



OFFSHORE TAKEOVERS AND ACQUISITIONS

Under the *Foreign Acquisitions and Takeovers Act 1975* (Act) certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities (being corporations and unit trusts) and businesses, that have a connection to Australia are defined as significant actions. Some significant actions, called notifiable actions, must be notified to the Treasurer before the actions can be taken.

Acquiring an interest in a foreign corporation is a significant action under Australia's foreign investment framework if:

- the foreign corporation holds relevant Australian assets (that is, land in Australia, including legal or equitable interests in that land or securities in an Australian entity) and carries on an Australian business, or is a holding entity of such a foreign corporation;
- the Australian assets or businesses of the target company are valued at more than the applicable monetary threshold value; and
- there would be a 'change in control' in the foreign corporation as a result of the acquisition. Where one or more foreign persons already control the entity there will be a change in control if another foreign person would become, or has become, a person who controls the entity or business or a person would cease or has ceased to be a person who controls the entity or business.

However, this type of acquisition is not a notifiable action unless the foreign person is also a foreign government investor, or the acquisition is a non-exempt acquisition of an interest in securities in a land entity.

- For a foreign government investor, offshore acquisitions of a direct interest in an Australian entity are notifiable actions regardless of the value, unless the following exception for non-material interests in businesses that are not sensitive businesses is met (section 56(4) of the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation)). To be covered by the exception (and thus neither a significant action nor notifiable action):
 - the foreign government investor acquires a 'direct interest' in an Australian entity by acquiring an interest in securities in a foreign entity;
 - the Australian total asset value for the foreign entity is less than 1 per cent of the value of the global total assets of the entity;
 - the Australian total asset value is less than \$10 million; and
 - none of the assets taken into account in working out the Australian total asset value are assets of a 'sensitive business'. A sensitive business is defined in section 22 of the Regulation.

A foreign person is not obliged to inform the Treasurer that they are proposing to take a significant action unless the action is also a notifiable action. However under the Act, the Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken.

If the significant action has already been taken and the Treasurer was not notified and determines the action is contrary to the national interest, the Treasurer may make a disposal order, which is directed at unwinding the action. For example, the Treasurer could order a person to dispose of their shares by a specified time. The Treasurer may also choose to impose legally enforceable conditions in such circumstances as an alternative to a disposal order.

If the Treasurer is notified (including voluntarily in the case of an offshore takeover or acquisition) that a person is proposing to take a significant action, the Treasurer may:

- decide that they do not object to the action and give the person a no objection notification not imposing conditions;
- decide that they do not object to the action provided the person complies with one or more conditions and give the person a no objection notification imposing conditions; or
- decide that taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

A no objection decision by the Treasurer in relation to a significant action that is notified usually extinguishes the Treasurer's powers to make future orders in relation to the action.

In determining whether an offshore takeover or acquisition is a significant action, further guidance is available on monetary screening thresholds (see Guidance Note 34), the calculation of consideration (see Guidance Note 33) and the tracing of interests (see Guidance Note 36).

FEES

Fees apply to applications for approval under Australia's foreign investment framework, with the applicable fee depending on the type of action being notified. This equally applies for offshore takeovers and acquisitions. For more information, see Guidance Note 30.

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.