Chapter 3

Overview of the *Foreign Acquisitions and Takeovers Act 1975*

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The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides legislative backing for the Government's foreign investment policy. A copy of the Act is at **Appendix D**.

Introduction

The Act empowers the Treasurer to examine proposals by foreign persons:

- to acquire, or increase, a substantial shareholding in, or takeover an Australian business valued at more than $50 million, or $800 million for a US investor[1]; and

- to acquire interests in Australian urban land; and

The Act provides for the notification of proposals by the parties involved and for the prohibition of certain types of proposals that, in the judgment of the Treasurer, are contrary to the national interest. Where proposals coming within the scope of the Act are implemented without prior notification, and are subsequently found to be contrary to the national interest, the Treasurer may order divestment and the parties would be required to sell the assets.

Notification

Section 25 provides for the notification of proposals that come within the scope of the Act but which are not subject to compulsory notification (for example, off-shore takeovers, takeovers of businesses by purchase of assets, or acquisitions of shares in Australian companies that are less than a substantial shareholding).

Section 26 makes it compulsory for a foreign interest to notify a proposal to acquire, or increase, a substantial shareholding (that is, a holding by foreign persons of 15 per cent or more or by two or more persons of 40 per cent for more) of an Australian

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1 Under the Australia-United States Free Trade Agreement (AUSFTA), which came into effect on 1 January 2005, the general notification threshold is $800 million instead of $50 million, except in relation to acquisitions in prescribed sensitive sectors, or by entities controlled by a US government, where the threshold is $50 million. The US specific thresholds are to be indexed each year from 2006.

corporation, unless its total assets are below the general $50 million or US investor thresholds established under the Foreign Acquisitions and Takeovers Regulations (see **Appendix E**).

Section 26A makes it compulsory for a foreign interest to notify a proposal to acquire an interest in Australian urban land. The section does not apply if the proposed acquisition is exempt under the Foreign Acquisitions and Takeovers Regulations.

There are substantial penalties for non-compliance with the notification provisions of sections 26 and 26A.

Formal notification of a proposal under sections 25, 26 or 26A (that is, in accordance with the forms prescribed in the Foreign Takeovers (Notices) Regulations (refer to **Appendix E**) activates a time clock and, if the Treasurer does not take action within 30 days and notify the parties of this action within a further 10 days, the Treasurer loses the ability to either prohibit the proposal or to impose conditions. The normal 30 day examination period may be extended by up to a further 90 days by the issue of an interim order (sections 22 and 25(3) of the Act).

Examination

The Treasurer's powers to examine proposals (and to take action against them in certain circumstances) are contained in sections 18, 19, 20, 21 and 21A.

Section 18 deals with proposals involving the acquisition or issue of shares in companies which carry on an Australian business (unless the total assets are below the general $50 million and US investor thresholds. Where a proposal under section 18 would lead to a change in control of the company with the resultant control being foreign, and the Treasurer concludes that the proposal would be contrary to the national interest, the proposal may be prohibited by the issue of an order. The Treasurer's powers under the section apply irrespective of whether control is changing from Australian to foreign or from a foreign person(s) to another foreign person(s).

Sections 19, 20 and 21 confer upon the Treasurer essentially similar powers to section 18 but in respect of other kinds of takeovers. Section 19 deals with takeovers of businesses by the purchase of assets, section 20 with takeovers achieved by board representation arrangements or alterations of such constituent documents as the articles of association, and section 21 with takeovers implemented through the leasing or hiring of assets, management agreements or profit sharing arrangements.

Sections 18, 19, 20 and 21 also give the Treasurer the power to order the unwinding of a proposal if the proposal proceeded without prior notice and which the Treasurer subsequently found to be contrary to the national interest.

Section 21A empowers the Treasurer to examine acquisitions of interests in Australian urban land, to prohibit proposed acquisitions that would be contrary to the national

interest, and to order the divestment of interests in urban land that are purchased without prior notice and which the Treasurer subsequently concludes are contrary to the national interest.

As the definition of interests in Australian urban land is so broad (see section 12A), section 21A applies not only to direct purchases of Australian urban land, but also to the purchase of shares and units in companies and trusts that have more than half their assets in the form of Australian urban land. There is no threshold value for such companies and trusts.

Another feature of section 21A is that there is no limit (in either dollar terms or in terms of the proportionate interest in the whole property) on the size of examinable acquisitions. However, the regulations provide for an extensive range of exemptions for categories of urban real estate acquisitions (see the Foreign Acquisitions and Takeovers Regulations 1989, **Appendix E**).

The Treasurer's powers in section 21A to take action against foreign acquisitions of interests in Australian urban land are not limited to acquisitions where there is a change of control with the resultant control being foreign. As noted earlier, the powers of the Treasurer in sections 18 to 21 are restricted to such cases.

Foreign-to-foreign transactions

Transactions involving takeovers by foreign interests of businesses operating in Australia which are already foreign-owned and controlled are subject to examination and are subject to action under the Act. This applies where a foreign-owned business operating in Australia is the target of a takeover by another foreign interest and/or where an offshore company that conducts a business in Australia is acquired by another offshore company and the target company's Australian assets are valued at more than the general $50 million or the above-mentioned US investor thresholds.

These transactions are assessed against the policy applicable to the relevant sector of the economy and having regard to the fact that they do not involve any reduction in Australian ownership and control. Such takeovers normally do not raise issues which would be contrary to the national interest. In cases where such issues are raised, the Government would seek to resolve any concerns through consultations with the parties involved.

Prior approval for contractual arrangements

When parties propose to enter into transactions which are subject to the provisions of the Act, including underwriting arrangements, the exercise of pre-emptive rights or transactions entered into by way of bids at auction or by tender, the parties should ensure that the contractual arrangements include a provision that makes the arrangement subject to approval under the Act. Failure to provide for such a condition may result in contractual arrangements being in contravention of the provisions of the Act and expose the acquiring party to possible divestiture action.

Foreign control

Foreign investment policy does not rely upon a single all-embracing definition of control. Under the Act, there is a presumption that, unless the Treasurer is satisfied to the contrary, a 'substantial interest' that is, an interest of 15 per cent or more (for an individual) and/or 40 per cent or more (in aggregate) in a corporation is a controlling interest. However, a variety of factors other than share ownership may be taken into account when determining where ultimate control of a corporation or venture lies. These include:

- voting rights attached to shareholdings and the rights of shareholders to representation on the Board or controlling body;
- the distribution of share ownership; and
- arrangements or agreements between shareholders and a corporation or controlling body that would enable a shareholder to exercise control, such as through the provision of finance, technology, materials, markets and marketing or management expertise.

The extent to which each of these factors is relevant depends on the particular circumstances of each case. These circumstances can vary widely and determination of control can, therefore, only be undertaken on a case-by-case basis.

Other provisions of the Act

If the Treasurer raises no objections to a proposal subject to conditions and the parties implement the proposal but do not comply with these conditions, the parties commit an offence (section 25(1C)). Failure to comply with an order made by the Treasurer is an offence (section 30) and provision of false or misleading information is also an offence (refer to Chapter 7 of the *Criminal Code Act 1995*). The Treasurer may also make orders to prohibit or unwind any schemes entered into for the purpose of avoiding the provisions of the Act (section 38A).

Other aspects of foreign investment policy

Foreign portfolio shareholdings

The Act defines a holding of 15 per cent or more of the shares or voting power of a company by a single foreign interest, either alone or together with associates, to be a controlling interest unless the Treasurer is satisfied to the contrary. Accordingly, a holding of 15 per cent or more is normally deemed a non-portfolio holding.

A holding of less than 15 per cent is normally regarded as being of a portfolio nature in determining levels of ownership for the purposes of foreign investment policy. There are, however, exceptions to this approach, including where:

- a person with a shareholding of less than 15 per cent is able to exert control through representation on the board of the company and/or is otherwise able to influence the operations through other means, for example, the provision of technology, finance or marketing links, the shareholding may be taken into account in calculating the level of foreign ownership of the company. The person's arrangements affecting control of the company may also come within the scope of the Act.

- foreign shareholdings (including portfolio shareholdings) aggregate to 40 per cent or more in a company or venture, which the Act defines to be a controlling interest unless the Treasurer is satisfied to the contrary.

- more than half the assets of a company are in the form of Australian urban land, proposed acquisitions by foreign interests of shareholdings of less than 15 per cent are examinable, unless exempted by regulation (see the Foreign Acquisitions and Takeovers Regulations 1989, Appendix E).

Responsibilities of the foreign investor

In the application of foreign investment policy, the Government seeks the cooperation of foreign investors. As part of this process of cooperation, and in its role of maintaining awareness of the activities of foreign controlled corporations operating in Australia, the Board welcomes opportunities to discuss with foreign companies their operations and plans for investment in Australia.

The Government also directs the attention of foreign investors to the *Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises* (see **Appendix F**). The guidelines form an integral part of the OECD Declaration on International Investment and Multinational Enterprises, with which Australia has associated itself. The Government seeks the cooperation of foreign companies operating in Australia to observe those guidelines.

Taxation

Taxation revenue arising from foreign investment represents a significant benefit to Australia. Special taxation controls apply to the financing of foreign investments in Australian companies and businesses to ensure that foreign investors do not, through the structuring of their investments, obtain a taxation advantage not available to local investors.

The provisions of the income tax legislation seek to ensure that financing arrangements associated with foreign investment reflect normal commercial practice. This is of particular relevance where funds for the implementation of a proposal are to be provided by foreign associates of the parties to a proposal, for instance, by a foreign parent or associated company. In these circumstances, the Government is concerned to ensure that the capital structure employed, and especially the proportion of debt to equity funds employed, reflects the commercial practices of the industry concerned.

Foreign government investment in Australia

Special considerations can arise in respect of proposals by foreign governments or their agencies to invest in Australia, including for example in relation to taxation. The Government requires commercial investments in Australia by foreign governments or their agencies to be structured in a manner that enables all normal taxes and charges to be levied, and that questions of sovereign immunity do not arise.