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| **EXPOSURE DRAFT** |

Inserts for

Foreign Investment Reform (Protecting Australia’s National Security) Bill 2020: Integrity amendments

| Commencement information | | |
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| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Schedule 3 | 1 January 2021. | 1 January 2021 |

Schedule 3—Integrity amendments

Part 1—Change in control test

Foreign Acquisitions and Takeovers Act 1975

1 At the end of section 40

Add:

(7) However, the last condition in subsection (6) is not required to be met if:

(a) paragraph (2)(b) applies and the action is or is to be taken by a foreign person who controls the entity (whether alone or together with one or more associates) immediately before the action is or is to be taken; or

(b) paragraph (2)(c) applies and a foreign person controls the entity (whether alone or together with one or more associates) immediately before the action is or is to be taken.

2 At the end of section 41

Add:

(6) However, the third condition in subsection (5) is not required to be met if:

(a) paragraph (2)(b) applies; and

(b) the action is or is to be taken by a foreign person who controls the business (whether alone or together with one or more associates) immediately before the action is or is to be taken.

3 Section 46 (paragraph beginning “Unlike”)

Omit “Unlike for a significant action, there”, substitute “There”.

4 Application of amendments

The amendments made by this Part apply in relation to actions taken, or proposed to be taken, on or after 1 January 2021.

Part 2—Buy‑backs of securities and capital reductions

Foreign Acquisitions and Takeovers Act 1975

5 After section 15

Insert:

15A Rules relating to certain buy‑backs of securities and capital reductions

Buy‑backs of securities and capital reductions—effect of increasing proportion of voting power or proportion of interests in issued securities

(1) Subsection (2) applies if:

(a) an entity buys back a security in itself or otherwisereduces its capital; and

(b) as a result of the buy‑back or capital reduction, a person:

(i) increases the proportion of the total voting power, or the total potential voting power, in the entity that the person is in a position to control (whether alone or together with one or more associates of the person); or

(ii) increases the proportion of interests in issued securities in the entity that the person holds (whether alone or together with one or more associates of the person); and

(c) in the case of a buy‑back where the result mentioned in paragraph (b) occurs other than by the person accepting an offer to buy back securities in the entity—the entity made the person such an offer.

(2) For the purposes of this Act, the person mentioned in paragraph (1)(b) is taken to acquire an interest in securities in the entity.

Note: As a result of this subsection, the buy‑back or capital reduction might amount to the taking of a significant action or a notifiable action by the person mentioned in paragraph (1)(b).

Buy‑backs of securities—no acquisition of interests in securities by entity

(3) The buying‑back of a security in an entity by the entity does not constitute an acquisition by the entity of an interest in a security in the entity.

6 Application of amendment

Section 15A of the *Foreign Acquisitions and Takeovers Act 1975*, as inserted by this Part, applies in relation to:

(a) a buy‑back of securities in an entity for which an offer is made by the entity on or after 1 January 2021; and

(b) a capital reduction that occurs on or after 1 January 2021 (subject to paragraph (a)).

Part 3—Presumption of advancement

Foreign Acquisitions and Takeovers Act 1975

7 At the end of section 12

Add:

(4) If:

(a) a person (the ***first person***) acquires a legal interest in Australian land (other than an interest covered by subparagraph (1)(a)(i), (ii) or (iii)); and

(b) some or all of the consideration for the acquisition is given by another person (the ***second person***); and

(c) the second person does not, apart from this subsection, acquire an equitable interest in the Australian land by giving the consideration, because of the operation of a principle of equity that presumes the second person to have given the consideration as a gift for the first person;

the second person is taken, for the purposes of this Act, to have acquired an equitable interest in the Australian land.

(5) However, a person does not acquire an equitable interest in Australian land under subsection (4) if the person proves the person gave the consideration as a gift for another person*.*

(6) The regulations may provide for and in relation to determining whether consideration is given by a person as a gift for another person for the purposes of this section.

8 Application of amendment

The amendment made by this Part applies in relation to an acquisition of a legal interest in Australian land on or after 1 January 2021, whether consideration is given for the acquisition before, on or after that day.

Part 4—Businesses carried on by the Commonwealth, States, Territories or local governing bodies

Foreign Acquisitions and Takeovers Act 1975

9 Section 4

Insert:

***business*** has a meaning affected by subsection 8(3).

10 At the end of section 8

Add:

(3) Without limiting subsection (1), an activity carried on wholly or partly in Australia by:

(a) the Commonwealth, a State, a Territory or a local governing body; or

(b) an entity wholly owned by the Commonwealth, a State, a Territory or a local governing body;

is both a ***business*** and an ***Australian business*** for the purposes of this Act if the activity would, or could, be carried on in anticipation of profit or gain if it were carried on by someone other than:

(c) a body referred to in paragraph (a); or

(d) an entity referred to in paragraph (b); or

(e) a foreign government; or

(f) a separate government entity.

11 Application of amendments

The amendments made by this Part apply in relation to actions taken, or proposed to be taken, on or after 1 January 2021.

Part 5—Tracing interests through unincorporated limited partnerships

Foreign Acquisitions and Takeovers Act 1975

12 Section 4 (definition of *aggregate interest*)

Repeal the definition, substitute:

***aggregate interest***:

(a) of a specified percentage in an entity—has the meaning given by subsection 17(2); and

(b) of a specified percentage in an unincorporated limited partnership—has the meaning given by subsection 17(2B).

13 Section 4 (definition of *aggregate substantial interest*)

Omit “entity or trust”, substitute “entity, trust or unincorporated limited partnership”.

14 Section 4 (paragraph (a) of the definition of *aggregate substantial interest*)

Repeal the paragraph, substitute:

(a) for an entity or unincorporated limited partnership—the persons hold an aggregate interest of at least 40% in the entity or partnership; or

15 Section 4 (note to the definition of *aggregate substantial interest*)

After “entity”, insert “or unincorporated limited partnership”.

16 Section 4 (definition of *general meeting*)

Repeal the definition, substitute:

***general meeting*** means:

(a) for a corporation—a general meeting of the corporation; or

(b) for a unit trust—a general meeting of the unit holders of the trust; or

(c) for an unincorporated limited partnership—a general meeting of the partners of the partnership.

17 Section 4

Insert:

***general partner*** means a partner of a limited partnership whose liability relating to the partnership is not limited.

18 Section 4 (after paragraph (c) of the definition of *interest*)

Insert:

(ca) in an unincorporated limited partnership—has the meaning given by section 11A; and

19 Section 4 (after paragraph (e) of the definition of *interest*)

Insert:

; and (f) of a specified percentage in an unincorporated limited partnership—has the meaning given by subsection 17(2A).

20 Section 4

Insert:

***limited partner*** means a partner of a limited partnership whose liability relating to the partnership is limited.

***limited partnership*** means an association of persons that:

(a) was formed solely for the purposes of becoming a partnership where the liability of at least one partner relating to the partnership is limited; and

(b) is recognised under a law of the Commonwealth, a State, a Territory, a foreign country or a part of a foreign country as such a partnership.

21 Section 4 (definition of *substantial interest*)

Omit “entity or trust”, substitute “entity, trust or unincorporated limited partnership”.

22 Section 4 (paragraph (a) of the definition of *substantial interest*)

Repeal the paragraph, substitute:

(a) for an entity or unincorporated limited partnership—the person holds an interest of at least 20% in the entity or partnership; or

23 Section 4 (note to the definition of *substantial interest*)

After “entity”, insert “or unincorporated limited partnership”.

24 Subsection 9(1) (note 2)

Omit “and trusts”, substitute “, trusts and unincorporated limited partnerships”.

25 Sections 10 and 11 (note 2)

Omit “and trusts”, substitute “, trusts and unincorporated limited partnerships”.

26 After section 11

Insert:

11A Meaning of *interest* in an unincorporated limited partnership

A person holds an ***interest*** in an unincorporated limited partnership if the person:

(a) is in a position to control all or any of the voting power or potential voting powerin the partnership; or

(b) has contributed any or all of the assets or capital contributed to the partnership; or

(c) is entitled to any or all of the distributions of capital, assets or profits of the partnership on the dissolution of the partnership; or

(d) is entitled to any or all of the distributions of capital, assets or profits of the partnership otherwise than on the dissolution of the partnership.

Note: See also section 19 (tracing of substantial interests in corporations, trusts and unincorporated limited partnerships).

27 Section 17 (at the end of the heading)

Add “**or unincorporated limited partnership**”.

28 After subsection 17(2)

Insert:

Meaning of **interest** of a specified percentage in an unincorporated limited partnership

(2A) A person holds an ***interest*** of a specified percentage in an unincorporated limited partnership if the person, alone or together with one or more associates of the person:

(a) is in a position to control at least that percentage of the voting power or potential voting powerin the partnership; or

(b) has contributed at least that percentage of the total amount of assets or capital contributed to the partnership; or

(c) is entitled to at least that percentage of the total distributions of capital, assets or profits of the partnership on the dissolution of the partnership; or

(d) is entitled to at least that percentage of the total distributions of capital, assets or profits of the partnership otherwise than on the dissolution of the partnership.

Meaning of **aggregate interest** of a specified percentage in an unincorporated limited partnership

(2B) Two or more persons (who are not associates of each other) hold an ***aggregate interest*** of a specified percentage in an unincorporated limited partnership if they, together with any one or more associates of them:

(a) are in a position to control at least that percentage of the voting power or potential voting powerin the partnership; or

(b) have contributed at least that percentage of the total amount of assets or capital contributed to the partnership; or

(c) are entitled to at least that percentage of the total distributions of capital, assets or profits of the partnership on the dissolution of the partnership; or

(d) are entitled to at least that percentage of the total distributions of capital, assets or profits of the partnership otherwise than on the dissolution of the partnership.

29 Subsection 17(3)

After “entity”, insert “or unincorporated limited partnership”.

30 Section 19 (heading)

Omit “**and trusts**”, substitute “**, trusts and unincorporated limited partnerships**”.

31 Subsection 19(1)

Repeal the subsection, substitute:

(1) This section applies (subject to subsection (3)) if:

(a) any of the following apply:

(i) a person holds a substantial interest in a corporation or trust (the ***higher entity or partnership***);

(ii) 2 or more persons hold an aggregate substantial interest in a corporation (the ***higher entity or partnership***);

(iii) 2 or more persons hold an aggregate substantial interest in a trust (a trustee of which is a ***higher entity or partnership***);

(iv) a person holds a substantial interest, or 2 or more persons hold an aggregate substantial interest, in an unincorporated limited partnership (a general partner of which is a ***higher entity or partnership***);

including because of one or more applications of this section; and

(b) the higher entity or partnership:

(i) is in a position to control all or any of the voting power or potential voting power in a corporation or unincorporated limited partnership (the ***lower entity or partnership***); or

(ii) holds interests in all or any of the shares in a corporation (the ***lower entity or partnership***); or

(iii) holds an interest in a trust or unincorporated limited partnership (the ***lower entity or partnership***).

32 Subsection 19(2)

After “entity” (wherever occurring), insert “or partnership”.

33 Subsection 22(1)

After “an entity”, insert “or unincorporated limited partnership”.

34 Subsection 22(1)

After “the entity”, insert “or partnership”.

35 Subsection 22(2)

After “an entity”, insert “or unincorporated limited partnership”.

36 Subsection 22(2)

After “the entity” (wherever occurring), insert “or partnership”.

37 Subsection 22(3)

After “an entity”, insert “or unincorporated limited partnership”.

38 Paragraph 22(3)(a)

After “the entity”, insert “or partnership”.

39 Subsection 22(4)

After “an entity”, insert “or unincorporated limited partnership”.

40 Subsection 22(4)

After “the entity”, insert “or partnership”.

41 Section 23

After “an entity”, insert “or unincorporated limited partnership”.

42 Section 29 (heading)

Omit “**and entities**”, substitute “**, entities and unincorporated limited partnerships**”.

43 Paragraph 29(b)

After “corporations”, insert “and unincorporated limited partnerships”.

44 Application of amendments

The amendments made by this Part apply in relation to actions taken, or proposed to be taken, on or after 1 January 2021.

Part 6—More coordinated information sharing and gathering

Foreign Acquisitions and Takeovers Act 1975

45 Section 4 (definition of *Commonwealth entity*)

Repeal the definition.

46 Paragraph 120(2)(c)

Repeal the paragraph, substitute:

(c) the disclosure is made to:

(i) the Secretary; or

(ii) a person appointed or engaged under the *Public Service Act 1999* who is employed in the Department; or

(iii) a person appointed by the Commonwealth for the purposes of this Act;

47 Section 122

Repeal the section, substitute:

122 Authorisation of disclosures to Commonwealth Ministers and Commonwealth bodies

(1) A person may disclose protected information to a person covered by subsection (2) for the purposes of:

(a) administering a law covered by subsection (3); or

(b) a Minister discharging that Minister’s responsibility for a matter covered by subsection (4).

(2) This subsection covers the following persons:

(a) a Minister who has responsibility for:

(i) administering a law covered by subsection (3); or

(ii) a matter covered by subsection (4);

(b) an individual who is:

(i) employed by such a Minister under Part III or IV of the *Members of Parliament (Staff) Act 1984*; or

(ii) engaged by such a Minister as a consultant under Part II of that Act;

(c) an officer or employee of a Department of State, or of an authority or agency of the Commonwealth, administered by such a Minister.

(3) This subsection covers the following laws:

(a) the *Airports Act 1996*;

(b) the *Australian Crime Commission Act 2002*;

(c) the *Australian Prudential Regulation Authority Act 1998*;

(d) the *Australian Securities and Investments Commission Act 2001*;

(e) the *Australian Security Intelligence Organisation Act 1979*;

(f) the *Banking Act 1959*;

(g) the *Competition and Consumer Act 2010*;

(h) the *Corporations Act 2001*;

(i) the *Defence Act 1903*;

(j) the *Financial Sector (Shareholdings) Act 1998*;

(k) the *Industry Research and Development Act 1986*;

(l) the *Inspector‑General of Intelligence and Security Act 1986*;

(m) the *Insurance Acquisitions and Takeovers Act 1991*;

(n) the *Intelligence Services Act 2001*;

(o) the *Migration Act 1958*;

(p) the *Northern Australia Infrastructure Facility Act 2016*;

(q) the *Proceeds of Crime Act 2002*;

(r) the *Qantas Sale Act 1992*;

(s) the *Security of Critical Infrastructure Act 2018*;

(t) a taxation law (within the meaning of section 995‑1 of the *Income Tax Assessment Act 1997*);

(u) the *Telstra Corporation Act 1991*;

(v) any other law prescribed by the regulations.

(4) This subsection covers the following matters:

(a) agriculture;

(b) water;

(c) infrastructure;

(d) telecommunications;

(e) industry policy;

(f) investment promotion;

(g) taxation policy;

(h) foreign investment in Australia;

(i) defence;

(j) national security.

48 After section 123

Insert:

123A Authorisation of disclosures to foreign governments and separate government entities

(1) A personmay disclose protected information to a foreign government or a separate government entity in relation to a foreign country (or a part of a foreign country) if:

(a) either:

(i) the person discloses the information in performing the person’s functions or duties, or exercising the person’s powers, under this Act; or

(ii) the person is satisfied the disclosure of the information will assist or enablethe foreign government or separate government entity to perform a function or duty, or exercise a power, of the government or entity; and

(b) the Treasurer is satisfied that the information relates to a matter in relation to which a national security risk may exist for Australia or the foreign country; and

(c) the Treasurer is satisfied that the disclosure is not contrary to the national interest; and

(d) the person is satisfied that the information will be used in accordance with an agreement to which subsection (2) applies; and

(e) the foreign government or separate government entity has undertaken not to use or further disclose the information except in accordance with the agreement or otherwise as required or authorised by law.

(2) This subsection applies to an agreement that is in force between:

(a) the Commonwealth or a Department of State, authority or agency of the Commonwealth; and

(b) one or more of the following:

(i) a foreign government;

(ii) a separate government entity.

(3) The Treasurer may, by writing, impose conditions to be complied with by a foreign government or a separate government entity in relation to protected information disclosed to it under subsection (1).

(4) An instrument under subsection (3) is not a legislative instrument.

Taxation Administration Act 1953

49 Subsection 355‑65(4) in Schedule 1 (after table item 7)

Insert:

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| --- | --- | --- |
| 7A | a person appointed by the Commonwealth for the purposes of the *Foreign Acquisitions and Takeovers Act 1975* | is for the purpose of advising the Treasurer in relation to the administration of that Act |

50 Application of amendments

The amendments made by this Part apply in relation to records, disclosures and uses of information on or after 1 January 2021, whether the information is obtained before, on or after that day.