

EXPLANATORY STATEMENT

Select Legislative Instrument No. 217, 2015

Issued by the Authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Regulation 2015

Subsection 139(1) of the *Foreign Acquisitions and Takeovers Act 1975* (Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The primary purposes of the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation) are to: prescribe definitions for section 4 of the Act; provide for exemptions from the Act; specify the threshold values (that is, monetary amounts) that apply to certain actions; and prescribe certain actions to be significant actions and notifiable actions.

Background information about the Act and the Regulation is set out in [Attachment A](#).

Further details of the Regulation are set out in [Attachment B](#).

The Statement of Compatibility with Human Rights is set out in [Attachment C](#).

The Act does not specify any conditions that need to be met before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (LIA). The Regulation provides for certain matters by applying, adopting or incorporating matters contained in other instruments or other writing existing from time to time. This is permitted by subsection 139(3) of the Act.

Exposure drafts of the Regulation and the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015* were published on the website of the Department of the Treasury (Treasury) on 13 October 2015. Interested persons were invited to provide comments on the exposure drafts by 30 October 2015. Treasury received 15 submissions, none of which were designated non-confidential. Discussions were also had with a number of stakeholders during and post the exposure period. Several peak bodies, law firms (that act as agents for foreign persons), and entities that will be directly affected by the Regulation were amongst those who provided submissions. The States and Territories were also consulted. Treasury also consulted with the Australian Taxation Office generally, and with the Attorney-General's Department and the Department of Foreign Affairs and Trade in relation to those provisions in the Regulation that are directly relevant to those departments.

An earlier draft of the Regulation was released for public comment on 6 July 2015 together with an exposure draft of the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015*.

The main issues raised by stakeholders included:

- the scope of the definition of 'foreign government investor';

- the breath of the definition of the term ‘agribusiness’; and
- the scope of the exemptions provided for by the Regulation, including exemptions applying to moneylending agreements and exemptions from the meaning of associate.

Following consultation, a number of technical amendments were made to ensure that the Regulation achieves its objectives. These included expanding the exemption from the definition of ‘associate’ in the Act. A provision that enables a person to apply for an exemption certificate for certain interests in tenements has also been included.

The measures in the Regulation are covered by the Regulation Impact Statement (RIS) included at Chapter 15 of the explanatory memorandum to the Foreign Acquisitions and Takeovers Legislation Amendment Bill 2015, the Foreign Acquisitions and Takeovers Fee Imposition Bill 2015 and the Register of Foreign Ownership of Agricultural Land Bill 2015.

The Regulation commenced on the later of:

- immediately after the commencement of Schedule 1 to the *Foreign Acquisitions and Takeovers Amendment Act 2015* (Amending Act); and
- the start of the day after the instrument was registered on the Federal Register of Legislative Instruments.

Glossary

The following abbreviations and acronyms are used throughout this explanatory statement.

<i>Abbreviation</i>	<i>Definition</i>
ABS	Australian Bureau of Statistics
Act	<i>Foreign Acquisitions and Takeovers Act 1975</i>
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
ADI	Authorised Deposit-taking Institution
Amending Act	<i>Foreign Acquisitions and Takeovers Amendment Act 2015</i>
ANZSIC Codes	<i>Australian and New Zealand Standard Industrial Classification Codes</i> , as in force from time to time, published by the Australian Bureau of Statistics
APRA	Australian Prudential Regulation Authority
APS 111	<i>Standard APS 111—Capital Adequacy: Measurement of Capital (APS 111)</i> , as in force on 1 December 2015
ASIC	Australian Securities & Investments Commission
Chile	Republic of Chile
Charities Act	<i>Charities Act 2013</i>
Convention	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
Corporations Act	<i>Corporations Act 2001</i>
Covenant	<i>International Covenant on Civil and Political Rights</i>
Financial Sector (Shareholdings) Act	<i>Financial Sector (Shareholdings) Act 1998</i>
IFRS	International Financial Reporting Standards
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
Insurance Act	<i>Insurance Act 1973</i>
Korea	Republic of Korea
LIA	<i>Legislative Instruments Act 2003</i>
Life Insurance Act	<i>Life Insurance Act 1995</i>
Migration Act	<i>Migration Act 1958</i>
RBA	Reserve Bank of Australia
Regulation	<i>Foreign Acquisitions and Takeovers Regulation 2015</i>
Singapore	Republic of Singapore
Thailand	Kingdom of Thailand
This Act	The Act and the Regulation
United States	United States of America

Background information about the Act

Definition of 'foreign person'

The Act and the Regulation primarily apply to foreign persons. In broad terms, section 4 of the Act defines 'foreign person' to mean:

- an individual who is not ordinarily resident in Australia;
- a corporation or a trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest with associates (that is, an interest of at least 20 per cent);
- a corporation or a trustee of a trust in which two or more persons, each of whom is either an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest with associates (that is, an interest of at least 40 per cent); or
- a foreign government.

Regulated actions

The Act regulates certain kinds of foreign investment in Australia to ensure that these are not contrary to the national interest. Specifically, the Act enables the Treasurer to make certain orders in relation to a 'significant action'. Broadly, a significant action is an action to acquire interests in securities, assets or land, or otherwise take action in relation to corporations and unit trusts. An action is generally only a significant action if it meets the percentage interest and monetary threshold values (if such thresholds apply to the action) and the action results in either a change in control involving a foreign person or the action is taken by a foreign person.

If a person proposes to take, or has taken, a significant action, the Treasurer has power under the Act:

- to decide that the Commonwealth has no objection to the action;
- to impose conditions on the action;
- to prohibit the action;
- to require the action to be undone (for example, by requiring the disposal of an interest that has been acquired).

Some actions, which are called notifiable actions, must be notified to the Treasurer before the action can be taken by a foreign person. A person who takes a notifiable action without doing so may be found guilty of an offence or the subject of a civil penalty order.

Background information about the Regulation

The Regulation:

- prescribes the meaning of certain terms used in the Act and the Regulation;
- prescribes exemptions from the Act;
- specifies monetary thresholds for certain actions;
- explains how to work out the indexed value of certain amounts;

- prescribes that certain actions are ‘significant action’ and ‘notifiable action’ for the purposes of the Act;
- specifies the kind of orders that may be made by the Treasurer with respect to proposed acquisitions and disposal orders;
- prescribes that certain actions are not significant actions or notifiable actions;
- specifies information that may be disclosed for the purposes of reporting on the administration of the Act and the Regulation; and
- deals with certain transitional matters.

Australia’s obligations under trade agreements

Australia is a Party to trade agreements with Japan, New Zealand, the Kingdom of Thailand (Thailand), the Republic of Chile (Chile), the Republic of Korea (Korea), the Republic of Singapore (Singapore) and the United States of America (United States). In broad terms, most of these agreements require Australia to accord to investors of the other Party to these agreements treatment no less favourable than it accords, in like circumstances, to its own investors with respect to investment. This overarching obligation is subject to various reservations which differ in each agreement. To comply with the obligations imposed by these agreements the following applies (except in relation to foreign government investors):

- Higher threshold values apply to some actions taken or proposed to be taken by the entities of most of these countries. For some actions, a prescribed threshold value (that is, monetary amount) must be met before an action can be either a significant action or notifiable action under this Act.
- Entities of some of these countries are also subject to differing treatment in relation to agribusinesses and agricultural land, or land that is used wholly and exclusively for a primary production business.

Details of the *Foreign Acquisitions and Takeovers Regulation 2015*

Part 1 — Preliminary

Section 1 — Name

The title of the Regulation is the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation).

Section 2 — Commencement

The Regulation commenced on the later of the day after the instrument was registered on the Federal Register of Legislative Instruments or immediately after the commencement of Schedule 1 to the *Foreign Acquisitions and Takeovers Amendment Act 2015* (Amending Act).

Section 3 — Authority

The Regulation is made under the *Foreign Acquisitions and Takeovers Act 1975* (Act).

Section 4 — Simplified outline of this Part

Section 4 provides a simplified outline of Part 1 of the Regulation, which defines terms that are used in the Regulation.

Section 5 — Definitions

This section defines a number of terms used in the Regulation. A number of other terms used in the Regulation are defined in section 4 of the Act.

Section 6 — Meaning of ‘acquire’ an interest of a specified percentage in a business

A person acquires an interest of a specified percentage in a business if the person:

- starts to hold an interest of that percentage in the business;
- would start to hold an interest of that percentage in the business if it is assumed that the person held interests in the assets of the business that are interests that he or she has offered to acquire (including by making or publishing a statement that expressly or impliedly invites a holder of interests to offer to dispose of interests in assets);
- for a person who already holds an interest of that percentage in the business, the person starts to hold additional interests in assets of the business, or would start to hold additional interests in assets of the business if interests in assets of the business were transferred as the result of the exercise of an option or has a right (other than by reason of an interest under a trust) to have such an interest transferred to the person or to the person’s associate. Section 6 of the Act specifies who is an associate of a person.

Section 6 of the Regulation is relevant to the application of section 16 of the Regulation. It is relevant to an action by a:

- foreign person to acquire a direct interest in an Australian business that is an agribusiness;
- foreign person to acquire an interest of at least 5 per cent in a business that wholly or partly carries on an Australian media business; and
- foreign government investor to acquire a direct interest in an Australian business.

Section 7 — Meaning of ‘enterprise’ of a country

Section 5 of the Regulation provides that the term ‘agreement country investor’ means an enterprise or a national of an agreement country. The term ‘agreement country’ is defined by section 5 of the Regulation to mean the Chile, Japan, Korea, New Zealand or the United States. The term ‘enterprise’ is also relevant to the definition of ‘relevant country investor’, which is defined by section 5 of the Regulation to mean an enterprise or national of the Chile, New Zealand or the United States.

Section 7 of the Regulation provides that an ‘enterprise’ of a country is an entity of a kind constituted or organised under a law of the country regardless of whether it is carried on for profit or is owned or controlled privately. The term also includes a branch of an entity (within the ordinary meaning of the term).

However, an entity, or a branch of an entity, is not an enterprise of a particular country if the Treasurer is satisfied that it is owned or controlled by one or more persons of another country if:

- Australia does not maintain diplomatic relations with the other country;
- Australia adopts or maintains measures relating to the other country or a person of the other country that have the effect of prohibiting transactions with the entity or branch; or
- the entity or branch has no substantial business activities in the particular country.

Section 8 — Meaning of a ‘national’ of a country

With the exception of a national of the United States, a national of a country is defined to mean an individual who is a citizen of that country or an individual who is entitled to live indefinitely in the country.

A national of the United States is a national as defined in Title III of the *Immigration and Nationality Act* of the United States, or a permanent resident of the United States. Defining the term ‘national’ of the United States in this way ensures consistency with the terms used in the Australia – United States Free Trade Agreement. A number of websites provide access to this statute free of charge, including the Legal Information Institute.¹

¹ The Legal Information Institute’s website is at: www.law.cornell.edu.

Despite subsection 8(1) of the Regulation, a national of New Zealand does not include an individual who is entitled to live in the Cook Islands, Niue or Tokelau, and does not live in New Zealand.

Section 9 — References to United States of America

A reference in the Regulation to the territory of the United States includes Puerto Rico and the District of Columbia.

A reference in the Regulation to a law of the United States of America includes a law that applies in a State of the United States or in any part of the territory of the United States.

Section 10 — Meaning of ‘starts an Australian business’

Section 8 of the Act provides that an ‘Australian business’ is a business that is carried on wholly or partly in Australia in anticipation of profit or gain. A person who has an interest in a mining or production tenement is taken to carry on a business in Australia of exploiting that tenement in anticipation of profit or gain.

The effect of section 10 of the Regulation is that a foreign government investor (a term which is defined by section 17 of the Regulation) is considered to start an Australian business if:

- the investor starts to carry on an Australian business; or
- for a foreign government investor that already carries on an Australian business, the business starts a new activity that is not incidental to an existing activity of the Australian business and that is within a different Division under the *Australian and New Zealand Standard Industrial Classification Codes* (ANZSIC Codes), as in force from time to time, from the current activities of the Australian business. This document is published by the Australian Bureau of Statistics (ABS) and is freely available from the ABS website (www.abs.gov.au).

A foreign government investor is not considered to ‘start an Australian business’ merely because it establishes a new subsidiary of an entity that already carries on an Australian business, provided that the subsidiary carries on the same Australian business or is established for the purposes of acquiring interests in assets of the same Australian business.

Part 2 — Provisions relating to definitions and rules of interpretation

Section 11 — Simplified outline of this Part

Section 11 of the Regulation provides a simplified outline of Part 2 of the Regulation. Part 2 prescribes definitions for section 4 of the Act; particular matters for definitions used in that section, and some rules for interpreting the Act and the Regulation.

Section 12 — When an Australian entity or Australian business is an agribusiness

Section 4 of the Act provides that an Australian entity or Australian business is an ‘agribusiness’ in the circumstances prescribed by the regulations. The term ‘Australian business’ is defined by section 8 of the Act to mean a business that is carried on wholly or partly in Australia in anticipation of profit or gain. The term

‘Australian entity’ is defined by section 4 of the Act to mean an Australian corporation or an Australian unit trust.

An Australian entity will be an agribusiness if:

- the entity, or any subsidiary of the entity, derives earnings from carrying on a business that falls within one of the specified classes of the ANZSIC Codes; and
- the amount of those earnings before interest and tax derived in the most recent financial year for which the financial accounts of the entity have been audited exceeds 25 per cent of the amount of the total earnings for the entity. The total earnings for the entity is the total of all earnings before interest and tax derived in Australia in that year by the entity or any subsidiary of the entity that carries on a business in specified classes of the ANZSIC Codes.

An Australian entity is an agribusiness if:

- the entity or any subsidiary of the entity uses assets in carrying on a business in specified classes of the ANZSIC Codes; and
- the value of those assets exceeds 25 per cent of the value of the total assets of the business.

An Australian business is an agribusiness if:

- the business uses assets in carrying on a business in specified classes of the ANZSIC Codes; and
- the value of those assets exceeds 25 per cent of the value of the total assets of the business.

Classes of business

If the other criteria are met, a business carried on wholly or partly in any of the following classes of the ANZSIC Codes is an agribusiness:

- any of the classes in Division A — Agriculture, forestry and fishing. The classes in this Division include growing crops, raising animals, growing and harvesting timber, and harvesting fish and other animals from farms or their natural habitats.
- subject to certain exceptions, classes in Subdivision 11 of Division C — Food product manufacturing. This subdivision includes meat processing, poultry processing, milk and cream processing, cheese and other dairy manufacturing, oil and fat manufacturing, fruit and vegetable processing and sugar processing. The classes in Subdivision 11 of Division C which are not prescribed are class 113 (cured meat and smallgoods manufacturing); class 1132 (ice cream manufacturing), class 1162 (cereal, pasta and baking mix manufacturing); a class in group 117 (bakery product manufacturing); class 1182 (confectionary manufacturing), and a class in group 119 (other food product manufacturing).

Apportioning mixed earnings and mixed-use assets for the purposes of determining when an Australian entity or Australian business is an agribusiness

If earnings are derived from carrying on a business that is not wholly in a specified class of the ANZSIC Codes, the earnings may be apportioned between the business that is in the class and other parts of the business, on the basis of information

available to the foreign person taking action in relation to the business. Similarly, if the value of assets that are used in carrying on a business is not wholly in a specified class of the ANZSIC Codes, the value of the assets may be apportioned between the business that is in the class and other parts of the business, on the basis of information available to the foreign person taking the action.

Section 13 — Land entities

Section 4 of the Act provides that the terms ‘agricultural land corporation’, ‘agricultural land trust’, ‘Australian land corporation’ and ‘Australian land trust’ have the meaning prescribed by the regulations. Together these are defined by section 5 of the Regulation as ‘land entities’. Section 13 of the Regulation prescribes the meaning of each of these terms. Other definitions relevant to assessing if a corporation or unit trust is a land entity (whether incorporated or established inside or outside of Australia) are:

- The term ‘Australian land’ is defined by section 4 of the Act to mean ‘agricultural land’, ‘commercial land’, ‘residential land’ or a ‘mining or production tenement’, which are also terms defined in section 4 of the Act.
 - ‘Agricultural land’ is defined by section 4 of the Act to mean land in Australia that is used, or could be used, for a primary production business. However, section 44 of the Regulation provides that land of a specified kind is not agricultural land.
 - Subsections 40(3) and (4) of the Regulation allows relevant agreement country investors (that is, Chilean, New Zealand and United States investors) and enterprises and nationals of Singapore and Thailand (other than foreign government investors), when assessing if an entity that they propose to acquire an interest in is a land entity, to disregard the fact that land that is used wholly and exclusively for a primary production business is agricultural land.
 - : This does not preclude the fact that agricultural land that is not used wholly and exclusively for a primary production business may also be residential or commercial land.

Agricultural land corporation

A corporation that is a holding entity and prepares financial statements or another document in accordance with subsection 24(2) or (3) (for example, consolidated financial statements) is an agricultural land corporation if the value of interests in agricultural land set out in the financial statements exceeds 50 per cent of the total assets set out in the corporation’s financial statements.

Any other entity is an agricultural land corporation if the entity’s interests in agricultural land held by the entity are more than 50 per cent of the total assets of the entity.

Agricultural land trust

A unit trust is an agricultural land trust if the interests in agricultural land held by the trustee of the unit trust exceeds 50 per cent of the total assets of the trustee of the unit trust. The interests in agricultural land held by the trustee and the total assets of the trustee are those held by the trustee in their capacity as trustee of the applicable unit trust.

Australian land corporation

A corporation is an Australian land corporation if:

- in the case of a corporation that is a holding entity, the corporation's interest in Australian land exceeds 50 per cent of the corporation's total assets set out in the consolidated financial statements.
- in the case of any other corporation, the corporation's interest in Australian land exceeds 50 per cent of the corporation's total assets.

Australian land trust

A unit trust is an Australian land trust if:

- in the case of a unit trust that is not a holding entity, the interests in Australian land held by the trustee of the unit trust is more than 50 per cent of the total assets held by the trustee
- in the case of a unit trust that is a holding entity and does not have consolidated financial statements, the interests in Australian land held by the trustee exceed 50 per cent of the total assets of the assets held by the trustee of the unit trust
- in the case of a unit trust that is a holding entity and has financial statements or another document in accordance with subsection 20(2) or (3), the interest in Australian land sets out in the financial statements is more than 50 per cent of the total assets set out in the financial statements.

For the above, the interests in Australian land held by the trustee and the total assets of the trustee, are those held by the trustee in their capacity as the trustee of the applicable unit trust.

Section 14 — Meaning of 'consideration'

Section 4 of the Act provides that consideration has the meaning prescribed by the regulations.

Subsection 14(1) of the Regulation provides that the consideration for an acquisition of an interest in securities, assets, Australian land, a mining, production of exploration tenement (within the meaning of section 5 of the Regulation), or an issue of securities in an entity includes:

- consideration in any form (including consideration that is 'in kind'). Examples of in kind consideration include scrip for scrip (that is where securities are received as payment for a sale of other securities) and payment through the transfer of property or other assets. Other examples of in kind consideration include providing goods or services, granting a right, or entering into an obligation (including an obligation to not undertake an act). In kind consideration may represent the consideration in whole or part;
- any Goods and Services Tax (GST) or any equivalent tax payable under a law of a foreign country or a part of a foreign country.
 - Other government taxes or duties are not considered to be part of the consideration under this Act (this includes any 6 monthly fee paid by a developer for the sale of new dwellings covered by a section 57 exemption certificate for new dwellings, irrespective of if the foreign person agrees to pay the developer an amount equivalent to the fee);

- any consideration that is contingent on the occurrence or non-occurrence of a particular event.

Assessing the value of consideration

Subsections 14(3) and (4) of the Regulation explains how the value of consideration is to be assessed for an acquisition of an interest in securities, assets, Australian land, a mining production or exploration tenement, or an issue of securities in an entity, in circumstances where there is an agreement relating to the acquisition or issue and the parties to the agreement are not dealing at arm's length, or where there is no agreement. In these circumstances a reasonable assessment of the value of the consideration is to be made.

An assessment of consideration is reasonable on a particular day if it is worked out on the basis of a price that was publicly available no more than seven days earlier. For example, reasonable consideration for listed and unlisted public offer entities may be the publicly quoted daily closing price of the security, or if under a trading halt, the last quoted price. For land, a reasonable assessment of the value of consideration may be the price publicly advertised by, or on behalf of, the vendor. For a house and land package, it would be the advertised price for the package.

In the case of an acquisition of an interest in securities made under a takeover bid, an assessment of consideration is reasonable if it is worked out on the basis of the first amount specified for the interest in the bidder's statement (within the meaning of the Corporations Act) or any equivalent document under a law of a foreign country or part of a foreign country. The Corporations Act specifies the information that must be included in a bidder's statement. In practice, this means that where the amount of the bid is subsequently either increased or decreased after the initial release of the bidder's statement, this would be disregarded. In the case where a bidder's statement or any equivalent document are released in more than one country, it would be reasonable to rely on the bidder's statement or equivalent document that is issued under the law of the country or part of a foreign country that has the closest connection to the entity in which securities are to be (for example, if a listed entity, the location of its primary listing, otherwise, its location of incorporation or establishment).

Where there is an agreement the value of the consideration is the value of the consideration for the acquisition or issue. However, this only applies if the parties to the agreement are dealing at arm's length. For example, if a family member proposed to gift to a relative an interest in land, such as ownership of an established dwelling, for either a nil amount or only a nominal amount (that did not reflect the market value of the interest to be transferred), the amount shown in the agreement would not be a reasonable assessment of the value of consideration and a reasonable assessment of the value of the consideration would otherwise need to be made.

While what is a reasonable assessment of the consideration will depend on the facts and circumstances of the action, examples of what may be a reasonable assessment of consideration in particular circumstances are as follows.

- Consideration for a leasehold interest in Australian land will generally be the total of any:
 - up-front initial payments (other than taxes and regulatory charges) for the grant of the leasehold interest;
 - periodic payments for the benefit and enjoyment of the Australian land (for example, annual lease payments including amounts as increased in accordance with a formula over the term of the lease); and
 - amounts likely to be paid for an extension or renewal of the lease (if prescribed under the lease agreement).
- Consideration for interests related to security interests (that are not otherwise exempt under this Act):
 - For grant of a security interest, the sum of up-front initial payments (ongoing interest payments are disregarded if reflecting a market rate of interest).
 - For interests acquired through the enforcement of a security interest, the sum of the outstanding loan balance likely to be recouped by the lender and any penalties levied on the borrower.

Consideration for acquisitions of interests in securities of foreign entities

The Regulation provides a method to assess consideration where an acquisition of an Australian business or entity takes place because a person acquires a foreign entity which has an interest in the Australian business or Australian entity. Consideration may be apportioned to the acquisition of the Australian business or entity on the basis of the earnings of the foreign entity and the Australian business or entity.

Section 15 — Number of independent self-contained dwellings in a development

‘Development’ is relevantly defined by section 4 of the Act to mean one or more multi-storey buildings if the buildings are or were under one development approval and the number of independent self-contained dwellings (other than townhouses) that the buildings contain or will contain is at least the number prescribed by the regulations. The number of independent self-contained dwellings prescribed by the Regulation is 50. Development is defined primarily for the purposes of the definition of ‘new dwelling’ and the exemption certificates for new dwellings that may be granted by the Treasurer under section 57 of the Act.

Section 16 — Meaning of ‘direct interest’ in an entity or business

Section 4 of the Act provides that the term direct interest has the meaning prescribed by the regulations.

The effect of section 16 of the Regulation is that a direct interest in an entity or business is:

- an interest of at least 10 per cent in the entity or business;
- an interest of at least five per cent in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business.

- An example of a legal arrangement for the purpose of paragraph 16(b) would be a legally binding *strategic alliance* agreement between two or more airlines in relation to the conduct of their businesses. Such strategic alliances are most common between businesses and entities within a single sector, or who carry on businesses that are suited to full or partial integration. Such legal arrangements may be known by various names. The arrangements impose parameters that restrict or limit the operation of the businesses of the parties to the agreement. However, this provision is not intended to capture an ordinary arm's length goods or services provision agreement (for example, an offtake agreement) that is made on ordinary commercial terms;
- an interest of any percentage in the entity or business if the person who acquired the interest is in a position to influence or participate in the central management and control of the entity or business or to influence, participate in or determine the policy of the entity or business.
 - Entry into an ordinary arm's length goods or services provision agreement by itself is not intended to be covered by paragraph 16(c).

Section 17 of the Act defines interest of a specified percentage in an entity. Section 6 of the Regulation defines interest of a specified percentage in a business.

Section 17 — Meaning of 'foreign government investor'

Section 4 of the Act provides that 'foreign government investor' has the meaning prescribed by the regulations.

The effect of section 17 of the Regulation is that a person is a foreign government investor if the person is:

- a foreign government or separate government entity;
- a corporation in which:
 - a foreign government or separate government entity, alone or together with one or associates, holds a substantial interest; or
 - foreign governments or separate government entities of more than one foreign country (or part of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest; or
- the trustee of a trust in which:
 - a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest; or
 - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with anything one or more associates, hold an aggregate substantial interest; or

- the general partner of a limited partnership in which:
 - a foreign government or separate government entity, alone or together with one or more associates, holds an interest of at least 20 per cent; or
 - foreign governments or separate foreign entities of more than one foreign country (or parts of more than one foreign country) together with any one or more associates, hold an aggregate interest of at least 40 per cent;
- a corporation, trustee or partner of a kind described in paragraph (b), (c) or (d) assuming that the references to foreign government (or foreign governments) in those paragraphs includes references to a foreign government investor (or foreign government investors) within the meaning of those paragraphs, or as a result of a previous operation of this paragraph.

Section 18 — Meaning of ‘foreign person’

Paragraph (g) of the definition of ‘foreign person’ in section 4 of the Act provides that foreign person means ‘any other person, or any other person that meets the conditions, prescribed by the regulations’.

General partners of limited partnerships

Subsection 18(1) of the Regulation provides that a person is a foreign person if the person is a general partner of a limited partnership in the circumstances specified by the provision. The terms ‘general partner’ and limited partnership’ are defined by section 5 of the Regulation.

The circumstances are that interests of at least 20 per cent, or aggregate interests of at least 40 per cent, are held in the limited partnership by individuals not ordinarily resident in Australia, a foreign corporation or foreign government. Section 17 of the Act provides that such interests may be held alone or together with one or more associates.

Certain foreign government investors

Subsection 18(2) of the Regulation provides that a person is a foreign person if the person is a foreign government investor and apart from this subsection, the person would not be a foreign person.

Section 19 — Number of future dwellings on residential land

Section 4 of the Act defines the meaning of ‘residential land’. Subparagraph (a)(ii) of the definition relevantly defines ‘residential land’ to mean land in Australia if the number of dwellings that could reasonably be built on the land is less than the number prescribed by the regulations. Section 19 of the Regulation provides that the number of dwellings for the purposes of the definition is 10.

Section 20 — Meaning of ‘total asset value’

Total asset value is used to determine whether the threshold test for entities in section 51 of the Act is met. For example, if the total asset value for an entity is greater than the amount prescribed, then the threshold test is met when an interest in securities in the entity is acquired. In the Regulation, the concept is also used to define a mining, production or exploration entity, as well as in the meaning of agribusiness.

The threshold test is important in determining whether an action is a significant action.

Section 4 of the Act provides that the term ‘total asset value’ for an entity has the meaning prescribed by the regulations. Section 20 of the Regulation specifies the definition of total asset value for an entity.

The Regulation prescribes a meaning for the following circumstances: entities that are not holding entities; holding entities that prepare financial statements in accordance with subsection 24(2) or (3) of the Regulation (for example, consolidated financial statements); and holding entities that prepare financial statements in accordance with subsection 24(2) or (3) of the Regulation. For a foreign entity, only the total relevant Australian assets are to be taken into account for the purposes of this section.

Entities whose securities are stapled

A stapled entity is one where the securities can only be transferred together with securities in another entity. It is not possible to acquire securities in the entity alone. In that case the value of the assets of the stapled entity is taken to include the value of the assets of the other entity or entities.

Entities operation on a unified basis

Entities operating on a unified basis may take many forms. Generally, the structure would be designed to place the shareholders in each entity in substantially the same position as if they held interests in a single entity owning all of the assets of both. For example there may be shared voting rights and common directors.

Where an entity operates on a unified basis the value of the assets includes the value of the assets of the other entities.

Section 21 — Meaning of ‘total issued securities value’

Section 4 of the Act provides that the term ‘total issued securities value’ has the meaning prescribed by the regulations. The term is used in section 51 of the Act, which relevantly provides that the threshold test is met in relation to an entity for the significant action of acquiring interests in securities in an entity, or issuing securities in an entity, if the total assets value for the entity or the total issued securities value for the entity (whichever is higher) is more than the value prescribed by the regulations.

The total issued securities value for an entity is the class value worked out for each class of security of the entity and each relevant subsidiary of the entity. Entities may have more than one class of securities on issue, which may have differing rights or nominal values attached. For example, some may have preferential voting rights, preferential rights to distributions or no voting rights. To ascertain the total issued securities value requires that the class value is worked out for each class.

Meaning of class value for a class of security if securities in that class are being acquired or issued

For securities in a class that is being acquired, the class value is the total consideration for the acquisition of securities in that class divided by the number of securities in the class to be acquired, multiplied by the total number of issued securities in that class immediately before the acquisition. This is relevant to significant actions where a person proposes to acquire an interest in securities (for example, in an entity). This

includes where the securities may be acquired including by participating to acquire securities through a share placement or a non-pro rata securities issue.

The class value for a class of security if securities in that class are being issued is worked out by dividing the total issue price of all the securities in that class to be issued by the number of securities in the class to be issued, multiplied by the total number of issued securities in that class immediately before the issue. This is relevant only to the significant action – entities, only where the kind of action is to issue securities in an entity.

Meaning of class value for a class of security of an entity if securities in that class are not being acquired or issued

Where securities in a class are not being acquired or issued the class value for a class of security is worked out by multiplying the market value of securities in that class with the total number of issued securities in that class immediately before the acquisition or issue. For example, when a corporation has both preferential and ordinary shares on issue, but the acquisition is only in relation to the ordinary shares, then the class value for preferential shares must be worked out.

Section 22 — Businesses that are sensitive businesses

Subsection 26(1) of the Act provides that a business is a ‘sensitive business’ if the business meets the conditions specified in the regulations. Subsection 26(2) of the Act clarifies that the regulations may prescribe sensitive sectors generally, or different sensitive sectors for different kinds of foreign persons, and different conditions for different kinds of sensitive sectors.

Section 22 of the Regulation provides that a business is a sensitive business if the business is carried on in the sectors specified by the provision (that is, the media sector, the telecommunications sector, or the transport sector), including a business relating to infrastructure for these sectors.

In addition, a business is a sensitive business if the business is wholly or partly:

- the supply of certain services and goods to the Australian Defence Force or other defence forces;
- the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
- the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; or
- the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

This definition is relevant to sections 51, 52 and 56 of the Regulation.

Section 23 — Value of assets of entities or businesses

Section 27 of the Act provides, in part, that regulations may provide in relation to valuing the assets of an entity or business.

Subsections 23(1) and (2) of the Regulation provides that the value on a particular day of an asset of an entity or business is:

- if there is a most recent financial statement and an event affecting the value of the asset as shown in the financial statement has not occurred since the financial statement was most recently audited or reviewed, the value of the asset as shown in the financial statement; or
- the value of that asset as shown on that day in the accounting records of the entity.

Subsection 23(3) of the Regulation provides that subsection (1) does not apply if the value shown is not a reasonable value. For example, values will generally be reasonable if determined in accordance with accounting standards and related pronouncements of the Australian Accounting Standards Board or in accordance with the international financial reporting standards.

Section 24 — Value of assets of entities that prepare consolidated financial statements

If an entity prepares consolidated financial statements (which combine the financial results of a parent entity and all of its subsidiary entities in a single financial report) and those statements are prepared in accordance with International Financial Reporting Standards (IFRS), the value of the assets of the entity is the value set out in those statements.

The IFRS is a single set of accounting standards that is developed and updated by the International Accounting Standards Board (IASB). Most relevantly, IFRS 10 *Consolidated Financial Statements* establishes principles for the presentation and preparation of consolidated financial statements when an entity controls one or more other entities. IFRS are freely available from the website of the IFRS Foundation and IASB, which in October 2015 was available at <http://www.ifrs.org/Pages/default.aspx>.

Where an entity prepares consolidated financial statements that are not in accordance with the IFRS, the value of the assets of the entity is the value set out in any other financial statements or other document (referred to in the Regulation as the ‘reconciliation document’) for the purpose of reconciling the value of the assets in the consolidated financial statements with the value produced using the method in the IFRS.

These methods apply to the calculations of value in paragraph (b) of column 1 of table item 1 of subsection 13(6) and in subsections 20(3) and (4).

Section 25 — Foreign currencies

A number of provisions in the Act require the determination of a value of a thing. Section 27 of the Act authorises regulations to be made in relation to valuing the assets of an entity, trust or business and paragraph 139(1)(b) of the Act authorises regulations necessary or convenient for carrying out or giving effect to the Act.

Section 25 of the Regulation explains how that value is to be assessed if the value has been expressed in an agreement or other document only in a currency that is not Australian dollars. It also explains how to determine the value of a thing if a notice is given for the purposes of the Act in relation to an acquisition of an interest or an issue of securities in an entity and there is no agreement relating to the acquisition or issue.

The effect of section 25 of the Regulation is that the value will be worked out using the daily exchange rate for that currency published by the Reserve Bank of Australia (RBA) if the RBA publishes a daily exchange rate for that currency. When calculating the value expressed in an agreement or other document, the daily exchange rate that will be applied is the rate for the day the agreement was entered into or the document was made. Where a notice is given for the purposes of the Act in relation to an acquisition of an interest or an issue of securities in an entity and there is no agreement relating to the acquisition or issue, the daily exchange rate that applied on any of the seven days before the notice is given may be used. If no exchange rate was published or made publicly available on the day the agreement was entered into, the exchange rate used would be that for the day most recently published or made publicly available.

If the RBA does not publish a daily exchange rate for the currency in question the value is to be worked out using any publicly or commercially available exchange rate that is reasonable to use. An example of a commercially available exchange rate that is reasonable to use would also include a wholesale exchange rate (as opposed to retail exchange rates) that would be commercially available to the party if making a large value currency exchange when dealing with a provider at arm's length.

Part 3 — Exemptions

Division 1 — Simplified outline of this Part

Section 26 — Simplified outline of this Part

Section 26 of the Regulation contains a simplified outline of Part 3 of the Regulation. Part 3 is made for sections 37 and 63 of the Act.

Section 37 of the Act provides that the regulations may provide that the Act, or specified provisions of the Act, do not apply in relation to any one or more:

- acquisitions of the kind or in the circumstances prescribed by the regulations;
- interests of the kind or in the circumstances prescribed by the regulations;
- Australian businesses of the kind or in the circumstances prescribed by the regulations;
- foreign persons in a class or in the circumstances prescribed by the regulations.

Section 63 of the Act provides that regulations may be made for and in relation to additional kinds of exemption certificates given by the Treasurer.

Division 2 — Exemptions applying for all purposes

Section 27 — Moneylending agreements

The exemption in section 27 of the Regulation applies to any interest in securities, assets, a trust, Australian land or a tenement that is held solely by way of security for the purposes of a moneylending agreement or acquired by way of enforcement of a security held solely for the purposes of a moneylending agreement (see below for specific rules that apply in relation to interests relating to residential land and interests acquired by way of enforcement of a security by foreign government investors).

Section 5 of the Regulation defines ‘moneylending agreement’ to mean an agreement entered in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (a moneylending business) of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business. In addition, the entity that holds or acquires the interest must be:

- the entity (lender) that entered the moneylending agreement;
- a subsidiary or holding entity of the lender;
- a person who is (alone or with others) in a position to determine the investments or policy of the lender;
- a security trustee (that is, an entity that holds various security interests created on trust for banks and other lenders) who holds or acquires the interest on behalf of the lender; or
- a receiver, or a receiver and manager, appointed in relation to one of the above persons.

Interests relating to residential land

For an interest in residential land for foreign persons (other than foreign government investors) the Act does not apply to an interest only if the lender or a holding entity of the lender, is an Authorised Deposit-taking Institution (ADI) or otherwise licensed (whether or not in Australia) as a financial institution. However, if otherwise licensed as a financial institution, for the entity to benefit from this subsection there must be at least 100 holders of securities in that entity, or the entity must be listed for quotation in the official list of a stock exchange.

A sole trader, entity or business otherwise licensed as a financial institution not meeting either the widely held test or the listed test, will be subject to the Act when taking or enforcing a security interest in residential land. In such cases, both taking and enforcing the security interest will be both a significant action and a notifiable action if the threshold test is met (for residential land, there is generally not a threshold value).

This subsection does not apply to foreign government investors either taking or enforcing security interests in residential land (for foreign government investors, the Act does not apply to the former, and the Act will only apply to the latter, if the foreign government investor does not meet subsection 27(3)).

Interests acquired by foreign government investors (through enforcement of a security interest)

For an interest acquired by a foreign government investor by way of enforcement of a security held solely for the purposes of a moneylending agreement, the Act does not apply to the interest only if:

- for a foreign government investor that is an ADI or a subsidiary of an ADI:
 - 12 months have not passed since the acquisition of the interest; or
 - at least 12 months have passed since the acquisition of the interest and the foreign government investor is making a genuine attempt to dispose of the interest;

- otherwise (that is, for a foreign government investor that is not an ADI or a subsidiary of an ADI):
 - 6 months have not passed since the acquisition of the interest; or
 - at least 6 months have passed since the acquisition of the interest and the foreign government investor is making a genuine attempt to dispose of the interest.

Whether a genuine attempt to dispose of the interest is being made will depend on the circumstances and facts of the situation. However, examples of the kinds of actions that may constitute a genuine attempt to dispose of an interest include deciding on the method of disposal, and complying with any requirements of a law that apply before the interest can be disposed of.

The effect of section 27

As the note to section 27 states, the effect of section 27 of the Regulation is that acquisitions of interests mentioned in this provision are not significant actions or notifiable actions. Such actions are also to be disregarded for other purposes under the Act, including for the purpose of determining whether a person holds a substantial interest in an entity or is a subsidiary of another entity.

Division 3 — Exemptions for certain actions from being significant and notifiable actions

Subdivision A — Application of this Division

Section 28 — Application of this Division

This section provides that the Division sets out the kinds of actions to which Parts 2, 3 or 4 of the Act, and any other provision of the Act to the extent that it relates to those parts, do not apply. The provisions of the Act that do not apply in relation to the kinds of action set out in the Division are referred to in the Regulation as the ‘excluded provisions’.

Subdivision B — General exemptions

Section 29 — Will or devolution

Section 29 of the Regulation provides that the excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by will or devolution by operation of law (for example, by operation of a constructive trust). The exemption does not apply to an arrangement under Part 5.1 — Arrangements and reconstructions, or Part 5.3A — Administration of a company’s affairs with a view to executing a deed of company arrangement, of the Corporations Act.

Section 30 — Certain interests held by foreign custodian companies

Section 30 of the Regulation provides that the excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust, Australian land or a tenement by a foreign person in the circumstances specified by the provision.

Custodians provide a range of services for their clients, who are generally institutional investors, money managers and broker/dealers. These services typically include: settlement of trade and safekeeping of financial assets on behalf of the client; collection of income arising from portfolios; application of entitlements to reduce rates of withholding tax at source and reclaiming tax withheld; and notification and dealing with corporate action.

Generally, custodians only exercise voting rights attached to their holdings under direct instruction from their client and do not normally exercise influence independent of their client. It would be inconsistent with the underlying rationale of the Act to screen the operations of foreign custodians operating in Australia when they act on behalf of Australian investors.

Section 31 — Australian businesses carried on by or land acquired from government

Section 31 of the Regulation provides that the excluded provisions do not apply in relation to an Australian business that is carried on (whether alone or together with one or more other persons) by, or an acquisition of an interest in Australian land from, the Commonwealth, a State or a Territory or an entity wholly owned by the Commonwealth, a State, a Territory or a local governing body.

This section does not apply in relation to an acquisition of an interest by a foreign government investor (that is, this Act applies to any action of a foreign government investor to acquire interests through an Australian government privatisation or asset sale process, if the action is a significant action under this Act).

Subdivision C — Significant and notifiable actions relating to entities

Section 32 — Investments in financial sector companies

The excluded provisions do not apply in relation to an acquisition of an interest in shares if the shares are in a financial sector company within the meaning of the *Financial Sector (Shareholdings) Act 1998*. Section 3 of the Financial Sector (Shareholdings) Act currently defines ‘financial sector company’ to mean an Authorised Deposit-taking Institution (ADI), an authorised insurance company, or a holding company of an authorised deposit-taking institution or an authorised insurance company. ‘Authorised insurance company’ is defined by section 3 of the Financial Sector (Shareholdings) Act to mean a company authorised under the *Insurance Act 1973* to carry on an insurance business or a company registered under section 21 of the *Life Insurance Act 1995*.

The effect of this provision is that investments in financial sector companies are not regulated by the Act, although approval will still be required under the Financial Sector (Shareholdings) Act. However, if the foreign person proposing to take the action or who has taken the action is a foreign government investor, this section does not apply to the action and the action remains subject to this Act.

Section 33 — Compulsory acquisitions and compulsory buy-outs

The excluded provisions do not apply in relation to an acquisition of an interest in securities, including securities in a land entity and a mining, production or exploration entity, if the security is acquired under a compulsory acquisition or compulsory buy-out under Chapter 6A —Compulsory acquisitions and buy-outs, of the Corporations Act. This includes when securities are acquired by an action that would be subject to Chapter 6A as exempted or modified by the Australian Securities & Investments Commission (ASIC).

Section 34 — Convertible instruments that include a requirement for loss absorption if entity becomes non-viable

Broadly, section 11AF of the *Banking Act 1959* permits the Australian Prudential Regulation Authority (APRA) to determine standards in relation to prudential matters to be complied with by an authorised deposit-taking institution (ADI) (that is, a body corporate that is granted an authority to carry on banking business in Australia).

Standard APS 111—Capital Adequacy: Measurement of Capital (APS 111), which is made by APRA under section 11AF of the Banking Act, seeks to ensure that an ADI maintains adequate levels of appropriate quality capital to meet its risk exposure by setting out the characteristics that an instrument must have to qualify as regulatory capital for an ADI. An ADI is required to hold regulatory capital as a buffer against the risks it undertakes. For the purposes of *APS 111*, ‘Regulatory Capital’ consists of Tier 1 Capital (which in turns consists of Common Equity Tier 1 Capital and Additional Tier 1 Capital) and Tier 2 Capital. These terms are defined by APS 111. APS 111 provides that Additional Tier 1 Capital comprises high quality components of capital that satisfy the following characteristics:

- provide a permanent and unrestricted commitment of funds;
- are freely available to absorb losses;
- rank behind the claims of depositors and other more senior creditors in the event of winding up of the issuer; and
- provide for fully discretionary capital distributions.

APS 111 explains the types of instruments that may be included in Tier 2 Capital.

Tier 2 Capital includes other components of capital that do not meet the quality of Tier 1 Capital but which contribute to the overall strength of an ADI and its capacity to absorb losses. APS 111 explains the types of instruments that may be included in Tier 2 Capital.

The effect of section 34 of the Regulation is that the Act does not apply to an acquisition of an interest in securities, including securities in a land entity and a mining, production or exploration entity, that is an Additional Tier 1 Capital or Tier 2 Capital instrument (within the meaning of APS 111 as in force at the time section 34 of the Regulation commences) provided the security has not been converted into ordinary shares.

Subdivision D — Significant and notifiable actions relating to Australian land etc.

Section 35 — Acquisition by persons with a close connection to Australia

Acquisitions of any land by persons with a close connection to Australia

The excluded provisions do not apply in relation to an acquisition of an interest in Australian land by any of the following specified persons:

- an Australian citizen not ordinarily resident in Australia;
- a foreign person that is an Australian corporation that would not be a foreign person if interests held directly in it by any one or more of the specified persons were disregarded (including through a previous application of this provision); or
- a foreign person that is the trustee of a resident trust at the time of the acquisition, and which would not be a foreign person if interests held directly in it by any one or more of the above persons (an Australian citizen and an Australian corporation held by an Australian citizen) were disregarded (including through a previous application of this provision).
 - ‘Resident trust’ is defined under section 5 of the Regulation to mean a trust that is taken to be a resident trust estate under subsection 95(2) of the *Income Tax Assessment Act 1936*.

An example of the effect of this subsection when a person is covered by a previous application of this provision, is when an Australian citizen not ordinarily resident in Australia owns 100 per cent of an Australian holding corporation, which has an Australian subsidiary, then an acquisition by the Australian subsidiary would be excluded. That is because:

- the Australian holding corporation meets the conditions of the subsection. It would not be a foreign person if the interest held by the Australian citizen not ordinarily resident in Australia were disregarded; and
- the Australian subsidiary has an interest held in it by a person covered by that previous application of the section. The Australian subsidiary would not be a foreign person if the interest held by the Australian holding corporation were disregarded.

The excluded provisions also do not apply in relation to an acquisition of an interest in Australian land by a charity operating in Australia primarily for the benefit of persons ordinarily resident in Australia.

‘Charity’ has the meaning given by the *Charities Act 2013*. Broadly, the effect of section 5 of the Charities Act is that an entity will be a charity if it satisfies the following criteria:

- it is a not-for-profit entity;
- all of the purposes of the entity are ‘charitable purposes’ that are for the ‘public benefit’ (within the meaning of those terms), or purposes that are incidental to or ancillary to, and in furtherance or in aid of, the entity’s charitable purposes that are for the public benefit;
- none of the entity’s purposes are disqualifying purposes within the meaning of the Charities Act; and

- it is not an individual, a political party or a government entity.

Acquisitions of interests in agricultural land by spouses and de facto partners of Australian citizens

The excluded provisions do not apply in relation to the acquisition of an interest in agricultural land by a foreign person if the person is the spouse or de facto partner (within the meaning of the *Acts Interpretation Act 1901*) of an Australian citizen and the interest is held by the person and his or her spouse or de facto partner as joint tenants.

Section 2D of the Acts Interpretation Act provides that a person is a ‘de facto partner’ of another person (whether of the same or different sex) if the person is in a registered relationship with the other person under section 2E of the Acts Interpretation Act or the person is in a de facto relationship with the other person under section 2F of the Acts Interpretation Act. Section 2E of the Acts Interpretation Act provides that a person is in a ‘registered relationship’ with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship. Section 2F of the Acts Interpretation Act provides that a person is in a de facto relationship with another person if the persons are not legally married to each other; are not related by family and have a relationship as a couple living together on a genuine domestic basis. For the purposes of determining whether two persons have a relationship as a couple, all the circumstances of the relationship are taken into account, including the duration of the relationship; the nature and extent of the common residence; the ownership, use and acquisition of their property and the degree of mutual commitment to a share life.

Section 36 — Acquisition by funds and schemes

Acquisition of certain interests by a life insurance company

The excluded provisions do not apply to an acquisition of:

- an interest in Australian land (including an acquisition of an interest in a land entity);
- an interest in a tenement (a term which is defined by section 5 of the Regulation), or
- an interest in securities in a ‘mining, production or exploration entity’ (a term which is also defined by section 5 of the Regulation),

by a foreign person that is a ‘life company’ operating in Australia or a subsidiary of such a life company where the acquisition is made by way of investment of its statutory funds primarily for the benefit of owners of policies who are ordinarily resident in Australia.

‘Life company’ is defined by section 5 of the Regulation to have the meaning given by the *Life Insurance Act 1995*. The Life Insurance Act defines ‘life company’ to mean a company that is carrying on life insurance business in Australia.

‘Life insurance business’ is defined to mean a business that consists of any or all of the issuing of life policies; the issuing of sinking fund policies (that is a contract where the company issuing the policy undertakes to pay money on one or more specified dates where neither payment of that money nor the payment of premiums is dependent on the death or survival of the person to whom the policy is issued or any

other person); the undertaking of liability under sinking fund policies or any related business.

Under section 29 of the Life Insurance Act a ‘statutory fund’ is a fund that is established in the records of the company and relates solely to the life insurance business of the company or a particular part of that business. Part 4 of the Life Insurance Act imposes requirements regarding statutory funds.

Acquisition of certain interests by a general insurer

The excluded provisions do not apply to an acquisition of an interest in Australian land (including an interest in a land entity); an interest in an exploration tenement or a mining or production tenement; or an interest in securities in a mining, production or exploration entity by a foreign person that is a body corporate that is a general insurer (other than a life company) operating in Australia or a subsidiary of a general insurer where the acquisition is made from the reserves of the body corporate and is consistent with the body corporate’s obligations under the *Insurance Act 1973*.

Section 5 of the Regulation defines ‘general insurer’ to have the meaning given by the Insurance Act. Section 11 of the Insurance Act defines general insurer to mean a body corporate that is authorised under that Act to carry on insurance business in Australia. ‘Insurance business’ means the business of undertaking liability, by way of insurance, including reinsurance, in respect of any loss or damage, including liability to pay damages or compensation, contingent upon the happening of a specified event, and includes any business incidental to insurance business as so defined. It does not include:

- life insurance business;
- accident insurance business undertaken solely in connection with life insurance business;
- pecuniary loss insurance business carried on solely in the course of carrying on banking business and for the purposes of that business by an ADI;
- business in relation to the benefits provided by a friendly society or trade union for its members or their dependents;
- business in relation to a scheme or arrangement under which superannuation benefits, pensions or payments to employees or their dependants (and not other persons) on retirement, disability or death are provided by an employer or an employer’s employee or by both, wholly through an organisation established solely for the that purpose by the employer or the employer’s employees or by both; or
- business in relation to a scheme or arrangements for the provisions of benefits consisting of the supply of funeral, burial or cremation services; the payment of money, upon the death of a person, for the purpose of meeting the whole or a part of the expenses of and incidental to the funeral, burial or cremation of that person;

- business undertaken by a person, being an innkeeper or lodging-house keeper, relating only to the person's liability in respect of goods belonging to another person and in the possession or under the control of a guest at the inn or lodging-house of which the first-mentioned person is the innkeeper or lodging-house keeper or deposited with the innkeeper or lodging-house keeper for safe custody;
- the business of insuring the property of a registered religious institution where the person carrying on the business does not carry on any other business;
- health-related business within the meaning of section 131-15 of the *Private Health Insurance Act 2007* carried on by a private health insurer within the meaning of that Act through a health benefits fund within the meaning of section 131-10 of that Act; or
- health insurance business within the meaning of Division 121 of the *Private Health Insurance Act* carried on by a private health insurer within the meaning of that Act.

Acquisition of certain interests by an Australian business that maintains a superannuation fund

The excluded provisions do not apply to an acquisition of an interest in Australian land (including an interest in a land entity); an interest in a mining, production or exploration tenement; or an interest in securities in a mining, production or exploration entity by a foreign person that is an Australian business that maintains a superannuation fund for its employees (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) primarily for the benefit of the members of the fund, or their dependents, who are ordinarily resident in Australia if the acquisition is made as an investment of all or part of the assets of the fund.

Acquisition of certain interests by a responsible entity of a managed investment scheme

The excluded provisions do not apply to an acquisition of an interest in Australian land (including an interest in a land entity); an interest in a mining, production or exploration tenement; or an interest in securities in a mining, production or exploration entity by a foreign person that is a responsible entity of a managed investment scheme registered under section 601EB of the *Corporations Act* to the extent that it acquires an interest in Australian land that is primarily for the benefit of scheme members who are ordinarily resident in Australia.

Section 37 — Acquisition in certain circumstances

Section 37 of the Regulation specifies the circumstances in which the excluded provisions do not apply in relation to an acquisition of an interest in Australian land by a foreign person.

Securities in listed Australian land entities and stapled securities

Subsection 37(2) of the Regulation provides that the excluded provisions do not apply to the acquisition of an interest in Australian land that is:

- an acquisition of an interest in shares or units in a land entity;
- the land entity is or will be listed for quotation in the official list of a stock exchange (whether or not in Australia). An acquisition that is pursuant to an initial public offering meets ‘will be listed’;
- after the acquisition, the foreign person, alone or together with one or more associates, holds an interest of less than 10 per cent in the entity; and
- the foreign person is not in a position to influence or participate in the central management and control of the entity, or to influence, participate in or determine the policy of the land entity.

Subsection 37(3) of the Regulation provides that the provisions in the Act that apply to the acquisition of an interest in Australian land do not apply to the acquisition of an interest in Australian land that is:

- an acquisition of an interest in shares or units in a land entity;
- the interests in the shares or trust can only be transferred together with interests in one or more securities in another entity;
- the interest in the securities in the other entity is covered by subsection 37(2) of the Regulation.

Securities in unlisted Australian land entities

The excluded provisions do not apply to an acquisition of an interest in Australian land by a foreign person if:

- the acquisition is of an interest in Australian land that is an acquisition of an interest in shares or units in a land entity;
- the entity is not, and will not be, listed for quotation in the official list of any stock exchange. An acquisition of securities will meet the ‘will not be’ requirement so long as the acquisition is not made pursuant to an initial public offer (IPO);
- after the acquisition, the foreign person, alone or together with one or more associates, holds an interest of less than 5 per cent in the entity;
- the foreign person is not in a position to influence or participate in the central management and control of the land entity or to influence, participate in or determine the policy of the land entity;
- there are, or as a result of the acquisition there will be, at least 100 holders of securities in the entity. For example, if the acquisition was to be made by participating in a securities offer that would result in at least 100 holders at the time of issue, there will be at least 100 holders in the entity;
- the entity carries on a business that does not include (other than incidentally) investing directly or indirectly in established dwellings. The term ‘established dwellings’ is defined by section 4 of the Act.

Acquisitions by foreign countries

The provisions in the Act that apply to an acquisition of an interest in land do not apply to a foreign person that is a foreign government, a separate government entity, or an entity (within the ordinary meaning of the term) in which a foreign government of a foreign country holds a substantial interest and the acquisition is of an interest in commercial land or residential land to be used exclusively as any of the following:

- a diplomatic mission or consular post; or
- a diplomatic residence or the residence of the head of a consular post.

Section 38 — Acquisitions of interests in residential land

Section 38 of the Regulation prescribes the circumstances in which the excluded provisions do not apply to the acquisition of an interest in residential land by a foreign person.

Acquisitions by persons with connection to Australia

The excluded provisions do not apply in relation to an acquisition of residential land by a foreign person if:

- a) the foreign person holds a permanent visa (within the meaning of the *Migration Act 1958*) at the time of the acquisition. A person who holds a permanent visa may remain in Australia indefinitely.
- b) the foreign person is, at the time of the acquisition, the holder of a Special Category visa (subclass 444) within the meaning of the Migration Act. Broadly, a Special Category visa is a class of temporary visa. It is currently a criterion for a Special Category visa that the person is a New Zealand citizen who holds a New Zealand passport that is in force. The visa is normally issued on entry into Australia.
- c) if the foreign person had entered Australia lawfully immediately before the acquisition, he or she would have been entitled to the grant, on presentation of a passport, of a Special Category visa. At the time of the Regulation, a person is not eligible for a Special Category visa if the person would be assessed by Australian immigration as a ‘behaviour concern non-citizen’ or a ‘health concern non-citizen’. Circumstances where a person would be assessed as a ‘behaviour concern non-citizen’ include, but are not limited to, where the person has been: convicted of one or more crimes that have resulted in sentences of imprisonment that add up to at least one year; previously removed from Australia; or previously removed or deported from another country. A person might be considered to be a ‘health concern non-citizen’ if the person suffers from tuberculosis and at time of entry into Australian are not carrying and taking appropriate medication.
- d) the foreign person is an Australian corporation (that is, a corporation formed in Australia) that is a foreign person only because of a direct interest held in it by a person to whom paragraph (a), (b), (c) or (e) applies, an Australian citizen not ordinarily resident in Australia; an Australian corporation that is a foreign corporation only because of interests directly held in it by Australian citizens not ordinarily resident in Australia, or a trustee of a resident trust if the trustee is a foreign person only because of interests held directly in the trust by Australian citizens not ordinarily resident in Australia.

- e) the foreign person is the trustee of a resident trust at the time of the acquisition, where the trustee is a foreign person only because of a direct interest held in the trust by a person to whom paragraph (a), (b), (c) or (d) apply, or a person to whom any of paragraphs 33(1)(a) to (c) of the Regulation applies. ‘Resident trust’ is defined under section 5 of the Regulation to mean a trust that is taken to be a resident trust estate under subsection 95(2) of the *Income Tax Assessment Act 1936*.

Paragraphs (d) and (e) apply to a person covered by a previous application of those paragraphs. For example, if a permanent visa holder owns 100 per cent of an Australian holding corporation which has an Australian subsidiary, then an acquisition by the Australian subsidiary would be excluded. That is because:

- the Australian holding corporation meets the conditions of the subsection. It would not be a foreign person if the interest held by the permanent visa holder were disregarded; and
- the Australian subsidiary has an interest held in it by a person covered by that previous application of the section. The Australian subsidiary would not be a foreign person if the interest held by the Australian holding corporation were disregarded.

Acquisitions of interests in residential land by spouses and de facto partners of Australian citizens etc.

The excluded provisions do not apply in relation to an acquisition of residential land by a foreign person if the person is the spouse or de facto partner (within the meaning of the Acts Interpretation Act) of an Australian citizen, an Australian permanent visa holder, a Special Category visa (subclass 444) holder, or a person who, if they had entered Australia lawfully, would have been entitled to a Special Category visa. The interest must be held by the person and his or her spouse or de facto partner as joint tenants.

- For the meaning of spouse or de facto partner within the meaning of the Acts Interpretation Act, see above explanation of subsection 35(5).

Acquisition of interests in residential timeshare schemes

The excluded provisions in the Act do not apply to an acquisition of an interest in residential land by a foreign person if the acquisition is of an interest in a residential timeshare scheme and the foreign person’s total entitlement, alone or together with one or more associates, is not more than four weeks in any year.

Section 39 — Acquisitions of certain easements

The excluded provisions do not apply in relation to the acquisition of a legal or equitable interest in an easement if the interest is acquired by a foreign person other than a foreign government investor and the easement is not an easement in gross.

Broadly, an easement is a right attached to one parcel of land (the dominant land) that allows the owner of that land to either use the land of another person (the servient land) in a particular manner or to restrict its use by that other person to a particular extent. Australian common law distinguishes between easements and easements in gross. The term easement in gross refers to an easement without dominant land. In Australia an easement must have a dominant tenement unless legislation otherwise provides.

The excluded provisions do not apply in relation to an acquisition of an easement in gross if the easement is created for the purposes of a public utility providing services to the public. ‘Public utility’ is defined by section 5 of the Regulation to mean a body that provides:

- reticulated products or services to the public such as electricity, gas, water, sewerage or drainage;
- telecommunication services; or
- transport services.

This exemption is only applicable if the easement in gross is created for the purposes of enabling a public utility to provide services to the public generally. It would not, for example, apply to an easement in gross created for the purpose of constructing a water pipeline that will supply water to a mine. This is because the water pipeline is being provided to a particular entity or entities rather than the community more generally. Moreover, the exemption only applies to an easement in gross that is created for the purpose of providing public utility services. It would therefore not apply to a person who is granted an easement over land that allows for the conveyance of petroleum from a well head to a refinery facility.

Subdivision E — Agribusinesses and agricultural land

Section 40 — Action relating to agribusinesses and agricultural land for certain investors

Relevant agreement country investors — exemption in relation to agribusinesses

The effect of paragraph 40(2)(a) of the Act is that the acquisition of a direct interest in an Australian entity that is an agribusiness will be a significant action if the other specified conditions are met. Similarly, the effect of paragraph 41(2)(a) of the Act is that the acquisition of a direct interest in an Australian business that is an agribusiness is a significant action if the other conditions are satisfied.

The effect of subsection 40(1) of the Regulation is that paragraphs 40(2)(a) and 41(2)(a) of the Act do not apply in relation to relevant agreement country investors. This exemption is necessary to give effect to Australia’s obligations under the Australia - United States Free Trade Agreement (AUSFTA)²; the Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)³ and the Australia - Chile Free Trade Agreement (ACIFTA).⁴

Thresholds for agricultural land acquired by certain investors

Section 52 of the Act provides threshold tests for different types of land. Subsection 40(2) allows a relevant agreement country investor, or an enterprise or national of Singapore or Thailand (other than a foreign government investor), who takes an action relating to an interest in agricultural land may, to disregard the fact that the land is agricultural land for the purposes of subsections 52(1) and (2) of the Act. This means that for such actions, the threshold test in and the thresholds

² [2005] ATS 1.

³ [2013] ATS 10 and [1983] ATS 2.

⁴ [2009] ATS 6.

prescribed for the purposes of subsection 52(3) of the Act applies in relation to such land. That is, the threshold value for any other land as prescribed in the table to subsection 52(5) applies:

- for a relevant agreement country investor, a threshold of \$1,094 million applies;
- for an enterprise or national of Singapore or Thailand, a threshold of \$50 million applies for interests in land that is used wholly and exclusively for a primary production business,

rather than the cumulative \$15 million threshold value that applies to other foreign persons.

Land entities

An action taken by a relevant agreement country investor or an enterprise or national of Singapore or Thailand in relation to an interest in agricultural land that is used wholly and exclusively for a primary production business may include an action taken by acquiring a security in an entity that holds land. If the land is used wholly and exclusively for a primary production business then those investors (other than a foreign government investor) may disregard the fact that it is agricultural land for the purposes of working out whether the entity is a land entity, in section 13 of the Regulation.

The reason it is disregarded is that it is not agricultural land, and as land used wholly and exclusively for a primary production business, it also cannot be commercial land or residential land, as defined in section 5 of the Act.

Section 41 — Exemptions for certain acquisitions

For the actions covered by the section 41 of the Regulations, subsection 41(1) has the effect of turning-off the provisions in the Act relating to notifiable actions. The provisions of the Act specified in subsection 41(1) do not apply in relation to an acquisition of securities in an entity, including securities in a land entity or an Australian entity that is an agribusiness, if the acquisition occurs as a result of a rights issue (whether under the Corporations Act or a law of a foreign country or part of a foreign country) and the interest to be acquired has not been previously offered for issue under the rights issue. This section extends to rights issues under a law of a foreign country or a part of a foreign country so long as the rights issue is a pro-rata rights issue similar to a rights issue under the Corporations Act.

Under subsection 9A(1) of the Corporations Act, a rights issue is an offer of a body's securities for issue if:

- the securities being offered for issue are in a particular class;
- the offer is made to every person who holds securities in that class to issue them, or their assignee with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the offer (or, in certain circumstances, the offer is made to every person with a registered address in Australia or New Zealand who holds interests in that class); and
- the terms of each offer are the same.

Subsection 9A(2) of the Corporations Act similarly defines a rights issue in respect of managed investment schemes. Section 42 of the Regulation is intended to include when securities are acquired by an action that would be considered a rights issue under the Corporations Act where the application of provisions relating to a rights issue under the Corporations Act have been exempted or modified by ASIC, except for the situation covered in subparagraph 41(2)(a)(ii).

- An example of a rights issue where the application of the Corporations Act has been modified is an accelerated rights issue. Accelerated rights issues may have a different offer period and timing of allotment of the securities or interests to retail and institutional holders (see ASIC class orders [CO 08/35] and [CO 09/459], which are available at www.comlaw.gov.au).

Under subparagraph 41(2)(a)(ii) of the Regulation, the provisions specified in subsection 41(1) continue to apply to acquisitions made under a rights issue if the acquisitions are pursuant to the take-up of rights on a secondary or later offer of rights that were not taken up when initially offered to security holders (that is, acquisitions through a take-up of rights resulting from a shortfall in take-up). This is the case irrespective of if the person is an existing security holder or not. In such cases, if the acquisition were to result in a notifiable action, a foreign person who takes the notifiable action without giving notice to the Treasurer may be found guilty of an offence or the subject of a civil penalty order.

In addition, the provisions of the Act specified in subsection 41(1) of the Regulation do not apply in relation to an acquisition of an interest in securities in an entity, including securities in a land entity or an Australian entity that is an agribusiness, if the entity is listed for quotation in the official list of the stock exchange in Australia; that listing is the entity's primary listing in an official list of a stock exchange; and the acquisition is under:

- a dividend reinvestment plan (that is, a plan under which shareholders in a corporation are able to reinvest dividends by subscribing for additional shares in the corporation);
- a bonus share plan (that is, a scheme by which a corporation with distributable profits will capitalise those profits by issuing new paid-up shares to its members);
- a distribution reinvestment plan (that is, a plan under which members in a managed investment scheme are able to reinvest distributions by subscribing for additional units in the scheme); or
- a switching facility (that is, a facility offered by managed investment schemes to its members which allows the members to switch their units between funds, or between components of funds such as balanced and growth options),

within the meaning of the Corporations Act (including as exempted or modified by ASIC).

Where the interest in the shares or units of an entity meeting paragraph 41(2)(b) can only be transferred together with interests in one or more securities in another entity, this paragraph may also be taken to apply to the acquisition of interests in securities in the latter entity.

Subdivision F — Exemption certificates

Section 42 — Exemption certificate for underwriters

Under section 42 of the Regulation, a foreign person may apply to be given an exemption certificate if the foreign person:

- has a business of underwriting securities (including through sub-underwriting);
- or any other foreign person (for example, another entity within the same wholly-owned group) proposes to acquire kinds of interests in securities (including securities in land entities and entities that are Australian agribusinesses); and
- proposes to acquire the interest for the purposes of, or in the course of, the foreign person's business of underwriting securities.

'Underwriting' refers to the practice of entering into an agreement whereby a person, the underwriter, agrees to take up any unsubscribed portion of an issue of securities. The agreement is generally entered into with the issuer of the securities or in the case of sub-underwriting, another person in the business of underwriting. An entity who is a financial services licensee holder authorised under the Corporations Act to underwrite (including sub-underwrite) securities in Australia is an example of an entity who has a business of underwriting securities (including through sub-underwriting).

Foreign persons who are in the business of underwriting generally will not be interested in acquiring control of the entity in which they underwrite a securities issue or holding the securities acquired through underwriting for the long term. Such foreign persons will normally underwrite subject to an obligation to sell-down all or some of the securities acquired in the course of the underwriting to other persons. The sell-down may be subject to particular parameters set by the issuer of the securities. For example, the securities may not be sold for an initial period following acquisition and subsequent to this, the number of securities sold within any defined period may not exceed a specified number.

The Treasurer may give such a certificate if the Treasurer is satisfied that the acquisitions of those kinds of interests by that foreign person are not contrary to the national interest. Such a certificate must specify the person to whom the certificate relates (who may be a person who is not yet incorporated or established) and the kinds of interests in securities to which the certificate relates.

A certificate may specify one or more conditions, a period during which the certificate is in force and any other matter. An example of a condition that may be attached includes a condition to report to the Treasurer on a periodic basis on acquisitions made that are covered by the certificate.

If a certificate is given, an acquisition of securities that is covered by the certificate is generally not a significant action or a notifiable action.

Applications for a certificate will be considered on a case-by-case basis and the Treasurer declining to grant a certificate does not have any implications for the foreign person's ability to seek no objection notifications for individual acquisitions.

Section 43 — Exemption certificates for certain interests in tenements

Under section 43 of the Regulation, a foreign person may apply to be given an exemption certificate if the foreign person or any other foreign person proposes to acquire one or more kinds of interests in either:

- a tenement; or
- in securities in a mining, production or exploration entity,

so long as the kinds of interests are not interests in Australian land.

Section 5 of the Regulation includes definitions for ‘tenement’ and ‘mining, production or exploration entity’, while section 5 of the Act includes a definition of ‘Australian land’ and section 12 of the Act prescribes the meaning of interest in Australian land.

The Treasurer may give such a certificate if the Treasurer is satisfied that the acquisitions of those kinds of interests by that foreign person are not contrary to the national interest. Such a certificate must specify the person to whom the certificate relates (who may be a person who is not yet incorporated or established) and the kinds of interests to which the certificate relates.

A certificate may specify one or more conditions, a period during which the certificate is in force and any other matter. An example of a condition that may be attached includes a condition to report to the Treasurer on a periodic basis on acquisitions made that are covered by the certificate.

This certificate is intended for foreign government investors and its inclusion in the Regulations follows from the inclusion of related the significant action and notifiable action for foreign government investors under paragraph 56(1)(c) of the Regulation. This also takes into account that some of the interests covered by paragraph 56(1)(c) of the Regulation will not be interests in Australian land and thus cannot be covered by an exemption certificate for foreign persons under section 58 of the Act.

Applications for a certificate will be considered on a case-by-case basis and the Treasurer declining to grant a certificate does not have any implications for the foreign person’s ability to seek no objection notifications for individual acquisitions.

Division 4 — Exemptions from other specified provisions

Section 44 — Meaning of ‘agricultural land’

Section 4 of the Act provides that agricultural land means land in Australia that is used, or that could reasonably be used, for a primary production business. Section 4 of the Act provides that ‘primary production business’ has the same meaning as in the *Income Tax Assessment Act 1997* (ITAA 1997). The effect of subsection 955-1(1) of the ITAA 1997 is that a person is considered to carry on a primary production business if the person carries on a business of:

- (a) cultivating or propagating plants, fungi or their products or parts (including seeds, spores, bulbs and similar things), in any physical environment;
- (b) maintaining animals for the purpose of selling them or their bodily produce (including natural increase);
- (c) manufacturing dairy produce from raw material that you produced;

- (d) conducting operations relating directly to taking or catching fish, turtles, dugong, bêche de mer (sea cucumbers), crustaceans or aquatic molluscs;
- (e) conducting operations relating directly to taking or culturing pearls or pearl shell;
- (f) planting or tending trees in a plantation or forest that are intended to be felled;
- (g) felling trees in a plantation or forest; or
- (h) transporting trees, or parts of trees, that you felled in a plantation or forest to the place:
 - (i) where they are first to be milled or processed; or
 - (ii) from which they are to be transported to the place where they are first to be milled or processed.

Subsection 37(3) of the Act permits regulations to be made that land of a specified kind is not agricultural land. Section 44 of the Regulation specifies the kind of land that is not agricultural land.

Land whose zoning requires approval for primary production businesses

Land is not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and if every use for a primary production business requires the approval of a government authority (that is, the Commonwealth, a State or a Territory; a Commonwealth, State or Territory body; or a local governing body). If there are one or more uses which do not require approval then the land remains agricultural land.

Similarly, land is not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and:

- the zoning of the land allows use for a primary production business;
- an application has been made to a government authority for:
 - the land to be rezoned as land which does not allow use for a primary production business; or
 - approval for a mine, oil or gas well, quarry or other similar operation under a mining or production tenement (a mining operation) to be established on the land; or
 - approval to locate infrastructure relating to a mining operation on the land; or
 - approval for waste from a mining operation to be stored on the land (for example, the construction of a tailings dam); and
- the application has not been finally determined and the application has not been withdrawn.

Land used in relation to mining operations

Land is not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and the land is used wholly or predominantly for a mining operation, to locate infrastructure relating to a mining operation or to store waste from a mining operation.

Land is also not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and an approval for a government authority (other than a mining or production tenement) is in force that allows a mining operation to be established or operated on the land, to locate infrastructure relating to a mining operation or waste from a mining operation to be stored on the land. If land is acquired solely for, or used wholly or predominantly to meet a condition of such an approval (such as land purchased to satisfy a condition requiring land to offset an activity or act) it is also not agricultural land.

Land used for protecting or conserving the environment

Land is not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and it is used, under a law of the Commonwealth, a State or a Territory or a legally binding agreement, wholly or predominantly for the purposes of the protection or conservation of the environment (for example, a sequestration offsets project that has been declared to be an eligible offsets project under the *Carbon Credits (Carbon Farming Initiative) Act 2011*).

Land that is wholly or predominantly used for the purposes of a wildlife sanctuary or for rehabilitating animals (including birds) is also not agricultural land at a particular time provided that it is not being used wholly or predominantly at that time for a primary production business.

Land within industrial estates

Land is not agricultural land if it is not being used wholly or predominantly at a particular time for a primary production business and is located within an area that has been approved by a government authority as an industrial estate. An industrial estate is an area of land allocated for industrial purposes (such as manufacturing, assembling, repairing or renovating goods and articles); undertaking industrial trades (such as selling, leasing or servicing goods or materials for industrial, agricultural, or construction purposes); housing logistics centres; wholesaling of goods; storing, displaying and leasing plant and equipment and other similar purposes.

Small areas of land

Land is not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and is one hectare or less.

Tourism, education and outdoor recreation facilities

Land is not agricultural land at a particular time if it is not being used wholly or predominantly at that time for a primary production business and it has been approved by a government authority for use as a tourist facility, an outdoor education establishment, or an outdoor recreation facility (for example, a golf course or an equestrian facility) that is open to the public (whether in anticipation of a profit or otherwise).

Primary production businesses relating to submerged plants and animals etc.

Land is not agricultural land if the only primary production business the land is or could reasonably be used for is:

- a business mentioned in paragraph (d) or (e) of the definition of primary production business in subsection 995-1(1) of the ITAA 1997;
- a business of cultivating or propagating under water plants, fungi or their products or parts;
- a business of maintaining animals under water for the purposes of selling them or their bodily produce (for example, aquaculture operations such as a fish or a shell fish farm).

Section 45 — Meaning of associate — exemptions

Consortiums

Paragraph 6(1)(b) of the Act provides that any person with whom a person is acting, or proposes to act, in concert in relation to an action to which the Act may apply is an ‘associate’ for the purposes of the Act. Subsection 45(1) of the Regulation provides a limited exemption from paragraph 6(1)(b) of the Act for the partners of a consortium. The effect of subsection 45(1) of the Regulation is that partners in a consortium are not associates if none of their partners, or their associates, that are foreign persons hold a substantial interest or an aggregate substantial interest in a body established for the purposes of the consortium.

Limited partners

Paragraph 6(1)(c) of the Act provides that any person with whom the person carries on a business in partnership is an associate of a person.

The effect of subsection 45(1) of the Regulation is that paragraph 6(1)(c) of the Act does not apply to a person (referred to in the subsection as the first person) to the extent that:

- the first person is a ‘limited partner’ of a ‘limited partnership’ within the meaning of section 5 of the Regulation. Under section 5 of the Regulation:
 - ‘limited partnership’ means an association of persons that:
 - : was formed solely for the purposes of becoming a partnership where the liability of at least one partner in relation to the partnership is limited; and
 - : is recognised under a law of the Commonwealth, a State, a Territory, or a foreign country or a part of a foreign country as such a partnership.
 - ‘limited partner’ is defined to mean a partner of a limited partnership whose liability in relation to the partnership is limited.
- another person would be an associate of the first person because the other person is also a limited partner or general partner of the partnership. Under section 5 of the Regulation:
 - ‘general partner’ means a partner of a limited partnership whose liability relating to the partnership is not limited;

- the first person is not in a position to participate in the management and control of the partnership, or of any of the general partners of the partnership, in relation to any matter.

This means that where a person has a purely passive investment in a limited partnership they will not become associates of other partners (general or limited) because of that fact alone.

Foreign government investors

Paragraph 6(1)(l) of the Act specifies the classes of persons who are an associate of a foreign government investor for the purposes of the Act.

The effect of section 45 of the Regulation is that paragraph 6(1)(l) of the Act does not apply to a foreign government investor if it is:

- a corporation in which foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest;
- the trustee of a trust in which foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate substantial interest; or
- a partner of a limited partnership, or a limited partnership, if governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of at least 40 per cent.

Section 46 — Meaning of ‘foreign person’ — potential voting power and future rights

Certain provisions do not apply in relation to an interest in a security that a person holds that is part of a substantial interest or an aggregate substantial interest in an entity because the person is in a position to control a specified percentage of the potential voting power of the entity, or the person would hold at least a specified percentage of the issued securities in the entity if securities in the entity were issued as a result of the exercise of some or all rights of kind mentioned in paragraphs 15(1)(b) or (c) of the Act.

The provisions that do not apply as a result of section 46 of the Regulation are paragraphs (b), (c), (d) and (e) of the definition of ‘foreign person’ in section 4 of the Act to the extent that the definition applies for the purposes of:

- item 8 of the table in subsection 67(2) of the Act. This item ordinarily gives the Treasurer power to make an order prohibiting the proposed acquisition of an interest in Australian land.
- item 3 of the table in subsection 67(3) of the Act. This item ordinarily gives the Treasurer the power to make an additional order directing a specified foreign person (whether alone or with a specified associate or class of associates) not to acquire any interests in Australian land or other thing concerned or to acquire any such interests only to a specified extent.

- item 7 of the table in subsection 69(2) of the Act. If the Treasurer is satisfied that an acquisition of an interest in land is contrary to the national interest, the Treasurer may make an order under item 7 requiring the person to dispose of that interest within a specified period to one or more persons who are not associates.

Section 47 — Meaning of ‘foreign person’ — disregarding small holdings of securities in primary listed entities

Paragraph (c) of the definition of ‘foreign person’ in section 4 of the Act refers to a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest. Paragraph (e) of the definition of ‘foreign person’ refers to the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate interest.

Section 47 of the Regulation provides that paragraphs (c) and (e) of the definition of foreign person do not apply to an interest in securities in an entity if the entity is listed for quotation in the official list of a stock exchange in Australia and the listing is the entity’s primary listing in an official list of a stock exchange, and the interest, together with any interests held by any associates of the person, is not a substantial holding within the meaning of the Corporations Act (including as exempted or modified by ASIC). In general terms section 9 of the Corporations Act defines a ‘substantial holding’ in a body corporate or listed registered managed investment scheme to mean an interest of 5 per cent or more. However, such an interest is to be taken into account for the purpose of working out the percentage of that or any other interest in the entity.

Section 48 — Tracing of interests in corporations and trusts

Broadly, section 19 of the Act allows for substantial interests in a corporation or a trust to be traced (tracing rules). Subsection 19(3) of the Act provides that it does not apply for the purpose of determining whether a foreign person acquires a direct interest in an Australian entity or Australian business or for determining whether a foreign person acquires a substantial interest in an Australian entity.

However, the effect of section 48 of the Regulation is that the tracing rules do apply to an action taken by a foreign government investor, including significant actions and notifiable actions under the Act and the Regulation.

- For example, if a foreign government investor is acquiring a direct interest in an Australian entity, by acquiring a direct interest in a European holding corporation that holds its interest in an Australian entity through an foreign corporation in Asia, the offshore acquisition in the European holding corporation will also be an acquisition of a direct interest in an Australian entity and thus, a significant action and notifiable action for the foreign government investor.

Part 4 — Thresholds

Section 49 — Simplified outline of this Part

Section 49 provides a simplified outline of Part 4 of the Regulation.

Section 50 — Certain actions taken in relation to agribusinesses

The effect of item 1 in the table to section 51 of the Act is that the threshold test is met in relation to a person acquiring a direct interest in an Australian entity or an Australian business that is an agribusiness if the total value of the consideration for the acquisition and the total value of the other interests held by the person, alone or together with one or more associates in the entity or business or previously acquired from the entity or business, is more than the value prescribed by the regulations. Section 50 of the Regulation prescribes the value to be \$55 million.

Section 51 — Taking action in relation to entities and businesses

The effect of the table in section 51 of the Regulation is that for an agreement country investor (that is, an entity that is an enterprise or national of Chile, Japan, Korea, New Zealand, or the United States: except for a foreign government investor) where the action relates to an entity, or a subsidiary of an entity, that is not carrying on a sensitive business, or a trustee of which does not hold assets or a business that is not a sensitive business, the prescribed value is \$1,094 million. ‘Sensitive business’ has the meaning given by section 22 of the Regulation.

In the case of an acquisition of an interest by any foreign person in any other circumstances, the prescribed value is \$252 million. This applies for the following significant actions and values under table items 2 to 5 in section 51 of the Act.

<i>When the threshold test is met</i>		
<i>Table item (section 51 of the Act)</i>	<i>Significant action</i>	<i>Value</i>
2	Acquiring interests in securities in an entity, or issuing securities in an entity.	The total asset value for the entity or the total issued securities value for the entity (whichever is higher).
3	Entering into an agreement, or altering a constituent document.	The total asset value for the entity.
4	Acquiring interests in the assets of an Australian business.	The value of the consideration for the acquisition.
5	Entering into or terminating a significant agreement with an Australian business.	The value of the total assets of the business.

Section 52 — Land

Land without threshold value

The effect of subsection 52(1) of the Act is that the threshold test is met in relation to land if the land is of a kind that is prescribed for the purposes of that subsection.

Subsection 52(1) of the Regulation provides that most residential land; commercial land that is vacant; a mining or production tenement (except one being acquired by a relevant agreement country investor), or land acquired by a foreign government investor (subject to certain exceptions); and, in some circumstances, land held by an Australian corporation or the trustee of an Australian land trust (except an agricultural land corporation or an agricultural land trust) is prescribed for the purposes of subsection 52(1) of the Act. Section 5 of the Regulation provides that land is ‘vacant’ if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods or livestock.

Threshold value for agricultural land

The effect of subsection 52(2) of the Act is that the threshold value test is met in relation to agricultural land if the total value of all interests in agricultural land held by the foreign person, alone or together with one or more associates, and the consideration for the acquisition of the interest is more than the value prescribed for the purposes of paragraph 52(2)(b) of the Act.

Subsection 52(4) of the Regulation specifies that the prescribed value for agricultural land that is being acquired by a foreign person is \$15 million. The prescribed value for agricultural land held by an agricultural land corporation or an agricultural land trust if the interest that is being acquired by a foreign person is an interest in a share in the corporation or a unit in the trust is also \$15 million.

Threshold value for other land

Subsection 52(3) of the Act provides a threshold test for that land which is not prescribed for the purposes of subsection 52(1) and which is not agricultural land (‘other land’).

- As subparagraph 52(1)(d) of the Regulation prescribes a nil threshold value for interests in land acquired by foreign government investors, the threshold values for other land under subsection 52(5) do not apply to foreign government investors.

The threshold test is met if the value of the interest in the land is more than the value prescribed for the purposes for the purposes of paragraph 52(3)(b) of the Act.

The values prescribed for the purposes of paragraph 52(3)(b) of the Act range from \$50 million to \$1,094 million depending on who is acquiring the land and the kind of land that is being acquired.

Threshold value for ‘other land’: non-vacant commercial land acquired by an agreement country investor, including certain interests in land entities (table item 1)

The threshold value for other land is \$1,094 million if the land is being acquired by an agreement country investor (no further items in the table will be applicable if table item 1 is met).

This threshold value is also intended to apply to an agreement country investor acquiring an interest in a land entity where the value of non-vacant commercial land interests held by the land entity exceeds 50 per cent of the value of the land entity's total assets. The threshold would also be taken to apply to an agreement country investor if the investor is acquiring an interest in a land entity that meets subsection 52(3).

Threshold value for 'other land': land used wholly and exclusively for carrying on a primary production business acquired by an enterprise or national of Singapore or Thailand (table item 2)

The threshold is \$50 million if the land is acquired by an enterprise or national of Singapore or Thailand and is used wholly and exclusively for carrying on a primary production business (no further items in the table will be applicable in relation to interests in land that meet table item 2: this is because such land by definition cannot be commercial land).

Threshold value for commercial land that is not vacant (investors other than agreement country investors: table item 3 and subsection 52(6) Conditions for lower threshold)

The threshold value for other land is \$55 million if the land is being acquired by a foreign person (other than an agreement country investor) if:

- the land that is being acquired is commercial land that is not vacant;
- the interest in the land being acquired gives a right to occupy the land or to be involved in the central management and control of the entity that holds the land. This can be as direct legal owner or as lessee, or if acquiring securities, the securities giving the holder of the securities the right to be involved in the central management and control of the entity that holds any land the subject of one or more subparagraphs of paragraph 52(6)(c); and
- one or more of the circumstances specified by paragraph 52(6)(c) of the Regulation will apply at the time the interest in the land is acquired. These are circumstances which are of particular significance, for example, land under prescribed airspace.

This threshold value does not apply to agreement country investors as actions of these investors meet the threshold value at table item 1.

Threshold value for small specified land holdings by an Australian land corporation or the trustee of an Australian land trust (table item 4)

The threshold value for land held by an Australian land corporation or the trustee of an Australian land trust is \$252 million if:

- the interest in land that is being acquired by a foreign person (other than an agreement country investor) is an interest in a share in the corporation or a unit in the trust; and
- the total value of interests in residential land, and vacant commercial land, that are held by the Australian land corporation or the trustee of the Australian land trust based on a reasonable assessment of the value of the interests is less than 10 per cent of the value of the total assets of the corporation or trustee (for the

latter, the total assets held in their capacity as the trustee of the unit trust in which one or more units is to be acquired).

This threshold value applies if items 1 or 3 the table in subsection 52(5) do not apply.

Threshold value for all other land (table item 5)

For land which is described in subsection 52(3) of the Act and not otherwise mentioned in subsection 52(5) of the Regulation, the threshold value is \$252 million.

This means that the threshold is the same whether the interest is being acquired by acquiring securities in a land entity (table item 4), or being acquired by taking an interest directly in the land (table item 5).

Section 53 — Indexation of values

Section 53 of the Regulation explains how certain values are to be indexed each financial year. The formula prescribed by the provision is based on the proportionate increase in the GDP implicit price deflator value against the previous year.

‘GDP implicit price deflator value’ for a calendar year is defined to mean the value that was published by the ABS in the publication *Australian System of National Accounts* (cat. 5204.0) for the last financial year that ended before that calendar year. This publication is freely available from the ABS website.

Section 53 of the Regulation applies on and after 1 January 2016 (see section 55 of the Regulation).

Part 5 — Significant actions and notifiable actions

Division 1 — Simplified outline of this Part

Section 54 — Simplified outline of this Part

Section 54 of the Regulation provides a simplified outline of Part 5 of the Regulation.

Division 2 — Prescribing significant actions and notifiable actions

Section 55 — Investments in Australian media businesses

Subsection 55(2) of the Regulation provides that the acquisition of an interest of at least five per cent in an entity or business that wholly or partly carries on an Australian media business is a significant action and a notifiable action. The term ‘Australian media business’ is defined by section 5 of the Regulation, and means an Australian business of publishing daily newspapers, or broadcasting television or radio, in Australia, including websites from which those newspapers or broadcasts may be accessed. It does not include Australian businesses that only publish or broadcast such content through websites.

Section 56 — Actions by foreign government investors

Subsection 56(1) of the Regulation provides for additional actions which are significant actions and notifiable actions. These are actions by a foreign government investor for:

- the acquisition of a direct interest in an Australian entity or Australian business;
- the starting of an Australian business; or

- the acquisition of a legal or equitable interest in a tenement, or the acquisition of at least 10 per cent in securities in a mining, production or exploration entity. A mining, production or exploration entity is defined in section 5 of the Regulation as an entity where the value of interests in mining, production or exploration tenements held by the entity, or any subsidiaries of the entity, exceeds 50 per cent of the total asset value for the entity. Some of these may not otherwise be notifiable as an acquisition of land, because not all interests in mining, production or exploration tenements are interests in Australian land (for example, a lease for a term of less than 5 years).

Division 3 — Other provisions relating to significant actions and notifiable actions

Section 57 — Orders prohibiting proposed acquisitions and disposal orders

Subsection 67(1) of the Act permits the Treasurer to make an order under subsection 67(2) of the Act if the Treasurer is satisfied that a significant action is proposed to be taken and taking the significant action would be contrary to the national interest. The table to subsection 67(2) sets out the orders that may be made. The effect of table item 9 is that if the significant action is to take any significant action prescribed for regulations made for the purposes of section 44, the Treasurer may make an order prohibiting any thing prescribed by regulations made for the purposes of that item.

Paragraph 57(1)(a) of the Regulation provides that the Treasurer may make an order prohibiting the whole or part of:

- the acquisition by a foreign person of an interest of at least five per cent in an entity or business that wholly or partly carries on an Australian media business; and
- the acquisition by a foreign government investor of a direct interest in an Australian entity or Australian business, a legal or equitable interest in a mining, production or exploration tenement or an interest of at least 10 per cent in securities in a mining, production or exploration entity.

The effect of paragraph 57(1)(b) of the Regulation is that the Treasurer may make an order prohibiting a foreign government investor starting the whole or part of an Australian business.

Subsection 69(1) of the Act permits the Treasurer to make an order in accordance with the table to subsection 69(2) if the Treasurer is satisfied that a significant action has been taken and the result of the significant action is contrary to the national interest. If an action is to take significant action prescribed for section 44 of the Act (that is, significant action – actions prescribed by the regulations), then under table item 8 the Treasurer may make an order prescribed.

The effect of subsection 57(2) of the Regulation is that the Treasurer may make an order:

- directing a specified person to dispose of an interest in an entity or business that wholly or partly carries on an Australian business; or
- directing a specified person to dispose of a direct interest in an Australian entity or Australian business within a specified person to one or more persons approved in writing by the Treasurer;

- directing specified persons to do within a specified period, or refrain from doing, specified acts or acts of a specified kind.

Subsection 57(3) of the Regulation clarifies that subsections 69(3) to (5) of the Act apply in relation to an order mentioned in the Regulation apply in the same way as they apply to an equivalent order mentioned in the table to subsection 69(2) of the Act.

Section 58 — Actions that are not significant actions or notifiable actions

Where regulations are made under section 63 of the Act for additional kinds of exemption certificates, subsections 45(3) and 49(2) of the Act also authorise regulations to provide that related actions are not significant actions and are not notifiable actions.

An action is not a significant action or a notifiable action if the action is a foreign person acquiring an interest in securities or in a tenement; the foreign person is specified in an exemption certificate in force under section 42 or section 43 of the Regulation (exemption certificates for underwriters); the interest is of a kind specified in the certificate; and any conditions specified in the certificate were met.

Part 6 — Other provisions

Section 59 — Simplified outline of this Part

Section 59 of the Regulation provides a simplified outline of Part 6 of the Regulation. Part 6 prescribes matters for various provisions of the Act, including in relation to time limits and authorised disclosures of information.

Section 60 — Time limits for making decisions on exemption certificates

Paragraph 61(1)(a) of the Act provides that if a person applies for an exemption certificate, the Treasurer must make a decision whether to grant the application before the end of the period prescribed by the regulations. Section 60 of the Regulation provides that the prescribed period is 30 days.

Section 61 — Time limit for taking actions specified in no objection notifications

Subsection 76(1) of the Act provides that a no objection notification given to a person must specify certain matters, including the a requirement that the action to which the notification relates, if taken, must be taken before the end of a specified period after the day the notification is given. Paragraph 76(4)(a) relevantly provides that the period mentioned in paragraph 76(1)(a) is the period prescribed by the regulations. Section 61 of the Regulation provides that the period prescribed is 12 months.

Section 62 — Authorised disclosures of periodic aggregate information

Section 124 of the Act provides that a person may disclose protected information if the information specifies the matters prescribed by the regulations for the purposes of reporting on administration of this Act provided that it does not identify, and is not reasonably capable of being used to identify, a person. ‘Protected information’ has the meaning given by section 120 of the Act, and, in broad terms, refers to information obtained under, in accordance with, or for the purposes of the Act.

Section 62 of the Regulation specifies the matters that may be disclosed for the purposes of reporting on the administration of this Act. These matters include:

- the number of notices that are given for the purposes of the Act during a particular period;
- the number of no objection notifications imposing conditions that are given during a particular period;
- the number of no objection notifications not imposing conditions that are given during a particular period;
- the number of exemption certificates that are given during a particular period;
- the number of orders that are made prohibiting a proposed significant action; and
- the number of disposal orders made during a particular period.

A number or value may be specified as a total number or value, or by reference to particular classes, or both. For example, aggregate data about the number of notices given under the Act might distinguish between the kinds of notices that may be given under the Act.

Part 7 — Application and transitional provisions

Section 63 — Simplified outline of this Part

Section 63 of the Regulation provides a simplified outline of Part 7 of the Regulation, which contains application and transitional provisions.

Section 64 — Values determined this section commences

To avoid doubt, section 64 of the Regulation confirms that a reference in section 19 of the Regulation to the last financial statement of an entity includes a reference to a financial statement audited before section 64 of the Regulation commences.

Section 65 — Application of indexation provision

Section 53 of the Regulation applies on and after 1 January 2016.

Section 66 — Application of disclosures of periodic aggregate information

Section 62 applies in relation to any information specifying matters prescribed under that section that is disclosed after section 66 of the Regulation commences.

Statement of Compatibility with Human Rights

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

Foreign Acquisitions and Takeovers Regulation 2015

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 primary purposes of the *Foreign Acquisitions and Takeovers Regulation 2015* (Regulation) are to:

- prescribe definitions for section 4 of the *Foreign Acquisitions and Takeovers Act 1975* (Act);
- provide for exemptions from the Act;
- specify the threshold values (that is, monetary amounts) that apply to certain actions; and
- prescribe certain actions to be significant actions and notifiable actions.

Human rights implications

This Legislative Instrument engages the right to freedom from discrimination on prohibited grounds.

Right to be free from discrimination

Article 26 of the International Covenant on Civil and Political Rights (Covenant) recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin’. However, the Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.⁵

The Legislative Instrument also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination (Convention). Paragraph 1 of Article 1 of the Convention defines the term ‘racial discrimination’ to mean ‘any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life’. Under Article 2(a)(a) of the Convention, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against

⁵ Human Rights Committee, General Comment No. 18: Non-discrimination, Thirty-seventh session, 10 November 1989, [13].

persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation'. Under Article 5 of the Convention, State Parties 'undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law' in the enjoyment of civil, political, economic, social and cultural rights, including the 'right to own property alone as well as in association with others'.

Differential treatment of individuals with a close connection to Australia

Sections 35 and 38 of the Regulation limit the rights recognised by Article 26 of the Covenant and Articles 2 and 5 of the Convention because they provide an exemption from certain provisions in the Act to individuals who have a close connection to Australia. Specifically, the effect of section 35 is that the excluded provisions do not apply in relation to an acquisition of an interest in Australian land by an Australian citizen not ordinarily resident in Australia, an Australian corporation that would not be a foreign person if interests held in it by Australian citizens not ordinarily resident in Australia were disregarded, or a trustee of a trust that is a resident trust at the time of the acquisition if the trustee would not be a foreign person if interests held directly in the trust by Australian citizens not ordinarily resident in Australia were disregarded. In addition, the excluded provisions do not apply to an acquisition of an interest in agricultural land by a foreign person if the person is the spouse or de facto partner of an Australian citizen and the interest is held by the person and his or her spouse or partner as joint tenants. The effect of subsection 38(2) is that the excluded provisions do not apply in relation to an acquisition of an interest in residential land by a foreign person if the person is, at the time of the acquisition, the holder of a permanent visa or a special category visa or an Australian corporation or trustee of a resident trust which would not be a foreign person if such interests in it were disregarded. Subsection 38(2) also provides that the excluded provisions do not apply to the acquisition of residential land by the spouse of an Australian citizen, or the holder of a permanent visa or a special category visa (for the latter, including someone eligible to hold). To the extent that these provisions differentiate between Australians who would otherwise be a 'foreign person' for the purposes of the Act and other foreign persons, this limitation on the right to equality is justified on the basis of the contribution of these Australians to the Australian economy and community over the course of their lives. These limitations are therefore considered to be reasonable, necessary and proportionate.

Differential treatment of individuals for the purpose of complying with Australia's obligations under trade agreements

Section 40 of the Regulation limits the rights recognised by Article 26 of the Covenant and Articles 2 and 5 of the Convention because it provides certain exemptions in relation to agribusinesses that and agricultural land that are only available to individuals who are nationals of certain countries. The effect of subsection 40(1) of the Regulation is that it is not a significant action for a foreign person (including an individual) who is a relevant agreement country investor to acquire a direct interest in an Australian entity that is an agribusiness or to acquire a direct interest in an Australian business that is an agribusiness. Section 5 of the Regulation defines 'relevant agreement country investor' to mean an enterprise or national of Chile, New Zealand or the United States (other than a foreign government investor). In addition, the effect of subsection 40(2) of the Regulation is that for the

acquisition of an interest in agricultural land by a relevant agreement country investor, or an enterprise or national of Singapore or Thailand (other than a foreign government investor), the fact that the land is agricultural land may be disregarded for the purposes of subsections 52(2) and (3) of the Act. This means that differential treatment applies.

Sections 51 and 52 of the Regulation also limit the rights recognised by Article 26 of the Covenant and Articles 2 and 5 of the Convention because higher screening thresholds apply to individuals who are nationals of certain countries than apply to other citizens. Broadly, the effect of section 51 of the Regulation is that the threshold test is met by an individual who is an agreement country investor (which is relevantly defined by section 5 of the Regulation to mean a national of Chile, Japan, Korea, New Zealand or the United States) in relation to an action or business for most significant actions if the threshold value of the action is more than \$1,094 million. For individuals who are not nationals of the above countries, the threshold test is met in relation to an action which has a threshold value of more than \$252 million.

Similarly, the threshold test for commercial land that is not vacant acquired by a national who is an agreement country investor is \$1,094 million. The threshold value for other nationals is either \$55 million or \$252 million (depending on the characteristics of the land⁶).

The Regulation distinguishes between individuals who are nationals of certain countries because Australia has entered into trade agreements with the Chile, Japan, Korea, New Zealand and the United States that require Australia to grant higher screening thresholds in relation to some transactions than would otherwise be the case. As there is no less restrictive way of achieving the objectives of the Act and giving effect to Australia's obligations under various trade agreements, these limitations are reasonable, necessary and proportionate.

Conclusion

The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

⁶ See items 3 and 5 of the table in subsection 48(5) of the Regulation and subsection 48(6) of the Regulation.