

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment Regulations 2022

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) establishes a regime for the notification, review and approval of foreign investment in Australia.

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 purpose of the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to support the improved administration of Australia's foreign investment framework by clarifying certain aspects of the Principal Regulations and streamlining the processing of less sensitive types of investment.

As required by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Secretary to the Treasury undertook an evaluation of the Government's most recent foreign investment reforms, which came into effect on 1 January 2021. The Government accepted all seven of the evaluation's findings and in doing so committed to making further refinements to the foreign investment framework to ensure it remains fit for purpose.

The Regulations give effect to this response by reducing the regulatory burden for foreign investors that engage in moneylending, invest in unlisted land entities or Australian media businesses, acquire shares or units under rights issues and other pro-rata offers, or transact on behalf of institutional investors as part of a custodian service. Regulatory burden is reduced through amendments that refine the rules for the notification of these kinds of foreign investments, including raising thresholds and providing broader exemptions from foreign investment screening.

Public consultation on the Regulations was undertaken from 14 February 2022 to 25 February 2022. Five submissions were received. Multiple changes were made to take into account feedback received in these submissions. These changes ensured the proposed Regulations reflect commercial practices of foreign investors and that the scope of the amendments is clear.

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

The Act specifies no conditions that need to be satisfied 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 on the day after they were registered on the Federal Register of Legislation.

The Regulations has been assessed as having no more than a minor regulatory impact (OBPR reference number OBPR21-01260). Accordingly, no Regulatory Impact Statement has been prepared.

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

Details of the *Foreign Acquisitions and Takeovers Amendment Regulations 2022*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (the Regulations).

Section 2 – Commencement

The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

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 Schedule to this instrument will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations)

Items 1 and 2 – Definition of moneylending agreement and moneylending business

Item 1 repeals the definition of a ‘moneylending agreement’ in section 5 to the Principal Regulations and substitute a new definition. The amendment clarifies that a relevant agreement entered into by a new entity will meet the definition where the new entity was created by an existing moneylending business for the predominant purpose of lending money (or otherwise providing financial accommodation). This is a common industry practice, but the Principal Regulation do not expressly provide for an exemption in these circumstances. The new definition ensures that the moneylending exemption in section 27 of the Principal Regulations also applies to moneylending agreements of entities that are newly created by existing moneylending businesses. The purpose of the amendment is to ensure the Principal Regulations remain fit for purpose and meet investor expectations, including with respect to this common industry practice.

Under the new definition of ‘moneylending agreement’, there are a number of exceptions to the inclusion of newly created moneylending entities:

- Paragraph 5(b)(iv) provides that the agreement entered into by the newly created entity must not deal with any matter unrelated to the purpose of moneylending and unrelated to the carrying on of the moneylending business of the person or entity that created the new entity.

- Paragraph 5(b)(v) provides that the newly created entity must not have carried on a business unrelated to the purpose of moneylending or otherwise providing financial accommodation.

Under the new definition of ‘moneylending agreement’, subsection 5(b) ensures that agreements of newly created entities (that may not be carrying on any business at the time of entering into the relevant agreement) can meet the definition provided that the above elements are satisfied. Where an entity carries on a number of businesses, including a moneylending business, the existing provisions in subsection 5(a) may apply.

The amendments clarify that references to a person in the definition of a ‘moneylending agreement’ also apply to an entity. The term ‘entity’ is defined in section 4 of the Act and means a corporation or unit trust. These amendments align the language of the definition of moneylending agreement with the existing language used in the moneylending exemption under section 27 of the Principal Regulations.

Item 2 inserts the definition of ‘moneylending business’ in section 5 of the Principal Regulations. This change is not intended to alter the concept of a moneylending business, which is currently nested in the definition of moneylending agreement and will be repealed. The purpose of the amendment is to support the readability of the Principal Regulations. As the new definition of moneylending agreement is lengthier than the old definition that would be repealed, a separate rather than nested definition would be easier to understand for a reader.

Item 3 – Moneylending exemption – subsidiary and holding entities

Item 3 omits the words ‘the first entity’ and substitutes ‘an entity mentioned in subparagraph (i) or (ii)’ in subparagraph 27(1)(b)(iii) of the Principal Regulations. This extends the moneylending exemption to a person who is (alone or with others) in a position to determine the investments or policy of a subsidiary or holding entity of the entity which entered into the moneylending agreement. The purpose of the amendment is to clearly specify the class of persons who can access the moneylending exemption and the operation of the exemption as currently understood by investors.

Item 4 – Moneylending exemption – security trustees

Item 4 omits ‘the first entity’ and substitutes ‘a person or entity mentioned in any of subparagraphs (i) to (iii)’ in subparagraph 27(1)(b)(iv) of the Principal Regulations. This extends the moneylending exemption to a security trustee who holds or acquires an interest referenced in paragraph 27(1)(a) on behalf of:

- a subsidiary or holding entity of the entity which entered into the moneylending agreement (the first entity), or
- a person who is (alone or with others) in a position to determine the investments or policy of the first entity (or a subsidiary or holding entity of the first entity).

The purpose of the amendment is to reduce the regulatory burden for foreign investors by ensuring consistent treatment of interests held by security trustees. This would mean the moneylending exemption applies in all security trustee circumstances that do not pose sufficient risks to the national interest to warrant screening.

Item 5 – Moneylending exemption – receivers

Item 5 amends subparagraph 27(1)(b)(v) of the Principal Regulations so that the moneylending exemption applicable to a receiver (or receiver and manager) appointed in relation to a person or entity listed in subparagraphs 27(1)(b)(i) to (iv) also applies to a receiver (or receiver and manager) appointed by that person or entity.

This clarification means the moneylending exemption can apply, for example, in circumstances where the entity which entered into the moneylending agreement (the first entity), as a lender, exercises a right under its moneylending agreement to appoint a receiver.

The purpose of the amendment is to align the Principal Regulations with commercial practices and to enable a receiver (or receiver and manager) to hold an interest under a moneylending agreement after being appointed by an entity to do so without requiring screening.

Item 6 – Moneylending exemption – large financial institutions

Item 6 inserts new subparagraph 27(2)(b)(ia) into the Principal Regulations to allow moneylending businesses that are licenced financial institutions and have at least 100 members to be covered by the moneylending exemption for interests relating to residential land. This new subparagraph exempts non-stock or mutual entities from seeking foreign investment approval when they are involved in moneylending for residential land, provided such entities have at least 100 members.

A ‘member’ can include:

- a person who holds interests or shareholding in a non-stock entity (a privately owned entity – an entity which is not listed on an official stock exchange); or
- a person who is a policyholder of a mutual entity (an entity based on the principle of mutuality where policyholders do not contribute to the capital of the entity by direct investment and policyholders derive rights to profits and votes through their customer relationship with the entity).

The purpose of the amendment is to ensure the Principal Regulations remain fit for purpose. Currently, licensed financial institutions that are not authorised deposit-taking institutions (as defined in the *Banking Act 1959*) can only benefit from the exemption if they are listed on an official stock exchange or have 100 holders of securities. –The existing exemption does not extend to non-stock or mutual entities. The amendment ensures the Principal Regulations extend the exemption to such entities, which are already required to hold a financial services licence (in Australia or elsewhere) and therefore do not pose sufficient risks to the national interest to warrant screening.

Items 7, 8 and 9 – Australian media business

Items 7 and 8 amend the definition of an ‘Australian media business’ in section 13A so that some businesses that were classified as Australian media businesses prior to the amendments are no longer captured by the definition.

Item 7 narrows the definition by repealing subparagraph 13A(3)(a)(iii) the Principal Regulations, which currently specifies that ‘content that reports, investigates or explains current issues or events of interest to Australians’ would satisfy the content test of an Australian media business. Subparagraph 13A(3)(a)(iii) is no longer required as it has the potential to capture non-media businesses that presented no or low risk to Australia’s national interest in the context of an Australian media business. For example, a bank (a business broader than the media sector) may have been viewed as an Australian media business due to the operation of former subparagraph 13A(3)(a)(iii) when the bank published interest rate changes on its website, given interest rate changes are a current issue of interest to Australians.

Item 8 clarifies subsection 13A(4) the Principal Regulations so that an electronic service (a digital-only media business) satisfies the threshold test in subsection 13A(4) if it is reasonable to conclude that the average daily audience for the service exceeds 10,000 people *in Australia*, not globally.

Item 9 omits ‘an interest of at least 5%’ and substitutes ‘a direct interest’ in section 55 of the Principal Regulations. This amends the threshold test for investments in Australian media businesses under section 55, changing the 5 per cent threshold test to a ‘direct interest’ test. This aligns the threshold for acquisitions of Australian media businesses with the threshold that generally applies to more sensitive investments, including acquisitions of national security businesses and acquisitions by foreign government investors.

The meaning of ‘direct interest’ in an entity or business is defined in section 16 as:

- an interest of at least 10% in the entity or business; or
- an interest of at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business; or
- an interest of any percentage in the entity or business if the person who acquired the interest is either in a position:
 - to influence or participate in the central management and control of the entity or business; or
 - to influence, participate in or determine the policy of the entity or business.

The purpose of the amendments to the definition of Australian media business and to the threshold test for investments in Australian media businesses is to support a better balance between welcoming foreign investment and protecting national interests in

relation to media investments. The amendments ensure the Principal Regulations remain fit for purpose by only capturing those acquisitions that pose sufficient risks to the national interest to warrant screening. During the evaluation of the 2021 foreign investment reforms, some stakeholders provided feedback that the current definition captures businesses that have no material connection to Australia or are not traditionally in the media sector.

Item 10 – Unlisted Australian land entities

Item 10 omits ‘5%’ and substitutes ‘10%’ in paragraph 37(4)(c) of the Principal Regulations. This amends the exemption under paragraph 37(4)(c) for acquisitions of securities in unlisted Australian land entities so that the exemption applies where after the acquisition, a foreign person (alone or together with one or more associates), holds an interest of less than 10 per cent in the land entity, instead of 5 per cent. This amendment aligns the percentage control thresholds for acquisitions of unlisted Australian land entities with listed Australian land entities under paragraph 37(2)(c).

The purpose of the amendment is to reduce the regulatory burden for foreign investors that invest in unlisted land entities. The current 5 per cent threshold is lower than the threshold for investments into national security businesses, despite not entailing the same risks. The change to the threshold would ensure that the Principal Regulations only capture acquisitions that pose sufficient risks to the national interest to warrant screening.

Items 11, 12 and 13 – Acquisitions of interests in securities where proportionate share or unit holding will not increase as a result of a person’s acquisition

Item 13 inserts new paragraph 41(2)(c) into the Principal Regulations to provide an exemption from the notifiable provisions of the Act for foreign persons that acquire an additional interest in an entity, provided their proportional percentage interest holding would not generally increase post-acquisition. The exemption operates as follows:

Firstly, under subparagraph 41(2)(c)(i), a person holds an interest of a particular percentage in an entity if the person (alone or together with one or more associates) is either in a position to control at least that percentage of the voting power of the entity, or holds interests in at least that percentage of the issued securities in the entity. This concept is analogous to the meaning of a person’s interest of a specified percentage in an entity as outlined in subsection 17(1) of the Act. This percentage is the ‘allowable percentage’.

Secondly, under subparagraph 41(2)(c)(ii), the person’s acquisition was of additional interests only available to existing interest holders at their respective allowable percentages. These circumstances include subscription agreements where the existing interest holders are offered the opportunity to contribute capital at the same proportions as their existing interest holding or capital calls where they are required to do so.

Thirdly, under subparagraph 41(2)(c)(iii), the portion of additional interest acquired by the person (and their associates) when compared against the total amount of

additional interest available for acquisition by all existing interest holders must not exceed the person's allowable percentage. Under this provision, 'those additional interests' refers to the amount of additional interests available for acquisition by all existing interest holders as mentioned in subparagraph 41(c)(ii). This is also made clear in Note 3 to paragraph 41(2)(c).

For example, an existing foreign investor who holds a 25 per cent interest in an entity must not acquire more than 25 per cent of the total amount of interests available to all existing investors under a pro-rata capital raising offer of additional shares, regardless of whether or not some investors end up acquiring interests under that offer (and subject to the application of subparagraph 41(2)(c)(iv) discussed below). If 100 additional shares are available to all existing shareholders under the offer, subparagraph 41(2)(c)(iii) requires that the foreign investor must not acquire more than 25 of the 100 additional shares. This applies regardless of whether at the end of the offer, certain other investors did not participate and only a total of 80 additional shares were acquired by all existing shareholders.

Finally, under subparagraph 41(2)(c)(iv), at the time of acquisition, the person must have no reasonable grounds to believe that their overall proportionate interest holding at the end of the acquisitions would increase as a result of their acquisition. Whether or not the person has reasonable grounds to believe that their percentage interest holding in an entity would increase as a result of the acquisition is an objective test.

- Depending on the circumstances, a person may have reasonable grounds to believe that pursuant to a pro-rata capital raising offer, their proportionate interest holding will increase, and therefore, the exemption would not apply. For example, a person may intend to acquire more shares under the offer for additional shares in an entity but has reasonable grounds to believe that their percentage shareholding would increase post-acquisition. This could be because at the time of the person's acquisition, the facts suggest that any number of other shareholders will not participate in the capital call.
- A person's proportionate share or unit holding is generally not expected to increase as a result of a capital call (or a comparable pro-rata capital raising or unit subscription event), where each person is required to contribute additional funding to an investment vehicle in their respective ownership proportions. Under these circumstances, because each investor has an obligation to contribute additional capital, there are generally no reasonable grounds to believe that another investor would not comply.

A foreign investor may be covered by the exemption even if post-acquisition, they have a proportionate interest holding above their allowable percentage (prior to the acquisition). In these cases, the exemption may still apply if subparagraph 41(2)(c)(iv) is satisfied (at the time of acquisition).

The exemption is not restricted to the above circumstances and is intended to cover transactions that present low risk to Australia's national interest, including in instances where a person's proportionate share or unit holding does not increase as a result of capitalising a wholly-owned subsidiary. This is because the immediate owner's allowable percentage would not change as a result of the person's acquisition

of an additional interest in the wholly-owned subsidiary (it remains at 100 per cent). The amendments ensure that in these circumstances, the exemption from the notifiable action provisions of the Act applies.

Example 1 – No increase in proportionate interest holding

Foreign persons X, Y and Z are participating in a capital call and will contribute additional funding to an investment vehicle for additional interest in the entity.

Foreign persons X, Y and Z are the only investors that have provided funding to the investment vehicle to date and each foreign investor works out their allowable percentage based on the percentage of shareholding prior to the capital call.

Each investor contributes capital for additional shares in the same proportions as their existing ownership (additional acquisition is at no more than their respective allowable percentages). The exemption under the amendments apply to each of the foreign persons X, Y and Z.

Each of the foreign investors had no reasonable grounds to believe there will be an increase in the percentage interest for each of the foreign persons X, Y and Z in relation to this capital call, because each of the foreign persons are required to contribute additional capital in their respective ownership proportions and no other persons are able to provide capital to the investment vehicle.

The purpose of the amendments is to reduce the regulatory burden for investors by removing the requirement to submit an application before acquiring an interest in an entity where the investor's proportionate share or unit holding will not increase.

Items 11 and 12 make minor editorial amendments to subsection 41(2) to facilitate the insertion of new paragraph 41(2)(c). For example, Item 11 omits 'an acquisition' and substitutes 'a person's acquisition' in subsection 41(2) of the Principal Regulations.

Item 14 – Meaning of rights issue

Item 14 clarifies that the exemption from the notifiable action provisions of the Act in paragraph 41(2)(a) apply to circumstances where a person acquires interest under any of the following:

- a rights issue within the meaning of the *Corporations Act 2001*;
- a rights issue within the meaning of a foreign country, if that issue is regulated by a law of a foreign country; or
- an issue that is similar to a rights issue within the meaning of the *Corporations Act 2001*, and is provided for under an instrument made by the Australian Securities Investment Corporation (ASIC) under the *Corporations Act 2001*.

The amendment ensures that the exemption from the notifiable provisions of the Act applies to foreign persons when they acquire an additional interest in an entity under a voluntary, pro-rata rights issue contemplated by this provision (or a law of a foreign country or part of a foreign country, as the case may be with a foreign entity).

Under subparagraph 41(2)(a)(ii), acquisitions are also exempt under the notifiable provisions of the Act if they are similar to rights issues and are provided for in an instrument made under the *Corporations Act 2001* by the Australian Securities and Investments Commission (ASIC). This clarification aligns with what different regulators and the market understand a rights issue to be, which ensures consistent application of the law. ASIC has issued an instrument that provides for a form of ‘accelerated rights issue’. It is the policy intention that the exemption applies to acquisitions under these types of rights issues.

The purpose of the amendment is to ensure the Principal Regulations remain fit for purpose and meet investor expectations by including an explicit definition of a rights issue in the Principal Regulations which is consistent with the common industry understanding of that term.

Items 15 to 21 – Foreign custodian corporations

Items 18 and 19 amend the foreign custodian corporations exemption in section 30 of the Principal Regulations to ensure that foreign custodians do not require approval where they undertake acquisitions in the course of providing custodian services. The amendments achieve this by clarifying that the exemption can be accessed where a foreign custodian will be unable to exercise voting rights associated with an interest it acquires, and where it will have an equitable interest that is only a right to indemnification.

The purpose of the amendments is to reduce the regulatory burden on investors by not requiring screening of acquisitions which do not pose sufficient risks to the national interest to warrant screening.

Items 15, 16, 17, 20 and 21 make consequential editorial and referencing amendments to section 30 and subsection 41A(2) of the Principal Regulations for the amendments made by items 18 and 19. For example, item 17 omits ‘the interest’ and substitutes ‘the subject interest’ in paragraphs 30(b) and (c) while items 20 and 21 omit ‘30(a)’ and substitute ‘30(1)(a)’ in paragraphs 41A(2)(b) and (c) and the example in subsection 41A(2).

Item 22 - Application of the Regulations

Item 22 inserts new section 77 the Principal Regulations to provide application and transitional rules as follows:

- the amendments relating to moneylending agreements apply in relation to moneylending agreements entered into on or after 1 April 2022; and
- the other amendments to the Principal Regulations apply to actions taken or proposed to be taken on or after 1 April 2022.

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 Regulations 2022

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 Act 1975* (the Act) establishes a regime for the notification, review and approval of foreign investment in Australia.

The purpose of the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to support the improved administration of Australia's foreign investment framework by clarifying certain aspects of the Principal Regulations and streamlining the processing of less sensitive types of investment.

As required by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Secretary to the Treasury undertook an evaluation of the Government's most recent foreign investment reforms, which came into effect on 1 January 2021. The Government accepted all seven of the evaluation's findings and in doing so committed to making further refinements to the foreign investment framework to ensure it remains fit for purpose.

The Regulations give effect to this response by reducing the regulatory burden for foreign investors that engage in moneylending, invest in unlisted land entities or Australian media businesses, acquire shares or units under rights issues and other pro-rata offers, or transact on behalf of institutional investors as part of a custodian service. Regulatory burden is reduced through amendments that refine the rules for the notification of these kinds of foreign investments, including raising thresholds and providing broader exemptions from foreign investment screening.

Human rights implications

This Legislative Instrument engages with the right to be free from discrimination.

Article 26 of the International Covenant on Civil and Political Rights (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 Regulations 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, ‘Each 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 Regulations engage 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 Act and the Principal Regulations 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 Regulation will not be Australian citizens.

While the Regulations will primarily affect individuals who are citizens of countries other than Australia, the Regulations streamline the administration of the Act and Principal Regulations by clarifying concepts that represent lower risk to national interests and broadening the exemptions from the relevant notification provisions under the Act.

Conclusion

This Legislative Instrument is compatible with human rights as it promotes the right to be free from discrimination.