REVISION TO THE FOREIGN INVESTMENT REGIME IN AUSTRALIA

Australia is one of a number of OECD countries with a generalised foreign investment approval regime. The Australian version has recently undergone the most significant changes in 40 years of its history. The rules regarding acquisition of Australian agricultural land were materially amended early in 2015[1] and three pieces of new legislation to change the foreign investment regime in Australia passed both houses of the Australian Parliament by 24 November 2015.[2] The new regime introduced by that legislation came into force on 1 December 2015. This article examines: (i) the pre-existing regime; (ii) causes of reform to the pre-existing regime; and (iii) principal changes under the new foreign investment regime.

THE PRE-EXISTING FOREIGN INVESTMENT REGIME

Australia's foreign investment regime had been administered prior to 1 December 2015 uniquely by the Foreign Investment Review Board (**FIRB**), a non-statutory body assisting the Australian Government (specifically the Australian Federal Treasurer) in the application of a combination of:

- primary legislation (the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**));
- secondary legislation (the *Foreign Acquisitions and Takeovers Regulations 1989* (Cth)); and, in some significant cases,
- merely the Australian Government's published Foreign Investment Policy (**Policy**), which lacked the force of law.

From the implementation of FATA, "*foreign persons*" seeking to acquire certain types of real estate, business assets or companies in Australia had to consider whether they must, or ought to, provide prior notification of that acquisition to FIRB.

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[1] From 1 March 2015

[2] *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015* (Cth) passed both houses on 24 November 2015, *Foreign Acquisitions and Takeovers Fees Imposition Bill 2015* (Cth) passed both houses on 11 November 2015, *Register of Foreign Ownership of Agricultural Land Bill 2015* (Cth) passed both houses on 11 November 2015

Under FATA, a *foreign person* encompassed, among other things, any corporation (wherever incorporated) in which an overseas-incorporated corporation (solely or together with associates) held 15% or more of that corporation[3] (increased to 20% or more under the new regime[4]). The foreign investment review regime could thus be engaged with relatively low overseas involvement in the acquiring corporation, even in contexts where the overseas-incorporated corporation was wholly-owned by Australian resident citizens.

To avoid criminal sanction under FATA, prior approval had to be obtained from FIRB of transactions under which *foreign persons* proposed to acquire a "*substantial interest*" (originally 15% or more[5] but increased to 20% or more[6]) in an Australian corporation[7] with total assets valued at A$252m[8] or more (indexed annually). This threshold is subject to increase under free trade agreements or other arrangements with Chile[9], China[10], Japan[11], New Zealand[12], South Korea[13] and the US[14] in relatively limited circumstances. It was the case under the law prior to 1 December 2015[15], and will remain the case after 1 December 2015[16], that *foreign persons* are permitted to enter into contracts in which the acquisition of the *substantial interest* is conditional upon receipt of the foreign investment approval.

The Australian Government considered whether notified proposals were contrary to the "*national interest*", which was defined very broadly by reference to objectives under the Policy including national security, competition and public policy[17]. Given that the ultimate decision rests with a political appointee, the Australian Federal Treasurer, domestic and international politics have had an undoubted influence on the outcome of applications considered

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[3] *Foreign Acquisitions and Takeovers Act 1975* (Cth) definition of "*foreign person*" sub-paragraph (b) in subsection 5(1), read together with definition of "*substantial*" and "*controlling*" interests in subsections 9(1) and 9(2)
[4] Definition of "*substantial interest*" in *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 4
[5] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 9(1)
[6] Definition of "*substantial interest*" in *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 4
[7] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 18(2), read together with subsection 26(2)
[8] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsections 17A(1)(a) and 17B, read together with http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp
[9] Per *Foreign Acquisitions and Takeovers Regulations 1989* (Cth)
[10] Signed on 17 June 2015 and will raise private investor threshold in line with Japan, South Korea, US
[11] Entered into force on 15 January 2015 – private investor threshold of A$1.094m
[12] Investment Protocol entered into force on 1 March 2013
[13] Entered into force on 2 December 2014 - private investor threshold of A$1.094m
[14] Per *Foreign Acquisitions and Takeovers Regulations 1989* (Cth)
[15] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 26(3)(b)
[16] *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) subsection 15(5)
[17] Australia's June 2015 *Foreign Investment Policy* "*National Interest Considerations*"

controversial. The political nature of the *national interest* criterion in decisions whether to oppose a proposed foreign acquisition also restricts the ability of disappointed applicants to seek meaningful judicial review on administrative law grounds. It has, for example, been held by the Australian High Court that the national interest in a similar context may extend to the environmental impact of a proposal.[18]

Very important provisions requiring notification of foreign investments in Australia were not contained within the formal legislation prior to 1 December 2015, but rather were found only in the Policy, notably:

- acquisitions of 5% or more of entities in the media sector[19]; and

- direct investments of any magnitude[20] by "*foreign government investors*"[21] encompassing (amongst others) entities in which foreign governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15% or more (increased in the new legislation to 20% or more[22]).

[18] *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) HCA 20
[19] Australia's June 2015 *Foreign Investment Policy* paragraph 2
[20] Australia's June 2015 *Foreign Investment Policy* paragraph 1
[21] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 17F and Australia's June 2015 *Foreign Investment Policy* Annex 1 definition
[22] *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) subsection 17 read together with definition of "*substantial interest*" in *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 4

The blanket notification requirement for *foreign government investors* (which continues under the new regime) materially qualifies prospects for the liberalisation of Chinese investment in Australia under the China-Australia Free Trade Agreement signed in June 2015 and expected to be ratified shortly[23]. 89% by value of Chinese outbound investment in Australia between 2007 and 2013 was by state-owned enterprises.[24]

Other proposed acquisitions were not compulsorily notifiable but might yet still be subject to the Australian Treasurer making adverse prohibition or divestment orders if he considered the investment or investment proposal to be contrary to Australia's national interest[25]. A *foreign person* may thus voluntarily apply for FIRB approval to mitigate this risk.

Foreign investment approval applications are very seldom rejected – there have only been four major non real-estate related foreign investment proposals announced as having been rejected since 2000, although approvals being granted subject to conditions are not uncommon.[26]

REASONS FOR CHANGE TO THE FOREIGN INVESTMENT REGIME

Change to the foreign investment regime in Australia had been a longstanding political theme. In August 2012 the then Australian Federal Parliamentary opposition, the Coalition (who now form the Federal Government) launched a policy discussion paper on changes to the regime.[27] It was considered timely to bring agricultural, not just urban, land and agribusinesses within the regime and it was considered that the generally applicable review threshold (presently A$252m) was too high for prudent oversight of changes in ownership of Australian agribusinesses, particularly as regards Chinese investment.

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[23] "*Australia signs landmark trade agreement with China*" Press Release of The Hon Tony Abbott, Prime Minister and The Hon Andrew Robb, Minister for Trade and Investment, 17 June 2015

[24] Source: "*Demystifying SOE Investment in Australia: a report prepared for the Business Council of Australia, KPMG and the University of Sydney China Studies Centre*" *August 2014*

[25] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 18(2)

[26] Shell/Woodside 23 April 2001; Singapore Stock Exchange/ASX 8 April 2011; ADM/Graincorp 29 November 2013; and S.Kidman and Co. 19 November 2015

[27] *The Coalition's Policy Discussion Paper on Foreign Investment in Agricultural Land and Agribusiness,* August 2012

There was considered to be substantial political pressure for such changes, although others pointed out that:

- 99% of Australian farm businesses are thought to be entirely Australian-owned;[28]
- 90% of Australian agricultural land is thought to be entirely Australian-owned;[29] and
- in the 2013/4 financial year, agricultural investments represented a mere A$32m of Chinese foreign direct investment into Australia.[30]

Changes were widely expected after the election of the present Australian Government in September 2013 and were later announced by press release in February 2015.[31] In addition to bringing agriculture within the scope of the FATA, it was also decided to give the legislation a major overhaul to modernise the rules and strengthen the administration and enforcement of the foreign investment system.

PRINCIPAL CHANGES UNDER THE NEW FOREIGN INVESTMENT REGIME

As noted above, the main substantive elements of the new foreign investment regime came into force from 1 December 2015. The principal changes effected were:

- the retention of a distinction between compulsorily notifiable foreign investment transactions and those that are not subject to compulsory notification but which may still result in adverse orders by the Australian Federal Treasurer, but under the new statutory nomenclature of "*notifiable*"[32] and "*significant*"[33] (trans)actions, respectively;

- an increase in the level of interest in a company deemed "*substantial*" and therefore potentially requiring notification upon acquisition in a target from at least 15%[34] to at least 20%[35].

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[28] Source: The Economist 3 October 2015 "*Selling the farm*"
[29] Source: The Economist 3 October 2015 "*Selling the farm*"
[30] Source: The Economist 3 October 2015 "*Selling the farm*"
[31] "*Joint media release between The Hon Tony Abbott MP, Prime Minister, The Hon Joe Hockey MP, Treasurer and The Hon Barnaby Joyce MP, Minister for Agriculture – Strengthening Australia's foreign investment framework,* 11 February 2015"
[32] Division 3 of Part 2 of the *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015
[33] Division 2 of Part 2 of the *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015
[34] *Foreign Acquisitions and Takeovers Act 1975* (Cth) subsection 9(1)
[35] Definition in *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 4

The amendment of this threshold, so as to mirror the statutory threshold generally prohibiting the acquisition of interests in public companies of greater than 20% in the absence of a takeover bid[36] (and subject to certain other exceptions), has broadly been welcomed. It eliminates the incentive for foreign bidders taking pre-bid stakes in Australian public companies to effect artificial transactions in respect of the 5% difference between the foreign investment and otherwise applicable general corporate thresholds pending FIRB approval of their acquisition[37]. 15% was in any event a relatively low threshold by international comparison[38];

- the formalisation of the media sector[39] and the *foreign government investor*[40] regimes previously only included in the Policy now having been introduced into legislation (without material amendment to their parameters);

- a new generally applicable obligation to pay fees on foreign investment applications lodged from 1 December 2015. Prior to 1 December 2015 there were no fees for applications and their administration was funded through consolidated Government revenue. From 1 December 2015, a "user pays" system has applied including fees of A$25,000[41] for most business and corporate acquisitions (including agribusinesses) and A$5,000 for agricultural and residential land acquisitions under A$1m[42]. The level of the fees is significantly greater than was originally anticipated[43] although not necessarily exorbitant by international comparison, especially when considered as a percentage of the assets involved in respect of notifiable transactions (i.e. presently generally being above A$252m).[44]

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[36] Corporations Act 2001 s606(1)
[37] Per Brookfield Infrastructure Partners LP/Asciano Limited 2015
[38] 33.3% is the level required for notification to Investment Canada
[39] *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 sections 44 and 48 read together with the *Foreign Acquisitions and Takeovers Regulation* (Cth) 2015 section 55
[40] *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 sections 44 and 48 read together with the *Foreign Acquisitions and Takeovers Regulation* (Cth) 2015 section 56
[41] Item 1 in table in subsection 7(1) of the *Foreign Acquisitions and Takeovers Fees Imposition Act* (Cth) 2015
[42] Item 2 in table in subsection 7(1) of the *Foreign Acquisitions and Takeovers Fees Imposition Act* (Cth) 2015
[43] The House of Representatives Standing Committee on Economics suggested a A$500-A$1500 fee for real estate per the "*Report on Foreign Investment in Residential Real Estate*" 2014 Canberra (page 38) whereas the new fees range from a minimum of A$5000
[44] Some application charges before the New Zealand Overseas Investment Office exceed NZ$20,000

Nonetheless, given fees can apply to unsuccessful bidders in competitive sale processes and from zero dollar thresholds for acquisitions by *foreign government investors*, only experience will show whether fears expressed as to the effect of fees on the international competitiveness of the Australian foreign investment regime are well founded;

- the introduction of new civil penalties in addition to the existing criminal penalties for breaches of the regime with higher maximum penalties in both cases than under both the previous law and the new law as originally proposed in February 2015[45]. Three years' imprisonment is a possibility for individuals[46], fines of up to A$675,000[47] apply to corporate offences and accessory liability was introduced for foreign investment offences for the first time.[48]

  Given the novelty of the changed regime and the complexity of the relevant concepts such as *foreign person* and *foreign government investor,* the application of these penalties to offences beyond those related to residential real estate (contrary to the recommendations of the applicable Parliamentary Committee Report) will make the obtaining of expert legal advice prior to the making of foreign investment in Australia more important than ever;

- the formalisation of the new A$15m cumulative threshold for investment in Australian agricultural land[49] which had been implemented merely by way of the Policy since 1 March 2015;

- a new A$55m threshold for investments in agribusiness[50]; and

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[45] See the Australian Government Options Paper "*Strengthening Australia's foreign investment framework*", 25 February 2015
[46] *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 84
[47] By application of section 4B of the *Crimes Act 1914* (Cth) - see *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 83
[48] By application of Part 2.4 of the *Criminal Code* – see *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth) 2015 section 83
[49] Subsection 52(4) of the *Foreign Acquisitions and Takeovers Regulation* (Cth) 2015 read together with subsection 52(2)(b) of the *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth)
[50] Section 50 of the *Foreign Acquisitions and Takeovers Regulation* (Cth) 2015 read together with subsection 51 of the *Foreign Acquisitions and Takeovers Legislation Amendment Act* (Cth)

- the establishment of a public register of foreign ownership of agricultural land by the Australian Taxation Office (**ATO**) and an obligation of *foreign persons* selling or acquiring agricultural land to notify it[51], together with an initial obligation of *foreign persons* holding agricultural land as of 1 July 2015 to notify by 31 December 2015[52].

CONCLUSION

Foreign investment regulation in Australia remains a sensitive political issue, most recently exemplified in concerns raised as to potential Chinese acquirers of S. Kidman & Co, Australia's largest land holding and cattle company, for which foreign acquisition under the original acquisition structure was ultimately blocked. The new legislation is probably a timely update, with some notable liberalisations of the former regime, particularly in respect of the increase of the substantial interest threshold from 15% to 20%. However, the tensions underlying a regime which is ostensibly intended at least not to discourage foreign investment have been exposed. This is particularly so in the imposition of relatively high application fees, expansive criminal and civil liability for quite technical offences and an agricultural foreign investment regime which might be seen as disproportionate in its stringency as compared to its overall significance to foreign investment in the Australian economy.

The foregoing article is intended to reflect the law as at 8 December 2015.

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[51] *Register of Foreign Ownership of Agricultural Land Act* (Cth) 2015 section 20
[52] *Register of Foreign Ownership of Agricultural Land Act* (Cth) 2015 section 19