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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FOREIGN INVESTMENT REFORM (PROTECTING AUSTRALIA'S NATIONAL
SECURITY) BILL 2020

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon. Josh Frydenberg MP)

Chapter 1

National Security

Outline of chapter

1.1 This Chapter explains the amendments contained in the Foreign Investment Reform (Protecting Australia’s National Security) Bill 2020: National security reviews and last resort power. References to ‘the Bill’ in this Chapter are to that draft Bill.

1.2 The Bill ensures that the Treasurer has the appropriate powers to protect the national interest – including national security – wherever risks arise from individual investment proposals taking into account the evolving geopolitical risks, technological change and the kinds of assets available to foreign investors.

1.3 The amendments provide a new national security test which:

- requires mandatory notification of any proposed direct investment in a sensitive national security business (including starting such a business) or proposed investment in Australian land where the location or use of the land could prejudice Australia’s national security (‘national security land’);
- allows a significant action that has not been notified and certain actions not otherwise captured under the FATA to be ‘called in’ for screening on national security grounds;
- allows investors to voluntarily notify of an action that could otherwise be called in, to obtain certainty about the particular investment; and
- allows the Treasurer, in exceptional circumstances, to impose conditions, vary existing conditions, or, as a last resort, force the divestment of any realised investment which was subject to the FATA where national security concerns are identified.

1.4 Investments subject to the new national security test are assessed against factors that give rise to national security concerns.

1.5 For clarity, the existing national interest test will remain unchanged including the factors that typically underpin the assessment process such as the character of the investor, competition, impact on the economy and community, national security and other Government policies (including tax).

1.6 In order to avoid overlap between the two tests, wherever the broader national interest test would apply to a particular action, only that test is used in an assessment. This is because national security is already a relevant factor that the Government considers when assessing the national interest.

National Security Review

Context of amendments

1.7 The FATA deals with certain actions to acquire interests in securities, assets or Australian land, and actions taken about entities and businesses that have a connection to Australia. Under the FATA, the Treasurer has powers for significant actions and must be informed of notifiable actions.

1.8 When exercising various powers under the FATA, the Treasurer considers whether the action is 'not contrary to the national interest' (the national interest test). The national interest test is not defined in the legislation but indicative criteria are set out in guidance material.

1.9 Once the Treasurer has exercised the Treasurer's powers under the FATA, either by issuing a no objection notification (with or without conditions) or prohibiting the proposed acquisitions, the Treasurer does not have subsequent powers to rescind approval after it is granted provided that any conditions imposed or orders made by the Treasurer are met. The Treasurer can only vary approvals with the person's consent.

1.10 However, risks to Australia's national interest, particularly national security are increasing as a result of a confluence of developments – including rapid technological change and changes in the international security environment.

1.11 In recent years, many countries have updated their foreign investment regimes to manage a range of new risks. In particular, both advanced and emerging economies have introduced changes to their foreign investment screening rules to strengthen the powers of government to scrutinise investment in sensitive sectors.

1.12 Currently, in Australia, foreign persons must notify the Treasurer of certain actions where the investment meets certain criteria, such as monetary or percentage thresholds that are dependent on the sector, nature of the investment and the country of the investor.

1.13 Prior to the temporary changes made to the FATR in response to the coronavirus, foreign government investors faced a zero-dollar screening threshold but private investments under \$275 million (or \$1,192 million for our Free Trade Agreement partners) were not screened.

1.14 The presence of monetary thresholds means investments in some of our most sensitive sectors are not screened, even where an investment raises national security concerns. Businesses in these sectors may be vulnerable if their valuations are below existing screening thresholds.

Summary of New Law

Notifiable National Security Actions

1.15 A new category of actions, ‘notifiable national security actions’ describes actions that must be notified to the Treasurer for review regardless of the value of the investment or whether they are otherwise significant or notifiable actions.

1.16 These actions involve a foreign person acquiring an interest in national security land or a direct interest in a national security business, or starting a national security business.

1.17 A notifiable national security action is an action that is, by its nature, likely to give rise to a national security concern that, regardless of its size or value, requires review by the Treasurer.

Call-in power

1.18 National security concerns may still be posed by actions that do not need to be notified. However, imposing further notification requirements to include all potentially concerning actions would disproportionately affect non-sensitive investments.

1.19 The Treasurer is able to review certain actions not otherwise captured by the FATA and significant actions that are not notified if the Treasurer considers the action, whether still proposed or already taken, poses a national security concern. This is referred to as a ‘call-in’ power.

1.20 The call-in power gives the Treasurer additional visibility and control over those investment proposals that are most likely to pose a national security concern without imposing a regulatory burden on those which are less likely to pose concerns. It is expected that the overwhelming majority of investments will not be called-in for review.

1.21 The Treasurer’s powers regarding the actions are the same as the Treasurer’s other powers in the FATA. The Treasurer may issue a no objection notification for the action, including with conditions; may require that the person divests assets; or may prohibit the action. However, in exercising these powers the Treasurer must consider whether the action is contrary to national security.

1.22 To provide investors with greater certainty, the Treasurer is not able to call in an action that has been notified to the Treasurer or for which a no objection notification or exemption certificate exists.

1.23 A person can extinguish the Treasurer's ability to use the call-in power by voluntarily notifying of an action.

Last Resort Power

1.24 The new Last Resort Power gives the Treasurer a final opportunity to review actions for which no objection notifications have been given if exceptional circumstances arise.

1.25 If a national security risk arises in connection with an action for which a no objection notification has been given, then in some circumstances the Treasurer may give orders directing persons to act to reduce the national security risk. That is, exercise the last resort power.

1.26 Prior to exercising the last resort power, a number of factors need to be present and conditions met. The last resort power may only be exercised if, after the no objection notification is given, the nature of the foreign person changes, the foreign person's circumstances change, the broader circumstances change, or the Treasurer becomes aware of a relevant material omission or misstatement by the foreign person.

1.27 In addition, before exercising the last resort power, the Treasurer must conduct a review, consider relevant advice from the national intelligence community, take reasonable steps to negotiate in good faith with the foreign person, and be satisfied that the use of other options under the existing regulatory systems of the Commonwealth, States and Territories would not adequately reduce the national security risk.

1.28 If these requirements are satisfied, the Treasurer may impose conditions, or vary or revoke any conditions that have been imposed, and may make orders prohibiting an action or requiring the undoing of a part or whole of an action (including, as a last resort, requiring divestment).

Comparison of key features of new law and current law

1.29 The following table provides a comparison of the key features of the new law and the current law.

<i>New law</i>	<i>Current law</i>
<i>Notifiable national security actions</i>	
A foreign person must notify the Treasurer before taking a notifiable national security action, or a notifiable action.	A foreign person must notify the Treasurer prior to taking a notifiable action.

<i>New law</i>	<i>Current law</i>
<i>Call-in powers</i>	
The Treasurer also has powers for certain actions not covered by the FATA or significant actions that are not notified if the action poses a national security concern.	The Treasurer has powers for significant actions assessed against the national interest.
A person may also voluntarily notify of a proposed action that could be reviewed under the Treasurer's 'call-in' power.	A person may voluntarily notify of a proposed action.
<i>Last Resort Powers</i>	
<p>The Treasurer is able to give orders necessary to reduce national security risks if:</p> <ul style="list-style-type: none"> • there has been a material misstatement or omission in information provided to the Treasurer; or • relevant circumstances or the activities of the person have changed; and • a national security risk has arisen; and • all other options, including good faith negotiation and other regulatory powers, have been exhausted. 	The Treasurer is unable to unilaterally amend a no objection notification or any conditions in the no objection notification if it is detrimental to the foreign person or without the foreign person's consent.

Notifiable National Security Actions

Detailed explanation of new law

1.30 A new type of action is defined in the FATA - a 'notifiable national security action'. [*National Security Bill, item 7, section 4 of the FATA*]

1.31 The definition of 'notifiable national security action' involves the concepts of 'national security land' and 'national security business'. A notifiable national security action is an action or a proposed action by a foreign person that is to:

- acquire a direct interest in a national security business or start a national security business; or
- acquire an interest in national security land.

1.32 A person proposing to take a notifiable national security action must give notice of the action to the Treasurer and must not take the action before receiving a no objection notification or an exemption certificate covering the action, regardless of the size or value of the action. *[National Security Bill, items 58 to 62, sections 80 to 82 of the FATA]*

1.33 A person who does not notify the Treasurer of a notifiable national security action may be committing an offence, contravening a civil penalty provision, or both. *[National Security Bill, items 64 to 66 and 73 to 75, sections 83, 84, 90 and 91 of the FATA]*

1.34 A person who takes a notifiable national security action before the day mentioned in section 82 of the FATA may be committing an offence, contravening a civil penalty provision, or both. *[National Security Bill, items 65, 67 to 70 and 76 to 78, sections 85 and 92 of the FATA]*

1.35 A notifiable national security action is an action that is by its nature so likely to give rise to a national security concern that regardless of its size or value it requires review by the Treasurer. .

1.36 If the notifiable national security action is not otherwise required to be screened (for example an action that is not a significant action), then it will be assessed by the Treasurer on national security grounds and not national interest grounds. If the action is both a notifiable national security action and a significant action then it will be reviewed by the Treasurer on national interest grounds. It is not intended that the national security reforms limit the scope of the national interest test.

1.37 The concept of national security land is included in the FATA in paragraph (b) of the definition of notifiable national security action. The definition of national security business will be prescribed in the FATR.

1.38 Whether Australian land is national security land for the purposes of the definition of a notifiable national security action, is determined by whether the land falls into any of three categories at the time the action occurs or will occur. That is, the time the interest is or will be acquired by the foreign person. If the land is in at least one of the categories, it is 'national security land' and must be notified to the Treasurer.

1.39 The three categories are:

- 'Defence premises' within the meaning of section 71A of the *Defence Act 1903*, excluding subparagraph (a)(iii) of the definition of that expression. This category includes all land owned or occupied by defence, including land, buildings, structures, and prohibited areas. Subparagraph (a)(iii) is excluded from the definition because it refers to vehicles, vessels or aircraft that may be occupied by defence personnel and if it were included, it would be including vehicles from commercial rental providers or commercial transport

providers. Such vehicles are not intended to be covered by the definition of national security land. [*National Security Bill, item 7, section 4 of the FATA*]

- Land in which an agency in the national intelligence community has an interest. This category is limited by the requirement that the foreign person acquiring the interest could reasonably be expected to be aware of the agency's interest. The limitation avoids applying the FATA to land in which an agency has an interest but the disclosure of the interest would itself be contrary to national security, or to land in which an agency's interest would not be readily known to a reasonably diligent person contemplating the acquisition of an interest in the land. [*National Security Bill, item 7, section 4 of the FATA*]
- Land declared by the Treasurer, by legislative instrument, to be national security land. This category allows the Treasurer to include land that is not included in the first two categories if national security risks particular to the specific land, type of land, or category of land arise. [*National Security Bill, item 7, section 4 of the FATA*]

1.40 The definition of 'national security business' operates to require endeavours that are sufficiently likely to give rise to national security concerns to be notified to the Treasurer for review. The taking of a direct interest in, or starting, a national security business is a notifiable national security action.

1.41 For the definition of national security business, 'national security' adopts the meaning of that term in the *National Security Information (Criminal and Civil Proceedings) Act 2004* but includes relations with foreign persons (in addition to foreign governments) in the meaning of international relations. This meaning encompasses the protective concepts in the meaning of security in the *Australian Security Intelligence Organisation Act 1979* and includes similar matters relating to defence, international relations and law enforcement. This approach is necessary and appropriate to address the breadth of potential risks that may be connected with the wide variety of actions by foreign persons that are subject to the FATA. [*Definition of "national security", section 5 of the FATR*]

1.42 National security businesses are endeavours that if disrupted or carried out in a particular way may create national security risks. This means that national security risks may arise if national security businesses are controlled or influenced by persons acting not in Australia's interests. For this reason it is important to enable the Treasurer to be able to review investments in such businesses by foreign investors.

1.43 Generally, national security businesses are involved in or connected with critical infrastructure, defence, or the national intelligence community or their supply chains. Because of the broad range of factors that can contribute to national security concerns and the wide range of potentially significant enterprises, the definition includes activities that are not usually considered to be businesses. An endeavour may be a national security business as long as it is carried on wholly or partly in Australia, regardless of whether it is carried on in anticipation of profit or gain and regardless of whether it is carried on by the Commonwealth, a State, a Territory, a local governing body, or an entity wholly owned by them. *[Definition of national security business, subsections 10A(1) and (3) of the FATR]*

1.44 The definition specifies categories of businesses that are national security businesses.

1.45 The first three categories incorporate concepts of businesses that are direct interest holders in assets or responsible entities for assets under the *Security of Critical Infrastructure Act 2018* or subject to the *Telecommunications Act 1997*. The FATA adopts the considerations of which businesses are important for national security under those Acts. *[Definition of national security business, paragraphs 10A(2)(a) and (b) of the FATR]*

1.46 If additional businesses come into the scope of those Acts, those added businesses will become included in the corresponding FATA categories. If businesses are removed from the scope of those Acts, they will be excluded from these categories of the definition, and if they are not within any other category in the definition of national security business, from the scope of the definition. Importantly, the word 'entity' in paragraph 10A(2)(b), has the broader meaning of the *Security of Critical Infrastructure Act 2018*, rather than the narrower FATA meaning of a corporation or unit trust.

1.47 The next four categories of national security businesses include businesses that develop, manufacture, or supply, critical goods or technology for (or intended for) a military end-use by defence and intelligence personnel or the defence force of another country in activities that relate to or may affect Australia's national security. These categories are intended to include the critical industries and supply chains for all defence and national intelligence goods, technology, and services but not to include ordinary goods and services that are not particular to defence or the national intelligence community (because such ordinary goods will not be critical). *[Definition of national security business, paragraphs 10A(2)(c),(d),(e) and (f) of the FATR]*

1.48 The next category applies to businesses that provide or intend to provide, services to defence and intelligence personnel or the defence force of another country. It incorporates substantially the same considerations as the goods and technology categories, adapted to services that are provided instead of goods and technology being supplied. This

category includes the wide variety of services that may be relevant to national security (such as maintenance or operation of goods that are relevant to national security, services for personnel, and other support services). *[Definition of national security business, paragraph 10A(2)(g) of the FATR]*

1.49 In the context of these categories, references to ‘develops’, ‘manufactures’, or ‘supplies’ are intended to cover the entire lifecycle of a product from initial idea generation and design, through testing and development, to production and supply to the final user. Follow-up repairs and services are also included, particularly where those services are carried out regularly and the persons carrying out those services have developed a familiarity with the goods and their experience and knowledge have national security value themselves.

1.50 The critical limitation in the categories includes both goods, technology and services that are vital to advancing or enhancing Australia’s national security and goods, technology and services that may be detrimental to Australia’s national security if not available or if misused. This includes goods, technologies and services to which the ongoing access is essential to the core capabilities of Defence and agencies in the national intelligence community – as well as sensitive goods, technologies and services of which the Australian government seeks to influence the supply as a matter of national security.

1.51 When determining whether a good, technology or service is critical or about Australia’s national security, it is relevant to consider whether the good, technology or service has been identified as an investment priority for Defence, or has otherwise been identified as sensitive. For example, this may include goods, technologies or services identified in publicly available Defence documents, such as the Defence Industry Policy Statement, Defence Industrial Capability Plan, and the Defence and Strategic Goods List.

1.52 The requirement that the goods are ‘intended to be for a military end-use’ by defence and intelligence personnel or the defence force of another country restricts the categories to goods that are military or related to national intelligence in nature and excludes those that are not actually used in this manner in practice. Some goods that are not considered military in nature, but are used by defence and intelligence personnel may nevertheless be critical to Australia’s national security and would still be included in these categories through the ‘are for a military end-use’ criterion for goods that are supplied.

1.53 The term ‘defence and intelligence personnel’ is defined by reference to the categories of persons who may be involved in activities that are particularly important for Australia’s national security and includes contractors and service providers to defence and agencies in the national intelligence community. The goods, technologies or services they

use in the performance of their roles are also likely to be important for Australia's national security. For this reason, these categories in the definition refer to these personnel. If the products of a business are not used or intended to be used by these personnel, it is likely that in many cases the activities critical to national security could continue and the additional scrutiny of actions involving the businesses is not necessary. *[Definition of 'defence and intelligence personnel' in section 5 of the FATR]*

1.54 The requirement that goods or technology be related to protecting Australia's national security is broad and includes both inputs without which Australian activities may be interrupted with adverse consequences for national security and goods, services or technology that, while not essential for Australia's activities, could cause harm to Australia's national security if accessed by others.

1.55 Since a service provided by a business may not have a further use or end-use by a defence and intelligence personnel (or the defence force of another country) after it is provided, critical services are not limited to being for a 'military use' or 'military end-use' in the same way that goods and technologies are limited.

1.56 Recognising that Australian businesses may interact with the defence forces of other countries in ways that may affect Australia's national security, the considerations which require scrutiny of actions that involve suppliers to the Australian defence and intelligence community also apply to actions involving businesses that support those defence forces. Such businesses are treated analogously to those that supply Australian defence and intelligence personnel.

1.57 The definition of 'defence and intelligence personnel' includes contractors to defence and the agencies in the national intelligence community because in many situations contractors may be performing roles that are as important to Australia's national security as those that are performed by members of the Defence Force or employees of the national intelligence agencies.

1.58 Businesses that store or have access to security classified information are also included as a category of national security businesses. Actions involving these businesses that may give foreign persons influence or control over the activities of the business could be a means of seeking access to the classified information. *[Definition of national security business, paragraph 10A(2)(h) of the FATR]*

1.59 The plain and ordinary meaning of security classified information is used. It not only includes information that has been classified as Protected or higher within the Australian Government Protective Security Policy Framework, but also includes information with equivalent classifications from other countries.

1.60 The next three categories include businesses that collect, store, maintain or have access to personal information of defence and intelligence personnel, which if accessed or disclosed could compromise Australia's national security. This category is intended to include information that may not necessarily be classified information, but that could pose a national security risk if, for example, it could be used to influence the personnel or to derive an advantage from knowing aggregate statistics about the defence force or the intelligence community. This does not have to be a complete or current data set because historical or incomplete information, depending on its nature, may still have national security significance. *[Definition of national security business, paragraphs 10A(2)(i),(j) and (k) of the FATR]*

1.61 Furthermore, these categories require the personal information to have been collected by or on behalf of defence or the national intelligence community. This ensures that commercial datasets collected by private entities that contain personal information of defence and intelligence personnel but that are unconnected to their roles relevant to national security are not included. For example, the dataset associated with a supermarket rewards program that may be used by many defence personnel is not captured in this definition.

Application and transitional provisions

1.62 The requirement to notify of a notifiable national security action applies to actions taken on or after 1 January 2021. Actions that are notified before this date because the action met the definition of significant action, but a decision was not made, will be considered under the FATA against the national interest test.

1.63 The application and transitional provisions are intended to ensure that the national security reform provisions do not apply in a way that would disrupt actions that have already occurred or agreements that have been entered into.

Call-in power

Detailed explanation of new law

1.64 The Treasurer has a new power to review actions that have been taken or that are proposed to be taken if the Treasurer considers that the action may pose a national security risk. *[National Security Bill, item 10, section 37C of the FATA]*

1.65 The actions are a new type of action prescribed in the FATA as 'reviewable national security actions' and significant actions that were not notified.

1.66 Reviewable national security actions are actions to acquire a direct interest in an entity or an Australian business, or to start an Australian business. *[National Security Bill, item 10, subparagraphs 37B(1)(a)(i) and 37B(1)(a)(vii) of the FATA]*

1.67 In addition, reviewable national security actions are actions that would otherwise not be captured by the FATA as significant actions because certain conditions in that definition are not met, such as the monetary threshold or level of interest. The actions are to:

- acquire an interest in Australian land;
- issue securities in an entity;
- enter or terminate a significant agreement with an Australian business;
- enter an agreement relating to the affairs of an entity; and
- alter a constituent document of an entity.

1.68 Reviewable national security actions are those actions expected to give foreign persons potential influence and rights, such as the ability to influence or participate in the central management or policy of an entity or business, or the right to occupy Australian land.

1.69 Acquisitions of interests in entities and businesses that do not amount to a direct interest – for example, interests of less than 10 per cent in an entity where the foreign person is afforded no influence or participation in the policy of the entity – are not reviewable national security actions. The Treasurer's call-in powers will not be available for these acquisitions, since they present materially lower (or negligible) national security risks.

1.70 If the Treasurer considers that an action might pose a national security concern, the Treasurer can seek information from the person or any other person the Treasurer thinks has relevant information about the action under the existing information gathering powers in the FATA.

1.71 If the Treasurer asks for information, the person will need to provide this information within the period specified by the Treasurer, which may be less than 14 days. This is less than the timeframe allowed in the FATA in other circumstances where the Treasurer asks for information but reflects the need to consider any possible national security concerns promptly. *[National Security Bill, item 89 to 91, section 133 of the FATA]*

1.72 From a practical perspective, a review by the Treasurer under the call-in power will operate similarly to the person notifying an action

under the FATA, such as, a notifiable action. The information required will most likely be similar to the information required as part of a notification, so that the Treasurer has a comprehensive view of the action and foreign persons who are taking, or who have taken the action.

1.73 If the Treasurer reviews an action using the call-in power the Treasurer must give a written notice to the person who proposes to take the action or who has taken the action, of the review. Once the Treasurer has issued the notice, the Treasurer has 30 days to issue a no objection notification (including with conditions) or issue an order requiring the disposal of the investment or prohibiting the investment, depending on whether the action has been taken or not.

1.74 This 30 day timeframe leverages the existing ‘decision period’ in the FATA. This means that the timeframe may be extended at the request of the foreign person. Consistent with other changes being made in this package the decision period can also be extended at the Treasurer’s discretion to no longer than 90 days.

1.75 Once the Treasurer gives the person a notice that the Treasurer has reviewed an action, and that action has not been taken yet, the person must not take the action before the earliest of 10 days after the end of the decision period, before the end of the period mentioned in an interim order or the day a no objection notification is given. These timeframes are set out in section 82 of the FATA.

1.76 A person may commit an offence, contravene a civil penalty provision, or both, if the person takes an action while prohibited from doing so following the exercise of the call-in power. [*National Security Bill, items 65, 67 to 70 and 76 to 78, sections 85 and 92 of the FATA*]

1.77 If the Treasurer does not make an order or issue a no objection notification before the end of the decision period, the Treasurer’s powers are extinguished, with the exception of the last resort power.

1.78 Similar to the existing FATA framework, the Treasurer is able to issue a no objection notification with or without conditions. The Treasurer will consider whether conditions are needed to ensure the action is not contrary to national security. The Treasurer is also able to vary or revoke an existing condition or impose a new condition with the person’s consent and if it is not contrary to national security. [*National Security Bill, items 44 to 52, sections 74 and 75 of the FATA*]

1.79 The possible orders the Treasurer could make are listed in the following table [*National Security Bill, items 16 to 31, sections 67 and 69 of the FATA*]:

<i>Where the action has not been taken</i>	
<i>If the action is to...</i>	<i>The Treasurer may make an order prohibiting...</i>
Acquire a direct interest in an entity or Australian business	the whole or part of the proposed acquisition.
Start an Australian business	the starting of the whole or part of the Australian business.
<i>Where an action has been taken</i>	
<i>If the action was to...</i>	<i>The Treasurer may make an order directing...</i>
Acquire a direct interest in an entity or Australian business	the person who acquired the interest to dispose of the interest within a specified period to one or more persons who are not associates of the person.
Start an Australian business	specified persons to do within a specified period, or refrain from doing, specified acts or acts of a specified kind.

1.80 The orders are made as notifiable instruments and published on the Federal Register of Legislation. [*National Security Bill, items 18, 27 and 36, sections 67, 69 and 72 of the FATA*]

1.81 The Treasurer is unable to review an action under the ‘call-in’ power if the person notified the Treasurer of the action or the Treasurer has issued a no objection notification about the action or an exemption certificate. The Treasurer is also unable to review an action if an order, being a disposal order, interim order or prohibition order, has been made about the action. [*Schedule National Security Bill, item 10, subsection 37C(4) of the FATA*]

1.82 In this way, if a person wants certainty that an action being taken, or that has been taken cannot later be reviewed by the Treasurer, with the exception of the last resort power, the person may voluntarily notify the Treasurer of the action. This is also similar to the existing FATA framework where a person may voluntarily notify of a significant but not notifiable action and extinguish the Treasurer’s powers.

1.83 A regulation making power is also included to limit the time period in which the Treasurer may start a review with reference to when the action was taken. [*National Security Bill, items 71 and 79, subsection 85A and 92A of the FATA*]

Application and transitional provisions

1.84 The call-in power can only be used by the Treasurer on actions that are taken or proposed to be taken on or after 1 January 2021.

1.85 The application and transitional provisions are intended to ensure that the national security reform provisions do not apply in a way that would disrupt actions that have already occurred.

Last Resort Power

Detailed explanation of new law

1.86 The Bill introduces a new division that gives the Treasurer powers to impose conditions, vary existing conditions, or, as a last resort, force the divestment of any realised investment which was subject to the FATA where national security concerns are identified.

1.87 The Treasurer must conduct a national security review of an action before using the last resort power. The foreign person is able to seek merits review of the outcome of the review.

Review of Actions

1.88 The Treasurer is required to review an action before the last resort power may be available. [*National Security Bill, item 39, paragraph 73C(a) of the FATA*]

1.89 The Bill limits the circumstances in which the Treasurer may exercise the last resort power by specifying that the Treasurer may only review actions if the Treasurer is satisfied that particular conditions are met. [*National Security Bill, item 39, subsection 73A(1) of the FATA*]

1.90 The first condition is that the Treasurer has given a no objection notification, a notice imposing conditions under an earlier exercise of the last resort power, or an exemption certificate about the action (or is deemed to have given one because a response to a notice of an action or an application for an exemption certificate was not provided within the decision period). [*National Security Bill, item 39, paragraph 73A(1)(a) of the FATA*]

1.91 The second condition is that at least one of three factors that could lead to a change in the national security considerations of an action needs to be present. The three factors are:

- a statement or omission misleading in a material particular was made orally or in the notification of the action or application for the exemption certificate;

- the business, structure or organisation of the person has, or the person's activities have, materially changed;
- the circumstances or the market relevant to the action have materially changed. *[National Security Bill, item 39, paragraph 73A(1)(b) of the FATA]*

1.92 These factors ensure that the last resort power is restricted to situations where a new national security concern has arisen. The last resort power cannot be used to revisit concerns that could have been addressed at the initial notification or application stage unless additional information becomes available or circumstances change (either of the person or market where the action occurs, or more broadly in a way that materially affects national security considerations generally). *[National Security Bill, item 39, paragraph 73A(1)(b) of the FATA]*

1.93 If the conditions described in paragraphs 1.92 and 1.93 above are met, the Treasurer may review the relevant action. *[National Security Bill, item 36, subsection 73A(1) of the FATA]*

1.94 In reviewing the action, the Treasurer must consider whether a national security risk exists about the action. In doing so, the Treasurer must have regard to advice provided by agencies in the national intelligence community. *[National Security Bill, item 39, subsection 73A(2) of the FATA]*

1.95 To ensure that the person is aware of the review and is able to provide information to the Treasurer if they choose to, the Treasurer must notify the person of the review in writing unless doing so would prejudice Australia's national security interests. *[National Security Bill, item 39, paragraph 73A(3)(a) of the FATA]*

1.96 If the Treasurer gives a person a notice of a review being conducted under Subdivision A of Division 3 of Part 3, and the person has not yet taken the action, then the person must not take the action until the review is completed and the Treasurer gives effect to the outcome of the review (by giving a no objection notification or an order). *[National Security Bill, item 39, subsection 73A(3) of the FATA]*

1.97 A person who takes an action while prevented from doing so because a review is being conducted, may be committing an offence, contravening a civil penalty provision, or both. *[National Security Bill, items 71 and 79, subsections 85A and 92A of the FATA]*

1.98 If the Treasurer gives a person a notice of a review being conducted under Subdivision A of Division 3 of Part 3, and the person has taken the action, then the Treasurer may include in the notice a direction to the person about the action or a related activity that the Treasurer considers necessary to address the national security risk. *[National Security Bill, item 39, subparagraph 73A(3)(c)(i) of the FATA]*

1.99 The Treasurer may give further orders in writing for the same purpose until the review is completed. [*National Security Bill, item 39, subparagraph 73A(3)(c)(ii) of the FATA*]

1.100 The effect of these powers is that during the review the Treasurer may pause a particular action or activities following an action. However, the Treasurer is not able to require the divestment or disposal of interests until a review is completed and the full process for giving orders under the last resort power is followed. [*National Security Bill, item 39, subsection 73A(4) of the FATA*]

1.101 If, after reviewing an action, the Treasurer considers that a national security risk exists, the Treasurer must give the person notice of this and of the reasons for considering this. [*National Security Bill, item 39, subsection 73B(1) of the FATA*]

1.102 This notice may be redacted in part or in full on grounds of national security. [*National Security Bill, item 39, subsections 73B(2) and (3) of the FATA*]

Merits Review

1.103 A person may apply to the Administrative Appeals Tribunal for review of the Treasurer's decision that a national security risk exists. [*National Security Bill, item 39, subsection 73P(1) of the FATA*]

1.104 The application must be considered by the Security Division of the Administrative Appeals Tribunal. [*National Security Bill, item 100, paragraph 17B(2)(c) of the Administrative Appeals Tribunal Act 1975*]

1.105 Future regulations may modify the processes in place for the operation of the Security Division of the Tribunal for the purposes of the decisions made under the FATA. [*National Security Bill, item 101, paragraph 69D(a) of the Administrative Appeals Tribunal Act 1975*]

1.106 The *Administrative Appeals Tribunal Act 1975* and the processes in place for the operation of the Security Division are already tailored to decisions made on national security grounds, and to dealing with matters of a sensitive national security nature.

1.107 It is expected that some variations to the operation of the existing review process of the Security Division in the *Administrative Appeals Tribunal Act 1975* for the purposes of the FATA will be necessary in the future to provide, for example, that it is the Treasurer who is able to prevent information relating to matters of national security from being shared with an applicant. Currently, it is the Minister responsible for the *Australian Security Intelligence Organisation Act 1979*. [*National Security Bill, item 101, paragraph 69D(b) of the Administrative Appeals Tribunal Act 1975*]

Last Resort Power: Orders, Notices and Variations

1.108 No objection notifications and exemption certificates given after 1 January 2021 will inform persons that the last resort power will be available for actions covered by the notice or the exemption certificate (unless the actions were notified prior to 1 January 2021).

[National Security Bill, item 50, subparagraph 76(1)(b)(ii) of the FATA]

1.109 The last resort power may be exercised in different ways, appropriate to the nature of the action that poses the national security risk and which takes into account whether the action has been taken and whether the Treasurer has given any notices relating to the action prior to the review. The different ways are based on the the same principle that the Treasurer should be able to prevent or, in extraordinary circumstances undo, an action that poses an unforeseen and unacceptable national security risk that cannot be adequately reduced in other ways.

1.110 The possible ways are:

- making an order prohibiting a proposed action; *[National Security Bill, item 39, section 73D of the FATA]*
- making an interim order; *[National Security Bill, item 39, section 73E of the FATA]*
- making a disposal order; *[National Security Bill, item 39, section 73F of the FATA]*
- varying a no objection notification to revoke, vary or impose a new condition; *[National Security Bill, item 39, section 73L of the FATA]*
- giving a notice imposing conditions; and *[National Security Bill, item 39, section 73M of the FATA]*
- varying a notice imposing conditions. *[National Security Bill, item 39, section 73N of the FATA]*

1.111 Before using the last resort power, the Treasurer must be satisfied that:

- a review has been conducted and found that a national security risk exists about the action; and *[National Security Bill, item 39, paragraphs 73C(a) and 73K(a) of the FATA]*
- the exercise of the last resort power is reasonably necessary to reduce or eliminate the national security risk. *[National Security Bill, item 39, paragraphs 73C(c) and 73K(c) of the FATA]*

1.112 The Treasurer's power is a last resort power because before giving an order, the Treasurer is also required to:

- take reasonable steps to negotiate in good faith to eliminate or reduce the national security risk to avoid giving the order;

and *[National Security Bill, item 39, paragraphs 73C(b) and 73K(b) of the FATA]*

- be satisfied that the use of all other regulatory systems of the Commonwealth, States and Territories would not adequately eliminate or reduce the national security risk. *[National Security Bill, item 36, paragraphs 73C(d) and 73K(d) of the FATA]*

1.113 Once the requirements described in paragraphs 1.113 and 1.114 above are satisfied, the Treasurer is able to use the last resort power in a manner appropriate for the status and circumstances of the action or proposed action. The Treasurer may give orders and impose, revoke or vary conditions.

Orders

1.114 If the Treasurer is satisfied that a proposed action would be contrary to national security, the Treasurer may, by notifiable instrument, make an order which would prohibit all or part of the proposed action. *[National Security Bill, item 39, subsection 73D(1) of the FATA]*

1.115 The details of possible orders prohibiting proposed actions are set out in the table in subsection 73D(2) of the FATA. Additional orders that can be made about some types of actions if an order prohibiting the action is made are set out in the table in subsection 73D(3) of the FATA.

1.116 For the purpose of considering whether to make an order prohibiting a proposed action, the Treasurer may, by notifiable instrument, make an interim order. An interim order may be on the same terms as an order prohibiting a proposed action (including any additional orders) but is limited to 90 days' duration. *[National Security Bill, item 39, section 73E of the FATA]*

1.117 If the Treasurer is satisfied that the result of an action that was taken is contrary to national security, the Treasurer may, by notifiable instrument, make an order which would require the person to dispose of interests acquired by taking the action or to act (or not to act) in a particular way. *[National Security Bill, item 39, subsection 73F(1) of the FATA]*

1.118 The details of possible disposal orders corresponding to types of actions that have been taken are set out in the table in subsection 73F(2) of the FATA. Subsection 73F(3) of the FATA clarifies when an acquisition of Australian land occurs in a trust context and when the disposal of interests occurs in a discretionary trust context for the purposes of item 7 of the table in subsection 73F(2) of the FATA.

1.119 If the Treasurer makes a disposal order, or a related order that has effect for a specified period, the Treasurer may extend the order before it ends. *[National Security Bill, item 39, subsection 73F(5) of the FATA]*

1.120 The Treasurer may vary or revoke an order made using the last resort power at any time if the Treasurer is satisfied that the variation or revocation is not contrary to national security. [*National Security Bill, item 39, subsection 73G(1) of the FATA*]

1.121 The process and requirements for making an order under the last resort power do not apply to variations or revocations of the order because the order making power is excluded from the application of subsection 33(3) of the *Acts Interpretation Act 1901*. [*National Security Bill, item 39, subsection 73G(2) of the FATA*]

1.122 Orders prohibiting actions, additional orders, interim orders and disposal orders must be registered on the Federal Register of Legislation within 10 days after being made. [*National Security Bill, item 39, subsection 73H(1) of the FATA*]

1.123 Orders prohibiting actions and interim orders commence on the day they are registered. [*National Security Bill, item 39, paragraph 73H(2)(b) of the FATA*]

1.124 Disposal orders and additional orders commence on the day specified in the order (but not earlier than 30 days after they are registered). [*National Security Bill, item 39, paragraph 73H(2)(a) of the FATA*]

1.125 If an action could be subject to more than one kind of order because it is an action of more than one kind, the Treasurer may make any of the orders about the action. [*National Security Bill, item 39, section 73J of the FATA*]

Notices and variations

1.126 If the last resort power is available to the Treasurer it may be used to revoke, vary or impose new conditions in a no objection notification that was given to a person about an action. [*National Security Bill, item 39, section 73L of the FATA*]

1.127 The last resort power (when available) may also be used to impose conditions by notice on actions that do not have an existing no objection notification that can be amended. Such notices may themselves be varied. [*National Security Bill, item 39, sections 73M and 73N of the FATA*]

Consideration in the exercise of power

1.128 In exercising the last resort power and conducting the reviews necessary to exercise it, the Treasurer may have regard to any matter. The Treasurer is also not required to have regard to any particular matter, except considering the advice of agencies in the national intelligence community when conducting a review to determine whether a national security risk exists. [*National Security Bill, item 39, section 73R of the FATA*]

Consequential amendments

1.129 The *Administrative Appeals Tribunal Act 1975* is amended to enable the Security Division of the Administrative Appeals Tribunal to exercise the Tribunal's powers for applications for merits review of the Treasurer's decision that a national security risk exists about an action. [National Security Bill, items 100 and 101, sections 17B and 69D of the FATA]

Application and transitional provisions

1.130 The Treasurer's last resort power is only available for actions that were notified to the Treasurer (or taken, if they were not notified) on or after 1 January 2020.

Offences and Penalties under the national security test and last resort power

1.131 A person who does not comply with the national security provisions may be committing an offence, contravening a civil penalty provision, or both.

1.132 The criminal penalty for an offence under the national security provisions is consistent with other penalties introduced in the broader reforms. The penalty is imprisonment for 10 years, or 15,000 penalty units, or both. The corporate multiplier for these offences is a factor of 10.

1.133 The penalty for a contravention of a civil penalty provision under the national security provisions is also consistent with other penalties introduced in the broader reforms. The penalty amount is the lesser of either:

- 2,500,000 penalty units; or
- the greater of:
- 5,000 penalty units (or 50,000 penalty units if the person is a corporation); and
 - the amount worked out under section 98P for the action.

1.134 Further amendments to section 98P are required to include the types of actions included in the definitions of reviewable national security

action and notifiable national security action and a method for calculating the amount. It is likely to be either (as applicable):

- 75 per cent of the greater of:
 - the value of the consideration for the relevant action; and
 - the market value of the relevant interest; or
- 75 per cent of the market value of the benefit obtained by the action.