

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FOREIGN TAKEOVERS AMENDMENT BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer,
the Hon Paul Keating, MP)

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GENERAL OUTLINE

This Bill amends the Foreign Takeovers Act 1975 as a result of changes to the Government's foreign investment policy announced by the then Acting Treasurer on 29 October 1985 and by the Treasurer on 30 April 1987 and 29 September 1987.

The purposes of the Bill are to:

- (i) exempt from the provisions of the Principal Act the acquisition by foreign persons of mineral exploration rights;
- (ii) increase from \$3 million to \$20 million the threshold amount below which "offshore takeovers" (that is takeovers where both offeror and target are incorporated overseas but subsidiaries or assets in Australia are incidentally involved) are excluded from the provisions of the Principal Act;
- (iii) amend the Principal Act so that takeovers of Australian companies and businesses are excluded from its provisions in cases where the total assets involved are less than \$5 million (less than \$3 million where more than half of the total assets are attributable to rural land);
- (iv) amend the Principal Act so as to bring within its provisions acquisitions by foreign persons of interests in Australian urban real estate;
- (v) amend the Principal Act to provide (a) a changed definition of "foreign person" that takes account of trusts; (b) scope for conditional approvals; (c) general anti-avoidance provisions; (d) increased penalties for offences; and (e) for it to be an offence for a person to make false or misleading statements.

FINANCIAL IMPACT

The only financial impact of the Bill will arise from a possible increase in the number of foreign investment proposals submitted to the Treasury for examination compared to the situation prevailing before the Bill is introduced. There has been a net reduction in staff in the foreign investment area of Treasury in recent years as a result of liberalisations of the foreign investment guidelines. It is not possible to provide a more precise statement of the financial impact of the Bill.

NOTES ON CLAUSES

CLAUSE 1. - SHORT TITLE OF BILL

1. This clause is self explanatory.

CLAUSE 2 - COMMENCEMENT

2. This clause is self explanatory.

CLAUSE 3 - TITLE OF PRINCIPAL ACT

CLAUSE 4 - SHORT TITLE OF PRINCIPAL ACT

3. Reflecting the Bill's extension of the Principal Act to cover acquisitions of urban land, the long and short titles of the Principal Act have been revised. Henceforth it will be known as the Foreign Acquisitions & Takeovers Act.

CLAUSE 5 - ADDITIONAL OPERATION OF ACT

4. This clause amends section 4 of the Principal Act and extends the operation of sections 19 and 21 of the Principal Act and new section 21A to transactions by a person in the capacity of trustee of a trust estate that has substantial foreign beneficiaries. The basic provisions of sections 19 and 21 and new section 21A cover a relatively limited range of persons and transactions and, having regard to constitutional considerations, the purpose of section 4 is to extend the scope of those sections to the full range of persons and transactions that the Act is intended to cover.

CLAUSE 6 - INTERPRETATION

5. This clause amends section 5 of the Principal Act, as set out below.

Paragraph 6(a) and 6(b)

6. This paragraph is designed to include a person in the capacity of trustee of a trust in which foreign beneficiaries hold substantial interests or aggregate substantial interests (see clause 11) within an expanded definition of "foreign person" in the Principal Act.

Paragraph 6(c)

7. Under the current foreign investment guidelines there are no restrictions on foreign participation in mineral exploration activities. Paragraph 6(c) of the Bill amends the definition of "mineral right" in the Principal Act so that it applies only to rights to recover minerals and excludes rights that are limited to exploration activities. The effect of the amendment is that the acquisition of a mineral right by a foreign person will only come within the scope of the Act if the right confers an entitlement to recover minerals.

Paragraph 6(d)

8. At present the Principal Act applies to takeovers of all Australian companies except non-trading companies whose assets do not exceed \$1000. Paragraph 6(d) of the Bill removes the definition of a "non-trading company", which becomes redundant because of the proposed insertion in the Act of a \$5 million threshold (\$3 million in the case of rural land) - see clause 14. This paragraph also excludes from the Principal Act the definition of "person", which has become redundant because of amendments to the Acts Interpretation Act.

Paragraph 6(e)

9. This paragraph inserts a series of definitions. Australian urban land means land in Australia that is not rural land and Australian rural land means land in Australia that is used wholly and exclusively for carrying on a business of primary production. The paragraph also defines interests in Australian urban land, Australian urban land corporations and Australian urban land trust estates by reference to new sections 12A, 13C and 13D respectively - see notes on clauses 12 and 14 below.

Paragraph 6(f)

10. This paragraph elaborates the meaning of references in the Bill to persons proposing to acquire interests in Australian urban land. There are similar provisions in the Principal Act with regard to persons proposing to acquire shares and assets.

Paragraph 6(g)

11. This paragraph omits sub-section 5(7) of the Principal Act which is redundant because of amendments to the Acts Interpretation Act.

CLAUSE 7 - ORDINARILY RESIDENT NON CITIZENS

12. This clause inserts a new section 5A in the Principal Act that deems a foreign national to be ordinarily resident in Australia if and only if (i) that person has actually been in Australia for 200 days in the past 12 months and (ii) there is no legal time limit on the person's continued presence in Australia - in effect that the person is entitled to remain in Australia as a permanent resident. Currently there is no statutory definition of "ordinarily resident" in the Principal Act and the common law meaning of the term does not

require a very high standard of connection with Australia. The purpose of the clause is to introduce an objective and precise definition of "ordinarily resident" in relation to persons who are not Australian citizens.

13. One effect of new section 5A is that newly arrived migrants in Australia will continue to be "foreign persons" for the first 200 days of their permanent residence in Australia. It is proposed to use the regulatory provisions in new sub-section 12A(8) to exempt such migrants from the requirement to seek approval to buy a family home in Australia during this period, thus saving the time and inconvenience that would otherwise be involved with such applications.

CLAUSE 8 - ASSOCIATES

14. This clause extends the definition of "associates" in section 6 of the Principal Act to cover the association between the trustees and substantial beneficiaries of trusts.

CLAUSE 9 - AUSTRALIAN BUSINESS

15. Sub-section 7(3) of the Principal Act exempts from the provisions of the Act businesses conducted by different types and levels of governments in Australia. Clause 9 of the Bill adds Territory governments to the exempt list and substitutes "the Commonwealth" for "Australia" in line with current drafting practice.

CLAUSE 10 - SUBSTANTIAL AND CONTROLLING INTERESTS IN CORPORATIONS

16. This clause amends section 9 of the Principal Act by deleting sub-section (3), which is to be replaced by the more comprehensive provisions of new section 12C.

CLAUSE 11 - SUBSTANTIAL INTERESTS IN TRUST ESTATES

17. This clause inserts a new section 9A in the Principal Act that defines substantial interests and aggregate substantial interests in trust estates. These terms are used in provisions that make trustees of trust estates "foreign persons" and also in the new tracing of interests provision (section 12C). A substantial interest is a holding by a person and any associates of an interest of 15 per cent or more in relation to the corpus or income of a trust and an aggregate substantial interest is a holding by two or more persons of interests totalling 40 per cent or more in relation to corpus or income.

CLAUSE 12

18. This clause inserts new sections 12A, 12B and 12C in the Principal Act.

Section 12A - Interests in Australian urban land

19. New section 12A defines "interests in Australian urban land" and includes some provisions dealing with "acquiring" such interests. Briefly stated, the interests include certain legal or equitable interests in Australian urban real estate, leases whose term exceeds 5 years, profit sharing arrangements, agreements and options in respect of urban land, interests in companies or unit trusts owning urban land, but exclude interests acquired by way of security for moneylending agreements, interests occurring by way of wills, or interests bought from Commonwealth, State, Territory or local government bodies.
20. New sub-section 12A(8) provides a regulatory power for exempting specified kinds of urban land acquisition from the provisions of the legislation. The long standing practice under the Government's foreign investment policy has been for certain classes of real estate purchases by foreign persons to be exempt from examination (for example, purchases by life insurance companies representing their Australian statutory funds). As well it has been the practice to approve annual programs of acquisitions for established real estate developers and thus save the time that would otherwise be involved in such developers having to make separate applications for approval for each acquisition. Now that the urban real estate aspects of foreign investment policy are to have legislative form, it will be necessary for regulations to be made exempting these classes of acquisition, and certain other classes of acquisition, from the provisions of the Act.

Section 12B - Interests in trust estates

21. The amendments in new section 12B elaborate the meaning of holding interests in trust estates, a concept which is central to the provision that defines what it means to hold a "substantial interest" or an "aggregate substantial interest" in a trust estate (new section 9A) and to the new tracing of interests provision (section 12C). Briefly stated, a reference to a person holding an interest in a trust estate is a reference to a person having a beneficial interest in the corpus or income of the trust estate. The elaboration in subsections (2) to (5) has been adapted from the broad provisions of section 11 of the Principal Act in relation to the meaning of holding interests in shares.

Section 12C - Tracing of substantial interests in corporations and trust estates

22. The Act as proposed to be amended will have various provisions which refer to persons "holding interests" in corporations or trust estates (eg the "substantial interest" and "controlling interest" requirements of the various definitions of "foreign person"). Subsection 9(3) of the Principal Act, which is being deleted, allows tracing of interests that are indirectly held through chains of corporations. New section 12C is an extended version of that provision and will allow interests to be traced down chains of companies and trust estates. For example, if Company A holds a substantial interest in Trust Estate B which holds a substantial interest or controlling interest in Company C, then A is taken to hold the interests in C that B holds.

CLAUSE 13 PRESCRIBED CORPORATIONS

23. This clause amends the definition of a "prescribed corporation" in section 13 of the Principal Act by increasing the monetary thresholds in sub-sections 13(1)(d) and (e) from \$3 million to \$20 million or such other amount as is prescribed. These sub-sections relate to overseas companies that have subsidiaries or certain other assets in Australia. Where the value of those Australian assets is above the threshold, the overseas company is a prescribed corporation for purposes of the Act and any offshore takeover of that company would be subject to the provisions of the Act.

CLAUSE 14

24. This clause inserts new sections 13A to 13D in the Principal Act.

Section 13A - Exempt dealings

25. The purpose of this new section is to exclude from the Principal Act takeovers of Australian companies and businesses with total assets below certain thresholds. It is to be noted that companies with total assets below the thresholds will only be exempt under the takeover provisions of the Act (sections 18, 19, 20, 21 and 26) and their acquisition may be separately examinable under the new urban land provisions (sections 21A and 26A) - see paragraph 29 below dealing with new section 13c.

- 26 Unless varied by regulation, new section 13A provides that the thresholds are \$3 million where more than half of the assets of the business are attributable to rural land and \$5 million in other cases. New section 13A defines exempt corporations and exempt businesses by reference to these thresholds and provides that the Treasurer's powers in the Principal Act to examine and, in certain circumstances prohibit, takeovers shall not apply in relation to exempt corporations and businesses.

Section 13B - Valuation of assets for purposes of section 13A

- 27 New section 13B provides the basis upon which total assets are to be determined for purposes of the thresholds in new section 13A. For share acquisitions (section 18 of the Principal Act), total assets are the higher of the gross assets in the balance sheet of the company or the value attributable to the whole company by reference to the price of the shares subject to the transaction in question. When a takeover is occurring by means of the purchase of assets (section 19 of the Principal Act) the consideration payable for those assets is taken to be the value of the total assets. When a takeover is occurring by means of the lease, hire or management of assets, or by a profit sharing arrangement (section 21 of the Principal Act) the value of the total assets is the value determined by a suitably qualified arms length valuer.

Section 13C - Australian urban land corporations

28. New section 13C provides that a company is an Australian urban land corporation if more than 50 per cent of its total assets are attributable to Australian urban real estate. If the assets in a company's sheet are reasonably valued, those values are to be used for purposes of the 50 per cent calculation.
29. It is again to be noted that the definition of an Australian urban land corporation is independent of the definition of an exempt corporation in new section 13A (ie the \$5 million threshold is not applicable to the definition of an urban land corporation). Shares in an Australian urban land corporation are taken to be interests in Australian urban land (see paragraph (e) of new sub-section 12A(1) and the acquisition of such shares by a foreign person is effectively treated as an acquisition of urban real estate and examinable under new section 21A, even if the corporation is an exempt corporation under new section 13A.

Section 13D - Australian urban land trust estates

30. This new section is similar to new section 13C, except that it deals with unit trust estates which have more than 50 per cent of their assets in the form of Australian urban land.

CLAUSE 15 - HEADING

31. The provisions of the Bill relating to acquisitions of urban land necessitate an amendment to the heading of Part II of the Principal Act.

CLAUSE 16 - ACQUISITIONS OF INTERESTS IN AUSTRALIAN URBAN LAND

32. This clause inserts new section 21A in the Principal Act. This is the key section that gives the Treasurer power to examine acquisitions by foreign persons of interests in Australian urban land; that provides for the prohibition of proposed acquisitions by foreign persons that the Treasurer concludes would be contrary to the national interest; and that enables the Treasurer to order the divestment of interests in urban land that are purchased by foreign persons without prior notice under the Act and which the Treasurer subsequently concludes are contrary to the national interest. Such orders would have effect while the person was a foreign person and the interest was in Australian urban land.
33. Because of the breadth of the definition of interests in Australian urban land, new section 21A applies not only to direct purchases of urban real estate, but also to the purchase of shares in Australian urban land corporations (defined in new section 13C) and of units in Australian urban land trust estates (defined in new section 13D). Subsection (6) also makes it clear that the section allows disposal (but not prohibition) orders to be made in cases where foreign persons are made beneficiaries through other trusts of interests in Australian urban land and might not otherwise be said to have "acquired an interest" in the land.
34. Another feature of the new section is that there is no limit (in either dollar terms or in terms of the proportionate interest in the whole property) on the size of acquisitions which are examinable. However, it is proposed that acquisitions of foreign portfolio shareholdings in publicly listed property development companies should be exempt under the regulations.

35. It should be noted that the Treasurer's powers in new section 21A to take action against foreign acquisitions of interests in Australian urban land are not limited to acquisitions that result in a change in control of the property with the resultant control being foreign. The powers of the Treasurer in the existing Principal Act, which cover the takeover of Australian businesses, are restricted to such cases. Foreign investment policy in relation to urban real estate is concerned primarily with foreign ownership rather than foreign control and that is the reason for the difference.

CLAUSE 17 - INTERIM ORDERS

CLAUSE 18 - REVOCATION OF ORDERS

CLAUSE 19 - PUBLICATION OF ORDERS

36. These clauses extend to new section 21A the provisions of the Principal Act in relation to the making of interim orders (which extend the time available for the examination of proposals), the revocation of orders and the publication of orders in the Gazette.

CLAUSE 20 - EFFECT OF NOTIFICATION OF TRANSACTIONS

37. This clause amends section 25 of the Principal Act, which currently provides for the notification of proposals and stipulates time limits (normally 30 days with possible 90 day extensions) within which action must be taken if the Treasurer wishes to issue an order prohibiting a notified proposal. The amendments provide that, rather than issuing a prohibition order in relation to a proposal, the Treasurer may decide to raise no objections subject to conditions. Conditions must be notified to the person within 10 days of the Treasurer's decision.
38. In the administration of the Government's foreign investment policy it has long been the practice to raise no objections to proposals subject to conditions but hitherto there has been no statutory basis for these conditions. New sub-section 25(1C) makes it an offence for a foreign person not to comply with a condition. There would be no offence, of course, if for example the person had ceased to be a foreign person.

CLAUSE 21 - COMPULSORY NOTIFICATION OF CERTAIN SECTION 18
TRANSACTIONS

39. This clause amends section 26 of the Principal Act to include trustees of trust estates that have substantial foreign beneficiaries in the definition of persons to whom the section applies; to remove the reference to a "non-trading corporation" (see paragraph 8 above); to recognise the new provision in new subsection 25(1A) for conditional advices; and to provide increased penalties for offences. For natural persons convicted of an offence under the amended section, the penalty is a fine of up to \$50,000 or imprisonment for up to 2 years, or both. For companies, the penalty is a fine of up to \$250,000. Paragraph (e) of the clause inserts new subsection (5A) and is designed to avoid a person having to notify a single proposed acquisition under both section 26 and new section 26A.

CLAUSE 22 - COMPULSORY NOTIFICATION OF CERTAIN SECTION 21A
TRANSACTIONS

40. This clause inserts a new section 26A which makes it an offence for persons to whom the section applies (in effect non-residents or corporations or trust estates in which non residents have substantial interests) not to give prior notice to the Treasurer of a proposal to acquire an interest in Australian urban land. The provisions of the new section are broadly similar to the provisions of section 26 of the Principal Act in relation to the compulsory notification of substantial shareholdings.

CLAUSE 23 - FORM OF NOTIFICATION

41. The effect of this clause is to provide that a notice under new section 26A does not have effect unless it is in the prescribed form.

CLAUSE 24 - OFFENCES

42. Clause 24 amends section 30 of the Principal Act to provide heavier penalties for offences. Section 30 provides that it is an offence for a person to fail to comply with an order made by the Treasurer under Part II of the Act. The amendments in clause 24 provide a higher fine for companies (up to \$250,000) than for natural persons (up to \$50,000) but offences by natural persons may also carry a sentence of imprisonment for up to 2 years. These offences are indictable offences.

CLAUSE 25 - DEFENCE TO PROSECUTIONS

43. Clause 25 amends section 32 of the Principal Act to take account of new section 21A.

CLAUSE 26 - REPEAL OF SECTION 34

44. Section 34 of the Principal Act is unnecessary by virtue of amendments to the Judiciary Act 1903.

CLAUSE 27 - POWER OF COURT TO ENFORCE TREASURER'S ORDERS

45. This clause amends section 35 of the Principal Act. Paragraphs (a) and (d) of the clause omit provisions that are now unnecessary because of amendments to the Acts Interpretation Act. Paragraph (b) inserts a new sub-section elaborating the powers of the Court to enforce orders made by the Treasurer in relation to the acquisition of urban land.

CLAUSE 28 - TREASURER MAY REQUIRE INFORMATION

46. Clause 28 amends section 36 of the Principal Act and is consequential on proposed new section 36A - see notes on next clause.

CLAUSE 29 - FALSE OR MISLEADING STATEMENTS

47. This clause inserts a new section 36A in the Principal Act making it an offence for a person knowingly or recklessly to make false or misleading statements. This general provision in relation to false or misleading statements renders paragraph (b) of sub-section 36(2) of the Principal Act unnecessary and the latter is not included in the amendment to section 36 provided by clause 28.

CLAUSE 30 - ANTI-AVOIDANCE

48. This clause inserts new section 38A that contains an anti-avoidance power for the Treasurer to take action against schemes entered into for the sole or dominant purpose of avoiding the provisions of the Act. In the event that the Treasurer does not take action until after a foreign person has entered into an acquisition or arrangement under such a scheme, subsection 38A(3) ensures that the only order that could be made is a disposal order.

CLAUSE 31 - CONSEQUENTIAL AMENDMENT OF OTHER ACTS

49. This clause is self explanatory.

CLAUSE 32 - APPLICATION

50. Clause 32 extends the application of the amending legislation to provide the Treasurer with power to order the divestment of certain interests in Australian urban land that were purchased between 30 October 1987 (the date of release of a detailed corrigendum to the foreign investment guidelines elaborating the change of policy announced by the Treasurer on 29 September 1987) and the commencement of the Act.

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