

Submission Exposure Draft Foreign Acquisitions and Takeovers Regulation 2015

Foreign government owned or controlled ADIs and banks

This submission is made in relation to the proposed new rules to apply to ADIs operating as banks in Australia who are foreign government owned or controlled. The substantive provisions regarding lending by such ADIs are contained in the Exposure Draft of the *Foreign Acquisitions and Takeovers Regulation 2015 (Draft Regulations)*.

The Government is seeking input from stakeholders on the two substantive Bills released for comment on 6 July 2015 being the *Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015 (Draft FATA)* and the *Register of Foreign Ownership of Agricultural Land Bill 2015* rather than the Draft Regulations. Nevertheless, the issues raised in the Draft Regulations are of sufficient importance to a number of our clients to warrant us making this submission at this time.

Current Policy

Australia's Foreign Investment Policy currently provides as follows:

Foreign government investors that are regulated by the Australian Prudential Regulation Authority as Authorised Deposit-taking Institutions do not need to notify the Government when they take security over an asset(s) as part of a lending agreement. Notification and prior approval is not required if the security is enforced and the asset(s) is sold within 12 months. However, the investor must notify the Government and get approval if the security is enforced, and the investor gains control over the asset(s) and retains it for more than 12 months.

A lending agreement is an agreement entered into in good faith in the ordinary course of carrying on a business of lending money. It does not include an agreement dealing with any matter unrelated to the carrying on of a lending business, such as one that allows a degree of influence or control over the borrower, their business activities or assets (other than the usual terms for such a security). Such an agreement may include separate contracts.

These provisions are the result of submissions to the Treasury and to the Foreign Investment Review Board over a period of several years. Under this regime ADIs which are "foreign government investors" for the purposes of the Policy are able to carry on business in Australia in competition to other banks and ADIs in the ordinary course.

Draft Regulations

The Draft Regulations taken together with the general rules applying to foreign government investors in the Draft FATA would impose a number of restrictions on ADIs which are foreign government investors which are not present in the current Policy. In particular:

- The Draft Regulations do not permit such ADIs to acquire security interests in residential land without clearance unless they or their parent entity are listed on a stock exchange and have at least 100 security holders.

Requiring clearance effectively excludes such ADIs from the market, because in order to compete they must be able to offer finance unconditionally and without the delay caused by the need to obtain clearance. It would also increase the timing, administrative and cost burden for routine secured financial accommodation from such ADIs if they still chose to compete. These changes go beyond what is necessary to protect the retail residential mortgage market and will reduce competition in that market.

- The exemption in the Draft Regulations for foreign government investor ADIs relating to interests in assets other than residential land is more limited than the current exemption. It only permits such an ADI to hold the interest without notification either for a maximum of 12 months from the time the interest is acquired or where the ADI is making a genuine attempt to dispose of the interest. We assume the intent of this exception is not to restrict the taking of the security but only enforcement under that security. As currently drafted, the proposed exemption does not exempt the taking of the security.

Submissions

We submit that:

- There is no policy requirement that lending on the security of residential land be treated differently from lending on the security of any other asset; and
- There is no policy reason, at least in this context, for distinguishing ADIs who are listed on a stock exchange or whose holding entities are so listed from any other kind of financier.

Therefore we request that any legislation and regulations introduced preserve the current exemption under the Policy which provides that Foreign government investors that are regulated by the Australian Prudential Regulation Authority as Authorised Deposit-taking Institutions do not need to notify the Government when they take security over an asset(s) as part of a lending agreement. Notification and prior approval is not required if the security is enforced and the asset(s) is sold within 12 months.

We ask that these submissions be taken into account when reviewing the Draft Regulations.

Kind regards

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