

Joint Committee on Public Accounts and Audit

Inquiry into Foreign Investment Obligations in Residential Real Estate - Inquiry based on Auditor-General's report 48 (2017-18)

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

12 SEPTEMBER 2018

Department/Agency: ATO

Question: 1

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Topic: Breach referrals

Question:

Mr Hill:

Paragraph 15 of the ATO submission: 'Sophisticated data matching capability combined with other sources of intelligence including community referrals to detect and investigate in the instances of non-compliance'.

1. How many community referrals have the ATO received in relation to suspected Foreign Ownership obligation breaches?
2. How many tip-offs or referrals have the ATO received from real-estate agents in relation to suspected Foreign Ownership obligation breaches?
3. Can you provide a list of all tip-offs by volume (how many), what kind of tip-off and where they are from geographically?

Paragraph 25 of the ATO submission references 'Intermediary community'

4. Can you provide an exhaustive list of what the ATO means by 'Intermediary Community'.

Answer:

1. 1,536 community referrals have been received since May 2015.
2. The vast majority of community referrals are provided anonymously. As such, the ATO does not have information relating to the source of referrals. Anecdotal evidence suggests some referrals have come from intermediaries, but we are not able to provide an estimate of how many.
3. 1,536 community referrals have been received since May 2015.
The vast majority of community referrals are provided anonymously. As such, the ATO does not have information regarding the geographical location of referrals. Generally community referrals concern a member of the community making a referral relating to a neighbouring property because they believe there may have been a breach of the foreign investment rules (often subsequent to an auction or purchase of a neighbouring property).
4. The term 'intermediary' is not defined in the *Foreign Acquisitions and Takeovers Act 1975* (FATA). The intermediary community can refer to those that are authorised to deal with the ATO on behalf of clients for FATA purposes, or even those that engage with foreign investors during the marketing process for their business activities. As such, intermediaries can include tax agents, accountants, conveyancers, solicitors, migration agents and developers. Separately, the ATO also engages with a number of other industry bodies and representatives including real estate agents to promote general FIRB compliance messages.

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Department/Agency: ATO

Question: 2

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Topic: State reporting requirements

Mr Hill

Discussion:

Requirements for state and territory government to take 100 points of ID or something of a similar nature, to identify foreign purchases. The conveyancers would be under state law regarding identification of purchases of property, and the registration of the transfer of real property. . Federal Government has negotiated with the states and territories, and most have passed laws to facilitate the recording if a person's foreign status. NT has not agreed to pass laws, WA has agreed to but this has not yet been implemented.

In those states where it has been passed it's a required information field, but not mandatory, so they haven't been providing foreign status information to a very high extent. Something which the ATO have currently been readdressing with manual intervention.

At what point do you think that will be remedied? – Do we have a timeline when this might be fixed? The ATO have that work-around, therefore its 'fixed' in a sense.

Community and Parliamentary concern around the systems between State and Territory government and Commonwealth have been weak.

Question:

Can you provide further information about the Northern Territory and Western Australia jurisdictions?

Answer:

Western Australia and South Australia have not yet passed legislation to collect foreign identifier data during property transactions:

- **Western Australia** – the legislation is still being drafted.
- **South Australia** – the legislative amendments are contained in the *Statutes Amendment and Repeal (Budget Measures) Bill 2018* that was introduced into Parliament on 4 September 2018 and was debated on 20 September 2018. The legislation has not yet passed.

The ATO is continuing to use alternate data matching and self-registration approaches to identify relevant property transactions in these states to be recorded on the register.

The Northern Territory did not agree to participate in the National Register of Foreign Ownership of Land Titles project and will therefore not be collecting foreign identifier data. As such, the ATO will continue to use alternate data matching and self-registration approaches to ensure that property transactions in the Northern Territory are appropriately recorded on the register for the foreseeable future.

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Department/Agency: ATO

Question: 3

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Topic: Beneficial ownership

Question:

Mr Hill:

Can you provide comprehensive detail around how the ATO determines beneficial ownership of property purchased by foreign companies?

Answer:

Beneficial ownership of foreign companies is considered by the ATO both where an applicant is seeking foreign investment (FIRB) approval to acquire property and where the ATO identifies a potential instance of property being acquired by a foreign company without FIRB approval.

The tracing provisions in section 19 of the *Foreign Acquisitions and Takeovers Act 1975* (FATA) ensure that the FATA cannot be avoided by having an Australian incorporated company with foreign beneficial ownership. The tracing provisions mean that foreignness may be traced back through the ownership structure of applicants.

Where an applicant is seeking FIRB approval, the ATO will request details around the beneficial ownership of the applicant. The ATO can also request information from other persons on the beneficial ownership of the applicant using formal information gathering powers in the *Taxation Administration Act 1953* (TAA) or the FATA.

The ATO will conduct extensive inquiries to ensure we are satisfied that the potential beneficial owner of the interest is not different from that which is described on the application. This can include inquiries with the Australian Securities and Investment Commission database ('MASCOT') in conjunction with AUSTRAC.

Where these inquiries suggest that a third party that hasn't been identified in an application may receive a beneficial interest in the property, we can request copies of any trust deeds and/or the names of beneficiaries from the applicant. Ultimately, the ATO will not issue FIRB approval until it is satisfied that it has determined who the beneficial owners of a property are and there are no unmitigated national interest issues.

The ATO will conduct similar inquiries where an individual may be seeking to acquire a property on behalf of or for the benefit of another individual or investor.

If FIRB approval is obtained by fraud or serious misrepresentation (e.g. because certain beneficial owners were intentionally omitted from an application) the FIRB approval may not be valid and compliance action may be taken (including potentially an order that they dispose of the property).

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Alternatively, where the ATO is conducting compliance investigations relating to an acquisition of property that potentially occurred without FIRB approval, we will use our formal information gathering powers under the TAA and the FATA, along with our access to external data sources (including MASCOT and AUSTRAC) and general investigative processes to establish the beneficial ownership of the property. Section 354-5 of the TAA was specifically inserted to allow the Commissioner to request information regarding beneficial interests in property held by other parties.

For example, where the legal owner of the property is a foreign company, we would use formal information gathering powers to compel relevant persons located in Australia to provide information to the ATO regarding the shareholders or beneficiaries. We could then engage with relevant overseas jurisdictions under international Exchange of Information (EOI) in order to establish beneficial ownership of the property.

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Department/Agency: ATO

Question: 5

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Topic: Breach type and visa status

Question:

Mr HILL: Thank you. In paragraph 16 you say that over the last almost three years, as you mentioned in your introductory statement, there were 1,158 breaches detected and 1,067 penalties. Can you provide us some more information on the type of breaches? Were they in relation to commercial land or residential land? What proportion?

What sorts of visa holders or ex visa holders were they? Were they temporary visa holders or students? Were there other sorts of breaches? Is that possible to obtain?

Mr Konza: I think we can break it up into the nature of the offence, but not necessarily the nature of the visa holder. You can have an offence for failing to seek approval—that's the most common one, I think—and you can have offences for purchasing more than one property. So we can break it up, I think, into that sort of category rather than the status of the actual person. [...]

Mr HILL: That's fine. I'll get through a couple more. You said you couldn't provide any information about the visa holders or the status of the kinds of people. You are doing data matching with Immigration, presumably, as part of your due diligence?

Mr Konza: Yes, we do.

Mr HILL: So why is it not possible to provide information about—

Mr Konza: I'm not going to tell you it's absolutely not possible, because I need to go back and check.

Mr HILL: Sure. That's fine. It's a complex area.

Mr Konza: I think it's unlikely, because we're more likely to keep records that tell us why a penalty was issued and to whom it was issued, but I'm not sure that our records would show the visa status of a person to whom a penalty has been issued.

Mr HILL: I would have thought that, if you were taking a risk based compliance matrix, over time you'd want to build that kind of picture so you'd know where to target your future effort and indeed your education. Is it international students who legitimately buy a property for three years, leave, don't sell it and then get picked up? Is it working holiday-makers? Is it random tourists who saw an auction and didn't know the rules? Is it business investors who leave?

Mr Konza: I'm only trying to shape your expectation in telling you what I think is most likely—that is, it's most likely that that data won't be recorded.

Mr HILL: No, I understand you've said that.

Mr Konza: The information is necessary for risk assessment, and it's definitely part, and we would assess our risk assessment techniques against the different visa classes, but I think it's unlikely that the ATO would record a person's visa class.

Mr HILL: We're going to need to reconvene, but can I ask you to reflect on that. I get the fact that you might not be able to press a button, but it's hard to reconcile the fact that you couldn't tell us anything about the status of visa holders, even if it's not 100 per cent quantified, broken down in a table, if you're doing that risk assessment and refinement over time.

Mr Konza: We could give you some observations on that, but you had asked for a break-up by visa class.

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Answer:

Breaches identified by dwelling type

All references to breaches below (along with references in the ATO's submission and opening statement to this inquiry) are in respect of residential land.

The following table provides the dwelling type of breaches identified by the ATO:

Dwelling type	% of breaches
Established dwelling	51%
Vacant land	20%
New dwelling	20%
Dwelling for redevelopment	9%
Total	100%

Visa status of those that have breached

The ATO does not systematically record visa types as part of standard compliance case outcome reporting.

The different types of visa which grant temporary residence¹ in Australia are not recorded by the ATO because all temporary residency visa types grant the same right: the ability to purchase one established residence in which to live (a right which is not granted to non-temporary residents). Accordingly, our risk detection and profiling does consider residency status and it is a relevant criterion for several of our data matching rules used to identify potential compliance cases. However, as the foreign investment laws do not distinguish between different classes of temporary residence visa, we do not systematically record or report on specific categories of visa held by foreign persons.

It is also not uncommon for a foreign person to hold multiple different visa types throughout the duration of their ownership of a property (and, in some instances, their visa type can change from when we first identify their breach to when we complete our compliance work).

As such, while the ATO does check whether a person has a temporary residence visa in order to determine whether they have complied with their entitlement, the specific type of temporary residence visa type held by a foreign person subject to compliance action is not necessarily a helpful consideration for future risk assessment.

¹ As defined in the FATA