

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Regulations 2018

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) provides for the regulation of foreign investment in Australia, specifying the circumstances under which foreign investors require the Treasurer's approval to invest in Australia.

Subsection 139(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Sections 51, 52 and 55 of the Act allow the Governor-General to prescribe the thresholds for significant foreign investments in Australian businesses and land.

The purpose of the amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (the principal Regulations) is to implement Australia's obligations with respect to the regulation of foreign investment under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP-11).

The TPP-11 is a plurilateral free trade agreement agreed between the remaining signatories of the *Trans-Pacific Partnership Agreement* (TPP) after the United States withdrew from that agreement. The TPP-11 was signed on 8 March 2018 in Santiago, Chile, by Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam.

The amendments increase the thresholds above which proposed investments into Australia by non-government investors of TPP-11 Parties are subject to review under Australia's foreign investment framework. The thresholds increase from \$261 million to \$1,134 million (indexed) for investments (actions) in non-sensitive businesses and all actions in developed commercial land.

Under Australia's foreign investment framework, significant actions are reviewed against the national interest test on a case-by-case basis. The Treasurer can make orders and decisions on national interest grounds for significant actions that are taken or proposed to be taken over the relevant threshold. These orders and decisions include deciding the Commonwealth does not object to the action, impose conditions on the action, prohibit the action or require the disposal of an interest that has been acquired.

Item 1 in Schedule 1 of the amendments increases the relevant thresholds by adding countries for which the TPP-11 is in force from time to time as a new class in the list of agreement countries in section 5 of the principal Regulations.

Item 2 in Schedule 1 of the amendments provides that the amendments apply generally once the TPP-11 is in force for Australia and apply in relation to a specific country when the TPP-11 is in force for that country. This includes countries that are otherwise listed as an agreement country.

The Government did not consult on the amendments but undertook extensive consultation during the negotiations of the TPP-11. The process for engaging stakeholders in relation to the Agreement was an extension of the Government's efforts to bring the original TPP into force. Stakeholders' views were actively encouraged and considered during consultations undertaken in relation to the original TPP, which commenced in 2008. This consultation process culminated in two parliamentary enquiries.

The Government continued to consult stakeholders, State and Territory Governments, interested members of the public throughout the TPP-11 negotiation process from February 2017.

The Government tabled the text of the TPP-11 and accompanying National Interest Analysis in the Parliament on 26 March 2018. The Joint Standing Committee on Treaties (JSCOT) undertook an inquiry into the Agreement, which included four days of public hearings. JSCOT received 69 public submissions into its inquiry. On 20 August 2018, JSCOT recommended the Government take binding treaty action to ratify the TPP-11.

The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day the TPP-11 enters into force for Australia and apply from that day. The Government will, by notifiable instrument, announce the day the TPP-11 enters into force for Australia.

A Regulation Impact Statement accompanied the National Interest Analysis for the TPP-11.¹

¹ The National Interest Analysis is available at:
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Treaty_being_considered.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Foreign Acquisitions and Takeovers Amendment (Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation) Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative Instrument amends the principal Regulations to implement Australia's obligations with respect to the regulation of foreign investment under the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP-11).

The amendments increase the thresholds above which proposed investments into Australia by non-government investors of TPP-11 Parties are subject to review under Australia's foreign investment framework from \$261 million to \$1,134 million (indexed) for investments (actions) in non-sensitive business and all actions in developed commercial land.

Human rights implications

This Legislative Instrument engages the right to freedom from discrimination.

Article 26 of the *International Covenant on Civil and Political Rights* recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin.

However, the United Nations Human Rights Committee has recognised that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.²

The Legislative Instrument also generally engages the rights protected by the *International Convention on the Elimination of All Forms of Racial Discrimination*. Paragraph 1 of Article 1 of Convention defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'.

² *General Comment No 18: Non-discrimination*, [13].

Under Article 2(1)(a) of the Convention, each State Party ‘undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation’. Under Article 5, States Parties ‘undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law’ in the enjoyment of civil, political, economic, social and cultural rights, including the ‘right to own property alone as well as in association with others’.

The Legislative Instrument engages these human rights as it adjusts certain monetary thresholds based on the citizenship of the investor. These monetary thresholds interact with provisions in the *Foreign Acquisitions and Takeovers Act 1975* to determine whether or not an investment is subject to review under Australia’s foreign investment framework.

The increased thresholds for non-sensitive businesses and all developed commercial land benefit non-government investors of TPP-11 Parties as the increase will reduce how frequently investments are subject to review by the Treasurer.

The underlying principle of Australia’s foreign investment framework is that foreign investment in Australia is welcome where it is in the national interest. The objective of the framework is to provide a predictable and welcoming environment for foreign investors while giving the Treasurer the power to review certain investments to ensure that investment is not contrary to the national interest. There is no less restrictive way of achieving the framework’s objectives. Accordingly, the adjusted thresholds are reasonable, necessary and proportionate.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.