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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE

Explanatory  
Memorandum

OF SELECTED  
BILLS  
PRESENTED  
TO  
THE  
HOUSE  
OF  
REPRESENTATIVES

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

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EXPLANATORY MEMORANDUM

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



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# ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACCC	Australian Competition and Consumer Commission
FATA	<i>Foreign Acquisitions and Takeovers Act 1975</i>
FATA Fees Act	<i>Foreign Acquisitions and Takeovers Fees Imposition Act 2015</i>
FATR	<i>Foreign Acquisitions and Takeovers Regulation 2015</i>
FIRB	Foreign Investment Review Board
Imposition Bill	Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill
TAA	<i>Taxation Administration Act 1953</i>



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## ***Overview and context for foreign investment reforms***

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Foreign investment is important for Australia's long term economic success, stability and prosperity. It creates jobs, improves productivity, enables the transfer of new technologies and connects Australian businesses to global supply chains. Foreign investment supports:

- employment (one in ten jobs are created by foreign businesses);
- the national economy (businesses supported by foreign investment contribute more than a quarter of Industry Value Added); and
- higher wages (foreign businesses pay wages that are on average \$20,000 a year higher).

Australia remains one of the world's most attractive investment destinations, with an overabundance of high-quality investment opportunities that cannot be realised from domestic savings alone. As a net capital importing country, Australia's stable democracy; strong rule of law; highly-skilled and highly-educated workforce; proximity to dynamic and fast-growing markets; abundant natural resources and world-class industry capabilities; and strong and well managed economy, mean choosing to invest in Australia benefits both investors and Australians.

Australia's foreign direct investment (FDI) inflows reflect our status as a leading investment destination, which in the three years to 2019 averaged 3.3 per cent of GDP — compared with 1.7 per cent of GDP for the OECD and 1.5 per cent of GDP for the G20 economies.<sup>1</sup>

Recognising the benefits of economic openness, Australia has maintained an open and transparent foreign investment review framework for over 40 years. It is established clearly in legislation, providing transparency and certainty on our rules. Australia's case-by-case assessment of investment applications ensure proposals are not contrary to the national interest, and maintains public confidence in the integrity of the framework.

However, risks to Australia's national interest, particularly national security, have increased as a result of a confluence of developments — including rapid technological change and changes in the international security environment. The challenge remains balancing the settings to attract foreign capital that supports the economy, while protecting the national interest.

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<sup>1</sup> OECD (2020), FDI flows.

## **Foreign Investment Reforms**

On 5 June 2020 the Government announced its intention to strengthen the foreign investment framework. These changes ensure the framework keeps pace with emerging risks and global developments.

The reforms build on the amendments the Government made to the foreign investment screening regime in 2015. Those reforms modernised the FATA by: bringing all foreign investment into the legislative framework; strengthening the Treasurer's oversight and enforcement of the residential real estate sector; providing greater scrutiny and transparency around agricultural investments; and introducing fees so that the cost of administering the foreign investment regime is borne by foreign investors and not Australian taxpayers.

Under the reforms, individual investments will continue to be reviewed on a case-by-case basis to ensure they are not contrary to the national interest. This is critical to protecting Australia's national interest and national security, and maintaining the Australian public's confidence in the foreign investment regime.

These reforms preserve the core principle underpinning Australia's foreign investment system: Australia welcomes foreign investment for the significant economic benefits it provides.

The reforms strike a balance between the benefits foreign investment into Australia brings and emerging national security concerns.

These comprehensive reforms improve and update the operation of the law across national security, compliance monitoring and enforcement, and integrity as well as streamlining requirements and making technical changes to improve the operation of the law. They strike the right balance between facilitating and attracting foreign investment while protecting the national interest.

### ***National Security Review and Last Resort Power***

Rising national security concerns have led many countries to review both their frameworks for screening inward investment and the way in which these frameworks are applied.

The reforms establish 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);
- requires mandatory notification of any proposed investment in sensitive 'national security land';



- allows a significant action that has not been notified and certain actions not already captured under the FATA to be ‘called in’ for screening on national security grounds;
- allows investors to voluntarily notify to receive investor certainty from ‘call in’ for a particular investment; and
- in exceptional circumstances, allows the Treasurer 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.

### ***Improving Compliance and additional enforcement tools***

The reforms ensure that the Treasurer and Commissioner of Taxation have monitoring and investigative powers, in line with those of other regulators, including access to premises with consent or as permitted by warrant to gather information. This measure will improve the regulators’ capabilities to monitor investor compliance and investigate potential non-compliance.

The Treasurer also has new powers to give directions to investors to prevent or address suspected breaches of conditions or of foreign investment laws. This gives the Treasurer flexibility to respond to actual or likely non-compliance.

Increased civil and criminal penalties under the FATA will ensure these penalties act as an effective deterrent. The increase to civil penalty amounts and enabling penalties to be calculated as a proportion of the benefit gained by wrongdoing or the value of the investment links the penalty imposed more directly with misconduct and provides a significant financial incentive for compliance.

The foreign investment infringement notices regime is extended to cover all types of breaches relating to foreign investments and enable proportionate, and appropriate enforcement action in response to investor non-compliance. A third tier of infringement notices applies to high value acquisitions. These changes enable the Treasurer and Commissioner of Taxation to respond to a broader range of compliance issues.

The Treasurer and Commissioner of Taxation are empowered to remedy situations where foreign persons are given a no objection notification or an exemption certificate based on a foreign investment application that makes an incorrect statement, or omits an important piece of information. This will ensure that there is appropriate recourse available, should the Treasurer or Commissioner of Taxation makes a decision based on false or misleading information.

Enforceable undertakings are able to be accepted by the Treasurer or Commissioner of Taxation to manage compliance with the FATA.

To improve visibility of actual foreign investments, foreign persons who have been issued a no objection notification for a proposed action or an exemption certificate are required to notify the Treasurer of certain events.

***Register of foreign owned Australian assets***

The new Register of Foreign Ownership of Australian Assets will record all foreign interests acquired in Australian land; water entitlements and contractual water rights; and business acquisitions that require foreign investment approval, including acquisitions reviewed under the new national security test.

***Integrity and other amendments***

The reforms clarify the operation of the change in control test for certain types of significant actions. Increases to approved holdings may also be subject to further approvals, including proportional increases through share buybacks and selective capital reductions. The presumption of advancement has also been removed, where it applies to actions under the FATA.

Where a foreign person acquires a 'national security business' from the Commonwealth or a State, Territory or local government, the reforms ensure that the acquisition is not exempted from the operation of the FATA.

The tracing rules will be expanded to allow interests to be traced through unincorporated limited partnerships.

The Government has improved information sharing provisions to support compliance activities. There are also new information sharing provisions to allow the sharing of protected information with international counterparts where national security considerations are present.

***Technical amendments***

Changes have been made to improve the readability of existing provisions, rectify inconsistencies and address unintended consequences, with a focus on improving clarity for investors.

***A fairer and simpler framework for foreign investment fees***

The fees applicable for foreign investors have been refined to ensure that fees are fairer and simpler, while ensuring that foreign investors, not Australian taxpayers, bear the costs of administering the foreign investment system.

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# **Chapter 1**

## **National Security**

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### **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>
<b><i>Call-in powers</i></b>	
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.
<b><i>Last Resort Powers</i></b>	
<p>The Treasurer is able to give orders necessary to reduce national security risks if:</p> <ul style="list-style-type: none"> <li>• there has been a material misstatement or omission in information provided to the Treasurer; or</li> <li>• relevant circumstances or the activities of the person have changed; and</li> <li>• a national security risk has arisen; and</li> <li>• all other options, including good faith negotiation and other regulatory powers, have been exhausted.</li> </ul>	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*]:

<b><i>Where the action has not been taken</i></b>	
<b><i>If the action is to...</i></b>	<b><i>The Treasurer may make an order prohibiting...</i></b>
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.
<b><i>Where an action has been taken</i></b>	
<b><i>If the action was to...</i></b>	<b><i>The Treasurer may make an order directing...</i></b>
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.



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## **Chapter 2**

# ***Improving the integrity of the framework and technical amendments***

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### **Outline of chapter**

2.1 This Chapter explains the amendments contained in the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Integrity amendments and Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Technical amendments.

2.2 This Chapter explains amendments to Australia's foreign investment review framework to improve the integrity of the framework, enable greater information sharing aimed at enhancing compliance and addressing national security risks and makes minor and technical amendments to address drafting errors or ensure the legislative framework supports the screening framework as intended.

2.3 The amendments:

- provide that some actions are significant actions without requiring the change in control test to be met where the foreign person already controls the entity or business;
- ensure that increases in actual or proportional shareholdings, including through share buybacks and selective capital reductions, are notifiable actions and/or significant actions;
- bring within the screening framework the acquisition of property where the Australian resident is buying a property for a foreign parent or spouse in an attempt to circumvent the FATA;
- ensure that the sale of State and Territory business functions meets the definition of Australian business;
- expand the tracing provisions to unincorporated limited partnerships;
- give the Treasurer the power to extend or further extend the decision period by up to 90 days; and
- allow for greater information sharing domestically with relevant government agencies and internationally with foreign counterparts.

2.4 Finally, this chapter explains a number of minor amendments which clarify the meaning of 'notifiable actions'; the application of fee waivers; when an agreement is entered into for the purposes of the FATA; and ensure the Treasurer can still make an order prohibiting a proposal where an order is found to be invalid and the decision period has expired.

## **Context of amendments**

### **Integrity of the foreign investment review framework**

2.5 It is important that the foreign investment review framework remains fit for purpose and meets community expectations regarding the acquisitions that fall within the framework. It is also important that foreign investors understand their obligations under the framework.

2.6 The FATA sets out conditions that if met mean an action is significant and/or notifiable. The Treasurer's powers to impose conditions on an acquisition, prohibit a proposed acquisition or order the disposal of interests acquired require an action to meet the definition of 'significant action'.

2.7 To improve the integrity of the framework, there will be a focus on closing gaps in the legislation (including screening gaps), making foreign investor obligations clearer, and ensuring that the foreign investment framework continues to be fit for purpose.

### **Information sharing**

2.8 Protected information obtained under the FATA is able to be disclosed to relevant government officials and employees for the purposes of consulting on a case under the FATA. The information then remains protected information in the hands of the recipient.

2.9 If a particular government agency, would then like to use the protected information for the purposes of administering their own legislation, a disclosure of the same information can be made so long as it complies with a prescribed list. Information disclosed in this way is no longer protected information in the hands of the recipient.

2.10 Authorised disclosure of protected information to foreign overseas government counterparts for the purposes of protecting national security (both for the benefit of Australia and for the benefit of overseas government counterparts) is not permitted.

### **Other technical amendments**

2.11 Prior to these reforms, the most significant reforms to the FATA occurred in 2015. Since those reforms, the administration of the FATA

has identified amendments which would improve the readability of the existing provisions, rectify inconsistencies and unintended consequences and address feedback from investors seeking greater certainty.

## **Summary of new law**

2.12 The Bill amends the circumstances under which an investor satisfies the change in control test; deems a foreign person who does not participate in a share buyback to have acquired an interest in securities in an entity where it results in an increase in their proportional holdings; removes the presumption of advancement; ensures that where a foreign person acquires a national security business from the Commonwealth or a State, Territory or local government, the acquisition is not exempted from the operation of the FATA; and extends the tracing rules to allow interests to be traced through unincorporated limited partnerships.

2.13 The Bill amends Division 3 of Part 7 of the FATA to allow for information sharing with foreign governments, expand the purposes for which information can be shared within the Commonwealth, and allow for the ATO to disclose protected information to specific persons appointed by the Commonwealth for the purposes of the FATA.

2.14 The Bill also makes a number of technical amendments.

## **Comparison of key features of new law and current law**

### **Integrity of the foreign investment review framework**

2.15 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>
The change of control test will not be a factor in determining that an action is a significant action once a foreign person controls an entity or business.	An action to acquire interests in securities in an entity or an interest in the assets of a business is not a significant action unless the change of control test is met.
A foreign person who does not participate in a share buyback will be deemed to have acquired an interest in securities in an entity, where it results in an increase in their proportional holdings, and may be taking a notifiable and/or significant action. They will have to notify the	Where a foreign person's percentage holding in an entity increases as a result of not participating in a share buyback, the foreign person is not considered to be taking an action.

<i>New law</i>	<i>Current law</i>
Treasurer within 30 days of taking the action.	
The presumption of advancement has been removed, so that a foreign person giving money to an Australian relative to purchase land is deemed to have an equitable interest in the land and is taking a significant and notifiable action, unless the person can demonstrate that the money is a gift.	The presumption of advancement applies so that a foreign person giving money to an Australian relative to purchase land is not taken to have an equitable interest in the land. The purchase is not a significant and notifiable action.
The definition of 'Australian business' is expanded to include activities carried on by Government.	The definition of 'Australian business' excludes activities carried on by Government, as these are not generally carried on in anticipation of profit or gain.
The tracing rules of the FATA are expanded to apply to unincorporated limited partnerships.	The tracing rules of the FATA do not apply to unincorporated limited partnerships.
In addition to the ways in which the decision period may be extended, the Treasurer may extend or further extend the decision period by up to 90 days.	Where the Treasurer has been notified of a proposed action the Treasurer has 30 days to make a decision about the action. This timeframe can be extended if the Treasurer makes an interim order or the foreign person requests an extension to the decision period.

## Information sharing

2.16 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>
Protected information may be shared with foreign government and separate government entities where national security risks may exist and where it is not contrary to the national interest. The information can only be shared if there is an agreement in place between the Commonwealth and the other government counterpart.	Disclosure of protected information to foreign overseas government counterparts for the purposes of protecting national security is not permitted.
In addition to the existing prescribed Acts, protected information may be	Protected information may be disclosed under the FATA to a

<i>New law</i>	<i>Current law</i>
disclosed under the FATA for the purposes of administering two additional Acts: <ul style="list-style-type: none"> <li>the <i>Competition and Consumer Act 2010</i>; and</li> <li>the <i>Northern Australia Infrastructure Facility Act 2016</i>.</li> </ul>	Minister or an accountable authority of the Commonwealth for the purposes of the administration of the prescribed list of Acts.
In addition to the existing permitted purposes, protected information may be disclosed under the FATA for the purposes of a Minister discharging the Minister's responsibility for three new matters – water, telecommunications and infrastructure.	Protected information may be disclosed under the FATA to a Minister or an accountable authority of the Commonwealth or departmental secretary responsible for agriculture, industry, investment promotion, taxation policy, foreign investment in Australia, defence and for national security purposes.
The Commissioner of Taxation may disclose protected information directly to persons appointed by the Commonwealth for the purposes of the FATA.	The Commissioner of Taxation is not permitted to disclose protected information to persons appointed by the Commonwealth for the purposes of the FATA.

## Minor and technical amendments

2.17 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>
For the purpose of the FATA, when a foreign person enters into an agreement, the actions covered by the agreement are taken to have occurred unless the agreement is subject to the person obtaining foreign investment approval where required, and approval is still pending.	For the purpose of the FATA, when a person enters into an agreement the actions covered by the agreement are taken to have occurred unless the agreement is subject to conditions, and those conditions have not yet been met.
If a court finds an order or decision made by the Treasurer to be invalid, the Treasurer can make a new order or decision.	If a court finds an order or decision made by the Treasurer to be invalid, the Treasurer cannot make a new order or decision if the decision period has ended.
It is clarified that the Treasurer can also apply to the court for an order	The Treasurer may apply to a court to make an order if a foreign person

where a foreign person has contravened the restrictions on the ownership of established residential dwellings.	has contravened a civil penalty provision under the FATA.
Typographical errors are corrected.	No equivalent

Detailed explanation of new law

Integrity of the foreign investment review framework

*Removing the presumption of advancement to actions under the FATA*

- 2.18 The amendments remove the presumption of advancement where it applies to actions under the FATA.
- 2.19 The presumption of advancement would normally provide that where a foreign person gives money to their wife, child or fiancé to purchase Australian land, the foreign person is presumed to be providing the money as a gift. The equitable interest in the land stays with their relative at the time of the acquisition, rather than reverting back to the foreign parent or spouse. If the foreign person does not have an equitable interest then the purchase of the land is not a significant or notifiable action and the Treasurer’s powers are not enlivened.
- 2.20 The presumption of advancement can be rebutted with evidence that the money was not a gift. However, this usually does not come until many years after the property has been purchased. For example, the proceeds of the property sale were dispersed back to the foreign person who originally provided the funds to purchase the property. It is at this later stage that it becomes clear the property was actually held on trust by the family member. By this time the property has been sold and funds dispersed, leaving little recourse against the foreign person who avoided scrutiny.
- 2.21 There is a risk that the common law presumption of advancement is being used to circumvent the clear limitations that are placed on when a foreign person can purchase an established residential dwelling.
- 2.22 The Bill displaces the presumption of advancement by deeming a foreign person to have acquired an equitable interest in land in the circumstances described above. The amendments allow for this deemed interest to be nullified if the foreign person can demonstrate that the money was provided to their family member as a gift. *[Integrity Bill, item 7, subsections 12(4) and (5) of the FATA]*
- 2.23 The intention is to capture those persons who presently may not have to comply with the foreign investment regime under the FATA due

to the presumption of advancement, but who were in fact not making a gift, and to subject them to the FATA's compliance and notification framework.

2.24 The FATA is designed to allow the Treasurer to scrutinise and approve acquisitions of Australian land by foreign persons. To achieve this, it is necessary to exclude the operation of the presumption of advancement from the FATA at the outset. Foreign persons can still obtain the benefits of the presumption of advancement if they actually disclaim all rights to the purchase monies or any resulting trust that could be argued to arise – effectively gifting the property to their family member.

### **Example 2.1**

Nachos is a Singaporean national who has a daughter called Michelle, an Australian resident. Nachos gives Michelle \$400,000 which Michelle uses to purchase a \$1 million property in Sydney. Nachos is deemed to have an equitable interest in the land from the time Michelle purchases the property. However, Nachos provides a statutory declaration to the ATO confirming the \$400,000 was a gift to his child. This ensures Nachos has no equitable interest in the land.

### ***Change in control test no longer relevant in certain situations***

2.25 Currently, not all increases in shareholdings of an Australian business or entity are significant actions if the acquisition does not result in a change of control. This means that private investors may be able to increase their holdings in a target Australian business or entity over time, and the Treasurer's powers under the FATA are not enlivened.

2.26 The amendments provide that once a foreign person controls an entity or business, the change of control test is not relevant in determining whether an action is a significant action. This is limited only to acquisitions of interests in securities of an entity and issuing of securities in an entity. *[Integrity Bill, items 1 and 2, subsections 40(7) and 41(6) of the FATA]*

### ***Capturing share buybacks and selective capital reductions in the FATA***

2.27 The amendments will clarify when actions relating to share buybacks and capital reductions may be captured under the FATA.

2.28 Specifically, where a foreign person's interest in the securities of an entity increases (including if the number of shares held by the foreign person has not increased but their percentage holding in the entity has increased) – be it as a result of participating or not participating in a share buyback.

2.29 The Bill ensures that actions or inactions in relation to capital reductions will give rise to a notifiable and/or significant action where the

other conditions are met. It does this by deeming the action of 'not participating in a share buyback' to be an 'acquisition of an interest in a security of an entity' if the foreign person's percentage shareholding increases. *[Integrity Bill, item 5, subsections 15A(1) and (2) of the FATA]*

2.30 This will be limited to share buybacks that all investors were eligible to participate in.

2.31 A foreign person undertaking a notifiable action is required to notify the Treasurer and wait for approval before taking that action. This may be impractical for someone taking an action to not participate in a share buyback. As such, the Bill will allow a foreign person in this situation to notify the Treasurer after the action has occurred. This post-event notification will be limited to 30 days.

2.32 Where a foreign person chooses not to participate in a general share buyback, and increases their proportion of shares as a result, the person may be taking a significant and/or notifiable action under the FATA. If the Treasurer makes an order, decision or notification about the action the person will have to comply.

***Extending the tracing rules to apply to unincorporated limited partnerships***

2.33 Currently under the tracing rules in section 19 of the FATA a person is taken to hold interests in securities in companies or trusts which are lower in the corporate structure where certain requirements are met. These tracing rules cannot be applied to limited partnerships which are not incorporated. This means that the Government can impose conditions on the higher entity in a corporate structure where the higher entity holds an interest in the lower entity but conditions cannot be imposed if there is an unincorporated limited partnership sitting between the two entities.

2.34 The FATA is amended so that the tracing rules can be applied to unincorporated limited partnerships in the same manner as the rules apply to corporations and trusts, so that beneficial interests can be traced. This means that limited partners can be deemed to hold a substantial interest in an Australian asset and limited partners who are associates can be deemed to hold an aggregate substantial interest in an Australian asset.  
*[Integrity Bill, items 30 to 32, section 19 (heading), subsections 19(1) and 19(2) of the FATA]*

2.35 The amendment achieves this by providing for the measurement of a partner's interest in an unincorporated limited partnership. The interest is determined on two factors: the partner's voting power and the partner's proportion of the distribution of property should the partnership be dissolved. This means that a limited partner can be deemed to hold an interest in the unincorporated limited partnership. *[Integrity Bill, item 26 to 29, section 11A, section 17 (heading), subsections 17(2A), 17(2B) and 17(3) of the FATA]*



2.36 These amendments will enable the Government to impose conditions on the higher entities in the organisational structure as required to ensure that an acquisition is not contrary to the national interest.

2.37 Consequential amendments are made to extend the voting power rules, the definitions of “interest” and “general meeting” and the application of the FATA provision to apply to unincorporated limited partnerships. *[Integrity Bill, items 12 to 25, and 33 to 43, sections 4, 9, 10 and 11, and sections 22 and 23, and 29 of the FATA]*

**Example 2.2: Tracing through limited partnerships**

State Corporation is a foreign government investor who holds a 25 per cent interest in an unincorporated limited partnership.

The General Partner of the unincorporated limited partnership holds an 80 per cent interest in AusCo, an Australian entity.

Under the amended tracing rules, as State Corporation holds a substantial interest in the unincorporated limited partnership the tracing rules apply. State Corporation is deemed to hold an 80 per cent interest in AusCo and AusCo will be considered to be a foreign government investor.

**Example 2.3: Tracing through limited partnership where there are associate limited partners**

State Blue Corporation, State Red Corporation and State Purple Corporation are foreign government investors who are limited partners in an unincorporated limited partnership. They are associates. State Blue Corporation holds a 19 per cent interest in the partnership, State Red Corporation holds a 19 per cent interest in the partnership and State Purple Corporation holds a 10 per cent interest in the partnership.

The General Partner of the unincorporated limited partnership holds an 80 per cent interest in an Australian entity AusCo.

Under the amended tracing rules, as the associate limited partners hold an aggregate substantial interest in the unincorporated limited partnership the tracing rules apply. Together, the three limited partners are deemed to hold an 80 per cent interest in AusCo.

***Oversight of government asset sales of national security businesses***

2.38 The FATA is amended to provide that the definition of Australian business under section 8 of the FATA includes an activity carried on by the Commonwealth, a State, a Territory, or a local governing body, or by an entity wholly owned by the Commonwealth, a State, a Territory or local governing body. *[Integrity Bill, item 10, section 8 of the FATA]*

2.39 The amendments also provide that an activity carried on by a government can be both a business and an Australian business, if the

activity would, or could, be carried on in anticipation of profit or gain if it were carried on by someone other than an Australian government of the kinds referred to, or a foreign government, or a separate government entity. [*Integrity Bill, item 10, paragraph 8(3)(b) of the FATA*]

2.40 The effect of these amendments is to clarify that the requirement in subsection 8(1) of the FATA, that an Australian business is a business that is carried on in anticipation of profit or gain, does not apply to activities carried on by government. As such, the definition of Australian business or business includes activities carried on by government.

2.41 In conjunction with amendments to the FATR which are being drafted, the amendments to the definition of Australian business in the FATA provide that the privatisation of certain government functions are not exempted from being significant and notifiable actions.

2.42 Subsection 31(1) of the FATR currently provides an exemption for Australian businesses carried on by, or land acquired from, government bodies. The effect of this exemption is that where a foreign person acquires an Australian business that is carried on by government, or acquires an interest in Australian land from government, these acquisitions are exempt from the operation of the FATA. This operation of this exemption will not be affected by the amendments to section 8, other than to clarify that government activities and functions are included in the definition of 'Australian business'.

2.43 Currently, subsection 31(2) of the FATR provides an exception to the rule in section 31(1). This provision provides that the exemption under section 31(1) does not apply to acquisitions of an interest by a foreign government investor, or the acquisition of interests in Australian land if the interest is, or includes, an interest in certain prescribed types of infrastructure. These types of infrastructure are relevant to national security.

2.44 Proposed amendments to the FATR will reduce the scope of actions subject to the exemption in subsection 31(1) of the FATR, by providing that, where a foreign person acquires an interest in an Australian business from government, and that business is a national security business, or acquires an interest in national security land, the acquisition will not be exempt from the operation of the FATA.

2.45 The effect of these amendments to the FATR will be to ensure that assets that are relevant to national security do not avoid scrutiny, including where the acquisition is from the Commonwealth, a State, a Territory or local governing body. These amendments will be consulted on separately at a later stage.

### **Example 2.4**

The government of an Australian Territory seeks to sell the operational aspects of a major port. Blue, a foreign national, seeks to purchase the operational aspects of the port to run as a private business.

The nature of the acquisition relates to a national security business and thus Blue notifies the Treasurer, and seeks a no objection notification in relation to the acquisition.

The Treasurer considers whether Blue's acquisition poses any concerns to national security. The Treasurer identifies several concerns, but considers that they can be mitigated by the imposition of conditions, under section 74 of the FATA.

The Treasurer places several conditions on the no objection notification issued to Blue, and the acquisition proceeds.

#### ***Treasurer's power to extend the statutory decision period***

2.46 The Treasurer is given the power to extend or further extend the decision period under subsection 77(5) of the FATA by up to 90 days. This power is limited so that the total period by which the Treasurer can extend the decision period is 90 days. However, multiple extensions may be made to reach the maximum 90 days. *[Technical Bill, item 16, paragraph 77(5)(c) and section 77A of the FATA]*

2.47 The Treasurer must provide a reason(s) to the applicant for the extension *[Technical Bill, item 16, subsection 77A(4) of the FATA]*

2.48 The extension allows the Treasurer time to determine whether the relevant action being considered is contrary to the national interest, including but not limited to providing sufficient time to consult with a Commonwealth, State or Territory body.

2.49 Generally, sensitive or significant applications which require in-depth analysis and expert input from consultation partners cannot be considered within 30 days. The new power is intended to provide for the efficient processing of sensitive or significant applications by allowing sufficient time for the Treasurer to consider the expert input that informs these applications. For such cases, a longer decision period is required to allow consultation partners sufficient time to provide their input including where they are developing bespoke conditions.

2.50 The rules of natural justice will not apply to decisions by the Treasurer to use this power. This is appropriate as the Government would be in a position to process cases more efficiently and meet urgent commercial deadlines. Affording natural justice by way of seeking the applicant's consent would be akin to the existing mechanism under paragraph 77(5)(b) of the FATA and may create further delays. *[Technical Bill, item 16, subsection 77A(5) of the FATA]*

2.51 While the Treasurer is not required to consult with a person before extending the decision period, the person will still be afforded natural justice at other times in the decision making process, such as if the Treasurer will apply conditions to the no objection notification.

2.52 The amendment applies in relation to notices received by the Treasurer on or after 1 January 2021. [*Integrity Bill, item 17*]

## **Information sharing**

### ***Information sharing with foreign governments***

2.53 The Bill provides that protected information under the FATA may be shared with foreign governments in limited circumstances where national security risks may exist, where it is not contrary to the national interest, subject to agreements in place between the Commonwealth and the foreign counterpart.

2.54 The reforms authorise the disclosure of protected information to foreign governments and separate government entities and provide that:

- a person may disclose protected information in performing the person's functions or duties or exercising the person's powers under the FATA; and
- the person is satisfied that the disclosure of information will assist the foreign government entity to perform a function or duty, or exercise a power of the government entity.

2.55 This ensures that information can only be shared with foreign governments and separate government entities, when it is relevant to the purposes of the FATA or if the information will assist the foreign government. [*Integrity Bill, item 48, subsection 123A(1) of the FATA*]

2.56 Information sharing with foreign governments is subject to three key tests. All three tests need to be satisfied before the information can be shared. These tests provide appropriate safeguard to ensure that information is only shared when necessary and appropriate. The three tests are:

- Information can only be shared if it relates to national security.
- Sharing the information must not be contrary to the national interest.
- An agreement regarding information sharing must be in place between the Commonwealth and the foreign government.

2.57 Information can only be disclosed if a person is satisfied that the information relates to national security and disclosing the information is

not contrary to the national interest. A person must also be satisfied that the information will only be used in accordance with the agreement between the Commonwealth and the foreign government and that the information will not be further disclosed unless in accordance with that agreement. [*Integrity Bill, item 48, paragraphs 123A(1)(b) to (e) of the FATA*]

2.58 As part of these reforms, a new national security test has been included to ensure the Treasurer has the visibility and ability to screen cases related to national security. To facilitate the Treasurer's assessment, where there are relevant national security considerations domestically and internationally the Treasurer needs to be able to share protected information. [*Integrity Bill, item 48, paragraph 123A(1)(b) of the FATA*]

2.59 Information sharing is subject to the existing national interest test. [*Integrity Bill, item 48, paragraph 123A(1)(c) of the FATA*]

2.60 Information sharing with foreign government entities is subject to separate individual agreements between the Commonwealth and the foreign government or separate government entity. These agreements will set out mutually agreed standards for the handling of personal information that provides privacy protection and, where relevant, limitations surrounding public disclosure of commercial in confidence information. The agreements will also specify that the information provided can only be used for the purpose for which it was provided – that is, to assist the foreign government to perform a function or duty, or exercise a power of the government or entity. This will provide certainty for regulators and investors and appropriately protect information, including possibly personal or commercial information. [*Integrity Bill, item 48, subsection 123A(2) of the FATA*]

2.61 For example, an agreement covered by subsection 123A(2) of the FATA could have specific arrangements for disclosure to the foreign entity; what the disclosed information can be used for; the categories of personal information that may be disclosed under the agreement; and that the foreign government or separate government entity must take reasonable steps to destroy or de-identify personal information where the overseas recipient no longer needs the information.

2.62 The Treasurer may impose in writing specific conditions on a foreign government or separate government entity in relation to the handling of disclosed protected information. Any conditions imposed by the Treasurer are not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. The Treasurer may impose specific conditions tailored to the circumstances of a particular disclosure of particular information if necessary. These conditions will not conflict with obligations under the *Privacy Act 1988*. [*Integrity Bill, item 48, subsections 123A(3) and (4) of the FATA*]

2.63 Protected information is defined in the FATA to mean information obtained under and in accordance with the FATA (with certain exceptions). Protected information obtained can also include personal information as defined under the *Privacy Act 1988*. The Australian Privacy Principles apply to the disclosures made under section 123A of the FATA. That section authorises cross-border disclosure of personal information that complies with Australian Privacy Principle 8.2(c), the disclosure is authorised under law. In addition, personal information disclosed under subsection 123A(1) must have been obtained in accordance with the FATA, in the performance of the person's functions or duties or exercising of the person's powers under the FATA.

***Information sharing within the Commonwealth***

2.64 The Bill expands the prescribed list of Acts and adds three new matters for permitted sharing of protected information within the Commonwealth. Protected information may be disclosed to a person for the purposes of administering the prescribed list of laws or for the purposes of a Minister discharging the Minister's responsibilities for a particular matter. A person who may receive this information includes:

- a Commonwealth Minister who has responsibility for administering that law or particular matter;
- a person employed by the Minister under the *Members of Parliament Act 1984*, who is a member of staff of the Minister, or a consultant for the Minister; and
- an officer or employee of a Department of State or an authority or agency of the Commonwealth administered by such a Minister. An officer may also include the Secretary of a Department and the Commissioner of Taxation. [*Integrity Bill, item 47, subsections 122(1) and (2) of the FATA*]

2.65 The *Competition and Consumer Act 2010* and the *Northern Australia Infrastructure Facility Act 2016* have been added to the list of prescribed laws, allowing for disclosures to the relevant person for the purposes of administering that law. This provision has also been redrafted for clarity and the Acts will now be listed alphabetically. [*Integrity Bill, item 47, subsection 122(3) of the FATA*]

2.66 The inclusion of the *Competition and Consumer Act 2010* ensures that information can be shared with the Minister responsible for the Australian Competition and Consumer Commission ACCC, a person employed by the Minister or by an officer or employee of the ACCC for the purposes of administering their Act. The national interest test, considers competition to be one of the factors that should be considered when determining whether or not an acquisition is contrary to the national interest. Appropriate sharing of protected information will ensure the ACCC can properly administer their Act to determine whether certain

transactions would have an impact on competition. *[Integrity Bill, item 47, paragraph 122(3)(g) of the FATA]*

2.67 The inclusion of the *Northern Australia Infrastructure Facility Act 2016* ensures that information can be shared with the Minister responsible for that Act, or an officer or employee employed at that agency for the purposes of administering that Act. The *Northern Australia Infrastructure Facility Act 2016* offers financial assistance to encourage and assist private sector investment in the Northern Territory, and the responsible agency may need protected information to determine if financial assistance is appropriate. In particular they assess applicants against particular criteria to determine their eligibility for financial assistance and this would benefit from protected information obtained under the FATA. *[Integrity Bill, item 47, paragraph 122(3)(p) of the FATA]*

2.68 The Bill provides that protected information can be shared for the purposes of discharging a Commonwealth Minister's responsibilities in relation to infrastructure, telecommunications, and water. This ensures that protected information can be shared with the relevant Minister to assist them to discharge their duties. This provision has also been redrafted for clarity. *[Integrity Bill, item 47, subsection 122(4) of the FATA]*

2.69 The Bill permits a person to disclose protected information in relation to discharging a Commonwealth Minister's responsibilities in relation to the following matters: agriculture; water; infrastructure; telecommunications; industry policy; investment promotion; taxation policy; and foreign investment in Australia. *[Integrity Bill, item 47, subsection 122(4) of the FATA]*

2.70 The provisions focus on relevant matters, rather than agencies or legislation to ensure the operation of information sharing is not hampered when changes are made to portfolios, or legislation.

2.71 Where a disclosure under section 122 of the FATA includes personal information, Australian Privacy Principle 6.2(b) authorises the disclosure as it is an Australian law authorising the disclosure of personal information. However, other Australian Privacy Principles continue to apply, in particular, Australian Privacy Principle 11.1, which requires that an Australian Privacy Principle entity must take reasonable steps to protect personal information from misuse, interference or loss, and from unauthorised access, modification or disclosure.

### ***Information sharing between the Commissioner of Taxation and the FIRB***

2.72 The Bill amends the TAA to provide the Commissioner of Taxation with the ability to disclose protected information to persons appointed by the Commonwealth for the purposes of the FATA.

2.73 Currently, only members of the FIRB would be persons appointed for the purposes of the FATA. FIRB plays a key role in advising the Treasurer on matters related to foreign investment. Enabling the Commissioner of Taxation to disclose information directly to FIRB allows for a more efficient and streamlined process. The amendments to the TAA ensure that the Commissioner of Taxation is able to disclose protected tax information to FIRB if it is for the purpose of advising the Treasurer about the administration of the FATA. [*Integrity Bill, item 49, subsection 355-65(4) in Schedule 1 (after table item 7) of the Tax Administration Act*]

2.74 The Bill makes amendments to paragraph 120(2)(c) of the FATA to ensure that information that is provided to the FIRB members remains FATA protected information and is subject to Division 3 of Part 7, which governs how protected information under the FATA is treated. [*Integrity Bill, item 46, paragraph 120(2)(c) of the FATA*]

2.75 The definition of Commonwealth entity has been repealed, as it is no longer used. [*Integrity Bill, item 45, definition of Commonwealth entity in section 4 of the FATA*]

2.76 The amendments to the Bill apply to the recording, disclosure, or use of information on or after 1 January 2021, regardless of whether the information was obtained before, on or after that day. [*Integrity Bill, item 50*]

## **Minor and technical amendments**

### ***Ensuring that interests acquired by entering agreements or acquiring options are treated in accordance with policy intent***

2.77 For the purposes of the FATA, an interest is generally considered to have been acquired if any agreement has been entered into regardless of whether or not an interest has been legally acquired. This is intended to encourage foreign investors to seek approval before entering into a binding agreement.

2.78 The amendment clarifies that, where an agreement to acquire an interest is subject to FIRB approval then the circumstances are to be regarded as involving only a 'proposed' acquisition. [*Technical Bill, item 3, subsections 15(4) and 15(5) of the FATA*]

2.79 The amendment is important to make it clear that the range of the Treasurer's powers that are available under Part 3 of the FATA with respect to the prohibition or placing of conditions on acquisitions apply in such circumstances.

### **Example 2.5**

Tomas Technologies, a foreign corporation, begins negotiations with AusCo to purchase a 25 per cent interest in the entity. This acquisition is a significant action and a notifiable action and requires approval. To avoid breaching the FATA, Tomas Technologies should notify the



Treasurer before entering into an agreement. Otherwise, Tomas Technologies can still avoid a potential breach by entering an agreement that includes a foreign investment approval condition. This means that until the Treasurer has made a decision, the action is a proposed action. The Treasurer may choose to issue a prohibition order to prevent the acquisition, or approve the action. If the action is approved, the condition is fulfilled and Tomas Technologies has taken the action at that point in time.

2.80 The amendment applies in relation to agreements entered into on or after 1 January 2021. *[Technical Bill, item 14]*

***Allowing the Treasurer to make an order or decision if an order is found invalid***

2.81 Currently, section 77 of the FATA gives the Treasurer 30 days to consider a significant action notice and make a decision or order. Subsection 77(2) of the FATA prohibits the Treasurer from making any decisions after the 30 days has expired.

2.82 However, a problem arises if any order or decision made by the Treasurer under Division 2 of Part 3 of the FATA is successfully challenged in court. In this case the order is found to be invalid and is taken as never being made. By the time of the court's decision, it is almost certain that the original 30 day decision period would have expired. This means the Treasurer would be prohibited from making any orders by subsection 77(2) of the FATA, and the action would be approved by default.

2.83 Subsection 77(2) applies the time limit by prohibiting the Treasurer from making an order after the end of the decision period if the Treasurer has not already made an order. To address the issue mentioned above, the Bill extends subsection 77(2) so that the Treasurer is prohibited from making an order after the end of the decision period if the Treasurer hasn't already made, or attempted to make, an order. *[Technical Bill, items 18 to 21, subparagraphs 77(2)(c)(i), (2)(c)(ii), 77(3)(d)(i) and 77(3)(d)(ii) of the FATA]*

2.84 This allows the Treasurer to make an order or decision under Division 2 of Part 3 if a court has found a previous order or decision to be invalid, and the decision period has ended.

2.85 The amendment applies in relation to notices received by the Treasurer from 1 January 2021. *[Technical Bill, item 21]*

***Ensuring court powers are available for contraventions of section 95 in accordance with policy intent***

2.86 Currently, under section 132 of the FATA the Federal Court, the Federal Circuit Court and the Supreme Court of a State or Territory may make a broad range of orders if a person has committed an offence or

contravened a civil penalty provision in Part 5. A court may make such an order regardless of whether the offender has been convicted of an offence or a civil penalty order has been made, and regardless of whether other proceedings relating to the contravention have been or are to be instituted.

2.87 Subsection 131(1) then lists contraventions of three but not all of the civil penalty provisions under Part 5. It does not include contraventions relating to acquisitions of interests in established dwellings as mentioned in section 95 (which is in Part 5) of the FATA.

2.88 The Bill clarifies that the courts have powers to make any order the court sees fit for a contravention of section 95 of the FATA. That section provides that where a person holds an interest in more than one established dwelling, or acquires an interest in an established dwelling, they can be subject to a civil penalty. [*Technical Bill, item 23, subparagraph 132(1)(aa) of the FATA*]

2.89 The amendment applies to contraventions occurring on or after 1 January 2021. [*Technical Bill, item 24*]

#### ***Amendments to correct previous drafting errors***

2.90 Section 51 of the FATA outlines the threshold test for acquiring an interest in entities and businesses.

2.91 The Bill amends section 51 of the FATA to remove the word ‘significant’, which will align the section with section 52. [*Technical Bill, item 29, section 51 of the FATA*]

2.92 This also clarifies that under subsection 53(1), where multiple actions are taken under one agreement and one action meets the threshold test, only that particular action meets the threshold test. The other actions are not deemed to meet the threshold test simply because they are covered under an agreement where a different action has met the test. [*Technical Bill, item 32, subsection 53(1) of the FATA*]

2.93 Consequential amendments are made to the simplified outline in section 50 of the FATA, and to the table in section 51 of the FATA. A new table item has been inserted to put beyond doubt that a notifiable action of acquiring a substantial interest in an Australian entity is covered. [*Technical Bill, item 28, 30 and 31, section 50 and heading to column 1 and item 2A to the table in section 51 of the FATA*]

2.94 Currently, subsection 37(5) of the FATA refers erroneously to ‘paragraph 4(a)’. The Bill corrects the typographical error, so that subsection 37(5) refers to ‘subsection (4)’. [*Technical Bill, item 25, subsection 37(5) of the FATA*]

2.95 Section 47 of the FATA sets out the conditions of a notifiable action. The Bill clarifies that in paragraph 47(2)(a) the first condition is that the action is either: to acquire a direct interest in an Australian entity that is an agribusiness; or to acquire a direct interest in an Australian

business that is an agribusiness. *[Technical Bill, item 26, paragraph 47(2)(a) of the FATA]*

2.96 The Bill amends subsection 47(4) to only reference the new subparagraph of 47(2) that deals with ‘Australian entities that are agribusinesses’. *[Technical Bill, item 27, subsection 47(4) of the FATA]*

2.97 Section 114 of the FATA is amended to remove a redundant reference to ‘remitted’, as a fee cannot be remitted if it has not yet been paid. *[Technical Bill, item 34]*



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## **Chapter 3**

# ***Improving compliance and additional enforcement tools***

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### **Outline of chapter**

3.1 This Chapter explains the amendments contained in the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Improving compliance and additional enforcement tools. Reference to 'the Bill' in this Chapter are to that Bill.

3.2 The Bill contains amendments to ensure that the Treasurer and the Commissioner of Taxation have appropriate powers to administer the FATA, including enhancements to the Treasurer's power to give directions to investors to prevent or address breaches of conditions.

3.3 Civil and criminal penalties have been increased to ensure appropriate deterrence is achieved and the infringement notice regime is extended to cover all types of breaches.

### **Context of amendments**

3.4 Ensuring compliance with the foreign investment framework is crucial to the credibility and effective functioning of the regime. These reforms address insufficiencies in the existing legislative framework to ensure that appropriate scrutiny is given to cases and non-compliance can be appropriately addressed.

3.5 The changes to the compliance framework bring it into line with other comparable regulators and enable more nuanced and targeted enforcement and compliance activities. These changes modernise the enforcement framework to allow for a graduated and proportional response to compliance issues, which strengthens the overall effectiveness of the regime.

### **Infringement Notices**

3.6 Currently, the FATA allows for less serious breaches of the foreign investment rules to be punishable by way of an infringement notice, but only for residential real estate investments. Infringement notices are issued using the framework in the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). There are two tiers of infringement notices. Tier 1 notices and associated penalties

are available where a person discloses the breach to the Commonwealth. Tier 2 notices are issued when the breach is discovered by a means other than self-disclosure.

3.7 The only existing mechanisms for penalising breaches of the FATA for all non-residential investment is to initiate court proceedings to impose civil or criminal penalties (a disposal order can be issued once a civil or criminal penalty is secured).

3.8 The current definition of tier 1 infringement notice in subsection 101(1) of the FATA requires notification to the Commonwealth. This is a broad provision and is being amended to clarify that a tier 1 infringement notice only applies if a person self-discloses a contravention to a foreign investment regulator.

## **Penalties**

3.9 Current monetary penalties under the FATA are low compared to other business regulators, and do not act as an effective deterrent. Part 5 of the FATA is amended to increase the maximum term of imprisonment and financial penalties for certain criminal offences and financial penalties for the contravention of certain civil penalties.

## **Remedy incorrect statement**

3.10 Currently, no provision exists under the FATA that allows the Treasurer to address a situation where a person makes a false or misleading statement, or omits an important piece of information, when notifying the Treasurer of their investment in Australia. It can result in an incorrect outcome if the Treasurer gives a no objection notification or exemption certificate to a foreign person relying on information that is false or misleading or omits a material fact.

## **Directions**

3.11 The FATA currently does not provide the Treasurer with the ability to issue directions. The absence of a directions power under the FATA leaves the Government without a tool to pursue early and effective action to remedy or prevent a breach of conditions. Relying on punitive action following a breach may place the national interest at greater risk than would be the case through more timely and targeted intervention.

## **Enforceable undertakings**

3.12 Currently under the FATA, the Treasurer does not have the power to accept enforceable undertakings to manage compliance with the FATA. The FATA is amended to provide for provisions in relation to undertakings enforceable under the Regulatory Powers Act.

## **Summary of new law**

3.13 The Bill amends the FATA to:

- expand the infringement notices regime to cover all types of foreign investments and introduce a third tier to allow for a more graduated and proportional approach to enforcement;
- increase civil and criminal penalties under the FATA to ensure these penalties act as an effective deterrent;
- remedy situations where foreign persons are given a no objection notification or an exemption certificate based on a foreign investment application that makes an incorrect statement or omits an important piece of information;
- require foreign persons who have been issued a no objection notification for a proposed action or an exemption certificate, to notify the Government of certain events, including that the action has occurred;
- provide the Treasurer with the power to give directions to investors in order to prevent or address suspected breaches of conditions or of the foreign investment laws;
- provide the Treasurer with the standard monitoring and investigative powers (in line with those of other business regulators), including access to premises with consent or by warrant to gather information, to improve regulators' capability to monitor investor compliance and/or investigate potential non-compliance; and
- provide the Treasurer with the power to accept enforceable undertakings from foreign persons to manage compliance.

## **Comparison of key features of new law and current law**

3.14 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>
An infringement officer may issue an infringement notice if the infringement officer believes on reasonable grounds that the person contravened a civil penalty provision in the FATA.	An infringement officer may issue an infringement notice if the infringement officer believes, on reasonable grounds, that the person contravened a civil penalty provision relating to residential land.

<i>New law</i>	<i>Current law</i>
An infringement notice is a <b><i>tier 1 infringement notice</i></b> if the notice relates to an alleged contravention of a civil penalty provision by a person that is discovered because the person informed the Treasurer (or the Commissioner of Taxation on behalf of the Treasurer) of the conduct.	An infringement notice is a <b><i>tier 1 infringement notice</i></b> if the notice relates to an alleged contravention of a civil penalty provision by a person that is discovered because the person informed the Commonwealth of the conduct that constituted the alleged contravention.
<p>A <b><i>tier 3 infringement notice</i></b> can be issued where the Treasurer (or the Commissioner of Taxation on behalf of the Treasurer) discovers a breach through active compliance, or information provided by a member of the public.</p> <p>A tier 3 infringement notice may be issued where the value of the consideration or market value of the relevant action to which the alleged contravention relates is equal to or more than:</p> <ul style="list-style-type: none"> <li>• \$275 million for business acquisitions and other non-real estate acquisitions; or</li> <li>• \$5 million for residential acquisitions.</li> </ul>	No equivalent
<p>The maximum criminal penalty of:</p> <ul style="list-style-type: none"> <li>• Individual — 15,000 penalty units or 10 years imprisonment.</li> <li>• Corporation — 150,000 penalty units.</li> </ul> <p>These penalties apply to the following criminal offences in the FATA:</p> <ul style="list-style-type: none"> <li>• section 84 (Failing to give notice);</li> <li>• section 85 (Taking significant action before end of period);</li> <li>• section 86 (Contravening orders under Part 3);</li> <li>• section 87 (Contravening conditions); and</li> <li>• subsection 88(1) (Failing to advertise new dwellings).</li> </ul>	<p>The maximum criminal penalty of:</p> <ul style="list-style-type: none"> <li>• Individual — 750 penalty units or 3 years imprisonment.</li> <li>• Corporation — 3,750 penalty units.</li> </ul> <p>These penalties apply to the following criminal offences in the FATA:</p> <ul style="list-style-type: none"> <li>• section 84 (Failing to give notice);</li> <li>• section 85 (Taking significant action before end of period);</li> <li>• section 86 (Contravening orders under Part 3);</li> <li>• section 87 (Contravening conditions); and</li> <li>• subsection 88(1) (Failing to advertise new dwellings).</li> </ul>



<i>New law</i>	<i>Current law</i>
<p>The maximum financial penalty for a breach of a civil penalty provision is:</p> <ul style="list-style-type: none"> <li>• Individual — the greater of: <ul style="list-style-type: none"> <li>– 5,000 penalty units; or</li> <li>– 75 per cent of the value of the consideration or market value of the interest or the benefit obtained (as appropriate), if it can be determined, capped at a maximum monetary value of 2.5 million penalty units.</li> </ul> </li> <li>• Corporation — the greater of: <ul style="list-style-type: none"> <li>– 50,000 penalty units; or</li> <li>– 75 per cent of the value of the consideration or market value of the interest or the benefit obtained (as appropriate), if it can be determined, capped at a maximum monetary value of 2.5 million penalty units.</li> </ul> </li> </ul> <p>These penalties apply to contraventions of the following civil penalty provision in the FATA:</p> <ul style="list-style-type: none"> <li>• section 89 (Contravening orders under Part 3);</li> <li>• section 91 (Failing to give notice);</li> <li>• section 92 (Taking a significant action before the end of the period); and</li> <li>• section 93 (Contravening conditions).</li> </ul>	<p>The maximum financial penalty for a breach of a civil penalty provision is:</p> <ul style="list-style-type: none"> <li>• Individual — 250 penalty units.</li> <li>• Corporation — 1,250 penalty units.</li> </ul> <p>The penalties apply to a contravention of the following civil penalty provision in the FATA:</p> <ul style="list-style-type: none"> <li>• section 89 (Contravening orders under Part 3);</li> <li>• section 91 (Failing to give notice);</li> <li>• section 92 (Taking a significant action before the end of the period); and</li> <li>• section 93 (Contravening conditions).</li> </ul>
<p>The maximum financial penalty for a contravention of a civil penalty provision relating to residential land under section 94 of the FATA, where a foreign person acquires an interest in residential land without giving a notice under section 81, or if the notice is given, takes an action before the day mentioned in section 82, is increased to be the greater of the following:</p>	<p>The maximum financial penalty for a contravention of a civil penalty provision relating to residential land under section 94, where a foreign person acquires an interest in residential land without giving a notice under section 81, or if the notice is given, takes an action before the day mentioned in section 82, is the greater of the following:</p>

<i><b>New law</b></i>	<i><b>Current law</b></i>
<ul style="list-style-type: none"> <li>• 25 per cent of the consideration for the residential land acquisition;</li> <li>• 25 per cent of the market value of the interest in the relevant residential land.</li> </ul>	<ul style="list-style-type: none"> <li>• 10 per cent of the consideration for the residential land acquisition;</li> <li>• 10 per cent of the market value of the interest in the relevant residential land.</li> </ul>
The maximum financial penalties for contravention of the strict and absolute liability offence listed in section 119 of the FATA for failing to make and keep records is increased to 250 penalty units.	The maximum financial penalties for contravention of the strict and absolute liability offence listed in section 119 of the FATA for failing to make and keep records is 30 penalty units.
The maximum financial penalties for contravention of section 133 of the FATA for failing to comply with the notice given by the Treasurer to provide information necessary for exercising the Treasurer's powers is 250 penalty units, or imprisonment for 6 months, or both.	The maximum financial penalties for contravention of section 133 of the FATA for failing to comply with the notice given by the Treasurer to provide information necessary for exercising the Treasurer's powers is 30 penalty units, or imprisonment for 6 months, or both.
A person is liable for a civil penalty of 250 penalty units or 'tier 1' or 'tier 2' infringement notice for making a false or misleading statement including omitting relevant information, in a vacancy fee return to the Commissioner of Taxation under subsection 115D(1).	No equivalent
The Treasurer can revoke a no objection notification or exemption certificate given under the FATA, if the Treasurer reasonably believes that the person gave false or misleading information or omitted important information relevant to that no objection notification. A person is also liable to a civil penalty or an infringement notice for making that false or misleading statement including omitting relevant information.	No equivalent
Foreign persons who have been issued a no objection notification for a proposed significant action, or an exemption certificate are required to notify the Treasurer within 30 days of when the action has occurred.	A foreign person is required to notify the Treasurer when taking action specified in a no objection notification where it is included as a condition in the no objection

<i>New law</i>	<i>Current law</i>
	notification. This currently occurs for all residential land acquisitions. A foreign person must give notice to the Commissioner of their holdings of agricultural land as at the start of 1 July 2015 and water entitlements and contractual water rights as at the end of 30 November 2017; and any later events causing the start or ceasing of such interest to be held by foreign persons.
The Treasurer may issue directions or interim directions where the Treasurer has a reason to believe that a person has engaged, is engaging, or will engage in a conduct that constitutes a contravention of a provision of the FATA.	No equivalent
The Treasurer has standard monitoring powers under Part 2 of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> , including access to premises with consent or by warrant to gather information in order to monitor compliance with the FATA.	No equivalent
The Treasurer has standard investigative powers under Part 3 of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> , including access to premises with consent or by warrant to gather information in order to investigate a potential non-compliance with the relevant offence or civil penalty provisions of the FATA.	No equivalent
The Treasurer can accept enforceable undertakings relating to compliance with the FATA provisions enforceable under Part 6 of the <i>Regulatory Powers (Standard Provisions) Act 2014</i> .	No equivalent

## **Detailed explanation of new law**

### **Harmonising and expanding the availability of infringement notices under the FATA**

3.15 Currently, the FATA allows for less serious breaches of the foreign investment rules to be punishable by way of an infringement notice, but only for residential real estate investments. Infringement notices are issued using the framework in the *Regulatory Powers (Standard Provisions) Act 2014*.

3.16 Infringement notices are commonly used for minor breaches that are likely to occur frequently which can be assessed using objective criteria. For example, an infringement notice can be issued for three successive late submissions of a report where an investor is required to report on a quarterly basis about transactions that have taken place under an exemption certificate. Another example would be where the investor submits a retrospective application to rectify the breach and is issued with an infringement notice to penalise the conduct.

3.17 There are two tiers of infringement notices – tier 1 notices and associated penalties are available where a person discloses the breach to the Commonwealth and tier 2 notices are issued when the breach is discovered by a means other than self-disclosure.

3.18 However, for other breaches of the FATA, the only existing mechanism for penalising breaches is to initiate court proceedings to impose civil or criminal penalties (a disposal order can be issued once a civil or criminal penalty is secured).

3.19 The current definition of tier 1 infringement notice in subsection 101(1) requires notification to the Commonwealth. This is a broad provision and the amendment clarifies that it is only information provided directly to the Treasurer (or delegate) for the purpose of foreign investment administration, which could be taken to have met the disclosure requirement.

#### ***Expanding the infringement notice regime***

3.20 The Bill provides that an infringement officer may issue an infringement notice if the infringement officer believes on reasonable grounds that the person contravened a civil penalty provision of the FATA. This enables the regulators to respond to a range of compliance issues, and ensure more credible deterrence for low to mid-range non-compliance with any civil penalty provision of the FATA. [*Compliance Bill, item 13, paragraph 100(1)(a) of the FATA*]

3.21 The FATA provides that an infringement officer is a person who holds an APS 6 Level position or higher who is appointed by the Secretary in relation issuing infringement notices.

***Update to the definition of tier 1 infringement notice***

3.22 The definition of a tier 1 infringement notice has been updated to clarify that it is the Treasurer, or the Commissioner of Taxation on behalf of the Treasurer, and not the Commonwealth that must be notified through a direct voluntary disclosure by a foreign person of an alleged contravention for the purposes of the FATA.

3.23 Limiting the disclosure for the purposes of the FATA ensures that other disclosures made to the Treasurer under any other legislation within the Treasurer's portfolio will not constitute a self-disclosure for the purpose of a tier 1 infringement notice. A disclosure by a person in reaction to engagement from the regulator such as an early show cause notice, or any intimation of impending compliance action is not considered voluntary 'self-disclosure' for the purposes of a tier 1 infringement notice. *[Compliance Bill, item 15, subsection 101(1) of the FATA]*

3.24 The Bill further provides that for the purpose of a tier 1 infringement notice, a disclosure must be made in the manner approved by the Secretary under section 135 of the FATA. *[Compliance Bill, item 18, paragraph 135(3)(ba) of the FATA]*

***Introduction of tier 3 infringement notice***

3.25 A third tier infringement notice is introduced for non-compliance of high-value acquisitions. This enables proportionate and graduated action in response to an investor's non-compliance that is commensurate with the quantum of the investment. Examples of circumstances when a tier 3 infringement notice may be issued could include repeated and systemic failure to comply in a timely manner with reporting conditions or taking a high value notifiable action before giving notice to the Treasurer. A tier 3 infringement notice applies where the Treasurer, or the Commissioner of Taxation on behalf of the Treasurer, discovers the conduct through active compliance, such as by undertaking data-matching, or information provided by a member of the public. A tier 3 infringement notice cannot be issued for a contravention of conditions under subsection 97(1) or (2) of the FATA, and contraventions related to vacancy fees for foreign acquisitions of residential land under subsection 115D(1), 115DA(1) or 115G(1). *[Compliance Bill, items 12 and 16, section 4 and section 101 of the FATA]*

3.26 The amount payable under a tier 3 infringement notice is 300 penalty units for an individual and 1,500 penalty units in the case of a body corporate. This penalty amount is necessary to reflect the seriousness of breaches on the part of major investors and potential harm to the national interest that can arise from misconduct in such cases. For these breaches, the standard approach to penalty setting would not operate as a sufficient deterrent, nor does it adequately capture the benefits that

can flow from misconduct. *[Compliance Bill, item 14, paragraph 100(6)(c) of the FATA]*

3.27 A tier 2 infringement notice applies where the value of the action to which the contravention relates is less than either \$5 million for a contravention relating to residential land, or \$275 million for other contraventions which are not related to residential land. The threshold value of \$275 million was established to align with the threshold for business investment by non-government foreign investors to be deemed a significant action (prior to implementation of the temporary zero dollar threshold imposed as a result of the COVID-19 pandemic). The threshold value of \$5 million for a contravention relating to residential land also reflects a level of sophistication of the investor and tries to align with the notion that an infringement is not simply a cost of doing business. A tier 3 infringement notice applies where the value of the action to which the contravention relates exceeds the monetary thresholds for tier 2 infringement notices. The threshold values may be indexed annually in accordance with regulations made for the purposes of subsection 139(2) of the FATA. *[Compliance Bill, item 16 and 17, subsections 101(2), 101AA(2) and (3) of the FATA]*

3.28 The assessment of value for the monetary thresholds for the imposition of a tier 2 or tier 3 infringement notice for breaches of section 89 or 92 or subsection 93(1) or 98B(2) is based on the value mentioned in column 2 of the table in section 51 - the significant action to which the contravention relates. *[Compliance Bill, item 17, paragraph 101AA(1)(a) of the FATA]*

3.29 If no value is mentioned in the table in section 51 for a significant action, the threshold value is the greater of the consideration for the acquisitions of the relevant interests, or the market value of the benefit derived by the action. If the determined value is lower than the monetary thresholds, a tier 2 infringement notice can be issued, provided a person did not make a voluntary self-disclosure of the contravention under subsection 101(1). *[Compliance Bill, item 17, paragraph 101AA(1)(a) and subsection 101AA(4) of the FATA]*

3.30 The assessment of value for the monetary thresholds for the imposition of a tier 2 or tier 3 infringement notice for a breach under subsection 93(3) is the value of the action to which the contravention relates. *[Compliance Bill, item 17, paragraph 101AA(1)(c) of the FATA]*

3.31 For alleged contraventions of the civil penalty provisions under section 91, the value for a relevant notifiable action is determined for the purpose of assessing the monetary thresholds as:

- for a notifiable action which relates to an acquisition of a direct interest mentioned in paragraph 47(2)(a)—the value mentioned in column 2 of the table in section 51 for the notifiable action;

- for a notifiable action which is an acquisition of a substantial interest mentioned in paragraph 47(2)(b)—the value of the action;
- for a notifiable action which is an acquisition of an interest in Australian land mentioned in paragraph 47(2)(c)—the greater of the value of the consideration for the acquisition and the market value of the interest; and
- for a notifiable action which is an action specified in regulations made for the purposes of section 48—either an amount for the action as determined by a method specified in the regulations, or the amount specified in the regulations, or the greater of the value of the consideration for the action and the market value of the benefit obtained by that action.  
*[Compliance Bill, item 17, paragraph 101AA(1)(b) and subsection 101AA(5) of the FATA]*

3.32 For contraventions of the civil penalty provisions under Subdivision C of Division 3 of Part 5 of the FATA, the threshold value is the greater of the amount of the consideration for the acquisitions of the relevant interests to which the alleged contravention relates, or the market value of those interests. *[Compliance Bill, item 17, paragraphs 101AA(1)(d), (e) and (f) of the FATA]*

3.33 Where a tier 3 infringement notice could be issued, the Treasurer may decide to issue a tier 2 infringement notice instead, despite the value of the relevant action if the Treasurer considers that a tier 2 notice is more appropriate.

3.34 In making this decision, the Treasurer will have regard to the conduct of the person after the alleged contravention, such as the steps taken by the person to remedy the alleged contravention and level of cooperation with the regulators in addressing the alleged contravention. The Treasurer will also ensure that the imposition of a tier 2 infringement notice is not contrary to the national interest. *[Compliance Bill, item 16, subsections 101A(4), (5) and (6) of the FATA]*

3.35 Regulator-imposed penalties such as an infringement notice scheme should be limited to situations where imposing the penalty does not reflect a judgment as to the person's guilt or liability. A regulator should not be exercising significant discretion in determining the level of penalty to be imposed on a recipient by way of infringement notice, other than in strict accordance with factual criteria set out in the legislation.

3.36 The infringement notice framework in the FATA provides some discretion to the Treasurer to impose a tier 2 infringement notice for an alleged contravention where the value of the relevant action is higher than the monetary threshold. However, the amendments to the FATA set out

the factors the Treasurer would consider in deciding the level of infringement notice to impose such as an investor's conduct or national interest factors. This limits the element of discretion for the regulator to determine the amount payable under an infringement notice. This also ensures natural justice for a person, and encourages them to actively engage and cooperate with the regulators and take steps to address the breach.

***Updating the penalties for certain criminal offences and contravention of civil penalties under the FATA***

***Increase to imprisonment terms and financial penalties applicable to certain criminal offences***

3.37 The Bill increases the penalties for certain offences to reflect the seriousness of those offences, and to deter and punish such behaviour as appropriate.

3.38 The increases to the maximum penalties applicable to certain offences have been increased to: reflect the seriousness of the offence; act as a deterrent from committing offences; effectively punish those who commit offences; ensure consistency in the penalties for offences compared to other regulators; safeguard Australia's national interest; and maintain the integrity of Australia's foreign investment framework.

3.39 Maximum penalties provide a court with guidance on how to punish criminal behaviour. They restrict the court's sentencing discretion as the court is unable to order a penalty in excess of the prescribed maximum penalty. The maximum penalty is generally reserved only for the most egregious cases.

3.40 Offences where the maximum term of imprisonment has been increased are listed in the table below. If the offence does not appear in the table, the penalty for the offence has not changed.



**Table 3.1– Offences where the maximum term of imprisonment and monetary penalties have been increased**

<i>Offence provision</i>	<i>Current imprisonment term and financial penalty</i>	<i>New imprisonment term and financial penalty</i>	<i>Brief description</i>
Section 84	Imprisonment for 3 years, or 750 penalty units, or both.	Imprisonment for 10 years, or 15,000 penalty units, or both	A foreign person must provide notice under section 81 before taking a notifiable action or notifiable national security action.
Section 85	Imprisonment for 3 years, or 750 penalty units, or both.	Imprisonment for 10 years, or 15,000 penalty units, or both	A foreign person must not take a significant action, notifiable national security action, reviewable national security action that has been notified to the Treasurer or an action that may pose a national security concern that has not been taken before the day mentioned in section 82.
Section 86	Imprisonment for 3 years, or 750 penalty units, or both.	Imprisonment for 10 years, or 15,000 penalty units, or both	A person must not engage in conduct contravening an order made under Part 3.

<b><i>Offence provision</i></b>	<b><i>Current imprisonment term and financial penalty</i></b>	<b><i>New imprisonment term and financial penalty</i></b>	<b><i>Brief description</i></b>
Section 87	Imprisonment for 3 years, or 750 penalty units, or both.	Imprisonment for 10 years, or 15,000 penalty units, or both	A person must not engage in conduct contravening conditions specified under section 74 relating to a significant action or in an exemption certificate.
Subsection 88(1)	Imprisonment for 3 years, or 750 penalty units, or both.	Imprisonment for 10 years, or 15,000 penalty units, or both	The developer must advertise new dwellings prior to disposing of an interest in the dwelling to a foreign person, contravening a condition of the exemption certificate.
Subsection 133(5)	Imprisonment for 6 months or 30 penalty units, or both.	Imprisonment for 6 months or 250 penalty units, or both.	A person must comply with the notice given by the Treasurer to provide information necessary for exercising the Treasurer's powers

*[Compliance Bill, items 20 to 24 and 32, sections 84, 85, 86 and 87, subsections 88(1) and 133(5)]*

3.41 The corporate multiplier for these offences is a factor of 10 for financial penalties. This higher relative penalty is necessary and appropriate to ensure that a corporation does not obtain financial benefits from illegal behaviour and to recognise the financial benefits that can be obtained by not complying with the law. Bodies corporate can be well resourced and may see the financial penalties as a cost of doing business.

To ensure financial penalties act as an adequate deterrent, punish illegal behaviour, and are commensurate to the size and capacity of bodies corporate, this higher penalty is appropriate as it provides an adequate penalty that will deter and punish illegal behaviour.

3.42 The approach to determining the maximum term of imprisonment recognises that criminal breaches relating to conduct that places the national interest at risk require a significant jail term as an option available to the court. In this instance, applying standard ratios of maximum fines to maximum terms of imprisonment would give rise to a manifestly excessive maximum jail term. A 10 year maximum term balances the seriousness of these offences against the social impact of a significant jail term for white collar criminals.

*Increase to financial penalties applicable to certain civil penalty provisions*

3.43 The Bill increases the financial penalties for breaches of certain civil penalty provisions. The increase in penalty amounts ensures that investors who do not comply with their legal requirements are appropriately penalised, and aligns civil penalty amounts under the FATA with those of other business regulators.

3.44 Civil penalty provisions where the maximum monetary penalties have been increased are listed in the table below. If the civil penalty provision does not appear in the table, the penalty for the provision has not changed.

**Table 3.2– Civil penalty provisions where the maximum monetary penalties have been increased**

<i>Civil penalty provision</i>	<i>Current financial penalty</i>	<i>New financial penalty</i>	<i>Brief description</i>
Section 89	250 penalty units (or 1,250 penalty units if the person is a corporation)	The lesser of the following: (a) 2,500,000 penalty units; (b) the greater of the following: (i) 5,000 penalty units (or 50,000 penalty units if the person is a corporation); (ii) the amount worked out under section 98P for the significant action in relation to which the order was made.	A person must not contravene an order made under Part 3

<b><i>Civil penalty provision</i></b>	<b><i>Current financial penalty</i></b>	<b><i>New financial penalty</i></b>	<b><i>Brief description</i></b>
Section 91	250 penalty units (or 1,250 penalty units if the person is a corporation)	The lesser of the following: (a) 2,500,000 penalty units; (b) the greater of the following: (i) 5,000 penalty units (or 50,000 penalty units if the person is a corporation); (ii) the amount worked out under section 98P for the notifiable action.	A foreign person who proposes to take a notifiable action or a notifiable national security action must give a notice under section 81 before taking the action.
Section 92	250 penalty units (or 1,250 penalty units if the person is a corporation)	The lesser of the following: (a) 2,500,000 penalty units; (b) the greater of the following: (i) 5,000 penalty units (or 50,000 penalty units if the person is a corporation); (ii) the amount worked out under section 98P for the action.	A foreign person who proposes to take a significant action, notifiable national security action, an action that poses a national security concern, or a reviewable national security action that has been notified must not take the action before the day mentioned in section 82.
Subsections 93(1) and (2)	250 penalty units (or 1,250 penalty units if the person is a corporation)	The lesser of the following: (a) 2,500,000 penalty units; (b) the greater of the following: (i) 5,000 penalty units (or 50,000 penalty units if the person is a corporation); (ii) the amount worked out under section 98P for the action in relation to which the no objection notice was given.	A person who is given a no objection notification under section 74 or 75 must not contravene a condition specified in the notification.

<i>Civil penalty provision</i>	<i>Current financial penalty</i>	<i>New financial penalty</i>	<i>Brief description</i>
Subsections 93(3) and (4)	250 penalty units (or 1,250 penalty units if the person is a corporation)	5,000 penalty units (or 50,000 penalty units if the person is a corporation)	A person who is given an exemption certificate must not contravene a condition specified in the certificate
Subsection 94(4)	The greater of the following: (a) 10 per cent of the consideration for the residential land acquisition; (b) 10 per cent of the market value of the interest in the relevant residential land.	The greater of the following: (a) 25 per cent of the consideration for the residential land acquisition; (b) 25 per cent of the market value of the interest in the relevant residential land.	A foreign person who proposes to take a notifiable action, notifiable national security action, reviewable national security action or an action that poses a national security concern and that is a residential land acquisition must give a notice under section 81 and must not take the action before the day mentioned in section 82.

[Compliance Bill, items 25 to 28 and 29, sections 89, 91, 92, and subsections 93(1), 93(2), 93(3), 93(4) and 94(4) of the FATA]

**Table 3.3—The amount for the purpose of imposing a civil penalty is worked out under section 98P for relevant actions as follows**

<i>Relevant provision</i>	<i>Relevant amounts for the imposition of civil penalty</i>
Actions covered in paragraphs 40(2)(a), 40(2)(b), 40(2)(c), 41(2)(a), 41(2)(b) and section 43.	75 per cent of the greater of the following: <ul style="list-style-type: none"> <li>the value of the consideration for the relevant action; and</li> <li>the market value of the relevant interest.</li> </ul>

<b><i>Relevant provision</i></b>	<b><i>Relevant amounts for the imposition of civil penalty</i></b>
Actions covered in paragraphs 40(2)(d), 40(2)(e) and 41(2)(c).	75 per cent of the greater of the following: <ul style="list-style-type: none"> <li>• the value of the consideration for the relevant action; and</li> <li>• the market value of the benefit obtained by the action.</li> </ul>
Regulations made for the purposes of section 44.	75 per cent of the amount specified or determined using a method as set out in those regulations.
Actions specified in regulations for the purposes of section 44, (where the amounts are not specified or a method to determine the value is not set out in regulations).	75 per cent of the greater of the following: <ul style="list-style-type: none"> <li>• the value of the consideration for the relevant action; and</li> <li>• the market value of the benefit obtained by the action.</li> </ul>
Actions covered in paragraphs 47(2)(a), 47(2)(b) and 47(2)(c).	75 per cent of the greater of the following: <ul style="list-style-type: none"> <li>• the value of the consideration for the relevant action; and</li> <li>• the market value of the relevant interest.</li> </ul>
Regulations made for the purposes of section 48.	75 per cent of the amount specified or determined using a method as set out in those regulations.
Actions specified in regulations for the purposes of section 48, (where the amounts are not specified or a method to determine the value is not set out in regulations).	75 per cent of the greater of the following: <ul style="list-style-type: none"> <li>• the value of the consideration for the relevant action; and</li> <li>• the market value of the benefit obtained by the action.</li> </ul>

*[Compliance Bill, item 30, subsections 98P(1) and (2) of the FATA]*

3.45 While paragraphs 98P(1)(l) and (2)(b) of the Bill are not limited to the foreign person or entity's share of the investment, this will be taken into account when making submissions during court proceedings. That is, in accordance with model litigant obligations the relevant applicant will consider the foreign person's share of the investment when making submissions to a court on what penalty amount should be imposed for the relevant contravention or contraventions.

3.46 The amounts worked out under section 98P are taken to be nil, if there is no consideration for the relevant significant or notifiable action, and the market value of the action cannot be ascertained. [*Compliance Bill, item 30, subsections 98P(3) and (4) of the FATA*]

3.47 The amendments to the maximum penalty are to ensure that appropriate penalties are available when the impact of non-compliance can cause serious harm to Australia's national interest. Failure to comply with these obligations can create community distrust in the foreign investment framework. The maximum penalty is considered appropriate to adequately deter misconduct. The court determines which method provides the greatest penalty, however the court retains its discretion to determine what penalty to impose up to the maximum amount. This discretion would include consideration of proportionality when the foreign investor holds only a part of the total investment. As a model litigant, the Commonwealth would draw any such issue to the attention of the court.

3.48 The method for calculating the pecuniary penalty applicable provides flexibility and ensures the penalty reflects the seriousness of the contravention and is not considered a cost of doing business. The amount is intended to deter and punish misconduct.

3.49 The financial penalty for failing to make and keep records in accordance with Division 2 of Part 7 of the FATA has been increased from 30 penalty units to 250 penalty units. It is an offence of strict liability. [*Compliance Bill, item 31, section 119 of the FATA*]

3.50 This penalty amount for a strict liability offence for an individual reflects the seriousness of the offence and the manner in which breaches of the law can occur, and is appropriate as it makes the amounts proportionate to the other penalty increases and acts a sufficient deterrent.

3.51 Further amendments are required to section 98P to accurately capture the types of actions that are captured under the definitions of reviewable national security action and notifiable national security action. This is discussed further in the Chapter on the national security review and last resort power.

### ***Infringement notices and civil penalty for vacancy fee lodgements***

3.52 The Bill establishes a new civil penalty, where the information provided in a vacancy fee return to the Commissioner of Taxation under subsection 115D(1) contains false or misleading information or omits a material fact or a thing. The maximum penalty is 250 penalty units. Alternatively, the person may be liable for a tier 1 or tier 2 infringement notice for making a false or misleading statement in a vacancy fee return. [*Compliance Bill, items 34 and 35, subparagraph 100(5)(b)(va) and section 115DA of the FATA*].

3.53 The Treasurer may declare that a charge applies to Australian land owned by the foreign person if the Treasurer is satisfied that the declaration is necessary to secure the payment of the unpaid vacancy penalty for the false or misleading information given in the vacancy fee return. *[Compliance Bill, item 36, subparagraph 115K(2)(b)(i) of the FATA]*

***Remedy incorrect statements***

3.54 The Bill amends the FATA to provide the Treasurer with adequate powers to remedy a situation where a foreign person is given a no objection notification or exemption certificate based on an application that is false or misleading or omits a material fact. The Treasurer can revoke the no objection notification or exemption certificate and the person may also be liable to a civil penalty or an infringement notice for making that false or misleading statement including omitting a material fact in the relevant application.

***Revocation of no objection notification or exemption certificate***

3.55 The Treasurer can revoke a no objection notification where the Treasurer has a reason to believe that a person has given a false or misleading statement, or omitted a material fact or a thing where this information is relevant and given before the no objection notification is issued. Limitation on making disposal orders also applies to revocation of no objection notifications. *[Compliance Bill, items 1 and 2, subsections 70(3), 76A(1), (2) and (3) of the FATA]*

3.56 The revocation needs to be made within 120 days of the Treasurer forming a belief that the person has made a false or misleading statement or omitted a material fact or a thing in their application. The Treasurer has 10 days to notify the person of the revocation decision. The 10 day requirement is consistent with other provisions in the FATA. *[Compliance Bill, item 2, subsections 76A(5) and (6) of the FATA]*

3.57 After the no objection notification is revoked, the Treasurer is allowed to rectify an unsatisfactory outcome by making an order prohibiting the action or requiring the person to dispose of the acquisition, or reissuing a new no objection certificate or exemption certificate with different conditions responding to the relevant national interest considerations.

3.58 The decision to issue an order, a new no objection notification or exemption certificate should be made by the Treasurer as if the no objection notification had never been given. The decision needs to be made within 30 days after the initial no objection notification was revoked. This is consistent with the decision period the Treasurer normally has to consider a notice from a person stating that a significant action (including a significant action that is a notifiable action) is proposed to be taken. *[Compliance Bill, item 2, subsection 76A(7) of the FATA]*



3.59 The Treasurer's powers cannot be exercised again in certain instances. For example, prohibiting a person from doing something where the relevant action has already been taken before the order was made. The Treasurer cannot make an order prohibiting actions under section 67, or an interim order under section 68 about the action which a person has already taken before the revocation. [*Compliance Bill*, item 2, subsection 76A(8) of the *FATA*]

*Revocation powers under the former provisions of the FATA*

3.60 The Treasurer can revoke a no objection advice under subsection 25(1B) of the former FATA, or a no objection decision under subsection 25(1A) of the former FATA given prior to 1 December 2015 to remedy an unsatisfactory outcome that is produced when the foreign person is granted a no objection advice or no objection decision based on an application with incorrect information while seeking approval. [*Compliance Bill*, item 2, subsections 76B(1) and (3) of the *FATA*]

3.61 As the power to issue a no objection decision under subsection 25(1A) of the former FATA ceased to be available upon the repeal of that provision on 1 December 2015, the Treasurer cannot issue a no objection notification under section 74 of the FATA for actions taken before 1 December 2015. [*Compliance Bill*, item 2, subsection 76B(2)]

*Penalties for making that false or misleading statement including omitting material*

3.62 A person is liable for a civil penalty or an infringement notice can be imposed, if the Treasurer finds that an incorrect outcome has arisen because a person made a false or misleading statement or omitted an important piece of information in seeking a no objection notification. Establishing a civil penalty and an ability to issue an infringement notice provides the regulator with a number of avenues and tools to seek enforcement action against an applicant or their representative when they provide false or misleading information. This is intended to operate as a significant disincentive to making an incorrect statement to the Treasurer and to ensure that appropriate penalties are available depending on the nature of the breach.

3.63 The civil penalty for making false and misleading statements in seeking a no objection notification is the greater of:

- 5,000 penalty units (or 50,000 penalty units if the person is a corporation);
- the greater of the following: 75 per cent of the value of the consideration or market value of the interest or the benefit

obtained (as appropriate), if it can be determined, capped at a maximum monetary value of 2.5 million penalty units.

*[Compliance Bill, item 3, section 98A of the FATA]*

3.64 Similar provisions will be inserted in the Bill to provide the Treasurer with the powers to revoke an exemption certificate where the Treasurer has a reason to believe that a person has given a false or misleading statement, or omitted a material fact or a thing where this information is relevant and given before the exemption certificate is issued. A person will be liable for a civil penalty or an infringement notice can be imposed, if the Treasurer finds that an incorrect outcome has arisen because a person made a false or misleading statement or omitted an important piece of information in seeking an exemption certificate.

### ***Notification requirement***

3.65 It is fundamental for a regulator to know the population it is expected to regulate. However, currently there is no uniform notification requirement that exists under the FATA. A foreign person is required to notify the Treasurer of taking an action if the requirement to notify is included as a condition in a no objection notification. However, there is no notification requirement if the person is issued an unconditional no objection notification under section 75 of the FATA.

3.66 The Register of Foreign Ownership of Agricultural Land and Water Rights collects information about a person's agricultural land holding or water rights.

3.67 The Bill introduces uniform notification requirements for foreign persons issued with a no objection notification for a proposed significant action, or an exemption certificate to notify the Treasurer, once the action has been taken or when specified related events take place.

*[Compliance Bill, item 9, subsections 98B(1) and 98C(1) of the FATA].*

3.68 A person must notify the Treasurer where there is a change of control of the entity or business to which the significant action relates, or where the person ceases to have a direct interest in the Australian entity or a part of their interest in Australian land. *[Compliance Bill, item 9, subsection 98D(1) and paragraphs 98D(2)(a), (b) and (c) of the FATA]*

3.69 A person must give a notice to the Treasurer, if the regulations made for the purposes of section 44 specify that a notice is required for one or more situations about the relevant significant action, and those situations cease to exist. If the significant action relates to acquiring an interest of at least a certain percentage in the entity or business and the person ceases to hold an interest of at least that percentage in the entity or business, they are required to notify that action. This notification requirement also extends to acquiring an interest in securities of an entity. A notification requirement applies to foreign government investors where

they cease to have a direct interest in the entity or business, or a tenement. Where the significant action was a starting of an Australian business, the foreign government investors need to notify when they cease to carry on that business. *[Compliance Bill, item 9, paragraph 98D(2)(d) and (e) of the FATA]*

*Time period for notice to be given*

3.70 A person has 30 days after the relevant action has been taken to notify the Treasurer and comply with the notification requirement. The notice must contain relevant details such as describing the action that has been taken and the date when the action was taken. The regulations may specify any additional content requirements for the notice. The notice must be made in the manner approved by the Secretary under section 135 of the FATA. *[Compliance Bill, items 9 and 10, subsections 98B(2) and (3), 98C(2) and (3), and 98D(2) and (3), and paragraph 135(3)(bb) of the FATA]*

*Contravention of notification requirement*

3.71 The person may be liable for a civil penalty or an infringement notice for failing to give notice to the Treasurer within 30 days after the action is taken. The civil penalty for contravention of the notification requirement is the greater of:

- 5,000 penalty units (or 50,000 penalty units if the person is a corporation);
- the greater of the following: 75 percent of the value of the consideration or market value of the interest or the benefit obtained (as appropriate), if it can be determined, capped at a maximum monetary value of 2.5 million penalty units.

*[Compliance Bill, item 9, subsections 98B(5), 98C(5) and 98D(5) of the FATA]*

***Direction Powers***

3.72 The Treasurer can give directions to a person where the Treasurer has a reason to believe that a person has engaged, is engaging or will engage in conduct that constitutes a contravention of a provision of the FATA. Directions may also be issued where the conduct relates to failure to act. The direction can be given in relation to one or more suspected contraventions. *[Compliance Bill, item 5, subsections 79A(1) and (2) of the FATA]*

3.73 The Treasurer's directions are designed to provide a quick and efficient response to the conduct of a person and to require the person to promptly remedy a breach of the FATA. The power supports early regulatory intervention in order to protect further or ongoing harm to the national interest.

*Treasurer may give interim directions*

3.74 The Treasurer may give an interim direction to a person if the Treasurer considers that a delay in giving a direction to address or prevent the relevant contravention would be contrary to the national interest. Similar to directions, interim directions can also be given in relation to one or more suspected contraventions. [*Compliance Bill, item 5, subsections 79F(1) and (2) of the FATA*]

3.75 An interim direction will expire if a direction about the same contravention is given to the person. The Treasurer may also revoke an interim direction prior to its expiration. [*Compliance Bill, item 5, section 79H of the FATA*]

*Scope of directions and interim directions*

3.76 The Bill provides a non-exhaustive list of directions and interim directions that the Treasurer may give to a person. The list is indicative of the kinds of directions and interim directions that could be issued by the Treasurer. The list of directions can be extended by regulations. Any types or kinds of directions that are being regularly made by the Treasurer, but that are not listed in the Bill, are expected to be prescribed in the regulations to provide transparency to investors. Any regulations made are subject to disallowance and parliamentary scrutiny. [*Compliance Bill, item 5, subsections 79A(5) and 79F(5) of the FATA*]

3.77 If the Treasurer is satisfied that the composition of the group of senior officers of a corporation is contrary to the national interest, the Treasurer can give a direction to address or prevent this by ensuring that specified persons (including foreign persons who are not Australian citizens) cease to be, or do not become senior officers of the corporation. The Treasurer can give a direction to maintain a specified proportion of senior officers of specified kind (such as foreign persons) in a corporation. [*Compliance Bill, item 5, subsections 79A(6) and (7) of the FATA*]

3.78 A direction or interim direction must be given to a person in writing, and must either address or prevent the suspected contravention that resulted in the direction or interim direction being issued, or prevent a similar or related contravention. The Treasurer can also give directions that are ancillary steps required to address or prevent a suspected contravention. [*Compliance Bill, item 5, subsections 79A(3) and 79F(3), and paragraph 79A(5)(d) of the FATA*]

3.79 A direction or interim direction may specify a time during or by which compliance with a direction must be completed. Where a time is specified in a direction, a person must comply with the direction within that period, however described. The Treasurer may limit a direction so that a person must engage in specified conduct until a condition in a direction is met. [*Compliance Bill, item 5, subsections 79A(4) and 79F(4) of the FATA*]

3.80 The Treasurer may also include a matter, detail or instruction contained in any instrument (legislative or not) or other writing, by referring to or identifying this in a direction or interim direction. A written direction or interim direction given by the Treasurer is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. [Compliance Bill, item 5, subsections 79A(8) and (9), and subsections 79F(6) and (7) of the FATA]

*Procedure when giving a direction and interim direction*

3.81 Before giving a direction, other than an interim direction, the Treasurer must give the person an opportunity to make submissions to the Treasurer about the matter to which the direction relates. Failure to provide an opportunity to make a submission or if the person does not make any submissions does not invalidate a direction. [Compliance Bill, item 5, section 79D of the FATA]

3.82 As soon as practicable after a direction is given to a person, it must be registered on the Federal Register of Legislation. An interim direction does not need to be registered on the Federal Register of Legislation. The Treasurer can decide not to register a direction on the Federal Register of Legislation, if it is determined that it is sensitive information and the release of contents of the given direction would be contrary to the national interest. This will not make the direction invalid. [Compliance Bill, item 5, section 79B of the FATA]

3.83 A direction and an interim direction to a person takes effect from the later of the time when it is given to the person in respect of which it was made, or the time specified in the direction or interim direction. Compliance with the direction or the interim direction is required from that time. The timing of the registration of the direction on the Federal Register of Legislation does not affect the timing of the requirement to comply with a direction. [Compliance Bill, item 5, section 79C and 79G of the FATA]

3.84 The Treasurer can delegate, in writing, a power to give directions in accordance with section 137 of the FATA. The delegation provisions allow the Treasurer to delegate the directions power to the Secretary, the Commissioner of Taxation, or a person engaged under the *Public Service Act 1999* who is employed in the Department or the Australian Taxation Office.

*Treasurer may vary or revoke a direction*

3.85 The Treasurer can vary a direction or an interim direction given to a person, if the Treasurer considers that this is appropriate and not contrary to the national interest. However, before doing so, the Treasurer must give the person an opportunity to make a submission to the Treasurer about the matter to which the variation relates. The Treasurer does not need to give a person these opportunities if the variation is to an interim

direction. [*Compliance Bill, item 5, subsections 79E(1) and (2) and subsection 79J(1) of the FATA*]

3.86 The Treasurer can repeal a direction or an interim direction given to a person if the Treasurer considers that the direction or interim direction is no longer appropriate, and it is not contrary to the national interest. [*Compliance Bill, item 5, subsections 79E(3) and 79J(2) of the FATA*]

3.87 A variation or revocation of a direction must be given to a person in writing. The variation or revocation of the direction takes effect from the later of the time when it is given to the person in respect of which it was made, or the time specified in the direction or interim direction. [*Compliance Bill, item 5, subsections 79E(8) and 79J(3) of the FATA*]

3.88 As soon as practicable after varying or revoking a direction, the Treasurer must register a copy of that variation or revocation on the Federal Register of Legislation. The Treasurer does not need to register a variation or revocation of an interim direction on the Federal Register of Legislation. The Treasurer can decide not to register a variation or revocation on the Federal Register of Legislation, if it is determined that it is sensitive information and the release of contents of the direction would be contrary to the national interest. This does not make that varied direction or revocation invalid. [*Compliance Bill, item 5, subsections 79E(4), (5), (6) and (7) of the FATA*]

#### *Limitations of other provisions*

3.89 A person will not fail to comply with other legislation as listed below or specified in regulations made for the purposes of section 79K, if they have engaged in conduct that was necessary to comply with a direction or interim direction given by the Treasurer under the FATA:

- the *Australian Prudential Regulation Authority Act 1998*;
- the *Australian Securities and Investments Commission Act 2001*;
- the *Competition and Consumer Act 2010*;
- the *Corporations Act 2001*;
- the *Financial Sector (Shareholdings) Act 1998*;
- the *Insurance Acquisitions and Takeovers Act 1991*;
- the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*;
- the new Register legislation which is part of the current FATA reforms; and

- a taxation law (within the meaning of the *Income Tax Assessment Act 1997*).

*[Compliance Bill, item 5, section 79K of the FATA]*

*Penalties for contravention of a direction or interim direction*

3.90 A contravention of a direction or interim direction is a criminal offence and is punishable by imprisonment of 10 years or 15,000 penalty units, or both. *[Compliance Bill, item 6, section 88A of the FATA]*

3.91 A contravention of a direction or interim direction is a civil penalty provision, if the underlying provision to which the relevant contravention relates is a civil penalty provision. A civil penalty for contravention of a direction or interim direction will be the maximum penalty that applies to the underlying provision to which the relevant contravention relates. *[Compliance Bill, item 7, section 98A of the FATA]*

***Monitoring and Investigation Powers***

3.92 Currently, the Treasurer relies on either voluntary cooperation, or the general information gathering power under section 133 of the FATA to monitor and investigate non-compliance, while the Commissioner of Taxation utilises powers under the TAA.

3.93 While the information gathering powers under the FATA support desk-top and paper-based auditing and compliance monitoring, the powers do not establish a specific framework for site or site-based inspections or investigations. At times the existing information gathering power is insufficient to draw compliance conclusions with respect to certain conditions (for example, conditions requiring the installation or removal of surveillance and communications equipment).

3.94 The Bill triggers the *Regulatory Powers (Standard Provisions) Act 2014*, which provides a standard suite of provisions in relation to monitoring and investigation powers. ATO officers working under the delegation of the Treasurer would continue to access powers under the TAA.

*Monitoring Powers*

3.95 Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* creates a framework for monitoring whether the provisions of an enlivening Act or a legislative instrument have been, or are being complied with, and that information given in compliance with a provision of that Act or legislative instrument is correct. Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* includes powers of entry and inspection.

3.96 This subdivision creates a framework for monitoring compliance with the provisions of the FATA and whether correct information has

been provided. Provisions of the FATA which are offences for the purposes of the *Crimes Act 1914* or the *Criminal Code* are also subject to monitoring. [*Compliance Bill, item 41, subsections 101A(1) and (2) of the FATA*]

3.97 This subdivision also clarifies that provisions of this Act that are taxation laws for the purposes of the TAA and may rely upon the Commissioner of Taxation's powers to obtain information and evidence under Division 353 in Schedule 1 to that Act.

#### *Investigation Powers*

3.98 Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* creates a framework for gathering material that relates to the contravention of offence and civil penalty provisions of an Act or legislative instrument.

3.99 A provision under the FATA is subject to investigation under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* if it is an offence against the FATA, or a civil penalty provision of the FATA, or an offence against the *Crimes Act* or the *Criminal Code* that relates to the FATA. [*Compliance Bill, item 41, paragraphs 101B(1) (a), (b) and (c) of the FATA*]

#### *Operation of Monitoring and Investigation Powers*

3.100 For the purposes of Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* the operative provisions apply in relation to the provisions identified and information mentioned in the FATA. For the purpose of Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014* the operative provisions apply in relation to evidential material that relates to a relevant provision in the FATA.

3.101 Related provisions for the purpose of monitoring and investigative powers under the FATA are offence provisions, or civil penalty provisions, of the TAA or the *Corporations Act 2001*, provisions of Part 3 or 3B of the *Register of Foreign Ownership of Water or Agricultural Land Act 2015* and relevant provisions of the *new Register of Foreign Ownership of Australian Assets*. If a thing is found in the course of executing a monitoring or investigation warrant that may be evidence of the contravention of a related provision, an authorised person is permitted to secure that thing in serious or urgent circumstances to prevent it from being concealed or destroyed. [*Compliance Bill, item 41, subsections 101A(3) and 101B(2) of the FATA*]

3.102 With the exception of the *Corporations Act 2001*, the other listed legislation are also administered by the Treasury or the Australian Taxation Office. From an operational perspective, an investigative officer is likely to be an authorised person for multiple pieces of legislation. Therefore in the course of exercising their monitoring or investigative powers they may come across evidence that relates to compliance for a number of legislative obligations and by incorporating the related



provisions, they can secure the evidence from concealment or destruction. Further, both agencies work collaboratively with the Australian Securities and Investment Commission and in monitoring or investigating corporate compliance with the FATA, evidence may be gathered that is relevant to compliance with the *Corporations Act 2001*.

3.103 The Secretary of the Department and an authorised officer as defined in the FATA is an authorised applicant. This enables the Secretary or an authorised officer to apply to an issuing officer for a monitoring warrant or an investigation warrant in relation to premises. The Secretary may delegate the Secretary's powers to an authorised officer who must comply with the Secretary's direction. [*Compliance Bill, item 41, subsections 101A(4), (5) and (6), and subsections 101B(3), (4) and (5) of the FATA*]

3.104 An authorised officer is an authorised person, allowing them to enter any premises and exercise monitoring powers for either the purpose of determining whether provisions subject to monitoring have been, or are being, complied with, or for the purpose of determining whether information subject to monitoring is correct. An authorised officer may also exercise investigation powers where they suspect on reasonable grounds that there may be material on the premises related to the contravention of a relevant provision identified in the FATA. However, an authorised person may not enter the premises unless the occupier has provided consent, or the authorised person is in possession of a monitoring or investigation warrant. [*Compliance Bill, item 41, subsection 101A(7) and 101B(6) of the FATA*]

3.105 The Secretary may appoint a person as an authorised officer, for the purposes of Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*, who is an APS employee performing the duties of an APS Level 6 position, or an equivalent or higher position, in the Department. The Secretary must be satisfied that the person has suitable training or experience to properly perform the functions, or exercise the powers, of an authorised officer. This is consistent with Australian Government policy and is appropriate given authorised officers will exercise coercive powers. An authorised officer must comply with the directions of the Secretary in relation to an authorised officer's exercise of powers or the performance of functions. The status of such a direction given by the Secretary is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003*, and is not intended as an exemption from that Act. [*Compliance Bill, items 38 and 41, sections 4 and 101E of the FATA*]

3.106 An issuing officer can either be a magistrate, a Judge of a court of a State or Territory, or the Judge of the Federal Circuit Court of Australia or a Judge of the Federal Court of Australia. An issuing officer may issue a monitoring or an investigation warrant only when satisfied, by oath or affirmation, that there are reasonable grounds for monitoring

premises for compliance with provisions of the FATA or suspecting that there is, or may be an evidential material on the premises. An issuing officer must not issue a warrant unless the issuing officer has been provided, either orally or by affidavit, with such further information as they require concerning the grounds on which the issue of the warrant is being sought. These constraints ensure adequate safeguards against arbitrary limitations on the right to privacy in the issuing of warrants. *[Compliance Bill, item 41, subsections 101A(8) and 101B(7) of the FATA]*

3.107 The Secretary is the relevant chief executive. The Secretary may, in writing, delegate the Secretary's powers or functions to the Commissioner of Taxation, or a Senior Executive Service employee, or acting SES employee, in the Department. If a power or function is delegated to the Commissioner of Taxation, they may sub-delegate the power or function to an SES employee, or acting SES employee, in the Australian Taxation Office. A delegate must comply with the Secretary's direction. *[Compliance Bill, item 41, subsections 101A(9), (10), (11) and (12), and 101B(8), (9), (10) and (11) of the FATA]*

3.108 The Federal Court of Australia, the Federal Circuit Court of Australia, and a court of a State or Territory that has jurisdiction in relation to matters arising under this Act are a relevant court. This jurisdiction has been conferred widely to ensure that disputes can be resolved in the lowest level of court appropriate, and allow the workload resulting to be distributed between courts. *[Compliance Bill, item 41, subsections 101A(13) and 101B(12) of the FATA]*

3.109 An authorised officer may be assisted by other persons in exercising powers or performing functions or duties, only where it is necessary and reasonable to do so. *[Compliance Bill, item 41, subsections 101A(14) and 101B(13) of the FATA]*

3.110 Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*, as they apply to the provisions identified and information mentioned in the FATA, extend to the external Territories. *[Compliance Bill, item 41, subsections 101A(15) and 101B(14) of the FATA]*

### ***Enforceable Undertaking***

3.111 All provisions of the FATA are enforceable under Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014*. This Part creates a framework for accepting and enforcing undertakings relating to compliance with provisions of the FATA. *[Compliance Bill, item 41, subsection 101C(1) of the FATA]*

3.112 The Treasurer is an authorised person in relation to the provisions subject to enforceable undertakings under the FATA, enabling the Treasurer to accept and enforce undertakings relating to compliance with the FATA. The Treasurer may, in writing, delegate the Treasurer's powers or functions to the Secretary or the Commissioner of Taxation,

with further sub-delegation of the power or function to an SES employee, or acting SES employee, in the Department or the Australian Taxation Office. A delegate must comply with the delegator's direction. [*Compliance Bill, item 41, subsections 101C(2), (3), (4) and (5) of the FATA*]

3.113 The Federal Court of Australia, the Federal Circuit Court of Australia, and a court of a State or Territory that has jurisdiction in relation to matters arising under this Act are a relevant court in relation to provisions of the FATA that are enforceable under Part 6 of the Regulatory Powers Act. Part 6 of the Regulatory Powers Act gives a relevant court power to make orders where there is a breach of an enforceable undertaking. [*Compliance Bill, item 41, subsection 101C(6) of the FATA*]

3.114 Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014*, as it applies to the provisions in the FATA, extend to the external Territories. [*Compliance Bill, item 41, subsection 101C(7) of the FATA*]

3.115 After an undertaking is accepted by the Treasurer, it must be published on the Department's website as soon as practicable. The Treasurer can decide not to publish an undertaking, if it is determined that it is sensitive information and the release of contents of the accepted undertaking would be contrary to the national interest. [*Compliance Bill, item 41, subsection 101D of the FATA*]

## **Application and transitional provisions**

### ***Expanding the availability of infringement notices under the FATA***

3.116 The amendments will apply in relation to breaches of the foreign investment rules that occur on or after 1 January 2021. [*Compliance Bill, item 19*]

### ***Updating the penalties for certain criminal offences and contravention of civil penalties under the FATA***

3.117 The amendments will apply in relation to the contravention of the civil penalty provisions of the FATA that occur on or after 1 January 2021. [*Compliance Bill, item 33*]

### ***Infringement notices and civil penalty for vacancy fee lodgements***

3.118 The amendments will apply in relation to the vacancy fee returns given on or after 1 January 2021. [*Compliance Bill, item 37*]

### ***Remedy incorrect statements***

3.119 The Treasurer can revoke a no objection notification or exemption certificate, and impose a civil penalty or infringement notice for any false or misleading statement given in relation to the no objection

notification or exemption certificate to the Treasurer before, on or after the commencement day. [*Compliance Bill, item 4*]

***Notification of actions***

3.120 The notification requirement will apply in relation to no objection notices and exemption certificates given on or after 1 January 2021. [*Compliance Bill, item 11*]

***Direction Powers***

3.121 The Treasurer can give directions and interim directions to a person where the relevant conditions for making a direction or interim direction were met on or after the commencement day. [*Compliance Bill, item 8*]

***Monitoring Powers***

3.122 Amendments apply in relation to compliance with the provisions of the FATA and information given in compliance with a provision of the FATA before, on or after the commencement day. [*Compliance Bill, item 42*]

***Investigation Powers***

3.123 Amendments apply in relation to contraventions or suspected contraventions of any offence provision or civil penalty provision of the FATA, or an offence against the Crimes Act or the Criminal Code that relates to the FATA that occurs before, on or after the commencement day. [*Compliance Bill, item 43*]

***Enforceable Undertaking***

3.124 The Treasurer can accept and enforce undertakings relating to compliance with the FATA given on or after the commencement day. [*Compliance Bill, item 44*]

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# **Chapter 4**

## **Register of Foreign Owned Australian Assets**

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### **Outline of chapter**

4.0 This Chapter explains the amendments contained in the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020: Register of Foreign Ownership. Reference to 'the Bill' in this Chapter are to that Bill.

4.1 This Bill creates a Register of Foreign Ownership of Australian Assets. The Register will utilise the framework of the *Commonwealth Registers Act 2020*, which will streamline and simplify the process of registration for both investors and the Registrar.

### **Context of amendments**

4.2 Currently the Australian Taxation Office administers the Register of Foreign Owned Water or Agricultural Land. A foreign person who has a registrable interest in water or agricultural land is required to register that interest. The ATO also maintains a register of residential property. These interests are recorded based on reporting conditions imposed on foreign persons who acquire residential property.

4.3 The Australian Communications and Media Authority maintains a Register of Foreign Owners of Media Assets and the Department of Home Affairs maintains the Register of Critical Infrastructure.

### **Summary of new law**

4.4 This Bill imposes an obligation on foreign investors to notify the Registrar of certain prescribed events which occur in relation to a registrable land or water interest or the acquisition of an interest in an Australian entity or business and interests acquired under the national security test. Civil penalty provisions will apply for failure to register a registrable interest.

## Comparison of key features of new law and current law

4.5 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>
Information about foreign ownership of certain Australian assets is recorded on a register held by the Government body which is appointed by the Treasurer.	There is a legislated register of foreign ownership of agricultural land and water. The ATO maintains a register of foreign ownership of residential land. There is no single register of foreign ownership of Australian assets.
The information is subject to uniform rules that are flexible, technology neutral and governance neutral.	The use of the information on the agricultural land and water register is governed by the <i>Taxation Administration Act 1953</i> .
The Government will maintain and have access to a single register of foreign ownership of specified Australian assets. Registers of foreign ownership of media assets and critical infrastructure are maintained by other Commonwealth bodies.	No equivalent

## Detailed explanation of new law

4.6 The requirement to keep a Register of Foreign Ownership of Australian Assets is in Part 7A of the FATA. Bill of provides that a Registrar must be appointed by the Treasurer to administer the Register of Foreign Ownership of Australian Assets. [*Register Bill, items 1 and 5, section 130A of the FATA*]

4.7 The Registrar that must maintain the Register of Foreign Ownership of Australian Assets is appointed under the *Commonwealth Registers Act 2020* (the Registers Act). [*Register Bill, Item 5, section 130D of the FATA*]

4.8 Under the Registers Act, the Treasurer can appoint an existing Commonwealth body to be the Registrar of a register by notifiable instrument. The Registrar of the Register of Foreign Ownership of Australian Assets performs its functions and exercises its powers in accordance with the FATA, the data standards and other Commonwealth laws. [*Register Bill, item 5, section 130C of the FATA*]

4.9 A Commonwealth body can be an agency within the meaning of the *Public Service Act 1999*, a body established for a public purpose by or under a law of the Commonwealth, or a person holding or performing duties of an office, or appointed under a law of the Commonwealth. *[Register Bill, Item 2, section 4 of the FATA]*

4.10 The Registrar is required to give the Treasurer an annual report to be tabled in Parliament, using statistical de-identified information from the Register. The Commissioner must give the report to the Treasurer as soon as practicable after 30 June each year. *[Register Bill, Item 5, section 130ZG of the FATA]*

4.11 The Bill requires that a foreign person must register certain events. The events that must be registered are:

- acquiring or ceasing to hold an interest in land or water; *[Register Bill, item 5, sections 130J and 130K of the FATA]*
- acquiring or ceasing to hold an interest in an Australian business, agribusiness or entity; *[Register Bill, item 5, section 130P of the FATA]*
- becoming or ceasing to be a foreign person while holding an interest in an Australian entity; and *[Register Bill, item 5, sections 130L, 130M, 130R, 130S and 130T of the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020]* becoming or ceasing to be a foreign person while holding an interest in an Australian entity; and *[Register Bill, item 5, sections 130L, 130M, 130R, 130S and 130T of the FATA]*
- an event that relates to a no objection notification or exemption certificate. *[Register Bill, Item 5, sections 130U, 130V, 130W, 130X and 130Y of the FATA]*

4.12 A registrable land or water interest is an interest in registrable land; an exploration tenement; a registrable water entitlement; or a contractual water right as defined in the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*. *[Register Bill, item 2, section 4 of the FATA]*

4.13 A registrable interest in land is an interest in land that is in Australia, or the seabed of the offshore area, a mining or production tenement or an exploration tenement that is not an equitable interest. *[Register Bill, item 2, section 4 of the FATA]*

4.14 An exploration tenement is a right under a law to recover minerals (such as coal or ore), oil or gas in Australia or from the seabed or subsoil of the offshore area for the purposes of prospecting or exploring for minerals, oil or gas. *[Register Bill, item 2, section 4 of the FATA]*

4.15 The Register contains the complete information required to satisfy the notification requirements and any information added or

corrected by the Registrar. It is not a public register. It includes any information provided for in the legislation and the data standards and any information corrected or updated by the Registrar. Where a person is required to register an interest, the notice must be given in accordance with the data standards and within 30 days of the event requiring registration. The registration should generally be made by the foreign person unless another person is specified in the law. *[Register Bill, Item 5, sections 130E, 130F, 130G and 130H of the FATA]*

4.16 In addition to registering interests, a foreign person is also required to register changes in relation to those interests. The changes that must be notified to the Registrar are when a person starts or ceases to hold the interest, where an interest, particularly in land, changes to another kind of interest, for example, where agricultural land becomes residential land and where the interest in an Australian entity changes by five per cent or more. *[Register Bill, item 5, sections 130N and 130Q of the FATA]*

4.17 The events and changes in interest required to be registered may be added to by regulations, to ensure that the Registrar is able to respond swiftly to any changes in relation to these interests. These regulations may prescribe what notice is required to be given to the Registrar and the timeframe. *[Register Bill, Item 5, section 130Z of the FATA]*

4.18 An agent of a foreign person is able to give notice, however, the obligation remains with the foreign person to ensure the Registrar is notified. *[Register Bill, Item 5, section 130ZC of the FATA]*

4.19 Where a person required to notify the Registrar dies within the 30 day period without having notified the Registrar, the executor or administrator of the estate is required to notify the Registrar. *[Register Bill, Item 5, section 130ZA of the FATA]*

4.20 Where a business entity is subject to winding up during the 30 day period, the corporate liquidator is required to notify the Registrar. *[Register Bill, Item 5, section 130ZB of the FATA]*

4.21 The registration must be made in accordance with the data standards and must occur within 30 days of the event.

4.22 A person who is required to notify of an event, must keep records for five years after the notification ceases to be required. *[Register Bill, items 3 and 4, sections 117 and 118 of the FATA]*

4.23 Failure to comply with a registration requirement is subject to a civil penalty provision. The maximum penalty amount is 250 penalty units. This civil penalty amount operates as an appropriate deterrent and is proportionate to the impact of non-compliance with registration requirements. While failing to register is serious, in that it can impact the visibility of foreign investment for Government, this level of penalty also reflects that registration is also a record keeping requirement at the end of a foreign investment review process. This penalty is consistent with the



existing penalty in the *Register of Foreign Ownership of Water or Agricultural Land Act 2015*. [*Register Bill, Item 5, section 130ZD of the FATA*]

4.24 The Registrar is empowered to make data standards, which are disallowable legislative instruments. The data standards relate to how information is collected, authenticated, stored and corrected. They may also prescribe internal processes and procedures to be followed by the Registrar and their delegates. For example, the data standards may prescribe the information required when notifying the Registrar, including details of the foreign person, the nature and details of the interest and whether the interest was acquired under the national security test. These examples are not exhaustive. The data standards may not override any legislative requirement in relation to the Register. [*Register Bill, Item 5, section of the FATA*]

4.25 The Registrar is able to delegate any of its powers and functions as a Commonwealth body, other than making data standards, to any person permitted under Commonwealth law, or as provided in the regulations. A delegate of the Registrar must comply with any directions issued by the Registrar. [*Register Bill, Item 5, section 130ZF of the FATA*]

4.26 Disclosures made in relation to the Register are governed by the FATA information sharing provisions, which set out the circumstances in which information can be disclosed to other third parties. Consistent with the existing practices for similar registers, the information on the register will not be publicly available and will not be able to be inspected.

4.27 The Treasurer may give general directions to the Registrar in relation to the administration of the Register, including in relation to instruments made by the Registrar. The Registrar must comply with a direction given by the Treasurer. [*Register Bill, Item 5, section 130ZE of the FATA*]

## **Application and transitional provisions**

4.28 The Register and associated law applies on a day declared by the Treasurer by legislative instrument, or the four years after commencement. [*Register Bill, item 5, section 130B of the FATA*]

4.29 The intended start date of this requirement is 1 January 2021.



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## **Chapter 5**

# ***A fairer and simpler framework for foreign investment fees***

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### **Outline of chapter**

5.1 This Chapter sets out the new fee framework for foreign investment in Australia.

### **Context of amendments**

5.2 Under the FATA, fees are generally payable when a foreign person applies for an exemption certificate, gives notice of a notifiable action, gives notice relating to an action that is not notifiable, and applies for a variation of a no objection notification or exemption certificate. Generally a fee is payable when a notifiable action or both a notifiable and significant action is being taken.

5.3 The FATA Fees Act and the regulations set out the specific fees and exemptions for the fees payable when giving notice under the FATA.

5.4 Fees are calculated based on the notification type, the value of the transaction or assets and the number of actions being taken. However, the fee may be higher or lower depending on the type of agreements in place, whether it is a variation, and whether any exemptions may apply.

5.5 All fees imposed are a tax.

### **Summary of new law**

5.1 In comparison to the existing fee framework, the new fee framework is intended to be fairer and simpler, and will reduce the administrative burden of determining the fee that is payable.

5.2 The Imposition Bill establishes authority for the regulations to charge existing and new fees.

5.3 Fees are still payable when a foreign person:

- applies for an exemption certificate or a variation of an exemption certificate;
- gives notice of a notifiable action;

- gives a notice about a proposal to take a significant action that is not a notifiable action;
- applies for a variation of a no objection notification; and
- when a foreign person has been given an order or has been provided a no objection notification without giving the Treasurer a notice relating to the action specified in the order or notification.

5.4 The amendments establish new fees. A fee is payable for a notifiable national security action and for a reviewable national security action that has either been notified by the Treasurer or notified to the Treasurer.

5.5 It also ensures that a fee is payable for all notifiable and significant retrospective applications and provides that only one person in a joint tenant agreement is required to lodge a vacancy fee form.

5.6 All fees imposed are a tax.

Comparison of key features of new law and current law

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

New law	Current law
FATA Fees Act	
<p>Fees are payable on applications and notices made under the FATA. All fee amounts are to be prescribed in the regulations.</p> <p>Regulations can prescribe fee amounts including (but not limited to):</p> <ul style="list-style-type: none"><li>• Specifying a fee amount or method;</li><li>• Specifying different fee amounts or methods;</li><li>• Specifying a nil amount or a method resulting in a nil amount;</li><li>• Specifying a method for a fee if two or more fees are payable in relation to a single agreement;</li><li>• Specifying a method for a fee if the action is covered by multiple actions; and</li></ul>	<p>Fees are payable on applications and notices made under the FATA. Fee amounts are prescribed in the FATA Fees Act and regulations.</p>

<i>New law</i>	<i>Current law</i>
<b><i>FATA Fees Act</i></b>	
<ul style="list-style-type: none"> <li>Specifying an initial amount, and then later determining a reduced amount or nil amount.</li> </ul>	
<b><i>FATA</i></b>	
Fees are payable for a notifiable national security action	No equivalent
Fees are payable when the Treasurer provides a notice about a reviewable national security action	No equivalent
Fees are also payable for reviewable national security actions that are voluntarily notified to the Treasurer.	Fees are payable for actions notified to the Treasurer that are not notifiable.
Fees are payable for retrospective applications for all notifiable and significant actions.	No equivalent
Only one person in a joint tenant arrangement is required to submit the vacancy fee return, in order to determine the applicable vacancy fee liability.	No equivalent

## Detailed explanation of new law

### Changes to the FATA Fees Act

#### *New regulation making power*

5.8 Fees are payable under Part 6 of the FATA (for an action) and under Part 6A of the FATA (for a vacancy fee for foreign acquisitions of residential land). Fees are imposed as a tax. A fee is payable when a person:

- applies for an exemption certificate;
- applies for a variation of an exemption certificate;
- gives notice of a notifiable action or a notifiable national security action;
- gives a notice in relation to a proposal to take a significant action that is not a notifiable action;
- applies for a variation of a no objection notification;

- retrospectively notifies the Treasurer for all significant and notifiable actions;
- has been given an order or has been provided a no objection notification without giving the Treasurer a notice relating to the action specified in the order or notification;
- receives a notice about a reviewable national security action;
- gives notice of a reviewable national security action; and
- is liable for a vacancy fee for acquisitions of residential land.

*[Schedule 1, item 2, section 5 of the FATA Fees Act]*

5.9 The FATA Fees Act is amended to provide that the regulations will set the amounts of fees that can be charged.

5.10 Without limiting the regulation making power, subsection 6(2) of the FATA Fees Act provides that regulations may do one or more of the following:

- specify a fee amount or a method for determining an amount;
- specify different fee amounts or methods for different kinds of fees, or different kinds of persons liable to pay a kind of fee, or different circumstances giving rise to the liability to pay a kind of fee;
- specify a nil amount or a method resulting in a nil amount;
- specify a method for a fee if two or more fees are payable in relation to a single agreement;
- specify a method for a fee if the action is covered by multiple actions; and
- specify an initial amount, and then later determine a reduced amount or nil amount.

*[Schedule 1, item 2, section 6 of the FATA Fees Act]*

5.11 The amendments ensure that, if necessary, fees can be paid by different kinds of persons. For example, for the most part, fees are borne by the foreign person making the acquisition. However, fees for a new dwelling exemption certificate are typically paid by the developer or the vendor, who can be either an Australian citizen or a foreign person. By providing that fees can be payable by different persons, the amendments ensure that the right person is liable to pay the appropriate fee for actions taken under the FATA. *[Schedule 1, item 2, paragraph 6(2)(b)(ii) of the FATA Fees Act]*

5.12 The amendments ensure that a fee is payable for different kinds of circumstances giving rise to the liability to pay the fee. An example of a circumstance could include enabling different fee amounts to be charged

for different kinds of variations or for variations with differing complexity. *[Schedule 1, item 2, paragraph 6(2)(b)(iii) of the FATA Fees Act]*

5.13 The amendments make clear that the regulations can prescribe a \$0 amount if necessary. For example, some actions under the FATA may not attract a fee. *[Schedule 1, item 2, paragraph 6(2)(c) of the FATA Fees Act]*

5.14 The amendments provide that the regulations can prescribe a method of working out the fee when a scenario arises where two or more fees are payable for a single agreement or when multiple actions are being covered. For example, the regulations could prescribe that if a single agreement covers the acquisition of multiple actions, the applicable fee is based on the aggregate consideration of the entire transaction. Previously the one agreement rule specified where multiple actions are covered by the single agreement, the fee applicable and payable is the highest fee. *[Schedule 1, item 2, paragraphs 6(2)(d) and 6(2)(e) of the FATA Fees Act]*

5.15 As all fee amounts are prescribed in the regulations, an overall cap which limits the fee amount is set in the FATA Fees Act. The amendment ensures all fee amounts prescribed in the regulations do not exceed the maximum cap. *[Schedule 1, item 2, subsection 6(3) of the FATA Fees Act]*

#### *Changes to the FATA – national security fees*

5.16 The reforms give the Treasurer new powers where there are national security risks. The acquisition of certain interests is defined as a notifiable national security action and these must be notified to the Treasurer. The amendment ensures that fees are payable where a person notifies of a notifiable national security action. *[Fees Bill, item 4, subsection 113(1), table items 3 and 4 of the FATA]*

5.17 Under the new national security test, the Treasurer may review certain actions that are not otherwise captured under the FATA or are significant actions but not notifiable if the Treasurer considers that the action may pose a national security concern. The amendments provide that a fee is payable when the Treasurer provides a notice that the action poses a national security concern. The fee is payable before the end of the 30 days after the Treasurer gives the notice. A fee is also payable if the person notifies the Treasurer of a reviewable national security action (voluntarily notification). *[Fees Bill, items 5 and 6, section subsection 113(1), after table item 4; subsection 113(1) (cell at table item 5, column 1) of the FATA]*

5.18 As fees are payable as part of the new national security test, the simplified outline of section 112 is amended to reflect that a fee is payable for giving a notice relating to a notifiable national security action. *[Fees Bill, item 2, section 112 of the FATA]*

5.19 Section 114 of the FATA is amended to clarify that fees are required to be paid before the exercise of any of the Treasurer's powers. A

fee is payable under section 113 when an application is made or a notice is given by the person. [*Fees Bill, item 8, section 114 of the FATA*]

5.20 Consequential amendments are made to ensure that a notice also includes a notifiable national security action. [*Fees Bill, item 11, paragraph 135(3)(c) of the FATA*]

### ***Changes to the FATA – retrospective applications***

5.21 Section 46 of the FATA is amended to clarify that a notifiable action does not have to be a proposed action. The change clarifies that a fee can be charged for retrospective actions that are both significant and notifiable actions. [*Fees Bill, item 1, section 46 of the FATA*]

5.22 Amendments to section 113 of the FATA ensure fees are payable for retrospective applications for all notifiable and significant actions. The amendment to table item 5 of section 113 of the FATA clarifies a fee is payable if a person is given an order under Subdivision A of Division 2 of Part 3 or if they have been given a no objection notification and they did not give a notice about the action. [*Fees Bill, item 6, subsection 113(1) (cell at table item 5, column 1) of the FATA*]

### ***Changes to the FATA and FATA Fees Act – Vacancy fee changes***

5.23 The amendments provide that only one person in a joint tenant arrangement is required to submit the vacancy fee return, in order to determine the applicable vacancy fee liability. As long as one person in the joint tenant arrangement submits the vacancy fee return, that is sufficient for the Commissioner of Taxation to determine the liability for persons involved in a joint tenant arrangement. If the Commissioner of Taxation finds the person liable for a vacancy fee, then the persons in the joint tenant arrangement are jointly and severally liable for the vacancy fee. The change applies to vacancy years ending on or after 31 December 2020. [*Fees Bill, items 12 and 13, section 115D of the FATA and Application of amendment*]

5.24 Paragraph 6(2)(f) of the FATA Fees Act ensures that for vacancy fees for joint tenants, the regulations can provide a method that first determines the amount payable and can also later determine a lower amount of fees, including a nil amount. As joint tenants are jointly and severally liable for the vacancy fee, it may be the case that in joint tenant arrangements only one person is required to pay the vacancy fee. [*Fees Bill, item 2, paragraph 6(2)(f) of the FATA Fees Act*]



## **Consequential amendments**

### **Changes to the FATA Fees Act**

5.25 As all fee amounts are prescribed in the regulations, consequential amendments are made to the FATA Fees Act to repeal definitions that were previously used in the FATA Fees Act which are no longer relevant. *[Schedule 1, item 1, subsection 4(1) of the FATA Fees Act]*

### **Changes to the FATA**

5.26 As all fee amounts are prescribed in the regulations, a number of consequential amendments are made to the FATA to clarify that all fee amounts are made under the FATA Fees Act and found in the regulations. *[Fees Bill, items 3, 7, 9 and 10; section 112, subsection 113(1) (note), section 115A, and subsection 115C(1) note, of the FATA]*

## **Application and transitional provisions**

### **Changes to the FATA Fees Act**

5.27 The new fees commence from the later of:

- the day after Royal Assent; and
- the day the amendments to the FATA commence.

5.28 However, if the main amendments do not receive Royal Assent then the new fees will not apply. This ensures that all related legislation must be enacted before the new fees can apply. *[Commencement table of the FATA Fees Act]*

5.29 The new fees apply to fees that become payable on or after 1 January 2021. *[Schedule 1, item 3, application of amendments of the FATA Fees Act]*