# EXPLANATORY STATEMENT

## Issued by authority of the Treasurer

*Foreign Acquisitions and Takeovers Act 1975*

*Foreign Acquisitions and Takeovers Amendment (Register of Foreign Ownership and Other Matters) Regulations 2023*

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 which are 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.

Regulations may also be made pursuant to sections 37, 98C, 98D, 98E and 130ZU of the Act. Section 37 enables regulations to provide for exemptions from the Act or from specified provisions of the Act. Paragraph 98C(1)(c) enables regulations to be made in relation to notifying the Treasurer of taking an action under a no objection notification. Paragraph 98D(1)(c) enables regulations to be made in relation to notifying the Treasurer of an action under an exemption certificate. Paragraph 98E(1)(e) enables regulations to be made in relation to notifying the Treasurer of situations following core Part 3 actions. Section 130ZU provides the regulations may require notice to be given to the Registrar.

The purpose of the *Foreign Acquisitions and Takeovers Amendment (Register of Foreign Ownership and Other Matters) Regulations 2023* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015*(the Principal Regulations) to support operation of the Register of Foreign Ownership of Australian Assets (the Register).

The Register, established by Part 7A of the Act, is an integral part of Australia’s foreign investment review framework. It records foreign interests in land, water, entities, businesses and other assets in Australia in a single resource, incorporating and extending the former Register of Foreign Ownership of Water Entitlements and Register of Foreign Ownership of Agricultural Land. The Commissioner of Taxation is the Registrar responsible for administering the Register, under the *Commonwealth Registers (Appointment of Registrars) Instrument 2021*.

Together with the Act, the Regulations enhance Government visibility of foreign ownership of Australian assets to aid policy consideration and efficient case processing by making more information available to decision-makers. The Regulations do this by prescribing circumstances in which foreign persons must notify the Registrar of certain interests, for example acquisition of land, and for that information to be included on the Register.

To minimise regulatory burden, existing exemptions from notification obligations will be continued and the regime has been designed to minimise duplication.

Public consultation on the draft Regulations was undertaken from 2 March 2023 to 31 March 2023. Five submissions were received from multiple peak legal and industry bodies that represent foreign persons affected by the Regulations and other stakeholders with an interest in the foreign investment framework. The relevant submissions were broadly supportive of the Regulations because they recognised that the Regulations implement the remaining aspects of the Register that was largely already created by Part 7A of the Act. The in-scope submissions focused on reducing the duplication of reporting requirements where possible and the need for public guidance on the operation of the Register. The submissions also sought an educational approach to compliance upon commencement of the Register. These submissions informed revisions to the Regulations to improve operation of the regime in practice by adjusting or clarifying how certain provisions of the Regulations interact with the Act.

The Principal Regulations are exempt from the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003.* For the purposes of paragraph 54(2)(b) of that Act, item 31 of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* exempts a regulation made under the Act.

The Act does not specify any 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 commence either on the day after they were registered on the Federal Register of Legislation or the Register commencement day (within the meaning of the Act), whichever occurs later.

Details of the Regulations are set out in Attachment A.

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

The Office of Impact Analysis has been (OIA) was consulted (OBPR ref: 25692) and agreed that impact analysis was required. The impact analysis was included in Chapter 6 of the Explanatory Memorandum to the Foreign Investment Reform (Protecting Australia’s National Security) Bill 2020.[[1]](#footnote-2)

**ATTACHMENT A**

**Details of the *Foreign Acquisitions and Takeovers Amendment (Register of Foreign Ownership and Other Matters) Regulations 2023***

Section 1 – Name

This section provides that the name of the regulations is the *Foreign Acquisitions and Takeovers Amendment (Register of Foreign Ownership and Other Matters) Regulations 2023* (the Regulations).

Section 2 – Commencement

The Regulations commence either on the day after the instrument is registered on the Federal Register of Legislation or the Register commencement day (within the meaning of the Act), whichever occurs later.

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

The amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (Principal Regulations) are in three parts: prescribing requirements to register and their relationship with other existing requirements, replicating existing exemptions, and setting application and transitional provisions.

Legislative references in this attachment are to the Principal Regulations unless otherwise stated.

#### PART 1 – FURTHER REQUIREMENTS TO REGISTER, RELATIONSHIP WITH OTHER NOTIFICATION REQUIREMENTS, EXEMPTIONS AND OTHER MATTERS

**Item 1 – Register of Foreign Ownership of Australian Assets**

Item 1 inserts new Part 5B into the Principal Regulations to cover matters relating to the Register of Foreign Ownership of Australian Assets (the Register).

Within Part 5B:

* Division 1 provides a simplified outline of the new provisions (section 58A) to assist readers. However, readers should rely on substantive provisions as the outline is not intended to be comprehensive.
* Division 2 prescribes actions which require notification to the Registrar for the purposes of section 130ZU of the Act.
* Division 3 explains the relationship of the new provisions with existing notification provisions.
* Division 4 provides exemptions for Register purposes for certain kinds of interests in Australian land and for certain persons becoming foreign persons.
* Division 5 outlines other matters related to the Register, including appointment of infringement officers for the purposes of section 130ZV of the Act, and the Treasurer’s ability to extend the time for giving register notices.

Actions covered by Part 5 of the Principal Regulations that are Registrable

Section 58B requires notice to be given to the Registrar in relation to certain significant and notifiable actions under Part 5 of the Principal Regulations. Section 130ZU of the Act provides the regulations may require notice to be given to the Registrar.

In particular, subsection 58B(1) applies to actions by a foreign person in relation to an Australian media business under section 55, and to certain actions by foreign government investors under subsection 56(1).

A foreign person must notify the Registrar (known as giving a ‘register notice’) if:

* the foreign person takes an action that is a significant action, or a notifiable action under section 55 or subsection 56(1) of the Principal Regulations (subparagraph 58B(1)(a)); and
* the foreign person is aware, or ought reasonably to be aware, that the action has been taken.

The Registrar may make data standards under section 130ZZ of the Act to provide for multiple register notices to be given into a single register notice, to minimise duplication. This is clarified by an explanatory note below subsection 58B(1), modelled on an equivalent note beneath subsection 130W(5) of the Act for consistency.

Subsection 58B(2) prescribes when a registered circumstance exists and ceases. Cessation of a registered circumstance triggers a requirement to give a register notice. However, a registered circumstance will neither arise nor cease in relation to an equitable interest, per subsection 58B(3).

The table in subsection 58B(2) prescribes five actions which must be notified to the Registrar, and which when notified give rise to a registered circumstance:

* a foreign person acquiring a direct interest in an entity or business carrying on an Australian media business;
* a foreign government investor acquiring a direct interest in an Australian entity or Australian business;
* a foreign government investor starting an Australian business;
* a foreign government investor acquiring an interest in a tenement; and
* a foreign government investor acquiring an interest of at least 10 per cent in securities in a mining, production or exploration entity.

These registered circumstances exist while the relevant interest is held, and cease when the foreign person no longer holds the interest or when the entity or business the interest relates to ceases.

**Example 1 – Foreign government investor acquiring a legal interest of 20 per cent in an Australian mining entity**

A foreign government investor acquires a legal interest of 20 per cent in an Australian mining entity. The investor must notify the Registrar of the acquisition, and when the investor does so a registered circumstance arises. When it ceases, the investor will again be required to notify the Registrar.

If the percentage of interest held by the investor changes but some percentage continues to be held (for example: percentage held decreases to 9 per cent – which is below the initial threshold for notification but an interest is still held), the registered circumstance persists as the investor continues to hold an interest in the Australian entity (and some notice obligations may arise while the registered circumstance continues to exist if the interest held changes sufficiently).

See section 17 of the Act for the meaning of interest of a specified percentage in an entity. When the investor no longer holds the interest (that it, the investor holds 0 per cent), the registered circumstance ceases (and notification obligations arise).

Subsection 58B(4) sets the registrable event day for a register notice under this section. A register notice must be given to the Registrar with 30 days of the applicable registrable event day, in accordance with section 130W of the Act (unless extended by the Treasurer). The registrable event day is either the day on which the foreign person takes the action that triggers the requirement to give a register notice or the day on which the foreign person first becomes aware, or ought reasonably to become aware, that the action has been taken (whichever occurs later). The ‘awareness’ aspect of this provision covers situations where an interest is acquired, or a percentage of an existing interest is changed in a way that creates or ceases a registered circumstance, but the foreign person is not immediately aware of this.

For example, this may happen through the actions of another person, such as an investment manager who is managing only part of the foreign person’s portfolio and is not aware that a small acquisition of securities may put the foreign person’s overall holdings over a relevant threshold.

**Example 2 – Acquisition of an interest in item 4 of the table in subsection 58B(2)**

If a foreign government investor acquires an interest in a tenement on 10 September 2023, the registrable event day is the day on which the interest is acquired (10 September 2023).

**Example 3 – A change in the percentage of shareholding in item 5 of the table in subsection 58B(2)**

This could occur if a foreign person holds a 9 per cent interest, and through buybacks other investors relinquish their shares and the foreign person’s holding grows from 9 per cent to 11 per cent without any action by the foreign person. The foreign person may not become aware of this change until a later date when shareholder information is disseminated. In this case, the date on which the foreign person would ordinarily receive such information is the registrable event day, as it is the date when they became aware or ought reasonably to have become aware of the change.

Subsection 58B(5) clarifies that section 130ZN of the Act (which prescribes that a person must give the Registrar notice of 5 per cent changes in some interests in an entity or business) applies to a registered circumstance mentioned in items 1, 2 and 5 of the table in subsection (2). This is not relevant to items 3 and 4 of the table, which relate to interests that are not covered by section 130ZN of the Act.

Subsection 58B(6) provides that section 58B applies to all actions taken on or after the Register commencement day. This means that there is no obligation to give the Registrar notice of any actions that were taken prior to the Register commencement day (although some actions *may* be notified under the transitional provisions).

Actions covered by exemption certificates that require notification to the Registrar

Subdivision B of new Part 5B prescribes actions which are covered by exemption certificates that must be notified to the Registrar. Generally, the Register requires reporting of many actions covered by the Act and some actions that are otherwise exempt from the Act so that more detailed information about foreign ownership is available to the Government. Due to the operation of general exemption certificate provisions under the Act, some actions that are covered by exemption certificates (which generally make them not notifiable) would not be required to be reported to the Register if not for this Subdivision.

As such, sections 58C, 58D, 58E, 58F and 58G prescribe circumstances in which a foreign person must give a register notice to the Registrar where the foreign person has received an exemption certificate in relation to an action that would otherwise be a significant action, notifiable action, notifiable national security action or reviewable national security action if it was not covered by the exemption certificate. In prescribing registered circumstances and related details such as the registrable event day, these sections reference equivalent sections in the Act, to ensure consistent notification requirements to the Registrar are imposed on similar actions under both the Act and the Principal Regulations. Table 1, below, provides a summary of these interactions.

**Table 1:** Summary of actions covered by exemption certificates which must be notified to the Registrar under Subdivision B

| **Section** | **Action** | **Registered circumstance exists and ceases consistently with …** | **Registrable event day is consistent with …** |
| --- | --- | --- | --- |
| 58C | action relating to an entity that would be a significant action or a notifiable action if not covered by an exemption certificate under section 42 or subsection 43(4) of the Principal Regulations | subsections 130ZH(2) to (3) the Act, which outline when a registered circumstance exists when a foreign person takes a significant action under section 40 of the Act (entities) | subsection 130ZH(4) of the Act, which outlines the registrable event day for when a foreign person takes a significant action under section 40 of the Act (entities) |
| 58D | action relating to a business that would be a significant action or notifiable action if not covered by an exemption certificate under section 42 of the Principal Regulations | subsections 130ZI(2) to (3) the Act, which outline when a registered circumstance exists when a foreign person takes a significant action under section 41 of the Act (businesses) | subsection 130ZI(4) of the Act, which outlines the registrable event day for when a foreign person takes a significant action under section 41 of the Act (businesses) |
| 58E | action that would be a notifiable national security action if not covered by an exemption certificate under subsection 43BA(4) of the Principal Regulations | subsections 130ZK(2) to (3) the Act, which outline when a registered circumstance exists when a foreign person takes a notifiable national security action under section 55B of the Act | subsection 130ZK(4) of the Act, which outlines the registrable event day for when a foreign person takes a notifiable national security action under section 55B of the Act |
| 58F | action relating to an entity that would be a reviewable national security action if not covered by an exemption certificate under subsection 43BB(4) of the Principal Regulations | subsections 130ZL(2) to (3) the Act, which outline when a registered circumstance exists when a foreign person takes a reviewable national security action under section 55D of the Act (entities) | subsection 130ZL(4) of the Act, which outlines the registrable event day for when a foreign person takes a reviewable national security action under section 55D of the Act (entities) |
| 58G | action relating to a business that would be a reviewable national security action if not covered by an exemption certificate under subsection 43BB(4) of the Principal Regulations | subsections 130ZM(2) to (3) the Act, which outline when a registered circumstance exists when a foreign person takes a reviewable national security action under section 55E of the Act (businesses) | subsection 130ZM(4) of the Act, which outlines the registrable event day for when a foreign person takes a reviewable national security action under section 55E of the Act (businesses) |

*Section 58C – Actions relating to entities that would be significant actions or notifiable actions if not covered by exemption certificates*

Section 58C works with sections 130ZH and 130ZU of the Act to require a foreign person who takes an action relating to entities which is covered by an exemption certificate to notify the Registrar of the action.

Subsection 58C(1) prescribes the circumstances in which notice must be given to the Registrar – effectively, the action relates to entities and would be a significant action, or notifiable action if it was not covered by an exemption certificate.

For the avoidance of doubt, note 1 under subsection 58C(1) explains that paragraphs 58C(1)(a) and (b) include an action to which subparagraph 56(1)(c)(ii) of the Principal Regulations applies, that is the acquisition by the person (as a foreign government investor) of an interest of at least 10 per cent in securities in a mining, production or exploration entity.

The actions in subsection 58C(1) may overlap, meaning multiple register notices may be required. As explained in note 2 under subsection 58C(1), the Registrar may make data standards under section 130ZZ of the Act to allow multiple register notices to be given into a single register notice – to reduce duplication. This note is consistent with equivalents elsewhere in Part 5B of the Principal Regulations and in section 130W of the Act.

Subsection 58C(2) sets out the interaction between this section of the Principal Regulations, section 130ZH of the Act (what interests in entities must be notified to the Registrar) and section 130ZU of the Act (what regulations may provide for). The effect is that the requirements for a register notice under subsection 130ZH(2) to (5) apply to actions covered by subsection 58C(1). This means the existence and cessation of registered circumstances, registrable event day, and application of requirements are consistent under the Act and the Principal Regulations.

Subsection 58C(3) clarifies that section 130ZN of the Act (which covers a change in interest in an entity or business) applies to a registered circumstance mentioned in item 1 or 2 of the table in subsection 130ZH(2) of the Act (as that table item applies because of subsection 58C(2)).

*Section 58D – Actions relating to businesses that would be significant actions or notifiable actions if not covered by exemption certificates*

Section 58D works with sections 130ZI and 130ZU of the Act to require a foreign person who takes an action relating to businesses (including Australian media businesses and agribusinesses) which is covered by an exemption certificate to notify the Registrar of the action.

Subsection 58D(1) prescribes the circumstances in which notice must be given to the Registrar – effectively, the action relates to an Australian business and would be a significant action or notifiable action if it was not covered by an exemption certificate.

These actions may overlap, meaning multiple register notices may be required. As noted under subsection 58D(1), the Registrar may make data standards under section 130ZZ of the Act to allow multiple register notices to be given into a single register notice – to reduce duplication. This note is consistent with equivalents elsewhere in Part 5B of the Principal Regulations and in section 130W of the Act.

Subsection 58D(2) sets out the interaction between this section of the Principal Regulations, section 130ZI of the Act (what interests in Australian businesses must be notified to the Registrar) and section 130ZU of the Act (what regulations may provide for). The effect is that the requirements for a register notice under subsection 130ZI(2) to (5) apply to actions covered by subsection 58D(1). This means the existence and cessation of registered circumstances, registrable event day, and application of requirements are consistent under the Act and the Principal Regulations.

Subsection 58D(3) clarifies that section 130ZN of the Act (which covers a change in interest in an entity or business) applies to a registered circumstance mentioned in item 1 or 2 of the table in subsection 130ZI (2) of the Act (as that table item applies because of subsection 58D(2)).

*Section 58E – Actions that would be notifiable national security actions if not covered by exemption certificates*

Section 58E works with sections 130ZK and 130ZU of the Act to require a foreign person who takes an action which is covered by an exemption certificate and that would be a notifiable national security action if not covered by the exemption certificate to notify the Registrar of the action.

Subsection 58E(1) prescribes the circumstances in which notice must be given to the Registrar – essentially, where the action would be a notifiable national security action if it was not covered by an exemption certificate.

These actions may overlap, meaning multiple register notices may be required. As noted under subsection 58E(1), the Registrar may make data standards under section 130ZZ of the Act to allow multiple register notices to be given into a single register notice – to reduce duplication. This note is consistent with equivalents elsewhere in Part 5B of the Principal Regulations and in section 130W of the Act.

Subsection 58E(2) sets out the interaction between this section of the Principal Regulations, section 130ZK of the Act (what notifiable national security actions must be notified to the Registrar), and section 130ZU of the Act (what regulations may provide for). The effect is that the requirements for a register notice under subsection 130ZK(2) to (5) apply to actions covered by subsection 58E(1). This means the existence and cessation of registered circumstances, registrable event day, and application of requirements are consistent under the Act and the Principal Regulations.

Subsection 58E(3) clarifies that section 130ZN of the Act (which covers a change in interest in an entity or business) applies to a registered circumstance mentioned in item 2 or 3 of the table in subsection 130ZK(2) of the Act (as that table item applies because of subsection 58E(2)).

*Section 58F – Actions relating to entities that would be reviewable national security actions if not covered by exemption certificates*

Section 58F works with sections 130ZL and 130ZU of the Act to require a foreign person who takes an action relating to entities which is covered by an exemption certificate to notify the Registrar of the action.

Subsection 58F(1) prescribes the circumstances in which notice must be given to the Registrar – effectively, the action relates to entities and would be a reviewable national security action if it was not covered by an exemption certificate.

These actions may overlap, meaning multiple register notices may be required. As noted under subsection 58F(1), the Registrar may make data standards under section 130ZZ of the Act to allow multiple register notices to be given into a single register notice – to reduce duplication. This note is consistent with equivalents elsewhere in Part 5B of the Principal Regulations and in section 130W of the Act.

Subsection 58F(2) sets out the interaction between this section of the Principal Regulations, section 130ZL of the Act (what interests in entities must be notified to the Registrar) and section 130ZU of the Act (what regulations may provide for). The effect is that the requirements for a register notice under subsection 130ZL(2) to (5) apply to actions covered by subsection 58F(1). This means the existence and cessation of registered circumstances, registrable event day, and application of requirements are consistent under the Act and the Principal Regulations.

Subsection 58F(3) clarifies that section 130ZN of the Act (which covers a change in interest in an entity or business) applies to a registered circumstance mentioned in item 1 of the table in subsection 130ZL(2) of the Act (as that table item applies because of subsection 58F(2)).

*Section 58G – Actions relating to businesses that would be reviewable national security actions if not covered by exemption certificates*

Section 58G works with sections 130ZM and 130ZU of the Act to require a foreign person who takes an action relating to entities which is covered by an exemption certificate to notify the Registrar of the action.

Subsection 58G(1) prescribes the circumstances in which notice must be given to the Registrar – effectively, the action relates to businesses and would be a reviewable national security action if it was not covered by an exemption certificate.

These actions may overlap, meaning multiple register notices may be required. As noted under subsection 58G(1), the Registrar may make data standards under section 130ZZ of the Act to allow multiple register notices to be given into a single register notice – to reduce duplication. This note is consistent with equivalents elsewhere in Part 5B of the Principal Regulations and in section 130W of the Act.

Subsection 58G(2) sets out the interaction between this section of the Principal Regulations, section 130ZM of the Act (what interests in businesses must be notified to the Registrar) and section 130ZU of the Act (what regulations may provide for). The effect is that the requirements for a register notice under subsection 130ZM(2) to (5) apply to actions covered by subsection 58G(1). This means the existence and cessation of registered circumstances, registrable event day, and application of requirements are consistent under the Act and the Principal Regulations.

Subsection 58G(3) clarifies that section 130ZN of the Act (which covers a change in interest in an entity or business) applies to a registered circumstance mentioned in item 1 or 2 of the table in subsection 130ZM(2) of the Act (as that table item applies because of subsection 58G(2).

Relationship with other notification requirements

*Section 58H - Some other notification requirements only apply for actions that do not require register notices*

Section 58H manages the relationship of the new notification provisions (Division 2) with existing notification provisions (sections 98C, 98D and 98E of the Act).

Sections 98C, 98D and 98E of the Act require a foreign person to notify the Treasurer of taking a core Part 3 action specified in a no objection notification, or a core Part 3 action related to an exemption certificate, or a situation following a core Part 3 action.

Paragraphs 98C(1)(c), 98D(1)(c) and 98E(1)(e) allow regulations to be made for the purposes of these paragraphs to specify additional requirements that must be met for the notification requirements in sections 98C, 98D and 98E of the Act to apply. Specifically, paragraph 98C(1)(c) enables regulations to be made in relation to notifying the Treasurer of taking an action under a no objection notification. Paragraph 98D(1)(c) enables regulations to be made in relation to notifying the Treasurer of an action under an exemption certificate. Paragraph 98E(1)(e) enables regulations to be made in relation to notifying the Treasurer of situations following core Part 3 actions.

Section 58H is made for the purposes of paragraphs 98C(1)(c), 98D(1)(c) and 98E(1)(e), to specify an additional requirement that must be met for each of the existing notification requirements to apply. The additional requirement is that the core Part 3 action is not an action for which the person must give a register notice to the Registrar for the purposes of Part 7A of the Act (the Register).

Intent of this additional requirement is to ease regulatory burden by minimising duplicative notification requirements, where the same action requires notification to the Treasurer (under sections 98C to 98E) as well as notification to the Registrar (under Part 7A of the Act and Part 5B, Division 2 of the Principal Regulations). As a result of this provision, where such dual notification would have been required in relation to the same action in the absence of this provision, notice to the Treasurer is not required (subject to the transitional provisions). This means notification to the Treasurer under the existing notification provisions is no longer required where a register notice is given to the Registrar in relation to the same action. However, this only applies where there are dual reporting obligations as described; in other circumstances, notifications must continue to be given to the Treasurer under sections 98C, 98D and 98E (notification requirements under these provisions relating actions that do not trigger notification requirements to the Registrar), or to the Registrar under Part 7A of the Act and Part 5B, Division 2 of the Principal Regulations. This approach preserves the operation of the existing notification requirements under sections 98C to 98E in relation to actions which require notification under those provisions but do not require notification to the Registrar.

Where a foreign person has notified the Treasurer of a core Part 3 action under sections 98C or 98D of the Act prior to Register commencement day, the foreign person must continue to notify the Treasurer of certain situations that follow and relate to the action under section 98E of the Act. In this case, the foreign person cannot rely on subsection 58H(3) to extinguish their notification requirement to the Treasurer. This is clarified by an explanatory note below subsection 58H(3). The note provides that subsection 58H(3) may not apply in transitional cases and includes a signpost reference to the transitional arrangements at subsection 81(2).

Exemption for Register purposes for certain kinds of interests in Australian land

Paragraph 37(1)(b) of the Act allows regulations to be made that provide that the Act or certain provisions of the Act do not apply to certain kinds of interests or in prescribed circumstances. Pursuant to this, section 58J provides that Part 7A of the Act (which contains requirements and other provisions relating to the Register) does not apply in relation to an interest in Australian land that is not:

* a freehold interest in Australian land; or
* an interest as lessee in a lease giving rights to occupy agricultural land if the term of the lease (including any extension or renewal) is reasonably likely, at the time the interest is acquired, to exceed 5 years; or
* a legal interest as a lessee in a lease giving rights to occupy commercial land or residential land (provided the term of the lease is reasonably likely, at the time the interest is acquired, to exceed 5 years);
* an interest in a mining or production tenement;
* an interest in a security in an entity that owns Australian land (giving the holder a right to occupy a dwelling of a kind situated on the land);
* an interest in a share in an Australian land corporation or agricultural land corporation;
* an interest in an Australian land trust or agricultural land trust; and
* if the trustee of an Australian land trust or agricultural land trust is a corporation, an interest in a share of that corporation.

The note under section 58J clarifies that Part 7A of the Act continues to apply to interests in exploration tenements, as these interests are not interests in Australian land.

The effect of this section is to limit the range of interests in land that must be registered on the Register under both the Act and the Principal Regulations to only the interests that are most important and sensitive. This means foreign persons do not have to bear the regulatory burden of reporting other interests in Australian land to the Registrar.

Exemption for Register purposes for certain persons becoming foreign persons

Subsection 37(1) of the Act allows regulations to be made that provide that the Act or certain provisions of the Act do not apply to certain kinds of acquisitions, interests or foreign persons, or in prescribed circumstances. Such regulations are found in Part 3 of the Principal Regulations, including Part 3 provisions such as sections 35 and 38 which exempt certain actions from being significant actions, notifiable actions or notifiable security actions of which a person must notify the Registrar.

Section 130ZC of the Act provides for circumstances where a person must give a register notice if they become a foreign person while holding an interest in land.

Pursuant to subsection 37(1) of the Act, section 58K provides that section 130ZC of the Act does not apply to an interest in Australian land a person holds when becoming a foreign person (that is, the person does not need to provide a register notice to the Registrar) provided the person would not need to give a register notice to the Registrar if they were to acquire that interest as a foreign person.

For example, an Australian citizen holds freehold title to Australian land, and becomes a foreign person by moving overseas and ceasing to ordinarily reside in Australia. As a foreign person covered by paragraph 35(1)(a) of the Principal Regulations, they are not required to notify the Registrar of an acquisition of Australian land. Consistent with this approach, section 58K would apply so the person is also not required to notify the Registrar of their landholding at the time they become a foreign person.

This provision aligns the approach of the Principal Regulations and the Act in exempting certain foreign persons from having to give a register notice in relation to their holding and their acquisition of land interests in land. This provision ensures that the notification obligations of a foreign person holding an interest in land are consistent regardless of the order in which they acquired the interest and became a foreign person.

Appointment of infringement officers for section 130ZV of the Act

Subsection 100(3A) of the Act provides that the Registrar may, in writing, appoint a person of a kind prescribed by the regulations as an infringement officer. Such an infringement officer is appointed in relation to section 130ZV of the Act, which provides the civil penalty for failing to give notice to the Registrar.

Pursuant to subsection 100(3A) of the Act, section 58L of the Regulations allows the Registrar to appoint a person who holds, or performs the duties of, an APS Level 6 position, or an equivalent or higher position, within the Australian Taxation Office (ATO), as an infringement officer for section 130ZV of the Act.

This level of delegation is appropriate to ensure the appointed infringement officers have the necessary qualifications and skills to exercise the delegation and perform the duties of an infringement officer. Furthermore, this level of delegation aligns with adjacent subsection 100(3) of the Act, which allows delegation within the ATO to APS6 Level staff, or equivalent. Such alignment supports legislative consistency and reflects established regulatory practice for issuing of infringement notices as APS6 Level staff have experience, qualifications and skills in issuing infringement notices under subsection 100(3).

Treasurer may extend time for giving register notices

Section 130Z provides that regulations may make provision for extending the time for giving a register notice to the Registrar under section 130W. Paragraph 130Z(2)(d) confers power on the Treasurer to make a legislative instrument providing for anything that may, under this section, be provided for by the regulations.

Subsection 137(2A) of the Act provides that the Treasurer may delegate powers or functions under certain provisions to the Registrar, including in relation to the Treasurer’s instrument-making power in section 130Z of the Act.

Pursuant to section 130Z of the Act, subsection 58M(1) of the Regulations allows the Treasurer, by legislative instrument, to extend the period in which a register notice must be given to the Registrar. Without limiting subsection 58M(1), subsection 58M(2) provides that an instrument under subsection 58M(1) could grant conditional extensions (where conditions are imposed generally or in particular cases by the Treasurer) or extensions that apply to specified persons. The subsection further provides that an instrument under subsection 58M(1) could confer a power on the Treasurer to make administrative decisions to grant extensions. Consistent with paragraph 130Z(2)(d) and subsection 137(2A), the Treasurer could also delegate the power to make such instruments to the Registrar once the Register is operational.

It is appropriate for the Treasurer to be able to extend time for submission of register notices, as well as to be able to delegate this power to the Registrar once the register is operational, to enable efficient administration of the Register. For instance, this power will allow the Treasurer (or the Registrar) to address any circumstances that may arise where the 30-day notice period would not be practically achievable or realistic.

#### PART 2 – REPLICATING EXISTING EXEMPTIONS

The Register will consolidate the Register of Foreign Ownership of Water Entitlements and Register of Foreign Ownership of Agricultural Land into one resource. Existing exemptions under those regimes will continue to apply under the new Register to provide consistency of information and approach, and to not increase regulatory burden on foreign investors.

Section 37 of the Act enables regulations to provide for exemptions from the Act or from specified provisions of the Act.

**Item 2 – Rights that are not registrable water entitlements**

Paragraph 26A(2)(d) of the Act provides that regulations may be made that specify that a right of a kind is not a registrable water entitlement for the purposes of the Act.

Pursuant to this, item 2 inserts new section 22A into the Principal Regulations to provide that a right held by an irrigation infrastructure operator is not a registrable water entitlement to the extent that the right is used to meet an irrigation infrastructure operator’s obligations to supply water to its customers.

In practice, this means notice need not be given to the Registrar in relation to such interests.

Section 22A continues the effect of section 5A of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* and section 7 of the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017*, with provisions specifying that certain rights held by an irrigation infrastructure operator are not registrable water entitlements that need to be registered for the Register of Foreign Ownership of Water Entitlements. Section 22A ensures consistency with the existing Register of Foreign Ownership of Water Entitlements framework, and that an increased regulatory burden is not imposed on foreign investors.

**Example 4 – Example of rights that are not registrable water entitlements**

Company A is an irrigation infrastructure operator operating in NSW which meets the definition of foreign person.

Company A has four water access entitlements which are used to meet its customers’ irrigation rights and account for the water that is lost through transit.

The rights held by Company A are not registrable water entitlements.

**Example 5 – Example of rights that are registrable water entitlements**

Company B is an irrigation infrastructure operator in South Australia which meets the definition of foreign person.

Company B holds three water access entitlements which give it access to water with a nominal volume of 2,500 ML.

Company B determines that 1,500 ML is subject to customers’ irrigation rights and to cover irrigation system distribution losses.

That part of Company B’s water holdings will not meet the definition of registrable water entitlement.

The remaining 1,000 ML will meet the definition of registrable water entitlements.

**Item 3 – Exemption for persons holding water entitlements because of enforcement of securities for moneylending agreements**

Item 3 amends subsection 27(1) to extend the moneylending exemption in the Principal Regulations to interests in a registrable water interest. Section 37 of the Act enables regulations to provide for exemptions from the Act or from specified provisions of the Act.

The purpose of the amendment is to maintain and not increase the regulatory burden for foreign investors by ensuring consistent treatment of registrable water interests under the new Register with treatment of such interests under the existing Register of Foreign Ownership of Water Entitlements framework given this framework is being absorbed into the Register.

The amendment is consistent with section 30U of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* and section 9 of the *Register of Foreign Ownership of Water or Agricultural Land Rules 2017*, which provide an exemption from registration to persons holding registrable water entitlements by way of enforcement of a security held solely for the purposes of a moneylending agreement and the person is either the person who entered into the moneylending agreement or a subsidiary or holding entity of that person. The exemption under the Register of Foreign Ownership of Water Entitlements will continue to have effect under the new Register through the amendment to subsection 27(1).

#### PART 3 – APPLICATION AND TRANSITIONAL PROVISIONS

The application and transitional provisions are intended to minimise disruption of registration requirements in relation to actions which occurred before the Register commencement day.

**Item 4 – Application of the Regulations**

Item 4 inserts a new section 81 into Part 7 to provide for the application of the amendments and transitional arrangements.

*Application of extension of exemption for moneylending agreements*

Subsection 81(1) provides the amendment of subsection 27(1) made by item 3 (explained above) applies on or after the commencement of Part 2 of Schedule 1 to the Regulations in relation to:

* moneylending agreements entered into before, on or after that commencement; and
* registrable water interests that start to be held before, on or after that commencement.

The purpose of this amendment is to provide clarity on when the amendment of subsection 27(1), which gives an extension to moneylending exemptions to interests in a registrable water interest, will apply. As outlined in Item 3, this amendment ensures the consistent treatment of registrable water interests under the new Register and ensures there are no additional regulatory burdens for foreign investors.

Section 37 of the Act enables regulations to provide for exemptions from the Act or from specified provisions of the Act.

*Transitional arrangements – overview*

Transitional arrangements are needed to deal with potentially overlapping notification requirements under sections 98C, 98D, and 98E of the Act and Part 7A of the Act around the Register commencement day (from which new obligations to notify the Registrar begin). After the Register commencement day, section 58H will eliminate the vast majority of dual reporting obligations.

The arrangements can be summarised in general terms as follows:

* Interests that have entered the Treasurer reporting regime under section 98C or 98D of the Act remain there (follow up reporting will be required under section 98E of the Act) even after the Register commencement day.
* Interests that are acquired after the Register commencement day that are within the scope of the Register only need to be reported to the Register. A small number of interests (largely equitable ones) will be outside the scope of the Register and will still need to be reported to the Treasurer (under sections 98C, 98D, and 98E of the Act).
* Persons who acquire interests that are within the scope of the Register just before the Register commencement day can elect to report them to the Treasurer under section 98C or 98D of the Act before the Register commencement day and remain in the Treasurer reporting regime or to report them to the Registrar.

Interests already reported to the Treasurer under sections 98C or 98D will not be “transferred” to the Register and will remain in the Treasurer reporting regime (section 98E of the Act).

As such, subsections 81(2) to (6) provide transitional arrangements in relation to:

* core Part 3 actions taken and notified to the Treasurer before the Register commencement day, where there are continuing notification obligations for situations relating to the core Part 3 actions – subsection 81(2); and
* core Part 3 actions which were taken but not notified to the Treasurer under section 98C or 98D of the Act before Register commencement day – subsections 81(3) to (6).

Subsection 81(2) provides transitional arrangements in relation to continuing notification requirements for situations relating to core Part 3 actions taken before the Register commencement day. Essentially, where an action such as acquisition of an interest was reported under section 98C or 98D of the Act prior to the Register commencement day, a situation mentioned in subsection 98E(2) of the Act that arises after the action (such as a subsequent disposal or change of the interest) continues to be reported under section 98E of the Act to the Treasurer (not to the Registrar), even if the situation arises after Register commencement day. This is because the acquisition was not reported to the Registrar and so it is not necessary to report its disposal to the Registrar (because there is no stocktake of assets that were held at the commencement of the Register). However, the disposal should be reported to the Treasurer under section 98E.

Subsections 81(3) to (5) and (6) provide transitional arrangements which apply where an obligation to notify the Treasurer of an action under section 98C or 98D of the Act arose but was not fulfilled by the Register commencement day. In this situation, from Register commencement day:

* the existing obligation to notify the Treasurer within 30 days of the action being taken continues to apply under section 98C or 98D of the Act;
* a further obligation to notify the Registrar of the action within 30 days of the Register commencement day arises, prescribed in subsections 81(3) to (6); and
* notification to the Registrar would satisfy both obligations (to notify the Treasurer and to notify the Registrar), due to section 58H.

These arrangements are necessary for efficient administration of both notification regimes, so a record of disposal or change of an asset is always able to be linked to the record of its acquisition. Providing that notification to the Registrar can satisfy both obligations is designed to ease burden of compliance for foreign persons, and to reduce risks of inadvertent non-compliance during the transitional period.

Regulations for these matters are made pursuant to sections 98C, 98D, 98E and 130ZU of the Act. Paragraph 98C(1)(c) enables regulations to be made in relation to notifying the Treasurer of taking an action under a no objection notification.

Paragraph 98D(1)(c) enables regulations to be made in relation to notifying the Treasurer of an action under an exemption certificate. Paragraph 98E(1)(e) enables regulations to be made in relation to notifying the Treasurer of situations following core Part 3 actions. Section 130ZU provides the regulations may require notice to be given to the Registrar.

These arrangements are explained in more detail below.

*Transitional—continuing other notification requirements for situations relating to core Part 3 actions taken before the Register commencement day*

Subsection 81(2) provides that subsection 58H(3) is to be disregarded where a notification obligation under subsection 98C(2) or 98D(2) of the Act applies to a person in relation to a core Part 3 action and the person has complied with that obligation. This preserves the person’s obligation to report a situation (such as change or disposal of the interest that was earlier notified of under section 98C or 98D) under section 98E, even if the situation which must be reported under section 98E occurs after Register commencement day.

For example, in January 2023 a foreign person acquired an interest in Australian land and reported that action to the Treasurer under subsection 98C(2) of the Act. If the foreign person later disposes of that interest after the Register commencement day, this situation relating to the action must be reported to the Treasurer within 30 days under subsection 98E(3) of the Act – not to the Registrar. Section 58H(3) (which would otherwise deem a notification to the Registrar to satisfy the parallel obligation to notify the Treasurer) does not apply due to the application of subsection 81(2).

For the avoidance of doubt, note 1 below this subsection explains that the foreign person must comply with subsection 98E(3) of the Act and notify the Treasurer of the situation relating to a core Part 3 action where a situation mentioned in subsection 98E(2) of the Act arises in relation to the core Part 3 action taken before the Register commencement day and notified to the Treasurer under subsection 98C(2) or 98D(2) of the Act.

Additionally, note 2 below the subsection explains that that subsection is only relevant for some core Part actions taken before the Register commencement day. The subsection is only relevant to situations following core Part 3 actions taken before the Register commencement day that were notified to the Treasurer under subsection 98C(2) or 98D(2) of the Act. The subsection is not relevant to situations following core Part 3 actions taken before the Register commencement day that have not been notified to the Treasurer by the Register commencement day – in this case, notification to the Register is required per section 58H and subsection 81(3) to (6) below. Subsection 81(2) is also not relevant to core Part 3 actions taken after the Register commencement day and situations relating to the action and arising after the action – in this case, notification to the Register is required per subsection 58H.

*Transitional—Register requirements for certain core Part 3 actions taken before the Register commencement day*

Subsections 81(3) to (6) provide transitional arrangements where a foreign person takes a core Part 3 action but does not notify the Treasurer of the action under section 98C or 98D of the Act before the Register commencement day. In this situation, subsection 81(3) creates a new obligation for the foreign person to notify the Registrar of the core Part 3 action. This new obligation exists in parallel with the ongoing obligation to notify the Treasurer under section 98C or 98D. Relevant details such as when the registered circumstances exist and cease, and the registrable event day, are prescribed by subsections 81(4), (5) and (6).

Subsection 81(3) is made for the purposes of paragraph 130ZU(1)(a) of the Act, which allows regulations to prescribe circumstances in which a person must give a register notice to the Registrar. Subsection 81(3) requires a foreign person to give a register notice to the Registrar if, cumulatively:

* a core Part 3 action is taken before the Register commencement day;
* the core Part 3 action is of a kind for which the person would need to give a register notice to the Registrar for the purposes of Part 7A of the Act had the action been taken on or after the Register commencement day;
* subsection 98C(2) or 98D(2) of the Act applies to the person in relation to the core Part 3 action (so: a notification obligation to the Treasurer exists);
* the 30-day period in which the person must comply with subsection 98C(2) or 98D(2) starts before the Register commencement day;
* the person has not provided such notice to the Treasurer before the Register commencement day; and
* in the case where:
  + a situation mentioned in subsection 98E(2) of the Act arises in relation to the core Part 3 action; and
  + that situation results in the person no longer holding any part of an interest that relates to the core Part 3 action; and
  + subsection 98E(3) of the Act applies to the person in relation to that situation,

the person fails to comply with subsection 98E(3) of the Act in relation to that situation before the Register commencement day.

The explanatory notes beneath this subsection clarify several points in practice.

Note 1 clarifies that where notification is given to the Treasurer under section 98E of a situation following the core Part 3 action which results in the foreign person no longer holding any part of the interest acquired by that action, the person must still notify the Treasurer under section 98C or 98D of the Act of the person’s core Part 3 action acquiring the interest (even after Register commencement day), but need not notify the Registrar under this subsection of the situation following the action.

This approach is taken to prevent out of-sequence notifications. It ensures that a foreign person cannot notify the Treasurer of a “disposal of an interest” situation under section 98E of the Act and then notify the Registrar of the core Part 3 action “acquisition of an interest”, which would result in the acquisition remaining on the Register after the disposal. The approach avoids lingering registrations of core Part 3 actions on the Register where the person no longer holds the interest related to the action but has notified the Treasurer of the situation that results in the person no longer holding the interest. Their original acquisition and subsequent disposal of the interest should be recorded under the same regime (sections 98C, 98D and 98E of the Act, or the Register), and registrations notified to the Treasurer need not transfer into the new regime of the Register. This would be different if the person still retains some of the interest, as in some circumstances (where the acquisition was not reported to the Treasurer before the Register commencement day) this interest should be recorded on the Register until the person no longer holds the interest.

For the avoidance of doubt, note 2 explains that the obligation to comply with the notification requirements under subsections 98C(2) or 98D(2) of the Act for core Part 3 actions (or the notification requirements under subsections 98E(3) for related situations that arise after the action), ceases if a register notice must be given under this subsection in relation to the action, due to operation of section 58H.

Subsection 81(4) is made for the purposes of paragraphs 130ZU(1)(c) and (d) of the Act, which allow regulations to prescribe registered circumstances that relate to a foreign person who gives such a register notice and the circumstances in which such a registered circumstance ceases.

Subsection 81(4) provides when a registered circumstance exists and ceases for a foreign person who gives a register notice under subsection 81(3). If a foreign person gives a register notice under subsection 81(3) on a particular day (the register notification day) in relation to a core Part 3 action taken before the Register commencement day, then a registered circumstance exists in relation to the foreign person that is the same as a registered circumstance that would have arisen if the person had taken the action in the same way on the Register commencement day.

Similarly, the registered circumstance ceases to exist in the same situations where the hypothetical corresponding (‘notional’) registered circumstance would cease. The timing of cessation depends on when the situation arises. If the situation actually arises on or before the register notification day, then cessation is on the register notification day. If the situation actually arises on a later day, then cessation is on that later day.

The approach of subsection 81(4) ensures consistency between the regulations and the Act, as the same registered circumstances arise and cease for the same actions and situations for which a register notice must be given.

Subsection 81(5) takes a similar approach to subsection 81(4) in applying section 130ZN of the Act (which requires a register notice for a change in interest in an entity or business of at least 5 percent). Subsection 81(5) provides that section 130ZN of the Act applies to a registered circumstance under subsection 81(4) if it would have applied to a corresponding hypothetical registered circumstance arising on or after the Register commencement day. So, if a register notice would be required under section 130ZN had the change in percentage interest occurred on or after the Register commencement day, then a register notice is required under subsection 81(5). Subsection 81(5) is made pursuant to paragraph 130ZN(4)(g), which allows regulations to provide section 130ZN applies to a registered circumstance.

The registrable event day for a register notice under subsection 81(3) is set by subsection 81(6), to be the same date as the Register commencement day. A foreign person has 30 days from the registrable event day to give a register notice to the Registrar, consistent with section 130W of the Act. Subsection 81(6) is made for the purposes of paragraph 130ZU(1)(b) of the Act, which allows regulations to prescribe the registrable event day for a register notice.

**Example 6 – Example of transitional obligation to report to the Registrar**

An example of the transitional arrangements in practice is where a foreign person acquires Australian land on 20 June 2023 (a core Part 3 action), which must be notified to the Treasurer within 30 days under subsection 98C(2) or 98D(2) of the Act. Such notice is not given before the Register commencement day on 1 July 2023

In this scenario, the person must give notice to the Registrar under subsection 81(3) as the action is a kind for which the person would need to give the Registrar a register notice had the action been taken on or after 1 July 2023.

Subsection 81(3) applies from the Register commencement day, requiring the foreign person to notify the Registrar of the action within 30 days of the Register commencement day. This obligation replaces the obligation to give notice to the Treasurer through the operation of section 58H. Such notice is given to the Registrar on 10 July 2023.

Paragraph 81(4)(a) applies so the registered circumstance which exists in relation to the subsection 81(3) register notice is the same as the registered circumstance which would have existed had the notification obligation arisen under the Act on Register commencement day, as the same action is involved.

In this scenario, the registered circumstance persists as the foreign person continues to hold the interest.

Paragraph 81(4)(b) provides for cessation of the registered circumstance in a similar way to paragraph 81(4)(a). If the interest in land is disposed of, the registered circumstance ceases. However, the timing of cessation of the registered circumstance will depend on when the situation (the disposal of the interest in land) occurs relative to the register notification day. If the register notice for acquiring the land is given on 10 July (register notification day), then:

* if the situation which disposes of that interest in land arises on or before the register notification day (any time between 20 June 2023 and 10 July 2023) – the registered circumstance ceases on 10 July (i.e. the same day the notice is given); and
* if the situation which disposes of that interest in land arises after the register notification day (any time after 10 July 2023) – the registered circumstance ceases on the day that the situation arises.

**Example 7 – Example of when to notify the Treasurer, not the Registrar**

Another example of the operation of the transitional arrangements is where a foreign person acquires 45 per cent of securities in a mining entity on 20 June 2023 (a core Part 3 action), which must be notified to the Treasurer within 30 days under subsection 98C(2) or 98D(2) of the Act (such notice is not given before the Register commencement day on 1 July 2023, although the period in which to notify the Treasurer has not lapsed). The person disposes of their interest completely on 23 June 2023 (a related situation resulting in the person no longer holding the interest), and notifies the Treasurer of this disposal under subsection 98E(3) of the Act on 26 June 2023.

In this scenario, the person must still notify the Treasurer of the corresponding core Part 3 action taken on 20 June 2023 within 30 days of 20 June 2023 (as explained in note 1 beneath subsection 81(3)) but does not need to notify the Registrar.

**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 (Register of Foreign Ownership and Other Matters) Regulations 2023

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 (Register of Foreign Ownership and Other Matters) Regulations 2023* (the Legislative Instrument) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulations) to support the operation of the Register of Foreign Ownership of Australian Assets (the Register).

The Register, established by Part 7A of the Act, is an integral part of Australia’s foreign investment review framework. It records foreign interests in land, water, entities, businesses and other assets in Australia in a single resource, incorporating and extending the former Register of Foreign Ownership of Water Entitlements and Register of Foreign Ownership of Agricultural Land. The Commissioner of Taxation is the Registrar responsible for administering the Register, under the *Commonwealth Registers (Appointment of Registrars) Instrument 2021*.

The Legislative Instrument supports the operation of the Register by prescribing circumstances in which foreign investors must notify the Registrar of certain interests, for that information to be included on the Register. Regulatory burden is mitigated by continuing existing exemptions from notification obligations and design of the regime to minimise duplication of notifications.

Together with the Act, the Legislative Instrument enhances Government visibility of foreign ownership of Australian assets to aid policy consideration and assist efficient case processing by making more information available to decision-makers.

### Human rights implications

The Legislative Instrument supports the operation of the Register. Both the Legislative Instrument and the Register respectively engage:

* the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR);
* the right to equality and non-discrimination under Articles 2, 16 and 26 of the ICCPR; and
* the right to no discrimination on the basis of race under Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Right to protection from arbitrary or unlawful interference with privacy

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with a person’s privacy, family, home or correspondence, and prohibits unlawful attacks on their honour and reputation. It also provides that everyone has the right to the protection of the law against such interference or attacks.

The Register will record foreign interests in Australian land, water, businesses and other assets. It will incorporate and extend existing registers currently administered by the Commissioner of Taxation: the Register of Foreign Ownership of Water Entitlements and the Register of Foreign Ownership of Agricultural Land. Once the Register is operational, foreign persons, or people acting on their behalf, must provide notice of their acquisition of a relevant interest, as well as of certain changes in the percentage held or the disposal of that interest.

The requirement to provide information to the Registrar for inclusion on the Register engages a foreign person’s right to privacy under Article 17 of the ICCPR, as some of the information required may be personal information such as name.

An interference with privacy will not be considered arbitrary or unlawful if it is provided for by law, for a reason consistent with the ICCPR, and reasonable in the particular circumstances.[[2]](#footnote-3) The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that an interference with privacy must be proportional to the end sought and be necessary in the circumstances of the case.[[3]](#footnote-4)

In this case, any limitations on privacy inherent in the requirement to provide information to the Registrar, and for information to be held on the Register, are provided for by law through the Act, Principal Regulations and this Legislative Instrument.

The registry regime has a legitimate purpose, namely Government oversight of foreign investment in Australia with a view to protecting the national interest.

The registry regime has been designed so that any interference with privacy is proportional to achieving those objectives, and to be reasonable in the circumstances. In particular:

* It would not be possible for the Registrar to administer and enforce the regime, to achieve those objectives, without collecting relevant personal information.
* The information required for inclusion on the Register is relevant to oversight of asset ownership; additional fields of personal information or sensitive information which do not relate to this purpose are not sought.
* The range and means of collecting the information for inclusion on the Register complement other existing mechanisms for recording details of foreign interests in Australia, for consistency.
* Registered information is not made publicly available, to protect privacy.
* The Registrar is subject to information handling obligations which ensure personal information is collected, used and stored securely in accordance with the *Privacy Act 1988*, which gives effect to the right to privacy in Australia.

Any limitation to the right to privacy from these arrangements is consistent with the ICCPR as the collection and use of personal information for the Register is authorised by and consistent with law, proportional to the end sought, and necessary in the circumstances to protect national security.

Rights to equality and non-discrimination

The right to equality and non-discrimination in Articles 2, 16 and 26 of the ICCPR obliges Australia to refrain from discriminating or eroding equality, and protect and advance the fulfilment and enjoyment of the rights to equality and non-discrimination for all people.

The right to no discrimination on the basis of race in Articles 1, 2 and 5 of the ICERD obliges Australia to refrain from discriminating on the basis of race, colour descent, or national or ethnic origin and to prohibit and eliminate such forms of discrimination.

Paragraph 1 of Article 1 of ICERD 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 ICERD, ‘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 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’.

Article 2 of the ICCPR requires Australia ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Article 16 of the ICCPR further provides that ‘everyone shall have the right to recognition everywhere as a person before the law’.

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

The UN 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’[[4]](#footnote-5). Thus, where laws, policies or programs treat people differently, there must be criteria for the differential treatment that are reasonable and objective, and they must aim to achieve a purpose which is legitimate under the ICCPR.

The Legislative Instrument engages Articles 2, 16 and 26 of the ICCPR and Articles 2 and 5 of ICERD because the core obligations imposed by the Legislative Instrument 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 the Act and Principal Regulations, it is anticipated that the majority of individuals who are directly affected by this Legislative Instrument will not be Australian citizens. Foreign persons will primarily be corporations or individuals who are citizens of countries other than Australia.

While differential treatment is applied to foreign persons who are required to notify the Registrar of actions taken in relation to Australian assets, this does not amount to prohibited discrimination, consistent with the Human Rights Committee’s comments. Foreign persons and the circumstances in which they must provide information are prescribed in objective and reasonable criteria embedded in publicly available legislation (the Act and the Principal Regulations). Further, there is a legitimate purpose for the differential treatment which is consistent with international law. Namely, to enhance Government visibility of foreign ownership of Australia assets and prevent foreign persons from taking an interest in or acquiring influence that would pose a national security risk or be contrary to national interest.

As such, the Legislative Instrument is consistent with the principles of the ICCPR and the ICERD.

### Conclusion

This Legislative Instrument is compatible with human rights because, to the extent it may limit human rights, those limitations are reasonable, necessary, and proportionate to the objective of protecting the national interest through efficient administration of a register of foreign interests in Australian assets.

1. https://www.legislation.gov.au/Details/C2020B00150/Explanatory%20Memorandum/Text [↑](#footnote-ref-2)
2. Human Rights Committee, *General Comment No. 16: Article 17 (Right to privacy*), *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* 32nd sess, UN Doc (1988). [↑](#footnote-ref-3)
3. Human Rights Committee, *Communication No. 488,* UN Doc CCPR/C/50/D/488 (1992). [↑](#footnote-ref-4)
4. Human Rights Committee, *General Comment No. 18, Non-discrimination,* 37th sess, reprinted in the *Compilation of General Comments and General Recommendations* *Adopted by Human Rights Treaty Bodies,* UN Doc HRI/GEN/1/Rev.9 (2008). [↑](#footnote-ref-5)