Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019

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Date introduced: 23 October 2019
House: House of Representatives
Portfolio: Treasury
Commencement: On the same day as Schedule 3 to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019, which will commence on the day after that Bill receives Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at November 2019.
The Bills Digest at a glance
This Bill replaces a 2018 Bill of the same name that lapsed at the end of the 45th Parliament.

Purpose of the Bill

The purpose of the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019 (the Bill) is to amend the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 to:

• impose a reconciliation fee on developers for dwellings sold to foreign person under a near-new dwelling exemption certificate
• ensure equivalent treatment to that given under the new dwelling exemption certificate, which allows property developers to sell new dwellings, to foreign persons, paying a reconciliation fee for each dwelling under the exemption certificate and
• ensure that developers pay the same fee as would be payable if a foreign person directly applied to the Foreign Investment Review Board for the acquisition but via a less onerous administrative process.

The provisions of the Bill operate alongside those of Schedule 3 of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019.

Background

• The near-new dwelling exemption certificate was introduced on 1 July 2017 to allow developers the flexibility to sell near-new dwellings (that is, dwellings previously subject to a failed settlement to foreign persons) to foreign persons.
• These changes were deemed necessary to overcome limitations with the pre-existing new dwelling exemption certificate system for individual residential real estate purchases—whereby dwellings previously subject to a failed settlement could not be covered by the new dwelling exemption certificate because they were no longer defined as a new dwelling under the Foreign Acquisitions and Takeovers Act 1975.¹
• The Bill and Schedule 3 to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 seek to create a reconciliation mechanism to ensure that where a near-new dwelling is sold by a developer to a foreign person, the developer provides a reconciliation payment in respect of that sale, just as they are currently required to for sales of new dwellings.

Stakeholder concerns

• There have been no issues raised by major interest groups such as the Property Council of Australia, Housing Industry Association, Urban Development Institute of Australia and the Law Council of Australia.

Key issues

• The amendments are retrospectively applied from 1 July 2017 to align with the introduction of the near-new dwelling exemption certificate. When commenting on the Bill the Standing

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Committee for the Scrutiny of Bills indicated that it was not clear from the explanatory materials provided whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.\textsuperscript{2}

Purpose of the Bill
The purpose of the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019 (the Bill) is to amend the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 to impose a reconciliation fee on developers for dwellings sold to foreign persons under a near-new dwelling exemption certificate. Note that the provisions introduced by the Bill are intended to operate alongside those of Schedule 3 of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019, for which a separate Bills Digest is being published. The two Bills share an Explanatory Memorandum.  

Background
On 26 November 2016, the Treasurer announced that foreign buyers would be allowed to purchase an off-the-plan dwelling (as a new dwelling) when another foreign buyer has failed to reach settlement.

Following the Treasurer's announcement, the 2017–18 Budget included a range of measures to clarify and simplify Australia’s foreign investment framework. These measures were aimed at improving the operation of the framework and reducing red tape, and included changes to the treatment of failed off-the-plan settlements.

In particular, following a March 2017 consultation process, on 24 June 2017 amendments were made to the Foreign Acquisitions and Takeovers Regulation 2015 (the Regulation) to introduce a near-new dwelling exemption certificate for failed off-the-plan purchases in a development. These amendments allow developers to sell near-new dwellings in a similar manner to new dwellings. A near-new dwelling is a dwelling in a development that has previously been 'sold' but the sale was not completed and the developer is entering a new agreement to sell the dwelling.

These amendments overcome limitations with the pre-existing new dwelling exemption certificate system for individual residential real estate purchases. This is because section 4 of the Foreign Acquisitions and Takeovers Act 1975 (the FAT Act) defines a new dwelling as a property that has not been previously 'sold' as a dwelling. A property is considered 'sold' once a binding purchase agreement has been entered into regardless of whether the sale is completed (that is, settled). If a purchase agreement is not completed the dwelling would no longer be covered by the new dwelling exemption certificate as it is not a new dwelling as defined by the FAT Act.

Without these 2017 amendments foreign buyers of near-new dwellings would be required to go through the more onerous FAT Act application process—that is, Foreign Investment Review Board (FIRB) approval—in order to purchase dwellings that had never been lived in but had been subject

3. Near-new dwellings are dwellings that have previously been subject to a failed settlement. See the definition of ‘near-new dwelling interest’ at section 5 of the Foreign Acquisitions and Takeovers Regulation 2015.
5. S Morrison (Treasurer), Government to allow on-sale of off-the-plan dwellings failing to reach settlement, media release, 26 November 2016.
8. See Schedule 2 to the Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017.
9. A near-new dwelling interest is defined in section 5 of the Foreign Acquisitions and Takeovers Regulation 2015.
to a failed settlement process. Following the 2017 amendments, property developers can apply for an exemption certificate under the Regulation to sell near-new dwellings in a development to foreign persons, without each foreign purchaser being required to seek their own FIRB approval. This mirrors the exemption certificates for new dwellings that are available under section 57 of the FAT Act.

The Bill and Schedule 3 to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 create a reconciliation mechanism to ensure that where a near-new dwelling is sold by a developer to a foreign person, the developer provides a reconciliation payment or fee in respect of that sale, just as they currently do for new dwellings.

The measures contained in the Bill were initially proposed in the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2018 (the 2018 Bill). The 2018 Bill lapsed at the end of the 45th Parliament in July 2019. The only differences between the 2018 Bill and the current Bill relate to timeframes set out in the transitional provisions, as discussed later in this Digest. Consequently, some of the information in this Digest has been drawn from the Bills Digest for the 2018 Bill.12 The same 2018 Digest also discussed the operation of the 2018 version of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill.13

The reconciliation payment that is payable for each dwelling acquired by foreign persons is equivalent to the amount that would have been payable if the foreign person sought approval from FIRB individually (as discussed above). The rationale for this reconciliation payment is explained in the Explanatory Memorandum for the Bills:

Reconciliation payments are a necessary mechanism to ensure that developers pay the same fee as would be payable if a foreign person directly applied to the Foreign Investment Review Board for the acquisition. Without reconciliation payments, foreign persons would be able to acquire dwellings without the Commissioner of Taxation receiving any additional fees with respect to those individual applications. Fees would only be incurred with respect to the application for the exemption certificate [by the property developer].14

The Australian Government has not been receiving any reconciliation payments for the sale of near-new dwellings to foreign persons since the amendments were made to the Regulations in June 2017 (with effect from 1 July 2017). As a consequence, the amendments to both the FAT Act and the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 are retrospectively applied from 1 July 2017 to align with the introduction of the near-new dwelling exemption certificate.

It is proposed that Schedule 3 to the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 will amend the FAT Act to establish the near-new dwelling exemption certificate reconciliation payment for developers. Under the proposed changes, a developer will remit their near-new dwelling payments every six months, as outlined in the Explanatory Memorandum for the Bills:

• if a developer receives the near-new dwelling exemption certificate after this Bill is enacted then the first reconciliation fee is payable at the end of the six month period after they received the near-new dwelling exemption certificate. The first reconciliation fee will include any fees payable made from sales made by a developer under a near-new dwelling exemption certificate within that six month period

• if a developer received the near-new dwelling exemption certificate before this Bill is enacted then the developer will pay the first reconciliation fee at their first reporting date after 30 days of the commencement of this legislation. The first reconciliation fee will include any fees payable from sales made by the developer under a near-new dwelling exemption certificate since the certificate was obtained

• for subsequent reconciliation payments, developers are required to pay the reconciliation fee for sales of residential land under near-new dwelling exemption certificates on a six monthly basis.\textsuperscript{15}

\textbf{Committee consideration}

\textit{Senate Standing Committee for Selection of Bills}

The Bill has not been referred to a committee at the time of writing, although the 2018 Bill was referred to the Senate Economics Legislation Committee on 15 February 2018 for inquiry and report by 23 March 2018 (alongside the \textit{Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018}).\textsuperscript{16}

The Senate Standing Committee for Selection of Bills referred these 2018 Bills on the basis of potential stakeholders’ interest in the adjustments to capital gains tax treatment of managed investment trusts involved in affordable housing supply.\textsuperscript{17}

Details of the inquiry are available via the \textit{inquiry homepage}. There was no discussion of the reconciliation payment for near-new dwelling exemption certificates by the Senate Economics Legislation Committee and it recommended that the Bills be passed.\textsuperscript{18}

\textit{Senate Standing Committee for the Scrutiny of Bills}

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) considered the Bill in its Scrutiny Digest, published on 13 November 2019.\textsuperscript{19}

The Scrutiny of Bills Committee highlighted the retrospective application of the measures contained in the Bill and noted that the Bill that first contained this measure—the Foreign Acquisitions and Takeover Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2018—was introduced almost nine months after the budget announcement on 9 May 2017, and this Bill was introduced well over two years after the announcement.\textsuperscript{20}

The Scrutiny of Bills Committee flagged the following section of the Explanatory Memorandum for the Bill that discussed considerations of the impact of, and reasons for, retrospective application:

\textsuperscript{15} Ibid., pp. 59–60. See items 2 and 12 of Schedule 3 to the \textit{Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019}.


\textsuperscript{17} Ibid., Appendix 6.


\textsuperscript{19} Senate Standing Committee for the Scrutiny of Bills, \textit{Scrutiny digest}, 8, 2019, pp. 19, 20.

\textsuperscript{20} Ibid.
The retrospective application of this measure is consistent with the announcement of the Near-New Dwelling Exemption Certificate in the 2017–18 Budget announcement. Any adverse impact is expected to be minor, given the retrospective application was in the Explanatory Statement that accompanied the regulations that introduced the Near-New Dwelling Exemption Certificate.

The Scrutiny of Bills Committee indicated that it was not clear from the explanatory materials provided whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected, it then stated:

... its long-standing concerns that provisions with retrospective application challenge a basic value of the rule of law that, in general, laws should only operate prospectively.

In light of the explanation provided in the explanatory memorandum as to the retrospective application of the amendments proposed by the bill, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying the amendments in the bill on a retrospective basis.

**Policy position of non-government parties/independents**

There have been no issues raised by the non-government parties in relation to the government establishing a framework to receive reconciliation payments from developers where they have sold a near-new dwelling to a foreign person.

**Position of major interest groups**

Based on an examination of publicly available information there have been no issues raised by major interest groups such as the Property Council of Australia, Housing Industry Association, Urban Development Institute of Australia and the Law Council of Australia in relation to the government establishing a framework to receive reconciliation payments from developers where they have sold a near-new dwelling to a foreign person.

These interest groups supported the underlying June 2017 amendments to the Foreign Acquisitions and Takeovers Regulation 2015 (the Regulation) to introduce a near-new dwelling exemption certificate for failed off-the-plan purchases in a development. This support was outlined in their submissions during departmental consultation on the Foreign Investment Framework 2017 Legislative Package.

**Financial implications**

The proposal to impose a reconciliation fee on developers for dwellings sold to foreign persons under a near-new dwelling exemption certificate formed part of the 2017–18 Budget measure Streamlining and Enhancing the Foreign Investment Framework, and that measure had overall negative revenue implications, even though the proposal itself will be revenue positive. The Explanatory Memorandum did not separate out the financial impact of enabling a reconciliation payment for near-new dwellings sold to foreign persons.

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21. Page four of the Explanatory Statement of the Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining) Regulations 2017 indicates that a reconciliation payment would apply for each near-new dwelling sold to a foreign person by the developer.


payment to be made by developers who sell dwellings to foreign persons under a near-new dwelling exemption certificate from the other changes to the foreign investment framework in the budget measure.

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.26

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights has not yet reported on the Bill. The Committee considered the 2018 Bill and did not raise any human rights concerns.27

**Key issues and provisions**

The provisions of the Bill amend the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015*; they work with provisions contained in Schedule 3 of the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019* to create a reconciliation mechanism to ensure that where a near-new dwelling is sold by a developer to a foreign person, the developer provides a reconciliation payment in respect of that sale.

**Reconciliation payment for near-new dwelling exemption certificates**

**Commencement**

The provisions of the Bill are contingent on, and are to commence at the same time as, the interrelated provisions of Schedule 3 of the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019*—that is, commencement for the Bill will occur the day after the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 receives Royal Assent.

The application of the amendments to the *FAT Act* are proposed to affect acquisitions occurring on or after 1 July 2017. However, transitional arrangements affecting the timing of reconciliation payments are proposed to apply to acquisitions that occur on or after 1 July 2017 and that are covered by a residential land (near-new dwelling interests) certificate issued to the developer before the day the item commences.28

**Key provisions**

To establish a reconciliation payment applying to sales of dwellings made under a near-new dwelling exemption certificate, new definitions are proposed to be added to the *FAT Act* by the accompanying Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019, including a definition of:

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26. The Statement of Compatibility with Human Rights can be found at pages 65 to 67 of the *Explanatory Memorandum* to the Bill.
28. *Items 11 and 12* of Schedule 3 of the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability) Bill 2019*; *items 5 and 6* of Schedule 1 of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Near-new Dwelling Interests) Bill 2019*. As noted in this Bills Digest, the Scrutiny of Bills Committee has drawn the retrospective operation of these provisions to the attention of the Senate.
1. a near-new dwelling acquisition\(^{29}\)
2. a near-new dwelling interest\(^{30}\) and
3. residential land (near-new dwelling interests) certificate.\(^{31}\)

Section 113 of the FAT Act, which sets out when fees are payable under that Act, is proposed to be amended by \textit{items 2 to 9} of Schedule 3 to the \textit{Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019}. The amendments would create a reconciliation mechanism that requires developers to make payments in relation to sales to foreigners made under residential land (near-new dwelling interest) certificates. This will mirror the existing requirements in section 113 that apply to sales to foreigners under new dwelling exemption certificates issued under section 57 of the FAT Act.

Schedule 1 of the Bill proposes to amend the \textit{Foreign Acquisitions and Takeovers Fees Imposition Act 2015} with reference to the FAT Act amendments to impose the reconciliation payment on developers. Section 6 of the \textit{Foreign Acquisitions and Takeovers Fees Imposition Act} sets out the fees for exemption certificate applications. \textit{Item 4} of Schedule 1 to the Bill adds \textit{proposed subsections 6(5) and 6(6)} that stipulate how the quantum of the reconciliation payment for a residential land (near-new dwelling interest) certificate is to be derived. Proposed subsection 6(5) provides that six monthly fees for near-new dwelling interest certificates payable by developers as mentioned in proposed subsection 113(2A) of the FAT Act,\(^{32}\) are the total of the fees payable under proposed subsection 6(6) for each near-new dwelling acquisition during the period. Proposed subsection 6(6) provides that the amount payable for each near-new dwelling acquisition is the amount payable at the time of the acquisition under item 3 of the Table in subsection 7(1) of the \textit{Foreign Acquisitions and Takeovers Fees Imposition Act}. Item 3 of that table deals with the notifiable action of acquiring an interest in residential land and provides that the fee is $5,500 for a consideration of $1 million or less, or is to be determined in accordance with formulas set out in subsections 7(2) and 7(3) for higher amounts.

Part 2 of Schedule 1 of the Bill establishes when the amendments made by Part 1 of Schedule 1 of the Bill will apply. \textit{Item 5} provides that the amendments made by \textit{items 1 to 4} apply to a \textit{near-new dwelling acquisition} from 1 July 2017.\(^{33}\) This means that any sales of near-new dwellings made pursuant to a near-new dwelling exemption certificate are subject to a reconciliation payment by the developer who sold the near-new dwelling from the date that the certificates were introduced (1 July 2017). \textit{Item 6} provides transitional arrangements for acquisitions made on or after 1 July 2017 where the certificate was given to the developer before the item commences. In that situation, \textit{item 6} requires a developer to make their first reconciliation payment at the end of the first six month reporting period that falls at least 30 days after the legislation commences.

\begin{itemize}
  \item \textit{Items 1 and 9} of Schedule 3 of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019, proposing amendments to section 4 and \textit{proposed subsection 113(4A)} of the FAT Act.
  \item Ibid., amendments to section 4.
  \item Ibid., amendments to section 4.
  \item \textit{Proposed subsection 113(2A)} of the FAT Act, to be inserted by \textit{item 5} of Schedule 3 of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019, provides that a developer must pay a fee for a near-new dwelling interests certificate for a six month period where there were one or more near new dwelling acquisitions covered by the certificate during the period.
  \item Items 1 and 9 of Schedule 3 to the \textit{Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019} will amend the FAT Act to define \textit{near-new dwelling acquisition} as an acquisition by a foreign person of a near-new dwelling interest that is covered by a near-new dwelling interest certificate given to the developer. This definition will apply to the \textit{Foreign Acquisitions and Takeovers Fees Imposition Act} due to subsection 4(2) of that Act.
\end{itemize}
Comparison of key features of current law and proposed new law

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<th>Current law</th>
<th>New law</th>
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<tr>
<td>Six monthly fees or reconciliation payments are payable by developers who</td>
<td>The new law will mirror existing requirements for developers to make reconciliation payments for</td>
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<tr>
<td>sell new dwellings to foreign persons under new dwelling exemption</td>
<td>new dwellings they sell to foreign persons under a new dwelling exemption certificate.</td>
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<td>certificates obtained under section 57 of the FAT Act. The fees are based</td>
<td>This will ensure that developers who sell near-new dwellings to foreign persons under near-new</td>
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<td>on the number of acquisitions made under the exemption certificate over the</td>
<td>new dwelling exemption certificates will be required to make reconciliation payments to the</td>
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<td>previous six months by developers. This provision does not extend to cover</td>
<td>Commissioner of Taxation under the Foreign Acquisitions and Takeovers Fees Imposition Act 2015.</td>
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<td>developer sales of near-new dwellings to foreign persons under near-new</td>
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<td>dwelling exemption certificates.</td>
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Concluding comments

The proposed amendments to ensure developers make reconciliation payments for near-new dwellings they sell to foreign persons under a near-new dwelling exemption certificate represent a mirroring of the current rules for the sale of new properties to foreign investors and the Bill does not appear to raise any significant concerns.