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Foreign Acquisitions and Takeovers Amendment Bill 2009

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Foreign Acquisitions and Takeovers Amendment Bill 2009

Date introduced: 20 August 2009

House: House of Representatives

Portfolio: Treasury

Commencement: Schedule 1 on 12 February 2009; sections 1–3 and Schedule 2 on Royal Assent.

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The purpose of the Foreign Acquisitions and Takeovers Amendment Bill 2009 (the Bill) is to amend the *Foreign Acquisitions and Takeovers Act 1975* (the Act) to take account of increasing use of emerging complex financing arrangements that could potentially result in influence over, or control of, Australian companies, either now or in the future. Such arrangements, not envisaged when the Act was drafted, include convertible bonds or notes that convert (or give the option to convert) debt finance to equity finance.

Background

The Bill specifically relates to foreign investments involving Australian companies or assets, which could potentially result in influence or control thereof.[1]

The current screening regime embodied in the Act, is based around the notion of control of an Australian company or assets. In order for the current screening regime to be triggered (requiring mandatory notification of the proposed transaction to the Treasurer), the following criteria must be met:

- the potential investor must be a foreign person, and
- the acquisition target must exceed the relevant monetary thresholds;
- a proposed acquisition of shares representing a substantial interest or aggregate substantial interest in the corporation;

1. The Act also deals with proposed foreign investments in both residential and commercial real estate and urban land corporations/trust estates. These types of foreign investment proposals are not relevant to the Bill and so are not discussed here.

- a proposed acquisition of assets resulting in control of the business, or
- any other type of proposed arrangement that results in voting power being transferred to the potential investor.[2]

Under the Act, the use of instruments such as convertible notes, where debt finance converts into equity at a later date, may be covered by the existing provisions of the Act. However, the amendments proposed in the current Bill aim to remove uncertainty by clarifying definitions of 'substantial interest' and 'aggregate substantial interest' and introducing a definition of 'potential voting power'.

Essentially, the intention of the Bill is to extend coverage of the Act to the exercise of rights to acquire shares or voting power in the future, so that such arrangements could immediately trigger the existing screening regime and the Treasurer's powers to block or place conditions upon any such proposed arrangement.

Basis of policy commitment

The proposed amendments to the Act contained in this Bill were announced in a press release from the Treasurer, Wayne Swan MP on 12 February 2009.[3]

Committee consideration

It is noted that the Senate Standing Committee on the Scrutiny of Bills reviewed the Bill and made no comment.[4]

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2. 'Foreign person' is defined in *Foreign Acquisitions and Takeovers Act 1975* section 5. 'Substantial interest' is currently defined in the Act as one person holding 15 per cent or more of issued shares/voting power, while 'aggregate substantial interest' is defined as two or more persons holding 40 per cent or more of issued shares/voting power in an Australian corporation (s.9). Note that these definitions are proposed to be amended by **item 8 of** the Bill. 'Control' is defined in the Act as being 'in a position to determine the policy of the corporation' (s.8). 'Voting power' is measured by the maximum number of votes that can be cast at a general meeting (s.14). In relation to the monetary thresholds for various transactions, see: Foreign Investment Review Board (FIRB), 'Monetary thresholds' FIRB website, viewed 14 September 2009, http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp?
3. W Swan (Treasurer), *Amendments to foreign acquisitions and takeovers act*, Media release, 12 February 2009, viewed 31 August 2009, http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/017.htm&pageID=003&min=wms&Year=&DocType=0
4. Senate Standing Committee on the Scrutiny of Bills, *Alert Digest*, no. 11 of 2009, 9 September 2009, viewed 11 September 2009, http://www.aph.gov.au/senate/committee/scrutiny/alerts/2009/index.htm

At the time of writing, the Bill has not been referred to any other committee for consideration.

Position of significant interest groups/press commentary

At the time of writing, there has been no significant interest group or media commentary

Financial implications

This Bill does not seek to appropriate any Commonwealth funds and so there is no direct financial impact.[5]

Main provisions

Schedule 1— Amendments to the Act

Item 7 proposes to amend **section 5(4)**, which currently provides that:

> a reference to entering into an arrangement is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication, and, without limiting the generality of the following, includes a reference to:
>
> (a) entering into an agreement, other than a money lending agreement;
>
> (b) creating a trust, whether express or implied; and
>
> (c) entering into a transaction.

The amendment adds **new paragraph 5(4)(d)** to explicitly extend the meaning of 'entering into an arrangement' so that it can include an arrangement to acquire an asset or share.

Item 8 proposes to amend subsection 9(1) and add **new subsection 9(1A).** Under **section 18** of the Act, having in mind the adverse impact on the national interest, the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, or the proposed issue of shares, as the case may be. However, this order first requires the Treasurer to be satisfied that a foreign person(s) has or will acquire a controlling interest in an Australian corporation. Under **section 9(1)** of the Act, the concept of 'control' is satisfied if:

- a person holds a 'substantial interest' – having either control over at least 15 per cent of the corporation's voting power or holding at least 15 per cent of its issued shares; or

5. Explanatory Memorandum, Foreign Acquisitions and Takeovers Amendment Bill 2009, p. 1.

- in the case of two or more persons, they together hold an 'aggregate substantial interest' – having either control over at least 40 per cent of the corporation's voting power or holding at least 40 per cent of its issued shares;

provided that such interest or interests enable them to 'determine the policy of the corporation'.[6]

Both of the concepts of 'substantial interest' and 'aggregate substantial interest' are defined in the legislation by a reference to specified percentages of voting power. The amendment proposed to **subsections 9(1)** and **9(1A)** expand these definitions to include *potential* voting power and interests, while using the existing percentages of voting power under the Act.

Item 9 proposes to amend section 11 by clarifying that the current definition of 'interest in a share' under **subsection 11(2)** includes a right under an instrument, agreement or arrangement, whether rights are exercisable presently or in the future, and whether on the fulfilment of a condition or not. The amendment is designed to ensure that all possible financing arrangements, which give rise to a component of control or influence, are captured and are therefore capable of being kept in check so as to achieve the purposes of the Act. However, the amendment is not designed to capture bona fide money-lending arrangements, where these do not involve the option to acquire shares or voting rights.[7]

Both **items 8** and **9** will trigger an obligation for foreign investors to notify the Treasurer (pursuant to **proposed section 26**) where there is the prospect that the kinds of arrangements used will in the future, create influence over, or control of, an Australian company which is subject to the Act: **subsections 9(1)** and **11(2)**.[8]

Item 12 proposes to amend **section 14**. For the purposes of the Act, control of a company is assessed by reference to the number of shares or voting power. However, the proportion of shares is not always equivalent to the voting power. The amendment proposed therefore addresses possible ambiguity in the definition of 'voting power' in section 14, by clarifying that 'voting power' also refers to potential voting power.

Items 14 and **15** propose to amend **paragraphs 20(5)(a) and 21(5)(a)** by clarifying that in relation to an Australian corporation or business being controlled by foreign persons, the ability to determine the policy of a corporation applies in relation to any matter. Thus potentially a person would not have to be in a position to determine *all* aspects of the corporation's policy in order to be considered to have a controlling interest.

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6. If a person or persons do have a substantial interest or aggregate substantial interest, they are deemed to be able to determine corporation policy unless the Treasurer is satisfied that this is not the case in the relevant circumstances.

7. Explanatory Memorandum, op cit., p. 9.

8. ibid., p. 8.

Items 16–19 propose to amend section 26, which provides for mandatory notification of acquisitions of 'substantial holdings'. The amendments proposed by these items replace all references to 'shares' and 'shareholding' with references to 'substantial interest', so as to ensure that all other financing arrangements are captured.

Schedule 2— Transitional Provisions

Schedule 1 commences *retrospectively* on 12 February 2009, the date of the Treasurer's announcement about the measures contained in the Bill. However, under **item 1**, no offence is committed in respect of a failure to notify the Treasurer (of a proposed investment of the type covered by the amendments) where the relevant investment arrangement is entered into during the 'transition period' – that is, between 12 February 2009 and the commencement of the Schedule 2 (which is the date of Royal Assent).

However, the above protection is limited. Once **schedule 2** commences, foreign investors will have only 30 days from that date to notify the Treasurer that they entered into a transaction of the type covered by these amendments during the transitional period. Failure to do so within the 30 days will be an offence and, in the case of a natural person, attract a maximum penalty of 500 penalty units ($55 000), or imprisonment of 2 years, or both. A corporation would face a maximum penalty of 2500 penalty units ($275 000).

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