

1985

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

(Presented pursuant to leave granted and read 1^o, 20 March 1985)

A BILL

FOR

An Act to establish a register of foreign corporations owning or controlling Australian property

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

Short title

1. This Act may be cited as the *Foreign Ownership and Control Registration Act 1985*.

Commencement

2. This Act shall come into operation on a date to be fixed by Proclamation.

Interpretation

3. (1) In this Act, unless the contrary intention appears—

“Australia” includes the External Territories;

“Australian corporation” means a corporation incorporated or registered in a participating State or a participating Territory under the provisions of the Companies Act, other than such a corporation that is a foreign corporation as defined in this sub-section;

“Commission” means the National Companies and Securities Commission established by the *National Companies and Securities Commission Act 1979*;

“Companies Act” means the *Companies Act 1981* of the Commonwealth or a corresponding law of a State or Territory;

“debenture” includes debenture stock, bonds, notes and any other document evidencing or acknowledging indebtedness of a corporation in respect of money that is or may be deposited with or lent to the corporation, whether constituting a charge on property of the corporation or not, but does not include a prescribed document or a document included in a prescribed class of documents;

“foreign corporation” means—

- (a) any body (including a society or association) incorporated outside of Australia, including a recognised foreign corporation;
- (b) an unincorporated society, association or other body formed outside Australia that—
 - (i) under the law of its place of formation, may sue or be sued, or may hold property in the name of the secretary or other officer of the society, association or body duly appointed for that purpose; and
 - (ii) does not have its head office or principal place of business in Australia;
- (c) a corporation in which a natural person not ordinarily resident in Australia holds a controlling interest;
- (d) a corporation in which 2 or more persons, each of whom is a natural person not ordinarily resident in Australia, hold an aggregate controlling interest; or
- (e) a corporation in which—
 - (i) a body referred to in paragraph (a);
 - (ii) a society, association or other body referred to in paragraph (b); or
 - (iii) a corporation referred to in paragraph (c) or (d), holds a controlling interest;

“investment contract” means any contract, scheme or arrangement that, in substance and irrespective of the form of the contract, scheme or arrangement, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in or right in respect of property in Australia that under, or in accordance with, the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in or right in respect of property, whether in Australia or elsewhere, acquired in or under like circumstances;

“last accounting date”, in relation to a corporation, means the date of the expiration of the most recent period in relation to which a balance-sheet of the corporation has been laid before it in general meeting, including a balance-sheet so laid before it before the commencement of this Act;

“mineral right” means—

- (a) an authority, licence, permit or right under a law of the Commonwealth or of a State or Territory to prospect or explore for, or to recover, minerals;
- (b) a lease under such a law by virtue of which the lessee is entitled to prospect or explore for, or to recover, minerals; or
- (c) an interest in such an authority, licence, permit, right, or lease;

“participating State” means a State that is a party to the Agreement;

“participating Territory” means—

- (a) the Northern Territory; and
- (b) an external Territory to which the Agreement applies in pursuance of clause 50 of the Agreement;

5 “prescribed interest” means any right to participate or interest, whether enforceable or not and whether actual, prospective or contingent—

- (a) in any profits, assets or realization of any financial or business undertaking or scheme in Australia;
- (b) in any common enterprise, in Australia, in which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or
- (c) in any investment contract,

10 whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include—

- (d) any interest in, or arising out of, a policy of life insurance; or
- (e) a right or interest, or a right or interest included in a class or kind of rights or interests, declared by the regulations to be an exempt right or interest, or a class or kind of exempt rights or interests, for the purposes of this definition;

20 “recognised foreign corporation” means a foreign corporation formed outside Australia that is registered as a foreign company in a participating State or participating Territory under the provisions of the law of that State or Territory that correspond with Division 5 of Part XIII of the *Companies Act 1981*;

25 “securities” means—

- (a) debentures, stocks or bonds issued or proposed to be issued by a government;
- (b) debentures (including debentures that do not constitute a charge on assets), stocks, shares, bonds or notes issued or proposed to be issued by a body corporate or unincorporate;
- (c) any right or option in respect of any such debentures, stocks, shares, bonds or notes; or
- (b) a prescribed interest,

35 but shall not include a prescribed document or a document included in a prescribed class of documents;

“share” means share in the share capital of a body corporate, and includes stock except where a distinction between stock and shares is expressed or implied;

40 “the Agreement” has the same meaning as it has in the *Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980*.

(2) For the purposes of this Act, the question whether a corporation is a holding corporation of an Australian corporation shall be determined in the same manner as the question whether the company within the meaning of the

Companies Act 1981 is the holding company of another such company is required to be determined under that Act for the purposes of that Act.

(3) For the purposes of this Act, the question—

(a) whether a person holds a controlling interest in a corporation; or

(b) whether 2 or more persons hold an aggregate controlling interest in a corporation,

shall be determined in the same manner as that question is required to be determined under the *Foreign Takeovers Act 1975* for the purposes of that Act.

Prescribed corporations

4. (1) A reference in this Act to a prescribed corporation is a reference to—

(a) a foreign corporation that, on its last accounting date, held assets the sum of the values of which exceeded \$3,000,000 or, if another amount is prescribed for the purpose of this paragraph, the amount so prescribed, being assets consisting of all or any of the following:

(i) land situated in Australia (including legal and equitable interests in such land);

(ii) mineral rights;

(iii) shares in a corporation incorporated in Australia;

(iv) securities issued in Australia; or

(v) assets of a prescribed kind or included in a prescribed class of assets;

(b) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation or Australian corporations, where the sum of the values, on that date, of the assets of the Australian corporation or Australian corporations exceeded \$3,000,000 or, if another amount is prescribed for the purpose of paragraph (a), the amount so prescribed;

(c) a foreign corporation that, on its last accounting date, held any single asset (including a single interest in shares or securities) within Australia the value of which exceeded \$1,000,000 or, if another amount is prescribed for the purpose of this paragraph, the amount so prescribed;

(d) a foreign corporation that was, on its last accounting date, a holding corporation of an Australian corporation, or of Australian corporations, which held any single asset (including a single interest in shares or securities) the value of which exceeded \$1,000,000 or, if another amount is prescribed for the purpose of paragraph (c), the amount so prescribed; or

(e) a corporation that was, on its last accounting date, a holding corporation of a foreign corporation referred to in paragraph (a), (b), (c) or (d).

(2) For the purposes of sub-section (1), the assets of a corporation shall be deemed not to include any shares in a subsidiary of that corporation.

Balance-sheet: recognised foreign corporations

5 5. Where a prescribed corporation that is a foreign corporation registered under Division 5 of Part XIII of the Companies Act lodges a copy of its balance-sheet with the Commission under section 516 of the Companies Act, the corporation shall, within 7 days after doing so, cause a copy of that balance-sheet to be lodged with the Treasurer.

Balance-sheet: other foreign corporations

10 6. (1) A prescribed corporation, other than a foreign corporation to which section 5 applies, shall, at least once in every calendar year and at intervals of not more than 15 months, lodge with the Treasurer a copy of its balance-sheet made up to the end of its last financial year, in such form and containing such particulars and including copies of such documents as the corporation is
15 required to prepare by the law for the time being applicable to that corporation in the place of its incorporation or formation, together with a statement in writing in the prescribed form verifying that the copies are true copies of the documents so required.

20 (2) The Treasurer may, whether before or after the expiration of the period within which a prescribed corporation is required by sub-section (1) to lodge a copy of a balance-sheet and other documents, extend the period within which the balance-sheet and the other documents are required to be lodged.

25 (3) The Treasurer may, if the Treasurer is of the opinion that the balance-sheet and the other documents referred to in sub-section (1) do not sufficiently disclose the corporation's financial position, by notice served on the corporation—

(a) require the corporation to lodge a balance-sheet; or

(b) require the corporation to lodge an audited balance-sheet,

30 within such period, in such form, containing such particulars and including such documents as are specified in the notice.

35 (4) Where a foreign corporation is not required by the law of the place of its incorporation or formation to prepare a balance-sheet, the corporation shall prepare and lodge with the Treasurer a balance-sheet or, if the Treasurer so requires, an audited balance-sheet, within such period, in such form and containing such particulars and including such documents as the corporation would have been required to prepare if the corporation were a company other than a proprietary company incorporated under the Companies Act.

Statement to accompany balance sheet

40 7. (1) Whenever a prescribed corporation lodges with the Treasurer a copy of its balance-sheet in pursuance of section 5 or 6 or in pursuance of a requirement of the Treasurer under sub-section 6 (3), the corporation shall, at the same time, lodge with the Treasurer a statement, in writing, setting out

particulars, as at the end of the financial year to which the balance-sheet relates, of—

- (a) the name of the corporation;
- (b) the address of the registered office of the corporation;
- (c) the name and address of the agent, or each agent, of the corporation in Australia; 5
- (d) the name of any other corporation of which the prescribed corporation is a holding corporation;
- (e) the total value of assets held within Australia, including, but without limiting the foregoing, assets of any of the following kinds: 10
 - (i) assets situated in Australia;
 - (ii) mineral rights;
 - (iii) shares in a corporation incorporated in Australia;
 - (iv) securities issued in Australia;
 - (v) assets of a prescribed kind or included in a prescribed class of assets; 15
- (f) the value of each of the following classes of assets:
 - (i) land situated in Australia (including legal and equitable interests in such land);
 - (ii) mineral rights; 20
 - (iii) shares in a corporation incorporated in Australia;
 - (iv) securities issued in Australia;
 - (v) assets of a prescribed kind or included in a prescribed class of assets;
- (g) the identity and value of each and every asset held within Australia which has a value in excess of \$1,000,000 or, if another amount is prescribed for the purpose of this paragraph, the amount so prescribed including, but without limiting the foregoing, each and every asset which has such a value and is any of the following kinds of assets: 25
 - (i) assets situated in Australia; 30
 - (ii) mineral rights;
 - (iii) shares in a corporation incorporated in Australia;
 - (iv) securities issued in Australia;
 - (v) assets of a prescribed kind or included in a prescribed class; and
- (h) the name of any other corporation incorporated in Australia in which the prescribed corporation has— 35
 - (i) a controlling interest; or
 - (ii) an interest in shares or securities, the value of which exceeds \$1,000,000 or, if an amount is prescribed for the purposes of paragraph (g), the amount so prescribed, 40

and the nature and value of those interests,

and containing such other information, and accompanied by such documents, as are prescribed.

5 (2) A prescribed corporation of a kind described in paragraph 4 (1) (b) or (d) shall include in a statement lodged with the Treasurer in pursuance of sub-section (1) of this section, in respect of each Australian corporation of which that prescribed corporation is a holding corporation, the particulars specified in sub-section (1) of this section as though the Australian corporation were a prescribed corporation.

Form of statement

10 8. A prescribed corporation shall not lodge a statement with the Treasurer in pursuance of section 7 unless the statement has been examined by the auditor of the corporation and the auditor has certified on the statement whether, in the view of the auditor, the particulars shown on the statement are true and fair.

Valuation

15 9. For the purposes of this Act, the value on a particular date of an asset of a corporation, or of an interest in shares or securities held by a corporation, shall be taken to be—

- 18 (a) the value of that asset or interest as shown in the last balance-sheet of the corporation that was prepared and audited before that date; or
- 20 (b) if no balance-sheet of the corporation was prepared and audited before that date, the value of that asset or interest as shown on that date in the accounting records of the corporation.

Register

25 10. The Treasurer shall cause a Register of Foreign Corporations to be kept for the purposes of this Act, and shall cause to be entered in the Register, in respect of each prescribed corporation that lodges a balance-sheet in pursuance of section 5 or 6 or of a requirement under sub-section 6 (3) —

- 28 (a) the name of the corporation;
- 30 (b) the address of the registered office of the corporation;
- 32 (c) the name and address of the agent, or of each agent, of the corporation in Australia;
- 34 (d) the date on which each balance-sheet of the corporation was lodged with the Treasurer in accordance with this Act;
- 36 (e) the total value of assets held within Australia, including, but without limiting the foregoing, assets of any of the following kinds:
 - 38 (i) assets situated in Australia;
 - 40 (ii) mineral rights;
 - (iii) shares in a corporation incorporated in Australia;
 - (iv) securities issued in Australia;
 - (v) assets of a kind prescribed for the purpose of sub-paragraph 7 (1) (e) (v) or included in a kind of assets so prescribed; and
- 42 (f) the value of each of the following classes of assets:
 - (i) land situated in Australia (including legal and equitable interests in such land);

- (ii) mineral rights;
- (iii) shares in a corporation incorporated in Australia;
- (iv) securities issued in Australia;
- (v) assets of a kind prescribed for the purpose of sub-paragraph 7 (1) (f) (v) or included in a class of assets so prescribed.

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Inspection

11. A person may inspect, and make copies of, or take extracts from, the Register of Foreign Corporations and any balance-sheet or statement lodged with the Treasurer by a prescribed foreign corporation in accordance with this Act.

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Offences

12. (1) A prescribed foreign corporation—

- (a) shall comply with the requirements of section 5 or 6, whichever is applicable to the corporation;
- (b) shall comply with the requirements of a notice served on the corporation under sub-section 6 (3); and
- (c) shall not lodge with the Treasurer a balance-sheet or statement for the purposes of section 5, 6 or 7 that is false or misleading in a material particular.

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Penalty: \$10,000.

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(2) Where a prescribed corporation contravenes or fails to comply with sub-section (1), any officer or agent of the corporation (including a person who subsequently ceased to be an officer or agent of the corporation) who is in any way, by act or omission, directly or indirectly knowingly concerned in or party to the contravention or failure commits an offence against this sub-section punishable, upon conviction, by a fine not exceeding \$5,000 or imprisonment for a term not exceeding 2 years, or both.

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(3) For the purposes of sub-section (2), where a prescribed foreign corporation is registered under the Companies Act in a State or Territory—

- (a) if it is so registered in a single State or Territory only—the agent of the corporation, within the meaning of Division 5 of Part XIII of the Companies Act, in that State or Territory; or
- (b) if it is so registered in 2 or more States or Territories—the agent of the corporation, within the meaning of that Division, in the State or Territory in which it was first so registered,

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shall, unless the contrary is proved, be deemed to be knowingly concerned in and party to any contravention by the corporation, or failure by the corporation to comply with sub-section (1) of this section.

Regulations

13. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

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