

EXPLANATORY STATEMENT

SELECT LEGISLATIVE INSTRUMENT NO. 171, 2014

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Life Insurance Act 1995

Trade Agreements Legislation Amendment Regulation 2014

Section 39 of the *Foreign Acquisitions and Takeovers Act 1975* (the FATA 1975) and section 253 of the *Life Insurance Act 1995* (the Life Insurance Act) each provide that the Governor-General may make regulations prescribing matters required or permitted by the Acts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The FATA 1975 and the associated *Foreign Acquisitions and Takeovers Regulations 1989* stipulate the notification and approval requirements for foreign investors proposing to invest in Australia. An investment proposal is subject to these notification and approval requirements if its value is greater than the relevant monetary thresholds specified in the *Foreign Acquisitions and Takeovers Regulations 1989*.

Currently, non-government Korean and Japanese investors seeking to obtain a 15 per cent or more interest in an Australian business or corporation valued above A\$248 million (indexed annually) are required to notify and seek approval from the Treasurer. Also, non-government Korean and Japanese investors seeking to acquire an interest in developed commercial real estate valued at A\$54 million (indexed annually) or more require approval.

United States investors have benefited from higher monetary thresholds since 1 January 2005 and New Zealand investors since 1 March 2013, following implementation of the *Australia-United States Free Trade Agreement* and the *New Australia New Zealand Closer Economic Relations Trade Agreement*. As a result of these agreements, non-government United States and New Zealand investors are subject to a higher threshold of A\$1,078 million (indexed annually) in relation to developed commercial real estate and most businesses. The lower A\$248 million threshold applies to acquisitions of businesses in the prescribed sensitive sectors which are media, telecommunications, transport, military related goods and services, encryption and security technologies and communications systems and uranium or plutonium related activities.

The Korea-Australia Free Trade Agreement and the Australia-Japan Economic Partnership Agreement, which were signed on 8 April 2014 and 8 July 2014 respectively, include a commitment by Australia to provide Korean and Japanese investors with the higher foreign investment screening thresholds that applies to United States and New Zealand investors. The *Trade Agreements Legislation Amendment Regulation 2014* (Regulation) would amend the *Foreign Acquisitions and Takeovers Regulations 1989* to implement this commitment by:

- including equivalent definitions for Korean and Japanese enterprises and nationals to those applying to United States and New Zealand enterprises and nationals; and
- including Korean and Japanese enterprises and nationals in the definition of prescribed foreign investors and prescribed foreign government investors.

As a consequence of including Korean and Japanese investors in the definition of prescribed foreign investors, proposed Korean and Japanese investment in Australian financial sector companies would no longer be subject to inward foreign investment screening under the FATA 1975.

Reflecting the most-favoured nation commitment Australia provided to Chile as part of the Australia-Chile Free Trade Agreement, Chilean investors would also receive the higher threshold on entry into force of the *Korea-Australia Free Trade Agreement* or the *Japan-Australia Economic Partnership Agreement*, whichever occurs first. The Regulation would amend the *Foreign Acquisitions and Takeovers Regulations 1989* to implement this commitment in the same way as described for Korea and Japan above.

The Life Insurance Act allows foreign corporations that are authorised to conduct life insurance business in an overseas jurisdiction to apply for registration to operate in Australia as a branch. Such a corporation is known as an eligible foreign life insurance company. At present, the *Life Insurance Regulations 1995* make access to the Australian market conditional on the applicant being incorporated and authorised to conduct life insurance business in the United States and New Zealand

The *Korea-Australia Free Trade Agreement* and *Japan-Australia Economic Partnership Agreement* includes a commitment by Australia to provide Korean and Japanese life insurance companies with similar preferential market access currently provided to United States and New Zealand companies. This will allow them to seek approval to operate in Australia as a branch. Currently a foreign life insurance group wishing to operate in Australia would have to establish a locally incorporated subsidiary. The Regulation would amend the *Life Insurance Regulations 1995* to implement this commitment by including body corporates that are incorporated and authorised to carry on life insurance business in Korea and Japan.

The *Korea-Australia Free Trade Agreement* was tabled with the Joint Standing Committee on Treaties which recommended that binding treaty action be taken. The *Japan-Australia Economic Partnership Agreement* was tabled with the Joint Standing Committee on Treaties on 14 July 2014. The agreement is awaiting recommendations.

The National Interest Analysis provided to the Joint Standing Committee outlines the extensive consultations process undertaken as part of the negotiations.

Korea-Australia Free Trade Agreement

In December 2008, public submissions on the *Korea-Australia Free Trade Agreement* were invited. Emails were sent to over 600 addresses, letters to over 50 key stakeholder as well as advertisement in the media and on the Department of Foreign

Affairs and Trade's (DFAT's) website. DFAT received 60 submissions, predominantly from individual companies and peak industry groups. These consultations suggested:

- Most submissions supported an FTA with Korea.
- A common concern raised was that Korea's FTAs with competitors (ASEAN, Chile, US, EU) risked reducing the competitiveness of certain Australian food and agricultural products in the Korean market.
- Other industries identified sensitivity toward Australian imports of Korean goods, most particularly in the manufacturing sector.

In addition to receiving written submissions, DFAT undertook consultations in Seoul, Canberra and State and Territory capitals with both industry and civil society. DFAT held six-monthly stakeholders meetings involving peak associations; conducted sectoral roundtables; regularly briefed the Australia-Korea Business Council; and provided input for community cabinet meetings. Public forums, open to individuals and groups, were held in capital cities, with invitations sent to key stakeholders. DFAT held a large number of meetings and discussions with affected organisations and companies, and provided regular updates on negotiations on its website.

State and Territory governments were consulted through regular Senior State and Territory Trade Officials Group (STOG) and Commonwealth-State-Territory Standing Committee on Treaties (SCOT) meetings. State and Territory departments were contacted and invited to make public submissions at the outset of negotiations.

In September 2009 the then Trade Minister wrote to State and Territory leaders seeking endorsement of Australia's initial services and investment offer, reflecting the responsibilities State and Territory Governments have for regulation of services and investment activities, prior to exchanging offers with Korea. State and Territory Governments subsequently advised that they supported the initial offer subject to continuing consultations on Korea-Australia Free Trade Agreement.

State and Territory Governments and Ministers were also consulted via correspondence, Officials' Groups meetings (including the Standing Committee on Treaties) and teleconferences. Federal Government agencies and Ministers have been consulted via bilateral meetings, correspondence and inter-departmental committee meetings. Stakeholders were updated via bulletins following each round of negotiations.

Commonwealth Government departments were consulted extensively throughout the negotiations and representatives from relevant departments attended negotiations in Australia and Korea.

Japan-Australia Economic Partnership Agreement

DFAT commenced stakeholder consultations in December 2006, with a call for public submissions. DFAT made another call for submissions following the launch of negotiations in April 2007.

In addition to seeking submissions from interested parties, DFAT, in conjunction with relevant Commonwealth agencies, conducted an extensive program of direct consultations and discussions with over 450 stakeholders to ensure their views informed the Government's negotiating strategy. Consultation with industry was substantial and ongoing, with officials holding individual meetings with businesses and industry groups, with the addition of industry roundtable meetings with peak organisations, professional bodies and other interested groups. These consultations suggested:

- Broad support for a bilateral trade agreement with Japan.
- Most businesses and industry groups, as well as State and Territory governments, argued a trade agreement would help achieve better access to the Japanese market for Australia
- A strong desire that a bilateral trade agreement create new export opportunities and enhance existing trade.

State and Territory governments were consulted through the Ministerial Council on International Trade and Commonwealth-States Standing Committee on Treaties meetings and visits by JAPEA negotiators to State and Territory capitals. The governments of Victoria, South Australia and Queensland lodged submissions, all of which were supportive of a bilateral trade agreement with Japan.

In accordance with a whole-of-government approach, DFAT ensured relevant Commonwealth Government agencies were regularly and extensively consulted throughout the *Japan-Australia Economic Partnership Agreement* negotiations. Agencies were consulted through regular inter-departmental committee meetings and through participation by relevant agencies in the Australian delegation to negotiating sessions. DFAT's website was also regularly updated after the *Japan-Australia Economic Partnership Agreement* negotiating sessions, facilitating wide dissemination of information to government stakeholders.

Australia has worked closely with Korea and Japan to ensure implementation is consistent with the *Korea-Australia Free Trade Agreement* and the *Japan-Australia Economic Partnership Agreement*.

Details of the Regulation are set out in the [Attachment](#).

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation as it relates to Korea and Japan would commence on the day the *Korea-Australia Free Trade Agreement* and the *Japan-Australia Economic Partnership Agreement* respectively enter into force, following the agreement between Australia and Korea and Australia and Japan on a start date for each of the agreements. The Regulation as it relates to Chile will commence immediately before (in effect simultaneously) whichever of the first of these agreements enters into force.

The FATA 1975 and the Life Insurance Act do not specify any conditions that need to be satisfied before the power to make the Regulation may be exercised.

Details of the *Trade Agreements Legislation Amendment Regulation 2014*

Section 1 – Name of Regulations

This section provides that the name of the Regulation is the *Trade Agreements Legislation Amendment Regulation 2014* (Regulation).

Section 2 – Commencement

The Regulation as it relates to Korea and Japan would commence on the day the *Korea-Australia Free Trade Agreement* and the *Japan-Australia Economic Partnership Agreement* respectively enter into force, following the agreement between Australia and Korea and Australia and Japan on a start date for each of the agreements. The Regulation as it relates to Chile will commence immediately before (in effect simultaneously) whichever of the first of these agreements enters into force.

Section 3 – Authority

This section provides that the Regulation be made under the *Foreign Acquisitions and Takeovers Act 1975* (the FATA 1975) and the *Life Insurance Act 1995* (the Life Insurance Act).

Section 4 – Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1 – Australia-Chile amendments

Foreign Acquisitions and Takeovers Regulations 1989

Item [1] – Regulation 2

This item inserts definitions for *Chilean enterprise* and *Chilean national*, replicating the existing definitions for *United States and New Zealand enterprises and nationals*, ensuring an equivalent definition for investors from each of these countries.

Items [2 and 3] – Subregulation 2AB (6)

These items insert a note at the foot of regulation 2AB to ensure this regulation can also be read as applying to *Chilean* enterprises.

Item [4] – Paragraph 9 (a)

This item includes *Chilean enterprise* and *Chilean national* in the condition to be satisfied by an entity for that entity to be a prescribed foreign investor for the purposes of the *Foreign Acquisitions and Takeovers Act 1975*. This item ensures that the provisions of the *Foreign Acquisitions and Takeovers Act 1975* and the regulations relating to prescribed foreign investors (previously only United States and New Zealand investors) also apply to Chilean investors.

Including Chilean investors in the definition of prescribed foreign investor in turn ensures that the asset thresholds applying to these investors under regulation 6 would apply to Chilean investors.

Item [5] – Subregulation 11(2)

This item inserts *Chile* into regulation 11 so that *Chile* becomes a relevant foreign country for the purposes of the definition of prescribed foreign government investor. This ensures equivalent treatment for foreign government investors from *Chile* and Australia's other free trade agreement partners.

Life Insurance Regulations 1995

Items [6-8] – regulation 2B.01 and subparagraphs 2B.01(a)ii and (b)(ii)

These items have been included for drafting purposes to allow for these provisions to continue operating effectively following the commencement of whichever of Parts 2 or 3 comes first.

Part 2 – Australia-Japan amendments

Item [1] – Regulation 2

This item inserts definitions for *Japanese enterprise* and *Japanese national*, replicating the existing definitions for *United States and New Zealand enterprises and nationals*, ensuring an equivalent definition for investors from each of these countries.

Items [2 and 3] – Subregulation 2AB (6)

These items insert a note at the foot of regulation 2AB to ensure this regulation can also be read as applying to *Japanese enterprises*.

Item [4] – Paragraph 9 (a)

This item includes *Japanese enterprise* and *Japanese national* in the condition to be satisfied by an entity for that entity to be a prescribed foreign investor for the purposes of the *Foreign Acquisitions and Takeovers Act 1975*. This item ensures that the provisions of the *Foreign Acquisitions and Takeovers Act 1975* and the regulations relating to prescribed foreign investors (previously only United States and New Zealand investors) also apply to Japanese investors.

Including Japanese investors in the definition of prescribed foreign investor in turn ensures that the asset thresholds applying to these investors under regulation 6 would apply to Japanese investors.

Item [5] – Subregulation 11(2)

This item inserts *Japan* into regulation 11 so that *Japan* becomes a relevant foreign country for the purposes of the definition of prescribed foreign government investor. This ensures equivalent treatment for foreign government investors from *Japan* and Australia's other free trade agreement partners.

Life Insurance Regulations 1995

Items [6-8] – regulation 2B.01 and subparagraphs 2B.01(a)ii and (b)(ii)

These items make changes to insert body corporates that are incorporated and authorised to carry on life insurance business in Japan to the definition of an eligible foreign life insurance company. Including Japanese life insurance companies as eligible foreign life insurance companies allows them to seek approval to operate in Australia as a branch.

Part 3 – Australia-Korea amendments

Item [1] – Regulation 2

This item inserts definitions for *Korean enterprise* and *Korean national*, replicating the existing definitions for *United States and New Zealand enterprises and nationals*, ensuring an equivalent definition for investors from each of these countries.

Items [2 and 3] – Subregulation 2AB (6)

These items insert a note at the foot of regulation 2AB to ensure this regulation can also be read as applying to *Korean enterprises*.

Item [4] – Paragraph 9 (a)

This item includes *Korean enterprise* and *Korean national* in the condition to be satisfied by an entity for that entity to be a prescribed foreign investor for the purposes of the *Foreign Acquisitions and Takeovers Act 1975*. This item ensures that the provisions of the *Foreign Acquisitions and Takeovers Act 1975* and the regulations relating to prescribed foreign investors (previously only United States and New Zealand investors) also apply to Korean investors.

Including Korean investors in the definition of prescribed foreign investor in turn ensures that the asset thresholds applying to these investors under regulation 6 would apply to Korean investors.

Item [5] – Subregulation 11(2)

This item inserts *Korea* into regulation 11 so that *Korea* becomes a relevant foreign country for the purposes of the definition of prescribed foreign government investor. This ensures equivalent treatment for foreign government investors from *Korea* and Australia's other free trade agreement partners.

Life Insurance Regulations 1995

Items [6-8] – regulation 2B.01 and subparagraphs 2B.01(a)ii and (b)(ii)

These items make changes to insert body corporates that are incorporated and authorised to carry on life insurance business in Korea to the definition of an eligible foreign life insurance company. Including Korean life insurance companies as eligible foreign life insurance companies allows them to seek approval to operate in Australia as a branch.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Regulation makes amendments to the *Foreign Acquisitions and Takeovers Amendment Regulations 1989* and the *Life Insurance Regulations 1995* to give effect to Australia's commitments under the *Korea-Australia Free Trade Agreement* and *Japan-Australia Economic Partnership Agreement*.

The amendments to the *Foreign Acquisitions and Takeovers Amendment Regulations 1989* include Chilean, Korean and Japanese enterprises and nationals in the definition of prescribed foreign investors and prescribed foreign government investors so that the higher foreign investment screening thresholds applying to these investors (currently United States and New Zealand investors) apply to Chile, Korea and Japan. As a result, privately owned Chilean, Korean and Japanese investors (businesses) are only subject to foreign investment screening if their investment proposal is greater than A\$1,078 million (indexed annually) in relation to developed commercial real estate and most businesses (the thresholds are currently A\$54 million and A\$248 million respectively).

The amendments to the *Life Insurance Regulations 1995* involve a minor amendment to the *Life Insurance Regulations 1995* to include body corporates that are incorporated and authorised to carry on life insurance business in Korea and Japan as eligible foreign life insurance companies. This would provide Korean and Japanese life insurance companies with equivalent treatment currently offered to United States and New Zealand companies.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.