# EXPLANATORY STATEMENT

## Issued by authority of the Treasurer

*Foreign Investment Reform (Protecting Australia’s National Security) Act 2020*

*Foreign Investment Reform (Protecting Australia’s National Security) (Transitional Provisions – Residential Land) Rules 2024*

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

The Register of Foreign Ownership of Australian Assets (the Register), established by Part 7A of the FATA, is an integral part of Australia’s foreign investment review framework. It records foreign interests in land, water, entities, businesses and other assets in Australia in a single resource, incorporating and extending the former statutory Register of Foreign Ownership of Water Entitlements, statutory Register of Foreign Ownership of Agricultural Land and non-statutory Register of Foreign Ownership of Residential Land (former registers). The Register commenced on 1 July 2023. It replaced the former registers. The Commissioner of Taxation (the Commissioner) is the Registrar responsible for administering the Register, under the *Commonwealth Registers (Appointment of Registrars) Instrument 2021*. Part 5B of the *Foreign Acquisitions and Takeovers Regulation 2015* (the FATR) also supports the operation of the Register.

Item 24 of Schedule 3 to the *Foreign Investment Reform (Protecting Australia’s National Security) Act 2020* (the Act) provides that the Treasurer may, by legislative instrument, make transitional rules relating to the Register. Such rules must be made within 12 months of Register commencement day, that is before 1 July 2024.

The purpose of the *Foreign Investment Reform (Protecting Australia’s National Security) (Transitional Provisions – Residential Land) Rules 2024* (the Instrument) is to provide arrangements which ensure the Register contains information on foreign interests in residential land, and to provide a comprehensive picture of foreign investment in Australia.

Prior to 1 July 2023, the Australian Taxation Office (ATO) maintained the non-statutory Register of Foreign Ownership of Residential Land based on information obtained from foreign persons on their residential land interests in accordance with conditions attached to exemption certificates, no objection notifications or notices imposing conditions. The Instrument facilitates the addition of information from the non-statutory register to the Register. It also assists with the inclusion of information on the Register that should have been included on the Register of Foreign Ownership of Residential Land but has not yet been.

The Instrument does this by:

* requiring the transfer of information on foreign ownership on residential land to the Registrar, for inclusion on the Register;
* providing registered circumstances to be taken to exist in relation to foreign persons who acquired relevant residential land interests prior to 1 July 2023, to support addition of information about those interests to the Register; and
* ensuring foreign persons whose interests in residential land are captured by the transitional rules are aware of any ongoing reporting obligations associated with the registered circumstance.

Together with the Act, the FATA and the FATR, the Instrument enhances Government visibility of foreign ownership of Australian assets to aid policy consideration and efficient case processing by making more information available to decision-makers.

No public consultation was undertaken on the Instrument as the provisions in the Instrument are targeted and machinery in nature. The Australian Taxation Office was consulted on draft instruments during the development of the Instrument and the Explanatory Statement.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

The Instrument is subject to the sunsetting regime set out in Part 4 of Chapter 3 of the Legislation Act. The Instrument is also subject to disallowance under section 42 of the Legislation Act.

The Instrument commences immediately after it is registered.

Details of the Instrument are set out in Attachment A.

A Statement of Compatibility with Human Rights is at Attachment B.

The Office of Impact Analysis has been (OIA) has been consulted (OIA ref: 25692) and agreed that an Impact Analysis is required. The full text of the Impact Analysis is available at <https://oia.pmc.gov.au/published-impact-analyses-and-reports/foreign-investment-review-reforms>.

The measure is estimated to have a low impact on compliance costs.

**ATTACHMENT A**

**Details of the *Foreign Investment Reform (Protecting Australia’s National Security) (Transitional Provisions – Residential Land) Rules 2024***

**PART 1 – PRELIMINARY**

Section 1 – Name

This section provides that the name of the instrument is the *Foreign Investment Reform (Protecting Australia’s National Security) (Transitional Provisions – Residential Land) Rules 2024* (the Instrument).

Legislative references in this attachment are to the Instrument unless otherwise stated.

Section 2 – Commencement

The Instrument commences immediately after it is registered.

Section 3 – Authority

The Instrument is made under the *Foreign Investment Reform (Protecting Australia’s National Security) Act 2020* (the Act).

As explained in the note under the section, item 24 of Schedule 3 to the Act provides that the Minister may, by legislative instrument, make transitional rules relating to the Register.

Section 4 – Definitions

Section 4 of the Instrument defines a number of terms which are integral to the transitional rules, by reference to definitions set out in the *Foreign Acquisitions and Takeovers Act* *1975* (the FATA) or the *Income Tax Assessment Act 1997*. These definitions are:

* exemption certificate;
* foreign person;
* interest, in relation to an interest in Australian land (however described);
* no objection notification;
* notice imposing conditions;
* Register;
* Register commencement day;
* Registrar;
* residential land; and
* taxation officer.

**PART 2 – TRANSITIONAL PROVISIONS**

Section 5 – Information obtained before Register commencement day

Subsection 5(1) requires the Commissioner of Taxation (the Commissioner) to cause information about foreign ownership of residential land that is covered by subsection 5(2) to be given to the Registrar on or before 1 July 2025. This requirement is in accordance with paragraph 24(1)(b) of Schedule 3 to the Act. The Registrar may add this information to the Register pursuant to section 130U of the FATA.

The relevant information, described in paragraph 5(2)(a), is about an interest in residential land that was acquired by a foreign person between 1 July 2016 and 30 June 2023 (the day before the Register commenced). This time is the period covered by the Australian Taxation Office’s (ATO) non-statutory Register of Foreign Ownership of Residential Land, until the Register commenced and replaced it.

The information must have been obtained in the same time period by a taxation officer in accordance with the FATA, as provided by paragraph 5(2)(b). For example, this includes (but is not limited to) information obtained by:

* an officer of the ATO (as a delegate of the Commissioner or the Treasurer) in accordance with a condition attached to an exemption certificate, no objection notification, or notice imposing conditions issued to the foreign person in relation to a proposed acquisition of an interest in residential land; or
* the Commissioner, including as a delegate of the Treasurer, in accordance with section 133 of the FATA.

A reference to ‘in accordance with the FATA’ includes regulations made under that Act.

Information about an interest that is taken to have been acquired between 1 July 2016 and 30 June 2023 only because of section 15 of the FATA is not covered by this section, as noted in paragraph 5(2)(a). Subsection 15(1) of the FATA provides that a person is taken to acquire an interest at the time the person enters an agreement to acquire that interest, or obtains a right to acquire that interest under an option (whether or not the person subsequently exercises that option), or has a right to have such an interest transferred to the person or an associate. That subsection is intended to ensure foreign persons seek approval before entering into an agreement to acquire an interest in residential land (even though the foreign person has not acquired legal title to the residential land interest). Section 5 of the Instrument does not cover interests which are taken to have been acquired before the Register commencement day through the operation of subsection 15 of the FATA, but which were actually acquired after the Register commencement day, because these interests are covered by section 130ZA of the FATA (see section 130X of the FATA) and information on these interests will form part of the Register after their actual acquisition.

Section 6 – Registered circumstance

In accordance with paragraph 24(1)(c) of Schedule 3 to the Act, subsection 6(1) of this Instrument provides a registered circumstance is taken to exist for the purposes of the FATA in relation to a foreign person in three circumstances (as outlined below). This allows the Registrar to add information relating to the registered circumstance (including the information received under section 5) to the Register under section 130U of the FATA. A person to whom a registered circumstance relates will be subject to additional reporting obligations while the registered circumstance exists, for example to report disposal of their interest to the Registrar, to ensure the Register contains up to date information.

The table beneath subsection 6(1) sets out three circumstances in which a registered circumstance is taken to exist in relation to a foreign person who acquired an interest in residential land prior to Register commencement day (1 July 2023), and at the start of that day was still a foreign person and held an interest in residential land:

* The first circumstance, in table item 1, arises where the foreign person did not comply with a condition attached to an exemption certificate, no objection notification, or notice imposing conditions issued before 30 June 2024, requiring the person to notify a taxation officer of the acquisition before 30 June 2024. Prior to 1 July 2023, such conditions requiring a foreign person to register an interest on the ATO’s non-statutory Register of Foreign Ownership of Residential Land, were imposed by the Treasurer under sections 57, 58, 59, 74 or 79H of the FATA, and sections 43A, 43B, 43BA or 43BB of the *Foreign Acquisitions and Takeovers Regulation 2015* (FATR).
* The second circumstance, in table item 2, arises where the foreign person was required to give the Treasurer a notice under section 81 of the FATA before acquiring a residential land interest and made the acquisition, but the person did not give that notice or otherwise obtain a no objection notification for their acquisition before 30 June 2024.
* The third circumstance, in table item 3, arises where the Commissioner is required by section 5 to cause information about an acquisition of a residential land interest by a foreign person to be given to the Registrar, provided that a registered circumstance does not currently exist or did not previously exist in relation to the foreign person who holds the relevant residential land interest, to prevent overlap of records and obligations.

The third circumstance covers information relating to relevant residential land interests that were acquired by foreign persons between 1 July 2016 and 30 June 2023, that was obtained in the same period by a taxation officer. Subsequent updates to that information are also covered. For example, if the Commissioner obtained information relating to a relevant residential land interest in September 2020 and later updated details of that information, the registered circumstance arises in relation to the person even though some of the information has not been given to the Registrar under subsection 5(1) because it was not obtained before 1 July 2023. Information obtained after 1 July 2023 in relation to a relevant residential land interest may be added to the Register under section 130U of the FATA.

Subsection 6(2) provides that the registered circumstance begins to apply from 30 June 2024. This is consistent with subitem 24(4) of Schedule 3 to the Act, which provides a registered circumstance in the transitional rules can only begin to apply on or before 1 July 2024.

*Cessation of the registered circumstance*

Paragraph 6(3)(a) provides that the registered circumstance ceases to apply immediately after it begins to apply if, at the time it begins to apply:

* the person was no longer a foreign person; or
* the person no longer held any residential land interest.

This is appropriate as, as the person is no longer a foreign person or no longer held any residential land interest at this time, the objective of the registered circumstance has been achieved: to enable addition of information about the person’s interest to the Register.

Alternatively, paragraph 6(3)(b) provides that the registered circumstance ceases to apply immediately after it begins to apply if the Registrar does not give the foreign person a written notice under subsection 7(1) (explained below) just before 1 January 2026. This provision and subsection 7(1) are included in the interests of fairness, to ensure foreign persons are reasonably aware where there is a registered circumstance that applies in relation to them. This is important as there will be ongoing obligations associated with the registered circumstance while it exists, such as requirements for the foreign person to notify the Registrar if they dispose of the relevant interest or if they cease to be a foreign person in accordance with sections 130ZQ and 130ZR of the FATA, which ensure the Register contains up to date information. The window of time between the commencement of the Instrument and 31 December 2025 is a reasonable period for the Registrar to make contact with the person.

In accordance with paragraph 24(1)(d) of Schedule 3 to the Act, subsection 6(4) provides that the registered circumstance ceases to apply if the foreign person stops holding an interest in residential land after 30 June 2024. In practice, this means that the registered circumstance ceases to apply if the foreign person stops holding an interest, in accordance with that subsection, or if the person ceases to be a foreign person, in accordance with subsection 130ZR(2) of the FATA. Where the foreign person is aware, or ought reasonably to have become aware, that a registered circumstance that relates to the person ceases, the foreign person must give a register notice to the Registrar in accordance with section 130ZQ of the FATA, so the Registrar can record the disposal of their interest on the Register.

Section 7 – Registrar to give notice of registered circumstance

In accordance with paragraph 24(1)(e) of the Act, subsection 7(1) requires the Registrar to give written notice to a foreign person of each registered circumstance that arises in relation to the person under section 6 and any additional reporting obligations that apply to the foreign person in relation to the registered circumstance. The additional reporting obligations cover any obligations imposed or that may be imposed on the foreign person. The written notice must be given on or before 31 December 2025.

To avoid doubt, section 135A of the FATA applies to the written notice in the same way as it applies to a notice under the FATA, with a reference to the Secretary, the Treasurer or the Commissioner in that section including a reference to the Registrar. This is in accordance with subitem 24(6) of Schedule 3 to the Act.

This notification requirement is included in the interests of fairness, to ensure foreign persons are informed if there is a registered circumstance that applies in relation to them. This is important as there will be ongoing obligations associated with the registered circumstance while it exists, such as requirements for the foreign person to notify the Registrar if they dispose of the relevant interest or if they cease to be a foreign person in accordance with sections 130ZQ and 130ZR of the FATA, which ensure the Register contains up to date information.

However, subsection 7(2) provides that subsection 7(1) (and the written notice requirement from the Registrar) does not apply if the registered circumstance ceased to apply, immediately after it begun to apply, under paragraph 6(3)(a). This happens where the information about the relevant residential land interest has been transferred to the Registrar but the person to whom the registered circumstance relates was no longer a foreign person or no longer holds the relevant interest as at the commencement of the Instrument. Because these persons are not subject to ongoing obligations, it is not necessary to require the Registrar to give written notice to them.

**ATTACHMENT B**

### Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### Foreign Investment Reform (Protecting Australia’s National Security) (Transitional Provisions – Residential Land) Rules 2024

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### Overview of the Legislative Instrument

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

The Register of Foreign Ownership of Australian Assets (the Register), established by Part 7A of the FATA, is an integral part of Australia’s foreign investment review framework. It records foreign interests in land, water, entities, businesses and other assets in Australia in a single resource, incorporating and extending the former statutory Register of Foreign Ownership of Water Entitlements, statutory Register of Foreign Ownership of Agricultural Land and non-statutory Register of Foreign Ownership of Residential Land (former registers). The Register commencement day was 1 July 2023. It replaced the former registers. The Commissioner of Taxation (the Commissioner) is the Registrar responsible for administering the Register, under the *Commonwealth Registers (Appointment of Registrars) Instrument 2021*. Part 5B of the *Foreign Acquisitions and Takeovers Regulation 2015* (the FATR) also supports the operation of the Register.

Item 24 of Schedule 3 to the *Foreign Investment Reform (Protecting Australia’s National Security) 2020 Act* (the Act) provides that the Treasurer may, by legislative instrument, make transitional rules relating to the Register.

The purpose of the *Foreign Investment Reform (Protecting Australia’s National Security) (Transitional Provisions – Residential Land) Rules 2024* (the Legislative Instrument) is to provide arrangements which ensure the Register contains information on foreign interests in residential land, and to provide a comprehensive picture of foreign investment in Australia.

Prior to 1 July 2023, the Australian Taxation Office (ATO) maintained the non-statutory Register of Foreign Ownership of Residential Land based on information obtained from foreign persons on their residential land interests in accordance with conditions attached to exemption certificates, no objection notifications or notices imposing conditions. The Instrument facilitates the addition of information from the non-statutory register to the Register. It also assists with the inclusion of information on the Register that should have been included on the Register of Foreign Ownership of Residential Land but has not yet been.

The Legislative Instrument does this by:

* requiring the transfer of information on foreign ownership on residential land to the Registrar, for inclusion on the Register;
* providing registered circumstances to be taken to exist in relation to foreign persons who acquired relevant residential land interests prior to 1 July 2023, to support addition of information about those interests to the Register; and
* ensuring foreign persons whose interests in residential land are captured by the transitional rules are aware of any ongoing reporting obligations associated with the registered circumstance.

Together with the Act, the FATA and the FATR, the Legislative Instrument enhances Government visibility of foreign ownership of Australian assets to aid policy consideration and efficient case processing by making more information available to decision-makers.

### Human rights implications

The Legislative Instrument supports the operation of the Register. Both the Legislative Instrument and the Register respectively engage:

* the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR);
* the right to equality and non-discrimination under Articles 2, 16 and 26 of the ICCPR; and
* the right to no discrimination on the basis of race under Articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

Right to protection from arbitrary or unlawful interference with privacy

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with a person’s privacy, family, home or correspondence, and prohibits unlawful attacks on their honour and reputation. It also provides that everyone has the right to the protection of the law against such interference or attacks.

The Register will record foreign interests in Australian land, water, businesses and other assets. It will incorporate and extend existing registers currently administered by the Commissioner of Taxation: the Register of Foreign Ownership of Water Entitlements and the Register of Foreign Ownership of Agricultural Land. Once the Register is operational, foreign persons, or people acting on their behalf, must provide notice of their acquisition of a relevant interest, as well as of certain changes in the percentage held or the disposal of that interest.

The requirement to provide information to the Registrar for inclusion on the Register engages a foreign person’s right to privacy under Article 17 of the ICCPR, as some of the information required may be personal information such as name.

An interference with privacy will not be considered arbitrary or unlawful if it is provided for by law, for a reason consistent with the ICCPR, and reasonable in the particular circumstances.[[1]](#footnote-2) The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that an interference with privacy must be proportional to the end sought and be necessary in the circumstances of the case.[[2]](#footnote-3)

In this case, any limitations on privacy inherent in the requirement to provide information to the Registrar, and for information to be held on the Register, are provided for by law through the FATA, the FATR and this Legislative Instrument.

The registry regime has a legitimate purpose, namely Government oversight of foreign investment in Australia with a view to protecting the national interest.

The registry regime has been designed so that any interference with privacy is proportional to achieving those objectives, and to be reasonable in the circumstances. In particular:

* It would not be possible for the Registrar to administer and enforce the regime, to achieve those objectives, without collecting relevant personal information.
* The information required for inclusion on the Register is relevant to oversight of asset ownership; additional fields of personal information or sensitive information which do not relate to this purpose are not sought.
* The range and means of collecting the information for inclusion on the Register complement other existing mechanisms for recording details of foreign interests in Australia, for consistency.
* Registered information is not made publicly available, to protect privacy.
* The Registrar is subject to information handling obligations which ensure personal information is collected, used and stored securely in accordance with the *Privacy Act 1988*, which gives effect to the right to privacy in Australia.

Any limitation to the right to privacy from these arrangements is consistent with the ICCPR as the collection and use of personal information for the Register is authorised by and consistent with law, proportional to the end sought, and necessary in the circumstances to protect national security.

Rights to equality and non-discrimination

The right to equality and non-discrimination in Articles 2, 16 and 26 of the ICCPR obliges Australia to refrain from discriminating or eroding equality, and protect and advance the fulfilment and enjoyment of the rights to equality and non-discrimination for all people.

The right to no discrimination on the basis of race in Articles 1, 2 and 5 of the ICERD obliges Australia to refrain from discriminating on the basis of race, colour descent, or national or ethnic origin and to prohibit and eliminate such forms of discrimination.

Paragraph 1 of Article 1 of ICERD defines the term ‘racial discrimination’ to mean ‘any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life’.

Under Article 2(a)(a) of the ICERD, ‘each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local shall act in conformity with this obligation’.

Under Article 5 of ICERD, States Parties ‘undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to …national …origin, to equality before the law’ in the enjoyment of civil, political, economic, social and cultural rights, including the ‘right to own property alone as well as in association with others’.

Article 2 of the ICCPR requires Australia ‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Article 16 of the ICCPR further provides that ‘everyone shall have the right to recognition everywhere as a person before the law’.

Article 26 of the ICCPR recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. Article 26 further provides that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as national origin’.

The UN Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’[[3]](#footnote-4). Thus, where laws, policies or programs treat people differently, there must be criteria for the differential treatment that are reasonable and objective, and they must aim to achieve a purpose which is legitimate under the ICCPR.

The Legislative Instrument engages Articles 2, 16 and 26 of the ICCPR and Articles 2 and 5 of ICERD because some of the core obligations imposed by the Legislative Instrument apply to a ‘foreign person’. These obligations include the giving of a register notice in relation to a foreign person’s residential land interest. While an Australian citizen who is not ordinarily resident in Australia may be a foreign person for the purposes of the FATA and the FATR, it is anticipated that the majority of individuals who are directly affected by this Legislative Instrument will not be Australian citizens. Foreign persons will primarily be corporations or individuals who are citizens of countries other than Australia.

While differential treatment is applied to foreign persons who are required to notify the Registrar of actions taken in relation to Australian assets, this does not amount to prohibited discrimination, consistent with the Human Rights Committee’s comments. Foreign persons and the circumstances in which they must provide information are prescribed in objective and reasonable criteria embedded in publicly available legislation (the FATA and the FATR). Further, there is a legitimate purpose for the differential treatment which is consistent with international law. Namely, to enhance Government visibility of foreign ownership of Australia assets and prevent foreign persons from taking an interest in or acquiring influence that would pose a national security risk or be contrary to national interest.

As such, the Legislative Instrument is consistent with the principles of the ICCPR and the ICERD.

### Conclusion

This Legislative Instrument is compatible with human rights because, to the extent it may limit human rights, those limitations are reasonable, necessary, and proportionate to the objective of protecting the national interest through efficient administration of a register of foreign interests in Australian assets.

1. Human Rights Committee, *General Comment No. 16: Article 17 (Right to privacy*), *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* 32nd sess, UN Doc (1988). [↑](#footnote-ref-2)
2. Human Rights Committee, *Communication No. 488,* UN Doc CCPR/C/50/D/488 (1992). [↑](#footnote-ref-3)
3. Human Rights Committee, *General Comment No. 18, Non-discrimination,* 37th sess, reprinted in the *Compilation of General Comments and General Recommendations* *Adopted by Human Rights Treaty Bodies,* UN Doc HRI/GEN/1/Rev.9 (2008). [↑](#footnote-ref-4)