

EXPLANATORY STATEMENT

Select Legislative Instrument No. 218, 2015

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975 and Life Insurance Act 1995
Treasury Legislation Amendment (China - Australia Free Trade Agreement)
Regulation 2015

Subsection 139(1) of the *Foreign Acquisitions and Takeovers Act 1975* 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 that Act. Subsection 253(1) of the *Life Insurance Act 1995* provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

The *Treasury Legislation Amendment (China - Australia Free Trade Agreement) Regulation 2015* (Regulation) amended the *Foreign Acquisitions and Takeovers Regulation 2015* and the *Life Insurance Regulations 1995* to give effect to Australia's obligations under the *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China* (ChAFTA). The ChAFTA was tabled in Parliament on 17 June 2015. The Joint Standing Committee on Treaties (JSCOT) reviewed the ChAFTA to ensure that ratification was in the national interest and recommended that binding treaty action be taken.¹ It is anticipated that the ChAFTA will enter into force late in 2015.

Broadly, the effect of the amendments made to the *Foreign Acquisitions and Takeovers Regulation 2015* is that the threshold values (that is monetary amounts) that apply to Chinese investors (other than foreign government investors) will increase from \$252 million to \$1,094 million for investments in most business and entities, as well as for investment in Australian land that is commercial land which is not vacant. The Regulation also amends the *Life Insurance Regulations 1995* to implement a commitment made by Australia in ChAFTA to allow Chinese life insurance companies to seek approval to operate in Australia as a branch.

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

The Statement of Compatibility is set out in [Attachment B](#).

Neither the *Foreign Acquisitions and Takeovers Act 1975* nor the *Life Insurance Act 1995* specify any condition that needs to be met before the powers to make the Regulation may be exercised.

While the Department of the Treasury (Treasury) did not specifically consult with the community about this Regulation, the Commonwealth undertook extensive consultation during negotiations on the proposed ChAFTA, The National Interest

¹ The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties, *Report 154: Treaty tabled on 17 June 2015*, 19 October 2015.

Analysis² (NIA) provided to the JSCOT outlined the extensive consultation process undertaken during the negotiations. The Department of Foreign Affairs and Trade (DFAT) commenced stakeholder consultations in 2004, with a call for public submissions. Following the launch of negotiations in 2005 and throughout the negotiating period, DFAT received over 260 submissions from individuals, non-government organisations, companies, and peak industry groups on issues relevant to negotiations.

In addition to seeking submissions from interested parties, DFAT, in conjunction with relevant Commonwealth agencies, conducted an extensive program of direct consultations and discussions with more than 700 stakeholders in Canberra, around Australia and in China since 2004. These consultations suggested:

- broad support for an agreement with China;
- most businesses and industry groups, as well as State and Territory governments, argued a trade agreement would help achieve better access to the Chinese market for Australia;
- some industries, particularly agriculture, mining, finance and investment, viewed a trade agreement as an important element in securing Australia's competitiveness in China; and
- a strong desire that a bilateral trade agreement create new export opportunities and enhance existing trade.

State and Territory governments were consulted through the regular Senior State and Territory Trade Officials' Group and Commonwealth-State-Territory Standing Committee on Treaties meetings. DFAT officials provided regular updates to State and Territory representatives of premiers and industry departments prior to or following key events such as negotiating rounds and broad industry consultations.

In accordance with a whole-of-government approach, DFAT ensured relevant Commonwealth Government agencies, including Treasury, were regularly and extensively consulted throughout ChAFTA negotiations.

Australia has worked closely with China to ensure implementation is consistent with the ChAFTA.

A Regulation Impact Statement (RIS) accompanied the NIA.³

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Section 2 of the Regulation specifies when each provision came into effect.

² *National Interest Analysis* [2015] ATNIA 7 with attachments. In November 2015 the NIA, including attachments, was available at www.apf.gov.au/Parliamentary_Business/Committees/Joint/Treaties/17_June_2015/Treaty_being_considered.

³ Attachment II to the NIA.

Section 1 — Name

The title of the Regulation is the *Treasury Legislation Amendment (China - Australia Free Trade Agreement) Regulation 2015*.

Section 2 — Commencement

Sections 1 to 4 of the Regulation commenced on the day after the Regulation was registered in the Federal Register of Legislative Instruments (FRLI).

Schedule 1 to the Regulation, which makes amendments to the *Foreign Acquisitions and Takeovers Regulation 2015*, will commence on the latest of:

- a) the start of the day after the Regulation is registered on the FRLI;
- b) the start of the day the ChAFTA enters into force; and
- c) immediately after the commencement of the *Foreign Acquisitions and Takeovers Regulation 2015*.

However, if neither b) nor c) occurs, Schedule 1 to the Regulation will not commence.

Schedule 2 to the Regulation, which makes amendments to the *Life Insurance Act 1995*, will commence on the later of the start of the day:

- a) after the Regulation is registered; and
- b) ChAFTA enters into force.

However, if b) does not occur, Schedule 2 to the Regulation will not commence.

Article 17.2 of ChAFTA provides that ChAFTA will enter into force 30 days after the date the Australia and China exchange diplomatic notes certifying that they have completed their respective internal requirements, or on such other date as they may agree.

Section 3 — Authority

The Regulation is made under the *Foreign Acquisitions and Takeovers Act 1975* and the *Life Insurance Act 1995*.

Section 4 — Schedules

Each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms. This is a technical provision which gives operational effect to the amendments contained in the Schedules.

Schedule 1 — Amendments to the *Foreign Acquisitions and Takeovers Regulations 1989*

1 Section 5

The Regulation amends the definition of the term ‘agreement country’ in section 5 of *Foreign Acquisitions and Takeovers Regulation 2015* to include China. The other countries which are ‘agreement countries’ are Japan, New Zealand, the Republic of Chile (Chile), the Republic of Korea (Korea) and the United States of America (United States).

The effect of making this amendment is that nationals and enterprises of China will benefit from the higher threshold values (that is, monetary amounts) that apply to agreement country investors (agreement country investors does not include foreign government investors). Specifically, the threshold value for actions relating to entities and business (with the exception of entities relating to a ‘sensitive business’) proposed or taken by nationals and enterprises of China increased from \$252 million to \$1,094 million (section 51 of the *Foreign Acquisitions and Takeovers Regulation 2015*). The threshold value for commercial land (other than commercial land that is vacant) increased from \$252 million to \$1,094 million (subsection 52(5) of the *Foreign Acquisitions and Takeovers Regulation 2015*).

2 Section 5

Item 2 of Schedule 1 to the Regulation amends section 5 of the *Foreign Acquisitions and Takeovers Regulation 2015* by inserting definitions for the terms ‘relevant World Trade Organization member’ and ‘World Trade Organization Agreement’. These definitions support the provisions that give the meaning of enterprise of China and meaning of national of China.

- The term ‘relevant World Trade Organization member’ is defined to mean the following members of the World Trade Organization established under the World Trade Organization agreement: Hong Kong, China; Macao, China and the Separate Customs Territory of Taiwan, Pengu, Kinmen and Matsu.
- The term ‘World Trade Organization Agreement’ is defined to mean the Marrakesh Agreement establishing the World Trade Organization, done at Marrakesh on 15 April 1994. As the note to the definition indicates, this agreement is in the Australian Treaty Series 1995 No. 8 and could in 2015 be viewed in the Australian Treaties Library on the Austlii website.

3 Subsection 7(2) (note)

Item 3 repeals the note to subsection 7(2) of the *Foreign Acquisitions and Takeovers Regulation 2015* and substitutes a note which alerts the reader to sections 9 and 9A of that Regulation.

4 At the end of section 7

Section 7 of the *Foreign Acquisitions and Takeovers Regulation 2015* specifies the meaning of ‘enterprise’ of a country. The term relates to the definition of the term ‘agreement country investor’, which is defined to mean an enterprise or national of an agreement country.

The effect of subsection 7(6) of the *Foreign Acquisitions and Takeovers Regulation 2015* is that 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 and that 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.

The effect of new subsection 7(7) of the *Foreign Acquisitions and Takeovers Regulation 2015* is that an entity, or a branch of an entity, is not an enterprise of China if the Treasurer is satisfied that the entity or branch has no substantial business activities in China and it is owned or controlled by one or more of:

- an individual who is usually resident in the territory of a relevant World Trade Organization member;
- an entity that is constituted or organised under a law of a relevant World Trade Organization member and the entity or branch has no substantial business activities in China.

The new subsection 7(7) does not limit the operation of existing subsection 7(6) of that Regulation. Existing subsection 7(6) and new subsection 7(7) are consistent with Article 9.6 (Denial of Benefits) of ChAFTA.

5 Subsection 8(1)

Subsection 8(1) of the *Foreign Acquisitions and Takeovers Regulation 2015* provides a definition of the term ‘national of country’ which applies generally. Item 2 of Schedule 1 to the Regulation amends the subsection so that the general definition does not apply for the purposes of determining who is a national of China or the United States.

6 After subsection 8(2)

Item 3 inserts a definition for the meaning of ‘national’ of China. A national of China is defined to mean an individual who is a national of China according to the law of China, other than an individual who is usually resident within the territory of a relevant World Trade Organization member.

7 After section 9

Item 4 of Schedule 1 to the Regulation inserts subsection 9A into the *Foreign Acquisitions and Takeovers Regulation 2015*. The effect of new subsection 9A is that a reference to China does not include a reference to a relevant World Trade Organization member. This is consistent with the understanding of the Parties to ChAFTA that the agreement does not apply to the territories of Hong Kong, Macau and Taiwan.

Schedule 2 — Amendments to the *Life Insurance Regulations 1995*

1 Regulation 1.03

Item 1 of Schedule 2 to the Regulation amends regulation 1.03 of the *Life Insurance Regulations 1995* by inserting a definition of the term ‘World Trade Organization Agreement’. The term is defined to mean the Marrakesh Agreement establishing the World Trade Organization, done at Marrakesh on 15 April 1994. As the note to the definition indicates this agreement is in the Australian Treaty Series 1995 No 8. and could in 2015 be viewed in the Australian Treaties Library on the Austlii website.

2 Regulation 2B.01

Item 1 of Schedule 2 to the Regulation amends regulation 2B.01 by making it a subregulation. This is necessary because item 2 of Schedule 2 to the Regulation will insert a new subregulation.

3 At the end of regulation 2B.01

The *Life Insurance Act 1995* allows foreign corporations that are authorised to conduct life insurance business in an overseas jurisdiction to apply for registration to operate in Australia as a branch. Such a corporation is known as an eligible foreign life insurance company.

An eligible foreign life insurance company for the purposes of paragraph 16ZD(1)(e) of that Act is defined in regulation 2B.01 of the *Life Insurance Regulations 1995*. At present, access to the Australian market is conditional on the applicant being incorporated and authorised to conduct life insurance business in Japan and Korea, New Zealand or the United States.

The Regulation amends regulation 2B.01 to include a body corporate that is incorporated and authorised to carry on life insurance business in China. A reference to China does not include a reference to the following members of the World Trade Organization established by the World Trade Organization Agreement:

- Hong Kong China
- Macao, China
- Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

Statement of Compatibility with Human Rights

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

Treasury Legislation Amendment (China - Australia Free Trade Agreement) 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 Legislative Instrument gives effect to Australia's obligations under the under the *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (ChAFTA)*.

Schedule 1 to the Regulation amends the *Foreign Acquisition and Takeovers Regulation 2015* by expanding the definition of 'agreement country' in section 5 of the Regulation so that it includes China. Agreement country investors (that is, nationals and enterprises of an agreement country, except foreign government investors) benefit from higher threshold values (that is, monetary amounts) than apply to foreign persons who are not of an agreement country. That is, the threshold value for investments in most business and entities increases \$252 million to \$1,094 million, as well as for investment in Australian land that is commercial land which is not vacant.

The Regulation also amends the *Life Insurance Regulations 1995* to include bodies corporate that are incorporated and authorised to carry on life insurance business in China as eligible foreign life insurance companies. This treats Chinese life insurance companies the same as companies from Japan, Korea, New Zealand and the United States.

Human rights implications

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

Conclusion

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