

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer and Minister for Financial Services

Insurance Acquisitions and Takeovers Act 1991

Insurance Acquisitions and Takeovers (Public Interest) Determination 2024

Subsection 5(1) of the *Insurance Acquisitions and Takeovers Act 1991* (the Act) provides that for the purposes of the application of the Act to an Australian-registered insurance company, a particular matter is taken to be contrary to the public interest if it is:

- likely to adversely affect the prudential conduct of the affairs of the company (see paragraph 5(1)(a) of the Act);
- likely to result in a person who is not a fit and proper person to be in a position of influence over the company being in such a position of influence (see paragraph 5(1)(b) of the Act);
- likely to unduly concentrate economic power in the Australian general insurance industry, in the Australian life insurance industry or in the Australian financial system (see paragraph 5(1)(c) of the Act); or
- contrary to the national interest (see paragraph 5(1)(d) of the Act).

Subsection 5(2) of the Act provides that the Minister may, by legislative instrument, determine circumstances in which a person is taken to be in a position of influence over an Australian-registered insurance company for the purposes of paragraph 5(1)(b) of the Act.

Subsection 5(4) of the Act relevantly provides that in relation to the Minister considering whether a matter is contrary to the public interest:

- in considering whether the matter is likely to have the result in paragraph 5(1)(b) of the Act, the Minister must, or may (as the case may be) have regard to matters determined under subsection 5(6) of the Act;
- in considering whether the matter is likely to have the effect in paragraph 5(1)(c) of the Act, the Minister must, or may (as the case may be), have regard to matters determined under subsection 5(6) of the Act; and
- in considering whether the matter is contrary to the national interest as mentioned in paragraph 5(1)(d) of the Act, the Minister must, or may (as the case may be), have regard to matters determined under subsection 5(6) of the Act.

Subsection 5(6) of the Act provides that the Minister may, by legislative instrument, determine matters for the purposes described above.

The Act establishes a framework for the control and compulsory notification of certain acquisitions and agreements relating to Australian-registered insurance companies. The Minister has various decision-making powers for these purposes. Specific decisions in the Act require the Minister to consider whether a matter would be contrary to the public interest.

The purpose of the *Insurance Acquisitions and Takeovers (Public Interest) Determination 2024* (the Determination) is to remake the *Insurance Acquisitions and Takeovers Act 1991- Decision-Making Principles IDM 1/1992* (the DMP) in a form that is fit for purpose, prior to the DMP sunseting on 1 October 2024.

Background

The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. The Attorney-General may defer sunseting in certain circumstances, pursuant to section 51 of the *Legislation Act 2003*. Legislative instruments generally cease to have effect after a specific date unless further legislative action is taken to extend their operation, such as remaking the instrument.

The *Legislation (Insurance Instruments) Sunset-altering Declaration 2018* aligned the sunseting date for the DMP, *Insurance Acquisitions and Takeovers (Notices) Regulations 1992*, *Insurance Regulations 2002* and *Life Insurance Regulations 1995* (the Insurance Instruments) to 1 October 2023 to enable Treasury to conduct a comprehensive thematic review of regulation imposed on the insurance industry. Relevant provisions of the enabling Acts, that is, the Act, the *Insurance Act 1973* and the *Life Insurance Act 1995*, were also considered as part of the review.

The *Legislation (Deferral of Sunseting—Insurance Instruments) Certificate 2023* further deferred the sunseting date for the Insurance Instruments to 1 October 2024 to allow for the passage of the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023*, which amended the enabling Acts to implement certain findings of the thematic review.

The DMP was made pursuant to subsection 65(1) of the Act, which allowed the Minister to formulate principles to be complied with by the Minister in making decisions under Part 3 or 4 of the Act. The review found that while the DMP was still required in some form, the application of the DMP was unclear, and the Act should be amended to clarify their intended operation and purpose; that is, to inform when a matter is contrary to the public interest (known as the ‘public interest test’) under subsection 5(1) of the Act.

To implement the findings of the thematic review, Schedule 4 to the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023* made a number of amendments to the Act, including:

- repealing subsection 5(2) and amending paragraph 5(1)(b) of the Act to remove redundant references to an unsuitable person;
- repealing subsection 5(3) of the Act, which set out when a person was taken to be in a position of influence over a company and replacing it with the head of

power to prescribe such matters in a legislative instrument in new subsection 5(2) of the Act; and

- repealing the enabling provision for the DMP in section 65 of the Act (also repealing the DMP) and replacing it with new subsection 5(6) of the Act which, as described above, provides the Minister with the power to determine, by legislative instrument, matters which inform the public interest test in subsection 5(1) of the Act.

Summary

The Determination remakes the DMP under new enabling provisions in the Act with improvements to ensure it aligns with modern drafting practices and is in a form that is fit for purpose. The operation of the Determination remains largely the same as the DMP. Key changes from the DMP are as follows:

- the Determination prescribes when a person is taken to be in a position of influence over a company. This replaces subsection 5(3) of the Act, which was repealed by Schedule 4 to the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023*; and
- the Determination updates the matters to which the Minister must or may have regard in considering whether a person is a fit and proper person under the DMP, to provide consistency with other similar provisions in the portfolio, including section 7 of the *Financial Sector (Shareholdings) Determination No. 1 of 2019*.

The Act does not specify any conditions which must be met before the Minister's power to make the Determination may be exercised.

An exposure draft of the Determination and the accompanying explanatory materials were released for public consultation from 11 April to 26 April 2023.

Details of the Determination are set out at [Attachment A](#)

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

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA23-04962) and agreed that an Impact Analysis is not required.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Determination commenced on 1 March 2024 (concurrently to the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023*) and applies from the date of commencement.

Details of the *Insurance Acquisitions and Takeovers (Public Interest) Determination 2024*

Part 1—Preliminary

Part 1 provides the name, commencement, authority and definitions relevant to the Determination.

Section 1 – Name

This section provides that the name of the instrument is the *Insurance Acquisitions and Takeovers (Public Interest) Determination 2024* (the Determination).

Section 2 – Commencement

The Determination commenced on 1 March 2024.

Section 3 – Authority

The Determination is made under the *Insurance Acquisitions and Takeovers Act 1991* (the Act).

Section 4 – Definitions

This section sets out definitions for terms used in the Determination.

A note to this section directs the reader to paragraph 13(1)(b) of the *Legislation Act 2003*, which has the effect that expressions have the same meaning in the Determination as in the Act as in force from time to time.

Part 2—Public interest matters

Part 2 prescribes matters which inform whether a particular matter is contrary to the public interest (known as the public interest test) for the purposes of subsection 5(1) of the Act.

Section 5 – Fit and proper person

Section 5 prescribes matters under subsection 5(6) of the Act to which the Minister must or may have regard in determining whether a particular matter is likely to result in a person who is not a fit and proper person to be in a position of influence over an Australian-registered insurance company, being in such a position of influence. This informs the public interest test for the purposes of subparagraphs 5(4)(b)(i) and (ii) of the Act.

Section 5 updates the operation of section 4 of the DMP to provide consistency with other similar provisions in the portfolio, including section 7 of the *Financial Sector (Shareholdings) Determination No. 1 of 2019*.

Section 6 – Position of influence over a company

Section 6 prescribes circumstances under subsection 5(2) of the Act in which a person is taken to be in a position of influence over the Australian-registered insurance company for the purposes of paragraph 5(1)(b) of the Act. This informs the ‘fit and proper person’ limb of the public interest test (see section 5).

Section 6 replaces subsection 5(3) of the Act, which was repealed by the *Treasury Laws Amendment (2023 Law Improvement Package No. 1) Act 2023*.

Section 7 – Undue concentration of power

Section 7 prescribes matters under subsection 5(6) of the Act to which the Minister must or may have regard in determining whether a particular matter is likely to unduly concentrate economic power in the Australia general insurance industry, the Australian life insurance industry or the Australian financial system. This informs the public interest test for the purposes of subparagraphs 5(4)(c)(i) and (ii) of the Act.

Section 7 remakes section 5 of the DMP.

Section 8 – Contrary to the national interest

Section 8 prescribes matters under subsection 5(6) of the Act to which the Minister must or may have regard in determining whether a particular matter is contrary to the national interest. This informs the public interest test for the purposes of subparagraphs 5(4)(d)(i) and (ii) of the Act.

Section 8 remakes section 6 of the DMP.

Statement of Compatibility with Human Rights

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

Insurance Acquisitions and Takeovers (Public Interest) Determination 2024

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* (HRPS Act).

Overview of the Legislative Instrument

The purpose of the *Insurance Acquisitions and Takeovers (Public Interest) Determination 2024* (the Determination) is to remake the *Decision-Making Principles IDM 1/1992* (the DMP) before it sunsets on 1 October 2024. The Determination remakes the DMP under new enabling provisions in the *Insurance Acquisitions and Takeovers Act 1991* (the Act), with updates to ensure it aligns with modern drafting practices and is in a form that is fit for purpose.

Human rights implications

Treasury has assessed the instrument against the international instruments listed in section 3 of the HRPS Act and determined that it may engage the following human rights:

- the right to protection from arbitrary or unlawful interference with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR);
- the right to work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to protection from arbitrary or unlawful interference with privacy

The right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The Act establishes a framework for the control and compulsory notification of certain acquisitions and agreements relating to Australian-registered insurance companies. The Minister has various decision-making powers for these purposes.

Section 73 of the Act provides that, if the Minister has reason to believe that a person is capable of giving information or producing documents about matters that are relevant to the exercise by the Minister of his or her powers under the Act, the Minister may, by notice in writing served on that person, require that person to give or produce such information within the time and in the manner specified in the notice.

The Determination, made under enabling provisions in subsection 5(2) and 5(6) of the Act, provides the matters to which the Minister must or may have regard in determining whether a particular matter is contrary to the public interest under subsection 5(1) of the Act. For example, subparagraph 5(1)(a)(i) of the Determination provides that the Minister, in determining whether a particular matter is likely to result in a person who is not a fit and proper person to be in a position of influence over the Australian-registered insurance company being in such a position of influence, must have regard to the honesty, integrity and reputation of the person.

The Minister may exercise his or her power under section 73 of the Act by requiring a person to give or produce information about matters that are relevant to the Minister in determining whether a particular matter is contrary to the public interest under section 5(1) of the Act. This information ultimately supports the objects of the Act to protect the public interest, by ensuring that the affairs of Australian-registered insurance companies are carried out in a prudential manner and preventing unsuitable persons from being in a position of influence.

Further, section 75 of the Act provides that section 56 of the *Australian Prudential Regulation Authority Act 1998*, which prohibits certain disclosures of information received by APRA, applies to information received under the Act. This is intended to protect the privacy of individuals, consistent with the right to privacy under Article 17, while still ensuring appropriate levels of transparency and accountability in assisting the Minister to exercise his or her powers under the Act.

The Determination's limitations on the right to privacy are therefore necessary, reasonable and proportionate to the legitimate aim of protecting the public interest by ensuring the Minister is able to access the information required to assess any risk, balanced by the safeguard in section 75.

The right to work

The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work. The right to work also requires that state parties provide a system of protection guaranteeing access to employment. This right must be made available in a non-discriminatory manner pursuant to Article 2(1) of the ICESCR.

Section 5 of the Determination requires the Minister have regard to prescribed matters in determining whether a particular matter is likely to result in a person who is not a fit and proper person to be in a position of influence over the Australian-registered insurance company being in such a position of influence. Requiring the Minister to have regard to these matters when considering whether a person is a fit and proper person is appropriate, because each of these matters will inform the overall assessment of the person's fitness and propriety. Additionally, the matters in the Determination are updated to provide consistency with other similar provisions within

the portfolio, including section 7 of the *Financial Sector (Shareholdings) Determination No. 1 of 2019*.

The inclusion of a fit and proper test is appropriate as it pursues the legitimate objective of ensuring that persons who have been approved to be in a position of influence over an Australian-registered insurance company are persons who are trustworthy and have the required integrity for the role. Ensuring that only individuals who meet appropriate ethical standards can be in such a position of influence is necessary to protect the public interest.

A position of influence over an Australian-registered insurance market in Australia's insurance market is not a right. This position is a privilege, granted by the Commonwealth to suitable persons. A person seeking the benefit of such a position in the insurance industry will do so in the knowledge that the existence of certain adverse factors may result in a proposal relating to the acquisition or leasing of assets of Australian-registered insurance companies or the entering into of agreements relating to directors of Australian-registered insurance companies being stopped if the Minister makes such an order. This is appropriate as it remains necessary to ensure that unsuitable persons are prevented from being in a position of influence over Australian-registered insurance companies.

Conclusion

This Legislative Instrument is compatible with human rights because, to the extent that this determination limits human rights, those limitations are reasonable, necessary and proportionate.