

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

(As read a first time)

FOREIGN TAKEOVERS AMENDMENT BILL 1988

TABLE OF PROVISIONS

Section	
1.	Short title etc.
2.	Commencement
3.	Title
4.	Short title
5.	Additional operation of Act
6.	Interpretation
7.	Insertion of new section: 5A. Ordinarily resident non-citizens
8.	Associates
9.	Australian business
10.	Substantial and controlling interests in corporations
11.	Insertion of new section: 9A. Substantial interests in trust estates
12.	Insertion of new sections: 12A. Interests in Australian urban land 12B. Interests in trust estates 12C. Tracing of substantial interests in corporations and trust estates
13.	Prescribed corporations
14.	Insertion of new sections: 13A. Exempt dealings 13B. Valuation of assets for purposes of section 13A 13C. Australian urban land corporations 13D. Australian urban land trust estates
15.	Heading
16.	Insertion of new section: 21A. Acquisitions of interests in Australian urban land
17.	Interim orders
18.	Revocation of orders

TABLE OF PROVISIONS—*continued*

Section

- 19. Publication of orders
- 20. Effect of notification of transactions
- 21. Compulsory notification of certain section 18 transactions
- 22. Insertion of new section:
 - 26A. Compulsory notification of certain section 21A transactions
- 23. Form of notification
- 24. Offences
- 25. Defence to prosecutions
- 26. Repeal of section 34
- 27. Powers of court to enforce Treasurer's orders
- 28. Treasurer may require information
- 29. Insertion of new section:
 - 36A. False or misleading statements etc.
- 30. Insertion of new section:
 - 38A. Anti-avoidance
- 31. Consequential amendment of other Acts
- 32. Application

SCHEDULE
AMENDMENT OF ACTS

1987-88

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

Presented and read a first time, 9 November 1988

(*Treasurer*)

A BILL

FOR

An Act to amend the *Foreign Takeovers Act 1975*

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

Short title etc.

5 1. (1) This Act may be cited as the *Foreign Takeovers Amendment Act 1988*.

(2) In this Act, "Principal Act" means the *Foreign Takeovers Act 1975*¹.

Commencement

2. This Act commences on a day to be fixed by Proclamation.

10 **Title**

3. The title of the Principal Act is repealed and the following title is substituted:

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

Short title

4. Section 1 of the Principal Act is amended by omitting "*Foreign Takeovers Act 1975*" and substituting "*Foreign Acquisitions and Takeovers Act 1975*".

Additional operation of Act

5. Section 4 of the Principal Act is amended:

- (a) by omitting from paragraph (3) (b) "or" (last occurring);
- (b) by adding at the end of subsection (3) the following paragraphs:
 - “(d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or 10
 - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.”; 15
- (c) by omitting from subparagraph (4) (a) (ii) "or" (last occurring);
- (d) by omitting from subparagraph (4) (a) (iii) "and";
- (e) by adding at the end of paragraph (4) (a) the following subparagraphs:
 - “(iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or 20
 - (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest; and”; 25
- (f) by omitting from subparagraph (5) (a) (ii) "or" (last occurring);
- (g) by omitting from subparagraph (5) (a) (iii) "and";
- (h) by adding at the end of paragraph (5) (a) the following subparagraphs: 30
 - “(iv) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
 - (v) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest; and”; 35
- (j) by adding at the end the following subsection:
 - “(6) Without prejudice to its effect apart from this subsection, this Act also has, by force of this subsection, the effect it would have if references in section 21A to a foreign person were references to: 40
 - (a) a natural person not ordinarily resident in Australia;

- (b) a corporation (other than a foreign corporation) in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest;
- (c) a corporation (other than a foreign corporation) in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;
- (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.”.

Interpretation

6. Section 5 of the Principal Act is amended:

- (a) by omitting “or” (last occurring) from paragraph (b) of the definition of “foreign person” in subsection (1);
- (b) by adding at the end of the definition of “foreign person” in subsection (1) the following paragraphs:

“(d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or

(e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest;”;

- (c) by omitting from subsection (1) the definition of “mineral right” and substituting the following definition:

“‘mineral right’ means:

(a) a right (however described) under a law of the Commonwealth or of a State or Territory to recover minerals, other than a right to recover minerals for the purposes of prospecting or exploring for minerals;

(b) a lease by virtue of which the lessee has a right falling within paragraph (a); or

(c) an interest in a right falling within paragraph (a) or in a lease falling within paragraph (b);”;

- (d) by omitting from subsection (1) the definitions of “non-trading company” and “person”;

- (e) by inserting in subsection (1) the following definitions:

“‘Australian rural land’ means land situated in Australia that is used wholly and exclusively for carrying on a business of primary production;

‘Australian urban land’ means land situated in Australia that is not Australian rural land;

‘Australian urban land corporation’ means a corporation to which section 13C applies;

‘Australian urban land trust estate’ means a trust estate to which section 13D applies; 5

‘interest in Australian urban land’ has the meaning given by section 12A;

‘land’ includes a building or other structure, or a part of a building or other structure; 10

‘lease’ includes a sub-lease;

‘primary production’ has the same meaning as in the *Income Tax Assessment Act 1936*;”;

(f) by inserting after paragraph (3) (a) the following paragraph:

“(aa) a reference to a person proposing to acquire an interest in Australian urban land includes: 15

(i) a reference to a person making an offer to acquire such an interest;

(ii) a reference to a person making or publishing a statement, however expressed, that expressly or impliedly invites a holder of such an interest to offer to dispose of that interest; and 20

(iii) a reference to a person taking part in, or proposing to take part in, negotiations with a view to the acquisition of such an interest;”;

(g) by omitting subsection (7). 25

7. After section 5 of the Principal Act the following section is inserted:

Ordinarily resident non-citizens

“5A. (1) For the purposes of this Act, a natural person who is not an Australian citizen is ordinarily resident in Australia at a particular time if and only if: 30

(a) the person 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, either:

(i) the person is in Australia and the person’s continued presence in Australia is not subject to any limitation as to time imposed by law; or 35

(ii) the person is not in Australia but, immediately before the person’s most recent departure from Australia, the person’s continued presence in Australia was not subject to any limitation as to time imposed by law. 40

“(2) For the purposes of paragraph (1) (b), but without otherwise limiting the generality of that paragraph, a person’s continued presence in

Australia is subject to a limitation as to time imposed by law if the person is a prohibited non-citizen within the meaning of the *Migration Act 1958*.”.

Associates

5 8. Section 6 of the Principal Act is amended by inserting after paragraph (k) the following paragraphs:

“(ka) the trustee of a trust estate in which the person holds a substantial interest;

(kb) where the person is the trustee of a trust estate—a person who holds a substantial interest in the trust estate;”.

10 Australian business

9. Section 7 of the Principal Act is amended:

(a) by omitting paragraph (3) (a) and substituting the following paragraph:

“(a) the Commonwealth, a State or a Territory;”;

15 (b) by omitting from paragraph (3) (b) “Australia” and substituting “the Commonwealth”.

Substantial and controlling interests in corporations

10. Section 9 of the Principal Act is amended by omitting subsection (3).

20 11. After section 9 of the Principal Act the following section is inserted:

Substantial interests in trust estates

“9A. (1) For the purposes of this Act:

25 (a) a person shall be taken to hold a substantial interest in a trust estate if the person, alone or together with an associate or associates, holds a beneficial interest in not less than 15% of the corpus or income of the trust estate; or

30 (b) 2 or more persons shall be taken to hold an aggregate substantial interest in a trust estate if the persons, together with an associate or associates, hold, in the aggregate, beneficial interests in not less than 40% of the corpus or income of the trust estate.

35 “(2) Where, under the terms of a trust, a trustee has a power or discretion as to the distribution of the income or corpus of the trust estate to beneficiaries, each beneficiary shall, for the purposes of subsection (1), be taken to hold a beneficial interest in the maximum percentage of income or corpus of the trust estate that the trustee is empowered to distribute to that beneficiary.”.

12. After section 12 of the Principal Act the following sections are inserted:

Interests in Australian urban land

“12A. (1) In this Act, ‘interest in Australian urban land’ means:

- (a) a legal or equitable interest in Australian urban land, other than an interest under a lease or licence or in a unit in a unit trust estate; 5
- (b) an interest in a share in a company that owns Australian urban land, being a share 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; 10
- (c) an interest as lessee or licensee in a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely, at the time the interest is acquired, to exceed 5 years;
- (d) an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land; 15
- (e) an interest in a share in an Australian urban land corporation;
- (f) an interest in a unit in an Australian urban land trust estate; or
- (g) if the trustee of an Australian urban land trust estate is a corporation—an interest in a share in that corporation. 20

“(2) For the purposes of this Act, an interest is an interest in Australian urban land even if it is the only interest that exists in the land or other thing concerned.

“(3) For the purposes of this Act, a person acquires an interest in Australian urban land even if: 25

- (a) the person acquires the interest jointly with another person or persons;
- (b) the person has previously acquired an interest in Australian urban land; or
- (c) the interest is an increase in the amount of an existing interest of the person in Australian urban land. 30

“(4) For the purposes of this Act, where a person:

- (a) enters into an agreement; or
- (b) acquires an option;

to acquire an interest in Australian urban land, the person shall be taken to have acquired that interest in Australian urban land. 35

“(5) For the purposes of this Act, a person shall be taken not to acquire an interest in Australian urban land if the person acquires the interest:

- (a) solely to hold as security for the purposes of a moneylending agreement; or 40
- (b) by way of enforcement of a security held solely for the purposes of a moneylending agreement.

“(6) For the purposes of this Act, a person shall be taken not to acquire an interest in Australian urban land if the person acquires the interest by will or by devolution by operation of law. 45

“(7) A reference in this Act to the acquisition of an interest in Australian urban land does not include a reference to the acquisition of an interest in Australian urban land from:

- (a) the Commonwealth, a State or a Territory;
- 5 (b) a corporation constituted for a public purpose by a law of the Commonwealth or of a State or Territory; or
- (c) a local governing body.

“(8) Where the regulations provide that this Act, or a specified provision or provisions of this Act, does not or do not apply in relation to an acquisition, of a kind specified in the regulations, of an interest in Australian urban land, this Act, or the provision or provisions, does not or do not so apply.

Interests in trust estates

“12B. (1) For the purposes of this Act, a reference to a person holding an interest in a trust estate is a reference to a person holding a beneficial interest in the corpus or income of the trust estate.

“(2) For the purposes of this Act, where a person:

- (a) has entered into a contract to purchase a beneficial interest in the corpus or income of a trust estate;
- 20 (b) has a right, otherwise than by reason of holding an interest in a trust estate, to have such an interest transferred to the person or to the person's order (whether the right is exercisable presently or in the future) and whether on the fulfilment of a condition or not; or
- 25 (c) has the right to acquire such an interest under an option (whether the right is exercisable presently or in the future) and whether on the fulfilment of a condition or not;

the person shall be taken to hold that interest in the trust estate.

“(3) For the purposes of this Act, a person holds an interest in a trust estate even if the person holds the interest jointly with another person.

30 “(4) For the purposes of this Act, a person shall be taken not to hold an interest in a trust estate if:

- (a) the person holds the interest solely by way of security for the purposes of a moneylending agreement; and
- (b) the ordinary business of the person includes the lending of money.

35 “(5) For the purposes of this Act, a person holds an interest in a trust estate despite:

- (a) its remoteness;
- (b) the manner in which it arose; or
- 40 (c) the fact that the exercise of a right conferred by the interest is, or is capable of being made, subject to restraint or restriction.

Tracing of substantial interests in corporations and trust estates

“12C. Where:

- (a) a person holds a substantial interest, or 2 or more persons hold an aggregate substantial interest, (including a substantial interest held by that person, or an aggregate substantial interest held by those persons, by another application or other applications of this subsection) in a corporation or a trust estate (which corporation or the trustee of which trust estate is in this section called the ‘first level entity’); and 5
- (b) the first level entity: 10
 - (i) is in a position to control all or any of the voting power, or holds interests in all or any of the issued shares, in a corporation (in this section called the ‘second level corporation’); or
 - (ii) holds an interest in a trust estate (in this section called the ‘second level trust estate’); 15

the following provisions have effect for the purposes of this Act:

- (c) where subparagraph (b) (i) applies—the person or those persons together shall be taken to be in a position to control so much of the voting power of the second level corporation as the first level entity is in a position to control or to hold the interests in the issued shares in the second level corporation that the first level entity holds, as the case may be; 20
- (d) where subparagraph (b) (ii) applies—the person or those persons together shall be taken to hold the interest in the second level trust estate that the first level entity holds.”. 25

Prescribed corporations

13. Section 13 of the Principal Act is amended by omitting from paragraphs (1) (d) and (e) “\$3,000,000” and substituting “\$20,000,000 or such other amount as is prescribed”. 30

14. After section 13 of the Principal Act the following sections are inserted:

Exempt dealings

“13A. (1) Sections 18 and 26 do not apply to shares in an exempt corporation. 35

“(2) Section 20 does not apply to the control of an exempt corporation.

“(3) Sections 19 and 21 do not apply to the control of an exempt business.

“(4) For the purposes of this section:

‘exempt corporation’ means a corporation: 40

- (a) that is of a kind referred to in paragraph 13 (1) (a), (b), (c), (g) or (h); and

(b) the value of whose total assets, determined under section 13B, does not exceed:

(i) if more than 50% of the value of those assets is attributable to Australian rural land—\$3,000,000 or such other amount as is prescribed; or

(ii) in any other case—\$5,000,000 or such other amount as is prescribed;

‘exempt business’ means a business the value of whose total assets, determined under section 13B, does not exceed:

(a) if more than 50% of the value of those assets is attributable to Australian rural land—\$3,000,000 or such other amount as is prescribed; or

(b) in any other case—\$5,000,000 or such other amount as is prescribed.

15 **Valuation of assets for purposes of section 13A**

“13B. (1) In determining whether a corporation is an exempt corporation in relation to the application of section 18 or 26, the value of its total assets at a particular time is:

(a) where the corporation is not a holding corporation:

(i) the value of those assets as shown in the last balance-sheet of the corporation audited before that time or, if no balance-sheet was audited before that time, as shown at that time in the accounting records of the corporation; or

(ii) if the value of the issued shares of the corporation determined under subsection (2) or (3) is greater—that greater value; or

(b) where the corporation is a holding corporation:

(i) the aggregate value of the assets of the corporation, and of each of its subsidiaries that is a prescribed corporation carrying on an Australian business, determined, in each case, under subparagraph (a) (i); or

(ii) if the aggregate value of the issued shares of the corporation and each of those subsidiaries determined under subsection (2) or (3) is greater—that greater value.

“(2) For the purposes of subparagraphs (1) (a) (ii) and (b) (ii) in relation to the application of section 18, the value of the issued shares of a corporation, or the aggregate value of the issued shares of a group of corporations, is the value ascertained under the formula:

$$\frac{C \times TS}{NS}$$

where:

C is:

- (a) where the transaction referred to in section 18 is the proposed acquisition of shares—the total consideration for the acquisition; or
- (b) where the transaction is the issue of shares—the total issue price of all the shares to be issued;

TS is the total number of issued shares, immediately before the proposed acquisition or issue, of the corporation or group of corporations, as the case may be; and

NS is the number of shares proposed to be acquired or issued, as the case may be.

“(3) For the purposes of subparagraphs (1) (a) (ii) and (b) (ii) in relation to the application of section 26, the value of the issued shares of a corporation, or the aggregate value of the issued shares of a group of corporations, is the value ascertained under the formula:

$$\frac{C \times TS}{NS}$$

where:

C is the consideration for the shares acquired or proposed to be acquired under the agreement referred to in section 26;

TS is the total number of issued shares, immediately before the acquisition or proposed acquisition, of the corporation or group of corporations, as the case may be; and

NS is the number of shares to which the agreement relates.

“(4) In determining whether a business is an exempt business in relation to the application of section 19, the value of its total assets is the consideration for the acquisition referred to in that section.

“(5) In determining whether a corporation is an exempt corporation in relation to the application of section 20, the value of its total assets at a particular time is:

(a) where the corporation is not a holding corporation—the value of those assets as shown in the last balance-sheet of the corporation audited before that time or, if no balance-sheet was audited before that time, as shown at that time in the accounting records of the corporation; or

(b) where the corporation is a holding corporation—the aggregate value of the assets of the corporation, and of each of its subsidiaries that is a prescribed corporation carrying on an Australian business, determined, in each case, under paragraph (a).

“(6) In determining whether a business is an exempt business in relation to the application of section 21, the value of its total assets at a particular time is the value determined by a person who was at the time of the valuation a suitably qualified valuer acting at arm’s length in relation to the valuation where:

- (a) the valuation was made at the particular time; or
- (b) the valuation was made not more than 12 months before the particular time and the value had not increased significantly between the time of the valuation and the particular time.

5 **Australian urban land corporations**

“13C. (1) For the purposes of this Act, a corporation is an Australian urban land corporation if:

- (a) where the corporation is not a holding corporation—the value of its eligible land assets exceeds 50% of the value of its total assets; or
- (b) where the corporation is a holding corporation—the sum of the values of the eligible land assets of the corporation and of each of its subsidiaries exceeds 50% of the sum of the values of the total assets of the corporation and of each of its subsidiaries.

“(2) Where a reasonable value of the eligible land assets or of the total assets of a corporation is:

- (a) shown in the last audited balance-sheet of the corporation; or
- (b) if not shown in the last audited balance-sheet—shown in the accounting records of the corporation;

the value of those assets as shown shall be taken to be their value for the purposes of subsection (1).

“(3) For the purposes of determining the values referred to in paragraph (1) (b), any asset of a corporation that consists of shares in any subsidiary of the corporation shall be disregarded.

“(4) In this section:

‘eligible land assets’, in relation to a corporation, means so much of the corporation’s total assets as consists of interests in Australian urban land.

Australian urban land trust estates

“13D. (1) For the purposes of this Act, a trust estate is an Australian urban land trust estate if it is a unit trust estate and the value of so much of its total assets as consists of interests in Australian urban land exceeds 50% of the value of its total assets.

“(2) Where a reasonable value of the particular assets or of the total assets of a trust estate is given in a valuation, that value shall be taken to be their value at a particular time for the purposes of subsection (1) if:

- (a) the person giving the valuation was at the time of the valuation a suitably qualified valuer acting at arm’s length in relation to the valuation;
- (b) the valuation was made not more than 12 months before the particular time; and

- (c) the value of those assets had not increased significantly between the time of the valuation and the particular time.”.

Heading

15. The heading to Part II of the Principal Act is amended by omitting “LIKE” and substituting “OTHER”.

5

16. After section 21 of the Principal Act the following section is inserted:

Acquisitions of interests in Australian urban land

“21A. (1) In this section:

‘foreign person’ means:

(a) a foreign corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or

10

(b) a foreign corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

15

“(2) Where the Treasurer is satisfied that:

(a) a foreign person proposes to acquire an interest in Australian urban land; and

(b) the proposed acquisition would be contrary to the national interest;

the Treasurer may make an order prohibiting the proposed acquisition.

20

“(3) Where the Treasurer makes such an order in relation to an interest in Australian urban land, he or she may also make an order in relation to:

(a) a specified foreign person; or

(b) a specified foreign person and specified associates, or the persons included in a specified class of associates, of that person;

25

directing that that person shall not, or none of those persons shall, whether alone or together with any other or others of them, acquire:

(c) any interest in the land or other thing concerned; or

(d) any such interest except to a specified extent.

“(4) Where a foreign person has acquired an interest in Australian urban land and the Treasurer is satisfied that the acquisition is contrary to the national interest, the Treasurer may make an order directing the foreign person to dispose of that interest within a specified period to any person or persons approved in writing by the Treasurer.

30

“(5) Before the end of the period specified in the order or of that period as extended under this subsection, the Treasurer may, by writing signed by the Treasurer, extend or further extend that period or that period as so extended, and in that event the order has effect as if the period as so extended or further extended had been specified in the order.

35

“(6) For the purposes of subsection (4), but without limiting the generality of that subsection:

40

(a) a foreign person shall be taken to have acquired an interest in Australian urban land if the person becomes, with or without the knowledge of the person, a beneficiary in a trust estate (other than a deceased estate) that consists of or includes an interest in Australian urban land; and

(b) where paragraph (a) applies and the trust estate is a discretionary trust estate—a reference to the disposal of the interest of the foreign person is a reference to the disposal of such assignable benefits in relation to that trust estate as may ultimately vest in that foreign person.

“(7) The Treasurer shall not refuse to approve a person for the purposes of subsection (4) unless the Treasurer is satisfied that the person is a foreign person and that it would be contrary to the national interest for that person to acquire the interest concerned.”.

Interim orders

17. Section 22 of the Principal Act is amended by omitting from subsection (1) “or 21 (2)” and substituting “, 21 (2) or 21A (2)”.

Revocation of orders

18. Section 23 of the Principal Act is amended by inserting “, 21A” after “21”.

Publication of orders

19. Section 24 of the Principal Act is amended by omitting from paragraph (b) “or 21 (3)” and substituting “, 21 (3) or 21A (3) or (4)”.

Effect of notification of transactions

20. Section 25 of the Principal Act is amended:

(a) by omitting from paragraph (1) (a) “or assets” and substituting “, assets or interests”;

(b) by omitting subsections (2) and (3) and substituting the following subsections:

“(1A) Where the Treasurer is empowered to make an order under subsection 18 (2), 19 (2), 20 (2), 21 (2) or 21A (2) in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, the Treasurer may, instead of making such an order, decide that the Commonwealth Government has no objection to the proposal specified in the notice, provided that the person or corporation complies with conditions that the Treasurer, when making the decision, considers necessary in order that the proposal, if carried out, will not be contrary to the national interest.

“(1B) Where the Treasurer makes a decision under subsection (1A), the person or corporation shall be given advice in writing of the decision, being advice that includes a statement of the conditions

to be complied with, before the end of 10 days after the day on which the decision is made.

“(1C) Where:

- (a) the person or corporation is given advice in writing of the decision within the period of 10 days; and 5
 - (b) the person or corporation carries out the proposal;
- the following provisions have effect:
- (c) if the person or corporation does not comply with the conditions—the person or corporation is guilty of an offence punishable, on conviction, by: 10
 - (i) in the case of a natural person—a fine not exceeding \$50,000 or imprisonment for a period not exceeding 2 years, or both; or
 - (ii) in the case of a corporation—a fine not exceeding \$250,000; 15
 - (d) the Treasurer may only make an order under subsection 18 (4), 19 (4), 20 (3), 21 (3) or 21A (4) in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice if:
 - (i) the person or corporation is convicted of an offence against paragraph (c) of this subsection in relation to the conditions; or 20
 - (ii) an order is made under section 19B of the *Crimes Act 1914* in relation to the person or corporation in respect of an offence against paragraph (c) of this subsection in relation to the conditions. 25
- “(2) If 30 days pass after the day on which the Treasurer receives the notice and by the end of that period:
- (a) the Treasurer has not:
 - (i) made a decision under subsection (1A) in relation to the proposal specified in the notice, being a decision of which advice is given in writing to the person or corporation before the end of 10 days after the day on which the decision is made; or 30
 - (ii) made an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice, being an order published in the *Gazette* before the end of 10 days after the day on which the order is made; and 35
 - (b) the person or corporation has not carried out the proposal; 40
- the Treasurer is not empowered:
- (c) to make an order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration; or

(d) to make a decision under subsection (1A) in relation to the proposal.

“(3) If:

(a) before the end of 30 days after the day on which the Treasurer receives the notice, the Treasurer makes an order under section 22 in relation to the acquisition, agreement, arrangement, issue or alteration specified in the notice;

(b) the order is published in the *Gazette* before the end of 10 days after the day on which the order is made; and

(c) 90 days pass after the day on which the order is published and by the end of that period:

(i) the Treasurer has not:

(A) made a decision under subsection (1A) in relation to the proposal specified in the notice, being a decision of which advice is given in writing to the person or corporation before the end of 10 days after the day on which the decision is made; or

(B) made any other order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration, being an order published in the *Gazette* before the end of 10 days after the day on which the order is made; and

(ii) the person or corporation has not carried out the proposal;

the Treasurer is not empowered:

(d) to make a further order under this Part in relation to the acquisition, agreement, arrangement, issue or alteration; or

(e) to make a decision under subsection (1A) in relation to the proposal.”;

(c) by inserting after subsection (4) the following subsection:

“(4A) For the purposes of this section but without limiting its generality, a person or corporation may be given advice in writing of a decision of the Treasurer in relation to a proposal if that advice in writing is given to the person or corporation at an address specified, in the notice containing the proposal, as the address for service of notices in relation to the proposal.”;

(d) by adding at the end of subsection (5) “or 26A”.

Compulsory notification of certain section 18 transactions

21. Section 26 of the Principal Act is amended:

(a) by omitting from paragraph (1) (b) “or” (last occurring);

(b) by adding at the end of subsection (1) the following paragraphs:

- “; (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or
- (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.”; 5
- (c) by omitting from paragraphs (2) (a) and (b) “(other than a non-trading company)”;
- (d) by omitting subparagraph (2) (b) (ii) and the succeeding words of subsection (2) and substituting the following: 10
 - “(ii) the date on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25 (1A)); 15
- whichever first occurs;
- the person is guilty of an offence and is punishable, on conviction, by:
 - (c) if the person is a natural person—a fine not exceeding \$50,000 or imprisonment for a period not exceeding 2 years, or both; or 20
 - (d) if the person is a corporation—a fine not exceeding \$250,000.”;
- (e) by inserting after subsection (5) the following subsection: 25
 - “(5A) Without affecting the operation of section 25, this section does not apply in relation to the acquisition of a substantial shareholding in an Australian corporation if that acquisition is also an acquisition of an interest in Australian urban land.”.
- 22. After section 26 of the Principal Act the following section is inserted: 30

Compulsory notification of certain section 21A transactions

- “26A. (1) In this section, ‘person to whom this section applies’ means:
 - (a) a natural person not ordinarily resident in Australia;
 - (b) a corporation in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; 35
 - (c) a corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia or a foreign corporation hold an aggregate substantial interest;
 - (d) the trustee of a trust estate in which a natural person not ordinarily resident in Australia or a foreign corporation holds a substantial interest; or 40
 - (e) the trustee of a trust estate in which 2 or more persons, each of whom is either a natural person not ordinarily resident in Australia or a foreign corporation, hold an aggregate substantial interest.

“(2) Where a person to whom this section applies:

- (a) enters into an agreement by virtue of which he or she acquires an interest in Australian urban land and did not, before entering into the agreement, furnish to the Treasurer a notice stating his or her intention to enter into that agreement; or
- (b) having furnished a notice to the Treasurer stating his or her intention to enter into an agreement by virtue of which he or she is to acquire an interest in Australian urban land, enters into that agreement before:
 - (i) the end of 40 days after the day on which the notice was received by the Treasurer; or
 - (ii) the day on which advice is given that the Commonwealth Government does not object to the person entering into that agreement (whether or not the advice is subject to conditions imposed under subsection 25 (1A));

whichever first occurs;

the person is guilty of an offence and is punishable, on conviction, by:

- (c) if the person is a natural person—a fine not exceeding \$50,000 or imprisonment for a period not exceeding 2 years, or both; or
- (d) if the person is a corporation—a fine not exceeding \$250,000.

“(3) Where:

- (a) a person enters into an agreement by virtue of which he or she acquires an interest in Australian urban land; and
- (b) the provisions of the agreement that relate to the acquisition of the interest do not become binding until the fulfilment of a condition or conditions set out in the agreement;

the person shall not be taken, for the purposes of subsection (2), to have entered into the agreement until the time when those provisions become binding.

“(4) Without affecting the operation of section 25, this section does not apply to an acquisition of an interest in Australian urban land if:

- (a) that interest is an interest in a share in a corporation;
- (b) the acquisition occurs because of a shareholder subscribing for shares in the corporation;
- (c) the shares were subscribed for in pursuance of a resolution by the corporation or the directors of the corporation agreeing to make available a number of shares specified in, or ascertained in accordance with, the resolution for allotment to persons who were registered as the holders of shares in the corporation on a day specified in the resolution; and
- (d) the proportion of the total shares made available for allotment represented by the shares for which the shareholder so subscribed is as near as practicable to the proportion of the issued shares in the

corporation, immediately before the day specified in the resolution, that were held by the shareholder immediately before that day.

“(5) For the purposes of subsection (4), it is immaterial that the shares in the corporation comprise 2 or more classes of shares to which different rights are attached.”.

5

Form of notification

23. Section 27 of the Principal Act is amended by omitting “or 26” and substituting “, 26 or 26A”.

Offences

24. Section 30 of the Principal Act is amended by omitting subsection (4) and substituting the following subsection: 10

“(4) A person who is convicted of an offence against this section is punishable by:

- (a) if the person is a natural person—a fine not exceeding \$50,000 or imprisonment for a period not exceeding 2 years, or both; or 15
- (b) if the person is a corporation—a fine not exceeding \$250,000.”.

Defence to prosecutions

25. Section 32 of the Principal Act is amended by omitting from subsection (2) “or 21” and substituting “, 21 or 21A”.

Repeal of section 34

20

26. Section 34 of the Principal Act is repealed.

Powers of court to enforce Treasurer’s orders

27. Section 35 of the Principal Act is amended:

- (a) by omitting from subsection (1) “having jurisdiction for the purpose”;
- (b) by inserting after subsection (4) the following subsection: 25

“(4A) The orders that may be made under subsection (1) in relation to the acquisition of an interest in Australian urban land include, but are not limited to:

- (a) an order restraining the exercise of any rights attached to any interest held by the offender in the land or other thing concerned; 30
- (b) an order prohibiting or deferring the payment of any sums due to the offender in respect of any such interest held by the offender;
- (c) an order directing the disposal of any such interest held by the offender; and 35
- (d) an order that any exercise of rights attached to any such interest held by the offender be disregarded.”;
- (c) by omitting from subsection (5) “and (4)” and substituting “, (4) and (4A)”;
- (d) by omitting subsections (8) and (9). 40

Treasurer may require information

28. Section 36 of the Principal Act is amended by omitting subsection (2) and substituting the following subsection:

“(2) A person shall not refuse or fail to comply with a notice under this section to the extent that the person is capable of complying with it.

Penalty:

- (a) in the case of a natural person—\$2,000 or imprisonment for 12 months, or both; or
- (b) in the case of a corporation—\$10,000.”.

29. After section 36 of the Principal Act the following section is inserted:

False or misleading statements etc.

“36A. A person shall not knowingly or recklessly, in connection with the operation of this Act:

- (a) make a statement, either orally or in writing, to the Treasurer or to an officer of the Department that is false or misleading in a material particular;
- (b) omit from a statement made, either orally or in writing, to the Treasurer or to an officer of the Department any matter or thing without which the statement is misleading in a material particular; or
- (c) give a document to the Treasurer or to an officer of the Department that contains information that is false or misleading in a material particular.

Penalty:

- (d) in the case of a natural person—\$10,000 or imprisonment for 12 months, or both; or
- (e) in the case of a corporation—\$50,000.”.

30. After section 38 of the Principal Act the following section is inserted:

Anti-avoidance

“38A. (1) In this section, ‘scheme’ means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and 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.

“(2) Where:

- (a) a person or persons enter into, commence to carry out or carry out a scheme (other than a scheme entered into before the commencement of this section);

- (b) it would be concluded that the person, or any of the persons, who entered into, commenced to carry out or carried out the scheme 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 any person or persons (whether or not a person or persons who entered into, commenced to carry out or carried out the scheme or any part of the scheme); and 5

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

the Treasurer may make any order under this Act that the Treasurer would have been able to make if the scheme or the part of the scheme had not achieved that purpose. 10

“(3) Subsection (2) does not authorise the making of an order prohibiting a person from doing any thing that has already been done by the person before the order is made.”. 15

Consequential amendment of other Acts

31. The Acts specified in the Schedule are amended as set out in the Schedule.

Application

32. (1) Subject to subsection (2), the amendments made by this Act do not apply in relation to acquisitions of any thing occurring before the commencement of this Act. 20

(2) In addition to its application apart from this subsection, subsection 21A (4) of the amended Act applies in relation to acquisitions, after 30 October 1987 and before the commencement of this Act, of what would be interests in Australian urban land by foreign persons if: 25

- (a) section 5A of the amended Act were omitted; and
(b) paragraph 12A (1) (c) of the amended Act did not apply to interests as licensee.

(3) In this section, “amended Act” means the Principal Act as amended by this Act. 30

SCHEDULE

Section 31

AMENDMENT OF ACTS

Administrative Decisions (Judicial Review) Act 1977

Paragraph (h) of Schedule 1:

Omit "*Foreign Takeovers Act 1975*", substitute "*Foreign Acquisitions and Takeovers Act 1975*".

Management and Investment Companies Act 1983

Paragraph 21 (2) (b):

Omit "*Foreign Takeovers Act 1975*", substitute "*Foreign Acquisitions and Takeovers Act 1975*".

NOTE

1. No. 92, 1975, as amended. For previous amendments, see No. 93, 1976; No. 19, 1979; and No. 74, 1981.

