



WHO IS A 'FOREIGN PERSON'?

The term 'foreign person' is central to the *Foreign Acquisitions and Takeovers Act 1975* (Act) and the *Register of Foreign Ownership of Agricultural Land Act 2015* (Agricultural Land Register Act). Those Acts apply where a foreign person has taken or is proposing to take certain action such as acquiring an interest in land. Foreign persons are subject to a number of obligations under the Act and the Agricultural Land Register Act. For example, under the Act a foreign person is required to give notice about a proposal to take a notifiable action. The Treasurer has certain powers under the Act if a foreign person takes, or proposes to take, a particular action that is a significant action.

DEFINITION OF 'FOREIGN PERSON'

Foreign person is defined in section 4 of the Act to mean the following:

- (a) an individual not ordinarily resident in Australia; or
- (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- (c) 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; or
- (d) 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; or
- (e) 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; or
- (f) a foreign government; or
- (g) any other person, or any other person that meets the conditions, prescribed by the regulations.

Section 18 of the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation) provides that following are also foreign persons:

- general partners of limited partnerships where:
 - an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds at least 20 per cent in the limited partnership, or
 - 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 interest of at least 40 per cent in the limited partnership.
- foreign government investors who would not otherwise be foreign persons without the regulations providing for this (section 17 of the Regulation defines foreign government investor. For more information, see Guidance Note 23).

The term 'foreign person' has the same meaning for the Agricultural Land Register Act (see section 4 of the Agricultural Land Register Act).

Individuals

An individual is a natural person. Where a natural person is not ordinarily resident in Australia, that person will be a 'foreign person'. The meaning of 'ordinarily resident' is different for a natural person who is not an Australian citizen, and a natural person who is an Australian citizen (see below).

Natural persons who are not Australian citizens

Under section 5 of the Act, if a natural person is not an Australian citizen, that person will only be taken to be ordinarily resident in Australia at a particular time if:

- the person has actually been in Australia during 200 or more days of the preceding 12 month period; and
- at the relevant time:
 - the person is in Australia and the person's continued presence in Australia is not subject to any limitation as to time imposed by law; or
 - the person is not in Australia, but, immediately before the person's most recent departure from Australia, the person's continued presence in Australia was not subject to any limitation as to time imposed by law.

If a person is an unlawful non-citizen under section 14 of the *Migration Act 1958*, the individual's continued presence in Australia will be subject to a limitation as to time imposed by law (subsection 5(2) of the Act).

Example 1

Maya proposes to acquire a large number of units in an Australian unit trust. Maya is a Malaysian citizen and has an Australian permanent visa which allows her to live in Australia indefinitely. Maya has been in Australia for the previous 12 months, other than when she visited her parents in Malaysia for 10 days. At the time of the proposed acquisition, Maya will be in Australia and her continued presence in Australia will not be subject to any time limitation. In these circumstances, Maya is ordinarily resident in Australia and will not be a 'foreign person' as defined in the Act.

Example 2

Chak is a Chinese citizen and has been in Australia for 257 days in the past 12 month period. He proposes to acquire shares in an Australian company. Chak is currently in Australia, working as a visiting professor at an Australian university, participating in an Australian research project. Chak's temporary visa only allows him to stay in Australia for the 18 month duration of the research project. Chak will not be ordinarily resident in Australia because, at the time he proposes to acquire the shares, his continued presence in Australia is subject to a limitation as to time imposed by law. Chak is an individual not ordinarily resident in Australia and, therefore, a 'foreign person' as defined in the Act.

Foreign business person

'Foreign business person' is defined in the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* to mean foreign person, except an individual not ordinarily resident in Australia, carrying on a business in Australia or elsewhere. This definition applies to a number of lower fee rules. For more information see Guidance Note 29 and 30.

Australian citizens

An Australian citizen who is living overseas may be a 'foreign person' as defined in the Act. There is no specific rule in the Act for determining whether or not an Australian citizen is ordinarily resident in Australia. It is relevant to have regard to the ordinary meaning of those words and the question is one of fact and degree (see, for example, *Wright v Pearce* (2007) 157 CLR 485 at [15]). Section 35 of the Regulation provides an exemption for land acquisitions by persons with a close connection to Australia.

When does a person hold a substantial interest in a corporation or a trust?

A person holds a substantial interest in a corporation if the person holds, alone or with one or more associates, an interest of at least 20 per cent in the corporation (see the definition of 'substantial interest' in section 4 of the Act).

A person holds a substantial interest in a trust (including a unit trust) if the person, together with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust (see the definition of 'substantial interest' in section 4 of the Act).

A substantial interest may be held through interests in other corporations or trusts (see tracing of substantial interests in section 19 of the Act and Guidance Note 36).

When do two or more persons hold an aggregate substantial interest in a corporation or a trust?

Two or more persons hold an aggregate substantial interest in a corporation if the persons, alone or with one or more associates, hold an aggregate interest of at least 40 per cent in the corporation (see the definition of 'aggregate substantial interest' in section 4 of the Act).

Two or more persons hold an aggregate substantial interest in a trust (including a unit trust) if the 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 (see the definition of 'aggregate substantial interest' in section 4 of the Act).

How to determine the interest or aggregate interest of a specified percentage in an entity (a corporation or unit trust)

Sections 17 and 18 of the Act outline the meaning of an *interest* of a specified percentage in an entity as generally:

- the percentage of the actual or potential voting power in the entity that the person, with associates, is in a position to control: or
- the percentage of the issued securities in the entity held by the person, with associates; or
- the percentage of the issued securities in the entity that the person, with associates, would hold at a particular time assuming that any future rights they hold to securities in the entity were exercised (unless it can be determined at that time, from the right itself or from the circumstances existing at that time, that the right will not be exercised).

For an *aggregate interest*, the interest is as above assuming 'the person, with associates', is 'two or more persons (who are not associates), with one or more associates of any of these persons'.

Section 46 of the Regulation turns-off the application of potential voting power and deemed exercise of future rights for paragraphs (b) to (e) of the foreign person definition for some of the provisions of the Act relating to the exercise of the Treasurer's powers and Part 4 of the Act (notice of notifiable actions and significant actions).

For a *discretionary trust* (that is, a trust where under the terms of the trust, a trustee has the power or discretion to distribute the income or property of the trust to one or more beneficiaries), each beneficiary that the trustee has discretion to distribute the income or property to is deemed to have the maximum percentage interest in the income or property that the trustee may exercise discretion to distribute to them (section 18 of the Act).

Example 3

Under the terms of the trust deed, the Australian citizen trustee of an Australian family trust is able to exercise discretion on the distribution of 40 per cent of the property of the trust (this is not expected to happen until the trust is wound up). The trust deed defines the potential beneficiaries as one of five individuals and their spouses. One of these individuals recently married a foreign person. Irrespective of the fact that discretion has not been exercised in favour of this foreign person spouse, and that the trustee may never intend to exercise discretion in favour of the foreign person spouse, the trustee, in their capacity as trustee of the family trust, is now a foreign person (as the foreign person spouse is deemed to have a 40 per cent interest in Australian family trust). Actions of the trustee, such as acquiring interests in residential land in their capacity as trustee, may be both notifiable and significant actions.

Example 4

The Property discretionary trust deed defines the potential beneficiaries of the trust by reference to particular relatives of the grandfather (for example, children, grandchildren and their spouses). The trustee has full discretion over who to distribute the income and property of the trust to. One of the children moves to the United States and as part of taking US citizenship, renounces their Australian citizenship. As this child is a potential beneficiary of 100 per cent of the income or property of the trust, the trustee in their capacity as trustee of the trust becomes a foreign person. Actions of the trustee, such as acquiring interests in residential land in their capacity as trustee, may be both notifiable and significant actions.

Foreign government

An entity will be a 'foreign government' if it falls within one of the following categories:

- it is a body politic of a foreign country;
- if is a body politic of part of a foreign country;
- it is part of a body politic of a foreign country; or
- it is part of a body politic of part of a foreign country.

Note: the term 'foreign government investor' is defined in section 17 of the Regulation and is relevant for the purposes of the definition of 'associate' (see section 6 of the Act and section 45 of the Regulation). For further information, see Guidance Note 23.

Example 5

The Department of Agricultural Acquisitions of a foreign country is proposing to acquire agricultural land in Australia for the purposes of farming cattle for export. The Department of Agricultural Acquisitions is part of a body politic of a foreign country and will be a 'foreign person' as defined in the Act and a foreign government investor.

Disregarding small holdings of securities in primary listed entities

Corporations and trusts are foreign persons if they are held by two or more foreign persons (and their associates) with an aggregate substantial interest. Section 47 of the Regulation modifies this rule so that in the following circumstances small holdings in an entity are not counted towards an aggregate substantial interest.

- If an entity has its primary listing on a stock exchange in Australia; and
- The small holding is less than 5 per cent (that is, it is not a substantial holding within the meaning of the *Corporations Act 2001*).

Foreign custodians

Foreign custodian corporations acting in their capacity as custodians are exempt from notifying under the Act (see exemption at Section 30 of the Regulation).

In addition persons who are only foreign persons because of foreign custodian corporation holdings of custodian shares are exempt from notifying under the Act, so long as the custodian shares remain held in the course of providing custodian services.

Example 6

Foreign custodian corporations are foreign persons. A foreign custodian corporation (Corporation FC) holds a total interest of 25 per cent in another corporation (Corporation F). No other foreign person holds an interest in Corporation F. Corporation FC's interest makes Corporation F a foreign person because it is a substantial interest (at least 20 per cent).

15 per cent of Corporation FC's interest in Corporation F is a custodian share to which the exemption (section 41A 2(c)) applies. However, the exemption does not apply to 10 per cent of the interest. Corporation F would not be a foreign person if it were not for the custodian share held by Corporation FC.

Corporation F therefore is exempt and does not need to notify under the Act and Regulation.

FEES

The fee is payable at the time of application with statutory processing timelines commencing when the correct fee is paid.

For more information on the fees applying to foreign investment applications, see [Guidance Note 30](#).

PENALTIES

Strict penalties (including civil and criminal penalties) may apply for breaches of Australia's foreign investment rules.

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting +61 2 6263 3795.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.