

EXPLANATORY STATEMENT

Select Legislative Instrument No. 216, 2015

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975 and Commonwealth Electoral Act 1918

Foreign Acquisitions and Takeovers Legislation Amendment 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 that Act. Section 395 of the *Commonwealth Electoral Act 1918* provides that the Governor-General may make regulations prescribing matters which by that Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to that Act.

The *Foreign Acquisitions and Takeovers Amendment Regulation 2015* (Regulation) repealed the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* and the *Foreign Acquisitions and Takeovers Regulations 1989*. The repealed regulations have been replaced by the *Foreign Acquisitions and Takeovers Regulation 2015*.

The Regulation also amended the *Electoral and Referendum Regulations 1940* by allowing the Australian Electoral Commission (AEC) to disclose information from an Electoral Roll to the Australian Taxation Office (ATO) or the Department of the Treasury (Treasury) for the purposes of administering specified statutes that regulate foreign investment in Australia.

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

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

Neither the Act nor the Commonwealth Electoral Act specify any condition that must be met before either power to make the Regulation may be exercised.

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

The Treasury undertook consultation on two occasions on exposure drafts of the *Foreign Acquisitions and Takeovers Regulations 2015*. The exposure drafts included provisions which provided for the repeal of the *Foreign Acquisitions and Takeovers Regulations 1989* and the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975*. The scope of that consultation is outlined in the explanatory statement for the *Foreign Acquisitions and Takeovers Regulation 2015*. Treasury consulted with the Department of Finance and the ATO on the amendments to the *Electoral and Referendum Regulations 1940*. The ATO and Treasury also held a confidential consultation with industry stakeholders on information sharing, including the amendments to the *Electoral and Referendum Regulations 1940*.

A separate Regulation Impact Statement (RIS) was not required for the Regulation as the measures in the Regulation are covered by the 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 Legislation Amendment Act 2015*; and
- the start of the day after the Regulation was registered on the Federal Register of Legislative Instruments.

Section 1 — Name

The title of the Regulation is the *Foreign Acquisitions and Takeovers Legislation Amendment Regulation 2015*.

Section 2 — Commencement

The Regulation commenced on the later of:

- the start of the day after the Regulation was registered in the Federal Register of Legislative Instruments; and
- immediately after the commencement of Schedule 1 to the *Foreign Acquisitions and Takeovers Amendment Act 2015*.

Section 3 — Authority

The Regulation is made under the Act and the *Commonwealth Electoral Act 1918*.

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 — Repeals

1 The whole of the Regulations

Item 1 repealed the whole of the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975*.

2 The whole of the Regulations

Item 2 repealed the whole of the *Foreign Acquisitions and Takeovers Regulations 1989*.

Schedule 2— Amendments

1 Subregulation 5(1)

Item 1 of Schedule 2 of the Regulation inserted a definition of the term ‘Australia’s Foreign Investment Framework’ into subregulation 5(1) of the *Electoral and Referendum Regulations 1940*. This term is used by the amendments made by the Regulation to Schedule 1 to the *Electoral and Referendum Regulations 1940*.

2 After Part III

Item 2 of Schedule 2 to the Regulation inserted new regulation 84 in the *Electoral and Referendum Regulations 1940*. The effect of the item is that the amendments to Schedule 1 to the *Electoral and Referendum Regulations 1940* made by the Regulation apply in relation to the use of information by a person or organisation after the amendments commenced, regardless of whether the information was given before or after that time.

3 Schedule 1 (at the end of the cell at table item 9, column headed “purpose”)

The effect of subsection 90B(4) of the *Commonwealth Electoral Act 1918* is that the Australian Electoral Commission (AEC) may give the persons and organisations specified in the table that follows the provision information in relation to the Electoral Rolls that is specified in the table in the circumstances specified in the table. Most relevantly, item 4 of the table specifies that the AEC can give a ‘prescribed authority’ any information on an Electoral Roll, and, if it wishes, the sex, date of birth or the occupation of a person whose name is included on the Roll. The AEC can give this information provided the provision of the information is authorised by the regulations. Subsection 91A(1) of the *Commonwealth Electoral Act* makes it an offence for a person to use information which is given to a person or organisation under section 90B except for a purpose that is a permitted purpose in relation to the person or organisation the information is given to. Subsection 91A(2AA) provides that the permitted purposes in relation to a prescribed authority include ‘any other purpose that is prescribed for the prescribed authority’. Schedule 1 to the *Electoral and Referendum Regulations 1940* prescribes the purposes that are permitted and the entities that a ‘prescribed authority’ within the meaning of the *Commonwealth Electoral Act 1918* (regulations 5A and 8).

Table item 9 of Schedule 1 to the *Electoral and Referendum Regulations 1940* permits the Australian Taxation Office (ATO: that is, the Statutory Agency consisting of the Commissioner of Taxation (Commissioner) and staff) to use information for the purpose of identifying or locating taxpayers as well as preventing, detecting or investigating taxation fraud.

The effect of item 3 of Schedule 2 to the Regulation is that the ATO may also use information on an Electoral Roll and certain other information provided by the AEC for the purpose of administering Australia’s Foreign Investment Framework (that is, the Act, the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the *Register of Foreign Ownership of Agricultural Land Act 2015*, and any instruments made under these Acts).

4 Schedule 1 (after table item 19)

The effect of item 4 of Schedule 2 to the Regulation is that the AEC may disclose any information on an Electoral Roll and, if it wishes, the sex, date of birth or the occupation of a person whose name is included on the Roll, to the Department of the Treasury (Treasury) for the purposes of administering the Act, the *Foreign Acquisitions and Takeovers Fees Imposition Act* and any instruments made under those Acts.

Statement of Compatibility with Human Rights

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

Foreign Acquisitions and Takeovers Legislation Amendment 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 repealed the *Foreign Acquisitions and Takeovers (Notices) Regulations 1975* and the *Foreign Acquisitions and Takeovers Regulations 1989*. It also amended the *Electoral and Referendum Regulations 1940*. The effect of the amendments to the *Electoral and Referendum Regulations 1940* is that the Australian Electoral Commission (AEC) is permitted to disclose information from the Electoral Rolls to the Australian Taxation Office (ATO: that is, the Statutory Agency consisting of the Commissioner of Taxation (Commissioner) and staff) and the Department of the Treasury (Treasury) for the purposes of administering Australia's Foreign Investment Framework. Australia's foreign Investment framework is defined as the *Foreign Acquisitions and Takeovers Act 1975* (Act), the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and the *Register of Foreign Ownership of Agricultural Land Act 2015*, and any instruments made under these Acts.

Human rights implications

Schedule 2 to the Legislative Instrument engages the right to privacy which is recognised by Article 17 of the International Covenant on Civil and Political Rights (Covenant).

Paragraph 1 of Article 17 of the Covenant recognises that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. Paragraph 2 of Article 17 of the Covenant recognises the right of everyone 'to the protection of the law against such interference or attacks'. Privacy is a concept which is broad in scope and includes a right to information privacy.

A legislative provision will only limit the rights protected by Article 17 if it 'unlawfully' or 'arbitrarily' interferes with a person's right to privacy. In General Comment No. 16 on the right to privacy under Article 17 of the Covenant, the Human Rights Committee (Committee) expressed its view on the meaning of the terms 'unlawful' and 'arbitrary'.

The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

The expression "arbitrary interference" is also relevant to the protection of the right provided for in Article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the

provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.¹

In the same general comment the Committee explained that ‘relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted’.

Schedule 2 to the Legislative Instrument directly engages the right to privacy protected by Article 17 of the Covenant because it authorises the disclosure of information from the Electoral Rolls kept under the *Commonwealth Electoral Act 1918* to the ATO for the purposes of administering Australia’s Foreign Investment Framework and to Treasury for the purposes of administering the Act, the Foreign Acquisitions and Takeovers Fees Imposition Act and any instruments made under those Acts.

To the extent that these provisions limit an individual’s right to privacy, those limitations are not unlawful because the amendments in Schedule 2 to the Regulation specify in detail the circumstances in which information about an individual may be disclosed to Treasury or the ATO.

To the extent these provisions authorise the disclosure of information about an individual, any interference with an individual’s privacy is not arbitrary because the interference is necessary to achieve a legitimate public purpose.

The Act and the *Register of Foreign Ownership of Agricultural Land Act 2015* impose a range of obligations on foreign persons. Employees in both the Treasury and the ATO will be responsible for the administration of the Act including its enforcement,² while the Commissioner is responsible for keeping the Register of Foreign Ownership of Agricultural Land provided for by the *Register of Foreign Ownership of Agricultural Land Act 2015* (section 13). It is therefore highly desirable that both the ATO and Treasury can access information on the Electoral Roll so that they can quickly and efficiently determine whether a particular individual is an Australian citizen, and therefore exempt from various provisions in the Acts. Subsection 91A(1) of the *Commonwealth Electoral Act 1918* makes it an offence for a

¹ Human Rights Committee, General Comment No. 16 Article 17: (Right to privacy), Thirty-second session, 8 April 1988, [3]-[4].

² Under section 137 of the Act the Treasurer may delegate any of the Treasurer’s powers and functions under the Act to the Secretary to the Treasury, the Commissioner of Taxation (Commissioner), or a person engaged under the *Public Service Act 1999* who is employed in the Department or the ATO. It is anticipated that the Treasurer will delegate his powers or functions relating to residential land under the Act to the Commissioner, who in turn may subdelegate those powers and functions to persons employed at the ATO (see section 137 of the Act). The Treasurer can also request, in writing, the Commissioner to exercise his or her powers under section 353-10 or 353-15 (powers to obtain information and evidence and access premises) in Schedule 1 to the *Taxation Administration Act 1953* in relation to a matter if a power or function has not been delegated to the Commissioner in relation to the matter (section 138 of the Act). The *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* imposes fees in relation to certain applications and actions that are made under the Act.

person to use information given by the AEC for any purpose except for a purpose that is a permitted purpose in relation to the person or organisation the information is given to. The maximum penalty for this offence is 100 penalty units (under section 4AA of the *Crimes Act 1914*, a penalty unit is \$180 (subject to indexation under subsection 4AA(3)). Subsection 91A(1) of the Commonwealth Electoral Act is an important safeguard which minimises the risk that any information provided by the AEC to the ATO or Treasury will be used for an unauthorised purpose.

Accordingly none of the provisions in Schedule 2 to the Regulation limit Article 17 because they do not permit an unlawful or arbitrary interference with an individual's privacy.

Conclusion

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