



## TRANSITIONAL ISSUES

Significant changes were made to the *Foreign Acquisitions and Takeovers Act 1975* (Act) with effect from 1 December 2015. Those changes included incorporating requirements for foreign government investors into the Act, increasing the penalties that can be imposed for offences under the Act, increasing the enforcement options available and requiring application fees to be paid. Transitional provisions were also introduced to facilitate the transition to the new requirements under the Act. Below is an outline of how the transitional arrangements operate.

For the purposes of this Guidance Note, ‘old provisions’ means the Act as in force immediately before 1 December 2015. ‘New provisions’ means the Act as in force immediately after the amendments to the Act took effect. ‘Transitional provisions’ means Schedule 3 to the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*.

## NOTICES

The table below sets out how notices given under particular provisions of the Act or Australia’s Foreign Investment Policy (or earlier equivalent Ministerial statements) before 1 December 2015 will be treated from 1 December 2015.

Notice given before 1 December 2015 (under either the old provisions or the Policy)	The notice will be taken to be ...
A notice from a corporation (under paragraph 25(1)(c)) stating that it is proposed to alter a constituent document of the corporation.	A notice that a ‘significant action’ (that is not a notifiable action) is to be taken (except in relation to new section 113 fees).
A notice from a person (under paragraph 25(1)(a)) stating that the person proposes to acquire shares, assets or interests or to enter into an agreement or enter into or terminate an arrangement.	A notice that a ‘significant action’ (that is not a notifiable action) is to be taken (except in relation to new section 113 fees).
A notice from a corporation (under paragraph 25(1)(b)) stating that the corporation proposes to issue shares.	A notice that a ‘significant action’ (that is not a notifiable action) is to be taken (except in relation to new section 113 fees).
A notice given under 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).
A notice given under section 26 of the old provisions (compulsory notification of certain section 18 transactions — acquisitions of shares).	A notice given under section 81 of the new provisions (compulsory notice of notifiable actions) (except in relation to new section 113 fees).
A notice given under former section 26A of the old provisions (compulsory notification of section 21A transactions — acquisitions of interests in Australian urban land).	A notice given under section 81 of the new provisions (compulsory notice of notifiable actions)(except in relation to new section 113 fees).

<b>Notice given before 1 December 2015</b> (under either the old provisions or the Policy)	<b>The notice will be taken to be ...</b>
A notice given under section 36 (notice requiring the production of documents or giving of information).	A notice given under section 133 of the new provisions. 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 1 December 2015.
A notice given on or after 1 March 2015 (under sections 25 or 26, or the Policy) in relation to Australian rural land.	A notice given under section 81 of the new provisions (compulsory notice of notifiable actions) in relation to agricultural land. The time limits on making orders and decisions specified in new section 77 apply to such a notice as if the notice were given on 1 December 2015.
A notice given by the Treasurer in accordance with the Policy on or after 1 March 2015 in relation to an acquisition or proposed acquisition of Australian rural land.	Binding on the Commonwealth after 1 December 2015.

**Example 1**

Issuer Co Pty Ltd provided a notice to the Treasurer on 30 November 2015, under section 25 of the old provisions stating that they propose to issue shares. This notice will be taken to be a notice that a 'significant action' (that is not a notifiable action) is proposed to be taken. No fees will be payable under section 113 of the new provisions in relation to the notice. From 1 December 2015 the Treasurer may exercise powers under Part 3 of the new provisions in relation to the proposal (for example, the Treasurer may issue a no objection notification subject to conditions to Issuer Co Pty Ltd under section 74 of the new provisions).

## NOTICES GIVEN AND ACTIONS TAKEN DURING THE TRANSITIONAL PERIOD IN RELATION TO AUSTRALIAN RURAL LAND

Where a foreign person acquired an interest in Australian rural land on or after 1 March 2015 (but before 1 December 2015), and if the acquisition would have been a notifiable action if it had been taken under the new provisions, then that foreign person must:

- notify the Treasurer in accordance with section 135 of the new provisions (unless the person has notified the Treasurer of the acquisition or proposed acquisition before 1 December 2015); and
- provide the notice before 31 December 2015.

Where a foreign person acquires an interest in Australian rural land during the period beginning on 1 March 2015 and ending on 30 November 2015 and the foreign person fails to notify the Treasurer of the acquisition during that period or before 31 December 2015, that foreign person will commit an offence. The maximum penalty for the offence will be three years or a fine of 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).

**Example 2**

A foreign person acquired a notifiable interest in Cattle Station (a large area of Australian rural land) on 1 April 2015. Because the acquisition was made between 1 March 2015 and 30 November 2015, the foreign person must notify the Treasurer of the acquisition before 31 December 2015. If the foreign person does not notify the Treasurer of the acquisition by 31 December, the foreign person may be committing an offence and potentially be liable for criminal and civil penalties.

**NOTICES GIVEN AND APPLICATIONS MADE PRIOR TO 1 DECEMBER 2015**

The Foreign Acquisitions and Takeovers Legislation (Transitional) Rule 2015 provides that:

- where an application was made under Australia’s Foreign Investment Policy before the commencement of the Amending Act, the Treasurer must make an order or a decision in relation to that application within 30 days of the commencement of the Amending Act (or such further period as requested by the person in writing — the period so extended); and
- where a person applied for a certificate under paragraph 3(e), (h) or (r) of the *Foreign Acquisitions and Takeovers Regulations 1989* before the commencement of the Amending Act and a decision on that application was not made by commencement, the Treasurer must make a decision on the application within 30 days of the commencement of the Amending Act (or such further period as requested by the person in writing — the period so extended).

**ORDERS GIVEN BEFORE 1 DECEMBER 2015**

The table below sets out how orders given by the Treasurer under particular old provisions of the Act before 1 December 2015 will be taken to have been given under particular new provisions from 1 December 2015.

<b>Orders given by the Treasurer before 1 December 2015 under the following old provisions of the Act</b>	<b>From 1 December, the orders will be taken to have been given under the following new provisions of the Act</b>
<ul style="list-style-type: none"> <li>• 18(2) — order prohibiting proposed acquisition of shares or the proposed issue of shares;</li> <li>• 19(2)- order prohibiting proposed acquisition of assets of an Australian business carried on by a prescribed corporation or prescribed corporations;</li> <li>• 20(2) — order prohibiting the entering into of an agreement in relation to the affairs of a corporation or the proposed alteration of the constituent document of a corporation;</li> <li>• 21(2) -order prohibiting the entering into of a proposed arrangement or termination of an existing arrangement, in relation to an Australian business carried on by a prescribed corporation or prescribed corporations;</li> <li>• 21A(2) — order prohibiting the proposed acquisition of an interest in Australian urban land.</li> </ul>	<ul style="list-style-type: none"> <li>• 67(2) — order prohibiting proposed significant actions</li> </ul>

Orders given by the Treasurer before 1 December 2015 under the following old provisions of the Act	From 1 December, the orders will be taken to have been given under the following new provisions of the Act
<ul style="list-style-type: none"> <li>• 18(3) — additional orders about control of a corporation;</li> <li>• 19(3) — additional orders about acquisition of interests in an Australian business carried on by a prescribed corporation or prescribed corporations;</li> <li>• 21A(3) — additional orders in conjunction with an order prohibiting the proposed acquisition of an interest in Australian urban land.</li> </ul>	<ul style="list-style-type: none"> <li>• 67(3) — additional order</li> </ul>
<ul style="list-style-type: none"> <li>• 18(4) — order directing person to dispose of shares;</li> <li>• 19(4) — order directing person to dispose of assets of an Australian business;</li> <li>• 20(3) — order directing person to do, or refrain from doing, specified acts for the purpose of restoring the control of a corporation to its previous position;</li> <li>• 21(3) — order directing specified persons to do, or refrain from doing, specified acts for the purpose of restoring the control of an Australian business;</li> <li>• 21A(4) — order directing person to dispose of an interest in Australian urban land.</li> </ul>	<ul style="list-style-type: none"> <li>• 69(2) — disposal order</li> </ul>
<ul style="list-style-type: none"> <li>• 22 — interim order</li> </ul>	<ul style="list-style-type: none"> <li>• 68 — interim order</li> </ul>

The Treasurer may **revoke** an order that is taken to have been given under sections 67, 68 or 69 of the new provisions, at any time, provided that the Treasurer is satisfied that the revocation is not contrary to the national interest (see item 5(2) of the transitional provisions).

The Treasurer may **vary** an order that is taken to have been given under sections 67, 68 or 69 of the new provisions, at any time, provided that the Treasurer is satisfied that the variation is not contrary to the national interest **and** the person consents to the variation (see item 5(2) of the transitional provisions).

## NO OBJECTION DECISIONS AND NOTIFICATION

Where the Treasurer made a no objection decision **subject to conditions**, under subsection 25(1A) of the old provisions before 1 December 2015, that decision will be taken to have been made under paragraph 74(2)(a) of the new provisions (no objection notification imposing conditions). Advice given by the Treasurer to a person under subsection 25(1B) of the old provisions about a no objection decision subject to conditions will be taken to be a no objection notification imposing conditions given under paragraph 74(2)(b) of the new provisions.

Where the Treasurer made a no objection decision which was **not subject to conditions**, under subsection 25(1A) of the old provisions before 1 December 2015, that decision will be taken to have been made under paragraph 75(2)(a) of the new provisions (no objection decision). Advice given by the Treasurer to a person under subsection 25(1B) of the old provisions about a no objection decision which was not subject to conditions will be taken to be a no objection notification not imposing conditions given under paragraph 75(2)(b) of the new provisions.

The Treasurer may vary a no objection decision imposing a condition by imposing a new condition or varying an existing condition if the person consents to the variation (see item 5(2) of the transitional provisions).

## DISPOSAL ORDERS

Disposal orders may be made under section 69 of the new provisions in relation to the following:

- where a significant action was taken on or after 1 December 2015 (even though it may have been notified earlier);
- an acquisition of an interest in Australian rural land taken during the period beginning on 1 March 2015 and ending on 30 November 2015; or
- significant action taken before 1 December 2015 if the Treasurer would have had the power, before 1 December 2015, to make an order under one of the following old provisions in relation to the action:
  - subsection 18(4) — order directing person to dispose of shares;
  - subsection 19(4) — order directing person to dispose of assets of an Australian business;
  - subsection 20(3) — order directing person to do, or refrain from doing, specified acts for the purpose of restoring the control of a corporation to its previous position;
  - subsection 21(3) — order directing specified persons to do, or refrain from doing, specified acts for the purpose of restoring the control of an Australian business; and
  - subsection 21A(4) — order directing person to dispose of an interest in Australian urban land.

If the Treasurer has received a notice from a person stating that a significant action is proposed to be taken, the time limits under section 77 of the new provisions for the Treasurer to make an order or a decision will apply. The time limits under the new provisions are similar to the time limits under the old provisions.

### Example 3

Trendy XYZ Inc is a foreign person and submitted a notice under section 25 of the old provisions to the Treasurer in relation to the proposed acquisition of shares in an Australian fashion company on 24 November 2015. The notice will be taken to be a notice that a significant action (that is not a notifiable action) is proposed to be taken (see item 2(1) of the transitional provisions). Section 77 of the new provisions will operate from 1 December 2015 to determine the time limits that apply in respect of the Treasurer being able to make orders or decisions relating to the significant action.

## ANTI-AVOIDANCE

The Act allows the Treasurer to exercise anti-avoidance powers where the Treasurer considers that a person has entered into a scheme for the sole or dominant purpose of avoiding a provision of the Act (sections 78 and 79 of the new provisions). These powers include declaring persons involved in avoidance to be taken to be associates for the purposes of the Act or for specified purposes. The anti-avoidance provisions apply to any scheme, regardless of whether it was entered into before or after 1 December 2015 (item 7 of the transitional provisions).

## CERTIFICATES FOR ACQUISITIONS OF INTERESTS IN AUSTRALIAN URBAN LAND

Certificates given before 1 December 2015 under particular provisions of the *Foreign Acquisitions and Takeovers Regulations 1989* will, from 1 December 2015, be taken to have been given under the new provisions (except for the purposes of section 113 of the new provisions, which specifies when fees are payable). The table below outlines the relevant provisions.

<b>Provision of the <i>Foreign Acquisitions and Takeovers Regulations 1989</i> that a certificate was given under before 1 December 2015</b>	<b>After 1 December 2015, the certificate will be taken to have been given under the following new provision (of the Act) ...</b>
<ul style="list-style-type: none"> <li>Regulation 3(e) — a dwelling that will be or is being constructed (commonly known as Advanced Off-The-Plan (AOTP) certificate); or</li> <li>Regulation 3(r) — established dwellings (commonly known as an Integrated Tourism Resort (ITR) certificate)</li> </ul>	Section 57 (new dwellings exemption certificate)
Regulation 3(h) — programs of land acquisitions in respect of a year (commonly known as an annual program certificate)	Section 58 (exemption certificate for foreign persons)

### Example 4 — AOTP certificate granted prior to 1 December

Steve is a real estate developer and was issued a certificate by the Treasurer under regulation 3(e) of the *Foreign Acquisitions and Takeovers Regulations 1989* on 28 September 2015 in relation to the sale of apartments in a new apartment complex to foreign persons. From 1 December 2015, the certificate will be taken to have been given under section 57 of the new provisions (exemption certificate for new dwellings). No fee is payable, either for the initial application for a certificate or for sales of new dwellings covered by the certificate.

### Example 5 — Application made prior to 1 December but certificate granted post 1 December

Steve is a real estate developer and applied prior to 1 December 2015 for a certificate under regulation 3(e) of the *Foreign Acquisitions and Takeovers Regulations 1989* in relation to the sale of apartments in a new apartment complex to foreign persons. Steve was granted a certificate after 1 December 2015. The certificate is given under section 57 of the new provisions (exemption certificate for new dwellings). However, no fee is payable, either for the initial application for a certificate or for sales of new dwellings covered by the certificate.

If an application has been made before 1 December 2015 for a certificate under regulations 3(e), (h) or (r) of the old provisions, but a certificate is not given before the new provisions commence, then the Treasurer may give a certificate under sections 57 or 58 of the new provisions.

## OFFENCES AND CIVIL PENALTIES

Where a person engaged in conduct in contravention of the Act before 1 December 2015, the old provisions will still apply to that conduct so that any investigation, legal proceeding or remedy may be instituted, continued or enforced, and any penalty or punishment may be imposed, as if the relevant old provisions of the Act were still in place (see section 7 of the *Acts Interpretation Act 1901*).

Where conduct was engaged in on or after 1 December 2015, the offence and civil penalty provisions under the new provisions will apply in relation to that conduct (except for sections 102 and 103 of the new provisions).

Sections 102 (liability for officers of corporations) and 103 (civil penalties for officers of corporations) of the new provisions will apply in relation to conduct engaged in after 1 December 2015, if the following has occurred on or after 1 December 2015:

- a corporation is convicted of an offence against the Act; or
- a civil penalty order is made against a corporation in relation to a contravention of a civil penalty provision of the Act.

### Example 6

Jana is a foreign investor and entered into an agreement to acquire a substantial interest in an Australian corporation before 1 December 2015. Jana did not, before entering into the agreement, provide to the Treasurer a notice stating her intention to enter into that agreement. Jana's conduct comes to the attention of the Treasurer in December 2015. The old provisions will apply to Jana's conduct. Jana has potentially committed an offence, and may be subject to a penalty, under section 26 of the old provisions.

## FEES

Where an application or notice was received before 1 December 2015, fees will not be payable. Fees will also not be payable where the Treasurer made an order, or raised no objections (with or without conditions) before 1 December 2015.

Fees may be payable in accordance with section 113 of the new provisions where the following occurs:

- applications are made on or after 1 December 2015 under the new provisions;
- orders and notices are given on or after 1 December 2015 in relation to action relating to rural land taken during the period beginning on 1 March 2015 and ending on 30 November 2015 (this only applies to actions that were not notified under the Policy during the period);
- orders, notices and notifications are given on or after 1 December 2015 in relation to action taken after that date.

Certain fees are indexed annually on 1 July.

## RECORD KEEPING REQUIREMENTS

New record keeping requirements have been included in the Act (see Division 2 of Part 7 of the Act). A person must now make and keep records relating to the following:

- any significant action or notifiable action that relates to an order or decision made under Part 4 of the new provisions on or after 1 December 2015;
- whether the person is complying with a condition in a no objection notification or an exemption certificate on or after 1 December 2015 (regardless of whether the notification or certificate was given before or after that date);
- any action taken by the person that is specified in an exemption certificate that occurs on or after 1 December 2015 (regardless of whether the certificate was given before or after that date); and
- disposal of an interest in residential land that occurs on or after 1 December 2015.

## FURTHER INFORMATION

Further information is available on the FIRB website at [www.firb.gov.au](http://www.firb.gov.au) or by contacting +61 2 6263 3795.

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**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.