

## **EXPLANATORY STATEMENT**

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

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Acquisitions and Takeovers Amendment  
(Australia-Hong Kong Free Trade Agreement) Regulations 2019*

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 (Australia-Hong Kong Free Trade Agreement) Regulations 2019* (the Regulations) amends the *Foreign Acquisitions and Takeovers Regulation 2015* to give effect to Australia's obligations under the Australia-Hong Kong Free Trade Agreement. Australia and Hong Kong, China signed a Free Trade Agreement on 26 March 2019 to liberalise trade and investment between the two economies.

These changes will apply from the later of: (a) the day after the instrument is registered; and (b) entry into force of the Australia-Hong Kong Free Trade Agreement, which is 30 days after the date on which Australia and Hong Kong, China exchange written notifications that they have completed their respective necessary internal procedures for the entry into force of the Agreement, or on such other date as Australia and Hong Kong, China may agree (Article 20.3).

The Regulations form part of the steps Australia must take to implement the Australia-Hong Kong Free Trade Agreement by altering certain threshold values (that is monetary amounts) that apply when determining whether Hong Kong investors (other than foreign government investors) are subject to Australia's foreign investment framework. The Regulations increase the threshold from \$266 million to \$1,154 million (indexed) for actions in relation to investments in entities or businesses (other than sensitive businesses) and for actions to acquire an interest in non-sensitive developed commercial land.

The Regulations apply in relation to actions taken on or after the day the Regulations commence.

Consultation was undertaken by the Department of Foreign Affairs and Trade (DFAT) as part of the Australia-Hong Kong Free Trade Agreement (and the related investment agreement) negotiations. DFAT commenced stakeholder consultations in 2017 with a call for public submissions. DFAT received eleven submissions, which are published on its website.

DFAT also conducted in-person consultation with stakeholders who may be directly affected by the Australia-Hong Kong Free Trade Agreement. These included industry, peak bodies and interested stakeholders across a range of States and Territories during negotiations, as well as with business stakeholders in Hong Kong, China.

State and Territory Governments were also consulted during and after the Free Trade Agreement negotiation process. All State and Territory Governments endorsed the Free Trade Agreement, including regional-level commitments as part of the Australia-Hong Kong Free Trade Agreement.

Details of the Regulations are set out in Attachment A.

Section 2 of the Regulations specifies when the Regulations commence.

A Regulation Impact Statement accompanied the National Interest Analysis (NIA).<sup>1</sup>

A statement of Compatibility with Human Rights is at Attachment B.

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<sup>1</sup> *National Interest Analysis* [2019] ATNIA 10 with attachments. In November 2019 the NIA, including attachments, was available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties/A-HKFTA/Treaty\\_being\\_considered](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA/Treaty_being_considered)

## **Section 1 – Name of the Regulations**

This section provides that the name of the Regulations is the *Foreign Acquisitions and Takeovers Amendment (Australia-Hong Kong Free Trade Agreement) Regulations 2019* (the Regulations).

## **Section 2 – Commencement**

Schedule 1 to the Regulations commence on the later day of

- a) the day after the Regulations is registered on the Federal Register of Legislation; and
- b) the day the Australia-Hong Kong Free Trade Agreement enters into force for Australia.

However, if b) does not occur, the Regulations will not commence.

The Australia-Hong Kong Free Trade Agreement provides that it will enter into force 30 days after the date on which Australia and Hong Kong, China exchange written notifications that they have completed their respective necessary internal procedures for the entry into force of the Agreement, or on such other date as Australia and Hong Kong, China may agree.

Section 2 of the Regulations provides that the Minister must announce the date that the Australia-Hong Kong Free Trade Agreement comes into force so that if b) applies, the date of commencement of the Regulations is clear.

## **Section 3 – Authority**

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

## **Section 4 – Schedule**

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules 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***

### **Section 5 – Agreement country or region**

Item 1 and 2 replace the term ‘agreement country’ in section 5 of the *Foreign Acquisitions and Takeovers Regulation 2015* with the term ‘agreement country or region’. Item 2 also includes the ‘region of Hong Kong, China’ in the definition of agreement country and region.

The effect is that investors from the region of Hong Kong, China (other than foreign government investors) can benefit from the higher threshold values that apply to agreement country and region investors to determine whether they are subject to Australia's foreign investment regime.

Specifically, the threshold value increases from \$266 million to \$1,154 million for actions relating to non-sensitive entities and businesses proposed or taken by investors from Hong Kong (section 51 of the *Foreign Acquisitions and Takeovers Regulation 2015*), and for actions to acquire an interest in non-sensitive developed commercial land (subsection 52(5) of the *Foreign Acquisitions and Takeovers Regulation 2015*).

However, foreign government investors from an 'agreement country or region' remain subject to \$0 threshold for investments of any kind. This includes foreign government investors from Hong Kong, China.

Items 3 and 4 replace the term of 'agreement country investor' in section 5 of the *Foreign Acquisitions and Takeovers Regulation 2015* with the term 'agreement country or region investor.'

The effect is that the term 'agreement country or region investor' means an enterprise or national of a country, or an enterprise or resident of a region. This does not apply to a foreign government investor (defined in section 17 of the *Foreign Acquisitions and Takeovers Regulation 2015*).

Item 5 inserts a new definition of 'enterprise' to provide that an enterprise of a country or a region has the meaning given by section 7.

Item 6 inserts a new definition of 'resident of a region' which has the meaning given by section 8A of the *Foreign Acquisitions and Takeovers Regulation 2015*.

## **Section 7 – Meaning of 'enterprise' of a country or region**

Items 7 to 15 amend section 7 to expand the scope of enterprise under the *Foreign Acquisitions and Takeovers Regulation 2015* to cover an enterprise of a region in addition to an enterprise of a country.

Subsection 7(1A) provides that an 'enterprise of a region' is an entity of the kind that is constituted or organised under a law of the region regardless of whether it is carried on for profit or is owned or controlled privately. The term also includes a branch of an entity (item 9 of Schedule 1).

The new subsection 7(5A) sets out when a branch of an entity is an enterprise of a region. This provision reflects the existing subsection 7(5) that sets out when a branch of an entity is an enterprise of a country (item 13 of Schedule 1).

In order for a branch of an entity of a region to be an enterprise, the branch does not have to be one that is constituted under the laws of the particular country or region. Although, the branch must be located in that particular region and carry on business activities in that particular region.

For a branch of an entity to qualify as an enterprise of a region, the branch must be carrying on business activities in the region (a) more than solely by way of having a representative office in the region and; (b) in a way other than being engaged solely

in agency activities including the sale of goods or services that cannot reasonably be regarded as undertaken in the region and; (c) by having its administration in the region.

However, this is not the case for working out whether a branch of an entity is an enterprise of Hong Kong, China. For Hong Kong, China, a branch of an entity will be considered to be an enterprise of Hong Kong, China if the branch is located in Hong Kong, China and the entity meets the definition in existing subsections 5(2) and 5(4).

An entity, or a branch of an entity, is not an enterprise of a particular region if the Treasurer is satisfied that:

- it is owned or controlled by one or more persons of another country; and
- Australia does not maintain diplomatic relations with the other country; or
- 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 general test in subsection 7(8) does not apply to Hong Kong, China. Instead subsections 7(9) and (10) provide that an entity, or a branch of an entity, will not be an enterprise of Hong Kong, China if the Treasurer is satisfied it has no substantial business activities in Hong Kong, China. Further, if the entity, or a branch of an entity, does have substantial business activities, it may still be found not to be an enterprise of Hong Kong, China if the Treasurer is further satisfied that the entity or the branch of an entity:

- is owned or controlled by:
  - an individual who is not a resident of the region of Hong Kong, China; or
  - an entity constituted or organised under a law of a country that is not a law applying in Hong Kong, China; and
- Australia adopts or maintains measures relating to the relevant country or a person of that country that have the effect of prohibiting transactions with the entity or branch.

### **Section 8A—Meaning of ‘resident’ of a region**

Section 5 of the Regulations provides that the term ‘agreement country or region investor’ means an enterprise or a national of a country that is an agreement country or region, or an enterprise or resident of a region that is an agreement country or region.

Item 16 inserts section 8A that provides that a resident of Hong Kong, China is an individual who is a permanent resident of Hong Kong, China. This is determined under the laws of Hong Kong, China.

### **Section 9A – Minor and technical amendments**

Items 17 and 18 make minor and technical amendments to clarify that while for the purposes of the *Foreign Acquisitions and Takeovers Regulation 2015* China does not include relevant World Trade Organisation members, that a reference to China can still be used to be used to identify a relevant World Trade Organisation member.

### **Consequential amendments**

Items 19 - 22 change references from ‘agreement country investor’ to ‘agreement country or region investor’

### **Application of the Foreign Acquisitions and Takeovers Amendment (Australia-Hong Kong Free Trade Agreement) Regulations 2019**

Item 23 inserts a new provision in Part 7 to provide that the amendments added because of the Regulations apply in relation to actions taken on or after the Regulations commence.

**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 (Australia-Hong Kong Free Trade Agreement) Regulation 2019***

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 primary purpose of the Regulations is to give effect to Australia's obligations under the Australia-Hong Kong Free Trade Agreement.

The legislative instrument increases the monetary thresholds which investments by private Hong Kong investors are to be considered by the Treasurer under Australia's foreign investment screening regime. The higher threshold will apply to investments in non-sensitive businesses and non-vacant commercial land.

The outcomes under the Australia-Hong Kong Agreement are equivalent to Australia's free trade agreements with Japan, the Republic of Korea, China, Singapore and a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force.

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 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 Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation and reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.’<sup>2</sup>

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 Hong Kong, China as the increase should reduce how frequently affected investors need to seek a no objection 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 or community expectations.

While the legislative instrument affects individuals who are citizens of countries or residents of regions of countries, other than Australia, namely Hong Kong, China, 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**

The Regulations, to increase the monetary thresholds which investments by private Hong Kong investors to be considered by the Treasurer under Australia’s foreign investment screening regime, is compatible with human rights as it does not raise any human rights issues.

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