

# **EXPLANATORY STATEMENT**

## **Issued by the Authority of the Treasurer**

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Acquisitions and Takeovers Amendment (Government Infrastructure)  
Regulation 2016*

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. Section 37 of the Act provides that the regulations may provide that the Act, or specified provisions of the Act, do not apply in one or more prescribed circumstances.

The purpose of the *Foreign Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016* (Regulation) is to reduce the scope of the exemption prescribed under section 31 of the *Foreign Acquisitions and Takeovers Regulation 2015* (principal Regulation) so that acquisitions of critical infrastructure from Australian governments can be scrutinised by the Treasurer and are subject to the normal rules.

Background information about the Act and principal Regulation is set out in Attachment A.

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). It 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.

Treasury consulted with the States and Territories and relevant government departments regarding the change to the exemption. The exemption has also been discussed by the Senate Economics References Committee.

The Regulation commenced on 31 March 2016.

## **ATTACHMENT A**

### **Background information about the Act and principal Regulation**

The Act regulates certain kinds of foreign investment in Australia to ensure that these are not contrary to the national interest. The Act empowers the Treasurer to prohibit or impose conditions on an investment if satisfied it would otherwise be contrary to the national interest. However, the general presumption is that foreign investment is beneficial, given the important role it plays in Australia's economy. Specifically, the Act enables the Treasurer to make certain orders in relation to a 'significant action' (the provisions of the Act set out any conditions, such as thresholds, that must be met before a proposed action can be a significant action).

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;
- impose conditions on the action;
- prohibit the action; or
- 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. Fees apply to giving notice of a notifiable action or significant action, unless otherwise waived or remitted under section 114 of the Act.

The *Foreign Acquisitions and Takeovers Regulation 2015*, the principal Regulation that is amended by the Regulation, broadly provides for:

- provisions relating to definitions and rules of interpretation (sections 11 to 25);
- exemptions in certain circumstances (sections 26 to 48);
- thresholds (that is, monetary thresholds which are applicable in determining if some proposed investments are notifiable actions or significant actions: sections 49 to 53; and
- some notifiable actions and significant actions (sections 54 to 58).

Australia's foreign investment framework balances the need to welcome foreign investment against the need to reassure the community that the national interest is being protected.

## **ATTACHMENT B**

### **Details of the *Foreign Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016***

#### **Section 1 — Name**

The title of the Regulation is the *Foreign Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016* (Regulation).

#### **Section 2 — Commencement**

The Regulation commenced on 31 March 2016.

#### **Section 3 — Authority**

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

#### **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**

The Schedule amends the *Foreign Acquisitions and Takeovers Regulation 2015* (principal Regulation).

#### **1 Section 5**

Item 1 inserted a definition of ‘inter-modal transfer facility’ into the principal Regulation at section 5 (Definitions). The definition takes the meaning given by the *National Land Transport Act 2014*. It means a facility for the transfer of cargo or passengers from one mode of transport to another. At least one of the modes of transport must be road or rail.

This definition is used in new subsection 31(2) of the principal Regulation, which reduces the scope of the exemption so that acquisitions of specified infrastructure (considered critical infrastructure) from Australian governments (or Australian businesses holding interests in such infrastructure) can be scrutinised by the Treasurer subject to the normal rules under the Act.

#### **2 Subsection 31(2)**

Item 2 repealed subsection 31(2) of the principal Regulation and substituted the new subsection.

Section 31 (Australian businesses carried on by or land acquired from government) of the principal Regulation provides that the excluded provisions do not apply in relation to an Australian business that is carried on 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. The effect of this section is that acquisitions from Australian governments or their entities cannot be notifiable actions or significant actions under the Act, unless excluded from the exemption due to meeting subsection 31(2).

If the exemption in this section does not apply to an action, the Act applies to the one or more actions under a privatisation or asset sale process, as applicable based on the nature of the foreign person (for example, foreign government investor, agreement country investor and other foreign persons) and taking into account if the action involves a sensitive business under section 23 of the principal Regulation.

The new subsection provides that the exemption does not apply if any of paragraphs 31(2)(a) to (c) are applicable.

Paragraph 31(2)(a) excludes acquisitions of interests by foreign government investors from the exemption. Foreign government investor is defined in section 17 of the principal regulation. 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 (that is, an interest of at least 20 per cent); 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 (that is, an interest of at least 40 per cent); 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; or
- a corporation, trustee or partner of a kind described in the above bullets assuming that the references to foreign government (or foreign governments) in those bullets includes references to a foreign government investor (or foreign government investors) within the meaning of those bullets, or as a result of a previous operation of this bullet.

Separate government entity is defined in section 4 of the Act, associate in section 6 of the Act, and general partner and limited partnership are defined in section 5 of the principal Regulation.

Paragraph 31(2)(a) is unchanged from the subsection that was repealed.

Paragraphs 31(2)(b) and (c) are new and reduce the scope of actions subject to the exemption.

Paragraph 31(2)(b) prescribes infrastructure identified as relevant to national security. That is, any of the following infrastructure:

- public infrastructure, except in relation to public roads. Public infrastructure is defined in section 5 of the principal Regulation as:
  - an airport or airport site within the meaning of the *Airports Act 1996*:
    - : Airport is defined as an airport in Australia. Examples of airports include the core regulated airports where the Commonwealth is the lessor, such as Sydney (Kingsford-Smith) Airport and Sydney West Airport (the latter being the proposed second international airport for Sydney and specifically deemed by the *Airports Act 1996* to be an airport although not yet developed).
    - : Airport site means a place that is declared by regulations to the *Airports Act 1996* to be an airport site. It must be a Commonwealth place and used, or intended to be developed for use, as an airport (whether or not the place is used, or intended to be developed for use, for other purposes). Regulation 1.03 of the *Airports Regulations 1997* specifies a list of places declared to be an airport site. The specified places are only an airport site to the extent that they are Commonwealth places. Commonwealth places is defined in the *Airports Act 1996* to be a Commonwealth place within the meaning of the *Commonwealth Places (Applications of Laws) Act 1970* or a place in a Territory, where the place is owned by the Commonwealth. The former is defined to mean a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth; or
  - a port within the meaning of the *Maritime Transport and Offshore Facilities Security Act 2003*:
    - : Port is defined as an area of water, or land and water (including any buildings, installations or equipment situated in or on that land or water) intended for use either wholly or partly in connection with the movement, loading, unloading, maintenance or provisioning of ships; or
  - infrastructure for public transport (whether or not the infrastructure is operated or owned by a Commonwealth, State or Territory body); or

- systems or facilities used to provide electricity, gas, water and sewerage services to the public: or
- infrastructure for existing or proposed roads, railways or inter-modal transfer facilities that are part of the National Land Transport Network (within the meaning of the *National Land Transport Act 2014*):
  - The National Land Transport Network means the National Land Transport Network, as in force from time to time that is determined by the Minister under Part 2 of the *National Land Transport Act 2014*. It includes existing or proposed roads, railways or inter-modal transfer facilities that are or will be important for either or both of the following:
    - : the development of international, inter-State or inter-regional trade and commerce; or
    - : the facilitation of international, inter-State or inter-regional travel.
  - The roads and railways that are included in the network would connect:
    - : two capital cities; or
    - : a capital city and a major centre of commercial activity; or
    - : two major centres of commercial activity; or
    - : a capital city or a major centre of commercial activity and an inter-modal transfer facility; or
    - : or be in a capital city or a major centre of commercial activity and connecting roads and railways that fall within the earlier categories roads or railways, or these where they connect the earlier categories roads or railways with an inter-modal transfer facilities.
  - The responsible Minister makes a legislative instrument that determines the network. The National Land Transport Network Determination 2014 which is available on the ComLaw site at [comlaw.gov.au](http://comlaw.gov.au) lists the roads and railways within the network. Maps of the network are available on the Department of Infrastructure and Regional Development site at <http://investment.infrastructure.gov.au>. Examples of roads within the network include major national highways such as the Hume, Pacific and Eyre Highways, and major urban roads that connect such highways. Examples of railways within the network include the Sydney to Adelaide, Adelaide to Perth, and Adelaide to Darwin railways.
- infrastructure for existing or proposed roads, railways or inter-modal transfer facilities that are designated under a law of a State or Territory as either significant or controlled by the State or Territory. Examples of such roads include:
  - in the case of Queensland, this would include all state-controlled roads declared under the *Transport Infrastructure Act 1994 (Queensland)* and other non-state controlled roads that form part of the state strategic road

network. Information on these roads is available on the Department of Transport and Main Roads site at [www.tmr.qld.gov.au](http://www.tmr.qld.gov.au).

- in the case of Victoria, this would include roads declared under section 14 of the *Road Management Act 2004 (Victoria)* as freeways and arterial roads. Maps of declared roads are available on the Vic Roads site at [www.vicroads.vic.gov.au](http://www.vicroads.vic.gov.au); or
- the infrastructure (or part of the infrastructure) of a telecommunications network. Examples of such infrastructure are infrastructure forming part of the National Broadband Network and telecommunications towers.
  - Where a part of a telecommunications network continues into residential or other land owned by an Australian Government, this is not intended to limit the application of the exemption to such a sale of the freehold title in the residential land, as distinct from the sale of telecommunications infrastructure that passes through or into the land, but which is an interest in Australian land in its own right. The same applies where utilities infrastructure (within the definition of public infrastructure) coexists on land, but is an interest in Australian land in its own right (for example, an easement with electricity or telecommunications lines above or below ground is an interest in Australian land); or
- a nuclear facility. An example of a nuclear facility is the nuclear reactor at Lucas Heights, which is operated by the Australian Nuclear Science and Technology Organisation (ANSTO).

Under paragraph 31(2)(b), acquisitions of an interest in Australian land if the interest is, or includes, an interest in any of the above infrastructure, are not covered by the exemption.

Paragraph 31(2)(c) extends the exclusion from the exemption under paragraph 31(2)(b) to Australian businesses that holds such interests in land. The effect of this is, for example, that the following types of infrastructure acquisition scenarios would be excluded from the exemption and subject to the normal requirements in relation to significant actions (for example, sections 40, 41 and 43 of the Act) and notifiable actions (for example, section 47 of the Act):

- acquiring the infrastructure directly as an acquisition of one or more interests in Australian land;
- acquiring the infrastructure by acquiring the assets of an Australian business that holds interests in Australian land that is or includes interests in such infrastructure;
- acquiring interests in securities in an entity that carries on an Australian business, where the Australian business that holds interests in Australian land that is or includes interests in such infrastructure; and
- acquiring interests in such infrastructure through one or more of the above.

### **3 At the end of Part 7**

Item 3 inserted an application provision relating to the amendments made by the Regulation as a new section 67 in the principal Regulation. This prescribes that paragraphs 31(2)(b) and (c) as amended by the Regulation do not apply in relation to agreements entered before 31 March 2016.



**Statement of Compatibility with Human Rights**

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

***Foreign Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016***

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 purpose of the *Foreign Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016* (Regulation) is to reduce the scope of the exemption prescribed under section 31 of the *Foreign Acquisitions and Takeovers Regulation 2015* (principal Regulation) so that acquisitions of critical infrastructure from Australian governments can be scrutinised by the Treasurer subject to the normal rules. The effect of the Regulation is that a small number of additional investments will be subject to the normal rules under the Act. The normal rules under the Act engages the right to freedom from discrimination on prohibited grounds and also includes differential treatment of individuals for the purpose of complying with Australia's obligations under trade agreements.

**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'.<sup>1</sup>

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

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<sup>1</sup> 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 for the purpose of complying with Australia's obligations under trade agreements*

Sections 51 and 52 of the principal 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 principal 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 principal Regulation to mean a national of Chile, China, 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 land<sup>2</sup>).

The principal Regulation distinguishes between individuals who are nationals of certain countries because Australia has entered into trade agreements with the Chile, China, 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.

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<sup>2</sup> See items 3 and 5 of the table in subsection 48(5) of the principal Regulation and subsection 48(6) of the principal Regulation.