

## Australia

### Foreign Acquisitions and Takeovers Act 1975 (1975)

#### Note

The Investment Laws Navigator is based upon sources believed to be accurate and reliable and is intended to be up-to-date at the time it was generated. It is made available with the understanding that UNCTAD is not engaged in rendering legal or other professional services. To confirm that the information has not been affected or changed by recent developments, traditional legal research techniques should be used, including checking primary sources where appropriate. While every effort is made to ensure the accuracy and completeness of its content, UNCTAD assumes no responsibility for eventual errors or omissions in the data.

The year indicated in brackets after the title of the law refers to the year of publication in the Official Gazette or, when this is not available, the year of adoption of the law.

<https://investmentpolicy.unctad.org>

## Contents

- Part 1—Preliminary
  - Division 1—Preliminary
  - Division 2—Definitions
    - Subdivision A—Dictionary of definitions

- Subdivision B—Some defined terms and rules of interpretation
- Division 3—Application of this Act
- Part 2—Meaning of significant action and notifiable action
  - Division 1—Simplified outline of this Part
  - Division 2—Meaning of significant action
  - Division 3—Meaning of notifiable action
  - Division 4—The threshold test and change in control
    - Subdivision A—Simplified outline of this Division
    - Subdivision B—The threshold test
    - Subdivision C—Change in control
    - Subdivision D—Regulations
  - Division 5—Exemption certificates
  - Division 6—Entities whose securities are stapled and entities operating on a unified basis
- Part 3—Powers of Treasurer
  - Division 1—Simplified outline of this Part
  - Division 2—Powers of Treasurer
    - Subdivision A—Orders
    - Subdivision B—Other powers of Treasurer
  - Division 3—Provisions relating to powers of Treasurer
- Part 4—Notice of notifiable actions and significant actions
- Part 5—Offences and civil penalties
  - Division 1—Simplified outline of this Part
  - Division 2—Offences
  - Division 3—Civil penalties
    - Subdivision A—Civil penalties relating to significant actions generally
    - Subdivision B—Civil penalties relating to actions (except in relation to residential land)
    - Subdivision C—Civil penalties relating to residential land
  - Division 4—Miscellaneous
    - Subdivision A—Application of the Regulatory Powers Act
    - Subdivision B—Liability of officers of corporations
    - Subdivision C—Recovering unpaid penalties
- Part 6—Fees in relation to actions
- Part 6A—Vacancy fees for foreign acquisitions of residential land
- Part 7—Record-keeping and confidentiality of information
- Part 8—Miscellaneous

# Foreign Acquisitions and Takeovers Act 1975

No. 92, 1975

Compilation No. 19

Compilation date: 12 April 2018

An Act relating to the foreign acquisition of certain land interests and to the foreign acquisition and foreign control of certain business enterprises and mineral rights

## **Part 1—Preliminary**

### **Division 1—Preliminary**

#### **1 Short title**

This Act may be cited as the Foreign Acquisitions and Takeovers Act 1975.

[...]

### **Division 2—Definitions**

#### **Subdivision A—Dictionary of definitions**

#### **4 Dictionary of definitions**

In this Act:

[...]

acquire an interest of a specified percentage in an entity has the meaning given by section 20.

[...]

aggregate interest of a specified percentage in an entity has the meaning given by subsection 17(2).

aggregate substantial interest: 2 or more persons hold an aggregate substantial interest in an entity or trust if:

(a) for an entity—the persons hold an aggregate interest of at least 40% in the entity; or

(b) for a trust (including a unit trust)—the persons, together with any one or more associates of any of them hold, in the aggregate, beneficial interests in at least 40% of the income or property of the trust.

[...]

asset includes an interest in an asset.

associate has the meaning given by section 6.

Australia, when used in a geographical sense, includes the external Territories.

Australian business has the meaning given by section 8.

Australian corporation means a corporation formed in Australia.

Australian entity means an Australian corporation or an Australian unit trust.

Australian land means agricultural land, commercial land, residential land or a mining or production tenement.

[...]

Australian subsidiary of a foreign entity means an Australian entity that is a subsidiary of the foreign entity.

Australian unit trust means a unit trust:

- (a) the trustee of which holds relevant Australian assets; or
- (b) the trustee of which carries on an Australian business; or
- (c) the central management and control of which is in Australia; or
- (d) in which one or more persons who are ordinarily resident in Australia hold more than 50% of the beneficial interests in the income or property of the unit trust; or
- (e) that is listed for quotation in the official list of a stock exchange in Australia.

change in control has the meaning given by section 54.

[...]

controls:

- (a) the voting power—has the meaning given by section 23; and
- (b) an entity or business—has the meaning given by subsections 54(4) and (5).

[...]

decision period has the meaning given by subsection 77(5).

[...]

direct interest has the meaning prescribed by the regulations.

[...]

engage in conduct includes fail or refuse to engage in conduct.

[...]

entity means a corporation or a unit trust.

[...]

foreign corporation means a foreign corporation to which paragraph 51(xx) of the Constitution applies.

foreign entity means an entity that is not an Australian entity.

[...]

foreign person means:

- (a) an individual not ordinarily resident in Australia; or
- (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

(c) a corporation in which 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 substantial interest; or

(d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

(e) the trustee of a trust in which 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 substantial interest; or

(f) a foreign government; or

(g) any other person, or any other person that meets the conditions, prescribed by the regulations.

[...]

interest:

(a) in a security—has the meaning given by section 9; and

(b) in an asset—has the meaning given by section 10; and

(c) in a trust—has the meaning given by section 11; and

(d) in Australian land—has the meaning given by section 12; and

(e) of a specified percentage in an entity—has the meaning given by section 17.

interim order means an order made under section 68.

[...]

no objection notification has the meaning given by subsections 74(2) and 75(2).

notifiable action has the meaning given by Division 3 of Part 2.

[...]

ordinarily resident has a meaning affected by section 5.

potential voting power has the meaning given by section 22.

[...]

proposes:

(a) to acquire an interest in securities, assets or Australian land—has a meaning affected by subsection 16(1); and

(b) to enter or terminate an agreement—has a meaning affected by subsection 16(2).

[...]

relevant Australian assets means:

(a) Australian land, including legal and equitable interests (within the ordinary meaning of the term) in such land; or

(b) securities in an Australian entity.

relevant entity means any of the following:

- (a) an Australian entity;
- (b) a foreign corporation:
  - (i) that holds relevant Australian assets; or
  - (ii) that is a holding corporation of one or more Australian corporations;
- (c) a holding entity of such a foreign corporation or of an Australian unit trust.

[...]

scheme means:

- (a) any agreement, understanding, promise or undertaking:
  - (i) whether express or implied; and
  - (ii) whether or not enforceable, or intended to be enforceable, by legal proceedings; and
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

Secretary means the Secretary of the Department.

security means a share in a corporation or a unit in a unit trust.

[...]

share of a corporation means a share in the share capital of the corporation, and includes:

- (a) stock into which all or any of the share capital of the corporation has been converted; and
- (b) except in section 9, an interest in such a share or in such stock.

significant action has the meaning given by Division 2 of Part 2.

significant agreement with an Australian business is an agreement relating to:

- (a) the leasing of, the letting on hire of, or the granting of other rights to use, assets of the business; or
- (b) the participation by a person in the profits or central management and control of the business.

[...]

substantial interest: a person holds a substantial interest in an entity or trust if:

- (a) for an entity—the person holds an interest of at least 20% in the entity; or
- (b) for a trust (including a unit trust)—the person, together with any one or more associates, holds a beneficial interest in at least 20% of the income or property of the trust.

[...]

this Act includes the regulations.

threshold test is met has the meaning given by Subdivision B of Division 4 of Part 2.

[...]

voting power has the meaning given by subsection 22(1).

## **Subdivision B—Some defined terms and rules of interpretation**

### **5 Meaning of ordinarily resident**

(1) An individual who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if:

(a) the individual has actually been in Australia during 200 or more days in the period of 12 months immediately preceding that time; and

(b) at that time:

(i) the individual is in Australia and the individual's continued presence in Australia is not subject to any limitation as to time imposed by law; or

(ii) the individual is not in Australia but, immediately before the individual's most recent departure from Australia, the individual's continued presence in Australia was not subject to any limitation as to time imposed by law.

(2) Without limiting paragraph (1)(b), an individual's continued presence in Australia is subject to a limitation as to time imposed by law if the individual is an unlawful non-citizen within the meaning of the Migration Act 1958.

### **6 Meaning of associate**

(1) Each of the following persons is an associate of a person:

(a) any relative of the person;

(b) any person with whom the person is acting, or proposes to act, in concert in relation to an action to which this Act may apply;

(c) any person with whom the person carries on a business in partnership;

(d) any entity of which the person is a senior officer;

(e) if the person is an entity:

(i) any holding entity of the entity; or

(ii) any senior officer of the entity;

(f) any entity whose senior officers are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of:

(i) the person; or

(ii) if the person is an entity—the senior officers of the person;

(g) an entity if the person is accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of:

(i) the entity; or

- (ii) the senior officers of the entity;
- (h) any corporation in which the person holds a substantial interest;
- (i) if the person is a corporation—a person who holds a substantial interest in the corporation;
- (j) the trustee of a trust in which the person holds a substantial interest;
- (k) if the person is the trustee of a trust—a person who holds a substantial interest in the trust;
- (l) if the person is a foreign government, a separate government entity or a foreign government investor in relation to a foreign country (or a part of a foreign country):
  - (i) any other person that is a foreign government in relation to that country (or any part of that country); or
  - (ii) any other person that is a separate government entity in relation to that country (or any part of that country); or
  - (iii) any other foreign government investor in relation to that country (or any part of that country).

#### Additional associates in relation to interests in residential land

(2) For an action taken relating to an interest in residential land (within the meaning of any of the paragraphs of subsection 12(1)), each of the following persons is also an associate of a person:

- (a) an entity that is not listed for quotation in the official list of a stock exchange if a relative of the person:
  - (i) holds a substantial interest in the entity; or
  - (ii) is a senior officer of the entity;
- (b) if the person is an entity (the first entity)—another entity (the second entity) if:
  - (i) an individual holds a substantial interest in the first entity or is a senior officer of the first entity; and
  - (ii) a relative of the individual holds a substantial interest in the second entity or is a senior officer of the second entity; and
  - (iii) the first entity and the second entity are not, and are not a subsidiary or trustee of an entity, listed for quotation in the official list of a stock exchange.

#### Persons who are not associates

(3) Despite subsections (1) and (2), a person is not an associate of another person merely because:

- (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; or
- (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products (within the meaning of the Corporations Act 2001), to acquire financial products on the client's behalf in the ordinary course of that business; or



- (c) one had sent, or proposes to send, to the other an offer under a takeover bid (within the meaning of that Act) for securities held by the other; or
- (d) one has appointed the other, otherwise than for valuable consideration (within the ordinary meaning of the term) given by the other or by an associate of the other, to vote as a proxy or representative; or
- (e) both of the following apply:
  - (i) one provides independent services as a trustee of a trust to the other who is a beneficiary of the trust;
  - (ii) the trustee is licensed to provide those services under a law of the Commonwealth, a State, a Territory, a foreign country or a part of a foreign country; or
- (f) one holds a substantial interest in a managed investment scheme (within the meaning of the Corporations Act 2001) and the other is the responsible entity of the scheme; or
- (g) both are partners of one of the following kinds of partnerships:
  - (i) a partnership of actuaries or accountants;
  - (ii) a partnership of medical practitioners;
  - (iii) a partnership of patent attorneys;
  - (iv) a partnership of sharebrokers or stockbrokers;
  - (v) a partnership of trade mark attorneys;
  - (vi) a partnership that has as its primary purpose collaborative scientific research, and includes at least one university and one private sector participant (whether or not it also includes government agencies or publicly funded research bodies);
  - (vii) a partnership of architects;
  - (viii) a partnership of pharmaceutical chemists or veterinary surgeons;
  - (ix) a partnership of legal practitioners.
- [...]

## **8 Meaning of Australian business**

- (1) An Australian business is a business that is carried on wholly or partly in Australia in anticipation of profit or gain.
- (2) For the purposes of this Act, a person who has an interest in a mining or production tenement is, as a result of having that interest, taken to carry on a business in Australia of exploiting that tenement in anticipation of profit or gain. The tenement is taken to be an asset of that business.

## **9 Meaning of interest in a security**

- (1) A person holds or acquires an interest in a security if he or she has any legal or equitable interest in that security.

(2) Without limiting subsection (1), a person holds or acquires an interest in a security in an entity if:

(a) the person is not the registered holder of the security; and

(b) the person is entitled to exercise or control the exercise of a right attached to the security (other than because he or she was appointed as a proxy or representative).

(3) In determining whether a person holds or acquires an interest in a security, it is immaterial that the interest cannot be related to a particular security.

**Issued shares in a corporation**

(4) A person holds or acquires an interest in the issued shares in a corporation if:

(a) all or part of the share capital of the corporation consists of stock; and

(b) the person holds an interest in that stock.

(5) For the purposes of this Act, the issued shares are taken to have:

(a) the same nominal amount as the amount of that stock; and

(b) the same rights attached to them as are attached to that stock.

#### **10 Meaning of interest in an asset**

A person holds or acquires an interest in an asset if he or she has any legal or equitable interest in that asset.

#### **11 Meaning of interest in a trust**

A person holds or acquires an interest in a trust if:

(a) the person holds or acquires a beneficial interest in the income or property of the trust; or

(b) the person holds or acquires an interest in a unit in a unit trust.

#### **12 Meaning of interest in Australian land**

(1) An interest in Australian land (however described) is:

(a) a legal or equitable interest in Australian land, other than:

(i) an interest under a lease or licence or in a unit in a unit trust; or

(ii) an interest in an agreement giving a right (known as a profit à prendre) to take something off another person's land, or to take something out of the soil of that land; or

(iii) an interest in an agreement involving the sharing of profits or income from the use of, or dealings in, Australian land; or

(b) an interest in a security in an entity that owns Australian land, being a security that entitles the holder to a right to occupy a dwelling of a kind known as a flat or home unit situated on the land; or

- (c) an interest as lessee or licensee in a lease or licence giving rights to occupy Australian land if the term of the lease or licence (including any extension or renewal) is reasonably likely, at the time the interest is acquired, to exceed 5 years; or
  - (d) an interest in an agreement giving a right of a kind mentioned in subparagraph (a)(ii) if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed 5 years; or
  - (e) an interest in an agreement involving the sharing of profits or income from the use of, or dealings in, Australian land if the term of the agreement (including any extension or renewal) is reasonably likely, at the time the interest in the agreement is acquired, to exceed 5 years; or
  - (f) an interest in a share in an Australian land corporation or agricultural land corporation; or
  - (g) an interest in a unit in an Australian land trust or agricultural land trust; or
  - (h) if the trustee of an Australian land trust or agricultural land trust is a corporation—an interest in a share in that corporation.
- (2) An interest is an interest in Australian land even if it is the only interest that exists in the land or other thing concerned.
- (3) A person acquires an interest in Australian land even if:
- (a) the person has previously acquired an interest in Australian land; or
  - (b) the interest is an increase in the amount of an existing interest of the person in Australian land.

[...]

#### **16 Meaning of proposes to take certain action**

- (1) A person proposes to acquire an interest in securities, assets or Australian land if:
- (a) the person makes an offer to acquire the interest; or
  - (b) the person makes or publishes a statement (however expressed) that expressly or impliedly invites a holder of an interest in securities, assets or Australian land to offer to dispose of an interest in securities, assets or Australian land; or
  - (c) the person takes part in, or proposes to take part in, negotiations with a view to acquiring an interest in securities, assets or Australian land.
- (2) A person proposes to enter or terminate an agreement if the person takes part in, or proposes to take part in, negotiations with a view to entering or terminating the agreement.
- (3) This section does not limit the meaning of propose.

#### **17 Meanings of interest and aggregate interest of a specified percentage in an entity**

Meaning of interest of a specified percentage in an entity

- (1) A person holds an interest of a specified percentage in an entity if the person, alone or together with one or more associates of the person:

(a) is in a position to control at least that percentage of the voting power or potential voting power in the entity; or

(b) holds interests in at least that percentage of the issued securities in the entity; or

(c) would hold interests in at least that percentage of the issued securities in the entity if securities in the entity were issued or transferred as the result of the exercise of rights of a kind mentioned in paragraph 15(1)(b) or (c).

[...]

#### Proxies and representatives

(3) In determining the percentage of voting power or potential voting power that a person is in a position to control in an entity, disregard any votes that he or she controls as a proxy or representative.

[...]

### **20 Meaning of acquire an interest of a specified percentage in an entity**

(1) A person acquires an interest of a specified percentage in an entity if the person:

(a) starts to hold an interest of that percentage in the entity; or

(b) would start to hold an interest of that percentage in the entity on the assumption that the person:

(i) held interests in securities that are interests that he or she has offered to acquire; or

(ii) held rights to votes that might be cast at a general meeting of the entity that are rights that he or she has offered to acquire; or

(c) for a person who already holds an interest of that percentage in the entity:

(i) becomes in a position to control more of the voting power or potential voting power in the entity; or

(ii) starts to hold additional interests in the issued securities in the entity; or

(iii) would start to hold additional interests in the issued securities in the entity if securities in the entity were issued or transferred as the result of the exercise of rights of a kind mentioned in paragraph 15(1)(b) or (c).

(2) For the purposes of subsection (1), a reference to a person offering to acquire interests in securities or rights includes a reference to a person making or publishing a statement (however expressed) that expressly or impliedly invites a holder of interests in securities or rights to offer to dispose of interests in securities or rights.

[...]

### **22 Meanings of voting power and potential voting power**

#### Meaning of voting power

(1) The voting power in an entity is the maximum number of votes that might be cast at a general meeting of the entity.

### Meaning of potential voting power

(2) The potential voting power in an entity is the voting power in the entity, on the assumption that the votes that might be cast at a general meeting of the entity included each vote that:

(a) because of the exercise of a right might come into existence in the future (whether or not the right is exercisable presently or in the future or on the fulfilment of a condition); and

(b) if it came into existence, might be cast at a general meeting of the entity.

### Exercise of future rights

(3) In determining how much of the potential voting power in an entity a person is in a position to control at a particular time, if:

(a) a right exists that, if exercised, would result in the person being in a position to control more of the potential voting power in the entity than the person would be in a position to control if the right were not exercised; and

(b) it cannot be determined at that time (whether from the right itself or from the circumstances existing at that time) whether the right would be exercised;

assume that the right were exercised at that time.

### Veto power

(4) If a person is in a position to veto any resolution of the board, central management or general meeting of an entity, then for the purposes of this Act (except paragraph 47(2)(b) (meaning of notifiable action) and subsection 54(4) (meaning of control)) the person is taken to be in a position to control 20% of the potential voting power in the entity.

## **23 Meaning of controls the voting power**

A person controls the voting power in an entity if the person controls the power directly or indirectly, including as a result or by means of agreements or practices, whether or not the agreements or practices:

(a) have legal or equitable force; or

(b) are based on legal or equitable rights.

[...]

## **Division 3—Application of this Act**

[...]

## **Part 2—Meaning of significant action and notifiable action**

### **Division 1-Simplified outline of this Part**

[...]

## Division 2—Meaning of significant action

[...]

### 40 Meaning of significant action—entities

(1) An action is a significant action if the conditions in this section are met.

First condition—kinds of action

(2) The first condition is that the action is any of the following:

(a) to acquire a direct interest in an Australian entity that is an agribusiness;

(b) to acquire interests in securities in an entity;

(c) to issue securities in an entity;

(d) to enter an agreement:

(i) relating to the affairs of the entity; and

(ii) under which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person);

(e) to alter a constituent document of the entity as a result of which one or more senior officers of the entity will be under an obligation to act in accordance with the directions, instructions or wishes of a foreign person who holds a substantial interest in the entity (or of an associate of such a foreign person).

Second condition—threshold

(3) The second condition is that the threshold test is met in relation to the entity (see Subdivision B of Division 4).

Third condition—kinds of entities covered

(4) The third condition (except if paragraph (2)(a) applies) is that the entity is the following:

(a) for an acquisition of interests in shares or an issue of shares:

(i) a corporation that is a relevant entity that carries on an Australian business, whether alone or together with one or more other persons; or

(ii) the holding entity of such a corporation;

(b) for any other action relating to a corporation:

(i) an Australian corporation that carries on an Australian business, whether alone or together with one or more other persons; or

(ii) the holding entity (other than a foreign corporation) of such a corporation;

(c) for an action relating to a unit trust:

(i) an Australian unit trust; or

(ii) a holding entity of an Australian unit trust.

Last condition—action taken by a foreign person

(5) If paragraph (2)(a) applies, the last condition is that the action is or is to be taken by a foreign person.

Last condition—action results in change in control

(6) If any of paragraphs (2)(b) to (e) apply, the last condition is that there would be or has been a change in control of the entity as a result of the action (see Subdivision C of Division 4).

#### **41 Meaning of significant action—businesses**

(1) An action is a significant action if the conditions in this section are met.

First condition—kinds of action

(2) The first condition is that the action is any of the following:

(a) to acquire a direct interest in an Australian business that is an agribusiness;

(b) to acquire interests in assets of an Australian business;

(c) to enter or terminate a significant agreement with an Australian business.

Second condition—threshold

(3) The second condition is that the threshold test is met in relation to the Australian business (see Subdivision B of Division 4).

Third condition—action taken by a foreign person

(4) If paragraph (2)(a) applies, the third condition is that the action is or is to be taken by a foreign person.

Third condition—action results in change in control

(5) If paragraph (2)(b) or (c) applies, the third condition is that there would be or has been a change in control of the business as a result of the action (see Subdivision C of Division 4).

[...]

#### **44 Meaning of significant action—actions prescribed by the regulations**

(1) The regulations may provide that a specified action is a significant action (including by providing that a specified action is a significant action if specified conditions are met).

(2) Sections 40, 41 and 43 do not limit the actions that may be specified by the regulations.

[...]

### **Division 3—Meaning of notifiable action**

[...]

#### **47 Meaning of notifiable action—general**

(1) An action is a notifiable action if the conditions in this section are met.

First condition—kinds of action

(2) The first condition is that the action is any of the following:

(a) to acquire a direct interest in an Australian entity or Australian business that is an agribusiness;

(b) to acquire a substantial interest in an Australian entity;

(c) to acquire an interest in Australian land.

Second condition—threshold

(3) The second condition is that the threshold test is met in relation to the entity, business or land (see Subdivision B of Division 4).

Third condition—kinds of entities covered

(4) If paragraph (2)(a) or (b) applies, the third condition is that the entity is:

(a) an Australian corporation that carries on an Australian business, whether alone or together with one or more other persons; or

(b) an Australian unit trust; or

(c) an Australian entity that is the holding entity of an entity mentioned in paragraph (a) or (b).

Last condition—action taken by a foreign person

(5) The last condition (whether paragraph (2)(a), (b) or (c) applies) is that the action is or is to be taken by a foreign person.

#### **48 Meaning of notifiable action—actions prescribed by the regulations**

(1) The regulations may provide that a specified action is a notifiable action (including by providing that a specified action is a notifiable action if specified conditions are met).

(2) Section 47 does not limit the actions that may be specified by the regulations.

[...]

## **Division 4—The threshold test and change in control**

### **Subdivision A—Simplified outline of this Division**

[...]

### **Subdivision B—The threshold test**

#### **51 The threshold test for entities and businesses**

The threshold test is met in relation to an entity or business for a significant action mentioned in column 1 of the following table if the value mentioned in column 2 of the table is more than the value prescribed by the regulations.

[table not included]



[...]

## **Subdivision C—Change in control**

### **54 Change in control**

(1) For the purposes of determining whether an action is a significant action, there is a change in control of an entity or business if, and only if, the Treasurer is satisfied that the action would have, or has had, any of the results mentioned in subsection (2) or (3).

Foreign persons begin to control entity or business

(2) One or more foreign persons would begin, or have begun, to control the entity or business (whether alone or together with any associates of any of those persons).

Change in foreign persons who control the entity or business

(3) If one or more foreign persons already control or controlled the entity or business:

(a) another foreign person would become, or has become, a person who controls the entity or business; or

(b) a person would cease, or has ceased, to be a person who controls the entity or business.

Meaning of control

(4) A person controls an entity or business if:

(a) the person (whether alone or together with one or more associates) is in a position to determine the policy of the entity or business in relation to any matter; or

(b) without limiting paragraph (a), in relation to the acquisition of interests in securities in an entity or an issue of securities in an entity:

(i) the person holds a substantial interest in the entity; or

(ii) the person is one of 2 or more persons who hold an aggregate substantial interest in the entity.

(5) However, a person mentioned in paragraph (4)(b) does not control the entity if the Treasurer is satisfied that, having regard to all the circumstances, the person together with any one or more associates of that person is not in a position to determine the policy of the entity.

(6) Subsection (5) does not require the Treasurer to determine whether a person is in a position to determine the policy of an entity.

References to foreign persons

(7) If the Treasurer is satisfied that one or more foreign persons together with any one or more associates control an entity under subsection (4), then, in relation to an action taken relating to the entity, a reference to a foreign person is taken, for the purposes of Part 3 (powers of Treasurer), to include a reference to those associates (even if those associates are not foreign persons).

## **Subdivision D—Regulations**

[...]

## **Division 5—Exemption certificates**

[...]

## **Division 6—Entities whose securities are stapled and entities operating on a unified basis**

[...]

## **Part 3—Powers of Treasurer**

### **Division 1-Simplified outline of this Part**

[...]

### **Division 2—Powers of Treasurer**

#### **Subdivision A—Orders**

##### **67 Order prohibiting proposed significant actions**

(1) The Treasurer may, by notifiable instrument, make an order under subsection (2) if the Treasurer is satisfied that:

- (a) a significant action is proposed to be taken; and
- (b) taking the significant action would be contrary to the national interest.

(2) The Treasurer may make an order in accordance with the following table.

[table not included]

(3) If the Treasurer makes an order under subsection (2), the Treasurer may, by notifiable instrument, also make an order in accordance with the following table.

[table not included]

##### **68 Interim orders**

(1) For the purpose of considering whether to make an order under section 67, the Treasurer may, by notifiable instrument, make an order, under this section, of the kind that he or she may make under that section as if that section had applied.

(2) An order made under this section must specify the period during which the order has effect. The period must not be more than 90 days.

##### **69 Disposal orders**

(1) The Treasurer may, by notifiable instrument, make an order under subsection (2) if the Treasurer is satisfied that:

(a) a significant action has been taken; and

(b) the result of the significant action is contrary to the national interest.

(2) The Treasurer may make an order in accordance with the following table.

[table not included]

[...]

Orders made under table items 2, 3, 5 or 6

(4) An order under any of items 2, 3, 5 or 6 of the table in subsection (2) may be made only for the purpose of:

(a) restoring the control of the entity or business as closely as possible to the position in which it was before the significant action was taken; or

(b) preventing the occurrence of a change in control of the entity or business.

(5) Before the end of a period specified in an order made under any of items 2, 3, 5 or 6 of the table in subsection (2) (or that period as extended under a previous application of this subsection), the Treasurer may, in writing, extend the period. The order has effect as if the period as extended had been specified in the order.

#### **70 Limitation on making disposal orders**

(1) This section applies if:

(a) a person is given a no objection notification specifying one or more significant actions; and

(b) for a decision to which paragraph 74(1)(a) or section 75 applied—the actions specified in the notification were taken; and

(c) in any case, both of the following apply:

(i) either the period specified under section 76 in the notification has not ended or the actions were taken before the end of the period specified in the notification;

(ii) the foreign persons who took the actions were specified in the notification.

(2) The Treasurer may make an order under section 69 (disposal orders) in relation to the actions only if:

(a) the person is convicted of an offence against section 87 in relation to a condition included in the notification; or

(b) an order is made under section 19B of the Crimes Act 1914 in relation to the person in respect of such an offence; or

(c) a civil penalty order is made against the person under the Regulatory Powers Act in relation to a contravention of section 93, 96 or 97 of this Act relating to a condition included in the notification.

## **71 Variation and revocation of orders**

(1) The Treasurer may vary or revoke an order under this Subdivision at any time if:

(a) the Treasurer is satisfied that the variation or revocation is not contrary to the national interest; and

(b) for a variation:

(i) the person consents to the variation; or

(ii) the Treasurer is satisfied that the variation does not disadvantage the person.

(2) Subsection 33(3) of the Acts Interpretation Act 1901 does not apply in relation to a power under this Subdivision to make an order.

## **72 Registration and commencement of orders**

Registration of orders

(1) An order made by the Treasurer under this Subdivision must be:

(a) in writing; and

(b) registered on the Federal Register of Legislation within 10 days after it is made.

When an order commences

(2) An order under this Subdivision commences:

(a) for an order under subsection 67(3) (additional orders) or 69 (disposal orders)—on the day specified in the order that is at least 30 days after the order is registered; and

(b) for any other order—on the day the order is registered.

## **73 Actions of more than one kind**

If a single action is covered by more than one of the following (because an action is an action of more than one kind):

(a) paragraph 40(2)(a), (b), (c), (d) or (e);

(b) paragraph 41(2)(a), (b) or (c);

(c) paragraph 43(a);

(d) a provision of regulations made for the purposes of section 44;

the Treasurer may make any of the orders under this Subdivision that he or she could make in relation to the single action.

## **Subdivision B—Other powers of Treasurer**

### **74 No objection notification imposing conditions**

Application of this section

(1) This section applies if:

(a) the Treasurer is satisfied that a significant action is proposed to be taken (whether or not the Treasurer was given a notice relating to the action); or

(b) both of the following apply:

(i) the Treasurer is satisfied that a significant action has been taken;

(ii) the Treasurer was not given a notice relating to the action before the action was taken; or

(c) all of the following apply:

(i) the Treasurer is satisfied that a significant action has been taken;

(ii) the Treasurer was given a notice relating to the action before the action was taken;

(iii) the action was taken before the day mentioned in section 82.

Imposition of conditions

(2) The Treasurer may:

(a) decide that the Commonwealth has no objection to the action if one or more of the following conditions were imposed:

(i) for paragraph (1)(a)—a condition that the Treasurer is satisfied is necessary to ensure the action, if taken, will not be contrary to the national interest;

(ii) for paragraphs (1)(b) and (c)—a condition that the Treasurer is satisfied is necessary to ensure that the action is not contrary to the national interest; and

(b) notify the person, in writing (the no objection notification), of the conditions.

(3) The no objection notification:

(a) must be given before the end of 10 days after the decision is made; and

(b) if a notice relating to the action was given—may be given to the person at an address (including an electronic address) specified in that notice as the address for service of notices relating to the action.

Variation and revocation of conditions

(4) The Treasurer may (subject to subsection (6)) vary a no objection notification given to a person by:

(a) revoking a condition; or

(b) imposing a new condition; or

(c) varying an existing condition; or

(d) varying the information specified under section 76;

if the Treasurer is satisfied that the variation is not contrary to the national interest.

(5) The variation may be made on the Treasurer's own initiative.

(6) The Treasurer may vary a no objection notification given to a person by imposing a new condition or varying an existing condition only if:

- (a) the person consents to the new condition or the variation; or
- (b) the Treasurer is satisfied that the new condition or variation does not disadvantage the person.

#### Statements in notices

(7) For the purposes of this section:

- (a) a notice relating to an action stating that a person has a right (including a right under an option) to acquire interests in securities, assets or Australian land is taken to be a statement that the person proposes to acquire the interests in the securities, assets or land; and
- (b) a notice relating to an action stating that a person proposes to acquire a right (including a right under an option) to acquire an interest in a security, asset or Australian land is taken to be a statement that the person proposes to exercise that right.

#### Effect of notification on later actions

(8) If:

- (a) a person gives a notice to the Treasurer relating to more than one significant action proposed to be taken in relation to an entity or business; and
- (b) the Treasurer is satisfied that the actions would result in a change in control of the entity or business; and
- (c) the Treasurer gives a no objection notification to the person under this section in relation to the actions; and
- (d) not all of the actions are taken; and
- (e) the person gives a later notice to the Treasurer relating to a later action that is proposed to be taken in relation to the entity or business;

the giving of the no objection notification does not prevent the Treasurer from determining that there has been or will be a change in control of the entity or business as a result of the later action.

#### **75 No objection notification not imposing conditions**

(1) This section applies if:

- (a) the Treasurer receives a notice that a person proposes to take an action; and
- (b) the Treasurer is satisfied that the action is covered by:
  - (i) subsections 40(2) and (3), and whichever of subsection 40(4) or (5) applies (meaning of significant action—entities); or
  - (ii) subsections 41(2) and (3) and subsection 41(4) (if it applies) (meaning of significant action—business); or
  - (iii) section 43 (meaning of significant action—land); or
  - (iv) regulations made for the purposes of section 44 (meaning of significant action—actions prescribed by the regulations), disregarding any conditions prescribed by the regulations in relation to a change in control.

(2) The Treasurer may:

- (a) decide that the Commonwealth has no objection to the action; and
- (b) notify the person, in writing (the no objection notification), of the decision.

(3) The no objection notification:

- (a) must be given before the end of 10 days after the decision is made; and
- (b) may be given to the person at an address (including an electronic address) specified in the notice relating to the action as the address for service of notices relating to the action.

Statements in notices

(4) For the purposes of this section:

- (a) a notice relating to an action stating that a person has a right (including a right under an option) to acquire interests in securities, assets or Australian land is taken to be a statement that the person proposes to acquire the interests in the securities, assets or land; and
- (b) a notice relating to an action stating that a person proposes to acquire a right (including a right under an option) to acquire an interest in a security, asset or Australian land is taken to be a statement that the person proposes to exercise that right.

Effect of notifications on later actions

(5) A notification given under this section in relation to an action taken relating to an entity or business does not prevent the Treasurer from determining later whether there has been a change in control of the entity or business.

## **76 Content of notification**

(1) A no objection notification given to a person under section 74 or 75 must specify the following:

- (a) the one or more actions to which the notification relates;
- (b) the one or more foreign persons to which the notification relates;
- (c) a requirement that the actions to which the notification relates, if taken, must be taken before the end of a specified period after the day the notification is given.

(2) The no objection notification may specify a foreign person by specifying:

- (a) a foreign person that:
  - (i) is not yet incorporated; or
  - (ii) is a trustee of a trust that is not yet established; and
- (b) the way in which the foreign person is to be incorporated or the trust is to be established.

(3) A foreign person is taken not to be specified in a no objection notification if:

- (a) the notification specified the foreign person under subsection (2) before the foreign person was incorporated or the trust was established; and

(b) the foreign person is not incorporated or the trust is not established in the way specified in the notification.

(4) The period mentioned in paragraph (1)(c) is:

(a) the period prescribed by the regulations; or

(b) if the Treasurer is satisfied that a longer period is not contrary to the national interest—that longer period.

(5) A single notification may include a no objection notification under each of sections 74 and 75 in relation to different actions.

Variation of no objection notification

(6) A person given a no objection notification may apply to the Treasurer for a variation of the notification (including after the action specified in the notification is taken).

(7) An application for an extension of a period specified in a no objection notification must be made 2 months before the end of the period.

(8) The Treasurer may vary a no objection notification if the Treasurer is satisfied that the variation is not contrary to the national interest.

## **Division 3—Provisions relating to powers of Treasurer**

### **77 Time limit on making orders and decisions**

Application of this section

(1) This section applies if the Treasurer receives a notice from a person stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken.

Time limit on making orders or decisions

(2) The Treasurer must not make an order or decision under Division 2 relating to the action if:

(a) the decision period ends; and

(b) the person has not taken the action by the end of the decision period; and

(c) either:

(i) the Treasurer has not made such an order or decision relating to the action by the end of the decision period; or

(ii) if the Treasurer has made such an order or decision by the end of the decision period—the Treasurer has not registered the order in accordance with section 72 or given a notification in accordance with subsection 74(3) or 75(3).

Time limit on making orders or decisions after interim orders made



(3) If the Treasurer makes an interim order relating to the significant action, the Treasurer must not make an order under section 67 or 69 or a decision under section 74 or 75 relating to the action if:

(a) the Treasurer makes the interim order before the end of the decision period; and

(b) the interim order is registered in accordance with section 72; and

(c) the period specified in the interim order ends; and

(d) by the end of that period, the Treasurer has not:

(i) made an order under section 67 or 69 relating to the action and registered the order in accordance with section 72; or

(ii) made a decision and given a no objection notification relating to the action in accordance with section 74 or 75; and

(e) the person has not taken the action by the end of that period.

Notice given under section 133

(4) If a notice is given to a person under section 133 requiring a person to give information or produce a document, a decision period, or a period specified in an interim order, does not include any day in the period:

(a) beginning on the day the notice is given; and

(b) ending on the day the person gives the information or produces the document in accordance with the notice.

Meaning of decision period

(5) A decision period is:

(a) the period of 30 days after the day the Treasurer receives a notice from a person stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken; or

(b) if, before the end of a decision period (including a decision period as extended under this paragraph), the person requests in writing the Treasurer to extend the period—the period as so extended.

## **78 Anti-avoidance**

(1) This section applies if:

(a) one or more persons enter into, begin to carry out or carry out a scheme; and

(b) the Treasurer is satisfied that any of the persons who entered into, began to carry out or carried out all or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of this Act in relation to one or more persons (whether those persons are the same as the persons mentioned in paragraph (a)); and

(c) all or part of the scheme has achieved, or (apart from this section) would achieve, that purpose.

(2) The Treasurer may (subject to subsection (3)) make any order or decision under Division 2 that the Treasurer would have been able to make if all or part of the scheme had not achieved that purpose.

(3) The Treasurer must not make an order prohibiting a person from doing anything that has already been done by the person before the order is made.

#### **79 Persons involved in avoidance taken to be associates**

(1) The Treasurer may make an order under subsection (2) if:

(a) the Treasurer makes an order under section 78 (anti-avoidance) in relation to more than one person; and

(b) the Treasurer is satisfied that not making an order under subsection (2) is contrary to the national interest.

(2) The Treasurer may make an order specifying that some or all of the persons to which the order under section 78 relates are taken to be associates of each other for the purposes of this Act or for specified purposes.

(3) An order under subsection (2) must specify the period during which the order is in force.

Effect of order

(4) An order under subsection (2) has effect according to its terms.

Order not a legislative instrument

(5) An order under subsection (2) is not a legislative instrument.

## **Part 4—Notice of notifiable actions and significant actions**

[...]

#### **81 Compulsory notice of notifiable actions**

(1) A foreign person who proposes to take a notifiable action must give a notice to the Treasurer before taking the action.

(2) If a person takes an action by entering an agreement, the notice must deal with each notifiable action covered by the agreement.

#### **82 Limitation on taking significant actions after notice given**

(1) This section applies in relation to a foreign person who gives a notice to the Treasurer stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken.

(2) The foreign person must not take the action before the earliest of the following:

- (a) the day that is 10 days after the end of the decision period mentioned in section 77;
- (b) if an interim order is made—the end of the period specified in the order;
- (c) the day a no objection notification is given to the person.

## **Part 5—Offences and civil penalties**

### **Division 1—Simplified outline of this Part**

[...]

### **Division 2—Offences**

#### **84 Failing to give notice**

A person commits an offence if:

- (a) the person is a foreign person; and
- (b) the person takes an action; and
- (c) the action is a notifiable action; and
- (d) a notice is not given under section 81 in relation to the action before the action is taken.

Penalty: Imprisonment for 3 years, or 750 penalty units, or both.

#### **85 Taking significant action before end of period**

A person commits an offence if:

- (a) the person is a foreign person; and
- (b) the person gives a notice to the Treasurer stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken; and
- (c) the person takes the action; and
- (d) the action is taken before the day mentioned in section 82; and
- (e) if a change in control is required for the action to be a significant action—there is a change in control as a result of the action.

Penalty: Imprisonment for 3 years, or 750 penalty units, or both.

#### **86 Contravening orders under Part 3**

A person commits an offence if:

- (a) a person engages in conduct; and
- (b) the conduct contravenes an order made under Part 3.

Penalty: Imprisonment for 3 years, or 750 penalty units, or both.

### **87 Contravening conditions**

A person commits an offence if:

(a) either:

(i) the person is given a no objection notification under section 74 (no objection notification imposing conditions) relating to a significant action; or

(ii) the person is specified in an exemption certificate; and

(b) the notification or certificate includes a condition; and

(c) the person engages in conduct; and

(d) the conduct contravenes the condition.

Penalty: Imprisonment for 3 years, or 750 penalty units, or both.

[...]

## **Division 3—Civil penalties**

### **Subdivision A—Civil penalties relating to significant actions generally**

#### **89 Contravening orders under Part 3**

A person must not contravene an order made under Part 3.

Civil penalty: 250 penalty units.

### **Subdivision B—Civil penalties relating to actions (except in relation to residential land)**

#### **90 This Subdivision does not apply to actions relating to interests in residential land**

This Subdivision does not apply in relation to a significant action or notifiable action relating to an interest in residential land.

#### **91 Failing to give notice**

A foreign person who proposes to take a notifiable action must give a notice under section 81 before taking the action.

Civil penalty: 250 penalty units.

#### **92 Taking significant action before end of period**

A foreign person who proposes to take a significant action must not take the action before the day mentioned in section 82 if:

(a) the person gives a notice to the Treasurer stating that the action is proposed to be taken; and

(b) if a change in control is required for the action to be a significant action—the action would result in a change in control.

Civil penalty: 250 penalty units.

### **93 Contravening conditions**

Conditions in no objection notifications

(1) A person who is given a no objection notification under section 74 (no objection notification imposing conditions) must not contravene a condition specified in the notification.

Civil penalty: 250 penalty units.

Conditions in exemption certificates

(2) A person who is specified in an exemption certificate must not contravene a condition specified in the certificate.

Civil penalty: 250 penalty units.

## **Subdivision C—Civil penalties relating to residential land**

[...]

## **Division 4—Miscellaneous**

### **Subdivision A—Application of the Regulatory Powers Act**

[...]

### **Subdivision B—Liability of officers of corporations**

#### **102 Liability of officers of corporations authorising or permitting contraventions**

Offences authorised or permitted by officers

(1) A person commits an offence if:

(a) the person is an officer of a corporation; and

(b) the corporation is convicted of an offence against this Act; and

(c) the person authorised or permitted the commission of the offence by the corporation.

Contraventions of civil penalty provisions authorised or permitted by officers

(2) An officer of a corporation is liable to a civil penalty if:

(a) a civil penalty order under the Regulatory Powers Act is made against the corporation in relation to a contravention of a civil penalty provision of this Act; and

(b) the officer authorised or permitted the contravention of the civil penalty provision by the corporation.

Maximum penalty

(3) The maximum penalty for a contravention of subsection (1) or (2) is the maximum penalty that would apply if the officer had committed the offence mentioned in paragraph (1)(b) or contravened the civil penalty provision mentioned in paragraph (2)(a).

### **103 Civil penalties for officers of corporations failing to prevent contraventions**

(1) An officer of a corporation is liable to a civil penalty if:

(a) the corporation contravenes a civil penalty provision of this Act; and

(b) the officer knew that, or was reckless or negligent as to whether, the contravention would occur; and

(c) the officer was in a position to influence the conduct of the corporation in relation to the contravention; and

(d) the officer failed to take all reasonable steps to prevent the contravention.

(2) The officer was reckless as to whether the contravention would occur if:

(a) the officer was aware of a substantial risk that the contravention would occur; and

(b) having regard to the circumstances known to the officer, it was unjustifiable to take the risk.

(3) The officer was negligent as to whether the contravention would occur if the officer's conduct involved:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and

(b) such a high risk that the contravention would occur;

that the conduct merits the imposition of a pecuniary penalty.

#### **Reasonable steps to prevent contravention**

(4) Without limiting this section, in determining whether an officer of a corporation failed to take all reasonable steps to prevent a contravention, a court may have regard to all relevant matters, including:

(a) what action (if any) the officer took directed towards ensuring the following (to the extent that the action is relevant to the contravention):

(i) that the corporation arranges regular professional assessments of the corporation's compliance with civil penalty provisions;

(ii) that the corporation implements any appropriate recommendations arising from such an assessment;

(iii) that the corporation's employees, agents and contractors have a reasonable knowledge and understanding of the requirements to comply with civil penalty provisions in so far as those requirements affect the employees, agents or contractors concerned; and

(b) what action (if any) the officer took when he or she became aware of the contravention.

#### **Maximum penalty**

(5) The maximum penalty for the contravention of subsection (1) is the maximum penalty that would apply if the officer had contravened the civil penalty provision mentioned in paragraph (1)(a).

## **Subdivision C—Recovering unpaid penalties**

[...]

## **Part 6—Fees in relation to actions**

[...]

## **Part 6A—Vacancy fees for foreign acquisitions of residential land**

[...]

## **Part 7—Record-keeping and confidentiality of information**

[...]

## **Part 8—Miscellaneous**

[...]

### **132 Powers of courts to enforce Treasurer's orders**

(1) If a person (the offender) has committed an offence or contravened a civil penalty provision in Part 5, the Federal Court of Australia, the Federal Circuit Court of Australia or the Supreme Court of a State or Territory may, on application by the Treasurer, make any order it thinks fit:

(a) if the contravention was failing to give a notice under section 81, or taking an action before the day mentioned in section 82, in relation to an acquisition of an interest in Australian land—to preserve the interest; or

(b) if the contravention was of an order made under Part 3—to achieve the purpose for which the order was made; or

(c) if the contravention was of a condition of a no objection notification or an exemption certificate—to achieve the purpose for which the condition was imposed by the Treasurer.

(2) To avoid doubt, the court may make an order:

(a) whether or not the offender has been convicted of an offence, or a civil penalty order has been made against the offender, in relation to the contravention; and

(b) whether or not the contravention still continues; and

(c) whether or not other proceedings relating to the contravention have been or are to be instituted.

Kinds of orders court may make

(3) Without limiting subsection (1), the court may make any of the following orders.

[table not included]

Additional powers

(4) In addition to the other powers conferred on a court by this section, the court may make the following orders:

(a) an order directing any person to do or refrain from doing a specified act for the purpose of securing compliance with any other order made under this section;

(b) an order containing such ancillary or consequential provisions as the court thinks just.

(5) Before making an order under this section, the court may give a direction requiring either or both of the following:

(a) notice of the application by the Treasurer to be given to such persons as it thinks fit;

(b) for the application by the Treasurer to be published in such manner as it thinks fit.

(6) The court may, by order:

(a) rescind, vary or discharge an order made by it under this section; or

(b) suspend the operation of an order made by it under this section.

Other powers of court unaffected

(7) The powers conferred on a court by this section are in addition to, and not instead of, any other powers of the court, whether conferred by this Act or otherwise.

### **133 Treasurer may require information**

(1) The Treasurer may give a notice under this section if the Treasurer has reason to believe that a person can give information or produce documents relating to matters that are relevant to the exercise by the Treasurer of his or her powers under this Act.

(2) The Treasurer may, by notice in writing given to the person, require the person:

(a) to give any such information to the Treasurer or any other specified person acting on the Treasurer's behalf; or

(b) to produce any such documents to the Treasurer or any other specified person acting on the Treasurer's behalf.

Giving information

(3) The notice must specify:

(a) a period (of at least 14 days) within which the information must be given or the documents produced; and

(b) the manner of giving the information or producing documents.



The Treasurer may, in writing, extend (or further extend) the period mentioned in paragraph (a) if the Treasurer is satisfied that it is reasonably necessary.

(4) The information mentioned in paragraph (2)(a) must be given to the Treasurer:

(a) in writing signed by that person; or

(b) for a corporation—by a competent officer of the corporation.

Offence

(5) A person commits an offence if:

(a) the person is given a notice under this section; and

(b) the person does not comply with the notice.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

(6) Subsection (5) does not apply if the person complies with the notice to the extent to which the person is capable of complying with it.

[...]

\* \* \*