

Appendix E

Foreign Acquisitions and Takeovers Regulations



Foreign Acquisitions and Takeovers Regulations 1989

Statutory Rules 1989 No. 177 as amended

made under the

Foreign Acquisitions and Takeovers Act 1975

This compilation was prepared on 29 November 2004
taking into account amendments up to SR 2004 No. 316

[Note: The amendments made by the *Foreign Acquisitions and Takeovers Amendment Regulations 2004 (No. 2)* (SR 2004 No. 316) have been incorporated in this compilation for the convenience of users.

As at 29 November 2004 the amendments made by the *Foreign Acquisitions and Takeovers Amendment Regulations 2004 (No. 2)* are uncommenced. They will commence on 1 January 2005.]

Prepared by the Office of Legislative Drafting,
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1 Name of Regulations [see Note 1]

These regulations are the *Foreign Acquisitions and Takeovers Regulations 1989*.

2 Definitions

In these regulations, unless the contrary intention appears:

accommodation facility means premises used, or suitable for use, as accommodation of persons on either a long-term or short-term basis, including, in particular, hotels, motels, hostels, guesthouses, serviced apartments and holiday units.

Act means the *Foreign Acquisitions and Takeovers Act 1975*.

charitable institution means:

- (a) any charitable, religious, scientific or educational institution (including an institution providing residential accommodation wholly or principally for full-time students attending an educational institution);
- (b) any institution being, or carrying on, a hospital; and
- (c) any institution the sole or principal purpose of which is to assist in the saving of life, or the prevention of loss or damage to property, whether at sea or otherwise;

being an institution which is not carried on for the purpose of profit or gain to its individual members and which is not empowered to make any distribution, whether in money, property or otherwise, to its members.

entity includes an individual.

foreign person includes a person to whom section 26A of the Act applies.

spouse, in relation to a person, includes another person who, although not legally married to the person, lives with the person on a *bona fide* domestic basis as the husband or wife of the person.

US enterprise has the meaning given by regulation 2AB.

US national means:

- (a) a national of the United States of America, as defined in Title III of the *Immigration and Nationality Act* of the United States of America; or
- (b) a permanent resident of the United States of America.

2AA References to *United States of America*

In these Regulations:

- (a) a reference to the territory of the United States of America includes Puerto Rico and the District of Columbia; and
- (b) a reference to a law of the United States of America includes a law that applies in a State of the United States of America or in any part of the territory of the United States of America.

2AB Meaning of *US enterprise*

- (1) A ***US enterprise*** is:
 - (a) an entity of a kind described in subregulations (2) to (4); or

- (b) a branch of an entity (other than an entity that is a US enterprise under paragraph (a)) that satisfies subregulation (5);

that is not disqualified under subregulation (6).

- (2) The entity is constituted or organised under a law of the United States of America.
- (3) The form in which the entity may be constituted or organised may be, but is not limited to, any of the following forms:
 - (a) a corporation;
 - (b) a trust;
 - (c) a partnership;
 - (d) a sole proprietorship;
 - (e) a joint venture;
 - (f) an unincorporated association.
- (4) It is immaterial whether the entity:
 - (a) is carried on for profit; or
 - (b) is owned or controlled privately.
- (5) If an entity is not described in subregulations (2) to (4), a branch of that entity is a US enterprise if the branch:
 - (a) is located in the United States of America; and
 - (b) is carrying on business activities in the United States of America:
 - (i) in a way other than being solely a representative office; and
 - (ii) in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the United States of America; and
 - (iii) by having its administration in the United States of America.
- (6) However, an entity or a branch of an entity is not a US enterprise if the Treasurer decides that this subregulation should apply to the entity or branch because:
 - (a) it is owned or controlled by a person or persons of a country other than the United States of America, and:
 - (i) Australia does not maintain diplomatic relations with that country; or
 - (ii) Australia adopts or maintains measures in relation to that country or a person of that country that have the effect of prohibiting transactions with the entity or branch; or

- (b) it is owned or controlled by a person or persons of a country other than the United States of America (including Australia) and the entity or branch has no substantial business activities in the United States of America.

2A Prescribed interests in shares

For paragraph 11 (5) (c) of the Act, an interest in a share is prescribed if:

- (a) the interest is of the kind described in regulation 2B; and
- (b) the interest is held by a corporation (a *foreign custodian company*) that:
 - (i) is a foreign person; and
 - (ii) is the holder of an Australian financial services licence under Chapter 7 of the *Corporations Act 2001*; and
 - (iii) is in the business of providing custodian services to other persons in relation to the ownership of shares; and
 - (iv) holds a certificate mentioned in regulation 2C in respect of the interest.

2B Kind of interest

- (1) For paragraph 2A (a), the interest is an interest in a share:
 - (a) in an Australian corporation; and
 - (b) in which the equitable interest is held by a person mentioned in subregulation (2); and
 - (c) in which the holder of the legal interest exercises voting rights associated with the interest only at the direction of the holder of the equitable interest in the share.
- (2) For paragraph (1) (b), the person who holds the equitable interest in the share:
 - (a) must not be:
 - (i) the holder of the legal interest in the share; or
 - (ii) an associate of the holder of the legal interest in the share; and
 - (b) must be:
 - (i) a person who is not a foreign person; or
 - (ii) a person mentioned in subregulation (3).

- (3) For subparagraph (2) (b) (ii), the person must be a foreign person who:
- (a) does not hold a substantial interest in the Australian corporation mentioned in paragraph (1) (a); and
 - (b) is:
 - (i) a charitable institution operating in Australia primarily for the benefit of persons ordinarily resident in Australia; or
 - (ii) a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia; or
 - (iii) a life insurance company that operates in Australia and invests the assets of its statutory funds (within the meaning of the *Life Insurance Act 1995*) primarily for the benefit of policy holders ordinarily resident in Australia; or
 - (iv) an insurance company (other than a life insurance company) that operates in Australia and makes investments:
 - (A) from the reserves of the company; and
 - (B) consistent with the company's obligations under the *Insurance Act 1973*; or
 - (v) a corporation that operates in Australia and maintains a superannuation fund for its employees (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) for the benefit of the members of the fund or their dependents, being persons ordinarily resident in Australia, and makes investments of all or part of the assets of that fund; or
 - (vi) the responsible entity of a managed investment scheme registered under section 601EB of the *Corporations Act 2001* that makes investments primarily for the benefit of scheme members ordinarily resident in Australia.

2C Certificate of exemption in respect of an interest

- (1) A foreign custodian company may apply to the Treasurer for a certificate under subregulation (3).
- (2) An application must be in writing.
- (3) The Treasurer may certify that a foreign custodian company is exempt from the operation of the Act with respect to an interest in a share of the kind described in regulation 2B only if the Treasurer is satisfied that the certification is not contrary to the national interest.

- (4) The Treasurer may make the certificate subject to conditions that are:
 - (a) necessary to ensure that the acquisition of an interest in a share of the kind described in regulation 2B will not be contrary to the national interest; and
 - (b) set out in the certificate.

3 Exempt acquisitions of interests in Australian urban land

For subsection 12A (8) of the Act, the Act does not apply in relation to an acquisition of an interest in Australian urban land of each of the following kinds, namely, the acquisition of such an interest by a foreign person:

- (a) that is:
 - (i) a charitable institution operating in Australia primarily for the benefit of persons ordinarily resident in Australia; or
 - (ii) a trustee of a foreign-controlled trust established for charitable or benevolent purposes, where the beneficiaries of the trust are persons ordinarily resident in Australia;
- (b) that is a life insurance company operating in Australia and the acquisition is made by way of investment of its statutory funds (within the meaning of the *Life Insurance Act 1995*) primarily for the benefit of policy holders ordinarily resident in Australia;
- (c) that is an insurance company (other than a life insurance company) operating in Australia and the acquisition:
 - (i) is made from the reserves of the company; and
 - (ii) is consistent with the company's obligations under the *Insurance Act 1973*;
- (d) that is a corporation operating in Australia that maintains a superannuation fund for its employees, (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), for the benefit of the members of the fund or their dependents, being persons ordinarily resident in Australia, and the acquisition is made as an investment of all or part of the assets of that fund;
- (e) where:
 - (i) the acquisition is of an interest in land on which a dwelling will be or is being constructed; and
 - (ii) the Treasurer has certified that the sale of that interest, (whether or not the certificate also refers to other interests) by a specified real estate developer to foreign persons is not contrary to the national interest; and
 - (iia) the conditions (if any) set out in the certificate are satisfied; and

- (iii) the real estate developer provides the foreign person with a copy of that certificate;
- (f) where:
 - (i) the land is being used, or is able to be used immediately and in its present state, for industrial or non-residential commercial purposes; and
 - (ii) the acquisition is wholly incidental to the conduct of the existing or proposed business activities of the foreign person (other than business activities that include acquisitions of land or the development of, or investment in, land or the development or operation of any form of accommodation facility);
- (g) where the acquisition is of an interest in a time share scheme and the entitlement of the foreign person and any of that person's associates is not in the aggregate greater than 4 weeks in any year;
- (h) where:
 - (i) the Treasurer has certified that a programme of land acquisitions by a foreign person in respect of a year is not contrary to the national interest; and
 - (ii) the acquisition is an acquisition referred to in that certificate;
- (i) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate that the corporation has not developed itself, being an Australian urban land corporation that is:
 - (i) publicly listed on an Australian Stock Exchange; and
 - (ii) primarily involved in the development of land;
- (j) where the acquisition is of shares as a consequence of which the foreign person holds less than a substantial interest in an Australian urban land corporation less than 10 per cent of the real estate assets of which are in the form of developed residential real estate, being an Australian urban land corporation that is publicly listed on an Australian Stock Exchange, or, where 2 or more foreign persons hold interests in the Australian urban land corporation, those foreign persons hold less than an aggregate substantial interest in that corporation;
- (k) who is an Australian citizen not ordinarily resident in Australia;
- (l) that is a corporation in which the government of an overseas country within the meaning of the *Diplomatic Privileges and*

Immunities Act 1967 holds a substantial interest and the acquisition is of an interest in land where the land is to be used exclusively for the purposes of the diplomatic mission of that country or as a diplomatic residence;

- (m) that is an Australian corporation that is a foreign person only because of direct interests held in it by Australian citizens not ordinarily resident in Australia;
 - (n) that is a trustee of a trust estate, where the trustee is a foreign person only because of direct interests held in the trust estate by Australian citizens not ordinarily resident in Australia;
 - (o) where the acquisition is of units in a unit trust as a consequence of which:
 - (i) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
 - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
 - (B) that has at least 100 unit holders;
 - (C) that is primarily engaged in the development of land; and
 - (D) that has less than 10 per cent of its real estate assets in the form of developed residential real estate that the trust has not developed itself; or
 - (ii) the foreign person holds less than a substantial interest in an Australian urban land trust estate:
 - (A) that is a unit trust that accepts funds from the public on the basis of a prospectus approved by the Corporate Affairs Commission of a State or Territory;
 - (B) that has at least 100 unit holders; and
 - (C) that has less than 10 per cent of its real estate assets in the form of developed residential real estate;
- or, where 2 or more foreign persons hold interests in the Australian urban land trust estate, those foreign persons hold less than an aggregate substantial interest in that trust estate;
- (p) if:
 - (i) the land is non-residential commercial land valued at:
 - (A) for land which is being acquired by a prescribed foreign investor — less than:

- (I) for the calendar year 2005 — \$800 000 000; or
 - (II) for any other calendar year — the amount worked out under regulation 13; and
 - (B) for land the whole or part of which is entered in the Register of the National Estate and the interest in which is being acquired by a foreign person other than a prescribed foreign investor — less than \$5 000 000; and
 - (C) in any other case — less than \$50 000 000; and
- (ii) the land is not:
 - (A) vacant land; or
 - (B) land the whole or part of which comprises an accommodation facility;
- (q) where the acquisition is of an interest in land that is zoned as residential property and the person:
 - (i) is, at the time of acquisition, the holder of a permanent visa (within the meaning of the *Migration Act 1958*); or
 - (ii) is, at the time of acquisition, the holder of a special category visa (within the meaning of that Act); or
 - (iii) if he or she had entered Australia lawfully immediately before the time of acquisition, would have been entitled to the grant, on presentation of a passport, of a special category visa (within the meaning of that Act); or
 - (iv) is an Australian corporation that is a foreign person only because of a direct interest held in it by a person to whom subparagraph (i), (ii) or (iii) applies; or
 - (v) is the trustee of a trust estate, where the trustee is a foreign person only because of a direct interest held in the trust estate by a person to whom subparagraph (i), (ii) or (iii) applies;
- (r) if:
 - (i) the acquisition is of an interest in land on which a dwelling exists that is, or may be, used for residential purposes, other than land that is part of a subdivided building in which hotel services are provided; and
 - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
 - (iii) the conditions (if any) set out in the certificate are satisfied; and

- (iv) the person who intends to dispose of the interest gives the foreign person a copy of the certificate;
- (s) if:
 - (i) the acquisition is of an interest in land that is, or would be, part of a subdivided building:
 - (A) that exists or may be constructed; and
 - (B) in which hotel services are, or would be, provided; and
 - (ii) the Treasurer has certified that the sale of an interest of that kind to foreign persons is not contrary to the national interest; and
 - (iii) the conditions (if any) set out in the certificate are satisfied; and
 - (iv) the person who intends to dispose of the interest gives the foreign person a copy of the certificate;
- (t) where the acquisition is of an interest in land that is zoned as residential property and:
 - (i) the person is the spouse of an Australian citizen; and
 - (ii) the interest is held by the person and his or her spouse as joint tenants;
- (u) that is the responsible entity of a managed investment scheme registered under section 601EB of the *Corporations Act 2001* and the acquisition is primarily for the benefit of scheme members ordinarily resident in Australia.

4 Prescribed corporations — value of assets of foreign corporation

- (1) For paragraph 13 (1) (d) of the Act, the amount of \$50,000,000 is prescribed.
- (2) For paragraph 13 (1) (e) of the Act, the amount of \$50,000,000 is prescribed.

5 Exempt dealings — value of assets

- (1) For subparagraph (b) (i) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (2) For subparagraph (b) (ii) of the definition of *exempt corporation* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.

- (3) For paragraph (a) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.
- (4) For paragraph (b) of the definition of *exempt business* in subsection 13A (4) of the Act, the amount of \$50,000,000 is prescribed.

6 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign investors

For a provision of section 17B of the Act mentioned in the following table, the amount is set out in the table:

Item	Provision	Amount
1	paragraph 17B (1) (b)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
2	paragraph 17B (1) (c)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
3	paragraph 17B (2) (b)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
4	paragraph 17B (2) (c)	<ul style="list-style-type: none"> (a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

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Item	Provision	Amount
5	subparagraph 17B (3) (a) (ii)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
6	subparagraph 17B (3) (b) (ii)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

7 Asset thresholds for exempt foreign investments in prescribed corporations etc — prescribed foreign government investors

For a provision of section 17C of the Act mentioned in the following table, the amount is set out in the table:

Item	Provision	Amount
1	paragraph 17C (1) (a)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13
2	paragraph 17C (1) (b)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

Item	Provision	Amount
3	subsection 17C (2)	(a) For the calendar year 2005 — \$50 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

8 Condition relating to exempt foreign investments in financial sector companies etc

For subsection 17D (3) of the Act, the condition is that the investor is a prescribed foreign investor.

9 Condition relating to prescribed foreign investor

For paragraph 17E (1) (a) of the Act, the condition to be satisfied by an entity is that the entity is:

- (a) a US national; or
- (b) a US enterprise.

10 Condition relating to foreign government investor

For paragraph 17F (c) of the Act, it is a condition that the interest is greater than 15%.

11 Conditions relating to prescribed foreign government investor

- (1) For paragraph 17G (b) of the Act, the conditions are that:
 - (a) the entity mentioned in section 17G of the Act (*entity 1*) is not:
 - (i) a body politic of a foreign country; or
 - (ii) a body politic of part of a foreign country; or
 - (iii) a part of a body politic of a foreign country or part of a foreign country; and
 - (b) either:
 - (i) entity 1 is controlled by another entity (*entity 2*); or
 - (ii) an entity (*entity 2*) holds an interest in entity 1 that satisfies the condition specified in regulation 10 for paragraph 17F (c) of the Act; and
 - (c) entity 2 is:

- (i) a body politic of a relevant foreign country; or
- (ii) a body politic of part of a relevant foreign country; or
- (iii) a part of a body politic of a relevant foreign country or part of a relevant foreign country.

(2) In subregulation (1):

relevant foreign country means the United States of America.

12 Conditions relating to prescribed sensitive sector

- (1) For paragraph 17H (a) of the Act, the condition is that the investor is a prescribed foreign investor.
- (2) For paragraph 17H (b) of the Act, the condition is that the business activity is any of the following:
 - (a) media;
 - (b) telecommunications;
 - (c) transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to or from, Australia);
 - (d) the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces;
 - (e) the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
 - (f) the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems;
 - (g) the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

13 Indexation of amounts

- (1) This regulation explains how to work out an amount for a provision of regulation 3, 6 or 7.
- (2) In this regulation:
 - earlier GDP implicit price deflator value*, for a relevant year, means the GDP implicit price deflator value for the calendar year that ended immediately before the relevant year.
 - existing amount*, for a calendar year, means:
 - (a) if an indexed amount has not been previously worked out under this regulation — the original amount; or

(b) the indexed amount for the year before the relevant year.

GDP implicit price deflator value, for a calendar year, means the GDP implicit price deflator value that was published by the Australian Bureau of Statistics in the publication *Australian System of National Accounts (cat. 5204.0)* (Table 7, Expenditure on GDP, Implicit Price Deflators), for the last financial year that ended before the calendar year.

indexed amount means an amount mentioned in subregulation (1).

latest GDP implicit price deflator value, for a relevant year, means the GDP implicit price deflator value for that year.

original amount means an amount that is replaceable under this regulation by an indexed amount.

relevant year means the calendar year for which an indexed amount is worked out.

- (3) The indexed amount for a relevant year is worked out in accordance with the formula:

$$\frac{\text{existing amount} \times \text{latest GDP implicit price deflator value}}{\text{earlier GDP implicit price deflator value}}$$

- (4) If, apart from this subregulation, an indexed amount that is worked out under this regulation would not be a multiple of \$1 000 000, the indexed amount is rounded to the nearest multiple of \$1 000 000 (rounding up if the indexed amount ends in \$500 000).
- (5) However, if the amount worked out under subregulation (3) (after any rounding under subregulation (4)) is less than the existing amount, the indexed amount for the relevant year is taken to be the existing amount.
- (6) If, at any time, whether before or after the commencement of these Regulations, the Australian Statistician publishes a GDP implicit price deflator value for a financial year in substitution for a GDP implicit price deflator value previously published for the financial year, the publication of the later GDP implicit price deflator value is to be disregarded for this regulation.
- (7) However, if, at any time, whether before or after the commencement of these Regulations, the Australian Statistician changes the reference base for the GDP implicit price deflator value, then, in applying this regulation after the change is made, regard is to be had only to values published in terms of the new reference base.



Foreign Acquisitions and Takeovers (Notices) Regulations

Statutory Rules 1975 No. 226 as amended

made under the

Foreign Acquisitions and Takeovers Act 1975

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1. Citation [see Note 1]

These Regulations may be cited as the Foreign Acquisitions and Takeovers (Notices) Regulations.

2 Commencement [see Note 1]

These Regulations shall come into operation on the date of commencement of the Act.

3 Interpretation

In these Regulations, *the Act* means the *Foreign Acquisitions and Takeovers Act 1975*.

4 Prescribed forms of notice

- (1) The prescribed form of notice under section 25 of the Act is Form 1 in the Schedule.
- (2) The prescribed form of notice under section 26 of the Act is Form 2 in the Schedule.
- (3) The prescribed form of notice under section 26A of the Act is Form 3 in the Schedule.

5 Balance sheet and profit and loss account to be furnished by corporation

Where a corporation furnishes a notice under section 25 of the Act stating that:

- (a) the corporation proposes to enter into an agreement, being an agreement in relation to the affairs of the corporation;
- (b) the corporation proposes to enter into or terminate an arrangement, being an arrangement in relation to an Australian business of the corporation;
- (c) the corporation proposes issue shares; or
- (d) it is proposed to alter a constituent document of the corporation;

the corporation shall annex to the notice a copy of the balance sheet and a copy of the profit and loss account of the corporation for each period in relation to which a profit and loss account of the corporation has been laid before it in general meeting during the preceding four years.

6 Documents relating to agreement or arrangement

Where a person furnishes:

- (a) a notice under section 25 of the Act stating that the person proposes to enter into an agreement, being an agreement of the kind referred to in section 20 of the Act, or to enter into or terminate an arrangement, being an arrangement of the kind referred to in section 21 of the Act; or

- (b) a notice under section 26 or 26A of the Act;

the person shall annex to the notice copies of all documents and other papers in the person's possession or control relating to or evidencing the agreement or arrangement to which the notice relates.

7 Constituent document

Where a corporation furnishes a notice under section 25 of the Act stating that it is proposed to alter a constituent document of the corporation, the corporation shall annex to the notice a copy of that constituent document.

8 Person signing notice

- (1) A notice under section 25, 26 or 26A of the Act furnished by a natural person shall be signed:
 - (a) if the person is not ordinarily resident in Australia — by that person or by his Australian agent; or
 - (b) in any other case — by the person furnishing the notice.
- (2) A notice under section 25, 26 or 26A of the Act furnished by a corporation shall be signed by a person authorized in writing by the corporation to sign the notice for and on behalf of the corporation.