

# New foreign investment regime in force

Australia's foreign investment regime has undergone significant reform, with the package of new legislation to implement the reforms coming into effect from today, [1 December 2015](#).

## The new regime

The new legislation comprises:

- the amended *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**Act**), which substantially redrafts the former foreign investment regime, including establishing a notification system based on the new concepts of "substantial actions" (which are not subject to mandatory notification requirements, but nonetheless may be reviewed by the Treasurer) and "notifiable actions" (which the Foreign Investments Review Board (**FIRB**) must be notified of) and changing the terminology regarding interests in Australian land;
- the *Foreign Acquisitions and Takeovers Regulation 2015* (Cth), which replaces the existing regulations and contains provisions central to the interpretation and application of the new Act, such as the definition of agribusiness, definitions relating to foreign government investors and various exemptions to the new Act;
- the *Register of Foreign Ownership of Agricultural Land Act 2015* (Cth), which gives legal effect to the Government's policy requirement for all foreign persons with certain interests in agricultural land to register those

interests with the Australian Taxation Office (**ATO**); and

- the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth), which imposes new filing fees for applications made under the Act.

## What is changing?

While the extensive redrafting of the regime will pose a number of new issues for legal advisors concerning interpretation and practice, the key substantive changes which foreign investors should be aware of are:

### Agriculture

The new legislation increases scrutiny of foreign investment in agriculture, including:

- a new A\$15 million cumulative screening threshold for agricultural land;
- a new A\$55 million screening threshold for direct investments in agribusiness; and
- a legal requirement for all foreign persons holding certain interests in agricultural land to register those interests (irrespective of whether the A\$15 million cumulative threshold is reached) on the Register of Foreign Ownership of Agricultural Land maintained by the ATO. All existing interests must be notified by 31 December 2015.

It is expected that the ATO-administered register will be

## Key issues

From 1 December 2015:

- The new foreign investment regime is in force.
- Agricultural land registration requirements now have legislative effect.
- Filing fees apply for foreign investment applications.

expanded over time to include residential land. The Government has also committed to introduce legislation to establish a national register of foreign ownership of water entitlements in the next 12 months.

### 20% substantial interest threshold

Under the old Act, foreign persons generally required FIRB approval if acquiring a stake of 15% or more (depending on the relevant monetary threshold). The new Act lifts the substantial interest threshold from 15% to 20%, aligning it more closely with the takeovers threshold in the *Corporations Act 2001* (Cth).

### Filing fees

Foreign investment applications now attract significant filing fees, meaning that Australian taxpayers are no longer required to fund the administration of the Act. From today, investors who seek FIRB approval will be required to pay the requisite filing fee before their application is

processed and the statutory time period to assess an application will only commence once payment has been received. If an application falls within a number of categories, the category with the highest filing fee will apply. Filing fees will depend on the value and type of investment. Filing fees for most commercial transactions will be in the order of A\$10,000 to A\$25,000, except for acquisitions valued at greater than A\$1 billion, where a filing fee of A\$100,000 will apply.

#### Increased penalties

The new Act imposes stricter criminal penalties for breaches, supplemented by civil pecuniary penalties and infringement notices for less serious breaches of the residential real estate rules. It is expected that a proportionate penalty regime and increased flexibility around the types of pecuniary orders which may be made by the Treasurer (which includes divestment orders, among others) will make it easier for the Government to pursue foreign investors that breach the legislation. Third parties who knowingly assist a foreign investor to breach the legislation are also subject to civil and criminal penalties.

#### Modernisation and harmonisation

The new Act modernises and seeks to simplify the foreign investment regime in a number of respects. Changes include:

- incorporating the rules relating to foreign government investors and investments in the media sector (which were previously only set out in the Australia's Foreign Investment Policy) into the legislation and removing the A\$5 million policy threshold for

screening of heritage listed commercial developed property;

- updating the money-lending exemption to better reflect current lending practices;
- exempting compulsory acquisitions and buy-outs (where the foreign investor already has 90%) from notification requirements and creating exemptions for dividend reinvestment plans and pro-rata rights issues;
- introducing an exemption certificate regime (replacing the former annual land program provisions) which can apply to various types of Australian land and to underwriters; and
- removing the requirement for lodgement of statutory notices.

#### Information and record-keeping

Much of the information required to complete a foreign investment notification is confidential or private information. The new legislation makes it an offence for a person to use or disclose such information for an unauthorised purpose. The legislation also imposes new record-keeping requirements on investors, requiring them to (among other things) keep records of notifiable actions and compliance with the Act for specified periods of time.

#### Transfer of compliance and enforcement functions

Certain compliance and enforcement functions (initially residential real estate and administration of the agricultural land register) have now been transferred to the ATO. Administration by the ATO is expected to improve compliance and enforcement through sophisticated data-matching systems and

specialised staff with compliance expertise.

#### New foreign investment policy

Today the Government adopted a new foreign investment policy (**Policy**) to replace the previous version. The Policy provides an overview of the legislative framework and guidance on factors which will be taken into account in relation to the national interest test (discussed below).

#### What is staying the same?

##### The national interest test

The ability of the Treasurer to exercise powers under the foreign investment framework is largely dictated by whether or not a matter is contrary to the national interest. The national interest test remains the same under the new regime. All applicants for inbound foreign investment approval are required to address the impact of their investment proposals (if any) on national interest considerations. These broadly comprise:

- national security;
- competition;
- other Australian government laws and policies (including tax);
- impact on the economy and the community; and
- the character of the investor.

Additional considerations apply in the case of investments in the agricultural sector, in residential land and in relation to foreign government investors. These are set out in more detail in the Policy.

##### Free trade deals

The new regime does not affect the bespoke monetary investment thresholds which have been

negotiated to apply to private investors from free trade agreement countries. Investors from these countries continue to enjoy the benefit of higher thresholds agreed to under those trade arrangements.

#### **Filing and assessment procedures**

Applications continue to be lodged through FIRB's online application system and most applications will be assessed within a 30-40 day period (subject to extension in certain cases). However, the time frame for assessment will now only commence following receipt of the requisite filing fee. FIRB will continue to liaise with other Government departments (including the Australian Competition and Consumer Commission, the ATO (which will now manage and assess residential land applications), the Department of Defence and the Australian Security Intelligence Organisation) when considering foreign investment applications.

#### **Further information:**

Further information on the changes to Australia's foreign investment framework (including foreign language guides and information on filing fees and penalties) can be accessed on the FIRB website at:

[www.firb.gov.au](http://www.firb.gov.au)

The agricultural land register can be accessed on the ATO website at:

[www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/](http://www.ato.gov.au/general/Foreign-investment-in-Australia/agricultural-land-register/).

A detailed overview of agricultural land registration requirements is set out in the Clifford Chance client briefing available at:

[http://www.cliffordchance.com/briefings/2015/11/the\\_new\\_agriculturallandregisterwhatforeign.html](http://www.cliffordchance.com/briefings/2015/11/the_new_agriculturallandregisterwhatforeign.html)

## Contacts

### Sydney

**Mark Pistilli**

Partner

T: +61 2 8922 8001

E: mark.pistilli@cliffordchance.com

**Richard Graham**

Partner

T: +61 2 8922 8017

E: richard.graham@cliffordchance.com

**Dave Poddar**

Partner

T: +61 2 8922 8033

E: dave.poddar@cliffordchance.com

**Lance Sacks**

Partner

T: +61 2 8922 8005

E: lance.sacks@cliffordchance.com

**Danny Simmons**

Partner

T: +61 2 8922 8007

E: danny.simmons@cliffordchance.com

**Joni Henry**

Counsel

T: +61 2 8922 8090

E: joni.henry@cliffordchance.com

**Amelia Horvath**

Counsel

T: +61 2 8922 8023

E: amelia.horvath@cliffordchance.com

### Perth

**Paul Vinci**

Partner

T: +61 8 9262 5504

E: paul.vinci@cliffordchance.com

**Jon Carson**

Partner

T: +61 8 9262 5510

E: jon.carson@cliffordchance.com

**Justin Harris**

Partner

T: +61 8 9262 5503

E: justin.harris@cliffordchance.com

**Paul Lingard**

Partner

T: +61 8 9262 5575

E: paul.lingard@cliffordchance.com

**Tracey Renshaw**

Partner

T: +61 8 9262 5505

E: tracey.renshaw@cliffordchance.com

**Kate Naude**

Senior Associate

T: +61 8 9262 5573

E: kate.naude@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

SYD#7862428

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Level 16, No. 1 O'Connell Street,  
Sydney, NSW 2000, Australia

© Clifford Chance 2015

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta\* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Linda Widyati & Partners in association with Clifford Chance.