



Overseas Investment (Australia) Amendment Regulations 2013

Jerry Mateparae, Governor-General

Order in Council

At Wellington this 4th day of February 2013

Present:

The Right Hon John Key presiding in Council

Pursuant to section 61(1)(i) of the Overseas Investment Act 2005, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council and on the recommendation of the Minister of Finance given after having regard to the purpose of that Act, makes the following regulations.

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Schedule 3

New Schedule 5 inserted in principal regulations

Regulations

- 1 Title**
These regulations are the Overseas Investment (Australia) Amendment Regulations 2013.
 - 2 Commencement**
These regulations come into force on 1 March 2013.
 - 3 Principal regulations**
These regulations amend the Overseas Investment Regulations 2005 (the **principal regulations**).
 - 4 New regulation 36A and cross-heading inserted**
After regulation 36, insert:
“Exemptions for Australian investors from requirement for consent in respect of certain overseas investments in significant business assets

“36A Exemptions in Schedule 5 apply
The exemptions in Schedule 5 apply to certain overseas investment transactions entered into on or after 1 March 2013.”
 - 5 New Schedule 5 inserted**
After Schedule 4, insert the Schedule 5 set out in the Schedule of these regulations.
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Schedule

r 5

**New Schedule 5 inserted in principal
regulations****Schedule 5**

r 36A

**Exemptions for Australian investors from
requirement for consent in respect of
certain overseas investments in significant
business assets****1 Overview of schedule**

- (1) This schedule implements certain obligations in the Protocol on Investment to the New Zealand–Australia Closer Economic Relations Trade Agreement signed at Wellington on 16 February 2011 in respect of certain investments in New Zealand significant business assets by Australian investors.
- (2) This clause is intended only as a guide to the general scheme and effect of this schedule.

2 Interpretation of schedule

In this schedule, unless the context otherwise requires,—

Australia does not include its external territories

Australian entity means an enterprise located in Australia that is constituted or organised under Australian law

Australian Government includes—

- (a) the Crown in right of Australia; and
- (b) an Australian State or territory; and
- (c) Australian regional or local government

Australian Government investor has the meaning set out in clause 8

Australian individual means an individual who is, under Australian law,—

- (a) an Australian citizen; or
- (b) a permanent resident of Australia

Australian investor means an Australian non-Government investor or an Australian Government investor

Australian non-Government investor has the meaning set out in clause 5

Schedule 5—*continued*

branch means an enterprise located in Australia that is constituted or organised under the law of any country other than Australia

enterprise means any of the following, whether acting for profit or not:

- (a) a body corporate:
- (b) a trust (including a unit trust):
- (c) a partnership:
- (d) a sole proprietorship:
- (e) a joint venture:
- (f) any other unincorporated body of persons

foreign Government investor means 1 or more of the following:

- (a) the Government, or any part of the Government (including regional or local government), of a country, or a part of a country, other than Australia or New Zealand:
- (b) an enterprise in relation to which an investor referred to in paragraph (a) has a 25% or more ownership or control interest

GDP implicit price deflator index value has the meaning set out in clause 9

March 2012 value has the meaning set out in clause 10

specified investor has the meaning set out in clause 5(2)

threshold for Australian Government investments has the meaning set out in clause 7

threshold for Australian non-Government investments has the meaning set out in clause 4.

Australian non-Government investments in
significant business assets

3 Consent not required for certain Australian non-Government investments

- (1) An overseas investment in significant business assets by an Australian non-Government investor is exempt from the requirement in section 10(1)(b) of the Act for consent if the following conditions are met:

Schedule 5—*continued*

- (a) the transaction would not be an overseas investment in significant business assets under the Act if the references in section 13(1) of the Act to \$100 million were references to the threshold for Australian non-Government investments; and
 - (b) as a result of the transaction, no overseas person or associate of an overseas person (either alone or together with its associates) acquires rights or interests in securities, or establishes a business, or acquires property, as referred to in section 13(1)(a) to (c) of the Act, other than an Australian non-Government investor.
- (2) For the purposes of subclause (1)(b), a person (**P**) does not acquire rights or interests in securities, or establish a business, or acquire property, as referred to in section 13(1)(a) to (c) of the Act, only because the Australian non-Government investor (**S**) is a subsidiary of P.
- (3) However, subclause (2) does not apply if P is an Australian Government investor, or a foreign Government investor, with a 25% or more ownership or control interest in S.

4 Threshold for Australian non-Government investments

- (1) The threshold for Australian non-Government investments is—
- (a) \$477 million until the close of 31 December 2013;
 - (b) in each subsequent year beginning on 1 January, the greater of—
 - (i) a new threshold calculated in accordance with subclause (2); and
 - (ii) the previous year's threshold.
- (2) The new threshold for the purposes of subclause (1)(b)(i) must be calculated using the following formula (and rounded to the nearest \$1 million):

$$\frac{\$477 \text{ million} \times \text{GDP implicit price deflator index value}}{\text{March 2012 value}}$$

Schedule 5—*continued***5 Meaning of Australian non-Government investor**

- (1) In this schedule, **Australian non-Government investor** means an investor that acquires rights or interests in securities, or establishes a business, or acquires property, as referred to in section 13(1)(a) to (c) of the Act, as a result of an overseas investment and that—
- (a) is—
 - (i) an Australian individual; or
 - (ii) an Australian entity or branch—
 - (A) that carries on substantive business operations in Australia; or
 - (B) in relation to which 1 or more specified investors, directly or indirectly, have a more than 75% ownership or control interest; and
 - (b) is not an Australian Government investor or a foreign Government investor.
- (2) In this clause, **specified investor** means 1 or more of the following:
- (a) 1 or more Australian individuals;
 - (b) 1 or more individuals who are New Zealand citizens or who are ordinarily resident in New Zealand.
- (3) In this clause, a person (A) has a more than 75% ownership or control interest in another person (B) if A has—
- (a) a beneficial entitlement to, or a beneficial interest in, more than 75% of B's securities; or
 - (b) the power to control the composition of more than 75% of the governing body of B; or
 - (c) the right to exercise or control the exercise of more than 75% of the voting power at a meeting of B.
- (4) Despite subclause (1), a person (C) is not an Australian non-Government investor if C, in relation to the overseas investment,—
- (a) is an agent, trustee, or representative of an overseas person that is not an Australian non-Government investor (D); or
 - (b) acts in any way on behalf of D; or

Schedule 5—*continued*

- (c) is subject to D's direction, control, or influence.

Australian Government investments in
significant business assets**6 Consent not required for certain Australian Government investments**

- (1) An overseas investment in significant business assets by an Australian Government investor is exempt from the requirement in section 10(1)(b) of the Act for consent if the following conditions are met:
- (a) the transaction would not be an overseas investment in significant business assets under the Act if the references in section 13(1) of the Act to \$100 million were references to the threshold for Australian Government investments; and
 - (b) as a result of the transaction, no overseas person or associate of an overseas person (either alone or together with its associates) acquires rights or interests in securities, or establishes a business, or acquires property, as referred to in section 13(1)(a) to (c) of the Act, other than an Australian investor.
- (2) For the purposes of subclause (1)(b), a person (P) does not acquire rights or interests in securities, or establish a business, or acquire property, as referred to in section 13(1)(a) to (c) of the Act, only because the Australian Government investor (S) is a subsidiary of P.
- (3) However, subclause (2) does not apply if P is a foreign Government investor with a 25% or more ownership or control interest in S.

7 Threshold for Australian Government investments

- (1) The threshold for Australian Government investments is—
- (a) \$100 million until the close of 31 December 2013;
 - (b) in each subsequent year beginning on 1 January, the greater of—
 - (i) a new threshold calculated in accordance with subclause (2); and

Schedule 5—*continued*

- (ii) the previous year's threshold.
- (2) The new amount for the purposes of subclause (1)(b)(i) must be calculated using the following formula (and rounded to the nearest \$1 million):

$$\frac{\$100 \text{ million} \times \text{GDP implicit price deflator index value}}{\text{March 2012 value}}$$

8 Meaning of Australian Government investor

- (1) In this schedule, **Australian Government investor** means an investor that acquires rights or interests in securities, or establishes a business, or acquires property, as referred to in section 13(1)(a) to (c) of the Act, as a result of an overseas investment and that—
- (a) is—
- (i) the Australian Government; or
 - (ii) an Australian entity or branch in relation to which the Australian Government has a 25% or more ownership or control interest; and
- (b) is not a foreign Government investor.
- (2) Despite subclause (1), a person (C) is not an Australian Government investor if C, in relation to the overseas investment,—
- (a) is an agent, trustee, or representative of an overseas person that is not an Australian Government investor (D); or
 - (b) acts in any way on behalf of D; or
 - (c) is subject to D's direction, control, or influence.

Miscellaneous provisions about indexing

9 Meaning of GDP implicit price deflator index value

The GDP implicit price deflator index value to be used in the calculations in clauses 4 and 7 is the first value published by Statistics New Zealand in the implicit price deflator table in the quarterly gross domestic product release for the most recent year ended on 31 March.

Schedule 5—*continued***10 Meaning of March 2012 value**

For the purposes of clauses 4(2) and 7(2), **March 2012 value** means the latest version of the GDP implicit price deflator index value for the year ended on 31 March 2012 as published by Statistics New Zealand.

11 Publication of thresholds

The regulator must, each year,—

- (a) publish the threshold for Australian non-Government investments and the threshold for Australian Government investments for that year on an Internet site maintained by or on behalf of the regulator; and
- (b) notify those thresholds in the *Gazette*.

Martin Bell,
for Clerk of the Executive Council.

Explanatory note

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations come into force on 1 March 2013. They amend the Overseas Investment Regulations 2005.

The purpose of the regulations is to implement an obligation under the Protocol on Investment to the New Zealand–Australia Closer Economic Relations Trade Agreement signed at Wellington on 16 February 2011. The text of that Protocol can be found at www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php.

One intention of the Protocol is to treat certain Australian investors in New Zealand significant business assets as if they were New Zealand investors, subject to certain conditions. The threshold for overseas investments in significant business assets under the Overseas Investment Act 2005 is \$100 million and, if the investment is more than that, consent is required under that Act. Under these regulations,

certain Australian investors will be exempt from the requirement to obtain consent, subject to conditions that relate to the amount of the investment and the type of investor, as follows:

- initially \$477 million if the investor is an Australian non-Government investor:
- initially \$100 million if the investor is an Australian Government investor.

The new thresholds are to be adjusted to a new amount each year, if an inflation-based formula produces an amount greater than the previous year's amount. The amounts of the new thresholds are to be published by the regulator on the Internet and in the *Gazette*.

In general terms, an investor qualifies as an Australian non-Government investor if the investor is an Australian individual or if the investor is located in Australia and carries on substantive business operations in Australia or is more than 75% owned or controlled by Australian individuals or New Zealanders. The investor must not be owned or controlled by the Australian Government or a foreign Government.

In general terms, an investor qualifies as an Australian Government investor if the investor is either the Australian Government or an entity or a branch located in Australia and 25% or more owned or controlled by the Australian Government. The investor must not be a foreign Government or 25% or more owned or controlled by a foreign Government.

In general terms, investments do not qualify for the exemption if, as a result of the transaction, an associate of the Australian investor that is not itself an Australian investor will acquire a 25% or more ownership or control interest of a type governed by the Act. However, different rules apply where the Australian investor is a subsidiary of an overseas person. In general terms, the existing rule under the Act is that an overseas parent triggers the consent provisions of the Act, but an overseas non-Government parent does not automatically disqualify an Australian investor from the benefit of these regulations.

2013/4

**Overseas Investment (Australia)
Amendment Regulations 2013**

Issued under the authority of the Acts and Regulations Publication Act 1989.

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These regulations are administered by the Treasury.
