

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*Foreign Acquisitions and Takeovers Fees Imposition Act 2015*

*Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020*

The *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* establishes a framework to impose, as taxes, fees for the review foreign investment applications.

Section 13 of the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (the Act) provides that the Governor-General may make regulations prescribing matters. These can be any matters required or permitted by the Act to be prescribed or any matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (the draft Fee Regulations) is to set out the fees payable for particular actions or notices given or issued under the *Foreign Acquisitions and Takeovers Act 2015*.

The draft Fee Regulations form part of a broader foreign investment legislation reform package, as announced by the Government on 5 June 2020 to strengthen the foreign investment framework. The amendments to the fee framework is intended to establish a fairer and simpler framework for foreign investment fees.

The draft Fee Regulations apply to fees that become payable on or after 1 January 2021.

The Act provides that fees are payable under Part 6 and Part 6A of the *Foreign Acquisitions and Takeovers Act 1975* (FATA). The draft Fee Regulations set the fees 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 of a proposal to take either a significant action that is not a notifiable action or notifiable national security action; or to take a reviewable national security action;
- applies for a variation of a no objection notification;
- retrospectively notifies the Treasurer of a significant or 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 that an action that is a reviewable national security action or a significant action that has not been notified may pose a national security concern; and
- is liable for a vacancy fee for acquisitions of residential land.

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

Details of the draft Fees Regulations are set out in Attachment A

The draft Fees Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The draft Fees Regulations will commence the later of the day after the instrument is registered and the day the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* commences.

**Details of the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020***

**Section 1 – Name of the draft Fee Regulations**

This section provides that the name of the draft Fee Regulations is the *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (the draft Fee Regulations).

**Section 2 – Commencement**

Schedule 1 to the draft Fee Regulations commences the later of: the day after the instrument is registered on the Federal Register of Legislation; and the day the *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* commences.

**Section 3 – Authority**

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

**Section 4 – Schedules**

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

**Section 5 – Definitions**

This section sets out the meaning of some of the key words or terms used in the draft Fee Regulations. Expressions used in the draft Fee Regulations that are not defined in subsection 5(1) and are defined in the *Foreign Acquisitions and Takeovers Act 1975* (FATA) or the *Foreign Acquisitions and Takeovers Regulations 2015* (Principal Regulations) have the same meaning in the FATA and Principal Regulations. For example ‘consideration’, ‘land entity’, ‘mining and production or exploration entity’ and ‘tenements’ are all terms defined in the Principal Regulations and have the same meaning in the draft Fees Regulations.

The following definitions are defined in the draft Fee Regulations:

- ‘Actual actions’ has the meaning given by section 42. ‘Actual actions’ is used to determine the appropriate fee treatment where one agreement covers more than one action;
- ‘Dominant kind of Australian land’ has the meaning given by section 45. ‘Dominate kind of Australian land’ is used to determine the appropriate fee treatment where one agreement covers different types of Australian land.

- ‘Fee constant’ has the meaning given by section 9. The ‘Fee constant’ applicable to certain types of actions is a value compared against the consideration, for the purposes of working out the applicable fee. For example the fee constant for acquiring an interest in agricultural land is \$2 million.
- ‘Foreign business person’ means a foreign person, except an individual not ordinarily resident in Australia, carrying on a business in Australia or elsewhere. The Australian Taxation Office provides guidance for Australian tax purposes as to whether a person is carrying on a business.
- ‘Indexation factor’ has the meaning given by section 60. ‘Indexation factor’ is used to determine the indexation for fees.
- ‘Index number’ has the meaning given by section 61. ‘Index number’ is published by the Australian Statistician.
- ‘Internal reorganisation’ has the meaning given by subsection 35(2). ‘Internal reorganisation’ is used to determine a different fee where an action meets that definition.
- ‘Quarter’ means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.
- ‘Relevant acquisition’ has the meaning given by subsection 36(2). ‘Relevant acquisition’ is used to determine whether a vacancy fee is payable.
- ‘Value’, of consideration, has the same meaning as in the Principal Regulations, subject to the adjustment in subsection (3).
- ‘Wholly-owned group’ has the same meaning as in the *Income Tax Assessment Act 1997*, which provides that if two companies are in the same wholly-owned group, if one of the company is a subsidiary of the other company or if each of the company is a subsidiary of the same third company.

#### *Value of consideration – long term leases*

The value of the consideration for an acquisition of an interest in Australian land has a different meaning under the draft Fees Regulations than it does in the Principal Regulations. The term ‘consideration’ is defined in section 14 of the Principal Regulations. However, for the purposes of the draft Fee Regulations, the term has been modified. When a person acquires an interest in Australian land, where there is a long term lease, licence or option involved, that is likely to exceed 25 years, the consideration is adjusted and apportioned to 25 years’ worth of payments.

For example, if an applicant acquires Australian land that has a 100 year lease for consideration of \$100 million. For the purposes of working out the fee applicable, the applicant would only need to account for 25 years’ worth of payments, by calculating all the payments over the 100 year period and apportioning that to 25 years’ worth of payments, which makes the value \$25 million.

## **Fees relating to actions**

### **Section 6 – Fees covered by this Part**

This section provides that fees are imposed by section 5 of the Act and are payable under Part 6 of the FATA for an action. It also provides that a vacancy fee is payable under Part 6A of the FATA for foreign acquisitions of residential land. 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 (i.e. because the Treasurer has determined that the action may pose a national security concern);
- gives notice of a reviewable national security action; and
- is liable for a vacancy fee for acquisitions of residential land.

### **Fees for giving notice of a notifiable action or national security action**

#### **Section 7 – Fees covered by this Division**

This section provides that a fee is payable in accordance with item 3 of the table in subsection 113(1) of the FATA, which provides a fee is payable when a person gives notice of a notifiable action or a notifiable national security action under section 81 of the FATA.

### **Fees for giving notice of a notifiable actions**

#### **Section 8 – Fees for giving notice of a notifiable action**

As a general rule, the fee for giving a notice under section 81 of the FATA is worked out by using the ‘fee constant’ number in section 9 and applying the fee in the formula set out in sections 10 and 11 of the draft Fee Regulations.

For foreign government investors, the applicable fee for giving a notice under section 81 of the FATA of a notifiable action to start an Australian business (paragraph 56(1)(b) of the FATA) is \$2,000.

Section 9 – Finding the fee constant

The fee constant is a different value depending on the kind of notifiable action. Items 1, 2 and 3 of the table in section 9 provides for the following fee constant:

- acquiring an interest in residential land - \$1 million;
- acquiring an interest in agriculture land - \$2 million;
- acquiring an interest in commercial land, interest in a mining or production tenement; acquiring an interest in certain entities; a foreign government investor acquiring an interest in Australian media business; a foreign government investor acquiring a direct interest in an Australian entity or business; a foreign government investor acquiring certain mining interests - \$50 million.

Section 10 – Applying the fee constant to work out the amount of the fee

The amount of fee payable is worked out by applying the fee constant against the consideration of the acquisition in order to determine the applicable fee. Item 1 of section 10 provides that if the consideration is less than or equal to the fee constant, the fee applicable is stated in subsection 2. In essence the starting fees are as follows:

If the consideration is less than:	The fee is ...
\$1 million for residential land	\$6,600
\$2 million for agricultural land	\$6,600
\$50 million for commercial land, tenements, businesses and entities.	\$6,600

For actions with a consideration greater than the relevant fee constant, the applicable fee is increased by the fee component (\$13,200) for every multiple of the fee constant.

Table item 2 of section 10 of the draft Fee Regulations provides that if the consideration is more than the fee constant and is a multiple of the fee constant (for example if the fee constant is \$2 million, the multiples are, 2, 4, 6, 8, 10 million etc.) then the fee is worked out in accordance with subsection 11(1) of the draft Fee Regulations. This has the effect of lowering the fee for an acquisition with a consideration that is exactly a multiple of the fee constant. The fee cannot exceed \$500,000.

Table item 2 of section 10 of the draft Fee Regulations provides that if the consideration is more than the fee constant and is not a multiple of the fee amount, then the fee is worked out in accordance with subsection 11(2) of the draft Fee Regulations. However the fee cannot exceed \$500,000.

Section 11 – Components for working out the fee if the consideration is more than the fee constant

The amount of fee payable is worked out by applying a different formula against the fee constant if the consideration is more than the fee constant.

For example if the consideration is more than the fee constant, and if the consideration is a multiple of the fee constant, the formula at subsection 11(1) of the draft Fee Regulations provides the fee is: the amount of consideration for the action minus \$1 divided by the fee constant and then multiplied by \$13,200.

If the consideration is more than the fee constant and if the consideration is not a multiple of the fee constant, the formula at subsection 11(2) of the draft Fee Regulations provides the fee is: the amount of consideration for the action divided by the fee constant, and then multiplied by \$13,200.

Together, sections 10 and 11 provide for the following formulas.

**The fee payable for an acquisition of Residential land is determined below:**

- For an acquisition with a consideration of \$1 million or less, \$6,600
- For an acquisition of more than \$1 million, worked out as follows:
  1. Apply the following formula:
    - 1.1. If the consideration for the acquisition is a multiple of \$1 million,
      - 1.2.  $(\text{Consideration of the acquisition} - 1)/1 \text{ million}$ , rounding down to the nearest whole number
      - 1.3. Otherwise,
        - 1.4.  $(\text{Consideration for the acquisition})/1 \text{ million}$ , rounding down to the nearest whole number;
    2. Multiply the step 1 amount by \$13,200
    3. The step 2 amount is the amount of the fee.

**The fee payable for an acquisition of Agricultural land**

- For an acquisition with a consideration of \$2 million or less, \$6,600 For an acquisition of more than \$2 million, worked out as follows:
  1. Apply the following formula:
    - 1.1. If the consideration for the acquisition is a multiple of \$2 million,
      - 1.2.  $(\text{Consideration of the acquisition} - 1)/2 \text{ million}$ , rounding down to the nearest whole number
      - 1.3. Otherwise,
        - 1.4.  $(\text{Consideration for the acquisition})/2 \text{ million}$ , rounding down to the nearest whole number;
    2. Multiply the step 1 amount by \$13,200

3. The step 2 amount is the amount of the fee.

**The fee payable for an acquisition of Commercial land is determined below:**

- For an acquisition with a consideration of \$50 million or less, \$6,600
- For an acquisition of more than \$50 million, worked out as follows:
  1. Apply the following formula:
    - 1.1. If the consideration for the acquisition is a multiple of \$50 million,
      - 1.2.  $(\text{Consideration of the acquisition} - 1)/50$  million, rounding down to the nearest whole number
      - 1.3. Otherwise,
        - 1.4.  $(\text{Consideration for the acquisition})/50$  million, rounding down to the nearest whole number;
    2. Multiply the step 1 amount by \$13,200
    3. The step 2 amount is the amount of the fee.

**The fee payable for an acquisition of an interest in a tenement is determined below:**

- For an acquisition with a consideration of \$50 million or less, \$6,600
- For an acquisition of more than \$50 million, worked out as follows:
  4. Apply the following formula:
    - 4.1. If the consideration for the acquisition is a multiple of \$50 million,
      - 4.2.  $(\text{Consideration of the acquisition} - 1)/50$  million, rounding down to the nearest whole number
      - 4.3. Otherwise,
        - 4.4.  $(\text{Consideration for the acquisition})/50$  million, rounding down to the nearest whole number;
    5. Multiply the step 1 amount by \$13,200
    6. The step 2 amount is the amount of the fee.

**The fee payable for an acquisition of interests in a business or entity is determined below:**

- For an acquisition with a consideration of \$50 million or less, \$6,600 For an acquisition of more than \$50 million, worked out as follows:
  7. Apply the following formula:
    - 7.1. If the consideration for the acquisition is a multiple of \$50 million,
      - 7.2.  $(\text{Consideration of the acquisition} - 1)/50$  million, rounding down to the nearest whole number
      - 7.3. Otherwise,
        - 7.4.  $(\text{Consideration for the acquisition})/50$  million, rounding down to the nearest whole number;
    8. Multiply the step 1 amount by \$13,200
    9. The step 2 amount is the amount of the fee.

The following table provides a guide as to what the applicable fee would be against certain considerations. As can be observed, the applicable fee increases by a flat amount (\$13,200) for each multiple of the fee constant that the consideration for the acquisition exceeds.

<b>Residential land thresholds</b>	<b>Agricultural land thresholds</b>	<b>Commercial land and business thresholds</b>	<b>Maximum applicable fee</b>
\$75,000 or less	\$75,000 or less	\$75,000 or less	<b>\$2,000</b> <i>(De minimis fee rule)</i>
\$1 million or less	\$2 million or less	\$50 million or less	<b>\$6,600</b>
\$2 million or less	\$4 million or less	\$100 million or less	<b>\$13,200</b>
\$3 million or less	\$6 million or less	\$150 million or less	<b>\$26,400</b>
\$4 million or less	\$8 million or less	\$200 million or less	<b>\$39,600</b>
\$5 million or less	\$10 million or less	\$250 million or less	<b>\$52,800</b>
\$6 million or less	\$12 million or less	\$300 million or less	<b>\$66,000</b>
\$7 million or less	\$14 million or less	\$350 million or less	<b>\$79,200</b>
\$8 million or less	\$16 million or less	\$400 million or less	<b>\$92,400</b>

<b>Residential land thresholds</b>	<b>Agricultural land thresholds</b>	<b>Commercial land and business thresholds</b>	<b>Maximum applicable fee</b>
\$9 million or less	\$18 million or less	\$450 million or less	<b>\$105,600</b>
\$10 million or less	\$20 million or less	\$500 million or less	<b>\$118,800</b>
\$11 million or less	\$22 million or less	\$550 million or less	<b>\$132,000</b>
\$12 million or less	\$24 million or less	\$600 million or less	<b>\$145,200</b>
\$13 million or less	\$26 million or less	\$650 million or less	<b>\$158,400</b>
\$14 million or less	\$28 million or less	\$700 million or less	<b>\$171,600</b>
\$15 million or less	\$30 million or less	\$750 million or less	<b>\$184,800</b>
\$16 million or less	\$32 million or less	\$800 million or less	<b>\$198,000</b>
\$17 million or less	\$34 million or less	\$850 million or less	<b>\$211,200</b>
\$18 million or less	\$36 million or less	\$900 million or less	<b>\$224,400</b>
\$19 million or less	\$38 million or less	\$950 million or less	<b>\$237,600</b>
\$20 million or less	\$40 million or less	\$1,000 million or less	<b>\$250,800</b>
\$21 million or less	\$42 million or less	\$1,050 million or less	<b>\$264,000</b>
\$22 million or less	\$44 million or less	\$1,100 million or less	<b>\$277,200</b>
\$23 million or less	\$46 million or less	\$1,150 million or less	<b>\$290,400</b>
\$24 million or less	\$48 million or less	\$1,200 million or less	<b>\$303,600</b>
\$25 million or less	\$50 million or less	\$1,250 million or less	<b>\$316,800</b>
\$26 million or less	\$52 million or less	\$1,300 million or less	<b>\$330,000</b>
\$27 million or less	\$54 million or less	\$1,350 million or less	<b>\$343,200</b>
\$28 million or less	\$56 million or less	\$1,400 million or less	<b>\$356,400</b>
\$29 million or less	\$58 million or less	\$1,450 million or less	<b>\$369,600</b>
\$30 million or less	\$60 million or less	\$1,500 million or less	<b>\$382,800</b>
\$31 million or less	\$62 million or less	\$1,550 million or less	<b>\$396,000</b>
\$32 million or less	\$64 million or less	\$1,600 million or less	<b>\$409,200</b>

<b>Residential land thresholds</b>	<b>Agricultural land thresholds</b>	<b>Commercial land and business thresholds</b>	<b>Maximum applicable fee</b>
\$33 million or less	\$66 million or less	\$1,650 million or less	<b>\$422,400</b>
\$34 million or less	\$68 million or less	\$1,700 million or less	<b>\$435,600</b>
\$35 million or less	\$70 million or less	\$1,750 million or less	<b>\$448,800</b>
\$36 million or less	\$72 million or less	\$1,800 million or less	<b>\$462,000</b>
\$37 million or less	\$74 million or less	\$1,850 million or less	<b>\$475,200</b>
\$38 million or less	\$76 million or less	\$1,900 million or less	<b>\$488,400</b>
More than \$38 million	More than \$76 million	More than \$1,900 million	<b>\$500,000</b>

### **Fees for giving a notice of notifiable national security actions**

#### **Section 12 – Notifiable national security actions**

The fee applicable for giving a notice under section 81 of the FATA of a notifiable national security action is equal to the fee that would have been worked out if the action were a notifiable action. The fees for notifiable national security actions are equivalent to notifiable actions.

#### *Example 1*

A foreign person proposes to acquire a direct interest in a national security business, which is a notifiable national security action. The consideration for this acquisition is \$210 million.

The fee payable is \$52,800, as this is the fee that would be payable for a business acquisition with a consideration value of \$210 million.

#### *Example 2*

A foreign person proposes to start a national security business, which is a notifiable national security action. The applicable fee for starting a national security business is \$2,000.

### **Fees for giving notice of a proposal to take an action that is neither a notifiable action nor a notifiable national security action**

#### **Section 13 – Fees covered by this Division**

This section provides that a fee is payable in accordance with item 4 of the table in subsection 113(1) of the FATA, which provides that a fee is payable when a person gives notice to the Treasurer of a proposal to take action that is not a notifiable action or notifiable national security action. In effect, this division provides for the applicable fee where a foreign person voluntarily notifies the Treasurer of an action (proposed or otherwise).

#### Section 14 – Proposal to acquire certain interests in entities or businesses, or issuing securities in entities etc.

This section provides that the fee payable for giving notice of a proposal to take a significant action to:

- acquire a direct interest in an Australian entity or business that is an agribusiness;
- acquire interest in securities in an entity;
- issue securities in an entity; and
- acquire interests in assets of an Australian business.

The fee is calculated the same way as the fee for acquiring an interest in certain entities.

#### Section 15 Proposal to enter or terminate agreements, or to alter constituent documents

This section provides that a flat fee is payable for giving a notice of a proposal to enter or terminate certain agreements (under paragraph 40(2)(d) or (e) of the FATA) or to alter constituent documents (under paragraph 41(2)(c) of the FATA). The fee is \$13,200.

#### Section 16 – Proposal to take a reviewable national security action

The amount of fee worked out for a reviewable national security action that is voluntarily notified is equal to 25 per cent of the fee that would have been worked out under the equivalent notifiable action. For example if the reviewable national security action relates to acquiring an interest in commercial land for a consideration value of \$60 million, the fee is 25 per cent of \$13,200, making it \$3,300.

#### *Example 3*

A foreign investor has recently acquired a direct interest in an entity whose core business is manufacturing textiles for the fashion industry, while researching and developing experimental textiles. This action did not require mandatory foreign investment approval as it was not a significant or notifiable action, nor was it a notifiable a national security action. The consideration for this acquisition was \$10 million.

Upon acquiring the company, the foreign investor recognises the potential to sell one of the experimental textiles for use in a national security context. The foreign investor decides to voluntarily notify in order to remove the possibility that this investment is called in at a later date.

The fee payable for voluntarily notifying of a reviewable national security action is \$1,650, as this is 25 per cent of the usual fee that would be payable for a business acquisition with a consideration value of \$10 million.

### **Fees for notices of national security reviews**

#### **Section 17 – Fees covered by this Division**

This section provides that a fee is payable in accordance with item 4A of the table in subsection 113(1) of the FATA. A fee is payable when a person is given a notice under subsection 37C(3) of the FATA that the action which has been taken or that is proposed may pose a national security concern and has been called-in by the Treasurer.

#### **Section 18 – Notices of national security reviews**

The amount of fee worked out for an action that has been called in is equal to 25 per cent of the fee that would have been worked out under the equivalent notifiable action.

#### *Example 4*

The Treasurer becomes aware through media reports that a foreign person is proposing to acquire a private company that provides after-hours maintenance services to state and territory government offices. The target company is estimated to be worth around \$90 million.

While this investment is not a significant or notifiable action, it does meet the criteria of being a reviewable national security action.

Given perceived sensitivities, the Treasurer decides to use the call in power to review the action on national security grounds.

The fee payable would be \$3,300, as this is 25 per cent of the usual fee that would be payable for a business acquisition with a consideration value of \$90 million.

### **Fees for certain circumstances relating to certain significant actions and actions contrary to national security**

#### **Section 19 – Simplified outline of this Division**

This section provides a simplified outline of this subdivision. This Division provides that a fee is payable in accordance with item 5 of the table in subsection 113(1) of the FATA.

Section 20 – Acquiring certain interests in entities or businesses, or issuing securities in entities etc.

This section provides the fee payable under item 5 of section 113 of the FATA for:

- acquiring a direct interest in an Australian entity or business that is an agribusiness;
- acquiring interests in securities in an entity
- issuing securities in an entity; and
- acquiring interests in assets of an Australian business.

The fee is calculated in the same way as the fee to acquire an interest in certain entities.

Section 21 – Entering or terminating certain agreements, or altering constituent documents

This section provides that if item 5 of the table in subsection 113(1) of the FATA applies, a flat fee is payable in accordance with section 15 of the draft Fee Regulations. That is, section 15 provides that a flat fee is payable for giving a notice of a proposal to enter or terminate certain agreements (under paragraph 40(2)(d) or (e) of the FATA) or to alter constituent documents (under paragraph 41(2)(c) of the FATA). The fee is \$13,200.

Section 22 – Acquisitions of interests in Australian land

This section provides that if item 5 of the table in subsection 113(1) of the FATA applies, for an action covered by section 43 of the FATA in relation to acquiring interest in Australian land, then the fee applicable is worked out in accordance with the fee payable for a notifiable action relating to acquiring land.

Section 23 – Notifiable national security actions

If item 5 of the table in subsection 113(1) of the FATA applies for a notifiable national security action, the fee is equal to the fee calculated under section 12 of the draft Fee Regulations.

**Fees for applying for a variation of a no objection notification**

Section 24 – Fees covered by this Division

This section provides that a fee is payable in accordance with item 6 of the table in subsection 113(1) of the FATA, which provides that a fee is payable when a person applies for a variation of a no objection notification under subsection 76(6) of the FATA.

Section 25 – Applying to vary a no objection notification

This section provides that the applicable fee for an application to vary a no objection notification depends on whether the variation is or is not of an immaterial or minor nature. In general, an example of a variation that would be considered of an immaterial or minor nature is an application to correct a typographical error. If a variation is of an immaterial or minor nature, the fee applicable is \$2,000. If a variation is not of an immaterial or minor nature, the fee applicable is \$13,200.

Examples where a request for a variation would not be considered immaterial or minor in nature include:

- When the applicant wants to change or remove a condition imposed on them; or
- To extend the validity period.

### **Fees for Exemption certificates**

#### **Section 26 – Fees covered by this Subdivision**

This section provides the fee that is payable when a person applies for an exemption certificate.

Exemption certificates permit a foreign investor to make a programme of unspecified acquisitions without notifying of each proposed action separately.

#### **Section 27 – Exemption certificates under section 57 (new dwellings) of the FATA**

This section provides the fee that is payable when an application is made for a new dwelling exemption certificate under section 57 of the FATA is \$27,100 (indexed).

#### **Section 28 – Residential land (near-new dwelling interests) certificates**

This section provides that the fee that is payable when an application is made for residential land (near-new dwelling interests) is \$27,100 (indexed). However if the person has also applied for a section 57 new dwellings exemption certificate, the fee is \$0.

#### **Section 29 – Certificates under section 59 of the Foreign Acquisitions Act (about established dwellings) or residential land (other than established dwellings) certificates.**

This section provides that the fee for applying for an exemption certificate in relation to an established dwelling or an exemption certificate related to residential land (other than established dwelling), is what would have been payable had the person acquire an interest in residential land.

#### **Section 30 – Other kinds of exemption certificates**

Section 30 provides how to calculate the application fee for almost all exemption certificates (except for some residential exemption certificate related to established

dwellings). A single exemption certificate may cover multiple actions. To calculate the fee:

- Step 1. Determine the kinds of action being applied for under the exemption certificate, and the consideration for each of those specified actions (e.g. a single exemption certificate may relate to \$50 million of agricultural land, and \$150 million of commercial land);
- Step 2. Calculate the fee for each of those kinds of actions as if there was only a single acquisition for a consideration equal to the consideration specified for that action;
- Step 3. Calculate the sum of the fees for each of those kinds of actions;
- Step 4. The amount in Step three is the notional fee amount.
- Step 5. The fee for the exemption certificate is 75% of the notional fee amount.

For example, if an investor applies for an exemption certificate and specifies that the exemption certificate should permit acquisitions of agricultural land up to \$50 million, the fee will be calculated at 75 per cent of the fee that would have been payable for an acquisition of agricultural land worth \$50 million.

### **Ongoing Fees for exemption certificates for new dwellings and near new dwellings**

#### Section 31 Simplified outline of this Subdivision

This section provides a simplified outline of this subdivision. This subdivision deals with fees for certain types of exemption certificates that have a 6-monthly fee in addition to the initial application fee.

#### Section 32 Ongoing 6-monthly fees for developers given exemption certificates under section 57 (new dwellings) of the FATA

This section provides a fee is payable by the developer every six months for each new dwelling acquisition that occurs during that period. The fee payable is worked out in accordance with the fee calculated under sections 9, 10 and 11 for acquisitions of interests in residential land.

#### Section 33 Ongoing 6-monthly fees for developers given residential land (near-new dwelling interests) certificates

This section provides a fee is payable by the developer every six months for each near-new dwelling acquisition that occurs during that period. The fee payable is worked out in accordance with the fee calculated under sections 9, 10 and 11 for acquisitions of interests in residential land.

## **Fees to vary exemption certificates**

### **Section 34 – Fees covered by this Subdivision**

This section provides that a fee is payable in accordance with item 2 of the table in subsection 113(1) of the FATA, which provides that a fee is payable for a person when they apply to vary their exemption certificate.

### **Section 35– Variations of exemption certificates**

This section provides that the applicable fee for an application to vary an exemption certificate depends on whether the variation is or not of an immaterial or minor nature. An example of a variation that would be considered of an immaterial or minor nature would be an application to correct a typographical error. If a variation is of an immaterial or minor nature, the applicable fee is \$2, 000 (indexed). A higher fee of \$13,200 (indexed) would be payable for all variations not of an immaterial or minor nature. Examples where a request for a variation would not be of an immaterial or minor nature include:

- When the applicant wants to change or remove a condition imposed on them; or
- to extend the validity period.

## **Fees for internal reorganisations**

### **Section 36 – Fees for internal reorganisations**

This section provides that if an action meets the definition of an internal reorganisation, the fee applicable is \$13,200. An action constitutes an internal reorganisation when an action involves acquiring interests in securities, and both the acquiring and target entity, are subsidiaries of the same holding entity or when the target entity is a subsidiary of the acquiring entity.

When an action involves acquiring interests in an asset or Australian land, an action is considered an internal reorganisation if both the acquiring and target entity are subsidiaries of the same holding entity, the target entity is a holding entity of the acquiring entity or when the target entity is a subsidiary of the acquiring entity.

## Vacancy fees

### Section 37 – Fees covered by this part

This section explains that Part 3 sets out how to work out vacancy fees for dwellings on residential land. It also defines ‘relevant acquisition’ as an acquisition of an interest in residential land.

### Section 38 – Acquisition was a notifiable action notified under section 81 of the FATA

This section provides that the vacancy fee for the acquisition of an interest in residential land that was notified by the person under section 81 of the FATA is the same as:

- The fee payable that was payable by the person for giving a notice of the acquisition, or
- If that fee was waived, the vacancy fee is the amount of the fee listed at item 1 of the table in section 10 of the draft Fee Regulations. That is, \$6,600 (indexed).

### Section 39 – Acquisition was covered by a new dwelling exemption certificate or a residential land (near-new dwelling) exemption certificate

This section provides that the vacancy fee for the acquisition of an interest in residential land that was covered by a new dwelling or near-new dwelling exemption certificate is equal to the notification fee that would have been charged if the person did not have the exemption certificate and instead was required to notify of the acquisition under section 81 of the FATA.

### Section 40 – Acquisition was covered by another kind of exemption certificate

This section provides that the vacancy fee for an acquisition covered by an exemption certificate not mentioned in section 37 of the draft Fee Regulations is:

- The fee payable for applying for that exemption certificate; or
- If that fee was waived, the lowest fee for that exemption certificate.

### Section 41 – Acquisitions for which an order is made under Division 2 of Part 3 of the FATA or no objection notification is given

This section provides the vacancy fee for an acquisition of residential land that the Treasurer made an order or decision about. The vacancy fee is:

- The fee payable for giving a notice of an acquisition of residential land; or
- If that fee was waived, the amount listed at item 1 of the table in section 10 of the draft Fee Regulations. That is, \$6,600 (indexed).

## Lowering Fees

### Section 42 – The amount of a fee may be lowered under this Part

This section provides that despite other parts of the draft Fee Regulations this Part may lower the fee payable.

### *One agreement covers more than one action*

#### Section 43 – Scope

This section explains that the other sections in the subdivision set out the fee payable if an agreement covers two or more actions.

#### Section 44 – Fee to the extent that the actions are all of the same kind

This section provides that if one agreement covers multiple actions of the same kind (for example acquiring interests in securities in multiple entities), then the fee payable is worked out by the sum of all the considerations.

#### *Example 5*

Applicant 1 is proposing to acquire an interest in four different funds under one agreement. The applicant is taking four actions, but the actions are the same kind of action – that is acquiring an interest in securities. The applicant is proposing to acquire:

- up to a 22 per cent interest in Fund 1 for \$90 million
- up to a 10 per cent interest in Fund 2 for \$10 million
- up to a 40 per cent interest in Fund 3 for \$900 million
- up to a 10 per cent interest in Fund 4 for \$10 million

The fee is calculated by summing up the consideration for the entire transaction under the agreement. The sum of the consideration for the multiple actions is \$1.01 billion. The fee is calculated by using the aggregate consideration.

The same rule applies to other actions of the same kind, as long as it is covered by one agreement.

#### *Example 6*

An investor enters into an agreement to acquire an agricultural property worth \$12 million. The investor already owns other agricultural land in Australia worth more than \$10 million.

The property, is split across six titles – and so each title is considered a separate action. Each title is valued at \$2 million. The fee is calculated by using the aggregate

consideration (\$12 million) – therefore the fee is considered against the fee formula for agricultural land. The applicable fee would be \$66,000.

Section 45 – Fee to the extent that the actions all relate to interests in Australian land, but not all to the same kind of Australian land

This section provides that if the actions relate to interests in Australian land but not the same kind of Australian land, the fee payable is calculated by first determining whether the dominant land holding rule applies under section 46.

Section 46 – Dominant kind of Australian land

This section sets out how to determine the fee if the agreement covers more than one actions and those actions relate to different kinds of Australian land. In this case, the dominant land holding rule provides that the fee is worked out based on the highest value of the Australian land.

For example, under one agreement, a foreign investor proposes to acquire three titles of agricultural land, each with a consideration of \$5 million and a title of non-vacant commercial land with a consideration of \$20 million. The aggregate consideration is \$35 million.

The applicable fee is determined by establishing the dominant land holding, and then applying the aggregate consideration to the relevant land fee formula. In this example, the value of the aggregate interests in agricultural land is \$15 million and the value in commercial land is \$20 million, which makes commercial land the dominant land holding. The fee payable would be \$6,600, as the fee for the acquisition is determined using the aggregate consideration (\$35 million) worked out against the commercial land fee formula.

Operation of sections 44, 45 and 46 together

Sections 44, 45 and 46 apply to the extent that they are relevant. Sections 44, 45 and 46 can work simultaneously together if an agreement covers multiple actions that covers the same kind of actions and different kinds of action. If under one agreement, there are five notifiable actions in total and two of these actions are acquiring different kinds of land and the other three are to acquire securities in an entity. The fee worked out will be the sum of the consideration for the land actions (worked out under section 45 and 46 of the draft Fee Regulations) plus the sum of the consideration for the securities action (worked out under section 44 of the draft Fee Regulations).

*Example 7*

Under an agreement a foreign person buys a printing business for the total consideration of \$370 million. As part of the agreement, the foreign person will acquire two parcels of vacant commercial land and interests in the securities of multiple entities. The aggregate consideration of the commercial land is \$100 million. The value of the aggregate interest in the securities in the entities is \$270 million. Two notional fees are payable for this transaction – the fee calculated for the \$100

million commercial land and the fee calculated for the \$270 million interest in securities in the entity.

The total fee payable will be the sum of the two notional fees.

Sections 44, 45 and 46 can apply as long as there are multiple actions occurring under the one agreement.

#### *Example 8*

An investor enters into an agreement to acquire an Australian entity valued at \$900 million. As part of the same agreement, the investor will also acquire Australian (sensitive) commercial land (not vacant) valued at \$100 million. The Australian entity uses the commercial property to carry on an Australian business.

The entire consideration is \$1 billion. Two fees are payable for this transaction. The fee calculated for the \$900 million entity – determined against the fee formula for entities – and the fee calculated for the \$100 million commercial land.

The total fee payable is the sum of these two fees.

#### Section 47 – Single action covered by 2 or more provisions of this Part

This section sets out how to determine the fee if a single action is an action of more than one kind or the action is an acquisition of Australian land and the land is more than one kind of land.

If an action is covered by more than one of the following kinds of actions:

- an action that may pose a national security concern; meets the definition of a notifiable national security action;
- is a reviewable national security action;
- is covered by paragraph 40(2)(a), (b), (c), (d) or (e) of the FATA;
- is covered by paragraph 41(2)(a), (b), (c) of the FATA; is covered by paragraph 43(a) of the FATA; or
- is a provision made for the purposes of section 44 of the FATA.

If the action is to acquire an interest in Australian land and the land is land of more than one kind, then the applicable fee is the highest fee payable.

### *Fees for multiple exemption certificates*

#### Section 48 – Applications for residential land certificates covering a single proposed acquisition

This section relates to applications for residential land exemption certificates if they cover a single proposed acquisition. It provides that a person only has to pay the single highest fee for an exemption certificate application if the following apply:

- The person applies for a residential land exemption certificate and a section 59 exemption certificate, and
- Both exemption certificates cover only a single proposed action

#### Section 49 – Multiple applications made for entities, land and national security exemption certificate

This section provides one fee is payable if a foreign person applies for multiple exemption certificates, as long as the applications are made within 14 days of the original application. For one fee to be payable, the second and subsequent exemption certificates need to relate to the first exemption certificate (for example, the same applicant or to give effect to the first exemption certificate application). The new rule applies to the following exemption certificates:

- a land exemption certificate that covers commercial land (whether vacant or not);
- a business and entities exemption certificate;
- a mining and tenement exemption certificate;
- a notifiable national security exemption certificate; and
- a reviewable national security exemption certificate.

#### *Example 9*

A foreign person wishes to make a programme of acquisitions of Australian land. Since Australian land may also be national security land, the foreign person applies for a land exemption certificate and a national security exemption certificate. As long as the applicant submits the applications for the two exemption certificates within 14 days of each other, only one fee will be payable.

#### *Example 10*

A foreign person wishes to make a programme of acquisitions of securities. Some of these securities may also be considered a land entity under section 13 of the FATR. The applicant submits an application for a land exemption certificate and a business and entities exemption certificate within 14 days, to ensure only one fee is payable.

### *Example 11*

A person applies for an exemption certificate for interests in agricultural land with a financial cap of \$20 million and commercial land of \$100 million. The person would be required to pay the fee calculated for \$20 million of agricultural land and the fee for \$100 million of commercial land. The fee payable would be 75 per cent of the summed fees (again at 75 per cent of the relevant fee).

### **Miscellaneous fee lowering rules**

#### **Section 50 – Fee payable if the value of the consideration is less than \$75,000**

This section provides for a new de Minimis rule, which will apply to almost all actions under the FATA. The rule provides that if the consideration is less than \$75,000, then the fee payable is \$2,000. This rule applies to land applications (agriculture, commercial, mining and tenements and residential), business, entity and securities related actions and a notifiable national security action.

However, if the action is a reviewable national security action that has been voluntarily notified to the Treasurer and the consideration for the action is below \$75,000, the fee payable is \$500.

This de Minimis rule does not apply if the action is an internal reorganisation.

#### **Section 51 – Majority owners**

This section establishes a ‘majority owner rule’ – if a foreign person already holds a 50 per cent interest in the target and wishes to acquire more, a lower \$2,000 fee will apply.

#### **Section 52 – Acquisition of leasehold interest after sale of freehold interest**

This section provides that a \$2,000 fee is payable in relation to acquisitions of leasehold interests after a sale of a freehold interest.

#### **Section 53 – Acquisition of securities in a land entity**

This section provides that the fee payable for a land entity that holds more than one type of land will depend on the dominant land holding.

#### **Section 54 – Internal reorganisation by foreign government investors involving tenements**

This section provides that where a foreign government investor acquires a legal or equitable interest in a tenement that is not an interest in Australian land from another entity and any of the following applies:

- Both entities are subsidiaries of the same holding company;
- the other entity is the holding entity of the foreign government investor; or

- other entity is a subsidiary of the foreign government investor.

Then the fee is \$13,200. However, if another fee is payable by the foreign government investor, the fee is nil.

#### Section 55 – Jointly acquiring or holding interests in a security, asset, trust or Australian land

This section provides that if two or more people acquire interests in a security, asset, trust or Australian land as joint tenants, as long as one of the joint tenants pays the applicable fee, the other person or parties are not liable to pay a fee. The fee is reduced to \$0 if the other joint tenant pays the full amount. If a joint tenant pays half, then the fee for the other joint tenant(s) is reduced by the same amount.

For example, together the joint tenants are liable to pay a fee of \$2,000. After the first joint tenant pays \$1,200, the remaining joint tenant is liable to pay \$800.

This section also provides that if a foreign person acquires an interest in a security, asset, trust, or Australian land as tenants in common with an Australian investor, the fee payable will reflect that person's percentage of ownership.

For example, assume a foreign person and two Australians acquire an interest in residential land as tenants in common in 1/3 shares. Assume the total consideration is \$1 million and that the fee generated is \$6,600. The foreign person's fee will be 1/3 of \$6,600, making the fee \$2,200.

#### Section 56 – Actions taken by wholly-owned groups

This section provides that actions taken by entities within the same wholly owned group and one entity within the group has already paid the applicable fee, no further fees are payable.

#### Section 57 – Fee for variation of no objection notifications and certain exemption certificate

This section provides that for a variation of a no objection notification – the fee for varying a no objection notification is usually \$13,200, if the applicant paid less in the original application (as a result of the Treasurer granting a fee waiver under section 115 of the FATA) or because of some other rule, a lower fee is applicable.

### **Indexation**

Fees are to be indexed every financial year. Indexation applies to the base amount number and not the thresholds.

#### Section 58 – Specified fees and fee components are subject to indexation

This section provides that each specified fee amount and fee component set out in the draft Fee Regulations is to be indexed from 1 July each year starting on or after 1 July 2021.

The section provides that an amount is indexed by multiplying it by its indexation factor. The methodology to determine the indexation factor is set out in section 60. If the indexation factor is 1 or less, an amount is not indexed. If after indexation an amount is not a multiple of \$100, round down the indexed amount to the nearest multiple of \$100.

Indexation does not apply to the fee constants.

Where a fee is worked out as a percentage of another fee (for example, where the fee for giving notice of a reviewable national security action is 25% of the fee applicable for the equivalent notifiable action), indexation is only applied to the equivalent notifiable action fee.

#### Section 59 – Indexation factor

This section provides how the indexation factor is calculated.

The indexation factor is:

The sum of the index numbers for the quarter in the year ending on 31 March just before the start of the relevant financial year

Divided by:

The sum of the index number for the quarters in the year ending on the previous 31 March

The indexation factor is calculated to 3 decimal places rounding up if the fourth decimal place is 5 or more.

#### Section 60 – Index number

This section provides that the index number comes from the Australian Bureau of Statistics. It is the All Groups Consumer Price Index Number first published by the Australian Statistician for the quarter.

### **Application and transitional provisions**

#### Section 61 – Application of this instrument

The new provisions and method for calculating the fee payable applies to fees that become payable on or after 1 January 2021.

Fees that were payable before 1 January 2021 will continue to be determined using the method included in the *Foreign Acquisition and Takeovers Fees Imposition Regulation 2015* before the draft Fee Regulations were made.

Schedule 1 – Section 1

Section 1 to Schedule 1 repeals *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*.