

EXPOSURE DRAFT

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Foreign Acquisitions and Takeovers Act 1975

Foreign Acquisitions and Takeovers Amendment Regulations 2022

The *Foreign Acquisitions and Takeovers Act 1975* (the Act) establishes a regime for the notification, review and approval of foreign investment in Australia.

Section 139 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (the Regulations) is to amend the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulation) to support the improved administration of Australia's foreign investment review framework by clarifying certain aspects within the Principal Regulation and streamlining the processing of less sensitive types of investment.

The Regulations:

- clarify that the moneylending exemption applies to a moneylending agreement that has been entered into by a new entity, where it was created by a foreign moneylending business predominantly for the purpose of lending money (or otherwise providing financial accommodation);
- improve readability by separately defining the terms 'moneylending agreement' and 'moneylending business' in section 5 of the Principal Regulation;
- amend the moneylending exemption to ensure that it is also available to:
 - a person who is (alone or with others) in a position to determine the investments or policy of an entity that enters into a moneylending agreement (the first entity), or a subsidiary or holding entity of the first entity;
 - a security trustee who holds or acquires a security interest on behalf of an entity that has entered into a moneylending agreement (the first entity); a subsidiary or holding entity of the first entity; or a person who is (alone or with others) in a position to determine the investments or policy of the first entity (or a subsidiary or holding entity of the first entity); and
 - a receiver, or a receiver and manager, that is appointed by a person or entity otherwise captured by the moneylending exemption.
- exempt non-stock or mutual entities that are widely held (with at least 100 members) and are licensed financial institutions (whether in Australia or

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elsewhere) from seeking foreign investment approval when they are involved in moneylending for residential land;

- narrow the definition of an Australian media business and raise the 5 per cent control threshold while retaining appropriate safeguards for acquisitions of interests in Australian media businesses;
- raise the control threshold for foreign persons who acquire an interest in an unlisted Australian land entity from 5 per cent to 10 per cent, aligning the control thresholds for listed and unlisted Australian land entities;
- exempt acquisitions of interests in securities where the proportionate share or unit holding does not increase as a result of a person's acquisition;
- clarify that foreign persons who acquire additional securities in an Australian entity under a rights issue do not require further approval if the issue is consistent with the meaning in the *Corporations Act 2001*; and
- amend the foreign custodian corporations exemption to ensure that foreign custodians do not require approval where they undertake acquisitions in the course of providing custodian services on behalf of someone who is not a foreign person.

Details of the Regulations are set out in Attachment A.

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

The Regulations commenced on the day after they were registered on the Federal Register of Legislation.

Details of the *Foreign Acquisitions and Takeovers Amendment Regulations 2022*

Section 1 – Name of the Regulations

This section provides that the name of the Regulations is the *Foreign Acquisitions and Takeovers Amendment Regulations 2022* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Foreign Acquisitions and Takeovers Act 1975* (the Act).

Section 4 – Schedule

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

Schedule 1 – Amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (the Principal Regulation)

Legislative references in this Schedule are made to the Principal Regulation unless otherwise specified.

Items 1 and 2 – Definition of moneylending agreement and moneylending business

Item 1 amends the definition of a ‘moneylending agreement’ in section 5 to clarify that a relevant agreement entered into by a new entity will meet the definition where it was created by an existing moneylending business for the predominant purpose of lending money (or otherwise providing financial accommodation). This ensures that the moneylending exemption in section 27 also applies to those kinds of moneylending agreements.

The amendments also clarify that references to a person in the moneylending agreement definition also apply to an entity. The term entity is defined in section 4 of the Act and means a corporation or unit trust. These amendments align the language of the definition with the existing language in the moneylending exemption under section 27.

Items 1 and 2 also amend the definition of a ‘moneylending agreement’ in section 5 to improve the readability of the definitions by including the term ‘moneylending business’ as a separately defined term. This change is not intended to alter the concept of a moneylending business.

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Item 3 – Moneylending exemption – subsidiary and holding entities

Item 3 amends subparagraph 27(1)(b)(iii) to provide the moneylending exemption to a person who is (alone or with others) in a position to determine the investments or policy of:

- the entity that entered into the moneylending agreement (the first entity), or
- the subsidiary or holding entity of the first entity.

Item 4 – Moneylending exemption – security trustees

Item 4 amends subparagraph 27(1)(b)(iv) to provide the moneylending exemption to a security trustee who holds or acquires an interest referenced in paragraph 27(1)(a) on behalf of:

- the entity who entered into the moneylending agreement (the first entity), or
- the subsidiary or holding entity of the first entity, or
- a person who is (alone or with others) in a position to determine the investments or policy of the first entity (or a subsidiary or holding entity of the first entity).

Item 5 – Moneylending exemption – receivers

Item 5 amends subparagraph 27(1)(b)(v) so that the moneylending exemption applicable to a receiver (or receiver and manager) appointed in relation to a person or entity listed in subparagraphs 27(1)(b)(i) to (iv) also applies to a receiver (or receiver and manager) appointed *by* that person or entity.

This clarification means the moneylending exemption can apply for example, in circumstances where the entity who entered into the moneylending agreement (the first entity), as a lender, exercises a right under its moneylending agreement to appoint a receiver.

Item 6 – Moneylending exemption – large financial institutions

Item 6 inserts new subparagraph 27(2)(b)(ia) to allow moneylending businesses that are licenced financial institutions and have at least 100 members to be covered by the moneylending exemption for interests relating to residential land. This new subparagraph exempts non-stock or mutual entities from seeking foreign investment approval when they are involved in moneylending for residential land, provided such entities have at least 100 members.

A ‘member’ can include:

- a person who holds interests or shareholding in a non-stock entity (a privately owned entity – an entity which is not listed on an official stock exchange); and

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- a person who is a policyholder of a mutual entity (an entity based on the principle of mutuality where policyholders do not contribute to the capital of the entity by direct investment and policyholders derive rights to profits and votes through their customer relationship with the entity).

Items 7, 8 and 9 – Australian media business

Items 7 and 8 amend the definition of an ‘Australian media business’ in section 13A so that some businesses that were classified as Australian media businesses prior to the amendments are no longer captured by the definition.

Item 7 narrows the definition by repealing subparagraph 13A(3)(a)(iii), which specified ‘content that reports, investigates or explains current issues or events of interest to Australians’ would satisfy the content test of an Australian media business. Subparagraph 13A(3)(a)(iii) is no longer required as it had the potential to capture non-media businesses that presented no or low risk to Australia’s national interest in the context of an Australian media business. For example, a bank (a business broader than the media sector) may have been viewed as an Australian media business due to the operation of former subparagraph 13A(3)(a)(iii) when the bank published interest rate changes on its website, given interest rate changes are a current issue of interest to Australians.

Item 8 clarifies subsection 13A(4) so that an electronic service (a digital-only media business) satisfies the threshold test in subsection 13A(4) if it is reasonable to conclude that the average daily audience for the service exceeds 10,000 people *in Australia*, not globally.

Item 9 amends the threshold test for investments in Australian media businesses under section 55, changing the 5 per cent threshold test to a ‘direct interest’ test. This aligns the threshold for acquisitions of Australian media businesses with the threshold that generally applies to more sensitive investments, including acquisitions of national security businesses and acquisitions by foreign government investors. The meaning of ‘direct interest’ is defined in section 16.

The amendments to the definition and the threshold test support a better balance between welcoming foreign investment and protecting national interests in relation to media investments.

Item 10 – Unlisted land entities

Item 10 amends the exemption under paragraph 37(4)(c) for acquisitions of securities in unlisted Australian land entities so that the exemption applies where after the acquisition, a foreign person (alone or together with one or more associates), holds an interest of less than 10 per cent in the land entity, instead of 5 per cent. This amendment aligns the percentage control thresholds for acquisitions of unlisted Australian land entities with listed Australian land entities (see paragraph 37(2)(c)).

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Items 11, 12 and 13 – Acquisition of interests in securities where the proportionate share or unit holding will not increase as a result of a person’s acquisition

Item 13 inserts new paragraph 41(2)(c) to provide an exemption for the acquisition of interests in securities where there are reasonable grounds to believe that the person’s percentage interest in the entity will not increase as a result of the person’s acquisition.

In general terms, a person holds an interest of a particular percentage in the entity if the person (alone or together with one or more associates) is either in a position to control at least that percentage of the voting power, or holds interests in at least that percentage of the issued securities in the entity. This concept is analogous to the meaning of a person’s interest of a specified percentage in an entity as outlined in subsection 17(1) of the Act.

A person’s proportionate share or unit holding will not increase as a result of a capitalisation of a wholly-owned subsidiary. This is because the immediate owner’s interest of a particular percentage does not change as a result of the person’s acquisition in the wholly-owned subsidiary (it remains at 100 per cent). The amendments ensure that in these circumstances, additional approval is not required.

Further, a person’s proportionate share or unit holding is reasonably expected not to increase as a result of a capital call, where the person is required to contribute additional funding to an investment vehicle along with other investors who are also required to contribute additional funding in their respective ownership proportions.

Whether there are reasonable grounds to believe that the person’s percentage interest in an entity will not increase as a result of the person’s acquisition is an objective test.

Example 1

Foreign persons X, Y and Z will contribute additional funding to an investment vehicle in the same proportions as their existing ownership pursuant to a capital call. Foreign persons X, Y and Z are the only investors that have provided funding to the investment vehicle to date. There are reasonable grounds to believe there will be no increase in the percentage interest for each of the foreign persons X, Y and Z in relation to this proposed capital call, because each of the foreign persons will be required to contribute additional capital in their respective ownership proportions and no other persons are expected to provide capital to the investment vehicle.

Items 11 and 12 make minor editorial amendments to subsection 41(2) to facilitate the insertion of new paragraph 41(2)(c).

Item 14 – Meaning of rights issue

Item 14 clarifies that the term ‘rights issue’ in subparagraph 41(2)(a)(i) has the same meaning as in the *Corporations Act 2001*. This clarifies the application of the rights issue exemption, which exempts an acquisition of an interest in the securities of an entity under a rights issue from being a notifiable action and notifiable national

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security action under the Act if the interest had not been previously offered for issue under a rights issue.

The exemption applies to foreign persons when they acquire additional securities in an Australian entity under a rights issue as long as it is a voluntary, pro-rata rights issue under the *Corporations Act 2001* (or a law of a foreign country or part of a foreign country).

Items 15 to 21 – Foreign custodian corporations

Item 18 amends the foreign custodian corporations exemption in section 30 to ensure that foreign custodians do not require approval where they undertake acquisitions in the course of providing custodian services on behalf of someone who is not a foreign person. The amendment clarifies that the exemption applies where the equitable interest is not held by *any* foreign person, not only where the equitable interest is held by the foreign custodian. This ensures the exemption will primarily exclude foreign custodian trustees of trusts with Australian beneficiaries from foreign investment screening. The amendment also clarifies that the exemption applies where the foreign custodian is unable to exercise voting rights.

Item 19 inserts new subsection 30(2) to clarify that a foreign custodian can access the exemption if its equitable interest is only a right to indemnification.

Items 15, 16, 17, 20 and 21 make consequential editorial and referencing amendments to section 30 and subsection 41A(2) for the above amendments.

Item 22 - Application of the Regulations

Item 22 inserts new section 77 to provide application and transitional rules as follows:

- the amendments relating to moneylending agreements apply in relation to moneylending agreements entered into on or after 1 April 2022; and
- the other amendments to the Principal Regulation apply to actions taken or proposed to be taken on or after 1 April 2022.