

# **EXPLANATORY STATEMENT**

## **Issued by authority of the Treasurer**

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Acquisitions and Takeovers Amendment (Amendments of Singapore-Australia Free Trade Agreement) Regulations 2017*

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides for the regulation of foreign investment in Australia, specifying the circumstances under which foreign investors require the Treasurer's approval to invest in Australia.

Subsection 139(1) of the 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 the Act.

The *Foreign Acquisitions and Takeovers Amendment (Amendments of Singapore-Australia Free Trade Agreement) Regulations 2017* (the Regulations) amend the *Foreign Acquisitions and Takeovers Regulation 2015* to give effect to Australia's obligations under the Agreement to Amend the Singapore-Australia Free Trade Agreement (the SAFTA Amendment).

The SAFTA Amendment was tabled in Parliament on 20 March 2017. The Joint Standing Committee on Treaties (JSCOT) reviewed the SAFTA Amendment to ensure that ratification was in the national interest and recommended that binding treaty action be taken.<sup>1</sup> The SAFTA Amendment is scheduled to enter into force on or before 1 December 2017.

The Regulations form part of the steps Australia must take to implement the SAFTA Amendment. The Regulations alter certain threshold values (that is monetary amounts) that apply to determine when Singaporean investors (other than foreign government investors) are subject to the foreign investment framework. The Regulations increase the threshold for investments in most business, entities and non-vacant commercial land from \$252 million to \$1,094 million. The threshold for investments in agricultural land decreases from \$50 million to \$15 million, applied on a cumulative basis. The \$55 million threshold for investments in agribusiness remains unaltered. The Department of the Treasury did not undertake consultation on the Regulations, the purpose of which is to implement the commitments already made and on which consultation has already taken place.

The Commonwealth undertook consultation on the proposed SAFTA Amendment. This included calling for public submissions and directly engaging with stakeholders affected by the proposed SAFTA Amendment. Feedback received during this process was taken into account when negotiating the SAFTA Amendment.

The Department of Foreign Affairs and Trade (DFAT) commenced stakeholder consultations in November 2015, with a call for public submissions. Three submissions were received from Curtin University, the University of Tasmania and Wilmar Sugar Australia.

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<sup>1</sup> The Parliament of the Commonwealth of Australia Joint Standing Committee on Treaties, *Report 172: Treaty tabled on 20 March 2017*, August 2017.

DFAT also consulted with stakeholders who would be directly affected by the proposed SAFTA Amendment, including individual companies and peak bodies from a range of sectors. Input was also sought from the Australian Chamber of Commerce in Singapore.

State and territory governments were consulted in meetings of the Commonwealth-State-Territory Standing Committee on Treaties. Additionally, state and territory officials were consulted in correspondence from the Minister for Trade and Investment and the Minister for Trade, Tourism and Investment. The states and territories have agreed to the SAFTA Amendment, including those parts which would impact the states and territories. The amendments included in the proposed Regulations would not impact the states and territories directly.

More than 15 organisations issued public statements in support of the SAFTA Amendment, including: Australian Chamber of Commerce Singapore, Singapore Business Circle, Universities Australia, James Cook University, ANZ, National Australia Bank, Engineers Australia, PriceWaterhouseCooper, and the Law Council of Australia.

Further information on the consultation process is included in the National Interest Analysis (NIA) provided to the JSCOT.<sup>2</sup>

Further details of the Regulations are set out in Attachment A.

The Statement of Compatibility is set out in Attachment B.

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

A Regulation Impact Statement accompanied the NIA.<sup>3</sup>

The Regulations are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*. Section 2 of the Regulations specifies when each provision takes effect.

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<sup>2</sup> *National Interest Analysis* [2017] ATNIA 9 with attachments. In September 2017 the NIA, including attachments, was available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/Singapore FTA-Amendment/Treaty\\_being\\_considered](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Singapore_FTA-Amendment/Treaty_being_considered).

<sup>3</sup> Attachment II to the NIA

**Section 1 — Name**

The title of the Regulations is the *Foreign Acquisitions and Takeovers Amendment (Amendments of Singapore Australia Free Trade Agreement) Regulations 2017*.

**Section 2 — Commencement**

The Regulations commence on the later of:

- a) the start of the day after the Regulations is registered on the Federal Register of Legislative Instruments; and
- b) the start of the day the SAFTA Amendment enters into force.

However, if b) does not occur, the Regulations will not commence. The SAFTA Amendment provides that it will enter into force on the date of the latest note of an exchange of notes confirming that each Party has completed its respective domestic requirements for entry into force.

Section 2 provides that the Treasurer must announce the date that the SAFTA Amendment comes into force so that if b) applies, the date of commencement of the Regulations is clear.

**Section 3 — Authority**

The Regulations are made under the *Foreign Acquisitions and Takeovers Act 1975*.

**Section 4 — Schedules**

Section 4 provides that '[e]ach instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.' 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 Regulation 2015***

### **1 Section 5**

Item 1 amends the definition of the term ‘agreement country’ in section 5 of *Foreign Acquisitions and Takeovers Regulation 2015* to include Singapore. The other countries which are ‘agreement countries’ are Japan, New Zealand, the Republic of Chile, the Republic of Korea, the United States of America and China.

The effect is that investors from Singapore benefit from the higher threshold values that apply to agreement country investors to determine whether they are subject to Australia’s foreign investment regime.

Specifically, the threshold value for actions relating to entities and businesses (with the exception of entities relating to a sensitive business) proposed or taken by investors from Singapore increases 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) increases from \$252 million to \$1,094 million (subsection 52(5) of the *Foreign Acquisitions and Takeovers Regulation 2015*).

However, foreign government investors from an ‘agreement country’ remain subject to \$0 threshold for investments of any kind. This includes foreign government investors from Singapore.

### **2 Subsections 40(2) and (3)**

Item 2 amends section 40(2) and (3) of the *Foreign Acquisitions and Takeovers Regulation 2015* to remove mention of Singapore.

This amendment is necessary because under the Singapore-Australia Free Trade Agreement as originally in force (SAFTA), it was agreed that investors from Singapore (other than foreign government investors) were subject to a threshold of \$50 million for acquisitions of agricultural land.

However, the SAFTA Amendment reverses the SAFTA agreement on the higher threshold for agricultural land, so that investors from Singapore are subject to the standard cumulative threshold of \$15 million which applies to all other investors (other than foreign government investors and investors from Thailand).

Removing mention of Singapore from subsections 40(2) and (3) of the *Foreign Acquisitions and Takeovers Regulation 2015* gives effect to that reversal.

### **3 Subsection 52(4) (note)**

Item 3 removes mention of Singapore from the note to subsection 52(4) of the *Foreign Acquisitions and Takeovers Regulation 2015* to give effect to the abovementioned reversal of the SAFTA agreement on the higher threshold of \$50 million for agricultural land.

The note to subsection 52(4) of the *Foreign Acquisitions and Takeovers Regulation 2015* explains when the cumulative \$15 million monetary threshold for investments in agricultural land does not apply.

As it was agreed in the SAFTA Amendment that Singaporean investors will be subject to the standard cumulative threshold of \$15 million for agricultural land

referencing Singapore in the note to subsection 52(4) of the *Foreign Acquisitions and Takeovers Regulation 2015* is no longer correct.

#### **4 Subsection 52(5) (table item 2)**

Table item 2 in subsection 52(5) of the *Foreign Acquisitions and Takeovers Regulation 2015* specifies when a \$50 million threshold for acquisitions of agricultural land applies to some investors.

Item 4 removes mention of Singapore from table item 2 in subsection 52(5) of the *Foreign Acquisitions and Takeovers Regulation 2015* giving effect to the abovementioned reversal of the SAFTA agreement on the higher threshold of \$50 million for agricultural land.

#### **5 Subsection 53(1) (note)**

Subsection 53(1) of the *Foreign Acquisitions and Takeovers Regulation 2015* explains how certain thresholds are indexed. The higher threshold of \$50 million for agricultural land is mentioned in the note to subsection 53(1).

Item 5 removes mention of Singapore from the note to subsection 53(1) of the *Foreign Acquisitions and Takeovers Regulation 2015*, because as a result of the SAFTA Amendment, the higher threshold is no longer available to investors from Singapore.

#### **6 In the appropriate position in Part 7**

Item 6 inserts a section in Part 7 to clarify when the amendments included in the Regulations apply.

The amendments apply to significant actions and notifiable actions taken on or after the day that the SAFTA Amendment comes into force. Significant actions and notifiable actions are the most important concepts in the *Foreign Acquisitions and Takeovers Act 1975*, as explained in section 38 of that Act. Very simply, a significant or notifiable action is an action taken by a foreign investor, such as taking an interest in a business or buying Australian land which is subject to the scrutiny of the Treasurer.

Example: The SAFTA Amendment enters into force on 1 December 2017. A Singaporean investor (other than a foreign government investor) acquires an interest of 45 per cent in a non-sensitive business on 2 December 2017 valued at \$420 million. This acquisition is not a significant or notifiable action because it does not meet the \$1,094 million threshold.

If the investor acquired the interest prior to the SAFTA Amendment coming into force, the acquisition would have been a significant and notifiable action as the relevant monetary threshold that would have applied would have been \$252 million.

**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 (Amendments of Singapore Australia Free Trade Agreement) Regulations 2017 (the Regulations)***

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 *Foreign Acquisitions and Takeovers Amendment (Amendments of Singapore Australia Free Trade Agreement) Regulations 2017* amends the Foreign Acquisitions and Takeovers Regulation 2015 to give effect to Australia's obligations under the *Agreement to Amend the Singapore-Australia Free Trade Agreement (SAFTA Amendment)*.

The SAFTA amendment increases from \$252 million to \$1,094 million, the monetary thresholds below which investments by private Singaporean investors are considered by the Treasurer under Australia's foreign investment screening regime. This higher threshold will apply to investments in non-sensitive businesses and non-vacant commercial land.

Under the agreement a new cumulative \$15 million threshold will apply to acquisitions of agricultural land. This replaces the previous threshold of \$50 million. The new threshold means that investors from Singapore will need to seek a no objection notification from the Treasurer where the consideration for the proposed acquisition and the value of the person's existing agricultural land holdings in Australia will exceed \$15 million.

The outcomes under the SAFTA Amendment are equivalent to Australia's free trade agreements with Korea, China and Japan.

Australia welcomes foreign investment in Australia because of the important role it plays in the development of the economy. However, it is necessary to have a robust and flexible legal framework which permits the Treasurer to review proposed investments to ensure the investment is not contrary to the national interest. The foreign investment framework ensures community confidence in foreign investment in Australia while providing a predictable and welcoming environment for foreign investors.

**Human rights implications**

This Legislative Instrument engages the right to freedom from discrimination.

Article 26 of the ICCPR 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>4</sup>

The Legislative Instrument also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination 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 International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against 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 International Convention on the Elimination of All Forms of Racial Discrimination States 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'.

The Legislative Instrument engages these human rights as it applies certain monetary thresholds based on the citizenship of the investor. These monetary thresholds interact with provisions in the *Foreign Acquisitions and Takeovers Act 1975* to determine whether or not an investor is subject to Australia's foreign investment framework.

The increased thresholds for business, entities and no-vacant commercial land benefit investors from Singapore as the increase should reduce how frequently affected investors need to seek a no objection notification from the Treasurer. However, the lower and cumulative threshold for agricultural investment may mean more investors need to seek a no objections notification from the Treasurer.

The underlying principle of Australia's foreign investment framework is that foreign investment in Australia is welcome where it is in the national interest. The objective of the framework is to provide a predictable and welcoming environment for foreign investors while giving the Treasurer the power to review certain investments to ensure that investment is not contrary to the national interest.

While the legislative instrument affects individuals who are citizens of countries other than Australia, namely Singapore, in the context of Australia's foreign investment framework there is no less restrictive way of achieving the framework's objectives. Accordingly those limitations are reasonable, necessary and proportionate.

## **Conclusion**

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

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<sup>4</sup> General Comment No 18: Non-discrimination at [13].