Foreign Takeovers Amendment Bill 1988

Date Introduced: 9 November 1988
House: House of Representatives
Presented by: Hon. Paul Keating, M.P., Treasurer

Digest of Bill

Purpose
To provide a legislative basis for, and provide for fines for a breach of, the policy to prevent investment by foreigners in urban land and certain trusts that hold urban land; to increase the threshold level below which approval is not necessary to seek approval for offshore takeovers; and to exclude the acquisition of mineral exploration rights from review.

Background
The Foreign Takeovers Act 1975 (the Principal Act) was passed to control the level of foreign equity in investments in Australia. Foreign investment is critical to Australia in a number of ways, principally in providing the capital which otherwise would not be available for productive investment and countering Australia's balance of current account deficits. With regard to the latter, this benefit is offset to a degree by the dividends that subsequently flow out of Australia to the foreign investors.

All categories of foreign investment are not equally productive. The least productivity occurs where the supply of the good which is invested in is fixed with a steady local demand. Take, for example, the principal area to which this Bill is directed, urban land. In this area, one of the more favoured investments is in inner city land as the supply is fixed and the land is almost certain to appreciate in value. As a result, foreign investment is often seen as merely increasing the price of the land rather than resulting in any productive gain. This argument has been used to explain, at least in part, the high appreciation in land values in inner areas of capital cities.

In October 1985, changes to the foreign investment policy increased the cumulative threshold above which acquisitions of urban land would be subject to review from $350,000 to $600,000. For acquisitions above this limit, permission would be granted if the property was to be for new development, owner occupation, occupation by an Australian based executive of a foreign owned company in Australia, or for intended migrants or Australians living overseas. However, a major change in the policy affecting the acquisition of urban land by foreigners was announced in September 1987. The threshold limit was abolished so that all acquisitions by foreigners of urban land were to be examined, and the
categories where approval would be granted were reduced to Australian citizens resident abroad, intending migrants who have received approval to become permanently resident in Australia, and foreign companies seeking residences for their executives in Australia. It was also announced that legislation would be introduced to give backing to these regulations and that it would apply from the date of the announcement, i.e. 29 September 1987. In the guide on the new guidelines, released in October 1987, it was made clear that the new rules would apply to trusts and businesses that are foreign controlled (i.e. 15% of the entity is owned by a single foreigner or that person controls 15% of the votes, or 40% of the ownership or votes are controlled by more than one foreigner).

The proposal to increase the threshold below which offshore takeovers (i.e. those where the purchaser and target are located offshore but Australian assets are involved) are not examined, from $3 million to $20 million was announced in October 1985, as was the decision to exempt the acquisition of mineral exploration rights.

Main Provisions

The short title of the Principal Act will be altered to Foreign Acquisitions and Takeovers Act 1975 (clause 4).

Urban land is defined in clause 6 to be land that is not rural land. Rural land is defined in the same clause to be land used wholly or exclusively for the business of primary production. Urban land therefore has a very wide definition.

Section 4 of the Principal Act deals with the operation of the Act. Clause 5 will amend this section so that a foreigner will be taken to be sufficiently involved to provoke the prohibitions if the trustee of a trust is a foreign person, or a foreign corporation, and has a substantial interest; or, if there are two or more trustees, each of whom are individuals and not ordinarily resident in Australia or foreign companies, and they have an aggregate substantial interest (also see clause 11).

People who are not citizens will be taken only to be ordinarily resident in Australia if they have spent 200 or more days in Australia during the preceding 12 months and there is no legal limit on their further stay (clause 7 which will insert a new section 5A into the Principal Act).

Clause 11 will insert a new section 9A into the Principal Act which will define substantial interests in trusts. A person will be taken to have a substantial interest if they, alone or with their associates, have an interest in 15% of the capital or income of the trust. Two or more people will be taken to have an aggregate substantial interest if they have an interest in 40% of the capital or income.
Proposed section 12A defines interests in Australian urban land and when a person will be deemed to have acquired an interest in such land. An interest is defined to include ownership; an interest in a company that entitles the owner to occupy a dwelling in Australia; or an interest in: a lease that exceeds five years, an arrangement that entitles the holder to a share of profits or income from land, a unit of an Australian urban land trust, or, if the trustee of an urban land trust is a company, an interest in a share in that company. Generally, a person will be taken to have acquired an interest if they enter into an agreement or option to acquire an interest as defined. The acquisition of such an interest as a security, or through a will etc., is excluded and it should be noted that the acquisition of an interest from the Commonwealth, States or Territories, a corporation established by those bodies, or from local government, also is excluded from the definition (clause 12).

Proposed section 12B deals with interests in trusts. A person will be taken as having an interest in a trust if they hold a beneficial interest in the capital or income of a trust. This will be deemed to occur where a person enters into an agreement, or has the right, to acquire such an interest.

Proposed section 12C provides for the tracing of interests to determine their true ownership.

Section 13 of the Principal Act will be amended to increase the threshold involving offshore takeovers from $3 million to $20 million (clause 13).

Proposed section 13A will insert a definition of exempt business. An exempt business will be one with assets that do not exceed $3 million if more than half the value is attributable to rural land, and $5 million in other cases. Exempt business will be excluded from the examination and control provisions of the Principal Act.

A body will be an urban land corporation if more than half of its assets are urban land (proposed section 13C). Similarly, a unit trust will be deemed to be an urban land trust estate if more than half of its assets are interests in urban land (proposed section 13D).

Proposed section 21A will give the Treasurer power to prohibit the acquisition of urban land by a foreign person if satisfied that such an acquisition would not be in the national interest. The Treasurer also will have power to order that urban land already held by a foreign person be disposed of if of the opinion that the holding is contrary to the national interest (this will have effect from 30 October 1987 – clause 32). A foreign person will be taken to have acquired an interest in urban land if they become a beneficiary to a trust (other than a deceased estate) that has an interest in urban land. For the purposes of the proposed section, foreign person is defined to be a foreign corporation in which a person who is not ordinarily resident in Australia, or a foreign corporation, holds a substantial interest (or if there are two or more such bodies, they hold an aggregate substantial interest).
A new section 26A will be inserted into the Principal Act to require notification of a transaction that may breach the new rules. It will be an offence to fail to notify such a transaction (clause 22).

Section 35 of the Principal Act will be amended to allow the Courts to enforce orders made by the Treasurer (clause 27).

For further information, if required, contact the Economics and Commerce Group.

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Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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