EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment (India Free Trade Agreement) Regulations 2022

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) establishes a regime for the notification and review 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 (India Free Trade Agreement) Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to give effect to Australia's obligations under the Australia-India Economic Cooperation and Trade Agreement (AI-ECTA). Australia and the Republic of India (India) signed the AI-ECTA on 2 April 2022 to deepen bilateral trade in goods and services between the two economies.

The Regulations form part of the steps Australia must take to implement the AI-ECTA. The Regulations alter certain threshold values (monetary amounts) in the Principal Regulations that apply when determining whether certain services investments by Indian investors (other than foreign government investors) are subject to screening under the national interest test in Australia's foreign investment framework.

The Regulations increase the threshold from $289 million to $500 million (indexed) for certain actions by private Indian investors in relation to non-sensitive services investments in entities, businesses and developed commercial land. This means that private Indian investors will only be required to notify the Treasurer of these types of investments if the proposed investment is above the higher $500 million threshold amount.

Public consultation was undertaken on the AI-ECTA by the Department of Foreign Affairs and Trade (DFAT) as part of the AI-ECTA negotiations. DFAT received submissions throughout the negotiation process which are published on its website. DFAT also conducted consultation with stakeholders who may be directly affected by the AI-ECTA, as well as with State and Territory Governments. No public consultation was undertaken specifically for these amendments as extensive consultation was undertaken as part of the negotiations of the AI-ECTA.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. Section 48A of the *Legislation Act 2003* provides that where a legislative instrument only repeals or amends another instrument, without making any application, saving or transitional provisions relating to the amendment or repeal, that

instrument is automatically repealed. By virtue of section 48A, if the Regulations are not disallowed, the Regulations will automatically repeal when the disallowance period ends. Once repealed, the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* is no longer relevant to the Regulations.

The Regulations commence and apply from the later of the day after the Regulations are registered and the day the AI-ECTA enters into force.

A Regulation Impact Statement accompanied the National Interest Analysis for the AI-ECTA.[1]

Details of the Regulations are set out in Attachment A.

A statement of Compatibility with Human Rights is at Attachment B.

[1] In October 2022, the National Interest Analysis, including attachments, was available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/AI-ECTA/Terms_of_Reference

ATTACHMENT A

Details of the *Foreign Acquisitions and Takeovers Amendment (India Free Trade Agreement) Regulations 2022*

Section 1 – Name of the Regulations

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

Section 2 – Commencement

The Regulations commence on the later of:

- the day after the Regulations are registered; and
- the day the Australia-India Economic Cooperation and Trade Agreement (AI-ECTA) enters into force for Australia.

However, the Regulations do not commence at all if the AI-ECTA does not enter into force.

The Minister must announce, by notifiable instrument, the day the AI-ECTA enters into force for Australia.

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

Schedule 1 – Amendments

Items 1 and 2 – New monetary thresholds for certain entity and business investments by Indian investors

Item 1 is a consequential amendment to support the new subsections added by Item 2.

Item 2 adds new subsections 51(2) and (3) to the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to prescribe monetary thresholds for certain entity and business investments by Indian investors (other than foreign government investors).

Subsection 51(2) sets out a higher $500 million monetary threshold for an enterprise or a national of India other than a foreign government investor (a private Indian investor), proposing to acquire an interest in certain entities which do not carry on a

sensitive business or hold assets of a sensitive business. A private Indian investor will be subject to the higher $500 million threshold if the target entity (defined in the Act as a corporation or unit trust):

- is not carrying on a sensitive business and does not hold assets of a sensitive business;
- does not have a subsidiary or holding entity that carries on a sensitive business or holds assets of a sensitive business. This condition reflects the intent of paragraph (a), item 1 of section 51(1) of the Principal Regulations with amended drafting for clarity;
- is carrying on a business that supplies a service through a commercial presence in Australia; and
- either:
  - derives earnings from carrying on that business and the amount of earnings before interest and tax, in the most recent financial year for which the financial accounts of the entity have been audited, exceeds 50 per cent of the amount of the total earnings for the entity; or
  - uses assets to carry on that business and the value of those assets exceeds 50 per cent of the total asset value for the entity.

Similarly, subsection 51(3) sets out a higher $500 million monetary threshold for private Indian investors proposing to acquire an interest in certain non-sensitive businesses. A private Indian investor will be subject to the higher $500 million threshold if all of the following conditions are satisfied:

- the target is an Australian business that is not a sensitive business;
- the Australian business supplies a service through a commercial presence in Australia; and
- the Australian business uses assets to supply the service and the value of those assets exceeds 50 per cent of the value of the total assets of the business.

The terms ‘sensitive business’, ‘total earnings’ and ‘total asset value’ have the same meaning as defined in the Principal Regulations.

The higher $500 million threshold does not apply to all entity or business investments by Indian investors. This is because the AI-ECTA only contains investment commitments relating to trade in services. Accordingly, the higher $500 million threshold for private Indian investors only applies to actions relating to entities or businesses that supply non-sensitive services through a commercial presence in Australia.

Item 2 also adds new subsection 51(4), which sets out definitions for key terms used in new subsections 51(2) and (3). Subsection 51(4) specifies that the terms ‘commercial presence’ and ‘supply of a service’ have the same meaning as in the AI-ECTA as in force from time to time. The AI-ECTA is the document which captures the services investment commitments agreed by Australia. The Regulations incorporate certain definitions in Chapter 8 of the AI-ECTA to ensure that the higher monetary thresholds are applied consistently with Australia’s agreed commitments in

the AI-ECTA. Subsection 139(3) of the Act provides that regulations under the Act may provide in relation to a matter by applying, adopting, or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The AI-ECTA can be freely accessed on the Australian Treaties Library on the AustLII website.[2]

Items 3 and 4 – New monetary threshold for certain developed commercial land investments by Indian investors

Item 3 inserts a new row in the table in subsection 52(5) of the Principal Regulations (item 3A).

The new row sets out a higher $500 million monetary threshold for private Indian investors proposing to acquire non-sensitive developed commercial land for the purposes of providing a service. A private Indian investor will be subject to the higher $500 million threshold if all of the following conditions are satisfied:

- the land is developed commercial land (land that is not vacant);
- the land is not covered by item 3 of the table in subsection 52(5), which relates to sensitive commercial land;
- the acquirer is a private Indian investor; and
- a reasonable person would conclude (having regard to all the circumstances), that the acquirer genuinely intends to use the land, as soon as practical after it is acquired and while the acquirer holds the interest in the land, predominantly for the supply of a service through a commercial presence in Australia.

The higher $500 million threshold does not apply to all commercial land investments by Indian investors. This is because the AI-ECTA only contains investment commitments relating to trade in services. Accordingly, the higher $500 million threshold for private Indian investors only applies to proposed acquisitions of non-sensitive developed commercial land that will be used predominantly for the supply of a service through a commercial presence in Australia.

This developed commercial land threshold is unique because it applies to land that will be used by an Indian investor predominantly for the supply of a service, whereas existing thresholds in the foreign acquisitions framework focus on the characteristics of land at the time of the acquisition. This focus on future use of the land is intended to prevent the higher threshold from applying to an acquisition of developed commercial land that is used to provide a service at the time of the acquisition, but is subsequently not used by the Indian investor to provide a service after the acquisition. This reflects the intent of the AI-ECTA which is to encourage services investment in Australia.

Subsection 52(5) includes a condition that the private Indian investor must genuinely intend to use the land, as soon as practical after it is acquired and while the interest in

[2] In October 2022, the AI-ECTA was available on the Australian Treaties Library at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/ATNIF/2022/6.html?stem=0&synonyms=0&query=title(India)

the land is held, predominantly for the supply of a service. This intent is determined by what a reasonable person would conclude having regard to all the circumstances. This is an objective test assessing how the Indian investor intends to use the developed commercial land at the time of acquisition. This condition has been included for developed commercial land acquisitions to protect the integrity of the framework, and to ensure that only actions related to the supply of services are subject to the higher monetary threshold.

Similar to Item 2 above, Item 4 adds new subsection 52(8) to the Principal Regulations, which sets out definitions for key terms used in new item 3A of the table in subsection 52(5). Subsection 52(8) specifies that the terms 'commercial presence' and 'supply of a service' have the same meaning as in the AI- ECTA as in force from time to time. The AI-ECTA is the document which captures the services investment commitments agreed by Australia. The Regulations incorporate certain definitions in Chapter 8 of the AI-ECTA to ensure that the higher monetary threshold is applied consistently with Australia's agreed commitments in the AI-ECTA. Subsection 139(3) of the Act provides that regulations under the Act may provide in relation to a matter by applying, adopting, or incorporating, with or without modification, any matter contained in any other instrument or other writing as in force or existing from time to time. The AI-ECTA can be freely accessed on the Australian Treaties Library on the AustLII website.[3]

Item 5 – Application provision

Item 5 inserts a new provision in Part 7 of the Principal Regulations to provide that the amendments made by the Regulations apply in relation to an action taken on or after the commencement of the Regulations.

[3] In October 2022, the AI-ECTA was available on the Australian Treaties Library at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/ATNIF/2022/6.html?stem=0&synonyms=0&query=title(India)

ATTACHMENT B

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 (India Free Trade Agreement) 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 purpose of the *Foreign Acquisitions and Takeovers Amendment (India Free Trade Agreement) Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to give effect to Australia's obligations under the Australia-India Economic Cooperation and Trade Agreement (AI-ECTA), which was signed on 2 April 2022.

The Regulations form part of the steps Australia must take to implement the AI-ECTA. The Regulations alter certain threshold values (monetary amounts) in the Principal Regulations that apply when determining whether certain services investments by Indian investors (other than foreign government investors) are subject to screening under the national interest test in Australia's foreign investment framework.

The Regulations increase the threshold from $289 million to $500 million (indexed) for certain actions by private Indian investors in relation to services investments in non-sensitive entities, businesses or developed commercial land. This means that private Indian investors will only be required to notify the Treasurer of these types of investments if the proposed investment is above the higher $500 million threshold amount.

Human rights implications

The Regulations engage the right to equality and non-discrimination under the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Article 26 of the ICCPR recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as…national or social origin, property, birth or other status'.

Article 2(1)(a) of the ICERD states that, '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 ICERD,

States Parties undertake to prohibit and eliminate racial discrimination 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'.

Different treatment amongst individuals or groups may not constitute prohibited discrimination under the ICCPR and ICERD if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate.

The Regulations engage Article 26 of the ICCPR and Articles 2 and 5 of ICERD because the amendments will apply to a foreign person who is a national of India.

The criteria by which the Regulations treat people differently are reasonable and objective. The purpose of Australia's foreign investment framework is to regulate certain kinds of foreign investment to ensure that the proposed investments are not contrary to Australia's national interest. The definition of foreign person is clearly set out in the *Foreign Acquisitions and Takeovers Act 1975*. The amendments rely on this established definition of foreign person in the *Foreign Acquisitions and Takeovers Act 1975* and apply in the same manner to all investors from India (other than foreign government investors).

The increased monetary thresholds benefit private Indian investors. This is because private Indian investors will only need to notify the Treasurer of certain investments that are above the increased monetary thresholds, making it easier for these Indian investors to invest in Australian businesses, entities and developed commercial land.

The purpose of the Regulations is to give effect to Australia's obligations under the AI-ECTA, specifically the agreed threshold values that are to apply to Indian investors under Australia's foreign investment framework. There is no less restrictive way to achieving this legitimate purpose.

While the Regulations relate to Indian nationals, this different treatment is reasonable, necessary, and proportionate to the objectives.

Conclusion

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