

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Investment Reform (Protecting Australia's National Security)  
Regulations 2020*

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) establishes a regime for the notification, review and approval of foreign investment in Australia. The requirement to notify the Treasurer of a proposed investment depends on the nature of the proposed investment, the value of the investment and whether the investor's country of origin is a country with which Australia has a free trade agreement.

On 5 June 2020, the Government announced a package of reforms to the foreign investment framework to strengthen the framework and address emerging national security concerns. The reforms are also intended to give the Treasurer and Commissioner of Taxation greater compliance and investigative powers and improve the integrity of the regime.

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

The *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* and the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* give effect to the Government's package of reforms.

The *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (the Regulations) amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulation) to give further effect to the reforms, building upon the new national security test, strengthening the integrity of the foreign investment framework, making a number of technical changes, reintroducing the monetary thresholds, and streamlining the processing of less sensitive types of investment.

### ***National Security Review***

The *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* requires the mandatory notification of 'notifiable national security actions', and allows certain actions – 'reviewable national security actions' – to be 'called-in' for screening on national security grounds, from 1 January 2021.

The Regulations support these elements of the national security reforms by setting out the definitions of 'national security business' and 'national security land', by establishing two new types of exemption certificates, and imposing a 10 year time limit on the availability of the Treasurer's 'call-in' power.

Amendments in the Regulations clarify where existing exemptions apply to reviewable national security actions or notifiable national security actions.

These Regulations commence on 1 January 2021 and apply to actions taken on or after that date.

***Streamline less sensitive investment***

The Regulations amend the definition of ‘foreign government investor’ so that some entities which are currently classified as ‘foreign government investors’ no longer meet this definition. Rather, these investors will be considered to be private foreign investors and able to access higher monetary thresholds. This new definition applies to actions taken on or after 1 January 2021.

***Monetary thresholds to determine if an action is a significant or notifiable action***

As part of the Government’s response to the Coronavirus (COVID-19), the monetary thresholds that determine whether an action needs to be notified to the Treasurer were lowered to zero dollars in March 2020. The Regulations reinstate the monetary thresholds. The reinstated thresholds apply from 1 January 2021.

***Integrity, compliance, technical and other amendments***

The Regulations make a number of amendments to the Principal Regulation to improve the integrity of the regime and, where appropriate, simplify the framework.

The integrity and technical amendments apply to actions taken on or after 1 January 2021.

Consultation on the Regulations was undertaken from 18 September to 2 October 2020. Twenty six submissions were received. Changes were made to a number of measures to take into account feedback received in submissions. For example:

- The moneylending exemption continues to apply with respect to interests in a national security asset held by way of security, until the asset is acquired by way of enforcement.
- The definition of a media business was amended to narrow the scope of businesses affected.
- The definition of ‘national security business’ was also amended to include a requirement that the status of the business be reasonably ascertainable before becoming a ‘national security business’.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

Details of the Regulations are set out in the [Attachment A](#).

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

The Regulations commence on 1 January 2021.

A statement of Compatibility with Human Rights is at [Attachment B](#)

**Details of the proposed *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020***

**Section 1 – Name of the Regulations**

This section provides that the name of the Regulations is the *Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020* (the Regulations).

**Section 2 – Commencement**

This section provides that the whole instrument commences on 1 January 2021.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Foreign Acquisitions and Takeovers Act 1975* (the Act).

**Section 4 – Schedule**

This section provides that each instrument that is specified in the Schedules to this instrument is amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

**Schedules 1 to 7 – Amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulation)**

***Schedule 1 - National Security***

Amendments to the Act establish new powers for the Treasurer to specifically consider whether certain actions and investments in Australia are contrary to Australia's national security.

The Act establishes a new category of actions - 'notifiable national security actions' - that must be notified to the Treasurer for review regardless of the value of the investment or whether the actions are otherwise notifiable or significant actions.

These actions include, but are not limited to, a foreign person acquiring an interest in 'national security land' or a direct interest in a 'national security business' or starting a 'national security business'. The Regulations define these terms.

National security concerns may also be posed by actions that do not need to be notified. Amendments to the Act mean the Treasurer is also able to review actions - 'reviewable national security actions' - which are not significant actions, notifiable actions or notifiable national security actions. The Treasurer is also able to review significant actions that are not notified to the Treasurer. The Treasurer may 'call-in' these actions for review, whether or not they are proposed or have been taken. The Regulations limit the time period in which the Treasurer can use this 'call-in' power.

## ***National Security Land***

Item 6 inserts the definition of ‘national security land’ into section 5 of the Principal Regulation.

Whether Australian land is national security land is determined by whether the land falls into one of two categories at the time the action occurs or is expected to occur. That is, at the time the interest is acquired or will be acquired by the foreign person. If the land is in at least one of the categories, it is ‘national security land’ and the action must be notified to the Treasurer.

The two categories are:

- ‘Defence premises’ within the meaning of section 71A of the *Defence Act 1903*, excluding subparagraph (a)(iii) of the definition of that expression. This category includes all land owned or occupied by defence, including land, buildings, structures, and prohibited areas. Subparagraph (a)(iii) is excluded from the definition because it refers to vehicles, vessels or aircraft that may be occupied by defence personnel and if it were included, it would be including vehicles from commercial rental providers or commercial transport providers. Such vehicles are not intended to be covered by the definition of national security land.
- Land in which an agency in the national intelligence community has an interest. This category is limited by the requirement that the existence of the interest is publicly known or could be known upon the making of reasonable inquiries. The limitation avoids applying the Act to land in which an agency has an interest but the disclosure of the interest in itself would be contrary to national security, or to land in which an agency’s interest would not be readily ascertainable by a reasonably diligent person contemplating the acquisition of an interest in the land. For example, an agency’s interest could take the form of a lease by a highly classified Government tenant for space in a commercial office building. Such a lease may have been intentionally obscured for national security reasons and may not be known about even after reasonable enquiries are made.

The Treasurer is able to amend the Principal Regulation in the future as necessary to prescribe additional locations, categories or types of land, including by prescribing land that is in proximity to existing national security land.

## ***National Security Businesses***

Item 9 inserts new section 8AA into the Principal Regulation, which defines ‘national security business’.

A national security business is generally an endeavour that if disrupted or carried out in a particular way, could create national security risks. This means that national security risks may arise if national security businesses are controlled or influenced by persons acting not in Australia’s interests. Broadly, national security businesses are involved in or connected with critical infrastructure, defence, or the national intelligence community or their supply chains. Because of the wide range of factors

that can contribute to national security concerns and the wide range of potentially significant enterprises, the definition includes activities that are not necessarily considered to be businesses.

An endeavour may be a national security business as long as it is carried on wholly or partly in Australia, regardless of whether it is carried on in anticipation of profit or gain and regardless of whether it is carried on by the Commonwealth, a State, a Territory, a local governing body, or an entity wholly owned by them.

However, a business is not a national security business unless it is publicly known, or could be known upon the making of reasonable inquiries, that the business meets the criteria for being a national security business. This limitation ensures that a person taking an action relating to a business is not contravening provisions or committing offences that relate to national security businesses if the person is not able to find out whether the business meets the criteria for being a national security business. For example, in some hostile takeover situations, it will not be possible to find out that a target is carrying on activities that mean the target would be a national security business if the activities were publicly known before an action under the Act occurs.

The definition specifies categories of businesses that are national security businesses.

The first three categories incorporate concepts of businesses that are direct interest holders in relation to critical infrastructure assets or responsible entities for assets under the *Security of Critical Infrastructure Act 2018* or are carriers or nominated carriage service providers subject to the *Telecommunications Act 1997*. The Principal Regulation will adopt any future changes to those concepts under their respective Acts because such changes are likely to result from updated assessments of the significance of relevant activities and the assessments are likely to be relevant to the national security consideration under the Act.

If additional businesses come into the scope of those Acts, those businesses will be included in the corresponding categories in the definition of 'national security business'. If businesses are removed from the scope of those Acts, they will be excluded from these categories of the definition, and if they are not within any other category in the definition of national security business, from the scope of the definition. Importantly, the word 'entity' in the new paragraph 8AA(2)(b) of the Principal Regulation, has the broader meaning of the *Security of Critical Infrastructure Act 2018*, rather than the narrower meaning in the Act of a corporation or unit trust.

The next two categories of national security businesses include businesses that develop, manufacture, or supply, critical goods or technology for (or intended for) a military use or an intelligence use by defence and intelligence personnel or the defence force or intelligence agency of another country. These categories are intended to include the critical industries and supply chains for all defence and national intelligence goods and technology but not to include ordinary goods and technology that are not particular to defence or the national intelligence community as such ordinary goods will not be critical.

The next category applies to businesses that provide or intend to provide, critical services to defence and intelligence personnel or the defence force of another country.

It incorporates substantially the same considerations as the goods and technology categories, adapted to services that are provided instead of goods and technology being supplied. This category includes the wide variety of services that may be relevant to national security (such as maintenance or operation of goods that are relevant to national security, services for personnel, and other support services).

In the context of these three categories, references to ‘develops’, ‘manufactures’, or ‘supplies’ are intended to cover the entire lifecycle of a good or technology from initial idea generation and design, through testing and development, to production and supply to the final user. Follow-up repairs and services are also included, particularly where those services are carried out regularly and the persons carrying out those services have developed a familiarity with the goods and their experience and knowledge have national security value themselves.

Further, for the three categories of national security business in the new paragraphs 8AA(2)(d) to (f) of the Principal Regulation, the key limitations are that the goods, technology and services must be:

- critical;
- for, or intended for, military or intelligence use; and
- by defence or intelligence personnel, whether Australian or foreign.

Goods, technology and services that are ‘critical’ must be vital to advancing or enhancing Australia’s national security and goods, technology and services that could be detrimental to Australia’s national security if not available or if misused. This includes goods, technologies and services to which the ongoing access is essential to the core capabilities of Defence and agencies in the national intelligence community – as well as sensitive goods, technologies and services of which the Australian government seeks to influence the supply as a matter of national security.

The requirement is broad and includes both inputs without which Australian activities may be interrupted with adverse consequences for national security and goods, services or technology that, while not essential for Australia’s activities, could cause harm to Australia’s national security if accessed by others. However, a widely available input (such as a mineral or commodity) is not considered critical because of its use in a good, technology or service that is critical. Nonetheless, acquisitions of businesses related to these inputs may raise national security concerns on a case-by-case basis, and may be reviewed under the Treasurer’s ‘call-in’ power if not already subject to screening under the existing national interest provisions.

When determining whether a good, technology or service is critical or about Australia’s national security, it is relevant to consider whether the good, technology or service has been identified as an investment priority for Defence, or has otherwise been identified as sensitive. For example, this could include goods, technologies or services identified in publicly available Defence documents, such as the Defence Industry Policy Statement, Defence Industrial Capability Plan, and the Defence and Strategic Goods List. However, the absence of the mention of a good, technology or service in such documents does not preclude the good, technology or service from being regarded as critical.

The requirement that the goods or technology are ‘intended to be for a military use, or an intelligence use’ by defence and intelligence personnel or the defence force or intelligence agency of another country restricts the categories to goods or technology that are military or related to national intelligence in nature and excludes those that are not actually used in this manner in practice. Some goods or technology that are not considered military in nature, but are used by defence and intelligence personnel may nevertheless be critical to Australia’s national security and would still be included in these categories through the ‘are for a military use’ criterion for goods or technology that are supplied.

The term ‘defence and intelligence personnel’ is defined by reference to the categories of persons who may be involved in activities that are particularly important for Australia’s national security and includes contractors and service providers to defence and agencies in the national intelligence community. The goods, technologies or services they use in the performance of their roles are also likely to be important for Australia’s national security. For this reason, these categories in the definition refer to these personnel. If the goods, technologies or services of a business are not used or intended to be used by these personnel, it is likely that in many cases the interruption to the development, manufacture or supply of those goods, technologies or services would not be materially detrimental to national security so the additional scrutiny of actions involving the businesses is not necessary.

Recognising that Australian businesses may interact with the defence forces of other countries in ways that may affect Australia’s national security, the considerations which require scrutiny of actions that involve suppliers to the Australian defence and intelligence community also apply to actions involving businesses that support those defence forces. Such businesses are treated analogously to those that supply Australian defence and intelligence personnel. For example, a company providing critical encrypted communications technology services to another country’s defence force in Australia is likely to be a national security business.

The definition of ‘defence and intelligence personnel’ includes contractors to defence and the agencies in the national intelligence community because in many situations contractors may be performing roles that are as important to Australia’s national security as those that are performed by members of the Defence Force or employees of the national intelligence agencies.

The next category of national security business includes businesses that store or have access to security classified information. Actions involving these businesses may give foreign persons influence or control over the activities of the business as a means of seeking access to the classified information.

## Example 1

Company A provides video communication capabilities to Organisation B that holds a range of security classified information. As part of the software package, Company A allows the sharing of files, and in doing so, stores classified information. This is likely to meet the definition of a national security business as the company has access to the information being transmitted and because classified information will be stored by it in the course of sharing the files.

The plain and ordinary meaning of security classification is used. It not only includes information that has been classified as Protected or higher within the Australian Government Protective Security Policy Framework, but also includes information with equivalent classifications from other countries.

For example, a data centre operator providing services to the national intelligence community is likely to be considered a national security business because it stores information that has a security classification. However, whether the owner of the building in which the data centre is located is a national security business depends on whether the owner is able to access the information (for example, having physical access to servers if the data centre operator does not have exclusive possession of the parts of the building with the servers).

The next three categories include businesses that collect, store, maintain or have access to personal information of defence and intelligence personnel, which if accessed or disclosed may compromise Australia's national security. This category is intended to include information that may not necessarily be classified information, but that may pose a national security risk if, for example, it could be used to influence the personnel or to derive an advantage from knowing aggregate statistics about the defence force or the intelligence community. This does not have to be a complete or current data set because historical or incomplete information, depending on its nature, may still have national security significance.

Furthermore, these categories require the personal information to have been collected by or on behalf of defence or the national intelligence community. Commercial datasets collected by private entities that contain personal information of defence and intelligence personnel that are unconnected to their roles relevant to national security are not included.

For example, the dataset associated with a supermarket rewards program that may be used by many defence personnel is not captured by this definition.

However, the following are examples of businesses that are likely to be national security businesses under the new paragraph 8AA(2)(j) of the Principal Regulation:

- an administrative service provider to the Defence Department (such as payroll or travel booking) may collect personal information of defence and intelligence personnel as part of an arrangement with the Defence Department and if so is likely to be a national security business if such information, if disclosed, could compromise Australia's national security; or



- an IT provider to the administrative service provider is also a national security business (under the criterion in the new paragraph 8AA(2)(j) of the Principal Regulation) if it stores, maintains, or has access to the personal information.

### ***Time limit on the call-in power***

Subsection 66A(2) of the Act provides that regulations may prescribe a period of time in which the Treasurer may use the call-in power. If a review of an action is not commenced within this time period the call-in power cannot be used later.

Item 33 of the Regulations provides that the period of time for the call-in power is 10 years from when the action is taken.

The purpose of the time limit is to provide foreign persons with greater certainty as to the Treasurer's powers and to assist in the foreign persons' decisions as to whether to voluntarily notify.

### ***Exemption certificates***

Under section 63 of the Act, regulations may provide for kinds of exemption certificates to be given by the Treasurer.

Item 25 provides for two new types of exemption certificates.

Item 25 inserts new section 43BA into the Principal Regulation which allows the Treasurer to give a foreign person an exemption certificate where the foreign person proposes to take an action that is a notifiable national security action, or one or more kinds of actions that are notifiable national security actions.

In deciding to give the certificate, the Treasurer needs to be satisfied that the taking of the action or kinds of actions by the foreign person is not contrary to national security.

The certificate needs to specify the foreign person that the certificate is issued to and the actions or kinds of actions covered by the certificate. An action that is covered by the certificate is not a notifiable national security action and therefore not subject to the notification requirements that attach to notifiable national security actions (if the action is also a significant or notifiable action, the obligations that attach to those actions remain unless an exemption applies).

### **Example 2**

A foreign defence contractor is considering undertaking a program of direct investments in entities that are national security businesses. However, the contractor has obtained an exemption certificate for very similar investments in the past and the contractor considers that the investments are unlikely to be contrary to Australia's national security and applies for an exemption certificate. If the Treasurer agrees that the program of investments is not contrary to national security, the Treasurer may give an exemption certificate.

Item 25 also inserts new section 43BB into the Principal Regulation to allow the Treasurer to give a foreign person an exemption certificate where the foreign person

proposes to take an action that is a reviewable national security action, or one or more kinds of actions that are reviewable national security actions.

In deciding to give the certificate the Treasurer needs to be satisfied that the taking of the action or kinds of actions by the foreign person is not contrary to national security.

The certificate needs to specify the foreign person that the certificate is issued to, and the actions or kinds of actions covered by the certificate. An action that is covered by the certificate is not a reviewable national security action and therefore not subject to the call-in power.

### **Example 3**

A private foreign investor is proposing to make a number of investments in Australian technology start-ups over the next 12 months. The foreign investor is satisfied that none of the acquisitions will be a significant or notifiable action (because the investments will not exceed the monetary or percentage thresholds) and that none of the acquisitions will be in a national security business. However, the foreign investor will be acquiring influence and control of target businesses that are developing important technologies that may have national security implications and the investments therefore may be reviewable national security actions.

To avoid the possibility of later being called in for review on national security grounds, and to enable the investor to make eligible acquisitions without case-by-case screening and to provide greater investor certainty, the foreign person decides to seek a time-limited exemption certificate.

### ***Exemptions to the application of the Act***

Existing section 28 of the Principal Regulation provides that apart from the definition of foreign person in the Act, the Act does not apply to the scenarios set out in Part 3, Division 3 the Principal Regulation.

Item 15 provides that the existing exemptions do not apply to actions that are reviewable national security actions. This means that where the exemptions have applied so that the taking of an interest in certain circumstances is exempt and therefore not a significant action, notifiable action or notifiable national security action, the Treasurer is still able to call-in the action if it poses a national security concern and is within 10 years of the action being taken.

Item 14 updates the note to provide that the exemptions in the Principal Regulation also mean that the acquisition of the proposed action is not a notifiable national security action.

Items 12, 16, 17, 18, and 19 amend the headings to various provisions to remove references to significant actions and notifiable actions as these are not the only actions the provisions apply to.

Item 20 adds a note to subsection 40(1) of the Principal Regulation to highlight that even though an action may not be a significant action or a notifiable action it may still be a notifiable national security action.

Items 21, 22 and 23 amends the existing exemption that applies to the acquisition of an interest in securities in an entity where the acquisition is under a rights issue. The exemption also applies to notifiable national security actions.

Item 24 extends the exemption that applies to foreign custodian corporations to notifiable national security actions.

Items 28 and 29 provides that when determining whether a direct interest by a foreign government investor in an Australian entity is a significant and notifiable action, where the interest is acquired by acquiring interests in securities in a foreign entity - none of the assets should be a national security business. This is in addition to the existing provision that the assets should not be in a sensitive business.

### ***Consequential amendments to the Principal Regulation***

Items 1, 3, 5, 7, 8 and 10 repeal definitions of terms that have been defined in the Act and so no longer need to be defined in the Principal Regulation.

Items 2, 4, 11, 13, 26, 27, 30, 31, 32, 34, and 35 implement other minor consequential changes necessary to give effect to the items described above and amendments to the Act made by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*.

## **Schedule 2 – Passive investments**

Under the Act, foreign persons are subject to different monetary thresholds and have to notify of certain actions depending on whether the foreign persons are foreign government investors or ‘private’ foreign investors. Section 56 of the Principal Regulation prescribes actions that are notifiable and significant actions if the actions are taken by a foreign government investor, regardless of the value of the investment.

Section 17 of the Principal Regulation defines ‘foreign government investor’. A private investment fund may be considered a foreign government investor if another foreign government investor has a 20 per cent interest in the investment fund (the individual cap) or if multiple foreign government investors together have a 40 per cent interest in the investment fund (the aggregate cap).

The Regulations remove the aggregate substantial interest cap on the combined interests that multiple passive foreign governments may hold in an investment fund before the fund is itself considered a foreign government investor. This streamlines the investments made by funds that would have been considered foreign government investors without these amendments because the funds are treated as foreign persons who are not foreign government investors under the Act.

If a foreign investor still meets the amended definition of a foreign government investor, the investor may still be able to apply for an exemption certificate for proposed actions or kinds of actions.

Item 1 inserts definitions of ‘aggregate interest’ and ‘property’ into the Principal Regulation. ‘Aggregate interest’ is defined by reference to subsection 17(3) of the Principal Regulation. ‘Property’ is defined broadly to include the widest possible range of potential investments in the streamlining provisions.

Item 2 makes numbering amendments and a minor editorial amendment.

Items 3 to 6 remove references to interests being calculated ‘together with any one or more associates’. These references are not necessary because the relevant definitions of ‘interest’ already anticipate that they will be calculated together with any one or more associates. Section 17 of the Act defines ‘interest in an entity’ for items 3 and 4. Section 4 of the Act defines ‘substantial interest’ and ‘aggregate substantial interest’ for items 5 and 6 respectively.

Item 7 amends paragraph 17(d) of the Principal Regulation to use ‘substantial interest’ and ‘aggregate substantial interest’ instead of the percentages that were equivalent to those terms. This simplification is possible because the definition of ‘substantial interest’ in section 4 of the Act has been extended to apply to unincorporated limited partnerships and the new subsection 17(3) of the Principal Regulation extends the definition of ‘aggregate interest’ to also apply to unincorporated limited partnerships.

Item 8 removes the aggregate substantial interest cap on the combined interests that passive foreign government investors may hold in an investment fund before the fund is itself considered a foreign government investor.

The new paragraph 17(2)(a) of the Principal Regulation removes the cap by providing that the relevant parts of subsection 17(1) of the Principal Regulation which contain the aggregate substantial interest cap do not apply if the conditions imposed by the new paragraphs 17(2)(b) and 17(2)(c) of the Principal Regulation are met.

The new paragraph 17(2)(b) of the Principal Regulation contains the requirement that the members are passive investors in the investment fund. The investment fund needs to be a corporation, a unit trust, or an unincorporated limited partnership.

The new subparagraphs 17(2)(b)(i) and (17)(2)(b)(ii) of the Principal Regulation require the foreign person seeking to benefit from the streamlining provisions to be what is commonly understood as an investment fund by specifying that investor contributions should be pooled and that investors should receive a share of the returns. These subparagraphs reflect the broad range of structures, contributions, and investments that are possible for an investment fund.

The new subparagraph 17(2)(b)(iii) of the Principal Regulation requires that investments in the fund be passive because to meet the criteria in this subparagraph the individual investors must not be able to influence individual investment decisions (for example, the individual member must not individually be able to authorise the purchase or sale of particular shares or property) or management decisions about individual investments (for example, the individual member must not be able to require the fund to exercise voting rights in respect of an individual investment in a particular way).

However, funds may still benefit from the streamlining provisions if investors have some influence over the broad investment strategy or are able to participate in collective decision making in relation to the fund, but are not involved in individual decisions about particular investments. For example, investors who have representatives on advisory committees are not considered to be able to influence individual investment decisions solely by virtue of this role. Further, funds with investors who may influence the broad investment strategy of the fund may still benefit from the streamlining provisions. For example, investors requiring the fund to divest from a particular sector, or to only make investments that meet ethical investing criteria may still be eligible for streamlining if the other criteria are met because such influence is not influencing individual investment decisions.

The new paragraph 17(2)(c) of the Principal Regulation also requires that investors not have indirect influence over the fund (in contrast to the direct influence that is excluded in the new paragraph 17(2)(b) of the Principal Regulation). This paragraph requires that investors not have any other interests in the fund besides their investment. One example of such indirect influence would be holding a position that does not influence investments as contemplated by the new paragraph 17(2)(b) of the Principal Regulation but could allow the investor to control which other entities may join the fund. Another example would be the general partner of a limited partnership being a wholly owned subsidiary of a limited partner of the same limited partnership.

The new subsections 17(3) and 17(4) of the Principal Regulation ensure that the definition of ‘aggregate interest’ that is used in relation to corporations and trusts also extends to limited to unincorporated limited partnerships.

Item 9 inserts the term ‘substantial interest’ instead of ‘an interest of at least 20%’ in reliance on the updated definition of that term. This does not change the effect of the Principal Regulation because a ‘substantial interest’ still relies on a 20 per cent criterion.

Items 10 and 11 amend cross references to renumbered provisions.

Item 1 of Schedule 7 inserts section 76 into the Principal Regulation to provide that the streamlining amendments apply to actions taken on or after 1 January 2021 unless the action was notified, received a no objection notification or an exemption certificate, or was subject to an order by the Treasurer before that date. This section ensures consistent treatment of a fund’s foreign government investor status while actions are considered by the Treasurer and avoids retrospective effects on actions that were considered before the streamlining amendments applied.

### **Schedule 3 - Reinstating the monetary thresholds**

The Act establishes a regime for the notification, review and approval of foreign investment in Australia. Regulations made under the Act may specify monetary thresholds above which investments may require notification to the Treasurer for approval.

In April 2020 the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* were made, which amended the monetary value thresholds for significant and notifiable actions to nil from 29 March 2020. Subsequent changes were made by the *Foreign Acquisitions and Takeovers Amendment (Commercial Land Lease Threshold Test) Regulations 2020* to reapply the monetary thresholds for leasehold interests in non-sensitive commercial land that is not vacant. These regulations commenced on 4 September 2020.

The changes in the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* were made due to the significant impact of COVID-19 on the Australian economy, which increased the risk of foreign investment in Australia occurring in ways that would be contrary to the national interest. Amending the monetary value thresholds to nil meant a greater number of investments by foreign persons have needed to be notified to the Treasurer. By reviewing more proposed investments the Treasurer has been able to impose conditions on those actions that were contrary to the national interest (or, where risks to the national interest could not be mitigated, not allow the proposed investment to proceed).

The reduction of all monetary value thresholds to nil was a temporary measure intended to be in place for the duration of the Coronavirus pandemic.

The Regulations reverse the changes to the monetary value thresholds for significant and notifiable actions, by reinserting the thresholds formerly in place, with the values adjusted for indexation.

Other minor amendments give effect to the intent of the *Australia-Hong Kong Free Trade Agreement 2019 (A-HKFTA)*, and ensure that mining and production tenements are treated consistently with residential land and vacant commercial land, in determining whether a transaction involving land held by an Australian land corporation or trustee is subject to a nil threshold.

Item 1 amends existing section 5 to insert definitions of ‘existing value’ and ‘GDP implicit price deflator value’ into the Principal Regulation to support the reinstated monetary thresholds for acquisitions under the Act.

Item 2 amends section 38 of the Principal Regulation to insert subsection 38(5) to apply monetary thresholds to acquisition of interests in residential land used for residential care, retirement villages and certain forms of student accommodation. This provision was repealed by the amendments made by the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020*, which reduced the monetary value thresholds for significant and notifiable actions to nil.

Item 3 inserts subsection 40(2), to apply monetary thresholds to acquisitions of interests in agricultural land acquired by a relevant agreement country investor, or an enterprise or national of Thailand (other than a foreign government investor).

Item 3 also inserts subsection 40(2A) to provide that where an owner or operator, or an associate of an owner or operator, of a wind or solar power station, takes an action relating to an interest in agricultural land for the sole purpose of acquiring or operating a wind or solar power station already located on the land, the investor may disregard the fact that the land is agricultural land for the purposes of monetary value thresholds.

Item 4 repeals Part 4 of the Principal Regulation and inserts a new Part 4, to prescribe values for threshold tests under the Act.

Item 4 inserts section 49 to provide a simplified outline of Part 4, setting out the operation of the provisions relating to thresholds.

Item 4 also inserts section 50 to prescribe a threshold value for actions taken in relation to an agribusinesses.

Item 4 inserts section 51 to prescribe threshold values for the purposes of section 51 of the Act.

Item 4 also inserts section 52 to prescribe threshold values for various classes of land and investors, including land without threshold value.

Items 5, 6 and 7 amend section 56 of the Principal Regulation. Subsection 56(1) of the Principal Regulation provides that an action is a significant and notifiable action if the action is a foreign government investor acquiring a direct interest in an Australian entity or Australian business. Previously, subsection 56(4)(c) provided an exception to this where the total asset value is less than \$55 million, amongst other criteria.

Item 5 inserts new subsection 56(4)(c) to raise the specified value in subsection 56(4)(c) from \$55 million to \$60 million. This would align subsection 56(4)(c) with the monetary threshold for low-threshold land, which was previously \$55 million and is now \$60 million. Item 7 notes the specified value would be indexed, consistent with other threshold values prescribed in the Regulation.

Item 8 inserts a new Part 5A into the Principal Regulation, to provide for the indexation of values prescribed by Parts 4 and 5. The indexation methodology references the Australian System of National Accounts (an annual Australian Bureau of Statistics publication that contains current and historical GDP information). It is free to access online at [abs.gov.au/statistics/economy/national-accounts/australian-system-national-accounts/latest-release](https://abs.gov.au/statistics/economy/national-accounts/australian-system-national-accounts/latest-release).

The Regulations apply to an action taken on or after 1 January 2021.

The provisions relating to indexation also apply on or after 1 January 2021.



## **Schedule 4 – Integrity amendments**

### ***Statutory corporations***

Existing section 31 of the Principal Regulation exempts a person from the foreign investment framework where they are acquiring an interest from a government in Australia, or an entity wholly owned by a government in Australia.

Item 1 amends subsection 31(1) of the Principal Regulation to clarify how the provision applies to statutory corporations. Item 1 extends this exemption to the acquisition of an interest in an Australian business carried on by, or an acquisition of an interest in Australian land from, a statutory corporation.

### ***Government asset sales and statutory corporations***

Item 2 repeals subsection 31(2)(c) of the Principal Regulation and inserts new subsections 31(2)(c)-(e), to provide additional exceptions to the exemption in subsection 31(1).

New subsection 31(2)(c) provides an exception for the acquisition of an interest in Australian land that, at the time of the acquisition, is national security land. This has the effect that a person acquiring an interest in national security land from a government in Australia could be taking an action under the Act.

New subsection 31(2)(d) provides exceptions to the acquisition of an Australian business, where the assets of that business include an interest in Australian land that, at the time of the acquisition, is national security land; where the assets of that business include an interest in an exploration tenement in respect of Australian land that, at the time of the acquisition, is national security land; or where that land is relevant to paragraph 31(2)(b) of the Principal Regulation which specifies types of infrastructure relevant to national security.

New paragraph 31(2)(e) provides an exception for the acquisition of an Australian business that is a national security business.

Item 2 applies to relevant agreements entered into on or after 1 January 2021.

### ***Definition of general partner, limited partner, and limited partnership***

Items 3, 4, 5 and 6 amend existing section 5 of the Principal Regulation to repeal the definitions of ‘general partner’, ‘limited partner’ and ‘limited partnership’. These definitions should be repealed as they are inserted into section 19 of the Act as part of the amendments to the tracing rules.

These items apply from 1 January 2021.

### ***Moneylending exemption and other exemptions***

Section 37 of the Act provides that regulations may be made that provide that the Act or certain provisions of the Act do not apply to prescribed acquisitions, interests, businesses or foreign persons.

A number of existing provisions in the Principal Regulation provide for exemptions to the Act.

Section 27 of the Principal Regulation provides that the Act does not apply to an interest in securities, assets, a trust, Australian land or a tenement if the interest is held solely by way of a moneylending agreement.

Item 8 inserts new subsection 27(2A), to provide that the moneylending exemption does not apply where a legal interest in the assets of a national security business, national security land, an interest in an exploration tenement in respect of Australian land that is national security land, or an interest in securities in an entity that carries on a national security business, is acquired by way of enforcement of a moneylending agreement. This means that a foreign person needs to notify the Treasurer prior to acquiring an asset through the enforcement of a money lending agreement.

This exception does not apply where a receiver, or a receiver and manager, is appointed in relation to the enforcement.

Item 7 inserts a reference to new subsection 27(2A) into section 27(1) of the Principal Regulation.

These amendments apply to both private foreign investors and foreign government investors, and will apply to moneylending agreements entered into on or after 1 January 2021.

### ***Information sharing – section 62 repeal and consequential amendment***

Item 13 repeals section 62 in the Principal Regulation as the amendment to section 124 by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* makes this section redundant.

The amendment to section 124 of the Act removes the authorisation to disclose only periodic aggregate information only if the matter to which the information relates is prescribed by in the regulations. Section 62 of the Principal Regulation specified the specific kinds of information that can be shared. As the regulation making power in the Act is repealed section 62 of the Principal Regulation is now redundant.

Item 12 updates the simplified outline as a result of the repeal of section 62 in the Principal Regulation.

### ***Supporting the passive increase amendments in the Act***

Section 18A of the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* deems certain passive increases to be actions under the Act. A passive increase is where a person holds an interest of a particular percentage in an

entity, and the percentage interest increases without the person acquiring additional interests in securities in the entity.

Item 18 inserts new section 62(2) into the Principal Regulation to disapply section 12 of the Act for passive increases. This would break the link between an acquisition of an interest in securities in an entity and an acquisition of an interest in Australian land. It would mean that where a foreign person acquires an interest in securities in a land entity by way of a passive increase, the person would only be taken to be acquiring an interest in securities but not an interest in land. It is envisaged that passive increases in Australian land entities will be considered at a future point.

#### **Example 4**

Allan is a Canadian citizen who holds 5 per cent in an Australian land corporation. The Australian land corporation runs a share buyback which Allan does not participate in, increasing his percentage shareholding to 7 per cent. This is not a notifiable action under section 47(2)(a) or (b) of the Act because 7 per cent is not a direct or substantial interest in the entity. It is also not a notifiable action under section 47(2)(c) (acquisition of interest in Australian land) of the Act because section 12 would be disapplied. It may, however, be a significant action under section 40(2)(b), because of the operation of section 18A of the Act.

Item 18 also supports the amendments to the Act by clarifying the operation of the maximum civil penalty amounts for acquisitions by way of passive increases.

A foreign person who takes a passive increase may breach some of the civil penalty provisions in the Act. In a few cases the maximum civil penalty amount is worked out by reference to the consideration of the acquisition, or the market value (through section 98F of the Act). Neither of these concepts relate to passive increases.

Item 18 removes the references to consideration and market value by removing the reference to section 98F of the Act where the action is a passive increase. This means the maximum civil penalty amount defaults to 5,000 penalty units (for an individual), or 50,000 penalty units (for a corporation).

Item 18 applies to a percentage interest in an entity that increases on or after 1 January 2021

Item 17 supports Item 18 by amending the simplified outline in section 59 of the Principal Regulation.

Items 14 and 15 also supports the amendments in section 12 of the Act for passive increases. Item 14 ensures that a passive increase caused by a devolution of law could still be an acquisition and action under the Act. Item 15 ensures that a passive increase caused by a compulsory acquisition or compulsory buy-out could still be an acquisition and action under the Act.

Item 16 supports the amendments to the Act by providing consistency for foreign government investors. The Act amendments provide that a passive increase is only a notifiable action if the increase causes the person to cross the relevant direct or

substantial interest threshold. Item 16 ensures the same principle is applied to a passive increase that is a notifiable action taken by a foreign government investor, under existing paragraph 56(1)(a) and subparagraph 56(1)(c)(ii) of the Principal Regulation.

### **Example 5**

Foreign Co is a foreign government investor who holds 9 per cent of Company X. Company X is an Australian corporation carrying on an Australian business with total market capitalisation of \$700 million. Company X undertakes a share buyback and Foreign Co does not participate. After the buyback is finalised, Foreign Co holds 10.5 per cent of Company X. Foreign Co has taken a significant action and a notifiable action because they hold a direct interest in an Australian entity as a result of the buyback.

Six months later, Company X undertakes a second buyback program and Foreign Co does not participate. After the buyback is finalised, Foreign Co holds 12 per cent of Company X. Foreign Co has not taken a notifiable action because they held a direct interest in Company X prior to the second buyback. However, Foreign Co may be taking a significant action.

## **Schedule 5 – Compliance**

### ***Notification requirement exemption for residential and commercial land***

Sections 98C, 98D and 98E as inserted by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* provide that a person must notify the Treasurer when they have taken an action specified in a no objection notification or exemption certificate or an action under section 98E of the Act.

Section 37 of the Act provides that regulations may be made that provide that the Act or certain provisions of the Act do not apply.

Item 1 inserts new section 41B into the Principal Regulation to provide that the notification requirement provided for in sections 98C, 98D and 98E in the Act does not apply when an applicant acquires residential land and commercial land. That is, if an applicant acquires an interest in residential land or commercial land (or the situation under s98E arises) – this does not need to be notified to the Treasurer.

## **Schedule 6 – Technical amendments**

### ***Value of consideration – long term leases***

Items 2, 4 and 5 amend the definition of consideration so that when a person acquires an interest in Australian land, where there is a long term lease, licence or option involved giving right to occupy agricultural land, commercial land or residential land, that is likely to exceed 20 years, the consideration is adjusted and apportioned to 20 years' worth of payments.

For example, if an applicant acquires Australian land that has a 100 year lease for consideration of \$100 million. For the purposes of working out the fee applicable, the applicant would only need to account for 20 years' worth of payments, by calculating all the payments over the 100 year period and apportioning that to 20 years' worth of payments, which makes the value \$20 million.

The amended definition of 'consideration' applies to actions or proposed actions taken on or after 1 January 2021.

### ***Definition of Australian media business***

Item 1 amends section 5 of the Principal Regulation to refer to the new definition of Australian media business.

The current definition of 'Australia media business' means an Australian business involved in the publishing of daily newspapers, or broadcasting television or radio, in Australia, including websites from which those newspapers or broadcasts may be accessed. It does not include Australian businesses that only publish or broadcast such content through websites. The new definition includes Australian businesses that only publish or broadcast such content through the internet.

Item 3 inserts new section 13A of the Principal Regulation to define an Australian media business as an Australian business that: publishes daily newspapers, broadcasts TV or radio, or operates an electronic service. This ensures that online-only media business are included in the definition.

The Regulations define an electronic service as a service: delivering content over the internet, operating wholly or partly for the purposes of serving Australian audiences, meeting the content test, and meeting the threshold test. The second of these, serving Australian audiences, is important for defining businesses operating only on the internet. Because of the internet's decentralised nature, Australians can access websites from businesses across the world. The use of the word 'access' in the current Principal Regulation does not work for an online only business, and is replaced with the concept of 'serving Australian audiences'.

The Regulations introduce a content test to the definition of Australian media business. Traditionally media regulation has been on the form of media but, for businesses operating only on the internet, regulation based on the content may be desirable.

Item 3 splits the content test into two streams: the content is predominantly news, or the content is delivered predominantly via audio or video (for clarity, the 'or' is not

exclusive and content can meet both). News is defined broadly as content that relates to Australia's democratic processes or issues of interest to Australians. Content delivered predominantly by audio or video includes podcasts and TV streaming services.

The Regulations also introduce a threshold test to the definition of Australian media business. A business meets this test if it is reasonable to conclude that their average daily audience for the service is more than 10,000 people. Unlike physical publishing or broadcasting, internet only businesses are not constrained by economies of scale or the need for a publishing licence. Without this threshold test a lot of small Australian media businesses would be picked up by the new definition.

Items 1 and 3 apply to an acquisition of an interest in a media businesses that occur on or after 1 January 2021.

### ***Simplified outline of Part 3***

Item 6 omits the words “that relate to moneylending agreements” from the Simplified Outline of Part 3, to reflect integrity amendments that narrow the scope of the moneylending exemption contained in section 27 of the Regulation.

### ***Revenue streams from mining or production tenements, and exploration tenements acquired by non-government foreign investors***

Item 7 inserts new section 27A of the Principal Regulation to provide an exemption from the operation of the Act where an interest acquired is a revenue stream in a mining or production tenement. The exemption does not apply if the interest is an interest in an asset of a national security business or the interest is in respect of Australian land that is national security land. The exemption also does not apply if the interest acquired gives the holder a proprietary right, a right to occupy the land, or to control or influence who enters the land (see the earlier explanation of the definition of national security land).

Item 7 also inserts new section 27B of the Principal Regulation to provide an exemption from the operation of the Act where an interest in an exploration tenement is acquired by a foreign person who is not a foreign government investor. However, the exemption does not apply if the exploration tenement is in respect of Australian land that is national security land.

Item 7 applies to acquisitions of interests in a tenement or Australian land that occur on or after 1 January 2021.

### ***Interests acquired through will or devolution***

Items 8 and 9 amend section 29 of the Principal Regulation to repeal the exemption for an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by will. Current section 29 of the Principal Regulation provides that the Act does not apply to an acquisition of an interest in securities, assets, a trust or Australian land that is acquired by will or devolution by operation of law (for example, by operation of a constructive trust). A foreign person now needs to notify the Treasurer of an interest acquired through a will.

The exemption continues to apply for the acquisition of an interest in securities, assets, a trust or Australian land that is acquired by devolution by operation of law, other than as a result of an arrangement under Part 5.1 or 5.3A of the *Corporations Act 2001*.

For clarity, the vesting of an interest in the property of a deceased estate to a personal administrator is covered by the exemption for devolution by operation of law. This covers devolution to executors named in wills.

Items 8 and 9 apply to an acquisition of an interest from a will acquired on or after 1 January 2021.

Schedule 7 would set out transitional and application provisions as described above.



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

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The Foreign Investment Reform (Protecting Australia's National Security) Regulations 2020 (the Regulations) support a package of reforms to ensure Australia's foreign investment screening framework keeps pace with emerging risks and global developments while remaining a welcoming destination for foreign investment.

The package improves and updates the operation of the framework across national security, compliance monitoring and enforcement, and integrity as well as streamlining requirements and making technical changes to improve the operation of the law.

The *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* amends the *Foreign Acquisitions and Takeovers Act 2015* (the Act) to:

- Introduce a new national security review and gives the Treasurer as a last resort, the ability in certain circumstances to issue a divestment order where there is no other remedy for a national security risk.
- Strengthen the Treasurer and Commissioner's enforcement powers through increased penalties, directions powers and new monitoring and investigative powers.
- Improve the integrity of the framework by closing potential gaps in the screening regime.
- Expand the information sharing arrangements to assist with the Treasurer and Commissioner's compliance activities and address national security risks.
- Establish a new register of foreign owned assets to record all foreign interests acquired in Australian land; water entitlements and contractual water rights; and business acquisitions that require foreign investment approval.
- Provide that fees are payable for the new actions included in the Act and simplify the fee framework.

**Overview**

***Schedule 1 - National Security***

Schedule 1 to the Regulations provides the definitions of 'national security land' and 'national security business' relied on by the Act and includes definitions of supporting terms. It establishes exemption certificates for actions that would otherwise be notifiable national security actions or reviewable national security actions.

Schedule 1 prescribes a time limit for the national security review of actions and specifies a time limit for taking actions specified in a notice imposing conditions.

Schedule 1 also repeals definitions from the *Foreign Acquisitions and Takeovers Regulation 2015* (Principal Regulation) that have been replicated in the Act and makes a number of minor heading and referencing changes necessary to reflect changes to the Act and the Principal Regulation.

### ***Schedule 2 - Passive Investments***

Schedule 2 removes the aggregate substantial interest cap on the combined interests that multiple passive foreign governments may hold in an investment fund before the fund is itself considered a foreign government investor. This streamlines the investments made by funds that would have been considered foreign government investors without these amendments because the funds are treated as foreign persons who are not foreign government investors under the Act.

Schedule 2 introduces definitions necessary to support this change and makes consequential technical amendments.

### ***Schedule 3 - Reinstating Monetary Thresholds***

Schedule 3 reverses the changes to the monetary value thresholds for significant and notifiable actions made by the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020*, by reinserting the thresholds formerly in place.

Other minor amendments made by Schedule 3 give effect to the intent of the *Australia-Hong Kong Free Trade Agreement 2019*, and ensure that mining and production tenements are treated consistently with residential land and vacant commercial land, in determining whether a transaction involving land held by an Australian land corporation or trustee is subject to a nil threshold.

### ***Schedule 4 - Integrity Amendments***

Schedule 4 makes multiple amendments to the Principal Regulations to improve the integrity of the foreign investment screening regime. These include:

- making sure that acquisitions from a statutory body of the Commonwealth, state or territory are not significant or notifiable actions;
- bringing into the foreign investment framework interests in national security land, a national security business, or a business the assets of which include national security land or an exploration tenement in respect of national security land, acquired from the Commonwealth, a State or a Territory, or a local governing body;
- making changes to support the amendments to the tracing rules made to the Act so that the tracing rules can be applied to unincorporated limited partnerships;
- narrowing the scope of the moneylending exemption where foreign moneylenders obtain a legal interest in a national security business or national security land through the enforcement of a moneylending agreement;
- making consequential amendments to support the new information sharing arrangements in the Act;

- disapplying section 12 of the Act in certain situations, such that if a foreign person acquires interests in securities in a land entity through a passive increase then they have not acquired an interest in Australian land; and
- supporting the amendments to the Act by ensuring the correct penalty provisions apply where there are breaches of the provisions that apply to acquisitions through passive increases and ensuring consistent treatment for foreign government investors.

### ***Schedule 5 – Compliance***

The Act requires a person who obtained a no objection notification to notify the Treasurer once the acquisition has occurred.

The Regulations remove the requirement to confirm that an acquisition in residential and commercial land has occurred.

### ***Schedule 6 - Technical Amendments***

Schedule 6 makes multiple technical amendments to the Principal Regulations to improve the operation of the Act. These include:

- exempting the acquisition of revenue streams of mining and production tenements from being a significant or notifiable action;
- updating the definition of ‘Australian media business’ to better reflect the broader means of communication by which media is accessed;
- excluding an acquisition of an interest in land acquired by a private investor as a result of obtaining a right in an exploration tenement from being a significant or notifiable action unless the land is ‘national security land’; and
- amending the definition of consideration to take account of long-term leases.

### ***Schedule 7 - Application and Transitional Provisions***

Schedule 7 to the Regulations contains the application and transitional provisions for Schedules 1 to 6 to the Regulations.

## **Human rights implications**

### ***Schedule 1 - National Security Review and Last Resort Power***

Schedule 1 to the Regulations provides definitions and sets out details (such as time periods) that are necessary to support the operation of the Act. It also provides a mechanism for the giving of exemption certificates by the Treasurer which means that actions that would otherwise attract obligations under the Act do not.

Schedule 1 does not engage any human rights in and of itself beyond the operation of the Act. The compatibility with human rights of the amendments to the Act has been considered in the Statement of Compatibility with Human Rights included in the

Explanatory Memorandum to the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020.

### ***Schedule 2 - Passive Investments***

Schedule 2 to the Regulations only affects investments by investment funds which, by definition, need to be corporations, trusts, or limited partnerships. This means that Schedule 2 does not affect individuals.

Since Schedule 2 does not affect individuals, it does not engage any human rights.

### ***Schedule 3 - Reinstating Monetary Thresholds***

The increases in monetary thresholds and the changes in the treatment of mining and production tenements made by Schedule 3 set the parameters necessary for the effective operation of provisions in the Act.

This means that Schedule 3 does not engage any human rights in and of itself beyond the operation of the Act.

### ***Schedule 4 - Integrity Amendments***

Schedule 4 makes various amendments to support the operation of the Act which are for the most part relatively minor adjustments to existing parameters or exclusions of certain actions from the operation of the Act.

Schedule 4 does not engage any human rights.

### ***Schedule 5 – Compliance***

Schedule 5 of the Regulations removes the requirement on an investor to notify the Treasurer where the person has received a no objection notification for an acquisition of residential land or commercial land and the acquisition has occurred.

The exemption does not engage human rights. To the extent that the remaining obligation to notify of other investments and acquisitions engage a person's right to privacy under Article 17 of International Covenant on Civil and Political Rights (ICCPR), this has been considered in the Statement of Compatibility with Human Rights included in the Explanatory Memorandum to the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020.

### ***Schedule 6 - Technical Amendments***

The amendments in Schedule 6 to the Regulations amend the definition of 'Australian media business' and exempt certain revenue streams and exploration tenements from the operation of the Act. These amendments do not engage human rights.

#### ***Right to freely dispose of natural wealth***

However, the removal of the exemption that applies to investments that are transferred by will to a foreign person with the effect that the recipient may require

approval from the Treasurer (items 8 and 9 of Schedule 6) may engage the right to freely dispose of natural wealth under Article 1 of the ICCPR.

Paragraph 2 of Article 1 of the ICCPR guarantees the right of an individual to freely dispose of their natural wealth and resources. Schedule 6 to the Regulations engages this right by removing the existing exemption for transfers of assets by will and thus expanding the circumstances in which the Treasurer may impose conditions on or restrict the disposal of particular assets in certain circumstances, or in very limited circumstances require a person to dispose of a particular asset.

These measures are intended to achieve the legitimate and significant objective of reducing national security risks or actions occurring that may be contrary to the national interest.

The measures are directly connected to their objective because they enable the Treasurer, if necessary in the circumstances, to prevent the foreign person taking the interest in or acquiring influence that would pose a national security risk to be contrary to the national interest.

The measures are proportionate to the objective because the Treasurer is able to adjust the response by tailoring conditions of approval or the required disposal to the particular circumstances in which the power is exercised. The measures are only a limited restriction of the right because they would not prohibit the disposal of assets and only restrict disposal to a particular buyer or group of buyers, leaving the person free to transfer it to other persons. Where a disposal order is made, it will not prevent a person from receiving a fair market value for their asset in the Australian market.

For these reasons, to the extent this provision might be considered to limit the right of an individual to freely dispose of their natural wealth and resources, the limitation is reasonable in all the circumstances.

### ***Schedule 7 - Application and Transitional Provisions***

Schedule 7 to the Regulations contains the application and transitional provisions for Schedules 1 to 6 to the Regulations.

There is no retrospective operation of any of the Schedules and so Schedule 7 does not engage any human rights.

### **Conclusion**

The Regulations are compatible with human rights, because to the extent the Regulations may limit human rights, those limitations are reasonable, necessary and proportionate.