

Airports (Ownership - Interests in Shares) Regulations 1996 No. 341

EXPLANATORY STATEMENT

STATUTORY RULES 1996 No. 341

Issued by the authority of the Minister for Transport & Regional Development

Airports Act 1996

Airports (Ownership - Interests in Shares) Regulations

Section 252 of the Airports Act 1996 (the Act) allows the Governor-General to make regulations prescribing matters that are required or permitted by the Act to be prescribed, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act imposes limitations on the ownership of leased airports by foreign persons and by airlines, and on the cross-ownership of certain airports. The ownership rules of the Act are set out in Part 3 of the Act and the Schedule to the Act.

Part 3 limits foreign ownership of an "airport-operator company" (ie a lessee or management company for a leased airport) to 49% and limits ownership by airlines (and their associates) of such companies to 5%.

Paragraph 9(1)(c) of the Schedule provides that, for purposes of the ownership provisions, an interest of a prescribed kind in a share, being an interest held by such persons as are prescribed, must be disregarded. The proposed regulations effectively provide for exemptions to be obtained from the foreign and airline ownership provisions of the Act by allowing for certain interests in shares, and the holders of those interests, to be prescribed for purposes of paragraph 9(1)(c).

The Airports (Ownership - Interest in Shares) Regulations increase the scope for Australian investment in leased airports by providing for foreign-managed investment funds to obtain exemptions from the foreign-ownership provisions, and for investment funds in general to obtain exemptions from the airline ownership provisions. In both cases an exemption can be obtained only if the Secretary is satisfied that foreign persons hold a beneficial interest in less than 40% of the capital and less than 40% of the income of the fund. In the case of the airline ownership provisions, an exemption can be obtained by a fund which is an associate of an airline and only if the fund cannot control the airline.

If a fund is exempted under the Regulations from the foreign ownership provisions, its interests in the shares of airport-operator companies would not be treated as foreign interests.

The Act precludes a person from holding an interest of more than 5% in an airportoperator company concurrently with an interest of 15% or more in an airline. This is because the holding in the airline would make the person an "associate" of the airline (under Clause 5 of the Schedule) and so the person's interests in an airport-operator company would be counted against the 5% limit on airline holdings in airport-operator companies (under subclause 11 (1) of the Schedule). The Regulations effectively allow for a fund with a holding of 15% or more in an airline to be treated as if it were not an associate of the airline, unless it can control the airline.

If a fund is exempted under the Regulations from the airline ownership provisions then its interests in the shares of airport-operator companies would not be counted as airline interests.

Details of the Regulations appear in the Attachment.

The Regulations commenced on notification in the Gazette.

Attachment

PART 1 - PRELIMINARY

Clause 1 - Citation

Regulation 1 provides for citation of the regulations as the Airports (Ownership - Interests in Shares) Regulations. The regulations will commence on Gazettal.

Clause 2 - Object

Regulation 2 expresses the object of the regulations as to identify interests in shares that are to be disregarded in giving effect to certain of the ownership provisions of the Act.

Clause 3 - Interpretation

Regulation 3 defines terms used in the regulations. In particular, an investment fund is defined as a unit trust (but excluding a discretionary trust), a statutory fund of a life insurance company, within the meaning of the *Life Insurance Act* 1995, a superannuation entity or an exempt public sector superannuation scheme both within the meaning of the *Superannuation Industry (Supervision) Act* 1993. This definition is intended to cover the major forms of managed public investments.

Clause 4 - Who is a holder of a beneficial interest

Regulation 4 explains the circumstances in which a person is taken for purposes of the regulations to hold a beneficial interest in an investment fund.

PART 2 - FOREIGN-OWNERSHIP - INVESTMENT FUNDS

Clause 5 - Purpose

Regulation 5 expresses the object of Part 2 as to prescribe a kind of interest in a share that must be disregarded in ascertaining whether, within the meaning of section 40 of the Act, an unacceptable foreign-ownership situation exists.

Section 40 states that an unacceptable foreign-ownership situation exists in relation to an airport-operator company if there is a group of foreign persons who hold, in total, a particular type of stake in the company of more than 49%. The Schedule defines a particular type of stake held by a person in a company to be the aggregate of the percentage held by the person and persons defined as associates of the person of any of:

- * the total paid-up capital of the company;
- * the voting power in the company;
- * the total rights to distributions of capital or profits on winding-up of the company; and
- * the total rights to distributions of capital or profits, otherwise than on winding-up of the company.

Clause 6 - Prescribed interest in a share - foreign-owned investment funds

Regulation 6 provides that, for paragraph 9(1)(c) of the Schedule to the Act, a person's interest in a share is prescribed if.

- * the interest arose solely as a result of an action by that person in the capacity of trustee or manager of an investment fund (for example, the person purchased the share in its capacity as investment fund manager, and hence the share became part of the property in the investment fund); and
- * that person is prescribed under subregulation 7(1).

Clause 7 - Prescribed interest-holder - foreign-owned investment funds

Regulation 7 empowers the Secretary to declare an investment fund to be a "substantially Australian investment fund" if he or she is reasonably satisfied that a beneficial interest in less than 40% of the capital and less than 40% of the income of the fund is held by persons who are foreign persons, as defined by the Schedule to the Act. The regulation also establishes arrangements for the monitoring by the Secretary of on-going compliance with this requirement.

If a fund is declared, then the trustee and manager of the fund become prescribed persons for purposes of regulation 6.

The combined effect of regulations 6 and 7 is that interests in shares held by the trustee or manager of a "substantially Australian investment fund", and which arise through the trustee or manager acting in that capacity, will be disregarded in applying the 49% limit on foreign interests in airport-operator companies established by the Act. Therefore, even if the manager or trustee of the fund is a foreign person, its interests in airport-companies will not be counted as foreign interests. This would enable, for example, a foreign investment manager to invest in an airport provided most of the benefits of that investment went to Australians.

PART 3 - ASSOCIATE OF AN AIRLINE

Clause 8 - Purpose

Regulation 8 expresses the purpose of Part 3 as to prescribe a kind of interest in a share that must be disregarded in ascertaining whether an unacceptable airline-ownership situation exists within the meaning of section 44 of the Act.

Section 44 states that an unacceptable airline-ownership situation exists in relation to an airport-operator company and in relation to a particular airline if the airline holds a particular type of stake in the company of more than 5%.

Clause 9 - Prescribed interest in a share - investment fund whose trustee or manager is an associate of an airline

Regulation 9 provides that, for paragraph 9(1)(c) of the Schedule to the Act, a person's interest in a share of an airline is disregarded if.

- * that person is an associate of the airline in his, her or its capacity as trustee or manager of an investment fund (for example, the investment fund property includes 15% or more of the shares in an airline); and
- * the interest arose solely as a result of an action by the person in that capacity (for example, the airline share was purchased by the person in its capacity as investment fund manager, and hence the share became part of the property in the investment fund); and
- * the person is prescribed under subregulation 10(1).

Clause 10 - prescribed interest-holder - investment fund whose trustee or manager is an associate of an airline

Regulation 10 empowers the Secretary to declare an investment fund to be a "distanced investment fund" if he or she is reasonably satisfied that:

- * a beneficial interest in less than 40% of the capital and less than 40% of the income of the fund is held by persons who are foreign persons, as defined by the Schedule to the Act; and
- * the airline is not within the control of the trustee or manager.

The regulation also establishes arrangements for the monitoring by the Secretary of on-going compliance with these requirements.

If a fund is declared, then the trustee and manager of the fund become prescribed persons for purposes of Regulation 9.

The combined effect of regulations 9 and 10 is that interests in shares in an airline held by the trustee or manager of a "distanced investment fund", and which arise through the trustee or manager acting in that capacity, will be disregarded in applying the 5% limit on airline interests in airport-operator companies established by the Act. Therefore, even though the trustee or manager may be an associate of the airline, its interests in airport-operator companies will not be counted as airline interests. This would enable, for example, an investment manager to invest in both an airport and an airline provided most of the benefits of that investment went to Australians and neither the investment manager nor the fund's trustee was in a position to control the airline.

PART 4 - REVOCATION OF DECLARATIONS AND REVIEW OF DECISIONS

Clause 11 - Revocation of a declaration

Regulation 11 empowers the Secretary to revoke a declaration, made under either subregulation 7(4) or 10(4), that an investment fund is a substantially Australian investment fund or a distanced Australian investment fund.

The result of such a revocation would be:

- * if the declaration had been made under subregulation 7(4), the foreign ownership rules of the Act would be applied, taking into account as foreign interests any interests in the shares of airport-operator companies held by the fund trustee or manager if that person is a foreign person; and
- * if the declaration had been made under subregulation 10(4), the airline ownership rules of the Act would be applied, taking into account as airline interests any interests in the shares of airport-operator companies held by the fund manager or trustee if that person is an associate of an airline.

The Secretary may revoke a declaration if he or she has reasonable grounds for believing that the conditions which had to be satisfied for the declaration to be made are no longer satisfied, or if the holder of the declaration fails to provide to the Secretary information required by the Regulations to be provided to enable the Secretary to satisfy himself or herself that those conditions are still being met.

Clause 12 - Review of decisions

Regulation 12 provides for review by the Administrative Appeals Tribunal of a decision of the Secretary on whether or not to declare an investment fund to be a substantially Australian investment fund or a distanced investment fund, or to revoke a declaration.

