



MEANING OF 'ASSOCIATE'

If a person has or is an 'associate' for the purposes of the *Foreign Acquisitions and Takeovers Act 1975* (the Act) this can have important consequences for the purposes of determining whether the Act applies in a particular situation. For example:

- in determining whether a person holds a substantial interest in an entity, or two or more persons hold an aggregate substantial interest in an entity, interests of associates of the person or persons are also taken into account (see the definitions of 'aggregate substantial interest' and 'substantial interest' in section 4)
- some actions are significant if they involve an associate (paragraphs 40 (2)(d) and (e))
- in considering whether the threshold test for the acquisition of an interest in agricultural land is met, the total value of all interests in agricultural land held by a foreign person with one or more associates is taken into account (paragraph 52(2)(b))
- in determining whether there is a change in control of an entity or business (which may make an action a significant action), the Treasurer may consider if one or more foreign persons have control together with any associates (subsection 54(2))
- if the Treasurer has made orders because people have been involved in a scheme of avoidance, then the Treasurer may also make an order declaring persons involved in avoidance to be taken to be associates. The Treasurer must be satisfied that not making the order is contrary to the national interest (section 79).

PERSONS WHO ARE ASSOCIATES

The word 'associate' has the meaning given in section 6 of the Act. The Act specifies who is an associate and provides for additional circumstances in which a person may be an associate in relation to an interest in residential land. The Act also provides that persons will not be taken to be associates merely because they are involved in a particular activity.

The following people are associates of a person:

- any relative of the person;
- any person with whom the person is acting, or proposes to act, in concert in relation to an action to which the Act may apply (this provision is modified for consortiums: see section 45 of the Foreign Acquisitions and Takeovers Regulation 2015 (Regulation));
- any person with whom the person carries on a business in partnership (this provision is modified for limited partners: see section 45 of the Regulation);
- any entity of which the person is a senior officer;
- if the person is an entity:
 - any holding entity of the entity; or
 - any senior officer of the entity;

- any entity whose senior officers are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of:
 - the person; or
 - if the person is an entity—the senior officers of the person;
- an entity if the person is accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of:
 - the entity; or
 - the senior officers of the entity;
- any corporation in which the person holds a substantial interest;
- if the person is a corporation—a person who holds a substantial interest in the corporation;
- the trustee of a trust in which the person holds a substantial interest;
- if the person is the trustee of a trust—a person who holds a substantial interest in the trust;
- if the person is a foreign government, a separate government entity or a foreign government investor in relation to a foreign country (or a part of a foreign country):
 - any other person that is a foreign government in relation to that country (or any part of that country); or
 - any other person that is a separate government entity in relation to that country (or any part of that country); or
 - any other foreign government investor in relation to that country (or any part of that country).

(This provision is modified for foreign government investors who are only a foreign government investor because of an aggregate substantial interest or foreign government partnership interests from more than one country or part of a country of at least 40 per cent: see section 45 of the Regulation)
- A person holds a 'substantial interest' in an entity if the person holds an interest of at least 20 per cent in the entity. A person holds a 'substantial interest' in a trust (including a unit trust) if the person, together with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust. (See the definition of 'substantial interest' in section 4 of the Act.)

Example 1

Eddie is the Chief Operations Officer of Buildingco Pty Ltd and is, therefore, a senior officer of that entity. Buildingco Pty Ltd and Eddie are both associates.

Example 2

Buildingco owns 25 per cent of the shares in Concretecompany Pty Ltd. As Buildingco holds an interest of at least 20 per cent in Concretecompany, it holds a 'substantial interest' in Concretecompany. Buildingco and Concretecompany are associates.

When are persons relatives?

Persons who are relatives will be associates for the purposes of the Act (paragraph 6(1)(a) of the definition of 'associate'). The word 'relative' has the same meaning that it has in the *Income Tax Assessment Act 1997* (ITAA 1997) (section 4 of the Act). 'Relative of a person' is defined in subsection 995-1(1) of the ITAA 1997 to mean:

- (a) the person's spouse; or
- (b) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendent or adopted child of that person, or of that person's spouse; or
- (c) the spouse of a person referred to in paragraph (b).

Note: section 960-255 of the ITAA 1997 may be relevant to determining relationships for the purposes of paragraph (b) of the definition of relative. The terms 'adopted child', 'child', 'parent' and 'spouse' are further defined in the ITAA 1997.

Example 3

Alice is a foreign investor and is proposing to purchase 10 per cent of the shares in a company. Her nephew already holds 10 per cent of the shares in the company. The nephew will be a 'relative' as defined and they are both 'associates' for the purposes of the Act. Alice would hold a substantial interest because she would hold 20 per cent of the shares together with her nephew.

When are persons acting in concert?

Any person with whom a person is acting, or proposes to act, in concert in relation to an action to which the Act may apply, will be an associate (see paragraph 6(1)(b) of the definition of 'associate').

The concept of *acting in concert* has been considered by the courts in a number of different contexts. It has been held to involve 'a common understanding or arrangement as to a common purpose'.¹ Other authorities have emphasised the need for 'knowing conduct that is the result of communication between parties and not simultaneous actions occurring contemporaneously'.² A mere coincidence of separate acts is insufficient.³ Furthermore, the 'understanding should be consensual and there should be some conscious adoption of it. However, it is not essential that the parties are committed to it or bound to support it ... Such an understanding may be proved by inference from circumstances surrounding the impugned transaction and from what the parties have done, as well as by the direct evidence'.⁴

¹ Alan Davis Group v Rivkin Financial Services (2005) 216 ALR 766 at 777 [67]; citing IPT Systems Ltd v MTIC Corporate Pty Ltd (2000) 158 FLR 349 (see 355-356 [24]-[25]). See also Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd (No.4) [1985] 1 Qd 127 at 132.

² See Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees' Union (1979) 42 FLR 331 at 373, Davids Distribution Pty Ltd v National Union of Workers (1999) 91 FCR 463 at 496 and Bank of Western Australia v Ocean Trawlers (1995) 16 ACSR 501 at 524, cited in Bateman v Newhaven (2004) 207 ALR 406 at 410 [18].

³ Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Company Ltd (No 4)[1985] 1 Qd R 127 at 132.

⁴ Bank of Western Australia v Ocean Trawlers (1995) 16 ACSR 501 at 524-5.

Example 4

Softdrink Co and Juice Co are foreign investors and proposing to acquire shares in an Australian drink manufacturer which supplies soft drink and juice concentrate to those companies respectively. Softdrink Co and Juice Co have a common understanding regarding the proposal to acquire shares in the Australian drink manufacturer (but are not making the acquisitions as members of a consortium). Softdrink Co and Juice Co will be acting in concert in relation to an action to which the Act may apply and will, therefore, be 'associates' (see paragraph 6(1)(b)).

What is a foreign government?

'Foreign government' is defined in section 4 of the Act to mean an entity (within the ordinary meaning of the term that is:

- a) a body politic of a foreign country; or
- b) a body politic of part of a foreign country; or
- c) a part of a body politic mentioned in paragraph (a) or (b).

Example 5

The Department of Minerals Exploration of a foreign country is proposing to acquire an interest in an Australian business. The Space Exploration Authority of the same country already holds a 6 per cent interest in the business. Both entities are a part of a body politic of the same foreign country and a 'foreign government' as defined in section 4 of the Act. They are associates under the foreign investment framework and the Department of Minerals Exploration will be required to notify of any proposed acquisition of interests of 4 per cent or more.

ADDITIONAL ASSOCIATES IN RELATION TO INTERESTS IN RESIDENTIAL LAND

The term 'associate' has a wider meaning for an action taken relating to an interest in residential land (see subsection 6(2) of the Act). In this context, the following people are also an 'associate' of a person:

- an entity that is not listed for quotation in the official list of a stock exchange if a relative of the person:
 - holds a substantial interest in the entity; or
 - is a senior officer of the entity;
- if the person is an entity (the *first entity*)—another entity (the *second entity*) if:
 - an individual holds a substantial interest in the first entity or is a senior officer of the first entity; and
 - a relative of the individual holds a substantial interest in the second entity or is a senior officer of the second entity; and
 - the first entity and the second entity are not, and are not a subsidiary or trustee of an entity, listed for quotation in the official list of a stock exchange.

PERSONS WHO ARE NOT ASSOCIATES

There are a number of circumstances in which a person will not be taken to be an associate of another person merely because of the fact that the person is involved in a particular activity (see subsection 6(3) of the Act).

A person will not be taken to be an associate of another person merely because:

- one person gives advice to the other person or acts on the other person's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship; or
- one person, a client, gives specific instructions to the other person, whose ordinary business includes dealing in financial products (within the meaning of the *Corporations Act 2001*), to acquire financial products on the client's behalf in the ordinary course of that business; or
- one person had sent, or proposes to send, to the other person an offer under a takeover bid (within the meaning of the *Corporations Act 2001*) for securities held by the other; or
- one person has appointed the other person, otherwise than for valuable consideration (within the ordinary meaning of the term) given by the other person or by an associate of the other person, to vote as a proxy or representative; or
- both of the following apply:
 - one person provides independent services as a trustee of a trust to the other person who is a beneficiary of the trust;
 - the trustee is licensed to provide those services under a law of the Commonwealth, a state, a territory, a foreign country or a part of a foreign country; or
- one person holds a substantial interest in a managed investment scheme (within the meaning of the *Corporations Act 2001*) and the other person is the responsible entity of the scheme; or
- both people are partners of one of the following kinds of partnerships:
 - a partnership of actuaries or accountants;
 - a partnership of medical practitioners;
 - a partnership of patent attorneys;
 - a partnership of sharebrokers or stockbrokers;
 - a partnership of trade mark attorneys;
 - a partnership that has as its primary purpose collaborative scientific research, and includes at least one university and one private sector participant (whether or not it also includes government agencies or publicly funded research bodies);
 - a partnership of architects;
 - a partnership of pharmaceutical chemists or veterinary surgeons;
 - a partnership of legal practitioners.

Example 6

Doug is an independent financial advisor who provides financial advice to Takeovers R Us which is a foreign company. Doug will not be taken to be an associate of Takeovers R Us merely because he gives advice to Takeovers R Us in the proper performance of the functions attaching to his professional relationship with that company (see section 6(3)(a) of the Act).

Example 7

Isabella and Emma are sisters and both partners in an architectural business. Isabella and Emma will not be taken to be associates as defined in the Act merely because they are both partners in a partnership of architects. However, Isabella and Emma are sisters and, therefore, 'relatives' as defined in subsection 995-1(1) of the ITAA 1997 and section 6 of the Act. On this basis, they will be associates of each other.

PERSONS INVOLVED IN AVOIDANCE MAY BE TAKEN TO BE ASSOCIATES

The Treasurer may make an order specifying that certain persons involved in avoidance are taken to be associates if the Treasurer is satisfied that not making the order is contrary to the national interest. The order may provide that the persons are associates for the purposes of the Act or for specified purposes. The order must specify the period during which the order is in force (see section 79 of the Act).

FURTHER INFORMATION

Further information is available on the FIRB website at www.firb.gov.au or by contacting +61 2 6263 3795.

Important notice: This Guidance Note provides a summary of the relevant law. As this Note tries to avoid legal language wherever possible it may include some generalisations about the law. Some provisions of the law referred to have exceptions or important qualifications, not all of which may be described here. The Commonwealth does not guarantee the accuracy, currency or completeness of any information contained in this document and will not accept responsibility for any loss caused by reliance on it. Your particular circumstances must be taken into account when determining how the law applies to you. This Guidance Note is therefore not a substitute for obtaining your own legal advice.
