

AMENDED EXPLANATORY STATEMENT

Issued by the Authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017

Together the *Foreign Acquisitions and Takeovers Act 1975 Act* (the Foreign Acquisitions Act) and the *Foreign Acquisitions and Takeovers Regulation 2015* (the Foreign Acquisitions Regulation) deal with certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities (being corporations and unit trusts) and businesses, that have a connection to Australia.

Section 139 of the Foreign Acquisitions Act provides that the Governor General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Foreign Acquisitions and Takeovers Amendment (Exemption and Other Measures) Regulations 2017* (the Regulations) introduced a suite of changes to enhance and streamline the operation of the foreign investment framework, facilitating business investment and reducing red-tape including by:

- introducing new exemption certificates for acquisitions of securities and residential land to avoid multiple approvals;
- recognising a greater range of commercial uses of land as acquisitions of commercial land;
- removing routine and non-sensitive transactions from the lower screening threshold (\$55 million) for commercial developed land; and
- removing requirements for consortia to notify multiple times and better aligning screening thresholds for some foreign government investors with commercial practice.

The Regulations also address a number of other unintended consequences of the significant reforms introduced in December 2015, such as inadvertently removing the exemption for custodian holdings which will be reversed through the proposed amendments. The changes commenced on 1 July 2017.

The Regulations form part of a broader foreign investment legislation reform package to streamline and enhance the operation of the foreign investment framework, announced as part of the 2017-18 Budget. In particular, the Regulations complement amendments to the foreign investment fees framework to simplify, streamline and achieve more equitable fee outcomes, also commencing from 1 July.

The Regulations were informed by a four week public consultation and stakeholder engagement process undertaken in March 2017. Stakeholders and the public were consulted on options to further simplify and streamline the foreign investment framework and the amendments reflect feedback about the preferred options and new additional ideas, many of which have been incorporated. Other amendments reflect

stakeholder feedback following the 2017-18 Budget announcement which would further improve the operation of existing rules.

Further details of the Regulations are set out in Attachment A.

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

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

The Regulations commenced at the same time as Schedule 1 to the Foreign Acquisitions and Takeovers Fee Imposition Amendment (Fee Streamlining and Other Measures) Act 2017 commences.

Context of amendments

The Regulations introduce a suite of changes to enhance and streamline the operation of the foreign investment framework by facilitating business investment, reducing red-tape and simplifying the fee framework. The changes will commence on 1 July 2017. They complement other amendments to the foreign investment fees framework to simplify, streamline and achieve more equitable fee outcomes which will also commence on 1 July.

The Regulations ensure the framework is robust by focusing Foreign Investment Review Board resources on transactions that require screening in the national interest while minimising the necessity to screen individually low sensitivity cases. A number of amendments will reduce regulatory burden associated with applicants having to make multiple applications by introducing a number of new exemption certificates to provide for broad pre-approval. Other amendments will seek to reduce unnecessary regulatory burden for foreign government investors that are subject to \$0 threshold screening and will align commercial uses of land with screening thresholds for commercial land.

The amendments will also seek to address unintended consequences of the 2015 reforms. They were informed by a four week public consultation and stakeholder engagement process in March 2017. The Regulations form part of a broader foreign investment legislation reform package to streamline and enhance the operation of the foreign investment framework, announced as part of the 2017-18 Budget.

Overview of key amendments

Introduction of a new business exemption certificates to reduce unnecessary red-tape

The amendments introduce a new exemption certificate for interests in securities modelled on the existing exemption certificate for interests in land. This will allow foreign investors to seek broad pre-approval for a program of investment activity over a period specified in the certificate.

Two new exemption certificates are introduced to address anomalies and inconsistencies in current arrangements for processing residential applications. One new exemption certificate addresses the problem whereby new dwellings that are sold but ultimately fail to settle are treated as established dwellings for the purpose of any future sale to foreign persons. The other new exemption certificate enables foreign persons to seek broad pre-approval for the purchase of one new dwelling or vacant land without having to specify the details of a particular properties being considered.

Clarifying the treatment of land used for commercial purposes

Currently, commercial residential premises, such as student accommodation and aged care facilities, are treated as residential land under the foreign investment regime rather than non-vacant commercial land like other commercial premises. As such, they are subject to \$0 notification requirements rather than the \$55 million or \$252 million thresholds applicable to other like-commercial developments. The amendments address this issue by bringing these types of residential dwellings used for a commercial purpose within the meaning of commercial residential premises.

Another area where there is a lack of clarity is the treatment of land used or intended to be used as a solar or wind farm. Depending on the nature of any infrastructure or fixture on the land, it can be treated as agricultural, vacant commercial or non-vacant commercial land and consequently result in different screening thresholds, fee and registration requirements. The amendments clarify the treatment of developed and undeveloped solar and wind farms.

Remove routine and low-risk transactions from ‘low threshold’ non-vacant commercial land

Experience has demonstrated that the scope of non-vacant commercial land treated as sensitive and subject to the lower \$55 million screening threshold is too broad and captures developed commercial land that is not sensitive in practice. The amendments address this problem by narrowing what is treated as sensitive land by, removing ‘prescribed airspace’ which covers most commercial properties in the CBDs of Australia’s major cities and narrowing the scope of what is captured under Australian Government leases.

Reducing regulatory burden for Australian businesses and offshore global transactions

Before the 2015 reforms companies with significant foreign custodian holdings were not subject to notification requirements. This was inadvertently reversed when the 2015 legislation was implemented and resulted in many ASX listed companies with foreign custodian holdings being treated as a foreign person and subject to notification requirements and ownership registration requirements. The amendments reverse this and exempt companies who become foreign persons by virtue of their foreign custodian holdings from notification and land and water registration requirements.

Currently, global acquisitions that result in an acquisition of Australian interests by a foreign government investor must be notified where the total asset value for the foreign entity is at least 1% of the total value of the assets and the total asset value is at least \$10 million. In practice these thresholds capture incidental interests in Australian business that do not raise national interest concerns and investors may not be aware of the Australian interests. The amendments increase the thresholds to only capture acquisitions that result in a 5% of the global firm’s total assets and where the value is \$55 million or less (to align with the threshold for sensitive land).

Improving the operation of an existing exemption for small interests in unlisted land entities and streamline consortium rules

The existing exemption for interests in securities in unlisted Australian land entities of less than 5 per cent is broadened by removing the 100 security holders requirement.

Currently consortiums that contain foreign government investors have to notify for actions to establish an investment entity or vehicle (an Australian business) and again when the entity proposes to make an acquisition. The proposed amendments would exclude consortiums from the meaning of ‘starts an Australian business’ where the foreign government investor already carries on such a business in Australia.

Similarly, the proposed amendments exclude foreign government investors acquisitions of interests in the consortium vehicle to affect the purchase of an asset, from constituting a notifiable and significant action.

Summary of new law

Section 1 – Name of Regulations

This is the *Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measures) Regulations 2017*.

Section 2 – Commencement

This instrument commenced at the same time as Schedule 1 to the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining and Other Measures) Act 2017* commences. Consequently, if Schedule 1 to the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Streamlining and Other Measures) Act 2017* does not commence this instrument also does not commence.

Section 3 – Authority

This instrument is made under the *Foreign Acquisitions and Takeovers Act 1975*.

Section 4 – Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Item 1—Section 5 – Definitions

Item 1 amends Section 5 to add four new defined terms for the purpose of new subsections 38(5) and (6) of Foreign Acquisitions Regulation.

“Education institution”, “school”, “residential care” and “retirement village” are introduced as new terms in the Foreign Acquisitions Regulation for the purpose of amendments to section 38, which deem certain uses of residential dwellings to be commercial (new subsections 38(5) and (6)). These terms are defined by reference to existing definitions in other Commonwealth legislation to ensure consistency in their meaning across regimes.

Retirement village is defined in *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to mean residential premises that provide accommodation for persons who are at least 55 years old and contain communal facilities for use by the residents of the premises. Tax rulings, such as GSTR 2007/1, which provide further guidance on the meaning of “retirement village”, are also applicable to the meaning of retirement village for the purposes of section 5 of the Foreign Acquisitions Regulation.

For example, GSTR 2007/1 specifies the meaning of communal facilities as facilities that are physical and within, attached to or connected to the residential building(s), or constructed on the surrounding land and contribute to the enjoyment of the building(s) or to the fulfilment of its purposes as a residence. For example: a library, a dining room, a recreation room, a chapel, an equipped gymnasium and outdoor recreational and leisure facilities such as a tennis court, a swimming pool or a barbeque area.

Facilities that would satisfy this requirement include: reception areas, pathways, gardens, driveways and landscaping.

Residential care has the same meaning as in the *Aged Care Act 1997* and means accommodation that provides personal care and/or nursing care provided to persons at the premises and includes the following features:

- appropriate staffing to meet the nursing and personal care needs of the person; and
- meals and cleaning services; and
- furnishings, furniture and equipment for the provision of that care and accommodation; and
- meets any other requirements specified in the Subsidy Principles in the Aged Care Act.

It does not include any of the following:

- care provided to a person in the person's private home;
- care provided in a hospital or in a psychiatric facility;
- care provided in a facility that primarily provides care to people who are not frail and aged; and
- care that is specified in the Subsidy Principles in the Aged Care Act not to be residential care.

Education institution is defined by reference to the definition in the *Student Assistance Act 1973* which specifies education institution to mean:

- a higher education institution; or
- a technical and further education institution; or
- a secondary school; or
- any other institution (including an educational institution), authority or body, deemed to be an education institution for the purposes of the Student Assistance Act.

Item 2 – Section 5 (definition of vacant)

The existing definition of “**vacant**” is amended to clarify that land is not considered to be vacant if there is a solar or wind power station on the land. The amended definition gives effect to new rules (see items 5-11) which clarify the treatment of land which has solar or wind power station infrastructure on the land. This infrastructure generally does not fall within the meaning of a substantive permanent building which is the distinguishing feature between vacant and non-vacant land. Only infrastructure to support a wind or solar power station that is above the ground will change the treatment of land from vacant to non-vacant.

Item 3 – Section 5

A “**wind or solar power station**” means a wind or solar farm that is recognised as an accredited power station as defined in the *Renewable Energy (Electricity) Act 2000*.

This includes each component that comprises a solar electricity generation system and each component that comprises a wind power station, for example each wind turbine. Importantly the infrastructure must be for the purpose of generating electricity for a commercial purpose and therefore must be operated as a power station rather than for private use. This is the defining feature between a wind or solar farm for private use which will not change the treatment of the land from agricultural or vacant commercial land to non-vacant commercial land.

The term “**value**” is introduced for the purpose of determining the treatment of wind or solar power stations. The term clarifies that the value of any interest in a wind or solar power station is to be included when determining the value of an interest a land entity has in land. This includes the entire value of the infrastructure both below and above the land.

Item 4—Acquisition of interests in residential land used for residential care, retirement villages and certain forms of student accommodation

Section 38 of the Regulation prescribes circumstances in which an acquisition of residential land by a foreign person is not treated as an acquisition of residential land for the purposes of the foreign investment framework. Item 3 amends section 38 to provide new circumstances in which residential land used for a commercial purpose and as part of a business is exempted. This is to align the treatment with like accommodation premises that are developed commercial land. The three specific circumstances deemed not to be acquisitions of residential land are where a foreign person acquires residential land where the land is used for the provision of:

- an aged care facility;
- retirement village; or
- student accommodation.

New subsection 38(5)

While the land acquired for these purposes is still technically residential, new subsection 38(5) has the effect of treating the acquisitions as acquisitions of non-vacant (ie developed) commercial land because the land is being acquired for a commercial purpose and the exemption is aligned with the thresholds for non-vacant commercial land.

For these reasons subsection 38(5) is only intended to capture residential premises used to provide aged care facilities (referred to in subparagraph 38(5)(a)(i) as premises that provide residential care), a retirement village (subparagraph 38(5)(a)(ii)), or student accommodation (where it is connected to an education institution that is not a school (subparagraph 38(5)(a)(iii)) within the meaning of how those terms are defined within section 5 of the Foreign Acquisition Regulations. For example, they are not intended to capture any grouping of more than one dwelling (for example, a group of five townhouses) where the group of dwellings is not used specifically for the purpose of residential care, retirement village or student accommodation within the meaning of those terms as defined in section 5.

For the purpose of subparagraph 38(5)(a)(i), the residential care being provided, must satisfy the meaning of residential care in section 5 which aligns the meaning with definition in the Aged Care Act. In summary, it means the accommodation involves

the provision of personal care and/or nursing care by appropriate staff, meals and cleaning services, furniture and equipment for the provision of that care. It is intended to apply to people who are frail and aged and not for care provided in a private residence.

For the purpose of subparagraph 38(5)(a)(ii), the use of the premises must fall within the meaning of retirement village. As noted in section 5, retirement village is defined by reference to the GST Act, and means residential premises that provide accommodation for persons who are at least 55 years old and contain communal facilities for use by the residents of the premises.

Subparagraph 38(5)(a)(iii) is intended to capture premises that are used to provide accommodation connected to an educational institution that is not a school within the meaning of *A New Tax System (Goods and Services Tax) Act 1999*. Educational institution is defined in section 5.

In these circumstances the term ‘in connection’ with is to be given its ordinary meaning. In other words, the accommodation provided must be exclusively for students connected with a particular educational institution. For example, the purchase of a house which is then rented to students is not intended to be captured. While the Regulation does not set a minimum number of students that must be accommodated or the form of the accommodation, it is only intended to capture premises where the purpose of that premises is for the sole purpose of providing student accommodation and not for any other accommodation. Generally there would need to be some form of formal arrangement in place between the accommodation owner and the educational institution for the accommodation to be considered to be connected to the educational institution.

Paragraph 38(5)(b) specifically excludes foreign government investors from the exemption as these investors do not benefit from a higher threshold (that is, a threshold other than nil), when acquiring interests in non-vacant commercial land.

Paragraph 38(5)(c) clarifies that the screening thresholds for residential premises that meet the requirements of section 38(5) will be aligned with the existing non-vacant commercial screening thresholds of \$55 million (the lower threshold that applies if the land meets one of the conditions set out in subparagraphs 52(6)(b) and (c)) or \$252 million. Furthermore, the subparagraph imposes a monetary value cap of \$252 million. This means that the value of the interest being acquired must fall below the applicable threshold to benefit from the exemption.

New subsection 38(6) - Certain acquisition of interests in residential land within retirement villages

Subsection 38(6) has the effect of exempting an acquisition of an interest in residential land within a retirement village, where the interest is acquired as a result of exercising an option or any other right. This is meant to cover circumstances where the owner or operator of the retirement village acquires a right to buy back an interest in a residential dwelling within the retirement village or acquires such an interest when exercising this right. Such acquisitions are common within retirement villages as they ensure that the owner or operator of the retirement village can maintain its operation as a retirement village on an ongoing basis by facilitating transfers between former and new residents and also allows a former resident to sell-back the dwelling to the operator without needing to find a new resident to acquire the dwelling.

Subsection 38(6) applies to all foreign persons, including foreign government investors, and will have the effect of exempting them from notification under the framework where they are the owner or operator of a facility and the nature of the purchase is a mandatory buy-back required by law or contract. For example, where a resident no longer resides at the retirement village and the dwelling must be purchased back by the facility owner or operator.

Items 5 and 6-12—Wind or solar power stations

Currently, the foreign investment framework does provide clear or consistent treatment for wind and solar farm operators or those acquiring such businesses. In practice, established wind and solar farms are commercial uses of land, but because the infrastructure (for example, wind turbine) does not always fall within the meaning of a fixture or building, where the land is not being used (or could not reasonably be used) for a primary production business it is treated as vacant commercial land.

Furthermore, depending on the nature of the solar or wind farm, it is possible that land used for this purpose can also still be used for primary production which means that it will still be treated as agricultural land despite the fact the foreign person's use of the land is for wind or solar farm operation.

To address this the Foreign Acquisition Regulation has been amended in a number of ways. First, a new exemption has been inserted into Division 4, subdivision A for foreign persons that are owners and operators of solar and wind power stations that acquire an interest in agricultural land on which there is a wind or solar power station and their acquisition is for the sole purpose of operating a wind or solar power station infrastructure on the land (new section 40(2A)). Subsection 40(2A) provides that in that circumstance, a foreign person can disregard that the land is agricultural land because, for example, it does not meet the predominant use test in new subsection 44(7A)—see below.

A new definition of “vacant” is inserted in section 5, to clarify that land is not vacant for the purposes of the foreign investment framework if there is a wind or solar power station located on the surface of the land. A “wind or solar power station” is defined in section 5 and means wind or solar infrastructure that generates electricity and is an accredited power station as defined in the *Renewable Energy (Electricity) Act 2000*.

Items 7 to 12 insert amendments to clarify that land is not agricultural land where the land is not used for the sole or dominant purpose of primary production in the following circumstances:

- an application has been made to a government authority to establish or operate a wind or solar power station (section 44(4)(b)(i));
- the whole or predominant use of the land is for a wind or solar power station (section 44(7A));
- an approval is in place to allow the wind or solar farm to be established or operated on the land (section 44(7B)); or
- the land was acquired solely for the purpose of meeting a requirement of the government approval for the solar or wind farm or its sole or predominant use is for this purpose (section 44(7C))

These provisions are modelled on the existing provisions that cover land used for mining operations and recognise that there can be dual uses of land. Where the predominant use test is met the land is not treated as agricultural land as non-vacant commercial land (subsection 44(7A)).

Subsection 44(4) of the Foreign Acquisitions Regulation sets out conditions for land not being treated as agricultural land at particular time if it is not being wholly or predominantly used at that time for a primary production business and an application has been made to a government authority to rezone the land, or allow other specified uses of the land. The amendments introduce new subparagraph 44(4)(b)(v) to provide that where an application has been made to a government authority for approval (including accreditation) for establishing a wind or solar power station to be located on the land the is also not to be treated as agricultural land. In this case the land is treated as vacant commercial land.

Item 11 is unrelated to the provisions concerning wind and solar power stations and provides editorial clarity for an existing provision.

Item 6—section 41A -Exemption— foreign persons in which foreign custodian corporations have interests

Section 30 of the Foreign Acquisitions Regulations provides an exemption for acquisition of interests by foreign custodian corporations in their capacity as custodians. However, Australian companies that have foreign custodian holdings and are therefore ‘foreign persons’ for the purpose of the foreign investment framework do not currently benefit from a notification exemption. Prior to the December 2015 reforms, interests held by Australian companies (including Australian listed companies) with foreign custodian holdings were exempt from having to notify of any actions.

Custodians provide a range of services for their clients, who are generally institutional investors, money managers and broker/dealers. These services typically include: settlement of trade and safekeeping of financial assets on behalf of the client; collection of income arising from portfolios; application of entitlements to reduce rates of withholding tax at source and reclaiming tax withheld; and notification and dealing with corporate action.

Generally, custodians only exercise voting rights attached to their holdings under direct instruction from their client and do not normally exercise influence independent of their client. It would be inconsistent with the underlying rational of the Act to screen the operations of foreign custodians operating in Australia when they act on behalf of Australian investors.

The amendment will have the effect of restoring the prior treatment of persons who are only foreign persons because of foreign custodian corporation holdings of custodian shares by removing the requirement to notify under the Foreign Acquisitions Act and requirements to register on the agricultural land and water registers. This will be achieved by inserting new subsection 41A and including an exemption in the rule for the agricultural land and water registers.

Sections 41A has the effect of providing that provisions in the Foreign Acquisitions Act that specify notifiable actions and notification requirements do not apply for actions undertaken by persons treated as foreign persons under the Foreign

Acquisitions Act and Foreign Acquisitions Regulations only because of interests held in them as custodian shares by foreign custodian corporations.

Importantly, paragraph (2)(c) clarifies that the interest acquired must be continued to be held in the course of providing custodian services.

Schedule 2—Exemption certificates

Item 1—Section 5 - definitions

The term “**near-new dwelling interest**” is inserted to describe the type of dwelling intended to be captured by the new exemption certificate introduced in section 43A. Section 43A creates a new category of residential dwelling for the purpose of the new exemption certificate, a ‘near-new dwelling’, to describe a dwelling in a residential development that was sold to a person but which failed to reach settlement.

An interest in a near-new dwelling means an interest in a dwelling contained in a development where an agreement to sell the interest in the dwelling was binding but did not result in the acquisition of the interest (in other words, while a sales contract was entered into and became binding, the purchase failed to settle), and the agreement is no longer in force and the interest is to be sold under another agreement and would otherwise be an interest in a new dwelling but for the fact there was a previous binding agreement. In reality, the dwelling in question is a new dwelling as it has never been lived in, but because of the existence of the first sale process which failed to settle under the existing rules in the Foreign Acquisitions Act the dwelling is treated as an established dwelling. The term ‘near-new dwelling’ is created to specifically to allow these types of dwellings to be treated like new dwellings again for the purpose of the Foreign Acquisitions Act rather than as established dwellings.

Item 2—new section 42 - Exemption certificate for businesses or entities

Item 2 repeals existing section 42 Foreign Acquisitions Regulation which in practice allowed a foreign person professional underwriter to obtain an exemption certificate from the Treasurer for interests in securities that are acquired in connection with their business of underwriting securities. The exemption certificate has the effect of allowing the foreign person to seek approval for multiple acquisitions of interests in securities that are acquired through the business of underwriting under the one exemption certificate. The existing exemption certificate provided for in section 42 is limited to underwriters only.

Section 42 will be repealed and replaced with a general exemption certificate power that allows the Treasurer to grant a foreign person an exemption certificate for acquisitions of interests in the assets of an Australian business and/or securities in an entity, including interests acquired through the business of underwriting.

Currently the framework casts a very broad net over foreign government investment—the majority of foreign government investment is notifiable. This means that private equity investors (including Australian funds) that contain passive foreign government investors (such as pension funds) are also subject to \$0 screening. Introducing a business exemption certificate will not remove screening requirements or lift the thresholds for foreign government investors, but will enable these investors to apply for a program of investment at the outset of a fund or beginning of a series of investments through the one application. This will be achieved by turning off the notification requirements for future acquisitions covered within the scope of an exemption certificate.

The exemption certificate will provide a means for foreign investors (including foreign government investors) to seek pre-approval for multiple investments in the

one application rather than having to apply separately for each investment. This will reduce red tape for large investment funds, particularly those with low risk foreign government investors, for example government pension funds, by allowing them to seek approval for a program of investments through one application rather than through multiple applications.

The power for the Treasurer to issue exemption certificates is modelled on the existing exemption certificate for land under section 58 of the Foreign Acquisitions Act (which also extends to land entities), and like existing provisions, provides for conditions to be imposed on the certificate (for example reporting, security and tax conditions)—see paragraphs 42(4)(e) and 42(5)(d) and described below.

Types of acquisitions that can be covered in a certificate

Subsection 42(1) provides that a foreign person may apply for a certificate to acquire one or more interests in assets of an Australian business or securities in an entity. A certificate may cover both the applicant and any other person specified in the application. Subsection 42(1) is deliberately broad to cover both acquisition of an interests in an entity as well as potential future acquisitions by the acquired entity, in other words it envisages acquisitions that occur indirectly through bolt-on acquisitions. The types of interests covered can include changes in shareholdings through internal reorganisations that would otherwise need to be separately notified and future increases in interests in an existing investment.

Subsection 42(1) does not limit the number or types of proposed interests that can be covered by an application certificate but when read together with subsection 42(2) it is clear that the proposed acquisitions must be of a kind that the Treasurer can be satisfied are not contrary to the national interest at the time of granting the certificate. As such, when granting an exemption certificate, the Treasurer must be satisfied that the proposed investments to be covered by the certificate are not individually or collectively contrary to the national interest.

As such, applications for exemption certificates will need to contain sufficient detail about proposed acquisitions to allow the national interest test to be applied. While in some cases, and applicant may not know the target entity for the investment applications will need to contain sufficient detail about potential target entities or assets by identifying target industries, and the nature of the business and assets that the foreign person wishes to invest in. For example, if the certificate is to capture bolt-on acquisitions the application will need to specify this and the nature of the likely bolt-on acquisitions.

Subsections 42(1) and (2) do not limit the scope of the proposed acquisitions by applying a monetary cap but in practice applications will need to specify the likely value of acquisitions and provide a total expected value for proposed acquisitions. Similarly, in practice the certificate will set a maximum consideration value to be covered by the entire certificate and potentially value caps for each individual acquisition. In practice, the exemption certificate process is more suitable for acquisitions in areas of low sensitivity, involve relatively passive investment vehicles (particularly where the foreign person contains foreign government investors) and in circumstances where the application provides sufficient certainty about the nature of the acquisition (for example likely market share).

Policy guidance will be published on the Foreign Investment Board website (firb.gov.au) to provide additional detail and clarity about the types of sectors and transactions likely to be appropriate for inclusion in an exemption certificate and those less likely to be approved. For example, typically critical infrastructure assets in sectors announced by the Government as higher-risk or captured within the meaning of ‘public infrastructure’ and ‘public utility’ (with the exception of some transport services) as defined in section 5 and/or sensitive business as defined in section 22 are less likely to be considered appropriate to be covered by a certificate. The reason is that due to the potential sensitivity of such investment, including foreign government investment in these areas, it may not be possible to satisfy the national interest test through this mechanism due to a lack of specific detail about the investment target and structure of the transaction.

Guidance will also be provided on the types of factors that will typically be considered in determining the appropriate timeframe for the certificate. The Regulations do not limit the timeframe in which an applicant may seek a certificate to be in place, or limit the Treasurer’s power to grant a certificate in this way.

Matters to be covered in an exemption certificate

The certificate must detail the person (for example, the entity) who is covered by the certificate for the purpose of acquiring interests in securities and assets of an Australian business. Paragraph 42(3)(a) envisages a certificate being granted to an entity that is not yet in existence because for example, the investments are to be undertaken by a special purpose vehicle yet to be established, or where, additional acquisitions are undertaken by an entity that has not yet been acquired by the person who submitted the application (for example, bolt-on acquisitions). The provision is also intended to capture an Australian corporation or trustee that is or will become a foreign person where that corporation or trust becomes a subsidiary of a foreign person to whom the certificate otherwise relates.

- As the certificate will not refer to a class of persons to be covered by the certificate but rather, a specific foreign person(s) as well as future subsidiaries of the specific foreign person by referring to ownership (whether they become a future subsidiary because they are subsequently established or acquired by the foreign person), the certificate is administrative in nature. Consequently, it will not be considered to be a legislative instrument under the *Legislation Act 2003*.
- The certificate is also not considered a notifiable instrument because they are commercially sensitive and market sensitive in nature, and it is important that their confidentiality is maintained, as the entities that may be acquired under the certificate would not already be publicly known or identified as potential targets for acquisition by the foreign persons covered by the certificate.

Paragraph 42(3)(b) requires the certificate to specify the types of interests that are covered by the certificate. In this regard, the certificate will provide certainty to the foreign investor about the scope of the certificate and provide parameters around the nature and type of acquisitions to be covered by the certificate.

The benefit of an exemption certificate is that once granted, a foreign person can undertake a program of investment activity without having to notify and obtain approval for each single acquisition covered by the certificate. Paragraph 42(3)(c)

clarifies that a certificate will specify whether all or some of the future acquisitions covered in the certificate are exempt from future notification for the purpose of section 49(2) of the Foreign Acquisitions Act and or from being treated as significant actions for the purposes of subsection 45(3) of the Foreign Acquisitions Act.

Typically, certificates will turn-off notification provisions for all interests set out in the certificate. However, there may be circumstances where one or more proposed actions are not exempted from this requirement because the application lacked sufficient detail to enable an adequate assessment of the national interest test for those actions. In comparison, in many circumstances certificates are unlikely to operate to remove actions covered in the certificate from constituting significant actions for the purposes of section 45(3) of the Foreign Acquisitions Act. This is an important safeguard to ensure the Treasurer retains his powers, particularly in circumstances where the national interest test is assessed at a point in time. It also ensures the framework is flexible and agile enabling typically low risk transactions to proceed and noting that it would be extremely rare in practice for the Treasurer to exercise these powers outside of a significant change in circumstances.

Exemption from notifiable and significant action requirements

Subsections 42(4) and (5) clarify that exemption from notification and significant action provisions only apply to those actions covered by the certificate, within the scope of the certificate and where they are undertaken by the entity covered by the certificate and in compliance with any conditions specified in the certificate.

Items 3 and 4—Subsection 43(1) -Tenements and mining, production or exploration entities certificates

Amendments to subsections 43(1) and (2) are small technical changes that flow from the creation of a new business exemption certificate in section 42 and to correct a grammatical error.

Item 5—new subsection 43(4)

Subsection 43(4) is inserted to clarify the treatment of actions covered by this type of exemption certificate for the purposes of subsections 45(3) (significant action) and 49(2) (notifiable actions) under the Foreign Acquisitions Act.

Item 6—Residential exemption certificates (overview)

Foreign persons generally need to apply for foreign investment approval before purchasing residential land in Australia. The framework is based on foreign persons receiving individual approval for a specific property prior to making the purchase. Broad pre-approval through exemption certificates can currently be granted for eligible foreign persons seeking to acquire an established dwelling (the Established Dwelling Exemption Certificate), or for developers seeking to sell new dwellings to foreign persons (the New Dwelling Exemption Certificate).

Foreign persons wishing to purchase a new dwelling or vacant residential land need to apply individually for each property they are considering, even if they only want to make one purchase. This can result in higher fees and application costs compared with established dwellings as multiple applications may be required. This problem will be addressed through the introduction of a new exemption certificate to provide

pre-approval for the purchase of one new residential dwelling or vacant residential land (new section 43B).

Under the Foreign Acquisitions Act if a person enters into a contract to acquire an off-the-plan dwelling and that contract becomes binding, the dwelling is considered sold, regardless of whether the transaction proceeds to settlement. As such for the purposes of the Foreign Acquisitions Act the dwelling is considered to be an established dwelling regardless of whether the sale is completed. This precludes most foreign persons from later purchasing the dwelling and consequently can affect the ability of developers or the initial purchaser to on-sell the dwelling.

On 26 November 2016, the Treasurer announced that an administrative solution would be implemented to avoid failed off-the-plan dwellings being treated as an established dwelling and treating them as if they were still new dwellings. The introduction of a new exemption certificate for near-new dwellings gives legal effect to this policy decision by enable developers to re-sell off-the-plan dwellings that failed to settle to foreign persons (new section 43A).

Section 63 of the Foreign Acquisitions Act provides that additional exemption certificates can be provided for by regulation. Sections 43A and 43B are new regulations made under section 63 of the Foreign Acquisitions Act. Sections 60 to 62 of the Foreign Acquisitions Act which specify matters that can be included in exemption certificates (section 60), timeframes for determining exemption certificates applications (section 61) and variation and revocation rules (section 62) apply to the new exemption certificates.

New section 43A—Exemption Certificates for residential land (near-new dwelling certificates)

The amendments insert new section 43A into the Foreign Acquisitions Regulation to provide for a new exemption certificate for a near-new dwelling. As noted above, an exemption certificate has been created to address a current limitation in the Foreign Acquisitions Act whereby a sale of a new dwelling (including those purchased off a development plan) is treated as an established dwelling for the purposes of the Foreign Acquisitions Act where a contract for the sale becomes binding but fails to complete or settle. The problem arises because the Foreign Acquisitions Act defines a new dwelling as a property that has not been previously “sold”. A property is treated as sold once a binding agreement has been entered into regardless of whether the sale is completed (or settled). Consequently, off-the-plan dwellings or new dwellings that have never been occupied are treated as established dwellings in circumstances where the sale to the first purchaser fails to settle. In practice this can make it challenging for re-sale to foreign purchasers because there are stricter rules that apply to foreign persons that purchase established dwellings than for new dwellings. The additional requirements applicable to foreign purchases of established dwellings, including visa and use requirements, can narrow the pool of foreign persons eligible to purchase an established dwelling. It is not intended that otherwise new dwellings, including off-the-plan dwellings, be treated as established dwellings in these circumstances.

Subsection 43A(1) provides that a person may apply for a near-new dwelling certificate. The exemption certificate will only be available for dwellings that come within the meaning of near-new dwellings which is defined in section 5 (see item 1, Schedule 1). The provision is modelled on existing section 57 of the Foreign Acquisitions Act which establishes a process for persons, typically in practice these

are property developers, to apply for and be granted an exemption certificate to allow them to sell dwellings in a new property development to foreign persons without each of those foreign persons having to individually apply for foreign investment approval before purchasing the property. Like the section 57 certificate, property developers, will be able to apply for a certificate that allows them to sell dwellings within a new development that a ‘near-new dwellings’ to foreign persons.

While in practice a developer will typically have applied for or have been granted a section 57 certificate, this is not a pre-requisite. A person can apply for a near new dwelling certificate in anticipation that one or more new dwellings in a residential will fail to settle, for example, at the time that the person applies for a section 57 certificate. The certificate is not intended to cover circumstances where the original purchaser seeks to sell their interest to a foreign person—this circumstance would still require the new purchaser to seek approval separately. (Note that new section 43B (described below) will provide a separate exemption to enable individuals to seek pre-approval to purchase a near-new dwelling).

The certificate is intended to cover both the circumstance where the original purchaser was a foreign person covered by the section 57 certificate and the circumstance where the original purchase was not covered by the certificate because they were not a foreign person.

Under subsection 43A(2), the Treasurer can grant a developer a certificate to a developer who makes an application under subsection 43A(1) (and therefore meets the eligibility requirements for the certificate under subsection 43A(1)) and if the Treasurer is satisfied that granting the certificate would not be contrary to the national interest.

Subsection 43A(3) specifies the information to be included in the certificate, which aligns with the requirements for exemption certificates under section 57 for new dwellings, with the key difference being that the interest to be specified is for a near-new dwelling (as defined in section 5).

Subsection 43A(4) clarifies that interests in near-new dwellings captured under an exemption certificate granted under subsection 43A(2) do not need to be further notified by the foreign person acquiring the interest and are not significant actions for the purpose of the Foreign Acquisitions Act. A pre-condition for an acquisition of the interest being exempt from notification and significant action provisions is that any conditions or eligibility requirements for being covered by the certificate are satisfied.

New section 43B—Exemption certificates for residential land (other than established land)

New section 43B introduces a new exemption certificate for foreign persons who wish to purchase an interest in a new dwelling or vacant residential land and are considering a number of properties. Established dwellings are not included because a separate exemption certificate already exists under section 59 of the Foreign Acquisitions Act for foreign persons intending to purchase an established dwelling. Section 43B is modelled on section 59 of the Foreign Acquisitions Act.

Subsection 43B(1) provides that a foreign person can apply for an exemption certificate to cover the acquisition of an interest in three residential land category types; a new dwelling, a near-new dwelling and vacant. An application may seek pre-approval for an acquisition of an interest in one or more these land types. As noted above, the amendments introduce a new type of interest in residential land for near-new dwellings (defined in section 5), and section 43A provides a process for developers to seek an exemption certificate to enable them to sell a near-new dwelling to a foreign person. Section 43B provides a mechanism for a foreign person to seek pre-approval to acquire an interest in a near-new dwelling.

Subsection 43B(1) envisages that the applicant may not be a single foreign person acquiring the interest in a dwelling or vacant land. In other words, an application for an exemption certificate may be made by a foreign person on behalf of other foreign persons. Importantly, while the application may specify a range of properties or dwellings that a foreign person is considering they may acquire an interest in, the foreign person will be limited to the acquisition of a single interest.

In other words, a foreign person can seek pre-approval through a certificate for a number of properties being considered for purchase but ultimately will only be authorised to acquire one property under the certificate. This aligns with the operation of the existing exemption certificate for established dwellings under section 59 of the Foreign Acquisitions Act.

Under subsection 43B(2) the Treasurer would only be able to grant an exemption certificate for a foreign person to purchase a new dwelling, near-new dwelling, or vacant residential land where the proposed acquisitions are not contrary to the national interest. The certificate will specify the persons who are pre-approved to purchase one of the three types of residential land described in subsection 43B(1). For example, the certificate could provide pre-approval for one or more of the types of land types. Typically, a certificate will provide some parameters around what can be purchased under the certificate in terms of maximum value of the consideration to be paid and location details. A certificate may specify other conditions, such as a requirement to report the details of the property ultimately purchased.

Purchases that are made in accordance with the terms of the certificate, including by the person/s named, will exempt the foreign person from having to seek any further approval under the foreign investment framework (subsection 43B(4)).

Item 7—section 58

Item 7 is machinery and removes section 58 because the provisions setting out the effect of exemption certificates granted under sections 42 and 43 are now located within those sections.

Schedule 3—Miscellaneous

Item 1—Section 10 – Consortiums established to start an Australian business

Section 8 of the Foreign Acquisitions Act provides that an “Australian business” is a business that is carried on wholly or partly in Australia in anticipation of profit or gain. Section 10 of the Foreign Acquisitions Regulations specifies the circumstances in which a foreign government investor is considered to start an Australian business which are:

- the investor starts to carry on an Australian business; or
- the investor is already carrying on an Australian business but starts a new activity that is not incidental to an existing activity (ie the new activity is within a different Division of the Australian and New Zealand Standard Industrial Classification codes).

Existing subsection 10(2) of the Foreign Acquisitions Regulation provides that where the foreign government investor carries on an Australian business it is not taken to start an Australian business when it establishes a new subsidiary to carry on the same business or acquires assets in the same Australian business. Item 2 amends subsection 10(2) to also exempt a foreign government investor who is a member of a consortium and the consortium establishes a new entity which carries on the same business that the foreign government investor already carries on.

If the foreign government investor meets the requirements in subsection 10(2) the foreign government investor is exempt from having to notify of the act to establish the consortium vehicle.

Item 2—Paragraph 37(4)(e) – omit requirement for at least 100 holders

Section 37 of the Foreign Acquisitions Regulation prescribes circumstances in which certain acquisitions of land by a foreign person are exempted from the foreign investment framework. One circumstance is the acquisition of small interests in unlisted land entities (subsection 37(4)).

Currently, the existing exemption for interests in securities in unlisted Australian land entities of less than 5 per cent is currently overly restrictive because it imposes a requirement that there be at least 100 security holders, in addition to a requirement that the foreign person is not in a position to influence or participate in the management of control of the land entity. In practice, the requirement for at least 100 holders of securities imposes a somewhat arbitrary requirement that does not always match commercial practice. It also potentially duplicates in practice the passive control restrictions and limitations on percentage ownership in the land entity.

Subsection 37(4) is amended to remove the 100 security holders requirement in paragraph 37(4)(e).

Items 3 and 4—section 52 – land entities

Section 52(1) of the Foreign Acquisitions Regulation specifies the kinds of land for the purposes of the threshold test in section 52(1) of the Foreign Acquisitions Act that has a \$0 screening threshold. Subsection 52(3) of the Foreign Acquisitions Regulation

provides a threshold test for land held by a land entity that is not prescribed for the purposes of subsection 52(1) and is not agricultural land.

Items 3 and 4 amends paragraph 52(3)(a) by excluding interests in residential land acquired by a land entity where the land is covered by new subsection 38(5)(a) which treats residential land as non-vacant commercial land where it has the following uses:

- the provision of residential care; or
- a retirement village; or
- premises that provide accommodation to students in connection with an education institution.

Amended subsection 52(3) and new subsection 52(3A) clarifies the circumstances in which land is not residential land within the meaning of subsection 52(1).

Items 5 – 7—Subsection 52(6) - removal of prescribed airspace and new meaning of Commonwealth Government lease

Subsection 52(6) Foreign Acquisitions Regulation specifies the circumstances in which the lower screening threshold of \$55 million will apply for foreign persons (other than agreement country investors) acquiring non-vacant commercial land. This is because there is some sensitivity associated with the land. Paragraph 52(6)(c) lists a number of factors that may mean the land is screened under the lower \$55 million threshold. Some of these factors have a broad application that mean they capture transactions that in practice are routine and do not raise national interest concerns. The amendments will address this problem by narrowing the land subject to the lower threshold by, removing ‘prescribed airspace’ (subparagraph 52(6)(c)(v)) which covers most commercial properties in the CBDs of Australia’s major cities and better targeting what is captured under Australian Government leases.

Item 3 removes subparagraph 52(6)(c)(v) so that non-vacant commercial land that falls under prescribed airspace is no longer screened at the lower threshold of \$55 million.

Currently, any non-vacant commercial land that has a Commonwealth Government tenant must be screened at the \$55 million threshold (subparagraph 52(6)(c)(i)). In practice, this captures any building complex, such as a large shopping development that has a Commonwealth Government tenant (for example an Australia Post shop). The reference to ‘leased to a Commonwealth Government entity’ is currently too broad.

Items 7 and 9 have the effect of excluding leases with corporate Commonwealth entities from leases captured by the reference to Commonwealth Government leases in subparagraph 52(6)(c)(i) with the exception of the corporate Commonwealth entities listed in new subsections 6A(a) to (e). ‘Corporate Commonwealth entity’ is defined by reference to its meaning in the *Public Governance, Performance and Accountability Act 2013*.

Items 8 and 9—Paragraphs 56(4)(b) and (c) – global offshore transactions with foreign government investor holdings

Part 5 of the Foreign Acquisitions Regulation prescribes additional significant actions for the purposes of sections 44 and 48 of the Foreign Acquisitions Regulation. Section

56 of the Foreign Acquisitions Regulation concerns additional significant and notifiable actions by foreign government investors. Paragraph 56(1)(a) has the effect of deeming an acquisition of a direct interest in an Australian entity or Australian business by a foreign government investor to be a significant and notifiable action.

Subsection 56(4) provides an exception to the rule in paragraph 56(1)(a) for non-material interests in non-sensitive businesses. Subsection 56(4) covers circumstances where a foreign government investor acquires an interest in an Australian entity indirectly through the act of acquiring another foreign company that happens to have Australian interests. For example, this is intended to provide some relief from notifiable and significant action rules for global offshore transactions that have some foreign government investor holdings. Currently, the exemption is framed too narrowly and therefore captures global transactions that involve incidental and relatively very small Australian interests in the context of the entire global transaction. This is because the current exemption only applies where the Australian assets indirectly acquired are less than 1% of the global firm's total assets and the value of these assets is less than \$10 million. The current values are also so low that in practice investors may not be aware of Australian interests.

Items 4 and 5 raise these thresholds from 1% to 5% (paragraph 4(b)) and from \$10 million to \$55 million (paragraph 4(c)).

A \$55 million threshold aligns with the lower threshold for non-vacant commercial land being acquired by most private (non-foreign government) investors. Australian assets indirectly acquired related to a sensitive business (for example media, telecommunications and transport) will still be screened from dollar zero and will not benefit from the new thresholds.

Item 10—subsection 56(5) - exception - acquisition of interest by entity established by consortium

Part 5 of the Foreign Acquisitions Regulation prescribe additional significant actions for the purposes of sections 44 and 48 of the Foreign Acquisitions Act. Section 56 of the Foreign Acquisitions Regulation concerns additional significant and notifiable actions by foreign government investors. Paragraph 56(1)(a) has the effect of deeming an acquisition of a direct interest in an Australian entity or Australian business by a foreign government investor to be a significant and notifiable action. Currently this includes where a foreign government investors acquires an initial interest in a consortium which has been established to acquire make an acquisition that is otherwise also a significant action and a notifiable action. In practice, this means the foreign government investor must be screened both for the acquiring the initial interest in a consortium and then each time the consortium makes an acquisition.

New subsection 56(5) addresses this duplication by exempting the action of acquiring the initial interest in a consortium from the meaning of acquiring a direct interest in an Australian business or Australian entity for the purpose of paragraph 56(1)(a). Taking this approach does not raise any national interest concerns as any substantive subsequent acquisition by the consortium entity, who is now also a foreign government investor, will be screened in its own right.

Statement of Compatibility with Human Rights

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

Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measurers) Regulations 2017

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

Overview of the Legislative Instrument

The Foreign Acquisitions and Takeovers Amendment (Exemptions and Other Measurers) Regulations 2017, introduce a suite of changes to enhance and streamline the operation of the foreign investment framework, facilitating business investment and reducing red-tape including by introducing new exemption certificates for acquisitions of securities and residential land to avoid multiple approvals and removing routine and non-sensitive transactions from the lower screening threshold (\$55 million) for commercial developed land.

Human rights implications

This Schedule engages the following human rights and freedoms:

- the right to protection from unlawful or arbitrary interferences with an individual's privacy; and
- the right to be free from discrimination.

Right to privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful or arbitrary interferences with a person's privacy, family, home or correspondence. It also provides that everyone has the right to the protection of the law against such interference or attacks. The Human Rights Committee has interpreted the term 'unlawful' to mean that no interference can take place except in cases envisaged by law, which itself must comply with the provisions, aims and objectives of the ICCPR. The Human Rights Committee has also indicated that an interference will not be considered to be 'arbitrary' if it is provided for by law and is in accordance with the provisions, aims and objectives of the ICCPR and is reasonable in the particular circumstances.

Privacy is a concept which is broad in scope and includes a right to information privacy. The Regulation does not create further engagement with the right to privacy under Article 17 of the ICCPR because it does not impose any additional right to provide information that doesn't already exist under the foreign acquisitions and takeovers regime.

Right to be free from discrimination on prohibited grounds

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

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

The Regulation also generally engages the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination. Paragraph 1 of Article 1 of International Convention on the Elimination of All Forms of Racial Discrimination defines the term ‘racial discrimination’ to mean ‘any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life’. Under Article 2(a)(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, [E]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation’. Under Article 5 of International Convention on the Elimination of All Forms of Racial Discrimination States Parties ‘undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to ...national ...origin, to equality before the law’ in the enjoyment of civil, political, economic, social and cultural rights, including the ‘right to own property alone as well as in association with others’.

The Regulation limits Article 26 of the ICCPR and Articles 2 and 5 of International Convention on the Elimination of All Forms of Racial Discrimination because the core obligations imposed by the Regulation only apply to a ‘foreign person’. While an Australian citizen who is not ordinarily resident in Australia may be a ‘foreign person’ for the purposes of this Act, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.

While the Regulation, if enacted, will primarily affect individuals who are citizens of countries other than Australia, there is no less restrictive way of achieving the objectives of the Regulation. Accordingly those limitations are reasonable, necessary and proportionate. Furthermore, the Regulations seek to reduce the scope of existing obligations under the foreign acquisitions and takeovers regime, including by removing some actions from the scope of the regime.

Conclusion

This Regulation is compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.