

# FOREIGN TAKEOVERS ACT 1975

## No. 92 of 1975

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# FOREIGN TAKEOVERS ACT 1975

## No. 92 of 1975

An Act relating to the Foreign Control of certain Business Enterprises and of certain Rights relating to Minerals.

BE IT ENACTED by the Queen, the Senate and the House of Representatives of Australia, as follows:—

### PART I—PRELIMINARY

1. This Act may be cited as the *Foreign Takeovers Act 1975*.<sup>1</sup> Short title.
2. This Act shall come into operation on a date to be fixed by Proclamation. Commencement.
3. (1) The *Companies (Foreign Take-overs) Act 1972*, the *Companies (Foreign Take-overs) Act 1973* and the *Companies (Foreign Take-overs) Act 1974* are repealed. Repeal and transitional provisions.
  - (2) Notwithstanding the repeal effected by sub-section (1), the repealed Act shall be deemed to continue in force in relation to—
    - (a) an offer (including an offer constituting, or made in pursuance of an invitation constituting, a take-over offer) to sell or purchase shares that was accepted before the date of commencement of this Act; and
    - (b) an issue of shares that occurred before that date.
  - (3) Without limiting the generality of sub-section (2), orders may be made under sections 14 and 15 of the repealed Act in pursuance of that sub-section.
  - (4) For the purposes of this Act, but without limiting the operation of sub-section (2)—
    - (a) a certificate in force under section 17 of the repealed Act immediately before the date of commencement of this Act has effect on and after that date as if it were a certificate given under section 29 of this Act;
    - (b) an order in force under sub-section 13 (6) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under section 22 of this Act;
    - (c) an order in force under paragraph 13 (2) (c) or (3) (c) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under sub-section 18 (2) of this Act; and

- (d) an order in force under paragraph 13 (2) (d) or (3) (d) of the repealed Act immediately before that date has effect on and after that date as if it were an order made under sub-section 18 (3) of this Act.

(5) Nothing in this section affects the operation of section 8 of the *Acts Interpretation Act 1901-1973*.

(6) Expressions used in this section have the same respective meanings as they had in the repealed Act.

Additional  
operation of  
Act.

4. (1) Without prejudice to its effect apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if references in sections 19 and 21 to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on by a prescribed corporation or prescribed corporations together with any other person or persons.

(2) Without prejudice to its effect apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if references in sections 19 and 21 to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on solely by a person other than a prescribed corporation or persons other than prescribed corporations.

(3) Without prejudice to its effect apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if references in sections 19 and 21 to a foreign person were references to—

- (a) a natural person not ordinarily resident in Australia;
- (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
- (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.

(4) Without prejudice to its effect apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if—

- (a) references in sections 19 and 21 to a foreign person were references to—
  - (i) a natural person not ordinarily resident in Australia;
  - (ii) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or

(iii) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest; and

(b) references in those sections to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on by a prescribed corporation or prescribed corporations together with any other person or persons.

(5) Without prejudice to its effect apart from this sub-section, this Act also has, by force of this sub-section, the effect it would have if—

(a) references in sections 19 and 21 to a foreign person were references to—

(i) a natural person not ordinarily resident in Australia;

(ii) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or

(iii) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest; and

(b) references in those sections to an Australian business carried on solely by a prescribed corporation or prescribed corporations were references to an Australian business carried on solely by a person other than a prescribed corporation or persons other than prescribed corporations.

5. (1) In this Act, unless the contrary intention appears—

“acquisition” includes an agreement to acquire, but does not include an acquisition—

(a) by will or by devolution by operation of law; or

(b) by way of enforcement of a security held solely for the purposes of a moneylending agreement;

“agreement” means any agreement, whether formal or informal and whether express or implied, other than a moneylending agreement;

“asset” includes an interest in an asset;

“Australia” includes the external Territories to which this Act extends;

“Australian corporation” means a corporation of a kind referred to in paragraph 13 (1) (a), (b) or (c);

“balance-sheet” includes a statement of assets and liabilities or any similar document;

Interpretation.

- “constituent document”, in relation to a corporation, means the memorandum and articles of association of the corporation or any rules or other document constituting the corporation or governing its activities;
- “debenture” includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a corporation, whether constituting a charge on the assets of the corporation or not;
- “director” includes any person occupying the position of director of a corporation, by whatever name called;
- “financial corporation” means a financial corporation to which paragraph 51 (xx) of the Constitution is applicable, and includes a corporation formed within the limits of Australia that carries on as its sole or principal business the business of banking or insurance, other than banking or insurance to which paragraph 51 (xiii) or (xiv) of the Constitution, as the case may be, is not applicable;
- “foreign corporation” means a foreign corporation to which paragraph 51 (xx) of the Constitution is applicable or a corporation that is incorporated in an external Territory to which this Act does not extend;
- “foreign person” means—
- (a) a natural person not ordinarily resident in Australia;
  - (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
  - (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest;
- “mineral right” means—
- (a) an authority, licence, permit or right under a law of Australia or of a State or Territory to prospect or explore for, or to recover, minerals;
  - (b) a lease under such a law by virtue of which the lessee is entitled to prospect or explore for, or to recover, minerals; or
  - (c) an interest in such an authority, licence, permit, right or lease;
- “moneylending agreement” means an agreement entered into in good faith in the ordinary course of carrying on a business of lending money, not being an agreement dealing with any matter unrelated to the carrying on of that business;
- “officer”, in relation to a corporation, includes—
- (a) a director, secretary or employee of the corporation;

- (b) a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; or
- (c) a liquidator of the corporation appointed in a voluntary winding up;

“person” includes a corporation, and the words “he” and “who” shall be construed accordingly;

“profit and loss account” includes any statement of profits and losses or any similar document;

“repealed Act” means the *Companies (Foreign Take-overs) Act 1972-1974*;

“share”, in relation to a corporation, means a share in the share capital of the corporation, and—

- (a) includes stock into which all or any of the share capital of the corporation has been converted; and
- (b) except in section 11, includes an interest in such a share or in such stock;

“Territory” means an internal Territory or an external Territory to which this Act extends;

“trading corporation” means a trading corporation to which paragraph 51 (xx) of the Constitution is applicable.

(2) In this Act, a reference to the determination of the policy of a business of exploiting a mineral right includes a reference to the determination of questions relating to the disposal of the right.

(3) In this Act—

- (a) a reference to a person proposing to acquire shares or assets includes—
  - (i) a reference to a person making an offer to acquire shares or assets;
  - (ii) a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of shares or assets to offer to dispose of shares or assets; and
  - (iii) a reference to a person taking part in, or proposing to take part in, negotiations with a view to the acquisition of shares or assets;
- (b) a reference to a person proposing to enter into an agreement or arrangement includes a reference to a person taking part in, or proposing to take part in, negotiations with a view to entering into an agreement or arrangement; and
- (c) a reference to a person proposing to terminate an arrangement includes a reference to a person taking part in, or proposing to take part in, negotiations with a view to terminating an arrangement.

(4) In this Act, a reference to entering into an arrangement is a reference to entering into any formal or informal scheme, arrangement or understanding, whether expressly or by implication, and, without limiting the generality of the foregoing, includes a reference to—

- (a) entering into an agreement, other than a moneylending agreement;
- (b) creating a trust, whether express or implied; and
- (c) entering into a transaction,

and references to an arrangement shall be construed accordingly.

(5) In this Act, a reference to entering into an agreement or arrangement includes a reference to altering or varying an agreement or arrangement.

(6) In this Act, an act done or proposed to be done by an agent on behalf of his principal shall be deemed to be done or proposed to be done by his principal.

(7) Where a word has a particular meaning in this Act, other parts of speech and grammatical forms of that word have corresponding meanings.

(8) A reference in this Act to an offence against this Act or against a particular provision of this Act includes a reference to an offence consisting of an attempt to commit such an offence.

Associates.

6. For the purposes of this Act, the following persons are associates of a person:—

- (a) the person's spouse or a parent or remoter lineal ancestor, son, daughter or remoter issue, brother or sister of the person;
- (b) any partner of the person;
- (c) any corporation of which the person is an officer;
- (d) where the person is a corporation—any officer of the corporation;
- (e) any employee or employer of the person;
- (f) any officer of any corporation of which the person is an officer;
- (g) any employee of a natural person of whom the person is an employee;
- (h) any corporation whose directors are accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person or, where the person is a corporation, of the directors of the person;
- (i) any corporation in accordance with the directions, instructions or wishes of which, or of the directors of which, the person is accustomed or under an obligation, whether formal or informal, to act;
- (j) any corporation in which the person holds a substantial interest;

- (k) where the person is a corporation—a person who holds a substantial interest in the corporation;
- (l) any person who is, by virtue of this section, an associate of any other person who is an associate of the person (including a person who is an associate of the person by another application or other applications of this paragraph).

7. (1) A reference in this Act to an Australian business is a reference to a business that is carried on wholly or partly in Australia in anticipation of profit or gain. Australian business.

(2) For the purposes of this Act, the holder of a mineral right shall, by virtue of his holding that right, be deemed to carry on in Australia, in anticipation of profit or gain, a business of exploiting that right, and that right shall be deemed to be an asset of that business.

(3) A reference in this Act, other than this section, to an Australian business does not include a reference to a business that is, or is deemed to be, carried on by any of the following persons, whether alone or together with any other person or persons:—

- (a) Australia or a State;
- (b) a corporation constituted for a public purpose by a law of Australia or of a State or Territory; or
- (c) a local governing body.

8. A reference in this Act to control of the voting power in a corporation is a reference to control that is direct or indirect, including control that is exercisable as a result or by means of arrangements, whether or not having legal or equitable force, and whether or not based on legal or equitable rights. Control of voting power.

9. (1) For the purposes of this Act—

- (a) a person shall be taken to hold a substantial interest in a corporation if the person, alone or together with any associate or associates of the person, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation; and
- (b) 2 or more persons shall be taken to hold an aggregate substantial interest in a corporation if they, together with any associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation.

Substantial and controlling interests in corporations.

(2) Where—

- (a) a person holds a substantial interest in a corporation; or



- (b) 2 or more persons hold an aggregate substantial interest in a corporation,

that person shall be taken to hold a controlling interest in the corporation, or those persons shall be taken to hold an aggregate controlling interest in the corporation, as the case may be, unless the Treasurer is satisfied that, having regard to all the circumstances, that person together with the associate or associates (if any) of that person is not, or those persons together with the associate or associates (if any) of each of them are not, in a position to determine the policy of the corporation.

- (3) Where—

- (a) a person holds a substantial interest, or 2 or more persons hold an aggregate substantial interest, in a corporation (including a substantial interest held by that person, or an aggregate substantial interest held by those persons, by another application or other applications of this sub-section); and
- (b) that corporation is in a position to control all or any of the voting power in another corporation or holds interests in all or any of the issued shares in another corporation,

that person or those persons together shall be taken to be in a position to control so much of the voting power of the other corporation as the first-mentioned corporation is in a position to control or to hold the interests in the issued shares in the other corporation that the first-mentioned corporation holds, as the case may be.

Holding  
corporations  
and  
subsidiaries.

- 10.** (1) For the purposes of this Act, but subject to sub-section (2)—

- (a) a corporation shall be deemed to be a subsidiary of another corporation if that other corporation—
- (i) is in a position to control more than one-half of the voting power in the first-mentioned corporation; or
  - (ii) holds more than one-half of the issued shares in the first-mentioned corporation (excluding any shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital); and
- (b) a corporation shall be deemed to be a subsidiary of another corporation if the first-mentioned corporation is a subsidiary of any corporation that is that other corporation's subsidiary (including a corporation that is that other corporation's subsidiary by another application or other applications of this paragraph).

- (2) In determining whether a corporation is a subsidiary of another corporation—

- (a) any shares held or power exercisable by that other corporation in a fiduciary capacity shall be treated as not held or exercisable by it;
- (b) subject to paragraphs (c) and (d), any shares held or power exercisable—

- (i) by any person as a nominee for that other corporation (except where that other corporation is concerned only in a fiduciary capacity); or
- (ii) by, or by a nominee for, a subsidiary of that other corporation, not being a subsidiary that is concerned only in a fiduciary capacity,

shall be treated as held or exercisable by that other corporation;

- (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned corporation, or of a trust deed for securing any issue of such debentures, shall be disregarded; and
- (d) any shares held or power exercisable by, or by a nominee for, that other corporation or its subsidiary (not being held or exercisable as mentioned in paragraph (c) ) shall be treated as not held or exercisable by that other corporation if the ordinary business of that other corporation or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable solely by way of security for the purposes of a moneylending agreement.

(3) A reference in this Act to a holding corporation of another corporation is a reference to a corporation of which that other corporation is a subsidiary.

**11.** (1) Subject to this section, a person holds an interest in a share if he has any legal or equitable interest in that share. Interests in shares.

(2) Without limiting the generality of sub-section (1), where a person—

- (a) has entered into a contract to purchase a share;
- (b) has a right, otherwise than by reason of having an interest under a trust, to have a share transferred to himself or to his order, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not;
- (c) has the right to acquire a share, or an interest in a share, under an option, whether the right is exercisable presently or in the future and whether on the fulfilment of a condition or not; or
- (d) is entitled (otherwise than by reason of his having been appointed a proxy or representative to vote at a meeting of members of a corporation or of a class of its members) to exercise or control the exercise of a right attached to a share, not being a share of which he is the registered holder,

that person shall be deemed to hold an interest in that share.

(3) A person shall not be deemed not to hold an interest in a share by reason only that he holds the interest in the share jointly with another person.

(4) It is immaterial, for the purpose of determining whether a person holds an interest in a share, that the interest cannot be related to a particular share.

(5) There shall be disregarded—

- (a) an interest in a share of a person whose ordinary business includes the lending of money if he holds the interest solely by way of security for the purposes of a moneylending agreement;
- (b) an interest of a person in a share, being an interest held by him by reason of his holding a prescribed office; and
- (c) an interest of a prescribed kind in a share, being an interest of such person, or of the persons included in such class of persons, as is prescribed.

(6) An interest in a share shall not be disregarded by reason only of—

- (a) its remoteness;
- (b) the manner in which it arose; or
- (c) the fact that the exercise of a right conferred by the interest is or is capable of being made subject to restraint or restriction.

(7) In relation to a corporation the whole or a portion of the share capital of which consists of stock, an interest of a person in any such stock shall be deemed to be an interest in an issued share in the corporation having the same nominal amount as the amount of that stock and having attached to it the same rights as are attached to that stock.

Interests in assets.

12. For the purpose of determining whether a person holds an interest in an asset, the provisions of section 11 (other than paragraph (2) (d), sub-section (4), paragraphs (5) (b) and (c) and sub-section (7) ) have effect as if references in those provisions to a share were references to an asset.

Prescribed corporations.

13. (1) A reference in this Act to a prescribed corporation is a reference to—

- (a) a trading corporation;
- (b) a financial corporation;
- (c) a corporation incorporated in a Territory under the law in force in that Territory relating to companies;
- (d) a foreign corporation that, on its last accounting date, held assets the sum of the values of which exceeded \$3,000,000, being assets consisting of all or any of the following:—
  - (i) land situated in Australia (including legal and equitable interests in such land);
  - (ii) mineral rights;
  - (iii) shares in a corporation incorporated in Australia;

- (e) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of the Australian corporation or Australian corporations exceeded \$3,000,000;
- (f) a corporation that was, on its last accounting date, a holding corporation of a foreign corporation referred to in paragraph (d) or (e);
- (g) a foreign corporation that, on its last accounting date, held assets of a kind or kinds referred to in paragraph (d), where the sum of the values on that date of those assets was not less than one-half of the sum of the values on that date of the assets of that corporation and of all the subsidiaries of that corporation; or
- (h) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values on that date of the assets of that Australian corporation or those Australian corporations was not less than one-half of the sum of the values on that date of the assets of the foreign corporation and of all the subsidiaries of that corporation.

(2) For the purposes of sub-section (1), the assets of a corporation shall be deemed not to include any shares in a subsidiary of that corporation.

(3) In this section, “last accounting date”, in relation to a corporation, means the date of the expiration of the most recent period in relation to which a profit and loss account of the corporation has been laid before it in general meeting, including an account so laid before it before the commencement of this Act.

(4) For the purposes of this section, the value on a particular date of an asset of a corporation shall be taken to be —

- (a) the value of that asset as shown in the last balance-sheet of the corporation that was prepared and audited before that date; or
- (b) if no balance-sheet of the corporation was prepared and audited before that date, the value of that asset as shown on that date in the accounting records of the corporation.

**14.** In this Act, a reference to the voting power in a corporation is a reference to the maximum number of votes that might be cast at a general meeting of the corporation. Voting power.

**15.** This Act does not apply in relation to—

- (a) an acquisition of shares or assets, or an issue of shares, that occurred before the date of commencement of this Act;
- (b) an arrangement that was entered into before that date; or

Application  
of Act.

- (c) an acquisition of shares or assets occurring by way of the exercise, on or after that date, of an option to sell or to purchase those shares or assets, where the option was acquired before that date and the holder or grantor of the option received, before that date, a notification in writing from the Government of Australia to the effect that the Government of Australia did not object to the acquisition of the option or to the acquisition of those shares or assets in pursuance of the option.

Extra-territorial operation of Act.

**16.** This Act applies both within and outside Australia and extends to every external Territory other than Papua New Guinea.

Persons obliged to comply with Act.

**17.** The obligation to comply with this Act extends to all natural persons, whether resident in Australia or not and whether Australian citizens or not, and to all corporations, whether incorporated or carrying on business in Australia or not.

## PART II—CONTROL OF TAKEOVERS AND LIKE TRANSACTIONS

Acquisitions of shares.

**18.** (1) In this section, “corporation” means—

- (a) a prescribed corporation that carries on an Australian business, whether alone or together with any other person or persons; or  
 (b) a holding corporation (other than a foreign corporation that is not a prescribed corporation) of such a prescribed corporation.

(2) Where the Treasurer is satisfied that—

- (a) a person proposes, or persons propose, to acquire shares in a corporation or a corporation proposes to issue shares;  
 (b) the proposed acquisition or acquisitions or the proposed issue would have the result that—

- (i) in the case of a corporation not controlled by foreign persons—the corporation would be controlled by foreign persons; or  
 (ii) in the case of a corporation controlled by foreign persons—the corporation would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this subparagraph; and

(c) that result would be contrary to the national interest, the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, or the proposed issue, as the case may be.

(3) Where the Treasurer makes an order under sub-section (2) prohibiting a proposed acquisition of shares in a corporation, he may

also make an order in relation to a specified foreign person, or in relation to a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person, directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them—

(a) be in a position to control more of the total voting power in the corporation than—

(i) such proportion of the total voting power in the corporation as is equal to the proportion of the total voting power in the corporation at the time of the coming into operation of the first-mentioned order that that foreign person, together with any associate or associates of that person, was in a position to control at that time; or

(ii) such greater proportion (if any) of the total voting power in the corporation as is specified in the order; or

(b) hold interests in a number of issued shares in the corporation exceeding—

(i) the number that bears to the total number of issued shares in the corporation the same proportion as the number of issued shares in the corporation in which that foreign person, together with any associate or associates of that person, held interests at the time of the coming into operation of the first-mentioned order bears to the total number of issued shares in the corporation at that time; or

(ii) such greater number (if any) as is specified in the order.

(4) Where a person has acquired shares in a corporation, and the Treasurer is satisfied that—

(a) the acquisition has had the result that—

(i) in the case of a corporation that, before the acquisition, was not controlled by foreign persons—the corporation is controlled by foreign persons; or

(ii) in the case of a corporation that, before the acquisition, was controlled by foreign persons—the corporation continues to be controlled by foreign persons, but those persons include a person who is not, or do not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

(b) that result is contrary to the national interest,

the Treasurer may make an order directing the person who acquired the shares to dispose of those shares within a specified time to any person or persons approved in writing by the Treasurer.

(5) Before the expiration of the time specified in an order made under sub-section (4) or of that time as extended under this sub-section, the Treasurer may, by writing signed by him, extend or further extend

that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.

(6) The Treasurer shall not refuse to approve a person for the purposes of sub-section (4) unless he is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the shares concerned.

(7) For the purposes of this section—

- (a) a corporation shall be taken to be controlled by foreign persons if, and only if, a foreign person holds a controlling interest in the corporation or 2 or more foreign persons hold an aggregate controlling interest in the corporation;
- (b) where, by virtue of paragraph (a), a corporation is taken to be controlled by foreign persons by reason that a foreign person, together with an associate or associates, is in a position to control not less than 15 per centum of the voting power in the corporation or holds interests in not less than 15 per centum of the issued shares in the corporation, references to the foreign persons who control the corporation include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons; and
- (c) where, by virtue of paragraph (a), a corporation is taken to be controlled by foreign persons by reason that 2 or more foreign persons, together with an associate or associates of any of them, are in a position to control not less than 40 per centum of the voting power in the corporation or hold interests in not less than 40 per centum of the issued shares in the corporation, references to the foreign persons who control the corporation are references to any foreign persons, and any associates of foreign persons (whether or not those associates are in fact foreign persons), each of whom is in a position to control any of the voting power in the corporation or holds interests in any of the issued shares in the corporation.

Acquisitions  
of assets.

19. (1) In this section, “foreign person” means—

- (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
  - (b) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.
- (2) Where the Treasurer is satisfied that—
- (a) a person proposes, or persons propose, to acquire assets of an Australian business carried on solely by a prescribed corporation or prescribed corporations;

(b) the proposed acquisition or acquisitions would have the result that—

- (i) in the case of a business not controlled by foreign persons—the business would be controlled by foreign persons; or
- (ii) in the case of a business controlled by foreign persons—the business would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

(c) that result would be contrary to the national interest,

the Treasurer may make an order prohibiting the proposed acquisition or all or any of the proposed acquisitions, as the case may be.

(3) Where the Treasurer makes an order under sub-section (2) prohibiting a proposed acquisition of assets of an Australian business, he may also make an order in relation to a specified foreign person, or in relation to a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person, directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire any interests in assets of that business, or acquire any such interests except to a specified extent.

(4) Where a person has acquired assets of an Australian business carried on solely by a prescribed corporation or prescribed corporations, and the Treasurer is satisfied that—

(a) the acquisition has had the result that—

- (i) in the case of a business that, before the acquisition, was not controlled by foreign persons—the business is controlled by foreign persons; or
- (ii) in the case of a business that, before the acquisition, was controlled by foreign persons—the business continues to be controlled by foreign persons, but those persons include a person who is not, or do not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

(b) that result is contrary to the national interest,

the Treasurer may make an order directing the person who acquired the assets to dispose of those assets within a specified time to any person or persons approved in writing by the Treasurer.

(5) Before the expiration of the time specified in an order made under sub-section (4) or of that time as extended under this sub-section, the Treasurer may, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has



effect as if the time as so extended or further extended had been specified in the order.

(6) The Treasurer shall not refuse to approve a person for the purposes of sub-section (4) unless he is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the assets concerned.

(7) For the purposes of this section—

- (a) an Australian business shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the business; and
- (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the business, references to the foreign persons who control the business include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

Arrange-  
ments  
relating to  
directorates  
of  
corporations.

20. (1) In this section, “corporation” means—

- (a) an Australian corporation that carries on an Australian business, whether alone or together with any other person or persons; or
- (b) a holding corporation (other than a foreign corporation) of such an Australian corporation.

(2) Where the Treasurer is satisfied that—

- (a) a person proposes to enter into an agreement in relation to the affairs of a corporation or it is proposed to alter a constituent document of a corporation;
- (b) under the proposed agreement or in consequence of the proposed alteration, a director or directors of the corporation will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the corporation or of an associate of such a foreign person;
- (c) the proposed agreement or alteration would have the result that—
  - (i) in the case of a corporation not controlled by foreign persons—the corporation would be controlled by foreign persons; or
  - (ii) in the case of a corporation controlled by foreign persons—the corporation would continue to be controlled by

foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

(d) that result would be contrary to the national interest, the Treasurer may make an order prohibiting the entering into of the proposed agreement or prohibiting the proposed alteration, as the case may be.

(3) Where an agreement has been entered into in relation to the affairs of a corporation, or an alteration has been made to a constituent document of a corporation, and the Treasurer is satisfied that—

(a) the agreement or alteration has had, or will have, the result that—

(i) in the case of a corporation that, before the agreement was entered into or the alteration was made, was not controlled by foreign persons—the corporation is or will be controlled by foreign persons; or

(ii) in the case of a corporation that, before the agreement was entered into or the alteration was made, was controlled by foreign persons—the corporation continues or will continue to be controlled by foreign persons, but those persons include or will include a person who is not, or do not or will not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

(b) that result is or will be contrary to the national interest, the Treasurer may, for the purpose of restoring the control of the corporation as closely as possible to the position in which it was before the agreement was entered into or the alteration was made or for the purpose of preventing the occurrence of a change in the control of the corporation of a kind mentioned in paragraph (a), as the case may be, make orders directing specified persons to do within a specified time, or refrain from doing, specified acts or acts of a specified kind.

(4) Where a time is specified in an order made under sub-section (3), the Treasurer may, before the expiration of that time or of that time as extended under this sub-section, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.

(5) For the purposes of this section—

(a) a corporation shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the corporation; and

- (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the corporation, references to the foreign persons who control the corporation include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

Arrangements relating to control of Australian businesses.

**21. (1) In this section—**

“arrangement”, in relation to an Australian business, means an arrangement relating to the leasing or letting on hire of, or the granting of other rights to use, assets of such a business or relating to the participation by a person in the profits or management of such a business;

“foreign person” means—

- (a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a controlling interest; or
- (b) a foreign corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate controlling interest.

**(2) Where the Treasurer is satisfied that—**

- (a) a person proposes to enter into an arrangement in relation to an Australian business carried on solely by a prescribed corporation or prescribed corporations or proposes to terminate an arrangement that exists in relation to such an Australian business;
- (b) the proposal, if carried out, would have the result that—
- (i) in the case of a business not controlled by foreign persons—the business would be controlled by foreign persons; or
- (ii) in the case of a business controlled by foreign persons—the business would continue to be controlled by foreign persons, but those persons would include a person who is not, or would not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

(c) that result would be contrary to the national interest, the Treasurer may make an order prohibiting the entering into of the proposed arrangement or prohibiting the termination of the existing arrangement, as the case may be.

(3) Where an arrangement has been entered into in relation to an Australian business carried on solely by a prescribed corporation or prescribed corporations or an arrangement that existed in relation to

such an Australian business has been terminated, and the Treasurer is satisfied that—

- (a) the entering into or the termination of the arrangement has had, or will have, the result that—
  - (i) in the case of a business that, before the entering into or termination of the arrangement, was not controlled by foreign persons—the business is or will be controlled by foreign persons; or
  - (ii) in the case of a business that, before the entering into or termination of the arrangement, was controlled by foreign persons—the business continues or will continue to be controlled by foreign persons, but those persons include or will include a person who is not, or do not or will not include a person who is, one of the foreign persons first referred to in this sub-paragraph; and

- (b) that result is or will be contrary to the national interest,

the Treasurer may, for the purpose of restoring the control of the business as closely as possible to the position in which it was before the arrangement was entered into or terminated or for the purpose of preventing the occurrence of a change in the control of the business of a kind referred to in paragraph (a), as the case may be, make orders directing specified persons to do within a specified time, or refrain from doing, specified acts or acts of a specified kind.

(4) Where a time is specified in an order made under sub-section (3), the Treasurer may, before the expiration of that time or of that time as extended under this sub-section, by writing signed by him, extend or further extend that time or that time as so extended, and in that event the order has effect as if the time as so extended or further extended had been specified in the order.

- (5) For the purposes of this section—

- (a) an Australian business shall be taken to be controlled by foreign persons if, and only if, the Treasurer is satisfied that a foreign person or foreign persons, alone or together with an associate or associates of that foreign person or of any of those foreign persons, is or are in a position to determine the policy of the business; and
- (b) where an Australian business is so taken to be controlled by foreign persons by reason that a foreign person or foreign persons, together with an associate or associates, are in a position to determine the policy of the business, references to the foreign persons who control that business include references to that associate or those associates, whether or not that associate is, or those associates are, in fact foreign persons.

Interim orders.

**22.** (1) For the purpose of enabling due consideration to be given to the question whether an order should be made under sub-section 18 (2), 19 (2), 20 (2) or 21 (2), the Treasurer may make an order of the kind that he would be empowered to make under that sub-section if it were applicable.

(2) An order made under this section has effect for such period, not exceeding 90 days after the coming into operation of the order, as is specified in the order.

Revocation of orders.

**23.** The Treasurer may at any time make an order revoking an order made under section 18, 19, 20, 21 or 22 or an order referred to in sub-section 3 (4).

Publication of orders.

**24.** An order made by the Treasurer under this Part shall be made in writing signed by him, shall be published in the *Gazette* within 10 days after the date on which it is made, and comes into operation—

- (a) except in a case to which paragraph (b) applies—on the date of publication; or
- (b) in the case of an order under sub-section 18 (3) or (4), 19 (4), 20 (3) or 21 (3)—on such date as is specified in the order, being a date not earlier than 30 days after the date of publication.

Effect of notification of transactions.

**25.** (1) This section has effect where the Treasurer receives—

- (a) a notice from a person stating that the person proposes to acquire shares or assets or to enter into an agreement or enter into or terminate an arrangement;
- (b) a notice from a corporation stating that the corporation proposes to issue shares; or
- (c) a notice from a corporation stating that it is proposed to alter a constituent document of the corporation.

(2) If—

- (a) the Treasurer does not, before the expiration of 30 days after the date of receipt of the notice, make an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, being an order published in the *Gazette* before the expiration of 10 days after the date of the making of the order; and
- (b) the proposal specified in the notice is not carried out before the expiration of that period of 30 days,

the Treasurer is not empowered, after the expiration of that period of 30 days, to make an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice.

(3) If—

- (a) before the expiration of 30 days after the date of receipt of the notice, the Treasurer makes an order under section 22 in relation

to the acquisition, agreement, arrangement, issue or alteration specified in the notice, and the order is published in the *Gazette* before the expiration of 10 days after the date of the making of the order;

- (b) the Treasurer does not, before the expiration of 90 days after the date of publication of the order, make an order under any other provision of this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, being an order published in the *Gazette* before the expiration of 10 days after the date of the making of the order; and
- (c) the proposal specified in the notice is not carried out before the expiration of that period of 90 days,

the Treasurer is not empowered, after the expiration of that period of 90 days, to make a further order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice.

(4) For the purposes of this section, a notice stating that a person has an option to acquire shares or assets shall be taken to be a statement that the person proposes to acquire the shares or assets, and references in this section to the proposal and to the acquisition shall be construed accordingly.

(5) In this section, “notice” includes a notice furnished under section 26.

**26.** (1) In this section, “person to whom this section applies” means—

- (a) a natural person not ordinarily resident in Australia;
- (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (c) a corporation in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

Compulsory  
notification  
of trans-  
actions.

(2) A person to whom this section applies who intends to acquire, or to make an offer to acquire, a substantial shareholding in an Australian corporation shall furnish to the Treasurer a notice stating his intention.

(3) Where a person to whom this section applies—

- (a) acquires, or makes an offer to acquire, a substantial shareholding in an Australian corporation without having furnished a notice under sub-section (2) stating his intention to do so; or
- (b) having furnished a notice under sub-section (2) stating his intention to acquire, or make an offer to acquire, a substantial shareholding in an Australian corporation, acquires or makes an offer to acquire such a shareholding before the expiration of 40

days after the date on which the notice was received by the Treasurer,  
the person is guilty of an offence and is punishable on conviction by a fine not exceeding \$50,000.

(4) Without affecting the operation of section 25, this section does not apply in relation to a shareholder of a corporation subscribing for, or making an offer to subscribe for, shares in a corporation if—

- (a) the shares were subscribed for or the offer was made in pursuance of a resolution by the directors of the corporation agreeing to make available a number of shares specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of shares in the corporation on a date specified in the resolution; and
- (b) the number of shares for which the shareholder so subscribed or offered to subscribe bears to the total number of shares made available for allotment in pursuance of the resolution as nearly as practicable the same proportion as the number of issued shares in the corporation held by him immediately before the date specified in the resolution bears to the total number of issued shares in the corporation immediately before that date.

(5) For the purposes of sub-section (4), it is immaterial that the shares in the corporation comprise 2 or more classes of shares to which different rights are attached.

(6) In this section, a reference to a person acquiring, or making an offer to acquire, a substantial shareholding in a corporation is a reference to a person acquiring, or making an offer to acquire, any shares in the corporation where he holds a substantial interest in the corporation or, upon the acquisition by him of those shares, or of those shares and of any other shares in the corporation that he has offered to acquire, he would hold a substantial interest in the corporation.

Form of notification.

**27.** A notice does not have effect for the purposes of section 25 or 26 unless it is in accordance with the prescribed form and complies with the directions set out in the form.

Notification of options.

**28.** Where a notice stating an intention to acquire, or to make an offer to acquire, an option to acquire a share or asset is furnished in accordance with section 25 or 26, that notice has effect as if it included a statement of an intention to exercise that option.

Certificate that transaction not contrary to national interest.

**29.** (1) Where the Treasurer is satisfied that—

- (a) the acquisition of shares in a corporation, or the entering into of an agreement in relation to the affairs of a corporation, by a person, the issue of shares in a corporation to a person or an alteration of a constituent document of a corporation would not

result in a change in the control of that corporation that would be contrary to the national interest; or

- (b) the acquisition of assets of an Australian business, or the entering into or the termination of an arrangement in relation to an Australian business, by a person would not result in a change in the control of that business that would be contrary to the national interest,

the Treasurer may cause a certificate in writing to that effect to be given and, where a certificate is so given, the Treasurer is not empowered at any future time to make an order—

- (c) prohibiting that person from acquiring those shares or assets, entering into that agreement or entering into or terminating that arrangement;
- (d) prohibiting the issue of those shares to that person; or
- (e) prohibiting that alteration of that constituent document,

as the case may be, or to make any relevant order under sub-section 18 (3) or (4), 19 (3) or (4), 20 (3) or 21 (3).

(2) A certificate given under sub-section (1) is not capable of being revoked or altered.

### PART III—MISCELLANEOUS

**30.** (1) A person who contravenes or fails to comply with an order made under Part II is guilty of an offence against this section. Offences.

(2) Where a person has been convicted of an offence consisting of a contravention, or failure to comply with, an order made under Part II and the contravention or failure continues after he has been so convicted, the person is guilty of a further offence against this section.

(3) Where an order made under Part II requires a person to do anything within a particular time and the person fails to do that thing within that time, the person shall be deemed to continue to fail to comply with the order until he does that thing.

(4) A person who is convicted of an offence against this section is punishable by a fine not exceeding \$50,000 or imprisonment for a period not exceeding 6 months.

**31.** (1) Where an offence against a provision of this Act is committed by a corporation, an officer of the corporation who is in default is guilty of an offence against this section and is punishable on conviction by the penalty provided in that provision. Offences by officers of corporations.

(2) A reference in sub-section (1) to an officer who is in default, in relation to an offence committed by a corporation, includes a reference to an officer who authorizes or permits the commission of the offence.



Defence to prosecutions.

32. (1) Subject to sub-section (2), in any proceedings against a natural person for an offence against section 30 or 31, it is a defence if the defendant proves that, at all relevant times, he was not aware, and could not have been reasonably expected to be aware, of a fact the existence of which was necessary to constitute the offence.

(2) For the purposes of sub-section (1), a person shall be conclusively presumed to have been aware at a particular time of a fact of which a servant or agent of the person, being a servant or agent having duties or acting on behalf of his master or principal in relation to any matter referred to in section 18, 19, 20 or 21, whichever is applicable, was aware at that time.

Treasurer's consent for criminal proceedings.

33. Proceedings for an offence against this Act shall not be instituted without the consent in writing of the Treasurer.

Criminal jurisdiction.

34. (1) A provision of the *Judiciary Act* 1903-1973 by which a court of a State is invested with jurisdiction with respect to offences against the laws of Australia has effect, in relation to offences against this Act not committed within any State, as if that jurisdiction were so invested without limitation as to locality.

(2) Where a person has committed an offence against this Act outside a Territory and is found in, or brought into, the Territory, a court of the Territory has the same jurisdiction in respect of the offence as it would have if the offence had been committed in the Territory.

Powers of court to enforce Treasurer's orders.

35. (1) Where a person (in this section referred to as "the offender") has contravened or failed to comply with an order in force under Part II, the Supreme Court of a State or Territory having jurisdiction for the purpose may, on the application of the Treasurer, whether or not that contravention or failure still continues, and whether or not other proceedings in respect of that contravention or failure have been or are to be instituted, make such order or orders as it thinks fit for the attainment of the purpose for which the order was made by the Treasurer.

(2) The orders that may be made under sub-section (1) in relation to a change in the control of a corporation other than a foreign corporation (in this section referred to as "the corporation concerned") or a change in the control of an Australian business (in this section referred to as "the business concerned") include, but are not limited to—

- (a) an order restraining the exercise of any rights attached to shares or assets held by the offender;
- (b) an order prohibiting or deferring the payment of any sums due to the offender in respect of shares or assets held by the offender;
- (c) an order directing the disposal of shares or assets held by the offender;

- (d) an order that any exercise of rights attached to shares or assets held by the offender be disregarded;
  - (e) an order prohibiting a person from acting as a director of the corporation concerned or from being involved in the management of the corporation or business concerned; and
  - (f) an order directing the corporation concerned to make such alterations of any of its constituent documents as are specified in the order.
- (3) For the purpose of sub-section (2)—
- (a) a reference to shares is a reference to shares in the corporation concerned; and
  - (b) a reference to assets is a reference to assets of the corporation or business concerned.
- (4) The orders that may be made under sub-section (1) in relation to a change in the control of a foreign corporation include, but are not limited to—
- (a) an order restraining the exercise of any rights attached to shares held by the foreign corporation in an Australian subsidiary;
  - (b) an order prohibiting or deferring the payment of any sums due to the foreign corporation in respect of shares held by it in an Australian subsidiary;
  - (c) an order directing the disposal of shares in, or assets of, an Australian subsidiary of the foreign corporation;
  - (d) an order directing the disposal of assets of the foreign corporation that consist of assets of an Australian business carried on by the foreign corporation (whether alone or together with any other person or persons) or prohibiting or deferring the payment of any sums due to the foreign corporation in respect of any such assets;
  - (e) an order that any exercise of rights attached to shares held by the foreign corporation in an Australian subsidiary be disregarded;
  - (f) an order that any exercise of rights attached to assets of the foreign corporation of a kind referred to in paragraph (d) be disregarded;
  - (g) an order prohibiting a person from acting as a director of, or from being concerned in the management of, an Australian subsidiary of the foreign corporation; and
  - (h) an order directing an Australian subsidiary of the foreign corporation to make such alterations of any of its constituent documents as are specified in the order.
- (5) In addition to the powers conferred on a Court by sub-sections (1), (2) and (4), the Court—

- (a) has power, for the purpose of securing compliance with any other order made under this section, to make an order directing any person to do or refrain from doing a specified act; and
- (b) has power to make an order containing such ancillary or consequential provisions as the Court thinks just.

(6) The Court may, before making an order under this section, direct that notice of the application be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both.

(7) The Court may, by order, rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

(8) A provision of the *Judiciary Act* 1903-1973 by which the Supreme Court of a State is invested with jurisdiction with respect to matters arising under any laws made by the Parliament has effect, in relation to applications under this section, as if that jurisdiction were so invested without limitation as to locality.

(9) Jurisdiction is conferred on the Supreme Court of a Territory for the purposes of the application of this section in relation to—

- (a) a corporation incorporated in the Territory or a holding corporation of such a corporation;
- (b) a business carried on in the Territory;
- (c) assets situated in the Territory;
- (d) a natural person ordinarily resident in the Territory;
- (e) a person carrying on business in the Territory either directly or by means of an agent or manager; or
- (f) a member of a firm or partnership carrying on business in the Territory.

(10) In this section, “Australian subsidiary”, in relation to a foreign corporation, means a corporation incorporated in Australia that is a subsidiary of that foreign corporation.

Treasurer  
may require  
information.

**36.** (1) Where the Treasurer has reason to believe that a person is capable of giving information or producing documents relating to matters that are relevant to the exercise by the Treasurer of his powers under this Act, he may, by notice in writing served on that person, require that person—

- (a) to furnish, within the time and in the manner specified in the notice, any such information to him by writing signed by that person or, in the case of a corporation, by a competent officer of the corporation; or
- (b) to produce, in accordance with the notice, any such documents to him or to a person specified in the notice acting on his behalf.

(2) A person shall not—

- (a) refuse or fail to comply with a notice under this section to the extent that he is capable of complying with it; or
- (b) in purported compliance with such a notice, knowingly furnish information that is false or misleading.

Penalty: \$1,000 or imprisonment for 3 months.

(3) A person is not excused from furnishing information or producing a document in pursuance of this section on the ground that the information or document might tend to incriminate him, but his answer to any question asked in the notice, or his furnishing of any other information in pursuance of the notice, is not admissible in evidence against him in any criminal proceedings other than proceedings under this Act.

37. It is the intention of the Parliament that this Act shall not apply to the exclusion of any law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

Effect of Act on other laws.

38. The doing of any act that constitutes an offence against section 30 or 31 is, notwithstanding the commission of that offence, valid for all purposes.

Validity of acts done in contravention of Act.

39. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Regulations.

#### NOTE

1. Act No. 92, 1975; assented to 28 August 1975.