

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment (UK Free Trade Agreement) Regulations 2022

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) establishes a regime for the notification and review of foreign investment in Australia.

Section 139 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 purpose of the *Foreign Acquisitions and Takeovers Amendment (UK Free Trade Agreement) Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to give effect to Australia's obligations under the Australia-United Kingdom Free Trade Agreement (A-UKFTA). Australia and the United Kingdom of Great Britain and Northern Ireland (the UK) signed the A-UKFTA on 17 December 2021 to deepen bilateral trade and investment between the two economies.

The Regulations form part of the steps Australia must take to implement the A-UKFTA. The Regulations alter certain threshold values (monetary amounts) in the Principal Regulations that apply when determining whether certain investments by UK investors (other than foreign government investors) are subject to screening under the national interest test in Australia's foreign investment framework.

The Regulations increase the threshold from \$289 million to \$1,250 million (indexed) for certain actions by private UK investors in relation to non-sensitive entities, businesses and developed commercial land. This means that private UK investors will only be required to notify the Treasurer of these types of investments if the proposed investment is above the higher \$1,250 million threshold amount. This is consistent with the threshold values that apply to other countries that have entered a free trade agreement with Australia.

Public consultation was undertaken on the A-UKFTA by the Department of Foreign Affairs and Trade (DFAT) as part of the negotiations for the A-UKFTA. DFAT received over 50 submissions which are published on its website. DFAT also conducted consultation with stakeholders who may be directly affected by A-UKFTA, as well as with State and Territory Governments. No public consultation was undertaken specifically for these amendments as extensive consultation was undertaken as part of the negotiations of the A-UKFTA.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. Section 48A of the *Legislation Act 2003* provides that where a legislative instrument only repeals or amends another instrument, without making any application, saving or transitional provisions relating to the amendment or repeal, that

instrument is automatically repealed. By virtue of section 48A, if the Regulations are not disallowed, the Regulations will automatically repeal when the disallowance period ends. Once repealed, the sunseting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* is no longer relevant to the Regulations.

The Regulations commence and apply from the later of the day after the Regulations are registered and the day the A-UKFTA enters into force.

A Regulation Impact Statement accompanied the National Interest Analysis for the A-UKFTA.¹

Details of the Regulations are set out in Attachment A.

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

¹ In October 2022, the National Interest Analysis, including attachments, was available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/AUKFTA/Terms_of_Reference

ATTACHMENT A

Details of the *Foreign Acquisitions and Takeovers Amendment (UK Free Trade Agreement) Regulations 2022*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Foreign Acquisitions and Takeovers Amendment (UK Free Trade Agreement) Regulations 2022* (the Regulations).

Section 2 – Commencement

The Regulations commence on the later of:

- the day after the Regulations are registered; and
- the day the Free Trade Agreement between Australia and the United Kingdom of Great Britain and Northern Ireland (UK) enters into force for Australia.

However, the Regulations do not commence at all if the Free Trade Agreement between Australia and the UK does not enter into force.

The Minister must announce, by notifiable instrument, the day the Free Trade Agreement between Australia and the UK enters into force for Australia.

Section 3 – Authority

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

Section 4 – Schedule

This section provides that each instrument that is specified in the Schedule to the instrument will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Including the UK as an agreement country or region

Item 1 amends section 5 of the *Foreign Acquisitions and Takeovers Regulation 2015* to add the UK in the definition of ‘agreement country or region’.

This amendment includes the UK in the agreement country or region definition, which ensures that any provision that references the defined term will also apply to the UK unless explicitly excluded. The result is that investors from the UK (other than foreign government investors) will be entitled to more lenient monetary thresholds for certain investments, due to their status as an ‘agreement country or region investor’. The new monetary thresholds for UK investors (other than foreign government investors) are as follows:

Action	Threshold (indexed) – more than:
<i>Non-land investments</i>	
Non-sensitive entities and businesses	\$1,250 million
<i>Land investments</i>	
Non-sensitive developed commercial land	\$1,250 million

Item 2 – Application provision

Item 2 inserts a new provision in Part 7 of the *Foreign Acquisitions and Takeovers Regulation 2015* to provide that the amendments made by the Regulations apply in relation to an action taken on or after the commencement of the Regulations.

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 (UK Free Trade Agreement) Regulations 2022

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 (UK Free Trade Agreement) Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to give effect to Australia's obligations under the Australia-United Kingdom Free Trade Agreement (A-UKFTA), which was signed on 17 December 2021.

The Regulations form part of the steps Australia must take to implement the A-UKFTA. The Regulations alter certain threshold values (monetary amounts) in the Principal Regulations that apply when determining whether certain investments by UK investors (other than foreign government investors) are subject to screening under the national interest test in Australia's foreign investment framework.

The Regulations increase the threshold from \$289 million to \$1,250 million (indexed) for certain actions by private UK investors in relation to non-sensitive entities, businesses and commercial land. This means that private UK investors will only be required to notify the Treasurer of these types of investments if the proposed investment is above the higher \$1,250 million threshold amount. This is consistent with the threshold values that apply to other countries that have entered a free trade agreement with Australia.

Human rights implications

The Regulations engage the right to equality and non-discrimination under the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

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 or social origin, property, birth or other status'.

Article 2(1)(a) of the ICERD states that, '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 of ICERD,

States Parties undertake to prohibit and eliminate racial discrimination 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’.

Different treatment amongst individuals or groups may not constitute prohibited discrimination under the ICCPR and ICERD if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate.

The Regulations engage Article 26 of the ICCPR and Articles 2 and 5 of ICERD because the amendments will apply to a foreign person who is a national of the UK.

The criteria by which the Regulations treat people differently are reasonable and objective. The purpose of Australia’s foreign investment framework is to regulate certain kinds of foreign investment to ensure that the proposed investments are not contrary to Australia’s national interest. The definition of foreign person is clearly set out in the *Foreign Acquisitions and Takeovers Act 1975*. The amendments rely on this established definition of foreign person in the *Foreign Acquisitions and Takeovers Act 1975* and apply in the same manner to all investors from the UK (other than foreign government investors).

The increased monetary thresholds benefit private UK investors. This is because private UK investors will only need to notify the Treasurer of certain investments that are above the increased monetary thresholds, making it easier for these UK investors to invest in Australian businesses, entities and developed commercial land.

The purpose of the Regulations is to give effect to Australia’s obligations under the A-UKFTA, specifically the agreed threshold values that are to apply to UK investors under Australia’s foreign investment framework. There is no less restrictive way to achieving this legitimate purpose.

While the Regulations relate to UK nationals, this different treatment is reasonable, necessary and proportionate to the objectives.

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.