreign government investor, the Government also considers the commerciality of the investment.

15.15 For agricultural investments there are additional factors that are typically considered when assessing foreign investment proposals against the national interest. These factors are set out in the Policy and include<sup>24</sup>:

- The quality and availability of Australia's agricultural resources, including water;
- Land access and use;
- Agricultural production and productivity;
- Australia's capacity to remain a reliable supplier of agricultural production, both to the Australian community and our trading partners;
- Biodiversity; and
- Employment and prosperity in Australia's local and regional communities.

15.16 In addition to approval or rejection of an application, the foreign investment rules allow for conditions to be placed on a sale where it is in the national interest to do so. An example of how national interest considerations have been applied is the Treasurer's foreign investment decision of 4 March 2015, concerning the proposal by JBS USA Holdings Inc. (JBS), through its wholly-owned subsidiary, JBS Smallgoods Hold Co Australia Pty Ltd, to acquire Australian Consolidated Food Holdings Pty Ltd (Primo). Conditions were attached to the approval which JBS agreed to maintain custom service killings of livestock provided at its processing plant in Scone, New South Wales.<sup>25</sup> This demonstrates a consideration of the impact of a foreign investment proposal beyond the existing tax, competition and environmental laws. Other examples of applications where conditions have been imposed can be found on the FIRB website at: <http://www.firb.gov.au/content/publications.asp?NavID=5>.

15.17 In relation to residential real estate, the Policy aims to ensure that any foreign investment increases Australia's housing stock.

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<sup>24</sup> *Australia's Foreign Investment Policy*, [http://www.firb.gov.au/content/downloads/AFIP\\_2015.pdf](http://www.firb.gov.au/content/downloads/AFIP_2015.pdf), 2015, page 9.

<sup>25</sup> *Foreign Investment Decision*, 4 March 2015, the Hon J. B. Hockey MP media release, <http://jbh.ministers.treasury.gov.au/media-release/014-2015/>.

Consistent with this aim, different rules apply depending on whether the property being acquired will increase the housing stock or whether it is an established dwelling.

15.18 Generally, applications by foreign persons to purchase new dwellings are approved without conditions, on the basis that this type of investment increases Australia's housing stock.

15.19 In relation to established dwellings, temporary residents can only apply to purchase one established dwelling to use as a residence while they live in Australia. The purchase of an established dwelling is conditional on the foreign person selling the property within three months of leaving Australia.

15.20 Under the Act, it is a requirement that each proposed acquisition of real estate be individually notified and reviewed, unless specifically exempt. For example, property developers (Australian or foreign) can apply for an advanced off-the-plan certificate to sell all new dwellings in a development of 100 or more dwellings to foreign persons, provided the development is marketed locally as well as overseas. Foreign persons purchasing dwellings in a certified development do not require separate approval.

- Off-the-plan purchases by domestic and foreign residents are often important for developers to commence construction of new apartment complexes. These provide surety to developers of the financial sustainability of progressing with the development. These developments contribute to Australia's total housing stock.

15.21 Proposals to acquire an interest of 15 per cent or more in any business valued at over \$252 million (or \$1,094 million for Chilean, Japanese, Korean, New Zealand and United States non-government investors) generally must be notified to FIRB for examination. Prior to the implementation of a lower screening threshold (\$15 million cumulative) for rural land on 1 March 2015, 'rural land' acquisitions were also subject to this general business screening threshold.

15.22 All foreign government investors must get prior approval before making a direct investment in Australia, starting a new business or acquiring an interest in land, regardless of the value of investment.<sup>26</sup>

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<sup>26</sup> This includes an interest in rural land as well as prospecting, exploration, production or mining tenement.

15.23 Further information on the foreign investment application processing arrangements can be found on the FIRB website at: <http://www.firb.gov.au/content/policy.asp?NavID=1>.

15.24 The foreign investment review framework is designed to strike an appropriate balance between maintaining community confidence in foreign investment, protecting the national interest and ensuring that Australia remains an attractive destination for foreign investment by providing certainty for investors.

- While community stakeholders are not directly consulted on foreign investment applications because of the need to protect the commercial interests and privacy of applicants, the national interest test includes consideration of the impact on the economy and the community. The interests of employees, creditors and other stakeholders are considered as part of the assessment process. FIRB consults with other government departments and the States and Territories to assist its consideration of these issues.
- In this way, where the framework applies to a particular foreign investment, it provides reassurance to the community that the Government is undertaking a balanced national interest assessment inclusive of its views.
- A system which does not reflect community expectations increases the risk that foreign investment could become subject to ad-hoc restrictions that negatively impact on investor confidence and Australia's ability to attract foreign capital.

15.25 While the framework has generally worked well since being introduced in the mid 1970s, heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate), and shifts in global investment patterns (most notably the increasing share of developing economies in global investment flows, with these economies less familiar with Australia's investment environment and the Australian community less accustomed to these investors) are all increasing community focus on the framework.

15.26 In 2012, the then Opposition released a Discussion Paper seeking public feedback on options to increase scrutiny and transparency around foreign investment in agriculture.<sup>27</sup> Following the discussion paper, the Coalition announced in the lead-up to the 2013 Federal

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<sup>27</sup> [http://shared.liberal.org.au/Share/Foreign\\_investment\\_discussion\\_paper.pdf](http://shared.liberal.org.au/Share/Foreign_investment_discussion_paper.pdf)

Election that it would reduce the screening thresholds and publish a register of foreign ownership.<sup>28</sup>

15.27 Recognising increasing community concerns around residential real estate, in March 2014 the Government asked the House of Representatives Standing Committee on Economics to inquire into foreign investment in residential real estate. It tabled its report to Parliament in November 2014.

15.28 Following this report, the Government considered how to strengthen the foreign investment framework, including how to realign the framework with community expectations and the broader investment environment to ensure it continues to welcome foreign investment that is not contrary to Australia's national interest. This Regulation Impact Statement considered options in this regard.

15.29 On 25 February 2015, the Government released an Options Paper 'Strengthening Australia's Foreign Investment Framework' (Options Paper) which sought feedback from stakeholders on proposed changes to the foreign investment framework. There were 192 submissions received during the consultation process.

## **The problem**

### **Maintaining the integrity of the foreign investment framework**

15.30 Australia's foreign investment framework has generally worked well since it was introduced. The framework recognises the importance of foreign investment but incorporates a screening function to ensure that foreign investment proposals are screened on a case-by-case basis to protect Australia's national interest. The fundamental principles behind the foreign investment framework are sound and the framework has generally received the support of domestic and international stakeholders.<sup>29</sup>

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<sup>28</sup> *Tony Abbott, Rooty Hill People's Forum, 28 August 2013.*

<sup>29</sup> Domestically, the framework has received bipartisan political support and the conditional support of most business and community stakeholders (though some stakeholders question the need for screening of foreign investment). Internationally, investor concerns with the review framework have decreased substantially over the years, while international organisation concerns with screening have also moderated (though Australia still receives some criticism from organisations and countries that do not have screening mechanisms).

15.31 However, heightened community sensitivity over certain types of foreign investment (in particular agriculture and residential real estate) and shifts in global investment patterns are placing stress on the ability of the framework to address community concerns.

15.32 Increasing community concerns in relation to agriculture have put pressure on the traditional approach of maintaining consistent thresholds for business investments across all sectors. While consistent thresholds portray Australia's non-discriminatory, non-preferential approach to business investment, they do not account for the relative significance of an investment in particular sectors where asset, business or land values are generally lower. For example, an investment of \$100 million in the mining industry may be small relative to the size of the industry, while a \$100 million investment in agriculture is more significant to industries in that sector.

15.33 Increasing community concerns in relation to foreign investment in residential real estate have also been a focus in recent times, particularly in relation to compliance and enforcement of existing rules. In particular, concerns exist that there are foreign investors who are circumventing the framework and affecting housing affordability. Various media articles have quoted anecdotal cases of investors purchasing both new and existing properties.

15.34 Foreigners now buy almost one in six newly built homes sold in NSW, whether apartments or houses, according to the latest NAB quarterly property index, released on Thursday. Their slice of the new housing market in NSW has leapt from 11 per cent to 16 per cent in the three months since the bank's June quarter survey of the property industry, owners and investors.<sup>30</sup>

15.35 In addition to the findings of the House of Representatives Standing Committee on Economics that compliance of the residential real estate rules is lacking, the consultation process provided anecdotal evidence of people being prepared to breach the foreign investment rules in relation to real estate on the basis that the risks of being caught were low. This reinforces the view in the community that changes need to be made to how the rules are enforced.

15.36 Global investment patterns are also affecting the framework, with foreign direct investment outflows from developing and transition countries reaching record levels, both in terms of level and proportion (making up around 39 per cent of global flows in 2013, compared to

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<sup>30</sup> "Real estate in Sydney: the big foreign buy up", Rick Feneley, Domain.com.au, 12 October 2013, <http://news.domain.com.au/domain/real-estate-news/real-estate-in-sydney-the-big-foreign-buyup-20131011-2vdpd.html>, accessed 9 April 2015.



only 12 per cent at the beginning of the 2000s<sup>31</sup>). Australia is an increasing recipient of investment from developing countries, whose investors are less familiar with Australia's investment environment (such as Australia's broader rules and regulations, corporate governance standards and market based economy) and the Australian community is less accustomed to these investors.

### **Agricultural investment**

15.37 Until 1 March 2015, non-government business proposals were only screened if they were over the relevant threshold (\$252 million for most countries). Agricultural investment proposals (both land and businesses) were assessed under the general business screening arrangements. This meant that there was only screening of a small number of exceptionally large agricultural transactions that were above the \$252 million threshold.

15.38 The majority of the submissions received in response to the 25 February Options Paper were from individuals and many raised concerns around foreign ownership of Australia's agricultural assets. While major stakeholders (peak bodies, business representatives, law firms and investors) generally noted the positive role foreign investment has in the agricultural industry, some also acknowledged the need to ensure that the community is supportive of foreign investment.

15.39 It is important to note that investments in agriculture can differ from other businesses. Investments in other business sectors tend to be self-contained. In contrast, the make-up of Australian farming businesses means that a non-government investor may acquire a number of parcels of agricultural land either in one area or across the country to build up their business, with each individual acquisition not screened.

15.40 The 2010-11 Australian Bureau of Statistics (ABS) Agricultural Census found that the majority of farms are small, with around a third covering less than 50 hectares (36 per cent), and 36 per cent covering between 50 and 500 hectares. There were a small number (100) of farms that each occupied more than 500,000 hectares - more than twice the land area of the Australian Capital Territory.<sup>32</sup>

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<sup>31</sup> UNCTAD *World Investment Report 2014*, United Nations Conference on Trade and Development [http://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf) (accessed 8 April 2015), page. xv.

<sup>32</sup> ABS 4102.0 - *Australian Social Trends*, Australian Bureau of Statistics, December 2012, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Dec+2012#FARMING>, accessed 31 March 2015.

15.41 A search of agricultural land for sale indicates that a farm of 850 hectares with significant water access in Queensland can be bought for around \$2.5 million, while the same money in Tasmania can buy a farm of 200 hectares. While over 4000 hectares can be purchased in New South Wales for around \$7 million. A property of \$2.5 million is 1 per cent of the former threshold.

15.42 Farming businesses accounted for 53 per cent of land use in Australia, with agricultural activity being undertaken on 410 million hectares of Australia's total land mass of 769 million hectares.<sup>33</sup>

15.43 The available data suggests that the vast majority of agribusinesses and farmland is Australian owned, and that foreign ownership of agricultural businesses and land has remained broadly the same between 2010 and 2013.

15.44 The ABS Agricultural Land and Water Ownership Survey (ALWOS) found that as at 30 June 2013:

- 87.5 per cent of agricultural land was entirely Australian owned (compared with 88.6 per cent in 2010);
- 98.9 per cent of agricultural businesses in Australia were entirely Australian owned (compared with 98.5 per cent at 31 December 2010); and
- 85.8 per cent of water entitlements for agricultural purposes were entirely Australian owned (compared with 90.8 per cent in 2010).

15.45 While there is Commonwealth, State and Territory government regulation of certain individual elements of foreign investment proposals (such as environmental approvals, competition, tax implications etc.), the foreign investment review framework provides the opportunity for a broader assessment of national interest concerns. The national interest test reflects a case-by-case assessment of these factors in reaching a balanced judgement on whether an investment proposal is contrary to the national interest.

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<sup>33</sup> 7101.0 - *Ag Mag - The Agriculture Newsletter*, Australian Bureau of Statistics, December 2012, <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/7101.0Main%20Features3Dec%202012?opendocument&tabname=Summary&prodno=7101.0&issue=Dec%202012&num=&view=>

15.46 To address broader community concerns about the agricultural sector, in December 2013 the Australian Government commissioned a White Paper to boost Australia's agriculture productivity and profitability. It undertook extensive public consultation in 2014, and produced an Agricultural Competitiveness Green Paper for public consultation in October 2014 to inform the White Paper. One area that consulted on was that of foreign investment in agricultural land and agribusiness.

15.47 The Agricultural Competitiveness Green Paper identified that the source of community perceptions that agricultural land has increasingly been acquired by foreign investors in a manner that is damaging to Australia's interests appear to have arisen because '*poor information on the extent, location and origin of foreign investment in Australian agriculture has constrained public debate around the issue of foreign direct investment*'.<sup>34</sup>

15.48 Further, the Senate Standing Committees on Rural and Regional Affairs and Transport 2013 report *Foreign Investment and the National Interest* found that community concerns about investment in the agricultural sector exist due to:

- Opaqueness regarding the level of foreign ownership in agricultural land
  - While the ABS ALWOS provides a periodic (three yearly) estimate of agricultural land ownership derived from business self-reporting, in addition to five yearly Agricultural Census data, political and community stakeholders have raised concerns with the frequency of information collection and the sample-based methodology. While statistically robust, the ABS's collections have not been sufficient to appease community concerns regarding foreign ownership.<sup>35</sup>
- The relative lack of scrutiny applying to acquisitions of agricultural land and agribusinesses

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<sup>34</sup> Agricultural Competitiveness Green Paper 2014, <https://agriculturalcompetitiveness.dpmc.gov.au/key-documents> accessed 23 March 2015, page 49.

<sup>35</sup> *Foreign Investment and the National Interest*, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, Chapter 3.

- Concerns have been raised that the current screening threshold of \$248 million<sup>36</sup> results in only a small number of agricultural acquisitions being screened.<sup>37</sup>

15.49 Specifically in relation to the ABS data, the Senate Standing Committees on Rural and Regional Affairs and Transport said it was concerned that the ABS ‘included a large number of very small farming enterprises in the sample selection’ and that this ‘significantly undermines the credibility of the survey’. It said that ‘having an estimated value of agribusiness between \$5,000 and \$125,000 is too low as it captures over half of the businesses surveyed’. The Senate Standing Committees on Rural and Regional Affairs and Transport said that this was because ‘very small businesses are likely to be of little or no interest to foreign investors’.<sup>38</sup>

- It also said that ‘The absence of information in the survey about the value of agricultural land under foreign ownership further undermines the usefulness of the survey for determining the level of foreign investment in Australian agriculture’.
- That ‘the self-reporting aspect of foreign ownership in the questionnaire undermines the veracity of the survey results as it clearly relies on the goodwill of companies to report foreign ownership’.<sup>39</sup>
- Finally, the Senate Standing Committees on Rural and Regional Affairs and Transport said that the specific issues above ‘seriously undermine the value of the ABS survey in informing public debate about the levels of foreign investment in Australian agriculture’.<sup>40</sup>

15.50 While improved data collection was not a key consultation issue in the Options Paper process, several key agricultural stakeholders reiterated their advocacy for the timely implementation of a foreign ownership register. Similarly, while the Options Paper focussed on definitional issues rather than the proposed agriculture screening

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<sup>36</sup> This was the threshold at the time of the 2013 Senate report.

<sup>37</sup> *Foreign Investment and the National Interest*, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, Chapter 5.

<sup>38</sup> *Foreign Investment and the National Interest*, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, page 31.

<sup>39</sup> *Foreign Investment and the National Interest*, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, page 38.

<sup>40</sup> *Foreign Investment and the National Interest*, Senate Standing Committees on Rural and Regional Affairs and Transport, 26 June 2013, page 39.

thresholds, several submissions noted the need to increase scrutiny of agriculture investment (though some submissions cautioned against overreach into non-agriculture industries).

15.51 The overall theme from submissions received from individuals on the Options Paper was that the proposed reforms in the Options Paper were a step in the right direction to restore integrity in the framework but the reforms did not go far enough in preventing foreign investment in the agricultural sector. While institutional stakeholders recognise the benefits of foreign investment in agriculture, the negative views of individual stakeholders suggest that concerns with transparency and scrutiny around foreign ownership are translating into negative community attitudes towards foreign investment.<sup>41</sup> While there is limited evidence to support claims that foreign investment in the agricultural sector is having a detrimental impact on the national interest, there is potential for negative community attitudes to have a negative impact on the general foreign investment environment and reduce Australia's ability to attract much needed foreign investment.

15.52 The community concerns about the lack of transparency appear to be focused on the need to improve transparency around the aggregate levels of foreign ownership of agricultural land and the lack of scrutiny around agricultural investments (although there may be members of the community who would like to see greater transparency at the individual transaction level).

### **Lack of data on foreign ownership**

15.53 More broadly than agriculture, the absence of available information on what foreign persons have purchased and how much of Australian land is actually held by foreign persons is further undermining the integrity and public confidence of the foreign investment framework.

15.54 The FIRB publishes annual approvals of foreign investment by sector and by source. The data shows the flow of intended total investment. However, it is not possible to ascertain how much approved investment gets realised and over what time period.<sup>42</sup>

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<sup>41</sup> This is supported by Lowy Institute Polls in recent years that suggest the majority of people do not approve of foreign investment in agricultural land.  
<http://www.lowyinstitute.org/lowyinstitutepollinteractive/>

<sup>42</sup> *Foreign investment in Australian Agriculture*, Kali Sanyal, Parliamentary Library Research Paper, 18 February 2014,

- According to the ABS in the 2013-14 financial year there were 418,484 housing finance commitments (excluding refinancing of existing loans).<sup>43</sup>
- In comparing the foreign investment proposals considered by FIRB with the ABS data, the level of foreign investment in the residential real estate sector represents around 6 per cent of this number. It is important to note though that as FIRB only collects approvals and not actual purchases of properties this number may be overstated.

15.55 The ABS also publishes aggregated data separately on net investment flows by country and by sector (separately – it is not possible to breakdown a particular country’s investment by sector).<sup>44</sup> However, the ABS provides an overall picture of foreign investment rather than detailed information on individual investments or localised trends.

15.56 On 24 April 2010, the then Assistant Treasurer, the Hon Senator Nick Sherry MP, announced the reintroduction of the requirement for temporary residents to seek foreign investment approval prior to acquiring residential real estate in Australia.<sup>45</sup> The requirement for temporary residents to seek foreign investment approval to purchase residential real estate was removed in March 2009.<sup>46</sup>

15.57 One of the reasons for reintroducing the requirement for temporary residents to seek foreign investment approval to acquire residential real estate was to address concerns at the time about the lack of transparency and available data around foreign investment activity in Australia’s residential real estate sector.

15.58 While the reintroduction of the requirement for temporary residents to seek foreign investment approval has provided transparency, in that investments in the residential real estate sector by temporary residents are now screened against the national interest, this change has not facilitated data on the actual extent of foreign ownership in this sector. This is because the data presented in the FIRB Annual Report

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[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1314/ForeignInvest](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/ForeignInvest), accessed 20 March 2015.

<sup>43</sup> ABS Catalogue 5609.0 Housing Finance

<sup>44</sup> ABS Catalogue 5302.0 and 5352.0.

<sup>45</sup> Press release: *Government Tightens Foreign Investment Rules for Residential Housing*, The Hon Nick Sherry, Assistant Treasurer, 24 April 2010, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/074.htm&pageID=&min=njsa&Year=&DocType=0>.

<sup>46</sup> *Foreign Acquisitions and Takeovers Legislation Amendment Regulations 2009 (No. 1)*, 27 March 2009.

only reflects the number of foreign investment approvals and not all approvals translate into an actual purchase of property.

15.59 The House of Representatives Standing Committee on Economics reported that it:

*... does not have confidence in the integrity of the current FIRB data on foreign investment in residential real estate. This lack of accurate and timely data represents a fundamental deficiency preventing proper understanding and analysis of the impact of foreign investment on the Australian real estate market.<sup>47</sup>*

15.60 The House of Representatives Standing Committee on Economics also found that a lack of reliable data has further eroded public confidence in the framework, and that to maintain and restore confidence significant improvements need to be made.<sup>48</sup>

15.61 The lack of reliable data also impedes identification of the size and scope of the problem of identifying how much non-compliance exists with the foreign investment rules.

#### **Residential real estate investment**

15.62 The Policy as it applies to residential real estate aims to increase Australia's housing stock. Foreign investment applications are considered in light of this overarching principle.

15.63 For foreign investment in residential real estate, the national interest test is prescriptive. Foreign persons will generally be granted approval to purchase new dwellings on the basis that such investment adds to Australia's housing stock. This includes purchases of dwellings off-the-plan, before construction commences. These types of purchases can considerably contribute to developers being able to commence construction.

15.64 For established dwellings, generally only temporary residents will be approved to purchase these properties. Only one established dwelling may be purchased by a temporary resident and it must be used as their place of residence in Australia. Foreign investment approval is normally given subject to conditions, including that the temporary

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<sup>47</sup> *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page 64.

<sup>48</sup> *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page 36.

resident sells the property within three months of it ceasing to be their primary residence. Established dwellings are unable to be used as rental properties or holiday homes.

15.65 Consistent with the policy objective of increasing the housing stock, more screening emphasis is generally placed on applications from temporary residents to purchase established residential property. These applicants are required to affirm their residency status, with this information validated against official sources. Investors are required to declare their property usage intentions, in line with the requirement that temporary residents must live in established properties they purchase and sell them when they depart Australia.

15.66 Until 4 May 2015, Treasury was responsible for compliance around the residential real estate rules. Compliance activities comprised a combination of pre-approval checking of applications, post-approval reviews, information resource building, consultation and investigation activities.

15.67 However, there were limited information sources available to Treasury that could be used to systematically identify non-compliant property acquisitions and it was difficult to prevent such transactions from proceeding. In this context, Treasury used a compliance framework that placed emphasis on information and education initiatives, supported where necessary by more active measures to encourage foreign investor compliance.

15.68 For example, a dedicated compliance hotline has operated since 2010. Information provided to the hotline was used to initiate follow-up investigations where appropriate. Relevant purchases identified in the media were also examined. Information sessions with real estate agents were conducted periodically in metropolitan centres.

15.69 Where conditions were imposed on approved purchases, the relevant properties were monitored to ensure the conditions are adhered to. Treasury made regular use of external data sources to support its compliance activities, such as the Department of Immigration and Border Protection's online visa record system, fee-based property ownership searches and statistical databases provided under licence by external agencies.

15.70 Treasury worked with applicants to resolve many compliance-related concerns and in examining proposals, the applicant's compliance with any conditions relating to past proposals was taken into account.

15.71 Currently, only divestment orders and criminal penalties apply for breaches of the Act. Criminal penalties are difficult to pursue due to the high burden of proof required. While existing measures were



previously considered effective for managing screening and compliance for the comparatively low volume of residential real estate investments, the recent surge of residential real estate investment, coupled with strong housing market activity in major cities like Sydney and Melbourne, has led to community concerns with the integrity of the foreign investment rules. Other mechanisms such as civil pecuniary penalties would provide an extra enforcement tool and make it easier to pursue punishment for breaches of the framework.

15.72 The 2013-14 Annual Report FIRB approval data shows a significant increase in approvals for proposed purchases in the residential real estate sector. In 2013-14, FIRB approved 7,915 acquisitions of established dwellings compared with 5,091 in 2012-13. For new dwellings, in 2013-14, FIRB approved 11,338 new dwelling acquisitions compared to 4,499 in 2012-13. The significant increase in approvals for residential real estate is likely to be contributing to the increased community concern that exists about foreign investment in residential real estate. Approved proposed investment in real estate was \$74.6 billion in 2013-14, compared with \$51.9 billion in 2012-13. Further significant growth is expected for 2014-15.

**Table 15.1: Investment in residential real estate by type of approval and number of proposals approved: 2010-11 to 2013-14<sup>49</sup>**

	2010-11		2011-12		2012-13		2013-14	
	No.	\$b	No.	\$b	No.	\$b	No.	\$b
<b>Residential</b>								
Developed								
- existing residential property	3,881	3.57	3,952	2.87	5,091	5.42	7,915	7.17
- annual programs	4	0.20	5	1.30	10	0.94	5	0.35
<i>Sub-total 'Developed'</i>	<i>3,885</i>	<i>3.77</i>	<i>3,957</i>	<i>4.18</i>	<i>5,101</i>	<i>6.36</i>	<i>7,920</i>	<i>7.51</i>
For development								
- vacant land	1,514	2.33	1,518	0.68	1,821	1.39	3,150	1.74
- new dwellings								
- individual purchases	3,911	2.46	4,022	2.54	4,499	2.91	11,338	7.72
- developer 'off-the-plan'	65	10.08	70	10.92	50	5.73	103	16.38
<i>Sub-total 'new dwellings'</i>	<i>3,976</i>	<i>12.54</i>	<i>4,092</i>	<i>13.46</i>	<i>4,549</i>	<i>8.64</i>	<i>14,591</i>	<i>25.85</i>
- redevelopment	171	0.45	191	0.50	189	0.36	534	0.79
- annual programs	10	1.83	10	0.89	8	0.41	9	0.57
<i>Sub-total 'For development'</i>	<i>5,671</i>	<i>17.15</i>	<i>5,811</i>	<i>15.52</i>	<i>6,567</i>	<i>10.80</i>	<i>15,134</i>	<i>27.20</i>
<b>Total residential</b>	<b>9,556</b>	<b>20.92</b>	<b>9,768</b>	<b>19.70</b>	<b>11,668</b>	<b>17.16</b>	<b>23,054</b>	<b>34.72</b>

Note: Totals may not add due to rounding

15.73 In March 2014, recognising increasing community concerns, the Government asked the House of Representatives Standing

<sup>49</sup> *Annual Report 2013-14*, Foreign Investment Review Board, May 2015, page 28.

Committee on Economics to inquire into foreign investment in residential real estate. It tabled its report to Parliament in November 2014.

15.74 The House of Representatives Standing Committee on Economics report highlighted no enforcement activities regarding foreign investment in residential real estate through the courts occurred since 2006 and that only 17 divestment orders had been issued since 2003. It also noted that no data could be provided on voluntary divestments by foreign investors.

15.75 From submissions and testimonies to the House of Representatives Standing Committee on Economics it was clear that ongoing concerns about possible non-compliance undermine public confidence in the entire foreign investment framework, and its ability to track those that are bypassing the system.

- Submissions to the Options Paper indicate a desire by the community to increase transparency about the aggregate levels of foreign ownership of residential real estate.
- Some submissions received (particularly from individuals) also reflected the view that Australia's national interest would be better served by preventing foreign investment in residential real estate altogether.

15.76 Given the beneficial role that foreign investment plays in the Australian economy, there is a need to ensure that the community has confidence in Australia's foreign investment framework to effectively screen investments to ensure they are in the national interest.

### **Modernisation**

15.77 The complex legislation underpinning the foreign investment framework has changed little since it was introduced in 1975. Overall the framework (not its fundamental principles but how it technically captures foreign persons to be screened) is not well aligned with other regulatory regimes, such as Australia's takeovers regime. The Act also contains obsolete provisions, as well as provisions that do not promote investor certainty or consistency in the application of the review framework.

15.78 The current penalty provisions were introduced in the late 1980s and have not been amended since then. The current penalty regime contains only criminal penalties, requiring a very high burden of proof before a case can be pursued.

15.79 The introduction of new and different thresholds through free trade agreements has also added complexity to the framework because different rules can apply depending on the origin of the investor.

15.80 Maintaining an effective foreign investment framework is crucial for Australia to be able to attract the high levels of foreign investment needed. The framework and its Act must continue to ensure:

- that the Treasurer has the necessary powers to protect Australia's national interests and maintain public confidence;
- regulatory costs for foreign investors are minimised; and
- to provide certainty about the consistency of the foreign investment and regulatory framework of Australia.

### **Summary**

15.81 While Australia's foreign investment framework has generally worked well, the community is increasingly concerned that the framework is not sufficiently equipped to deal with changing global investment patterns that have resulted in a significant increase in the level of foreign investment into the Australian economy.

15.82 In addition, a lack of data on the levels of foreign ownership in the agricultural and residential real estate sectors has made it difficult to maintain community confidence in the foreign investment framework. It has also limited the ability of Government to identify how much non-compliance with the framework currently exists.

15.83 To ensure that Australia is able to continue to attract the high inflows of foreign investment that it requires, the community needs to be convinced that foreign investment is in the national interest and that foreign investors are complying with the rules.

- A stronger level of compliance and enforcement as well as changes to the framework, are necessary to improve the integrity and community acceptance of the system.

### **The case for government action**

15.84 Perceptions of unscrutinised foreign ownership of Australia's agricultural sector, and of a lack of compliance with foreign investment in residential real estate rules are affecting the integrity of the overall foreign investment framework.

15.85 Australia needs to continue to attract high levels of foreign investment. The Financial System Inquiry found that ‘Australia is, and is likely to continue to be, a substantial net importer of capital’. It also found that Australia has ‘significant endowments of natural resources that cannot be fully utilised without foreign investment’.<sup>50</sup>

15.86 In order for Australia to continue to attract high levels of foreign investment, the foreign investment framework needs to maintain its integrity, collect and disseminate relevant data and have a solid legal framework to ensure that both investors and the community have confidence in it.

15.87 Foreign investment in the agricultural sector has long made an important contribution in supporting economic growth, jobs and prosperity and can assist in expanding Australia’s production capacity. In residential real estate, Australia’s foreign investment framework has aimed to channel investment into new housing, assisting in increasing the supply of housing and supporting broader economic activity. It is important to maintain the Australian community’s confidence in the foreign investment framework’s ability to appropriately screen and assess foreign investment proposals against the national interest. This includes having a system that is easily understandable by both the community and investors.

15.88 Without comprehensive information about the extent of foreign ownership of agricultural land and limited scrutiny of investment proposals by privately-owned foreign investors, it is difficult to placate community concerns and for there to be an informed public debate on these matters. There is a risk that, if not addressed, these concerns will continue to undermine community confidence in the benefits of foreign investment.

15.89 This, in turn, may undermine broad community support for, and openness to, foreign investment, potentially creating pressure for increased restrictions on foreign investment and reducing Australia’s attractiveness to foreign investors.

15.90 The House of Representatives Standing Committee on Economics Report acknowledged that there are concerns in parts of the community that policies allowing foreign investment in residential real estate are not benefitting Australians because they make housing less

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<sup>50</sup> *Financial System Inquiry Final Report*, November 2014, page 2.

affordable.<sup>51</sup> There is also community concern that foreign investors are by-passing the framework.

15.91 The House of Representatives Standing Committee on Economics found that better information about foreign investment in residential real estate would go a substantial way to addressing these community concerns:

*Better processes and better data collection within the Treasury and FIRB in the future will enable better reporting and engender greater confidence among policymakers, and the public at large, that this system is beneficial and is working effectively.*<sup>52</sup>

15.92 Government action can improve the integrity of the system by ensuring that there are suitable resources to undertake compliance and enforcement activities and clarifying what is and is not required to be screened in order to support both community and investor confidence in the framework.

15.93 Improved data collection, aggregated dissemination of data and data-matching will improve transparency about the foreign investment framework. This will help increase understanding in the community of the framework and support informed debate about the role of foreign investment in Australia's economy. Capturing and matching of data is within government control.

15.94 Modernising the Act is the responsibility of Government. The Act is somewhat outdated in community and business expectations of Australian legislation. Updating the Act to make it easier for stakeholders to navigate, providing greater certainty to investors and removing cases from the framework which do not raise national interest concerns would help to modernise the framework and reduce unnecessary regulation on business.

15.95 The framework must continue to ensure that the Treasurer has the necessary powers to protect Australia's national interests and maintain public confidence in the foreign investment regime, while minimising regulatory costs and disincentives for foreign investors.

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<sup>51</sup> *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page 84.

<sup>52</sup> *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page 37.

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## Policy Options<sup>53</sup>

### Options already in place

15.96 A number of the proposed options considered by Government have already commenced. These are summarised below.

### **Reduce the screening threshold for agricultural land from \$252 million to \$15 million cumulative**

15.97 On 11 February 2015, the Government announced that it would lower the screening threshold for agricultural land to a \$15 million cumulative threshold from 1 March 2015. This was consistent with its election commitments.<sup>54</sup>

15.98 To give early effect to implementation of the lower threshold, the Government relied on the existing definition of ‘rural land’ as an interim definition of ‘agricultural land’ pending further consultation on an appropriate definition. Details on the outcomes of this consultation are outlined in paragraphs 15.258 and 15.260.

15.99 Prior to the formal consideration of implementation options, the Government clearly articulated its policy that it would implement the lower agricultural land threshold changes to the extent possible given existing free trade agreement commitments.

15.100 Australia’s commitments in trade agreements bind if and how far Australia can lower the foreign investment screening threshold. In particular, in relation to agricultural investments, whether the lower screening threshold could apply to a foreign investor will depend on whether Australia has a trade agreement with that country and what that agreement provides for. Different thresholds will apply depending on what country an investor is from.

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<sup>53</sup> At the time of publication of the RIS, the Government has already started to implement aspects of the reform package (such as the lower \$15 million cumulative screening threshold for agricultural land from 1 March 2015, the agricultural land foreign ownership register from 1 July 2015 and the transferral of compliance and enforcement activities around residential real estate to the ATO from 4 May 2015).

<sup>54</sup> *Government tightens rules on foreign purchases of agricultural land*, 11 February 2015, the Hon Joe Hockey MP media release, <http://jbh.ministers.treasury.gov.au/media-release/005-2015/>.

15.101 Consistent with Australia's free trade agreement commitments the cumulative \$15 million threshold applies to all private investors except those from the United States, New Zealand, Chile, Singapore, Thailand, Japan, Korea and China. Foreign government investors would continue to be screened at the \$0 threshold for investments in agricultural land.

- United States, New Zealand and Chilean investors would require prior approval to acquire an interest in agricultural land valued above \$1,094 million;
- Singaporean and Thai investors would require prior approval if acquiring a substantial interest in a primary production business valued above \$50 million; and
- Japanese, Korean and Chinese investors would require prior approval to acquire an interest in agricultural land valued above \$15 million.

15.102 This Regulation Impact Statement does not consider implementation options that would require the renegotiation of free trade agreement commitments.

#### **Undertake a stocktake of agricultural land and introduce a foreign ownership register of all land**

15.103 There is no definitive data source showing how much Australian land is owned by foreigners. Treasury only collects data on approvals of applications submitted to it, which are published in the FIRB Annual Report. It does not track whether an approval translated into an acquisition or a subsequent disposal of a property.

15.104 On 1 July 2015, the Government introduced a foreign ownership register of land, leveraging existing State and Territory land titles collections. The register is administered by the Australian Taxation Office (ATO). When fully operational, the register will capture all land transfers to and from foreign persons, regardless of whether the land is agricultural, commercial or residential.

15.105 States and Territories already require a significant amount of data as part of the transfer of property process that can be used to form the basis of the national register. These include the lot number, name of purchaser, address and contract date.

15.106 The Government is currently negotiating with States and Territories to leverage from their existing State and Territory land title collects to establish the all land register. In the interim, the Government has established a foreign ownership register which collects existing and new acquisitions of agricultural land by foreign persons. The register commenced on 1 July 2015.<sup>55</sup>

15.107 The ATO is undertaking a stocktake of foreign persons with existing holdings of agricultural land. Foreign persons are required to notify the ATO of existing interests of agricultural land before 31 December 2015. Foreign persons are required to notify new acquisitions of interests in agricultural land within 30 days to the ATO.

15.108 The ATO will collect information such as the location and size of property and size of interest acquired on new foreign investment in agricultural land to develop a national register. Aggregate data will be made available to the public from the first half of 2016.

15.109 The register collecting data on the foreign ownership of agricultural land directly from investors will remain in place until land title data from the States and Territories can be provided to the ATO. From 1 July 2016 it is expected that the register would include information on all land types with data to be supplied from the States and Territories. There is no proposal to conduct a stocktake of existing foreign ownership of other types of land.

#### **ATO to undertake screening and compliance**

15.110 The role of screening residential real estate applications and undertaking compliance and enforcement of the foreign investment framework began transferring from Treasury to the ATO on 4 May 2015.

15.111 A new, dedicated compliance and enforcement area is being established within the ATO, which already tracks compliance of a range of property transactions. This new unit will undertake compliance, investigation and enforcement activities by utilising specialist, experienced staff to systemically detect breaches of conditions on foreign purchases of residential real estate and enforce compliance through the imposition of penalties.

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<sup>55</sup> Further information is available at <http://jbh.ministers.treasury.gov.au/media-release/066-2015/> and <https://www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/>.



## **Options under consideration**

### **Option 1: No Change**

15.112 This option would see the existing foreign investment framework (including the measures which have already commenced) being maintained. The focus on the upfront approval process would form the basis of enforcement and compliance. This would mean a continued limited capacity to detect foreign persons who avoid the foreign investment approval process.

15.113 This option would also mean that there would continue to be no application fees for foreign investment proposals. There would not be any additional revenue to fund increased compliance and enforcement activities.

15.114 The current criminal penalty framework would remain available for pursuing breaches of non-compliance.

### **Option 2: Agricultural land definition changes**

#### **Option 2A – Definition based on ‘rural land’**

15.115 The term ‘agricultural land’ is not currently used in the foreign investment framework. Currently the Act categorises Australian land as being either ‘urban land’ or ‘rural land’. ‘Rural land’ is defined as ‘land used wholly and exclusively for carrying on a business of primary production’.

15.116 Option 2A would define ‘agricultural land’ as ‘rural land’ for the purposes of the new threshold, utilising the longstanding and well understood definition under Australia’s foreign investment framework.

#### **Option 2B – Definition reflecting commonly understood concept**

15.117 This option proposes defining agricultural land with reference to exclusive ongoing use as a primary production business does not capture land used for multiple purposes or land that is suitable but not currently used for agriculture.

15.118 Option 2B therefore proposes defining agricultural land as ‘land used, or that could reasonably be used, for a primary production business’ (primary production business is defined under the *Income Tax Assessment Act 1997*).

### **Option 3: Introducing a screening threshold for agribusiness**

15.119 Currently, foreign investment approval is required to acquire an interest of 15 per cent or more in any business valued at over \$252 million (including agribusinesses). There is currently no definition of ‘agribusiness’ in the Commonwealth statute.

15.120 To deliver on its election commitment, the Government has announced its intention to introduce a new \$55 million screening threshold for non-government investments in agribusiness, subject to consultation on an appropriate definition of ‘agribusiness’.<sup>56</sup> All proposed direct investments by foreign government investors, including in agriculture, would continue to be reviewed regardless of value.

15.121 This option considers three alternatives for implementing the commitment, including one option that would retain the status quo (\$252 million) for agribusinesses that are not captured by the definition of agricultural land and two options for introducing a separate \$55 million threshold with different definitions of agribusiness.

15.122 Prior to the formal consideration of implementation options, the Government clearly articulated its policy that implementation of a lower agribusiness threshold would be to the extent possible given existing free trade agreement commitments. This Regulation Impact Statement therefore does not consider implementation options that would require the renegotiation of free trade agreement commitments.

15.123 United States, New Zealand and Chilean investors will continue to only require approval if acquiring a substantial interest in an agribusiness valued above \$1,094 million. The proposed agribusiness threshold would apply to all other countries.

### **Option 3A – Retain the status quo for ‘agribusinesses’ beyond the farm gate**

15.124 Option 3A would retain the existing general business threshold (\$252 million or \$1,094 million for certain free trade agreement partners) for the screening of agribusinesses that are not otherwise screened as ‘agricultural land’.

15.125 This reflects that both the current and prospective definitions of ‘agricultural land’ (Options 2A and 2B refer), for which a \$15 million cumulative screening threshold would apply, are based on land used for

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<sup>56</sup> *Government to strengthen Australia’s foreign investment framework*, 25 February 2015, joint media release the Hon Tony Abbott MP and the Hon Joe Hockey MP, <http://jbh.ministers.treasury.gov.au/media-release/008-2015/>

operating a primary production business. As a result, agribusinesses within the farm gate (directly involved in a business of primary production) would already be captured by the \$15 million cumulative threshold, substantially reducing the need for a separate \$55 million ‘agribusiness threshold’.

15.126 For ease of comparison, Option 3A would be similar in scope to defining agribusiness with reference to the sectors captured by Division A of the Australian and New Zealand Standard Industrial Classification (ANZSIC) Codes.

### **Option 3B – \$55 million threshold with a definition based on ANZSIC Codes**

15.127 Option 3B would introduce a \$55 million threshold for agribusiness that captures 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) via reference to the ANZSIC Codes.

### **Option 3C – \$55 million threshold with a definition based on predominant income derived from primary production business**

15.128 Option 3C would also introduce a \$55 million threshold for agribusiness that captures certain downstream businesses beyond the farm gate.

15.129 However, this option provides an alternative approach, based on suggestions by stakeholders, which would define agribusiness beyond the farm gate on the basis of business income and relatedness to primary production.

Agribusiness would be defined as ‘a business whose income predominantly derives from the production, processing or transformation of commodities produced by primary production businesses.’

### **Option 4: Introduction of application fees**

15.130 Currently, no fees apply to foreign investment applications. Under this option, the Government would seek to charge a fee on all foreign investment applications to fund screening, compliance and enforcement activities and improved data collection on foreign investment.

- i. Fees would apply to both residential real estate applications and all business foreign investment proposals.

15.131 The proposed fees are listed in the table below. Foreign investors would be required to pay the application fee before their foreign investment application is processed. The 30 day statutory time period for assessing the application would begin after payment is received.

15.132 For auctions, the eligible foreign person would seek approval to purchase one established property in a specified area. An approval would then be valid for six months, but only for purchases within the area for which they have sought approval. The fee will only be charged once in this instance. This is consistent with the rules that currently apply to the purchase of residential real estate as it will only allow one property to be purchased. This will remove the need for foreign investors to lodge multiple applications to bid in various auctions in an area.

**Table 15.2: Proposed fee schedule for foreign investment applications**

<b>Sector</b>	<b>Type of investment</b>	<b>Application Fees from 1 December 2015 (Indexed by CPI on 1 July)</b>
<b>Residential</b> <sup>57</sup>	Residential properties valued at \$1 million or less	\$5,000
	Residential properties valued at greater than \$1 million	\$10,000 then \$10,000 incremental fee increase per additional \$1 million in property value
	Advanced off-the-plan certificates	\$25,000 upfront, with a six monthly reconciliation of properties sold to foreign persons based on rates above
<b>Business</b>	Commercial real estate	\$25,000
	Business acquisitions in non-sensitive sectors	\$25,000
	New business proposals	\$10,000
	Any other interest in urban land (except residential real estate)	\$10,000

<sup>57</sup> In instances where a foreign investor is seeking multiple approvals to bid at auctions, a six months general approval period will be given to them to participate in an auction to purchase one property. This would alleviate the need for bidders to pay multiple application fees.

<b>Sector</b>	<b>Type of investment</b>	<b>Application Fees from 1 December 2015 (Indexed by CPI on 1 July)</b>
	Business acquisitions in sensitive sectors <sup>58</sup>	\$25,000
	Business acquisitions where the value of the transaction is greater than \$1 billion	\$100,000 (based on the value of the transaction)
	Internal reorganisations	\$10,000
<b>Agriculture</b>	Rural land valued at \$1 million or less	\$5,000
	Rural land valued at greater than \$1 million	\$10,000 incremental fee per \$1 million in rural land value, capped at \$100,000
	Investments in agribusinesses	\$25,000 or \$100,000 for agribusiness acquisitions where the value of the transaction is greater than \$1 billion
<b>Annual Program</b>	Annual programs for land interests	\$25,000 or \$100,000 where proposed investment is greater than \$1 billion

#### **Option 5: Penalties and enforcement**

15.133 Currently, only divestment orders and criminal penalties apply for breaches of foreign investment rules under the Act. The maximum penalty that can be applied by a Court to individuals on conviction of a breach (such as failing to obtain approval or comply with a condition of approval) is a fine of up to 500 penalty units (\$90,000), imprisonment of two years or both. In the case of a corporation, a multiplier of five applies to the maximum fine for an individual.

15.134 Enforcing breaches under the current criminal penalty framework requires a high burden of proof and may involve lengthy court proceedings. There is currently no civil penalty regime for breaches of the Act.

15.135 This option considers introducing a civil pecuniary penalties regime, supported by an infringement notice regime. Divestment orders

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<sup>58</sup> The prescribed sensitive sectors are: media; telecommunications; transport; defence and military related industries; and the extraction of uranium or plutonium or the operation of nuclear facilities.

would still be available, but in addition the Government would have the option to pursue either criminal penalties or civil penalties through the courts. This option also considers increasing the level of the current criminal penalties but not changing the offences to which they apply.

- These penalties are proposed to provide an additional compliance and enforcement tool for the investment framework, enhancing the Government’s ability detect and deal with breaches.

15.136 Foreign investors who breach the Act would be subject to civil pecuniary penalties. Civil pecuniary penalties would be introduced for those breaches in the Act to which criminal penalties already apply. Introducing civil pecuniary penalties would make it faster and simpler for court action to be undertaken as the burden of proof is the balance of probabilities, lower than the standard for criminal offences.

15.137 The civil penalties would be supported by an infringement notice regime that would apply to more minor breaches and provide an additional tool to enforce the Act.

15.138 Currently, the Criminal Code makes it an offence where a person knowingly assists another person to commit a criminal offence. Similarly, the *Regulatory Powers (Standard Provisions) Act 2014* makes it a breach where a person knowingly assists another person to breach a civil penalty provision. Under this option, it is also proposed that the Act make it clear that the Criminal Code offence and Regulatory Powers breach applies to third parties that knowingly assist foreign investors to breach the rules.

**Table 15.3: Proposed new penalty arrangements**

<i>Breach of current rule</i>	<i>Proposed new penalties</i>
<p><b>Foreign person acquires new property without approval</b> (approval would normally have been granted)</p> <p><b>Temporary resident acquires established property without approval</b> (approval would normally have been granted)</p>	<p>There is currently no civil pecuniary penalty or infringement notice regime under the Act for these breaches.</p> <p><b>Increased Criminal Penalty</b></p> <p>Maximum criminal penalty of</p> <ul style="list-style-type: none"> <li>▪ Individual — 750 penalty units (\$135,000) or 3 years imprisonment.</li> <li>▪ Company — 3,750 penalty units (\$675,000).</li> </ul> <p><b>Civil Penalty</b></p> <p>Maximum civil penalty is the greater of the following:</p> <ul style="list-style-type: none"> <li>▪ 10 per cent of purchase price in addition to the</li> </ul>

<i>Breach of current rule</i>	<i>Proposed new penalties</i>
	<p>relevant application fee; or</p> <ul style="list-style-type: none"> <li>▪ 10 per cent of market value of the property in addition to the relevant application fee.</li> </ul> <p><b>Tier 1 Infringement notice — Voluntary complied by coming forward</b></p> <ul style="list-style-type: none"> <li>▪ Individual — 12 penalty units (\$2,160) plus the relevant application fee.</li> <li>▪ Company — 60 penalty units (\$10,800) plus the relevant application fee.</li> </ul> <p><b>Tier 2 Infringement notice — Identified through compliance activities</b></p> <ul style="list-style-type: none"> <li>▪ Individual — 60 penalty units (\$10,800) plus the relevant application fee.</li> <li>▪ Company — 300 penalty units (\$54,000) plus the relevant application fee.</li> </ul> <p>Either an infringement notice or civil penalty would be sought but not both.</p>
<p><b>Non-resident acquires established property or temporary resident acquires more than one established property</b> (not normally approved)</p> <p><b>Temporary resident fails to sell established property when it ceases to be their principal residence</b> (breach of conditional approval)</p> <p><b>Temporary resident rents out an established property</b> (breach of conditional approval)</p> <p><b>Failure to begin construction within 24 months without seeking extension</b> (breach of conditional</p>	<p>There is currently no civil pecuniary penalty under the Act for these breaches.</p> <p><b>Increased Criminal Penalty</b></p> <p><b>Maximum criminal penalty of</b></p> <ul style="list-style-type: none"> <li>▪ Individual — 750 penalty units (\$135,000) or 3 years imprisonment.</li> <li>▪ Company — 3,750 penalty units (\$675,000).</li> </ul> <p><b>Civil Penalty</b></p> <p><b>Maximum civil penalty is the greater of the following:</b></p> <ul style="list-style-type: none"> <li>▪ the capital gain made on divestment of the property;</li> <li>▪ 25 per cent of purchase price; or</li> <li>▪ 25 per cent of market value of the property.</li> </ul>

<i>Breach of current rule</i>	<i>Proposed new penalties</i>
approval of vacant land/ redevelopment applications)	
<b>Developer fails to market apartments in Australia</b> (breach of advanced off-the-plan certificate)	<p><b>There is currently no civil pecuniary penalty or criminal penalty under the Act for this breach.</b></p> <p><b>Criminal Penalty</b></p> <p>Maximum criminal penalty of:</p> <ul style="list-style-type: none"> <li>▪ Individual — 750 penalty units (\$135,000) or 3 years imprisonment.</li> <li>▪ Company — 3,750 penalty units (\$675,000).</li> </ul> <p><b>Civil Penalty</b></p> <p>Maximum civil penalty of:</p> <ul style="list-style-type: none"> <li>▪ Individual - 250 penalty units (\$45,000)</li> <li>▪ Company – 1,250 penalty units (\$225,000)</li> </ul>



<i>Breach of current rule</i>	<i>Proposed new penalties</i>
<p><b>Property developer fails to comply with reporting conditions associated with approval</b> (breach of advanced off-the-plan certificate)</p> <p><b>Foreign person fails to comply with reporting condition which requires them to notify of actual purchase and sale of established properties</b> (a new rule)</p>	<p><b>There is currently no civil pecuniary penalty or infringement notice regime under the Act for these breaches.</b></p> <p><b>Civil penalty</b></p> <p><b>Maximum civil penalty of:</b></p> <ul style="list-style-type: none"> <li>▪ Individual - 250 penalty units (\$45,000)</li> <li>▪ Company – 1,250 penalty units (\$225,000)</li> </ul> <p><b>Tier 1 Infringement notice — Voluntary complied by coming forward</b></p> <ul style="list-style-type: none"> <li>▪ Individual — 12 penalty units (\$2,160) plus the relevant application fee.</li> <li>▪ Company — 60 penalty units (\$10,800) plus the relevant application fee.</li> </ul> <p><b>Tier 2 Infringement notice — Identified through compliance activities</b></p> <ul style="list-style-type: none"> <li>▪ Individual — 60 penalty units (\$10,800) plus the relevant application fee.</li> <li>▪ Company — 300 penalty units (\$54,000) plus the relevant application fee.</li> </ul> <p>Either an infringement notice or civil penalty would be sought but not both.</p>
<p><b>Third party assists foreign investor to breach rules</b></p>	<p>There is currently no civil pecuniary penalty under the Act for knowingly assisting breaches of the Act.</p> <p><b>Civil penalty</b></p> <p>Knowingly assisting another person to contravene a civil penalty provision is a breach of the <i>Regulatory Powers (Standard Provisions) Act 2014</i>. The maximum civil penalty is the same as the primary breach.</p> <p><b>Criminal Penalty</b></p> <p>Knowingly assisting another person to commit a criminal offence is an offence under Section 11.2 of the Criminal Code (maximum penalty is the same as the primary offence).</p>

Table 15.4: Penalties for breaches of rules which apply to the business and agriculture sectors

<p><b>Foreign person makes an acquisition without approval</b> (<i>approval would normally have been granted</i>)</p>	<p><b>Increased Criminal Penalty</b></p> <p>Maximum criminal penalty of</p> <ul style="list-style-type: none"> <li>▪ Individual — 750 penalty units (\$135,000) or 3 years imprisonment.</li> <li>▪ Company — 3,750 penalty units (\$675,000).</li> </ul> <p><b>Civil penalty</b></p> <p>Maximum civil penalty of:</p> <ul style="list-style-type: none"> <li>▪ Individual - 250 penalty units (\$45,000)</li> <li>▪ Company – 1,250 penalty units (\$225,000)</li> </ul>
<p><b>Foreign person fails to comply with a condition of approval</b></p>	<p><b>Increased Criminal Penalty</b></p> <p>Maximum criminal penalty of</p> <ul style="list-style-type: none"> <li>▪ Individual — 750 penalty units (\$135,000) or 3 years imprisonment.</li> <li>▪ Company — 3,750 penalty units (\$675,000).</li> </ul> <p><b>Civil penalty</b></p> <p>Maximum civil penalty of:</p> <ul style="list-style-type: none"> <li>▪ Individual - 250 penalty units (\$45,000)</li> <li>▪ Company – 1,250 penalty units (\$225,000)</li> </ul>

### Option 6: Information campaign

15.139 This option considers the Government conducting a targeted communication campaign to inform the community about the benefits of foreign investment and to outline how the foreign investment framework screens proposed investments to protect Australia's national interest.

### Option 7: Increased and improved ABS survey of agricultural land

15.140 This option proposes that the ABS be tasked to conduct a census of the land and water holdings of all foreign owners every two years. This option would seek to address the concerns about the lack of data about the level of foreign investment in Australian agricultural land and businesses.

15.141 A biennial ABS census of all foreign-owned land and water holdings would operate similarly to the existing ALWOS census surveys, but would take place every two years.

15.142 The ABS has existing procedures for the handling and protection of private and commercially sensitive information, and established mechanisms for maximising compliance and data integrity.

15.143 The results would be published in accordance with the *Census and Statistics Act 1905*.

### **Option 8: Modernising and simplifying the foreign investment framework**

15.144 While some amendments have been made over time to respond to particular developments and priorities, the Act has not undergone a major update since it was introduced in the 1970s.

15.145 Further, the rules underpinning the framework are overly complex and do not promote investor certainty. There are also asymmetrical screening outcomes depending on the nature of the target or how the transaction is structured.

15.146 The Government proposes a number of changes to the screening framework's legislation and associated regulations to modernise and simplify the system and remove less sensitive transactions that are unlikely to raise national interest concerns. There would also be drafting changes to simplify the current Act and better reflect administrative practices.

15.147 The proposed changes would reduce compliance costs for both investors and the Government. The measures are also consistent with the Government's deregulation commitment and commitment to create an investment environment that is open for business. They would largely offset the increased regulatory burden that would arise from lowering the screening thresholds for agricultural investments, introducing a stocktake requirement for agricultural land register and introducing application fees.

15.148 The proposed options are set out in the Options Paper on Modernising Australia's foreign investment framework<sup>59</sup> (Modernisation Paper) and include:

- incorporating the additional Policy only requirements into the legislative framework;

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<sup>59</sup> *Modernising Australia's foreign investment framework*, <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework>.

- addressing legal risks to the framework by legislating to allow applicants to voluntarily agree to extend the screening period, allow the Treasurer to impose conditions if foreign investors fail to notify, and issue exemption certificates with legally enforceable conditions; and
- amending the legislation so that it equally applies irrespective of the transaction structuring.

15.149 Other options include:

- increasing the control threshold for a single foreign person from 15 to 20 per cent;
- allowing entities with their primary listing on an Australian securities exchange to disregard non-substantial holdings when applying the foreign person definition (that is, holdings below the 5 per cent market disclosure trigger); and
- abolishing the special screening requirements for heritage listed commercial developed property.

15.150 The Modernisation package was put forward in the Modernisation Paper which went out for public consultation between 18 May 2015 and 29 May 2015. As a result of submissions received in the consultation process, a revised package was agreed by the Government and is available on the FIRB website at: [http://www.firb.gov.au/content/modernisation\\_package.asp](http://www.firb.gov.au/content/modernisation_package.asp). The package will be implemented through the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and its associated regulations.

## **Cost benefit analysis of each option/Impact analysis**

### **Options with no regulatory impacts**

15.151 The following cost benefit analysis examines the proposed changes to the foreign investment framework. Treasury's assessment is that the impact of application fees, increased penalties and enhanced compliance and enforcement will not significantly reduce Australia's attractiveness as a desirable destination for foreign investment as investment decisions are based on a broad range of factors.

### **Options already in place**

#### **ATO to undertake screening and compliance**

15.152 The role of screening residential real estate applications and of compliance and enforcement of the foreign investment framework began moving to the ATO on 4 May 2015. Previously the Foreign Investment and Trade Policy Division in Treasury was responsible for screening all residential real estate applications, as well as all compliance and enforcement activities concerning the foreign investment framework.

15.153 The House of Representatives Standing Committee on Economics found that the Foreign Investment and Trade Policy Division was under-resourced to undertake its compliance and enforcement activities. The Government proposed in its Options Paper that the compliance and enforcement functions be moved to the ATO, by establishing a new, dedicated compliance and enforcement area. The ATO already undertakes a significant number of compliance and enforcement activities as part of administering the tax system. While this is a new function, the ATO has staff with specialist skills and experience, as well as systems, to more effectively undertake such activities.

15.154 Submissions to the Options Paper generally supported improved compliance and enforcement of the rules. However, stakeholders noted the need for caution in striking the right balance between increased compliance and not deterring foreign investment.

15.155 As the ATO has taken over activities which already existed (or should have been undertaken to ensure compliance with the rules) there is no regulatory impact as a result of the move to the ATO. Consequently, no regulatory impact analysis has been done on this option.

## **Options under consideration**

### **Option 1: No change**

15.156 Leaving the foreign investment screening framework as it stands is unlikely to address broader concerns about its integrity in protecting Australia's national interest and the ability of all investors to be able to easily understand it.

15.157 In relation to foreign investment in residential real estate, Option 1 is unlikely to address concerns that the framework is not being enforced and may therefore cause public confidence in the framework to deteriorate further. In relation to foreign investment in agriculture, leaving the framework as it is would not address concerns about the reliability of data on the level of foreign investment in agriculture or that investments are being appropriately screened to ensure they are in Australia's national interest. This may ultimately undermine confidence

in the framework, leading to calls for foreign investment restrictions (as opposed to a screening based system) which would be detrimental to the economy.

15.158 Further, under Option 1, no application fees would be introduced for foreign investment proposals. Consequently, there would be no additional revenue to support increased compliance and enforcement activities, or improvements in IT systems to capture additional data to identify non-compliance.

15.159 Consequently, under Option 1, there would be no changes to current arrangements, and hence no additional regulatory impact.

### **Option 5: Penalties and enforcement**

15.160 This option proposes introducing a civil penalty regime, supported by an infringement notice regime, as part of the regulatory framework for foreign investment. Currently, only divestment orders and criminal penalties apply for breaches of the Act. Divestment orders would still be available, but in addition the Government would have the option to pursue either criminal penalties or civil penalties through the courts.

15.161 The House of Representatives Standing Committee on Economics report recommended that the Government introduce a civil penalty regime for breaches of the foreign investment framework as it applies to residential real estate.

- At hearings for the House of Representatives Standing Committee on Economics some stakeholders expressed the view that the current penalty regime could be extended to third parties who have intentionally broken the law.

15.162 The Options Paper recommended the introduction of civil penalties and infringement notices for residential real estate, agriculture, business and commercial real estate applications. It also sought feedback on whether the existing criminal penalties should be increased.

15.163 Submissions generally support the proposed civil penalty regime for residential real estate applications and the magnitude of the proposed penalties more broadly. Third parties such as conveyancers and real estate agents are opposed to being made subject to the proposed requirements and penalties for their enabling of non-compliance.

- Some stakeholders supported the proposed civil penalties being set at the rate of 10 per cent. The Law Council considered that the existing framework may need to be updated; however, any introduction of a new penalty regime should not occur without further assessment. The

Law Council considered the proposed penalty rate of 25 per cent of the property value was high. The Housing Industry Association supported the framework proposed in the Options Paper, but for any new offences, it stated that it is opposed to strict liability provisions which do not require intent.

15.164 There were mixed views from stakeholders on whether civil penalties and infringement notices should apply to agriculture, business and commercial applications.

- The Law Council did not support the application of civil penalties or infringement notices to agriculture, business and commercial real estate applications as they consider there is no evidence of widespread non-compliance. However, others supported the expanded penalty regime noting that those who comply have nothing to be concerned about.

15.165 In general, it is the size and gravity of a penalty that acts as a deterrent effect. To date the penalties available have only been criminal, and there have been very few successful prosecutions. A civil penalty has a lower burden of proof in order to take a matter before a court. The proposed penalties also mean that not only will someone who breaches the rules be more likely to be taken to court, the potential financial penalty that the judge could impose would be greater. It is considered that higher penalties, in conjunction with ATO enforcement of the rules, will act as a significant deterrent to those investors considering breaching the rules, and thereby result in better compliance with the framework.

15.166 This option would simply introduce a civil penalty regime to supplement the increased existing criminal penalties for breaches of the framework and would not impact people who are already compliant with the framework. Accordingly, there is no regulatory impact from this option.

#### **Option 6: Information campaign**

15.167 This option considers the Government conducting a targeted communication campaign to inform the community about the benefits of foreign investment and to outline how the foreign investment framework screens proposed investment to protect Australia's national interest.

15.168 An information campaign could inform the community about the benefits of foreign investment for the Australian economy. However, an information campaign is unlikely to address the community concerns with the current foreign investment framework. An information

campaign is also unlikely to meet community expectations due to the lack of data available on the extent of foreign ownership or address concerns that foreign investors are circumventing the foreign investment framework, particularly in relation to residential real estate.

15.169 As the community would simply receive information and not be required to do anything to receive the information, there is no regulatory impact from this option.

### **Option 7: Increased and improved ABS survey of agricultural land**

15.170 This option would propose that the ABS be tasked to conduct a census of the land and water holdings of all foreign owners every two years. This option would seek to address the concerns about the lack of data available around the level of foreign investment in Australian agricultural land and businesses.

15.171 Having the ABS conduct a census of land and water holdings of foreign owners would largely replace the need for a land register but is unlikely to provide as comprehensive a picture as the land register. This is because a biennial survey would only provide data every two years whereas a register will be updated each time a property is bought or sold. There are also limited options available to ensure that investors comply and accurately answer the survey questions, whereas penalties would be available to those who do not comply with the register requirements.

15.172 If the additional questions formed part of an existing collection process, they would be negligible in terms of adding any time to the survey. Consequently, there is no regulatory impact from this option.

15.173 However, the ABS has already released two ALWOSs. While they indicated that the level of foreign ownership is small, these surveys have not reduced community concern around foreign investment because they are not perceived to be comprehensive.

## **Options with regulatory impacts**

### **Options already in place**

#### **Agricultural land threshold changes**

15.174 As noted above in paragraph 15.96, the Government chose to reduce the screening threshold for agricultural land from \$252 million to \$15 million (cumulative) from 1 March 2015.

15.175 The lower threshold provides for more screening of proposed investments in agricultural land, introducing a new compliance cost on non-government foreign investors seeking to purchase agricultural land



in Australia. This is because the threshold for acquisitions of most agricultural land acquisitions was \$252 million (those not currently captured as ‘urban land’, for which all investments are screened from dollar zero). Consequently, previously unscreened acquisitions (everything between the current and proposed thresholds) are now captured.

15.176 Reducing the screening threshold has resulted in more applications being screened. This increases the possibility that a case could be deemed to be against the national interest or have conditions imposed. However, past history demonstrates that very few investment proposals are prohibited or subject to conditions. The screening arrangements ensure that Australia gains from the benefits of foreign investment by allowing the investment to proceed in most cases (as opposed to a system that imposes outright restrictions on the level of foreign investment which may prevent valuable investments) while ensuring that community concerns can be taken into consideration.

15.177 It is too early to conclude whether lowering the screening threshold has had an impact on investment activity. However, any impact is likely to be marginal. While it has been argued that the new threshold increases the overall complexity of the framework, with the introduction of different thresholds for different business activities (agriculture) and different countries (with thresholds varying on the basis of free trade agreement commitments), most investors acquiring more than \$15 million of agricultural land will be sophisticated investors who will typically engage professional advice (including from medium to large law firms), regardless of whether foreign investment approval is required.

15.178 The drivers for the potential increase in the regulatory burden as a result of implementing either of the proposed options include increases in compliance costs for foreign investors (costs incurred in applying for foreign investment approval) and administration costs (costs incurred by Treasury in providing the FIRB secretariat and the Government in administering the screening regime).

15.179 Potential compliance costs include professional advisory costs (such as legal and valuation costs) and the opportunity cost of time the investor spends in complying, including in relation to the statutory period for considering proposals caught by the Act, the use of interim orders to extend the statutory period and possibly further time where necessary for proposals considered under the Policy or otherwise withdrawn and resubmitted. There is also, potentially, a delay cost on the seller.

15.180 The likely compliance costs are somewhat reduced by extending exemptions which currently apply under the foreign investment screening framework to agricultural land (as proposed under Option 8). For example, extending annual program arrangements to agricultural land transactions would help minimise compliance costs for foreign investors that regularly acquire small interests in agricultural land (for example, acquiring easements for pipelines).

15.181 Community stakeholders are expected to benefit from the additional scrutiny and transparency around foreign investment in agricultural land, addressing increasing concerns that this investment is contrary to Australia's national interest. To the extent that additional screening increases community confidence in foreign investment, investors may benefit from an improved investment environment.

- However, it is possible that even with increased transparency some sections of the community that have general concerns with foreign investment will not find this reform addresses their concerns.
- Equally, those that are strongly supportive of foreign investment may view this reform as restricting and discouraging foreign investment.

15.182 An analysis of the potential compliance costs from a \$15 million threshold is provided at [Attachment A](#). Assuming the average compliance cost per proposal is \$10,000 per business per application (as a result of professional advisory fees), this is unlikely to represent a significant cost for a foreign investor in deciding whether to proceed with an agricultural land investment.

- Analysis was done on the average application cost with a range between \$1,000 and \$22,000 depending on the complexity of the case.
- As agricultural land applications could vary in complexity but are likely to be of average complexity, a median number of \$10,000 was chosen.

15.183 The number of new business applications that would be caught by the reduced \$15 million threshold, is estimated to be 120 per annum.<sup>60</sup> Assuming the average \$10,000 compliance cost per proposal,

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<sup>60</sup> Since 1 March 2015, the screening threshold for foreign purchases of agricultural land has been \$15 million cumulative. As a result of this lower threshold, around an additional 30 cases have been caught. This figure was extrapolated to reach the 120 estimate.

this results in an estimated total compliance cost of \$1.2 million per year.

15.184 The chosen definition of agricultural land may also impact on the number of additional cases screened.

### **Undertake a stocktake of agricultural land and introduce a foreign ownership register of all land**

15.185 A register of foreign holdings of agricultural land began operating on 1 July 2015 while systems are put in place with States and Territories to capture foreign ownership of all land.

15.186 The register will be populated by a stocktake of foreign holdings of agricultural land and notifications of new acquisitions of agricultural land.

15.187 Foreign persons are required to advise the ATO: of any new interests that they acquire in agricultural land; if a foreign person holds or ceases to hold an interest in that land; if a holder becomes a foreign person; and if a foreign person ceases to be a foreign person for the purposes of the Act.

15.188 The creation of a national register will assist in addressing the concerns expressed by the community, the House of Representatives Standing Committee on Economics and the Agricultural Competitiveness Green Paper that there is no definitive data set on how much Australian land is in foreign hands. The absence of this data limits the ability of the Government to undertake compliance and enforcement activities.

15.189 The Options Paper sought views on the creation of a national foreign ownership of land register to address these concerns. Submissions presented a range of views, but in general there was broad support for the creation of a land register.

15.190 Most submissions supported, in principle, the creation of a non-public database for the purpose of administering, monitoring and ensuring compliance of foreign investment in residential real estate. The submissions were also supportive of using existing data sources, such as State and Territory land title office data.

- One stakeholder suggested that an agricultural land register should be implemented as a one step process through the State and Territory land titles offices, with transitional provisions to require notification to the titles offices of foreign ownership of existing landholdings.

- The Business Council of Australia supported the proposal to establish an agricultural land register, with information being drawn from existing processes and databases, and not imposing an additional cost on business.
- The Law Institute of Victoria also supported using existing State and Territory data, and that relevant land forms should be amended to require declarations of residency. It suggested that any purchaser of a property should be required to personally sign a declaration of residency.

15.191 Submissions from the community highlighted concerns about whether foreign investment is being appropriately screened. This is consistent with the findings of the House of Representatives Standing Committee on Economics report that FIRB has not been undertaking a sufficient level of compliance, as would be expected.

15.192 Without a stocktake of foreign ownership and ongoing data collection, the Government risks further undermining community confidence in the framework.

- It is possible that even in publishing aggregated data this may not address entrenched views of a portion of the community that does not support foreign investment in any form. This section of the community may want to see greater transparency at the individual transaction level. The reduction in the thresholds for agricultural land and agribusiness will provide some reassurance to the community that proposals are being appropriately considered as to whether they are against the national interest.

15.193 In working with the States and Territories to leverage their existing processes and data the Government is seeking to ensure it does not create any duplication.

15.194 Once systems are established, the data collected through the process would then be transferred to the ATO to populate the national register. The ATO would then be responsible for publishing aggregated data on foreign ownership of land in Australia.

15.195 As noted in paragraphs 15.32 and 15.33 there are significant community concerns around investment in Australian agricultural as well as more broadly. The stocktake that is proposed under this option would address these concerns, particularly as part of populating a national register. In its submission to the Options Paper the National Farmers Federation said that a foreign ownership register of agricultural land is an important step in responding to community concerns around investment in Australian agriculture.

15.196 Similarly, the Chamber of Commerce and Industry Western Australia in its submission supported a register of foreign ownership of agricultural land as part of informing the debate on foreign investment and providing useful data.

15.197 A stocktake of existing foreign ownership holdings of agricultural land would result in a minor regulatory impact for affected persons and entities. According to the ABS ALWOS there are an estimated 350 businesses in Australia that currently own agricultural land. It is estimated that these entities may spend an additional two hours reporting to the ATO on their current holdings of agricultural land. The total compliance cost is estimated at \$131 each<sup>61</sup>, with the total compliance cost for all estimated 350 entities being \$46,470 for the year in which they are required to notify.

15.198 Overall, this option is broader than the Government's original election commitment to establish a register of foreign ownership of agricultural land.

15.199 The House of Representatives Standing Committee on Economics recommended:

*...the Government, in conjunction with States and Territories, establish a national register of land title transfers that records the citizenship and residency status of all purchasers of Australian real estate. This information should be accessible by relevant agencies from a single database.*<sup>62</sup>

15.200 The House of Representatives Standing Committee on Economics found that this title transfer data would contribute to compliance and the enforcement of the existing rules.

15.201 This option seeks to address community concerns about the reliability of data on foreign investment in residential real estate, and increase the data available on foreign ownership of agricultural land. The national register of foreign ownership of all land titles would provide a clearer and more comprehensive picture of foreign ownership of all Australian land.

### **Options under consideration**

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<sup>61</sup> This estimate is based on the additional time spent reporting on current ownership of agricultural land and the associated labour costs.

<sup>62</sup> *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page xviii.

### **Option 2A and 2B: Introduce a clearer definition of agricultural land**

15.202 Stakeholders that made submissions to the Options Paper supported the Government introducing a clearer definition that better captures ‘productive’ agricultural land. While few stakeholders provided specific suggestions regarding the proposed definition, some suggested changes to (rather than the complete removal of) the ‘wholly and exclusively’ aspect of current ‘rural land’ definition, while others noted that the definition should focus on reasonable potential agricultural land use rather than past activity. The options considered in this Regulation Impact Statement were developed in recognition of this feedback.

- It is acknowledged that there will be a transition as foreign investors that regularly deal with the framework seek to understand the change.

15.203 A clearer definition that better captures agricultural land that is used for productive purposes rather than the broader rural land definition will better target land used or that could reasonably be used for primary production purposes.

15.204 The choice of agricultural land definition would affect the regulatory impact of any threshold implementation. A definition based on ‘rural land’ (option 2A) unambiguously increases screening of agricultural land investments that are exempt under the \$252 million threshold which applied until 1 March 2015. Agricultural land investments that are ‘rural land’ are therefore more likely to be screened, whereas agricultural land investments that currently meet the definition of ‘urban land’ (that is, land that is not wholly and exclusively used for a business of primary production) would continue to be screened from dollar zero.

15.205 It is not possible from available data to differentiate the impact of Options 2A and 2B. The estimates at [Attachment A](#) are based on the ABS definition of agricultural land, which is limited to businesses owning or operating land, or water entitlements used for agricultural activity. This includes businesses that conducted agriculture as a primary or secondary activity as well businesses that owned land or water entitlements but were not active in agricultural production, and excludes the processing and downstream transformation of agricultural goods (manufacturing). In this regard, the ABS data is a reasonable approximation but captures a broader concept of agricultural land than either Option 2A or 2B.

### **Option 3: Introducing a lower screening threshold for agribusiness**

15.206 Options 3B and 3C would provide for more screening of proposed foreign investment in agribusiness, introducing new compliance costs on non-government foreign investors seeking to

purchase agribusinesses. Option 3A would retain the status quo with respect to screening of agribusiness beyond the farm gate.

15.207 Options 3B and 3C would be expected to involve similar additional cases screened and therefore similar compliance costs. Option 3B is limited to fewer sectors but may capture some businesses whose income is not predominantly derived from primary production businesses, whereas Option 3C is not limited by sector but by income.

15.208 The additional proposed investments captured by foreign investment screening would be subject to the Treasurer's powers to approve, reject or impose conditions upon to ensure the proposed investment is not contrary to Australia's national interest. While proposals are rarely rejected and conditions are infrequently imposed, the Treasurer would continue to have this discretion.

15.209 Reducing the screening threshold will result in more applications being screened than now. This increases the possibility that a case could be deemed to be against the national interest. However, past history demonstrates that very few investment proposals are prohibited. The screening arrangements also allow for conditions to be attached to an approval to ensure that Australia gains from the benefits of foreign investment while ensuring that community concerns can be examined or taken into consideration.

15.210 Stakeholders consulted on the Options Paper were divided on the potential scope of an agribusiness definition. For example, some submissions supported a narrow definition of agribusiness (within the 'farm gate'), whereas others supported a broader definition (beyond the 'farm gate').

15.211 Where stakeholders supported a definition that goes beyond the 'farm gate', they expressed concern that the ANZSIC Codes do not provide a sufficient mechanism for capturing businesses with significant links to primary production. While the Codes adequately capture certain value chain activities that could be considered agribusinesses, they do not subcategorise certain subsectors (such as manufacturing, wholesaling and transport) as agriculture related.

15.212 The consistent concern raised was that in the absence of further defining 'agribusiness' within particular sectors to ensure consistency and specificity across the Codes, a Codes-based definition would capture too many businesses not traditionally considered as agribusinesses.

15.213 Alternative approaches to the ANZSIC codes suggested by stakeholders sought to capture businesses that have significant control

over or input into the agricultural value chain. One confidential submission suggested defining agribusiness as a chain of industries directly involved in the production, transportation or provision of agricultural commodities. The options considered in this Regulation Impact Statement were developed in recognition of this feedback, noting that using the agricultural value chain provides a viable alternative to a sector based definition.

15.214 The introduction of a \$55 million screening threshold would (on balance) increase the overall complexity of the framework, with the introduction of different thresholds for different business activities (agribusiness, including vis-à-vis primary production businesses within the farm gate) and investments from different countries (with thresholds varying on the basis of free trade agreement commitments). While this may lead to costs to investors in having to identify if the target investment requires foreign investment approval, most investors acquiring more than \$15 million of agricultural land will be sophisticated investors who will typically engage professional advice (including from medium to large law firms), regardless of whether foreign investment approval is required.

15.215 The Business Council of Australia in its submission said there should be no new threshold for agribusiness *'because it increases costs, brings uncertainty and leads to a chilling effect on investment'*.

15.216 However, as noted in paragraphs 15.8 and 15.9 Australia's foreign investment framework is very open to foreign investment, and applications are only rejected if they are found to be contrary to the national interest. Since 2001, only three foreign investment proposals have been rejected.

15.217 The drivers for the potential increase in the regulatory burden as a result of implementing Options 3B or 3C include increases in compliance costs for foreign investors (costs incurred in applying for foreign investment approval) and administration costs (costs incurred by Treasury in providing the FIRB secretariat and the Government in administering the screening regime).

15.218 Potential compliance costs include professional advisory costs (such as legal and valuation costs) and the opportunity cost of time the investor spends in complying (including in relation to the statutory period for considering proposals caught by the Act, the use of interim orders to extend the statutory period and possibly further time where necessary for proposals considered under the Policy or otherwise withdrawn and resubmitted). There is also, potentially, a delay cost on the seller.



15.219 Conversely, increasing scrutiny of foreign investment in agribusinesses may improve community and government understanding of investment flows into the agricultural sector. Community stakeholders are expected to benefit from the additional scrutiny and transparency around foreign investment in agricultural land, addressing increasing concerns that investment is contrary to Australia's national interest. To the extent that additional screening increases community confidence in foreign investment, investors may benefit from an improved investment environment.

15.220 Analysis of the potential compliance costs from a lower screening threshold for agribusiness is provided at [Attachment A](#). It estimates that the regulatory impact per agribusiness application to be \$10,000. As most agribusinesses tend to be larger if they are of interest to a foreign investor we have assumed all applications are from businesses.

- The cost of \$10,000 per application was chosen for the same reasons in paragraph 15.181, as agribusiness applications are considered to be of medium complexity.

15.221 The number of anticipated additional agribusiness applications Treasury would receive each year is five.

- This was derived from the total number of ASX listed and non-listed public and proprietary Australian-owned agricultural businesses with market value between \$55 million and \$252 million as at 1 December 2014 equalling 380 companies. It is estimated that 10 per cent of these companies would be sold each year, with 20 per cent of those sold to a foreign entity.

15.222 Accordingly, the total compliance cost of introducing a \$55 million threshold for screening of agribusiness is estimated at \$50,000 per year.

15.223 It is not possible from available data to differentiate the impact between Options 3B and 3C. The above estimates are based on a sectoral based analysis of ASX data, which is most similar to the ANZSIC Codes approach under Option 3B but far from perfectly comparable. The definition would necessarily exclude businesses captured under Option 3C that predominantly source their income from primary production business commodities but are otherwise classified in non-agriculture related sectors (for example, transport and wholesale).

#### **Option 4: Introduction of application fees**

15.224 Currently, no fees are imposed as part of the foreign investment application process. This option considers introducing application fees on foreign investment proposals.

15.225 The House of Representatives Standing Committee on Economics report recommended that the Government apply an administrative fee to the current screening for all foreign purchases of residential real estate to fund compliance and enforcement activities. It noted that level of the fee should be such that it does not significantly deter future foreign investment in property. It also found that a fee regime would not only provide valuable new resources for compliance activities but also contribute greatly to data collection on completed purchases of properties by foreign investors.<sup>63</sup>

15.226 The Options Paper suggested a fee be imposed on all foreign investment applications – both for residential real estate or land proposals and business applications.

15.227 The majority of stakeholders accepted that introducing fees is necessary to fund additional compliance and enforcement measures and desirable that foreign investors should pay their fair share of the costs. However, they argue that fees should reflect a reasonable approximation of costs rather than be used to raise revenue, with the proposed fees on business applications attracting the most concern for appearing excessive. There were also some specific concerns regarding the proposed treatment of multiple applications for an individual investment and uncapped fees for certain investment types, which were seeking to avoid the potential for duplicate and disproportionate fees.

15.228 Submissions made by individuals generally indicated that the application fees should be higher than what was proposed in the Options Paper. For residential real estate applications, a number of submissions suggested a different level of fee be applied between established and new property, due to the lower perceived consequence of non-compliance in new property, and therefore the lower cost of resourcing compliance and enforcement activities for new properties.

15.229 A fee distinguishing between established and new residential property would provide a clear message to foreign investors that the Government's foreign investment policy as it applies to residential real estate is focused at increasing the housing supply. However, it would place a disproportionate regulatory burden on temporary residents who are often encouraged to participate in the Australian economy (for example, student visas) over investors.

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<sup>63</sup> *Report on Foreign Investment in Residential Real Estate*, House of Representatives Standing Committee on Economics, 27 November 2014, page 37.

15.230 For instances where a foreign investor is seeking multiple approvals (for example, a foreign person bidding at multiple auctions to buy property), it is proposed that a general approval would be given to the foreign investor to participate in auctions to purchase one property within a specified area for a period of six months. This would alleviate the need for individual foreign investors to pay multiple application fees.

15.231 This is appropriate where a foreign person is in the unique competitive environment of an auction. Sales of residential real estate by a negotiation or 'for sale' arrangement are typically subject to the purchaser receiving approval under the Act should it be required. It would be expected that such arrangements would continue.

15.232 In the case of business applications, submissions to the Options Paper from businesses and peak bodies were generally unsupportive of an application fee. Those who acknowledged the need for fees indicated that they should be consistent with cost recovery.

15.233 The Business Council of Australia opposed the proposed fees stating that they would deter investment.

15.234 The National Farmers' Federation said that they considered the proposed fees to be too high and would act as a deterrent on foreign investment, and that any fees should be consistent with the Government's Cost Recovery Guidelines.

15.235 Some stakeholders raised concerns around the proposal to introduce an upfront fee on advanced off-the-plan certificates and the potential for this cost to be passed on to domestic purchasers.

15.236 This option proposes, as set out in Table 15.2, that for developers seeking an advanced off-the-plan certificate they would pay an upfront application fee of \$25,000 to cover the cost of administration.

- An advanced off-the-plan certificate would be provided on condition the developer reports on six monthly basis from the date of the certificate and makes a payment based on the number of properties purchased by foreign persons in the preceding six month period. Payment would then be based on the sale price of individual dwellings.
- This should alleviate the concerns of stakeholders that fees would be passed on to domestic purchasers that do not need foreign investment approval.

15.237 CPA Australia said that the application fees should balance the cost of funding new compliance and enforcement activities while preserving Australia's reputation as a desirable investment destination.

15.238 The modelling and analysis that has been done internationally has found that there is a varying impact of taxes on decisions of companies to invest in particular country, and that while taxation matters, it is not the most important factor.

15.239 The Australian Productivity Commission said in 2013 that:

*Taxation matters for FDI, but it is not the most important factor. There is a complex interaction between the impact of tax exemptions, tax planning strategies or other sources of competitive advantage, such as efficient tax administration and low compliance costs, as well as other regulatory arrangements or location advantages of investment in a particular country.*<sup>64</sup>

15.240 The OECD in 2007 in relation to the impact of taxation on foreign direct investment decisions also said:

*...one might expect that the sensitivity of FDI to taxation would vary and depend on host country conditions and policies (including the level of corporate tax rates), types of industries/business activities covered, the time period examined, and other factors.*<sup>65</sup>

15.241 The academic literature indicates that charges or taxes, such as fees, can reach a point where they will weigh more in a foreign investment decision than they might otherwise for a comparable investment in a comparable jurisdiction.

15.242 As the proposed fees are greater than the costs of administering the system, they could be viewed as potentially reducing Australia's attractiveness as an investment destination. However, the decision to invest in a particular country is based on a wide range of factors. Treasury's assessment based on these findings is that an application fee of less than 1 per cent of the value of the investment is unlikely to be considered high enough to result in a material behavioural impact on foreign investment decisions.

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<sup>64</sup> *The use and abuse of indicators on foreign ownership restrictions and taxation to assess the investment climate*, Australian Productivity Commission 2013 (from Seminar and Policy Dialogue on Enhancing the Investment Environment in APEC and ASEAN economies), <http://mams.rmit.edu.au/w4ge5vn9eiu5.pdf>, accessed 8 April 2015.

<sup>65</sup> *Tax Effects on Foreign Direct Investment – No. 17: Recent Evidence and Policy Analysis*, OECD, 2007, <http://www.oecd.org/ctp/tax-policy/39866155.pdf>, accessed 8 April 2015.

15.243 Applicants would be required to pay the fee before their foreign investment application is processed, avoiding the need for debt recovery mechanisms. The Act would need to be amended so that the 30 day statutory time period to assess an application commences only after payment has been received.

- This proposal also includes legislating for the Treasurer to have the power to waive the fee, where it is considered to be in the national interest.
- This would likely only be exercised in rare situations. For instance, to ensure that only one application fee is paid in situations where substantively the same proposal is submitted a second time.

15.244 Regulatory costs from this option result from the additional time taken on the current application form to process the payment of the fee and to understand why the fee is being charged.

15.245 For individuals it is expected that this would add no more than 10 minutes to the current FIRB process. Accordingly, the estimated annual regulatory cost for individuals is \$108,539.

- This is based on 20,405<sup>66</sup> applications to Treasury each year, with an expected annual growth rate of 3 per cent.

15.246 For entities it is estimated they will spend about an additional 20 minutes per application in processing the fee. This time above the individuals is attributed to them possibly requiring feedback from FIRB on what the appropriate level the fee should be, as it will be dependent on the type of investment proposal. It is estimated that around 500 entities per annum will be required to pay the fee to the ATO. The total regulatory cost is therefore estimated for entities is \$8,181 per annum.

15.247 The total regulatory cost for this option is therefore estimated to be \$116,720 per annum.

15.248 The revenue from application fees would be used to improve service delivery to foreign investors and would help to offset the direct and indirect costs of managing the foreign investment regime. This includes the enhanced compliance and enforcement regime for the foreign investment in residential real estate and the establishment of a

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<sup>66</sup> The number of applications received from individuals in 2013-14.

national register. The ATO will be funded to conduct more detailed audits and ensure proper compliance with the law.

- Improved IT infrastructure and support for compliance and enforcement activities would allow for better capture of data and data-matching by the ATO. The ATO would also be able to match land title data from the States and Territories, taxpayer information, foreign investment approvals data and immigration movements to detect possible breaches.

### **Option 8: Modernising and simplifying the foreign investment framework**

15.249 The details of this option as set out in the Modernisation Paper available at

<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework>, seek to modernise and simplify the overall foreign investment framework.

15.250 Australia's foreign investment screening framework is designed to maintain a balance between welcoming much needed investment, protecting the national interest, and ensuring public confidence around foreign investment continues.

15.251 While the basic principles governing the framework are sound, the complex legislation underpinning the foreign investment framework has changed little since it was introduced in 1975. It does not promote investor certainty and has not been amended to take into account major changes in other corporate regulatory frameworks. This adds to complexity and the regulatory burden on all stakeholders.

15.252 Rewriting the Act will ensure that the drafting is up to date and as clear and simple as possible. This will make it easier for investors and stakeholders to understand and navigate the rules and consequently apply for approval.

15.253 Ensuring that the Act is brought into line with current regulatory frameworks, and to reflect current administrative practices and regulatory concepts, as well as for modern business and corporate finance practices, will improve foreign investor understanding about how the foreign investment framework fits within Australia's overall regulatory framework.

15.254 For those investors and professionals that are already very familiar with the current framework there would be a transition cost as they come to grips with the changes to the framework and the updated Act.

15.255 Modernising and simplifying the current framework would increase the efficiency of the system without impacting its national interest objectives. The legislative amendments needed to implement the proposed changes to the foreign investment framework provide an opportunity for this modernisation.

15.256 For some of the detailed changes the regulatory impact in terms of the number of cases removed cannot be easily quantified. Consequently, a conservative estimate of zero cases removed from the screening framework has been assumed. For those where the current data set makes it easier to estimate a number of cases removed from the screening process, it has been costed.

15.257 All of the detailed changes are assumed to affect only business applications under the framework. Accordingly the estimated cost saving per case removed from screening is assumed to be \$10,000 to reflect the varying complexity of cases.

15.258 The overall compliance cost saving per annum from Option 8 is estimated at \$1.5 million (based on an estimate of 150 cases being removed from the system).

## **Consultation**

### **Agriculture thresholds**

15.259 The development and implementation of the Government's commitments in relation to lowering agricultural land and agribusiness thresholds have been subject to broad stakeholder consultations over a sustained period beginning with the Coalition's Policy Discussion Paper on Foreign Investment in Australian Agricultural Land and Agribusiness in August 2012.<sup>67</sup>

15.260 Prior to the release of the revised Australia's Foreign Investment Policy on 1 March 2015, Treasury undertook targeted consultations with key legal stakeholders to ensure the proposed implementation of the \$15 million (cumulative) threshold for agricultural land was consistent with intended objectives.

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<sup>67</sup> This consultation paper can be found at [http://shared.liberal.org.au/Share/Foreign\\_investment\\_discussion\\_paper.pdf](http://shared.liberal.org.au/Share/Foreign_investment_discussion_paper.pdf).

15.261 Full public consultation was undertaken between 25 February 2015 and 20 March 2015 on definitions of agricultural land and agribusiness associated with implementing these thresholds. This was part of the Australian Government's Options Paper titled 'Strengthening Australia's foreign investment framework'.

#### **Non-agriculture elements of the reform package**

15.262 Full public consultation was undertaken between 25 February 2015 and 20 March 2015. The Australian Government released an Options Paper titled 'Strengthening Australia's foreign investment framework'.

15.263 The objective of consultation was to seek the views of stakeholders on options for reforming the foreign investment framework, and providing them with the opportunity to identify any key issues with the proposals.

15.264 There were 192 submissions received during the consultation process. The non-confidential submissions are available on the Treasury website. In addition, Treasury held targeted consultation with key stakeholders, including legal practitioners, institutional investors and industry bodies.

15.265 Most of the submissions from individuals argued against allowing foreign investment into Australia. While submissions from businesses, peak bodies, and law firms were generally concerned with maintaining an appropriate balance between integrity of the framework and not discouraging foreign investment.

15.266 As part of the day-to-day application of the foreign investment screening framework to foreign investment proposals, specific issues are identified and representations received from a variety of stakeholders, including umbrella organisations (for example, the Law Council of Australia), law firms and major Australian and foreign companies. In recent years, further targeted consultation with legal representatives has been undertaken as part of the annual updates to the Policy, including on specific issues.

15.267 Potential changes to the regime have also been identified or lobbied for through public reviews (for example, the Productivity Commission's Trade and Assistance Review 2012-13) and reports by umbrella organisations (for example, the Business Council of Australia's April 2010 report *Foreign Attraction: Building on Our Advantages through Foreign Investment*).

15.268 Australian government agencies were also consulted prior to the release of the Options Paper.



15.269 The Commonwealth is consulting with the States and Territories on developing a national foreign ownership of land register.

### **Modernisation package**

15.270 During consultation on the Options Paper, stakeholders were advised that the options for modernising the foreign investment framework would be subject to targeted consultation with legal practitioners and key stakeholders.

15.271 Full public consultation was undertaken between 18 May 2015 and 29 May 2015 on the Modernisation Paper. The paper can be found at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework>.

15.272 The objective of consultation was to seek the views of stakeholders on options to modernise and simplify Australia's foreign investment framework.

- There were 22 submissions received during the consultation process. Stakeholders were very supportive of the Government's commitment to simplify the framework and generally supported the options put forward as they reduce complexity and streamline existing processes.

15.273 Australian government agencies were also consulted on the Modernisation Paper.

### **Additional consultation**

15.274 Consultation on the Exposure Drafts of the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 and the Register of Foreign Ownership of Agricultural Land Bill 2015 legislation and explanatory material occurred between 6 July 2015 and 17 July 2015. There were 19 submissions received during the consultation process.

- Further public consultation on the regulations are planned to occur in September 2015.

## Preferred Options

### Agricultural investments

15.275 Community concerns about the level of foreign investment in agriculture have put pressure on the existing approach of maintaining consistent thresholds for business investments regardless of sector. The existing thresholds show Australia's non-discriminatory, non-preferential approach to business investment but do not sufficiently account for the relative significance of an investment in the agriculture sector where asset, business or land values are generally lower than they would be for others such as the mining sector.

15.276 The consultation process has shown community stakeholders are increasingly concerned that foreign investment in agricultural land is a concern and are supportive of additional scrutiny and transparency in this sector.

15.277 While consultations with the stakeholders identified the positive impact of foreign investment in the agricultural industry, the nature of the sector means that non-government investors are currently able to acquire a number of properties across the country to build up their business without scrutiny. The community is concerned that the current screening threshold only captures a small number of agribusinesses. Lowering the threshold for agribusiness investment and creating a cumulative threshold for foreign investment in agricultural land will result in an increase in the number of proposed agricultural investments being screened and help to restore confidence in the foreign investment framework.

- The available data suggests that the vast majority of agribusiness and farmland is Australian owned but without a comprehensive land register and ongoing census, it will be difficult to regain the confidence of the general public in this sector.

15.278 Stakeholders have indicated they support the Government introducing a clearer definition that better captures 'productive' agricultural land.

15.279 A national foreign ownership register that is considered comprehensive may help to improve community perceptions about the overall level of foreign ownership of Australian land.

15.280 The options already operating are:

- a lower, cumulative \$15 million screening threshold for agricultural land (or the extent allowed by trade commitments) for privately-owned investors; and
- a national foreign ownership register of all land and undertaking a stocktake of existing agricultural land holdings.

15.281 The preferred proposed options are:

- **Option 2B:** expanding the definition of agricultural land to ‘land used, or that could be reasonably used, for a primary production business’;
- **Option 3C:** introducing a \$55 million threshold for agribusiness (with thresholds varying on the basis of free trade agreement commitments) that captures primary production businesses and certain downstream manufacturing businesses beyond the farm gate;
- **Option 4:** introduction of application fees on all foreign investment applications as outlined in Table 2;
- **Option 5:** introducing a civil penalty regime including an infringement notice regime and increased criminal penalties; and
- **Option 8:** a modernised and simplified foreign investment framework.

15.282 While lower thresholds marginally increase the regulatory burden on investors and increase the cost of administering the regime, the Government must balance the concerns of the community around increasing foreign investment in agriculture against the increased compliance costs for both investors and Government.

15.283 Option 2B was chosen to better capture agricultural land that is, or could be, used for productive agricultural purposes. Option 2A would have resulted in a significant increase in the number of agricultural investments falling under the definition of urban land (that is, land that is not wholly and exclusively used for a business of primary production).

15.284 Introducing a screening threshold specific to agribusiness that captures certain downstream businesses beyond the farm gate will also deliver on the Government's election commitment to introduce a new \$55 million screening threshold for non-government investments in agribusiness. There were wide ranging views on the definition of agribusiness from the consultations. The proposed definition includes primary production businesses within the farm gate and certain downstream businesses (including the processing of meat, poultry, seafood, dairy, and fruit and vegetables, plus oil and fat, grain and sugar manufacturing) and should help to reassure the community that investments in these sectors are not contrary to our national interest. Option 3C was chosen over Options 3A and 3B based on stakeholder engagement.

15.285 The absence of available information on what foreign investors have purchased and how much Australian land is held by foreigners is undermining the integrity and public confidence of the foreign investment framework.

15.286 Having the ABS conduct a census of the land holdings of all foreign owners every two years may address some concerns regarding the lack of data about the level of foreign investment in Australian agricultural land and businesses but is unlikely to satisfy them all. Therefore, Option 7 is not recommended.

- The infrequency of data collection and the lack of information on the value of holdings limits the usefulness of this approach. The census is also based on a sample methodology and does not capture all foreign investments in land. Without a comprehensive register of all land, it would be difficult to fully evaluate how much land is being held by foreigners.

15.287 Establishing a foreign ownership register of all land and undertaking a stocktake of agricultural land may help to address concerns from the community that foreign investments are not being appropriately screened.

#### **Option4: Introduction of fees**

15.288 The preferred option is to introduce fees on all foreign investment applications as listed in Table 2. The fees will be used to improve service delivery for foreign investors and improve compliance and enforcement.

15.289 While concerns have been raised that the proposed fees may reduce Australia's attractiveness as a desirable destination for foreign investment, investment decisions are based on a broad range of factors. Treasury's assessment is that an application fee of less than 1 per cent of the value of the investment is unlikely to be considered high enough to result in a material behavioural impact on foreign investment decisions.

### **Option 5: Penalties**

15.290 The preferred option proposes the introduction of a civil penalty regime supported by an infringement notice regime, as part of the regulatory framework for foreign investment. Currently, only divestment orders and criminal penalties apply for breaches of the Act.

15.291 Consultation has shown community support for the proposed civil penalty regime for residential real estate applications and mixed views on whether civil penalties should apply to agriculture, business and commercial applications.

15.292 Community confidence in the level of compliance with the current penalty regime is lacking. Existing measures had previously been considered to be effective but the surge in investment in residential real estate, particularly in Sydney and Melbourne, has increased concerns that non-compliant investors are not being tracked and appropriately penalised.

15.293 The view put forward in some submissions is that there is a lack of evidence of non-compliance in agriculture, business and commercial real estate applications. This does not sufficiently justify not introducing civil penalties or infringement notices as those who are complying with the existing regime will not be impacted by the expanded regime.

15.294 The existing penalties available have only been criminal, and there have been very few successful prosecutions. A civil penalty has a lower burden of proof in order to take a matter before a court. The proposed penalties also mean that not only will someone who breaches the rules be more likely to be taken to court, the potential financial penalty could be both the sale of the property and up to 25 per cent of the purchase price or market value of the property. It is considered that these penalties, in conjunction with ATO enforcement of the rules, will act as a significant deterrent to breaching the rules.

### **Screening and compliance**

15.295 The preferred option has commenced and involves moving the role of screening residential real estate applications and undertaking compliance and enforcement of the foreign investment framework to the ATO.

15.296 The previous compliance regime largely relied on information provided to the 'dob-in' hotline and media reporting due to the fact that Treasury has limited access to the information sources that could be used to identify foreign purchasers who have purchased property without foreign investment approval.

15.297 The creation of a new, dedicated compliance and enforcement area within the ATO, which already tracks compliance of a range of property transactions, will streamline the compliance, investigation and enforcement activities in one location and provide the Government with sufficient data to track non-compliance and act accordingly.

15.298 Streamlining compliance and enforcement activities will lead to better tracking of non-compliant investors and should result in an increase in penalties handed out and help restore public confidence in the foreign investment framework.

### **Option 6: Information campaign**

15.299 An information campaign by itself is not considered sufficient to reduce community concerns around foreign investment and restore confidence in the foreign investment framework.

15.300 Measures relating to the land register, penalties, agribusiness and lower agriculture screening thresholds are aimed at improving the integrity of the foreign investment framework and reducing community concerns with the existing system.

15.301 The Government is considering the best approach to ensure that investors and their advisors are aware of their obligations and how to better inform the community about the benefits of foreign investment for the Australian economy.

15.302 Together, the new measures and information campaign will best address community concerns and provide advice to investors of their obligations under the framework.

### **Option 8: Modernising and simplifying the foreign investment framework**

15.303 The Government has committed to modernise and simplify the framework. Stakeholders were very supportive of this commitment to simplify the legislation and the options being considered.

- There is a strong expectation in the business community that adoption of the options outlined will reduce complexity and streamline existing processes.

15.304 The preferred package of modernisation options is that which was included in the consultation paper<sup>68</sup> with some minor refinements. This package includes:

- incorporating the additional Policy only requirements into the legislative framework;
- addressing legal risks to the framework by legislating to allow applicants to voluntarily agree to extend the screening period, allow the Treasurer to impose conditions if foreign investors fail to notify, and issue exemption certificates with legally enforceable conditions; and
- amending the legislation so that it equally applies irrespective of the transaction structuring.

15.305 These options increase the efficiency of the system without detracting from its national interest objectives.

15.306 They also largely offset the increases in regulatory burden resulting from increased screening of agricultural investments. This is due to the expected number of non-sensitive cases being removed from the framework through the modernisation process.

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<sup>68</sup> The paper can be found at <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Modernising-Australias-foreign-investment-framework>

## Implementation and evaluation

### Implementation

15.307 On 2 May 2015, the Government announced a package of reforms to strengthen the foreign investment framework. The reform package has six key elements, which will take effect on 1 December 2015 (unless otherwise stated):

- Stronger enforcement of the foreign investment rules by transferring all of the residential real estate functions to the ATO (between 4 May and 1 December 2015).
- Stricter penalties that will make it easier to pursue court action and ensure that foreign investors are not able to profit from breaking the rules. The Government also announced a reduced penalty period that applies until 30 November 2015 to encourage investors that have breached the rules to voluntarily come forward and sell their property.
- Application fees to improve service delivery and ensure that Australian taxpayers no longer have to fund the cost of administering the system.
- Increased scrutiny around foreign investment in agriculture.
  - From 1 March 2015, the screening threshold for agricultural land was lowered from \$252 million to \$15 million (cumulative).
  - A \$55 million threshold (based on the value of the investment) for investments in agribusiness will also be introduced to capture certain downstream activities with links to primary production.
- Increased transparency on the levels of foreign ownership in Australia through a comprehensive land register.
  - An agricultural land register with information provided directly to the ATO by investors commenced on 1 July 2015. Further information is available at [www.ato.gov.au/aglandregister](http://www.ato.gov.au/aglandregister).
  - The Government is in negotiations with the States and Territories to use their land titles data to expand the register to include all land.
- A more modern and simpler foreign investment framework.



15.308 The changes announced represent the most significant reforms to the foreign investment framework in forty years. They are designed to increase transparency, ensure a balance between welcoming foreign investment and providing appropriate safeguards to provide integrity in the system and ensure we retain public support for foreign investment that is in Australia's national interest.

15.309 A number of measures announced as part of the new policy have already commenced. These relate to a lower agriculture screening threshold, a reduced penalty period and the collection of data for the agriculture land register.

15.310 Legislation is required to legislate these measures and implement the remaining elements of the policy. The Government has set the start date of the majority of the policy measures as 1 December 2015. Legislation to implement these measures is currently before the Parliament.

<i>Date</i>	<i>Activity commencement</i>
1 March 2015	New \$15 million cumulative threshold for agricultural land screening
2 May 2015	Reduced penalty period began
1 July 2015	ATO started collecting data for agricultural land register
1 December 2015	Reduced penalty regime ends Application fees and civil penalties commence Residential real estate functions transferred to ATO Modern simplified <i>Foreign Acquisitions and Takeovers Act</i> (including new agricultural screening requirements) takes effect
1 July 2016	Register is expanded to include all land, using data obtained from the States and Territories

15.311 There has been extensive consultation between Treasury and the ATO to ensure both agencies understand the new policy and the associated responsibilities. This has been particularly important given the transfer of some functions from Treasury to the ATO.

- Consultation between Treasury and the ATO has also provided the opportunity to ensure systems and resources are established ahead of commencement of the measures.

15.312 The transfer of residential real estate functions to the ATO will improve compliance and enforcement; improving the integrity of the system. Additional resources have been provided to the ATO to undertake this responsibility as part of the 2014-15 Budget measure *Strengthening Australia's foreign investment framework*.

15.313 The Government will conduct an information campaign to ensure that the foreign investment framework is clearly understood by foreign investors. In addition to ongoing upgrades of the FIRB website, the Government will be launching an educational campaign to ensure that stakeholders have a thorough understanding of their obligations, allowing them to make required updates to their systems and processes ahead of new policy commencing on 1 December 2015.

- Various approaches have been taken to ensure the policy is communicated effectively and broadly, including engagement sessions with stakeholders (including the Property Council of Australia, Law Council and the Real Estate Institute of Australia), industry specific print media (for example industry targeted magazines and reports) and communications through international platforms.

### **Evaluation**

15.314 The policy is intended to improve compliance and enforcement and create a more modern and simplified system. The effectiveness of the chosen policy options to address these factors may be determined through a few mechanisms.

- Given one of the key objectives of the new system is to improve community confidence, it will be difficult to effectively evaluate the individual role this policy has had. However, greater compliance with the rules is likely to result in improved confidence and this is more easily assessed.

15.315 Higher levels of voluntary compliance may be an effective way to evaluate how well the penalties and enforcement practices are affecting investor behaviour. The ATO could collect this information through its existing practices of consulting with, and receiving feedback from, key stakeholders and users of the system. In this case, this would include real estate agents, lawyers and conveyancers.

15.316 An evaluation of how successful the policy and communication campaign has been could also include assessing the number of detected breaches of the system from ATO compliance activities. Detected breaches and media reporting of resulting action are likely to increase voluntary compliance.

15.317 Self-confessions and dob-ins are a measure of community engagement and confidence in the regulatory framework. The number of self-confessions of breaches and dob-ins can be collected, compared to the pre-announcement period and tracked over time.

15.318 Once the measure has been established for some time baseline levels of compliance may be developed. These could act as a useful long term tool to assess whether the measures are effectively addressing the objective of improving integrity in the system.

15.319 Industry feedback, as part of the day-to-day application of the framework to proposals, will be a good measure of the success of the policy, particularly in relation to the modernisation measures which are aimed at streamlining the process and reducing regulatory burden.

- Industry feedback through both formal and informal consultations has been incorporated into the proposed policy to improve its effectiveness and success of adoption.

15.320 It will also be important to consider whether the new measures have discouraged foreign investment in Australia. To ensure the policy provides the right mix of integrity and investment measures, the number of approvals granted could be analysed and compared to the growth rate prior to the commencement of these measures.

## Attachment A - Regulatory Burden

15.321 Treasury has estimated that this regulation results in average annual compliance costs of around \$0.05 million. This is outlined in the Regulatory Burden Cost Offset table provided below. The increased regulatory costs are partially offset by the regulatory cost reductions associated with a proposal to align the legal frameworks for personal and corporate insolvency practitioners.

**Table 15.5: Regulatory burden and cost offset estimate table**

Average annual regulatory costs (from business as usual)				
Change in costs (\$million)	Business	Community Organisations	Individuals	Total change in cost
<b>Existing measure: reduced agricultural screening threshold*</b>	\$1.2m			\$1.2m
<b>Option 2B: Changes to agricultural land definition</b> (associated regulatory costs are captured in the <i>reduced agricultural screening threshold</i> costs)	-	-	-	\$0m
<b>Option 3C: Introducing a screening threshold for agribusiness</b>	\$0.05m			\$0.05m
<b>Option 4: Introduction of application fees</b>	\$0.008m		\$0.108m	\$0.117m
<b>Option 5: Penalties and enforcement</b>	-	-	-	\$0
<b>Option 6: Information Campaign</b>	-	-	-	\$0
<b>Option 7: Increased and improved ABS survey of agricultural land</b>	-	-	-	\$0
<b>Option 8: Modernising and simplifying the foreign investment framework</b>	-\$1.5m			-\$1.5m

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<b>TOTAL</b>	-\$0.085m		\$0.137m	\$0.052m
<b>Cost offset from within the portfolio (\$ million)</b>	Business	Community organisations	Individuals	Total, by source
<b>Treasury</b>	-\$13.4m	-	-	-\$13.4m
Are all new costs offset?				
<input checked="" type="checkbox"/> Yes, costs are offset <input type="checkbox"/> No, costs are not offset <input type="checkbox"/> Deregulatory—no offsets required				
Total (Change in costs – Cost offset) (\$million) = -\$13.35m				
Note: A regulatory offset has been identified from within the Treasury portfolio, relating to the alignment of the legal frameworks for personal and corporate insolvency practitioners.				

**Costings assumptions:**

- The \$0.05 million figure is composed of the cost of implementing Options 3, 4 and the existing measures (\$1.55 million) and the cost savings (\$1.50 million) that would arise from the changes to the screening framework to modernise and simplify and remove some non-sensitive proposals (Option 8).
- Activities and purchases are typically made by businesses.
- The average compliance cost per proposal for agricultural land and for the proposals which would be removed from the screening framework was assumed to be \$10,000.
- Average number of business cases over two years was used to determine the cases removed from the screening framework.
- For the proposals which are to be removed from the framework adjustments have been made to the cost offset to take into account overlap between the various reforms proposed.



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