

# FIRB obligations for foreign persons inheriting Australian assets

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One of many changes to the foreign investment law that took effect from 1 January 2021 means that the foreign investment framework now applies to the acquisition of relevant assets (Australian land or a substantial interest in securities in an Australian entity) under a will by a beneficiary who is a foreign person. Interestingly, assets that devolve by operation of law, such as under an intestacy, continue to remain outside the framework.<sup>1</sup>

In the context of estate administration, FIRB Guidance Note 2 (V)<sup>2</sup> indicates that a beneficiary (that is a foreign person) is considered to have taken a relevant action when the legal interest in the asset is acquired on completion of administration.

The beneficiary is expected to submit their relevant foreign investment notification/application within 30 days. Fees are payable in respect of each notice given under the *Foreign Acquisitions and Takeovers Act 1975*, the amount varies generally depending on the value of the underlying property. Fees for residential properties are broadly in a range from AUD6,350 for acquisitions of AUD1 million or less, to AUD503,000 for acquisitions of more than AUD40 million. FIRB Guidance Note 10 contains more information about fees.

Importantly, be aware that just because a notice is given (and fees paid) does not mean the beneficiary can continue to own the asset. Indeed, administration practices may need to change – for example, assets sold by the legal personal representative rather than transferred to the beneficiary.

## PENALTIES

Failure to give a relevant notice can attract significant penalties. Penalties relating to residential land breaches are explained in FIRB Guidance Note 14 (the Note). The Note strongly encourages foreign persons who think they may have breached the law to self disclose this to the Australian government. Lower penalties may apply if a breach is self-reported.

The case of *C of T v Balasubramanian*,<sup>3</sup> shows that the government and courts take compliance with the rules very seriously. The landowner in the case failed to notify the treasurer of four residential land acquisitions and breached temporary resident requirements. The Commissioner of Taxation (the Commissioner) chose not to issue infringement notices that could have attracted total maximum penalties of AUD68,400. Rather, as a deterrent, the Commissioner sought to have the court impose a civil penalty. Ultimately, penalties totalling AUD250,000 were imposed, including AUD30,000 for each failure to notify. At the time of those breaches, the relevant maximum penalty amounts were 10 per cent of the acquisition cost or market value of the residential land; these are now 25 per cent and there is a new test based on the capital gain from the asset (as defined for FIRB purposes).



## REVIEW OF CHANGES

The Department of the Treasury (the Treasury) was required<sup>4</sup> to conduct a review of the changes that took effect on 1 July 2021, to determine what impact they had on foreign investment in Australia and the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.<sup>5</sup>

STEP, through its advocacy committee, made a submission<sup>6</sup> to that review noting, among other things, that:

- the devastating consequence that a child who is a foreign person (because they are not ordinarily resident in Australia) could be forced to dispose of the family home that they inherited because they are a foreign person at that time and do not meet any of the criteria for an exemption;
- the absurdity of professionals perhaps being required to advise a client to embrace an intestacy (partial or full) approach to ensure lands pass to selected beneficiaries; and
- many foreign person beneficiaries simply will not have the financial resources to go through the approval process.

Ultimately, the Treasury's evaluation did not reflect any of the STEP concerns (other than in respect of fees). However, the government indicated a package of reforms would be pursued in the second half of 2022 that focus on ensuring Australia's foreign investment framework continues to strike a balance between facilitating investment and protecting the national interest (including national security)<sup>7</sup>. It is hoped that STEP's concerns will be addressed in these reforms. ■

<sup>1</sup> Amendment of Regulation 29 of the *Foreign Acquisition and Takeovers Regulation 2015 (Cth)*

<sup>2</sup> All guidance notes can be accessed by using this link [firb.gov.au/guidance-notes](http://firb.gov.au/guidance-notes) [2022]

<sup>3</sup> FCA 374 <sup>4</sup> Section 4 *Foreign Investment Reform (Protecting Australia's National Security)*

*Act 2020* <sup>5</sup> Evaluation of the 2021 foreign investment reforms; [treasury.gov.au](http://treasury.gov.au) <sup>6</sup> All submissions

are available at the previous link <sup>7</sup> Government response to the evaluation of the foreign investment reforms; Foreign Investment Review Board; [firb.gov.au](http://firb.gov.au)

## ADVOCACY

### We want to hear from you!

Do you have a burning policy issue that needs to be given the voice of STEP?

STEP Members we want to hear from you!

We welcome your input, thoughts and feedback on policy issues you would like to see STEP involved in.

GET IN TOUCH...

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