



**Australian Government**

**Inspector-General of Taxation**

**Taxation Ombudsman**

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10 November 2020

Senator Slade Brockman  
Chair  
Senate Economics Legislation Committee  
Parliament House  
CANBERRA ACT 2600

Dear Chair

**Inquiry into the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020**

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) welcomes the opportunity to contribute to the Senate Economic Legislation Committee's (**Committee**) Inquiry into the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (**FIR Bill**) and the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020.

The IGTO is an independent Commonwealth statutory agency that investigates taxation administration systems and laws, as well as the actions and decisions made by Tax Officials - of the Australian Taxation Office (**ATO**) or the Tax Practitioners Board (**TPB**). The IGTO seeks 'to assure and ensure that there is fair, equitable, and transparent administration of the tax system consistent with community expectations.'<sup>1</sup> We also undertake tax investigations for the purpose of providing independent advice and assurance to Government on the taxation administration laws and systems.

The IGTO is not empowered to investigate or advise on tax policy matters. Accordingly, this submission does not make (or intend to make) comment on the appropriateness of the reforms set out in the Bills. Rather, we have reviewed the Bills and the associated explanatory memorandum and confine our comments to areas of tax administration for the Committee's consideration.

We understand that the Committee is operating under a short timeframe to report to the Senate and, accordingly, could not afford submitters more time beyond 10 November 2020. Within the time available, we have framed our submission at a high level. Our submission is focused on two broad issues, namely:

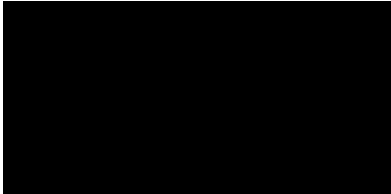
- The civil penalties regime and reliance upon market value as a basis for calculating penalties (refer Appendix A); and
- The potential implication arising from some of these reforms to inadvertently enliven the jurisdiction of the IGTO's complaints handling service (refer Appendix B).

Discussion of these issues is set in the two appendices to this letter.

<sup>1</sup> Inspector-General of Taxation and Taxation Ombudsman, *Corporate Plan 2021 – 2024* (2020) p 5  
<<http://igt.gov.au/accountability-and-reporting/>>.

We trust that this submission is of assistance to the Committee in its consideration of the Bills. If our office may be of any further assistance, or if the Committee requires us to elaborate on any matters that we have raised, please do not hesitate to contact me by email ([karen.payne@igt.gov.au](mailto:karen.payne@igt.gov.au)) or by phone (02 8239 2125).

Kind regards,



Karen Payne  
Inspector-General of Taxation and Taxation Ombudsman

## Appendix A – The Civil Penalties Regime

The Foreign Investment Policy framework and the associated legislation has been designed to introduce offences and allow for the imposition of criminal and civil penalties for the purposes of deterring non-compliance and to ensure the national interest is safeguarded.<sup>2</sup> There are existing sections of the *Foreign Acquisitions and Takeovers Act 1975 (FATA)* which calculate civil penalties by reference to the benefit gained by an entity from engaging in non-compliant conduct.<sup>3</sup>

The FIR Bill applies that concept further to enable the civil penalty provisions to deliver penalties which are more effective deterrents by calculating penalties proportionately to the degree of the benefit obtained from misconduct and harm to the national interest.<sup>4</sup> We wish to draw the Committee's attention specifically to the proposed addition of section 95A to the FATA which provides an option for calculating maximum civil penalties by reference to the 'market value' of an interest in the relevant residential land. This is one of three calculations, where the greatest of all three generally applies.<sup>5</sup> We also note that the calculation formula is similar to the existing provisions in the FATA, such as those found in sections 94 to 96.

The use of market value as a reference point for calculating civil penalties is also provided for in other parts of the FIR Bill.

In 2015, our office undertook a review investigation into the Australian Taxation Office's (ATO) administration of valuation matters.<sup>6</sup> That investigation was undertaken as a result of concerns raised by stakeholders about the increasing role of valuations in tax law and their associated compliance costs.

The IGT at the time noted:

*There are inherent difficulties associated with valuations, such as their subjective nature, the use of ranges and the potentially prohibitive costs of obtaining them. Minor changes in valuations may also have a disproportionate tax effect where, for example, the eligibility for a concession is dependent on not exceeding certain thresholds. These difficulties, combined with the taxpayers' burden of proof where the ATO challenges their valuation, increase the potential for increased uncertainty, disputation and costs for both taxpayers and the ATO alike.<sup>7</sup>*

There is a risk that where market valuation is used as one of the bases for calculating penalties that it can lead to collateral disputes – namely, disputes as to the correct 'market value'.

Based on the current rules in FATA and proposed amendments in the FIR Bill, the extent to which market valuations would need to be employed in these matters is unclear to the IGTO. Since it is only

<sup>2</sup> Foreign Investment Review Board, *Foreign Investment Compliance Framework Policy Statement* <[https://firb.gov.au/sites/firb.gov.au/files/2019-09/Compliance\\_Framework\\_policy\\_statement\\_V1.01\\_0.pdf](https://firb.gov.au/sites/firb.gov.au/files/2019-09/Compliance_Framework_policy_statement_V1.01_0.pdf)>.

<sup>3</sup> *Foreign Acquisitions and Takeovers Act 1975*, Divs 3 and 4.

<sup>4</sup> Explanatory Memorandum to the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 and Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020, p 10.

<sup>5</sup> The other two calculations are based on the amount of the capital gain that was made or would be made and the consideration for the residential land acquisition.

<sup>6</sup> Inspector-General of Taxation, *Review into the ATO's administration of valuation matters* (2015) <<https://www.igt.gov.au/news-and-publications/reports-reviews/review-atos-administration-valuation-matters>>.

<sup>7</sup> *Ibid*, p vii.

one of three options for calculating civil penalties, where the greatest applies, it may be that the other two calculations – being the capital gain made on the disposal of the interest or a proportion of the consideration for the acquisition of the interest – are relied upon.

We note that the FIR Bill contemplates situations where a market value cannot be ascertained<sup>8</sup> (in which case a nil value would be substituted) and we consider this may be an acknowledgement of the difficulty in obtaining ‘accurate’ or indisputable valuations. Whilst there is provision for a nil value to be substituted in place of a valuation of market value, it is unclear to the IGTO in what circumstances a market value would be considered unascertainable, who would make that decision and whether this, in and of itself, may generate further disputes.

The Committee may wish to make inquiries with the ATO on the potential risks associated with using market value and if, in its view, there are ways to minimise the risk of collateral disputes to reduce administration and compliance costs, and enhance overall efficiency. As part of this inquiry, the Committee may wish to explore options to more clearly define how ‘market value’ is to be determined, identify alternative options which are less subjective or otherwise consider approaches in which disputes about valuations of market value can be mitigated, or recommend that market values should only be used where other options have been exhausted.

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<sup>8</sup> Above n 4, para 3.53

## Appendix B – Jurisdiction of the IGTO in relation to Foreign Investment Review matters

The IGTO acknowledges the role and importance of the FATA to address new and emerging national security risks and that amendments are necessary to keep pace with developments in the international sphere. The IGTO submits that the role of the IGTO (if any) in relation to such matters could be clarified for these purposes. Specifically and respectfully, we submit that the IGTO **should not** have jurisdiction to review decisions relating to matters of national security risk – as we do not have relevant access and investigative powers to do so. However, we consider there is a risk under the drafting proposed that the existing investigation powers of the IGTO (the power to investigate administrative actions and decisions of Tax Officials<sup>9</sup>) may be inadvertently invoked in some circumstances. An express exclusion of the IGTO’s jurisdiction in such matters could be achieved through the FIR Bill or by way of an amendment to the *Inspector-General of Taxation Act 2003*.

A brief explanation is provided below for your reference and consideration:

The Treasurer is empowered to make determinations concerning national security matters. In making the determinations, the Treasurer may rely on information provided from other sources, including the Commissioner of Taxation.

Schedule 1 of FIR Bill, enables the Commissioner to disclose protected information to the Foreign Investment Review Board (FIRB) for the purpose of advising the Treasurer about the administration of the FATA.<sup>10</sup> The Commissioner currently maintains the register of foreign ownership of residential land under the FATA and the reforms propose to consolidate the existing registers with the registrar being appointed by the Treasurer.<sup>11</sup>

Under section 130A of the FIR Bill, applicants are empowered to apply to the Security Division of the Administrative Appeals Tribunal (AAT) for a merits review of the Treasurer’s determination regarding the existence of a national security risk. Merits review to the AAT do not fall within the jurisdiction of the IGTO and nor do merits review of ATO decisions.

However, our experience in dealing with tax administration complaints suggests that there is a risk of collateral action by way of complaints being lodged with our office, particularly where determinations may have been based upon information provided by the Commissioner.

For example, applicants may raise complaints about the accuracy of the information that has been shared as a basis of challenging the Treasurer’s determination. Additionally, we note that depending on the applications made, the Treasurer may have relied on information sourced from multiple agencies in making his determination and our office would not be in a position to comment on information or advice attained by other agencies. As such, we believe that it would not be appropriate for our office to investigate these matters as we do not primarily deal with matters of national security.

The IGTO has only limited discretion to refuse to investigate a taxation complaint.<sup>12</sup> We believe that in the present circumstances where the protection of Australia’s national security is the paramount

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<sup>9</sup> *Inspector-General of Taxation Act, 2003*, s 7.

<sup>10</sup> Above n 4, para 2.109.

<sup>11</sup> Above n 4, para 5.11.

<sup>12</sup> *Inspector-General of Taxation Act 2003*, s 9.

consideration, processes of dispute should be streamlined to minimise the risk of duplication and collateral action that may delay overall outcomes.

We note that, currently section 138 of the FATA allows actions to be taken by the Commissioner under delegation. In these circumstances, these actions may be treated as actions under a taxation law.<sup>13</sup> The Commissioner of Taxation currently has been delegated responsibility over residential property purchases, and we have received a small number of complaints relating to these cases. The Bill empowers the Treasurer to delegate more powers to the Commissioner.<sup>14</sup> Whilst it may be outside of the scope of this Inquiry, it is important to acknowledge that where more powers are delegated to the Commissioner of Taxation, any actions or decisions flowing from those delegations may, unless specifically excluded, fall within the IGTO's jurisdiction to investigate.

In this regard, we draw the Committee's attention to the information gathering and access powers introduced by the proposed Bill. We note that allowing the Commissioner to utilise the existing access and information gathering powers may streamline the process as 'in many situations where information is required for the administration of the FATA, that same information is also required to administer taxation laws'.<sup>15</sup>

However, we note that although the Commissioner utilises access and information gathering powers under the *Tax Administration Act 1953*, the Bill may also trigger the *Regulatory Powers Act 2014* (RPA).<sup>16</sup> As such, the Treasurer can delegate these powers under the FATA to the Commissioner when exercising its investigative powers. Powers, under Part 3 of the RPA, include access to premises with consent or by warrant to gather information to investigate potential non-compliance with the relevant offence or civil penalty provisions of the FATA. It follows that there may be concerns raised by applicants surrounding, not only the accuracy of the information, but also the processes by which the information was obtained.

Accordingly, and having regard to the above, the Committee may wish to consider whether there is a need to expressly preclude the IGTO from considering complaints concerning taxation administration actions and decisions arising from or which relate to a delegation by the Treasurer or relevant national security determination.

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<sup>13</sup> *Income Tax Assessment Act 1997*, s 995-1.

<sup>14</sup> For instance, please refer to Above n 4, paras 3.116 and 3.155.

<sup>15</sup> *Ibid*, para 3.156.

<sup>16</sup> *Ibid*, para 3.130.