

## **EXPLANATORY STATEMENT**

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

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Acquisitions and Takeovers Amendment (Peru-Australia  
Free Trade Agreement Implementation) Regulations 2018*

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. Sections 51, 52 and 55 of the Act allow the Governor-General to prescribe the thresholds for significant foreign investments in Australian businesses and land.

The purpose of the amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) is to implement Australia's obligations with respect to the regulation of foreign investment under the *Free Trade Agreement between Australia and the Republic of Peru* (PAFTA), done at Canberra on 12 February 2018.

The amendments increase the thresholds above which proposed investments into Australia by non-government Peruvian investors are subject to review under Australia's foreign investment framework. The thresholds increase from \$261 million to \$1,134 million (indexed) for investments (actions) in non-sensitive businesses and actions in non-low threshold developed commercial land.

Under Australia's foreign investment framework, significant actions are reviewed against the national interest test on a case-by-case basis. The Treasurer can make orders and decisions on national interest grounds for significant actions that are taken or proposed to be taken over the relevant threshold. These orders and decisions include deciding the Commonwealth does not object to the action, impose conditions on the action, prohibit the action or require the disposal of an interest that has been acquired.

Item 1 in Schedule 1 to the amendments increases the relevant thresholds by adding Peru to the list of agreement countries in section 5 of the Principal Regulations.

Non-government Peruvian investors are not entitled to the higher threshold in relation to low threshold developed commercial land under the terms of the PAFTA. The lower threshold of \$57 million (indexed) will continue to apply. However, these investors will be entitled to the higher threshold for low threshold developed commercial land under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP-11) when that agreement enters into force for both Australia and Peru.

Item 2 in Schedule 1 makes an amendment to the application and transitional provisions in Part 7 of the Principal Regulations to ensure the threshold for low threshold developed commercial land is not increased prematurely. Land is low threshold developed commercial land if, for example, it is used for government purposes, to store certain biological agents or for public infrastructure.

The limitation on low threshold developed commercial land will cease to apply when the TPP-11 enters into force for both Australia and Peru. From that time, non-government Peruvian investors will be entitled to the increased threshold for all actions in developed commercial land.

The Government did not consult on the amendments but undertook extensive consultation during the negotiations of the PAFTA. The public consultation and stakeholder engagement process on the PAFTA negotiations commenced with the Government's announcement on 24 May 2017 that Australia and Peru would be launching PAFTA negotiations. Australia's negotiating positions were informed by the views and information provided by stakeholders through both formal and informal mechanisms. Stakeholders in the public consultation process broadly appreciated the benefits of the PAFTA.

The Government tabled the text of the PAFTA and accompanying National Interest Analysis in the Parliament on 26 March 2018. The Joint Standing Committee on Treaties (JSCOT) undertook an inquiry into the Agreement, which included a public hearing on 7 May 2018. JSCOT received nine public submissions into its inquiry. On 15 August 2018, JSCOT recommended that the Government take binding treaty action to implement the PAFTA.

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

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day the PAFTA enters into force and apply from that day. The Government will, by notifiable instrument, announce the day the PAFTA enters into force.

A Regulation Impact Statement accompanied the National Interest Analysis for the PAFTA.<sup>1</sup>

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<sup>1</sup> The National Interest Analysis is available at: [www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/PeruFTA/Treaty\\_being\\_considered](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/PeruFTA/Treaty_being_considered).

## 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 (Peru Australia Free Trade Agreement Implementation) Regulations 2018***

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 amends the *Foreign Acquisitions and Takeovers Regulation 2015* to implement Australia's obligations with respect to the regulation of foreign investment under the Free Trade Agreement between Australia and the Republic of Peru, done at Canberra on 12 February 2018.

The amendments increase the thresholds above which proposed investments into Australia by non-government Peruvian investors are subject to review under Australia's foreign investment framework from \$261 million to \$1,134 million (indexed) for investments (actions) in non-sensitive business and actions in non-low threshold developed commercial land.

#### **Human rights implications**

This Legislative Instrument engages the right to freedom from discrimination.

Article 26 of the *International Covenant on Civil and Political Rights* 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 United Nations 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>2</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 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'.

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<sup>2</sup> *General Comment No 18: Non-discrimination*, [13].

Under Article 2(1)(a) of the Convention, each 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, 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 adjusts 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 investment is subject to review under Australia’s foreign investment framework.

The increased thresholds for non-sensitive businesses and non-low threshold developed commercial land benefit non-government Peruvian investors as the increase will reduce how frequently investments are subject to review by 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. There is no less restrictive way of achieving the framework’s objectives. Accordingly, the adjusted thresholds are reasonable, necessary and proportionate.

## **Conclusion**

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