

## **EXPLANATORY STATEMENT**

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

*Foreign Acquisitions and Takeovers Fees Imposition Act 2015*

*Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling)  
Regulations 2022*

The *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Act) establishes a framework to impose, as taxes, fees paid by foreign persons for the review of foreign investment applications under the *Foreign Acquisitions and Takeovers Act 1975* (FATA).

Section 13 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. Subsection 6(1) provides that the amounts of fees imposed by the Act for actions under the FATA are to be worked out in accordance with the regulations made under the Act.

The *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (the Principal Regulations) prescribe methods for working out the amount of fees imposed by the Act, regarding regulated actions of foreign persons under the FATA.

The purpose of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022* (the Amending Regulations) is to double the amount of fees worked out for the purposes of the Act under the Principal Regulations and provide clarity by updating references in indexation provisions.

The Amending Regulations apply to fees that become payable on or after 29 July 2022.

Public consultation did not take place prior to the preparation of the Amending Regulations because the Amending Regulations implement an announced election commitment. The administrators of the FATA (Treasury and Australian Taxation Office) were consulted on the proposed Regulations and explanatory materials.

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

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

The Amending Regulations commenced on 29 July 2022.

The Office of Best Practice Regulation (OBPR) has advised that the amendments do not require a Regulatory Impact Statement because they have been assessed to be machinery in nature. The OBPR reference number is OBPR22-02483.

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

**Details of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022***

**Section 1 – Name of the Regulations**

This section provides that the name of the regulations is the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022* (the Amending Regulations).

**Section 2 – Commencement**

This section provides that Schedule 1 to the Amending Regulations commences on 29 July 2022.

**Section 3 – Authority**

This section provides that the Amending Regulations are made under the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Act).

**Section 4 – Schedule**

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

Legislative references are made to the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Principal Regulations) unless otherwise specified.

**Schedule 1 – Amendments**

**Part 1 – Main amendments**

Fees under the foreign investment framework are imposed as a tax by the Act. Section 5 of the Act imposes a range of fees payable by foreign persons in relation to the *Foreign Acquisitions and Takeovers Act 1975* (FATA). The fees are subject to indexation under Part 5 of the Principal Regulations.

The Principal Regulations provide methods for working out different fees as follows:

- Part 2 - fees relating to actions such as an application for an exemption certificate and giving notice of a notifiable action (section 6 provides for fees covered under this Part);
- Part 3 - vacancy fees, which may arise when foreign persons do not utilise their residential property (section 42 provides for fees covered under this Part); and
- Part 4 - adjusting fees.

### Items 1 to 20 – updating fee figures

Items 1 to 20 of the Amending Regulations update the amount of fees in the Principal Regulations as imposed by the Act regarding actions regulated under the FATA. The effect of the amendments is to double the amount of fees worked out for the purposes the Act. The amendments incorporate any indexation of the fees (where relevant) prior to the application of the new fees in the Amending Regulations.

The amounts are as follows.

<b>Amount in Principal Regulations</b>	<b>Amount of fee prior to amendments (including indexation)</b>	<b>Amount of fee on application of the Amending Regulations (29 July 2022)</b>	<b>Item in Amending Regulations</b>
\$2,000	\$2,000	\$4,000	6, 8, 10, 13, 16, 17, 18, 19 and 20
\$6,350	\$6,600	\$13,200	1
\$12,700	\$13,200	\$26,400	2, 4, 7, 9, 11, 14 and 15
\$27,100	\$28,300	\$56,600	12
\$500,000	\$522,500	\$1,045,000	3 and 5

Subsection 6(3) of the Act imposes a cap of \$1,000,000 on the amount of fees that may be provided for under the regulations. Section 7 of the Act provides that this cap is also subject to indexation. Prior to the amendments, the cap under subsection 6(3) of the Act has been, in effect, \$1,045,000.

The Amending Regulations are not intended to impose a fee amount that is greater than the cap provided for under the Act. Section 61A, as inserted by item 24, ensures this does not occur (see below).

Although fees are subject to indexation under Part 5 of the Principal Regulations, certain fees did not previously increase as the indexation amount was rounded down under subsection 59(3). For example, this was the case for fees at \$2,000 where indexation was less than 5 per cent and rounded down to the nearest hundred.

### Items 21 to 23 – updating references in indexation provisions

Items 21 to 23 amend references to Part 5 of the Principal Regulations by updating the dates used for indexation. This is because the indexation amounts prior to the application of the Amending Regulations have been incorporated in the above amendments and future indexation amounts would apply from the proposed new dates below. Specifically,

- item 21 updates 1 July 2021 to 1 July 2023 in subsection 59(2);

- item 22 updates 1 July 2021 to 1 July 2023 in paragraph 59(4)(a); and
- item 23 updates the reference in the indexation formula under subsection 60(1) from 31 March 2020 to 31 March 2022.

#### Item 24 – fee cap

Item 24 inserts section 61A of new Part 5A to the Principal Regulations. Section 61A generally provides that where the amount of a fee imposed under the Act and worked out in accordance with the regulations exceeds the applicable fee cap under subsection 6(3) of the Act, the fee is instead worked out under the Principal Regulations to be equal to the cap.

This provision ensures that the amount of fees worked out under the Principal Regulations would not exceed the fee cap in the Act.

#### Part 2 – Application

##### Item 25 – Application of the amendments

Item 25 inserts section 66 which provides the application provision for the Amending Regulations. This section would provide that the Amending Regulations apply in relation to fees that become payable on or after 29 July 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 Fees Imposition Amendment (Fee Doubling) 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 Fees Imposition Act 2015* (the Act) establishes a framework to impose, as taxes, fees for the review of foreign investment applications under the *Foreign Acquisitions and Takeovers Act 1975* (FATA).

The purpose of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Fee Doubling) Regulations 2022* (the Amending Regulations) is to double the amount of fees worked out for the purposes of the Act under the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (the Principal Regulations) and provide clarity by updating references in indexation provisions.

Subsection 6(1) of the Act provides that fee amounts are worked out in accordance with the regulations. This delegation in the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Principal Regulations) supports a simpler fee framework and allows for flexibility in making timely amendments. The Act further imposes a fee cap under subsection 6(3) and this cap is also subject to indexation under section 7. Prior to the application of the amendments, the fee cap amount under the Act is in effect, \$1,045,000. The Amending Regulations update the amounts of fees calculated under the Principal Regulations and do not exceed the fee cap under the Act.

**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 Amending 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 Amending 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 fees imposed by the Act and the Principal Regulations apply to a ‘foreign person’ where that activity is regulated by the FATA. 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.

The fee amounts worked out under the Principal Regulations are limited by the cap in subsection 6(3) of the Act. To avoid doubt, the amendments include a provision to ensure the fee cap is not exceeded.

The amendments increase fees in relation to actions regulated by the FATA. The Amending Regulations increase the amount of fees, imposed as a tax under the Act to deliver the Government’s election commitment to raise revenue for the Budget.

The increased fees are also reasonable, necessary and proportionate because the amount of fee imposed depends on the nature of the transaction, the significance of the transaction to Australia’s national interests, the value of the transaction, as well as other fees subject to an existing de minimis threshold. It is expected that based on these criteria and the nature of actions regulated under the FATA, a significant proportion of increased fees are borne by foreign persons that are corporations.

## **Conclusion**

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