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# Foreign Acquisitions and Takeovers Amendment Regulations 2004 (No. 2)<sup>1</sup>

Statutory Rules 2004 No.  $\frac{2}{2}$

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I, PHILIP MICHAEL JEFFERY, Governor-General of the  
Commonwealth of Australia, acting with the advice of the  
Federal Executive Council, make the following Regulations  
under the *Foreign Acquisitions and Takeovers Act 1975*.

Dated 4 NOV 2004 2004

PM Jeffery  
Governor-General

By His Excellency's Command

PETER COSTELLO  
Treasurer

**1 Name of Regulations**

These Regulations are the *Foreign Acquisitions and Takeovers Amendment Regulations 2004 (No. 2)*.

**2 Commencement**

These Regulations commence on the commencement of Schedule 5 to the *US Free Trade Agreement Implementation Act 2004*.

**3 Amendment of *Foreign Acquisitions and Takeovers Regulations 1989***

Schedule 1 amends the *Foreign Acquisitions and Takeovers Regulations 1989*.

**Schedule 1 Amendments**

(regulation 3)

**[1] Regulation 2, heading**

*substitute*

**2 Definitions**

**[2] Regulation 2, after definition of *accommodation facility***

*insert*

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

**[3] Regulation 2, after definition of *charitable institution***

*insert*

*entity* includes an individual.

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**[4] Regulation 2, after definition of *spouse****insert**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.

**[5] Regulation 2, definition of *the Act****omit***[6] After regulation 2***insert***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.

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- (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

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- (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.

**[7] Paragraph 3 (p)**

*substitute*

- (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;

**[8] After regulation 5***insert***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:

<b>Item</b>	<b>Provision</b>	<b>Amount</b>
1	paragraph 17B (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
2	paragraph 17B (1) (c)	(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)	(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)	(a) For the calendar year 2005 — \$800 000 000; or (b) For any other calendar year — the amount worked out under regulation 13

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

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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

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**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 relevant 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).

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- (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.

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### Notes

- 1. These Regulations amend Statutory Rules 1989 No. 177, as amended by 1991 No. 302; 1994 No. 295; 1995 No. 416; 1999 No. 199; 2004 No. 49.
- 2. Notified in the *Commonwealth of Australia Gazette* on / 2004.

// November