

Australia

Foreign Acquisitions and Takeovers Regulation 2015 (2015)

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Foreign Acquisitions and Takeovers Regulation 2015

Select Legislative Instrument No. 217, 2015

made under the Foreign Acquisitions and Takeovers Act 1975

Compilation date: 24 June 2017

Part 1—Preliminary

[...]

5 Definitions

In this instrument:

Act means the Foreign Acquisitions and Takeovers Act 1975.

[...]

Australian media business means an Australian business of publishing daily newspapers, or broadcasting television or radio, in Australia (including on websites from which all or part of those newspapers or broadcasts may be accessed).

[...]

direct interest in an entity or business has the meaning given by section 16.

[...]

excluded provisions has the meaning given by section 28.

[...]

foreign government investor has the meaning given by section 17.

[...]

interest: a person holds an interest of a specified percentage in a business if the value of the interests in assets of the business held by the person, alone or together with one or more associates of the person, is that specified percentage of the value of the total assets of the business.

[...]

sensitive business: see section 22.

[...]

Part 2—Provisions relating to definitions and rules of interpretation

[...]

16 Meaning of direct interest in an entity or business

For the definition of direct interest in section 4 of the Act, a direct interest in an entity or business is:

(a) an interest of at least 10% in the entity or business; or

(b) an interest of at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business; or

(c) an interest of any percentage in the entity or business if the person who acquired the interest is in a position:

(i) to influence or participate in the central management and control of the entity or business; or

(ii) to influence, participate in or determine the policy of the entity or business.

17 Meaning of foreign government investor

For the definition of foreign government investor in section 4 of the Act, a person is a foreign government investor if the person is:

(a) a foreign government or separate government entity; or

(b) a corporation in which:

(i) a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest; or

(ii) foreign governments or separate government 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 substantial interest; or

(c) the trustee of a trust in which:

(i) a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest; or

(ii) foreign governments or separate government 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 substantial interest; or

(d) the general partner of a limited partnership in which:

(i) a foreign government or separate government entity, alone or together with one or more associates, holds an interest of at least 20%; or

(ii) foreign governments or separate government 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%; or

(e) a corporation, trustee or partner of a kind described in paragraph (b), (c) or (d) assuming the references to foreign government (or foreign governments) in those paragraphs included references to a foreign government investor (or foreign government investors):

(i) within the meaning of those paragraphs; or

(ii) as a result of a previous application of this paragraph.

18 Meaning of foreign person

General partners of limited partnerships

(1) For paragraph (g) of the definition of foreign person in section 4 of the Act, a person is a foreign person if:

(a) the person is a general partner of a limited partnership; and

(b) either:

(i) an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds an interest of at least 20% in the limited partnership; or

(ii) 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government hold an aggregate interest of at least 40% in the limited partnership.

Certain foreign government investors

(2) For paragraph (g) of the definition of foreign person in section 4 of the Act, a person is a foreign person if:

(a) the person is a foreign government investor; and

(b) apart from this subsection, the person would not be a foreign person.

[...]

22 Businesses that are sensitive businesses

(1) This section prescribes conditions for subsection 26(1) of the Act.

(2) A business is a sensitive business if:

(a) the business is carried on wholly or partly in any of the following sectors (including such a business relating to infrastructure for those sectors):

(i) media;

(ii) telecommunications;

(iii) transport; or

(b) the business is wholly or partly:

(i) the supply of training or human resources to, the manufacture of military goods, equipment or technology for, or the supply of military goods, equipment or technology to, the Australian Defence Force or other defence forces; or

(ii) the manufacture or supply of goods, equipment or technology able to be used for a military purpose; or

(iii) the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; or

(iv) the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of a nuclear facility.

[...]

Part 3—Exemptions

Division 1—Simplified outline of this Part

[...]

Division 2—Exemptions applying for all purposes

[...]

Division 3—Exemptions for certain actions from being significant and notifiable actions

Subdivision A—Application of this Division

28 Application of this Division

This Division applies to the provisions of the Act, other than:

- (a) the definition of foreign person in section 4 of the Act; and
- (b) any other provision of the Act to the extent that it relates to that definition.

The provisions of the Act that this Division applies to are the excluded provisions.

Subdivision B—General exemptions

29 Will or devolution

The excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by will or devolution by operation of law, other than as a result of an arrangement under Part 5.1 or 5.3A of the Corporations Act 2001.

30 Certain interests held by foreign custodian corporations

The excluded provisions do not apply in relation to an acquisition of an interest in securities, assets, a trust, Australian land or a tenement by a foreign person if:

- (a) the foreign person is a corporation that is in the business of providing custodian services to other persons in relation to the holding of interests in securities, assets, trusts, Australian land or tenements; and
- (b) the foreign person acquires the interest in the course of the foreign person's business of providing such services; and
- (c) the interest is a legal interest; and
- (d) the equitable interest in the securities, assets, trust, land or tenement is not held by the foreign person; and
- (e) the foreign person exercises voting rights associated with the interest only at, or in accordance with, the direction of:

- (i) another person that is providing custodian services to a person in relation to the holding of the legal interest in the securities, assets, trust, land or tenement; or
- (ii) the holder of an equitable interest in the securities, assets, trust, land or tenement that is receiving custodian services that are related to that interest.

31 Australian businesses carried on by or land acquired from government

(1) The excluded provisions do not (subject to subsection (2)) apply in relation to an Australian business that is carried on (whether alone or together with one or more other persons) by, or an acquisition of an interest in Australian land from, any of the following persons:

- (a) the Commonwealth, a State, a Territory or a local governing body;
- (b) an entity wholly owned by the Commonwealth, a State, a Territory or a local governing body.

(2) However, subsection (1) does not apply in relation to:

- (a) an acquisition of an interest by a foreign government investor; or
- (b) an acquisition of an interest in Australian land if the interest is, or includes, an interest in any of the following infrastructure:
 - (i) public infrastructure, except in relation to public roads;
 - (ii) infrastructure for existing or proposed roads, existing or proposed railways, or existing or proposed inter-modal transfer facilities, within the National Land Transport Network (within the meaning of the National Land Transport Act 2014);
 - (iii) infrastructure for existing or proposed roads, existing or proposed railways, or existing or proposed 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;
 - (iv) the infrastructure (or part of the infrastructure) of a telecommunications network;
 - (v) a nuclear facility; or
- (c) an Australian business that holds an interest in Australian land to which paragraph (b) applies.

Subdivision C—Significant and notifiable actions relating to entities

32 Investments in financial sector companies

(1) The excluded provisions do not (subject to subsection (2)) apply in relation to an acquisition of an interest in shares if the shares are in a financial sector company (within the meaning of the Financial Sector (Shareholdings) Act 1998).

(2) This section does not apply in relation to an acquisition of an interest by a foreign government investor.

33 Compulsory acquisitions and compulsory buy-outs

The excluded provisions do not apply in relation to an acquisition of an interest in securities if the securities are acquired under a compulsory acquisition or compulsory buy-out.

34 Convertible instruments that include a requirement for loss absorption if entity becomes non-viable

The excluded provisions do not apply in relation to an acquisition of an interest in securities if:

- (a) the securities are Additional Tier 1 Capital or Tier 2 Capital instruments (within the meaning of the Prudential Standard APS 111—Capital Adequacy: Measurement of Capital, as in force at the time this section commences); and
- (b) the securities have not been converted into ordinary shares.

Subdivision D—Significant and notifiable actions relating to Australian land etc.

[...]

Division 4—Other exemptions relating to significant and notifiable actions

Subdivision A—Exemptions relating to particular significant and notifiable actions

[...]

Subdivision B—Exemption certificates

42 Exemption certificate for businesses or entities

- (1) A foreign person may apply for a certificate under this section (a businesses or entities certificate) if the foreign person or any other foreign person proposes to acquire one or more kinds of interests in the assets of an Australian business or the securities of an entity.
- (2) The Treasurer may give a certificate if the Treasurer is satisfied that acquisitions of those kinds of interests by that foreign person are not contrary to the national interest.
- (3) The certificate must specify:
 - (a) the foreign person, who may not yet be incorporated or established, to whom the certificate relates (or will relate); and
 - (b) the kinds of interests to which the certificate relates; and
 - (c) whether the acquisition of any of those kinds of interests:
 - (i) does not give rise to a notifiable action; or
 - (ii) neither gives rise to a significant action nor a notifiable action.
- (4) For the purposes of subsection 45(3) of the Act, an action is not a significant action if:

- (a) the action is an acquisition by a foreign person of an interest in assets of an Australian business or securities of an entity; and
 - (b) the foreign person is specified in a businesses or entities certificate; and
 - (c) the interest is of a kind specified in the certificate; and
 - (d) the acquisition of the interest is specified in the certificate as not giving rise to a significant action; and
 - (e) the conditions (if any) specified in the certificate are met.
- (5) For the purposes of subsection 49(2) of the Act, an action is not a notifiable action if:
- (a) the action is an acquisition by a foreign person of an interest in assets of an Australian business or securities of an entity; and
 - (b) the foreign person is specified in an Australian businesses or entities certificate; and
 - (c) the interest is of a kind specified in the certificate; and
 - (d) the conditions (if any) specified in the certificate are met.
- [...]

Division 5—Exemptions from other specified provisions

[...]

Part 4—Thresholds

[...]

51 Taking action in relation to entities and businesses

The following table prescribes values for section 51 of the Act (entities and businesses) to the extent that that section relates to items 2 to 5 of the table in that section.

[table not included]

[...]

Part 5—Significant actions and notifiable actions

Division 1—Simplified outline of this Part

[...]

Division 2—Prescribing significant actions and notifiable actions

55 Investments in Australian media businesses

An action is a significant action and a notifiable action if the action is a foreign person acquiring an interest of at least 5% in an entity or business that wholly or partly carries on an Australian media business.

56 Actions by foreign government investors

(1) An action is a significant action and a notifiable action if the action is a foreign government investor:

- (a) acquiring a direct interest in an Australian entity or Australian business; or
- (b) starting an Australian business; or
- (c) acquiring:
 - (i) a legal or equitable interest in a tenement; or
 - (ii) an interest of at least 10% in securities in a mining, production or exploration entity.

(2) A person acquires an interest in a tenement even if:

- (a) the person has previously acquired an interest in a tenement; or
- (b) the interest is an increase in the amount of an existing interest of the person in a tenement.

Exception—subsidiaries of foreign government investors

(3) Paragraph (1)(a) does not apply in relation to an acquisition of a direct interest in an Australian entity by a foreign government investor if the foreign government investor acquires the direct interest in the Australian entity by establishing a new wholly-owned subsidiary.

Exception—non-material interests in businesses that are not sensitive businesses

(4) Paragraph (1)(a) does not apply in relation to an acquisition of a direct interest in an Australian entity by a foreign government investor if:

- (a) the foreign government investor acquires the direct interest in the Australian entity by acquiring an interest in securities in a foreign entity; and
- (b) the total asset value for the foreign entity is less than 5% of the value of the total assets of that entity; and
- (c) the total asset value is less than \$55 million; and
- (d) none of the assets taken into account in working out the total asset value are assets of a sensitive business.

Exception—acquisition of initial interest by entity established by consortium

(5) Paragraph (1)(a) does not apply in relation to an acquisition of an initial direct interest in an Australian entity by a foreign government investor if the entity is established by one or more persons for the purposes of the entity making a later acquisition that is a significant action and a notifiable action.

Division 3—Other provisions relating to significant actions and notifiable actions

57 Orders prohibiting proposed acquisitions and disposal orders

(1) For item 9 of the table in subsection 67(2) of the Act, the Treasurer may make an order prohibiting:

(a) for an acquisition of an interest mentioned in section 55 or paragraph 56(1)(a) or (c) of this instrument—the whole or a part of the acquisition; and

(b) for a foreign government investor starting an Australian business—the investor starting the whole or a part of the Australian business.

(2) For item 8 of the table in subsection 69(2) of the Act, the Treasurer may make an order directing:

(a) for an acquisition of an interest mentioned in section 55 or paragraph 56(1)(a) or (c) of this instrument—a specified person to dispose of that interest within a specified period to one or more persons approved in writing by the Treasurer; or

(b) for a foreign government investor starting an Australian business—specified persons to do within a specified period, or refrain from doing, specified acts or acts of a specified kind.

(3) Subsections 69(3) to (5) of the Act apply in relation to an order mentioned in this section in the same way as they apply to an equivalent order mentioned in the table in subsection 69(2) of the Act.

Part 6—Other provisions

[...]

Part 7—Application and transitional provisions

[...]

* * *