

EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Competition, Charities and Treasury

Foreign Acquisitions and Takeovers Fees Imposition Act 2015

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Technical Amendments) Regulations 2024

The *Foreign Acquisitions and Takeovers Act 1975* (FATA) establishes a framework for the Treasurer to review and issue various orders in respect of certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities (being corporations and unit trusts) and businesses, that have a connection to Australia, or actions taken by persons that have, or may have, implications for Australia's national security or national interest. Section 113 of the FATA provides that fees are payable in respect of certain actions taken or notices received or required to be given under the FATA. A person may be liable for a fee if they:

- Apply for an exemption certificate or a variation of an exemption certificate;
- Give notice in relation to the types of actions to which the FATA applies (notifiable actions, notifiable national security actions, reviewable national security actions, or significant actions);
- Have not notified the Treasurer of a significant action, and the Treasurer makes a decision or order under Part 3 of the FATA in relation to that action;
- Are given a notice under subsection 66A(4) that the Treasurer is reviewing an action taken, or proposed to be taken, by them; or
- Apply for a variation of a no objection notification or notice imposing conditions.

The *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Fees Act) establishes a framework to impose, as taxes, these. Subsection 6(1) of the Fees Act provides that the amounts of fees imposed by the Act for actions under the FATA are to be worked out in accordance with the regulations, and section 13 of the Fees Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (the Fees Regulations) prescribes methods for working out the amount of fees imposed by the Fees Act.

The purpose of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Technical Amendments) Regulations 2024* (the Amending Regulations) is to make technical amendments to clarify the operation of the Fees Regulations to ensure a person cannot avoid the tripled fees by acquiring interests through a corporation or unit trust rather than the established dwelling land directly. This addresses an unintended outcome in the development of the Fees Amendment Act.

Where a person acquires an interest in a land entity (where the entity's dominant land holding is residential land), and that entity holds at least one interest in established dwelling land, a portion of the fee attributable to that established dwelling land would be subject to the tripling of fees under section 10(2) of the Fees Regulations. This would ensure that the tripling of fees in respect of acquisitions of established dwelling land cannot be avoided by structuring acquisitions through a corporation or unit trust where more than 50% of whose assets by value are interests in land.

Section 10(2) of the Fees Regulations currently provides for a general rule that, if the action in respect of which a fee is charged is to acquire an interest in residential land on which there is at least one established dwelling, then the amount of the fee for the action is triple the fee otherwise worked out by applying subsection 10(1). This was inserted by item 7 of Schedule 2 to the Fees Amendment Act.

Public consultation did not occur before the Amending Regulations were finalised as the amendments address a potential integrity risk from persons avoiding increased fees through structuring transactions.

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

The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act). The Amending Regulations are subject to disallowance under section 42 of the Legislation Act and will be repealed automatically once they have commenced by force of section 48A of that Act. The sunset provisions of Part 4 of the Legislation Act do not apply to the Amending Regulations because they will be automatically repealed before those provisions would have effect. The Fees Regulations are a legislative instrument for the purposes of the Legislation Act and are not exempt from sunset.

The Amending Regulations commenced on the day after registration, and will apply to fees that become payable on or after that date.

The Office of Impact Analysis (OIA) has advised that the amendments do not require a Regulatory Impact Statement because they have been assessed to be machinery in nature. The OIA reference number is OIA24-08444.

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

The Fees Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

Details of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Technical Amendments) Regulations 2024*

Section 1 – Name

This section provides that the name of the regulations is the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Technical Amendments) Regulations 2024* (the Amending Regulations).

Section 2 – Commencement

Schedule 1 to the Amending Regulations commenced on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Amending Regulations are made under the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Fees Act).

Section 4 – Schedule

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

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

Schedule 1 – Amendments

Schedule 1 makes technical amendments to clarify the operation of the Fees Regulations. The amendments ensure the policy outcome that tripled fees are payable in respect of acquisitions of residential land on which there is at least one established dwelling ("established dwelling land"). A person cannot avoid the higher fees by acquiring interests through a land entity rather than the established dwelling land directly.

In detail, where a person acquires an interest in a land entity (where the entity's dominant land holding is residential land), and the entity holds at least one interest in established dwelling land, a portion of the fee attributable to that established dwelling land is subject to the tripling of fees under section 10(2) of the Fees Regulations. This ensures that the tripling of fees in respect of acquisitions of established dwelling land cannot be avoided by structuring acquisitions through a corporation or unit trust where more than 50% of whose assets by value are interests in land.

Section 10(2) provides for a general rule that, if the action in respect of which a fee is charged is to acquire an interest in residential land on which there is at least one established dwelling, then the amount of the fee for the action is triple the fee otherwise worked out by applying subsection 10(1). This was inserted into the Fees Regulations by item 7 of Schedule 2 to the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2024*.

Items [1] – Paragraph 51(5)(c)

Item [2] – At the end of section 51

Items 1 and 2 of Schedule 1 make drafting improvements and consequential amendments to support the amendments by:

- repealing and substituting the substance of the paragraph 51(5)(c) prior to the amendments, into a new subsection 51(6); and
- clarifying that the modification to the definition of “established dwellings fee” in section 33 (the replacement of the “established dwelling fee” with the fee under paragraph 51(5)(a)) also applies in calculating the “percentage of established dwellings maximum fee not charged” component of the subsection 33(4) formula.

Item [3] – At the end of section 56

Apportioning consideration of an acquisition of securities in a land entity

Item 3 of Schedule 1 amends section 56 to add new subsections 56(3), 56(4) and 56(5). Section 56 in Part 4 of the Fees Regulations contains provisions that adjust the amount of fees otherwise worked out under Part 2 to deal with specific circumstances, acquisitions and actions. This includes where a person acquires an interest in securities in a “land entity”. A “land entity” is defined in section 5 of the *Foreign Acquisitions and Takeovers Regulation 2015* (FATR) and means an agricultural land corporation, an agricultural land trust, an Australian land corporation or an Australian land trust. Further, section 13 of the FATR provides that “Australian land corporation” includes a corporation where the value of the interests in agricultural land or Australian land exceeds 50% of the entity’s total assets.

Section 56 applies if a person acquires an interest in securities in a land entity (the actual acquisition), and, apart from the section, the acquisition would be an action for which a fee would be payable under subsection 113(1) of the FATA.

In the circumstances where section 56 applies, the actual acquisition is treated as if it were instead (and were only) an acquisition by that person of an interest in Australian land of the same kind as the entity’s “dominant land holding”, the consideration for which is deemed to be equal to the value of the consideration for the actual acquisition. If the actual acquisition is a reviewable national security action, then this deemed acquisition is too. The fee is then worked out under the other provisions of the Fees Regulation (which a note clarifies may itself be modified by other provisions of Part 4).

The entity’s “dominant land holding” is worked out under subsection 56(2), and is generally the kind of relevant land with the highest total value (assessed on a reasonable basis) of all the kinds of relevant land in which the entity holds interests when the actual acquisition is made.

Item 3 inserts a new subsection 56(3). This new subsection provides that, despite the above, if the entity’s dominant land holding is residential land, and the entity also holds interests in residential land on which there is at least one established dwelling, then for the purposes of the Fees Regulation, the action is treated as if it were instead 2 separate,

deemed actions by the person, as set out in new subsections (4) and (5). The deemed interest and deemed value of the consideration of these actions is as follows:

	Interest deemed acquired	Deemed value of consideration
Subsection (4)	Interest in residential land on which there is at least one established dwelling (established dwelling land)	So much of the consideration as is attributable to all these interests
Subsection (5)	Interest in residential land on which there are no established dwellings (whatever the kind of interest is that is in fact acquired)	So much of the consideration as is not attributable to these interests in established dwelling land – which will be equivalent to the total consideration less the amount directly above

In both cases, if the actual action is a reviewable national security action, the deemed actions are also reviewable national security actions (paragraphs 56(4)(c) and 56(5)(c)).

Since agreements for the acquisition of land entities do not always attribute consideration to interests of a particular kind, new subsection 56(6) clarifies that, for the purposes of working out the deemed value of consideration discussed above, consideration is taken to be attributable to particular interests in residential land to the same extent as the total asset value of the land entity is attributable to those interests. In practice, this will require apportionment, on a reasonable basis, using the following formulas:

- For subsection 56(4), in relation to established dwelling land:

$$\text{Consideration} \times \frac{\text{Established dwelling value}}{\text{Total asset value}}$$

- For subsection 56(5), in relation to other interests:

$$\text{Consideration} \times \frac{\text{Total asset value} - \text{Established dwelling value}}{\text{Total asset value}}$$

In these formulas:

- “Consideration” means the consideration for the actual acquisition;
- “Established dwelling value” is the part of the total assets value for the land entity attributable to the interests in established dwelling land; and
- “Total asset value” is the total asset value for the land entity.

The effect of creating 2 deemed actions is, to require apportionment of the consideration for the actual action between established dwelling land held by the entity and other interests for the purposes of the Fees Regulations (with these other interests being treated as interests in residential land for the purposes of working out the fee). This is then used as the basis for calculating fees under the rest of the Fees Regulations, including the provisions in Subdivision B of Division 2 of Part 4 (discussed further below) and the provisions in Division 7 of Part 2.

Working out the fee payable – single agreement rules

If these two deemed actions are covered by a single agreement (such as an agreement under which an interest in a land entity is acquired), section 51 works out the fee payable under sections 49 and 50. Generally, section 49 modifies and replaces the fee that would otherwise be payable under the Fees Act with amounts worked out under various sections including section 51. If:

- a single agreement (such as an agreement under which an interest in a land entity is acquired) covers more than one action which is an acquisition of an interest in Australian land or in a tenement (for example, the 2 deemed actions described above); and
- residential land is the dominant kind of land; and
- one or more of the actions covered by the agreement (including one of the 2 deemed actions described above) is an acquisition of established dwelling land;

then under subsection 51(5), the fee payable is usually the sum of:

- the fee that would otherwise apply under the Fees Regulations for an action which is an acquisition of an interest in established dwelling land with the deemed consideration set out in the table above (in addition to the consideration for any other established dwelling land); and
- the fee that would otherwise apply under the Fees Regulations for an acquisition action which is an acquisition of an interest in residential land that is *not* established dwelling land, with the deemed consideration also set out in the above table (in addition to the consideration for any other acquisition of land which is not established dwelling land).

Paragraphs 56(4)(c) and 56(5)(c), and new subsection (6) together apply an adjusted maximum to this amount through a modified application of the formula contained in subsection 33(4). The modifications substitute the definition of “established dwelling fee” in subsection 33(4) with the fee under paragraph 51(5)(a) worked out above. This would largely operate the same way as subsection 51(5) prior to the amendments.

Subsection 33(4) was also inserted by the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2024*. For a detailed explanation of subsection 51(5), its relationship with section 33 of the Fees Regulations, and the modified operation of the fee provisions applicable to applications for exemption certificates in relation to established dwelling land generally, see paragraphs 2.54 to 2.65 and 2.43 to 2.49 of the explanatory memorandum to the originating Bill for the *Foreign Acquisitions and Takeovers Fees*

Imposition Amendment Act 2024 (the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024).

Statement of Compatibility with Human Rights

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

Foreign Acquisitions and Takeovers Fees Imposition Amendment (Technical Amendments) Regulations 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*.

Overview of the Legislative Instrument

The *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Fees Act) establishes a framework to impose, as taxes, fees paid by regarding regulated actions under the *Foreign Acquisitions and Takeovers Act 1975* (FATA).

Section 13 of the Fees Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Subsection 6(1) of the Fees Act provides that the amounts of fees imposed by the Act for actions under the FATA are to be worked out in accordance with the regulations.

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

The purpose of the *Foreign Acquisitions and Takeovers Fees Imposition Amendment (Technical Amendments) Regulations 2024* (the Amending Regulations) is to make technical amendments to clarify the operation of the Fees Regulations. The amendments ensure the policy outcome that tripled fees are payable in respect of acquisitions of residential land on which there is at least one established dwelling ("established dwelling land"). A person cannot avoid the higher fees by acquiring interests through a corporation or unit trust rather than the established dwelling land directly.

Human rights implications

This Legislative Instrument engages the following rights:

- the right to no discrimination on the basis of race under Articles 1, 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and
- the right to equality and non-discrimination under Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

This is because the Legislative Instrument changes the treatment under the Fees Regulations of certain acquisitions made and actions undertaken by "foreign persons" and the fee imposed in respect of these acquisitions and actions under the *Foreign Acquisitions*

and Takeovers Fees Imposition Act 2015, specifically where foreign persons acquire an interest in securities in a land entity which would be an action for which a fee would be payable under subsection 113(1) of the *Foreign Acquisitions and Takeovers Act 1975* (the Act). The Instrument extends the tripling of fees effected by the Fees Imposition Amendment Act to these acquisitions and actions, to avoid this tripling being avoided by structuring transactions in particular ways. Further, while an Australian citizen who is not ordinarily a resident in Australia may be a “foreign person” for the purposes of the Act, it is anticipated that the majority of individuals who are directly affected by these amendments will not be Australian citizens.

The human rights implications of the originating bill for the Fees Imposition Amendment Act 2024, the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2024* (Fees Imposition Amendment Bill), were set out in detail in the explanatory memorandum for that Bill. That memorandum concluded that the Fees Imposition Amendment Bill was compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the objective of ensuring foreign investment in residential property increases Australia’s housing stock through increased foreign investment fees for the purchase of established dwellings and increased vacancy fees for foreign-owned dwellings. In brief, the Bill was consistent with the ICERD and ICCPR because:

- the Bill served a legitimate purpose of creating additional new housing stock, jobs in the construction industry and supporting economic growth by encouraging foreign investment in new housing stock;
- foreign persons are regulated in the same manner under Australia’s foreign investment framework and the definition of foreign person is clearly set out in the Act; and
- the increased fees are reasonable, necessary and proportionate because the amount of fee imposed depends on the nature of the transaction, the value of the transaction, and the significant of the transaction to Australia’s national interest.

For a more detailed explanation, see the Statement of Compatibility with Human Rights of the Fees Imposition Amendment Bill in Chapter 4 of the explanatory memorandum.

This Instrument corrects an unintended omission in the implementation of the policy of the Fees Imposition Amendment Act and avoids this policy being subverted through structuring transactions in particular ways. It is consistent with the conclusion in the memorandum and applied here in respect of the Instrument, that the policy implemented by the Fees Imposition Amendment Act is consistent with the ICERD and ICCPR.

Conclusion

The Legislative Instrument is compatible with human rights because it corrects an unintended omission in the implementation of a policy which, to the extent that it may limit human rights, imposes limitations that are reasonable, necessary and proportionate to the objective of ensuring foreign investment in residential property increases Australia’s housing stock through increased foreign investment fees for the purchase of established dwellings and increased vacancy fees for foreign-owned dwellings.