Senator the Hon Marise Payne
Minister for Foreign Affairs
Minister for Women

Senator the Hon Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Chair

I write to you in relation to the Senate Standing Committee for the Scrutiny of Bills' request for further information in relation to the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020, as set out in *Scrutiny Digest 14 of 2020*.

I thank the Committee for its comprehensive review of the Bill. My response to the Committee's request is attached.

Yours sincerely

MARISE PAYNE

Response to the Senate Standing Committee for the Scrutiny of Bills - *Scrutiny Digest 14 of 2020*
Australia's Foreign Relations (State and Territory Arrangements) Bill 2020

1. ***Noting the committee's scrutiny concerns ... including in relation to the exclusion of both procedural fairness and merits review and the limitation on judicial review, the committee requests the Minister's more detailed advice regarding why it is necessary and appropriate to provide the Minister with such broad discretionary powers under the bill.***

The Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 (the Bill) ensures that arrangements between States and Territories, local governments and Australian public universities and foreign governments are consistent with Australia's foreign policy. As the Committee notes, at the core of the Bill is a test whether or not an arrangement may adversely affect Australia's foreign relations, or be inconsistent with Australia's foreign policy.

Extent of the Minister for Foreign Affairs' Discretion

It is appropriate that the Bill provides the Minister for Foreign Affairs with broad discretion for several reasons.

Firstly, Ministers of the Crown enjoy broad non-statutory executive powers. In this case, the Minister for Foreign Affairs has broad powers to determine Australia's foreign policy. Section 51(xxix) of the Constitution empowers the Commonwealth to make laws with respect to 'external affairs'. This external affairs power extends to making laws with respect to matters involving Australia's relations with other nations, implementing Australia's international obligations under treaties to which it is a party, and matters or things outside the geographical limits of Australia.

Secondly, foreign policy and foreign relations evolve in response to domestic and international factors. Australia's foreign policy and foreign relations can be impacted by the behaviour and actions of other states—such as the outbreak of war or regime changes, as well as less predictable events such as widespread disease or natural disasters. While foreign policy settings often change very slowly and incrementally, they can change quickly in response to global events. Reflecting this dynamism, it is important that Australia's foreign policy is defined broadly in the Bill, and that the Minister's corresponding decision-making power is flexible. This enables the Minister to respond to changes in Australia's foreign policy settings in Australia's national interest.

In recent years, there has been rapid expansion in the engagement of States, Territories and their associated entities with foreign governments. At the same time, the global context has become increasingly complex and contested. The Minister for Foreign Affairs is responsible for managing Australia's foreign policy and foreign relations and is briefed on, and makes decisions about, foreign policy and foreign relations on a daily basis. The Minister is able to draw on the expertise of the Commonwealth, particularly the Department of Foreign Affairs and Trade (DFAT) and its global overseas network, to be informed of foreign policy and foreign relations matters. The Minister also has access to the national intelligence community, and is privy to highly sensitive, but relevant, information. Where the Minister determines foreign policy and foreign relations priorities, she does so in consultation with the Prime Minister and the Cabinet. It is, therefore, entirely appropriate that the Minister be given broad discretionary powers in light of her role in determining Australia's foreign policy.

That said, the fact that the Minister's decisions in respect of foreign arrangements will be published in the public register[1] will enable State/Territory entities to build a picture of the kinds of arrangements that may be considered adverse to or inconsistent with Australia's foreign policy, as well as promote public transparency on the operation of the scheme. There will also be ongoing dialogue between DFAT and State/Territory entities (including universities and local governments) about Australia's foreign policy and foreign relations to ensure they continue to be well informed of Australia's foreign policy and foreign relations interests. Australia's foreign policies and foreign relations are also commonly set out or described in various other publicly available sources, including Parliamentary discussion and debate, and speeches such as the Prime Minister's address to the UN General Assembly on 26 September 2020, as well as the 2017 *Foreign Policy White Paper*.

The Committee has suggested it may be difficult for relevant entities to negotiate and enter arrangements given the Minister for Foreign Affairs' discretion to determine foreign policy. However, the Bill has been designed deliberately to negate this concern. The vast majority of foreign arrangements required to be notified under the scheme will be non-core arrangements. Non-core arrangements do not require a decision by the Minister to proceed. Instead, after notifying the Minister, it is expected that entities will enter into the arrangement. This means entities proposing to enter non-core arrangements can continue to negotiate and enter such arrangements just as they would have done prior to the scheme commencing, subject to the Minister having been notified. If an arrangement is a core arrangement, the Minister's approval is required before an entity negotiates and enters the arrangement. However, the Minister must make a decision within 30 days, or the Minister is deemed to have given approval. This means that entities proposing to enter core arrangements will have an early decision (or deemed decision) from the Minister that enables an arrangement to progress.

While the Minister retains the ability to make a declaration about an arrangement in future, the Minister would need to be satisfied that the arrangement was adverse to Australia's foreign policy or inconsistent with foreign relations. However, the Minister would also need to take account of relevant factors set out in section 51 of the Bill, before making a declaration. This includes the extent of the performance of the arrangement, and whether a declaration for that arrangement would have significant financial consequences for the State or Territory. It is anticipated that the vast majority of arrangements would *not* be subject to a declaration.

Exclusion of Procedural Fairness and Absence of Merits Review

The Committee has said its concerns are heightened by the exclusion of procedural fairness, the exclusion of review under the *Administrative Decisions (Judicial Review) Act 1977* (*ADJR Act*), and the absence of merits review.

Procedural fairness has been excluded as the Minister's decision-making powers under the Bill involve considerations entirely within the Commonwealth's responsibility and discretion. While this will exclude the hearing rule, the Minister will receive entities' views on arrangements via the notification scheme, and consider relevant section 51 factors. These require input from the relevant State/Territory entity. Transparency of decisions will also be provided via the public register.

Australia's foreign relations and foreign policy evolve with time and in response to international events and circumstances. It would not be appropriate in the majority of circumstances for reasons

[1] Unless one of the exceptions in subsection 53(3) applies.

for a decision based on foreign relations and foreign policy to be shared with State/Territory entities or the public at large. Providing reasons for a decision made under the Bill could itself adversely affect Australia's foreign relations, especially to the extent that the decision may disclose Australia's foreign policy or position in relation to particular issues. This could compromise Australia's bilateral relationships, and disadvantage Australia's position in international forums or negotiations. Affording a hearing or providing reasons for a decision could, therefore, defeat the object of the Bill to protect and manage Australia's foreign relations. It is also of note that the exclusion of procedural fairness and the *ADJR Act* would not unduly trespass on personal rights and liberties as the Bill predominately regulates the conduct of State and Territory entities, rather than individuals.

It is also appropriate not to provide for merits review. Policy decisions of a high political content – such as those affecting Australia's relations with other countries – have been identified by the Administrative Review Council as being generally unsuitable for merits review.[2] They are decisions appropriately taken by the Minister for Foreign Affairs. Given the high political consequence of decisions that may be made under the Bill, as well as the impact such decisions have on Australia's relationship with other countries, Commonwealth-State relationships and national security, it is appropriate that decisions not be subject to merits review.

Decisions made under the Bill remain subject to judicial review by the Federal Court under section 39B of the *Judiciary Act 1903*, and by the High Court in its original jurisdiction. These avenues of judicial review will provide a robust mechanism to challenge the legality of decision-making, and will ensure that entities may challenge a decision that affects them.

Broad Scope of Arrangements and Application of the Bill to Universities

The Committee has said its concerns are further heightened by the broad scope of 'arrangements' covered by the Bill, and because the Bill applies to entities not conventionally understood to be associated with government policy programs, such as universities.

The definition of 'arrangement' is broad to capture the range of means by which arrangements are entered into, and to avoid the provisions of the Bill being easily circumvented by entities using less formal means to transact.

However, the scope of the Bill is also deliberately limited. Where university-to-university arrangements are concerned, only those between Australian public universities and foreign universities that are an agency or department of a foreign government or that lack institutional autonomy are within the Bill's scope. Australian universities' arrangements with the vast majority of foreign universities will remain unaffected by the Bill. Similarly, arrangements by corporations are not targeted through the Bill.

The Government will further reduce the scope of the Bill by making rules to exempt certain arrangements. Draft rules are published on the Department of Foreign Affairs and Trade website. The rules will address the Committee's concerns and significantly reduce the scope of the scheme by exempting:

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[2] Administrative Review Council, *What decisions should be subject to merit review? <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>*

- core foreign arrangements which solely deal with the sharing of information or resources for the management of a declared emergency in Australia; and are negotiated, proposed to be entered or entered, while that emergency is declared;
- foreign arrangements solely dealing with minor administrative or logistical matters; and
- minor variations of a previously notified arrangement that does not alter the substance of the arrangement.

The Minister for Foreign Affairs has an ongoing rule-making ability, and if needed, can further exempt certain other kinds of arrangements under the rules. Once pre-existing arrangements are notified to the Commonwealth and the Minister has greater visibility of arrangements entered into by State/Territory entities, the Minister can consider whether certain other types of arrangements are less critical from a foreign policy perspective and consider exempting such arrangements.

The inclusion of universities recognises that publicly funded Australian universities are institutions established by state and territory law with a fundamental role in international research and partnerships. While established by Commonwealth law, the Australian National University has been specifically included to ensure equity between public universities. The status of Australia's public universities and their international posture means their foreign arrangements have the potential to impact Australia's foreign relations and foreign policy. However, it is also the case that university arrangements present a lower degree of risk to Australia's foreign relations and foreign policy than State and Territory arrangements with foreign national governments. As a consequence, university arrangements are classified as non-core arrangements and there are fewer requirements and a lesser degree of scrutiny afforded to such arrangements under the Bill.

2. ***The Committee requests the Minister's advice as to the appropriateness of omitting paragraph 5(2)(d) from the bill to narrow the scope of the definition of 'Australia's foreign policy' so that such policy does not explicitly include policy that has not 'been formulated, decided upon, or approved by any particular member or body of the Commonwealth'***

Paragraph 5(2)(d) should be retained in the Bill.

Paragraph 5(2)(d) recognises that foreign policy is dynamic, and ensures that the definition of Australia's foreign policy will be sufficiently flexible to cover a policy regardless of whether it was the product of, or approved by, the Cabinet, any other ministerial decision-making body, the Prime Minister or any other Minister, or DFAT or any other department of State. This ensures that the Minister is not required to identify a particular written policy, such as the 2017 *Foreign Policy White Paper,* prior ministerial or departmental statements or other formal documents, in assessing whether or not an arrangement is consistent with, or is not inconsistent with, Australia's foreign policy. This is particularly important given the information that a Minister relies upon in determining Australia's foreign policy may be classified or sensitive, and appropriately not within the public domain.

The Minister for Foreign Affairs is the Minister with responsibility for Australia's foreign policy. It would not be congruent with the scope of the Minister's executive powers to limit her ability to determine Australia's foreign policy to only those matters also considered or decided by other persons or bodies, or written down prior to a decision being made.

However, in practice, the Minister for Foreign Affairs is a member of the Cabinet and participates in the deliberative processes of government. The Minister also remains accountable to the Parliament.

3. ***The Committee requests that the Minister provide advice as to:***
- ***why it is proposed to confer on the minister the broad power to exempt arrangements from the application of the law; and***
- ***whether the bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for the minister to exempt an arrangement from the operation of the bill***

Any decision to exempt an arrangement from the application of the law requires a point-in-time assessment of the risk of a particular arrangement. These types of judgments are subject to change over time as Australia's domestic and international interests, and the geopolitical landscape, evolves. Arrangements which are low risk now, might be considered high-risk in the future, and vice versa. It is important that the Government of the day be able to exempt arrangements flexibly and in response to changing circumstances without needing to amend the Act.

The Bill has been introduced in response to an identified gap in State/Territory engagement with the Commonwealth on arrangements with foreign governments. The fact that, to date, State and Territory entities have had inconsistent engagement with the Commonwealth on such arrangements, means the Commonwealth does not have full visibility of the extent and nature of such arrangements. This runs counter to the Commonwealth's primary responsibility for managing Australia's foreign relations. Once the Bill commences and the Minister is given greater visibility of arrangements, the Minister will have fuller understanding of the nature and extent of arrangements entered into by State/Territory entities and may, at that time, consider it appropriate to introduce further exempt arrangements. It is important that the Minister retain the ability to manage implementation of the Bill over time and minimise regulatory impact by exempting arrangements considered to be low risk through the rules.

The rules prescribing exempt arrangements will be subject to disallowance in accordance with section 42 of the *Legislation Act 2003.*

4. ***The Committee requests that the Minister provide advice as to:***
- ***why it is considered necessary and appropriate to allow delegated legislation to determine the scope of key definitions in the bill; and***
  whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding the criteria or considerations that the minister must take into account before altering the scope of key definitions in the bill

The Government has addressed the Committee's recommendations and has amended the Bill to introduce the definition of foreign universities that lack institutional autonomy. The definition of foreign universities is clear and appropriately targeted to bring in foreign universities that are substantially controlled by a foreign government. There are a finite number of foreign universities in scope, and institutions with a comparable level of autonomy to Australian universities are not in scope of the Bill.

The Government has also amended the legislation to require a review of the operation of the Act. This statutory review will provide an opportunity for the Government to review operation of the legislation after three years, its effectiveness and whether any amendments are required. The

Government is committed to continued collaboration with stakeholders throughout the process of implementation and review.

5. ***The Committee requests that the Minister provide more detailed justification regarding why it is necessary and appropriate to remove any requirements of procedural fairness in exercising any power or performing any function under the bill.***

Please see the response to request 1 above.

6. ***The Committee requests that the Minister provide advice as to why it is considered necessary and appropriate to apply the measures in the bill to agreements that have already entered into force and whether there may be any detrimental effect on individuals.***

There has been rapid expansion in recent years in the engagement States, Territories and their associated entities have with foreign governments and associated overseas partners. These arrangements have the capacity to impact foreign relations. At the same time, the global context has become increasingly complex and contested. Despite this, there has been no systematic way to ensure that States, Territories and their associated entities consult with or notify the Commonwealth Government when they enter into arrangements with foreign governments and their associated entities. This has led to a situation where the Minister for Foreign Affairs, as the Minister responsible for Australia's foreign relations and foreign policy, has not had clear visibility of how Australia has been engaging with foreign governments across various levels of government, or an ability to shape that engagement in line with the national interest.

It is necessary for the Bill to capture arrangements entered into prior to its commencement, and remaining in operation, to provide the Minister with visibility of existing foreign arrangements, and to enable the Minister to consider whether such arrangements are adverse to Australia's foreign relations or inconsistent with our foreign policy. Without this mechanism, and given many arrangements are not publicly available, the Minister would be restricted in her ability to make decisions about such arrangements, as well as make decisions about new arrangements in context and with a full understanding of their potential impact on a State/Territory entity or on Australia's bilateral relationship. The public would also be deprived of the benefit of the full transparency that the inclusion of pre-existing arrangements on the public register brings. It is necessary and appropriate for the legislation to bring all existing arrangements in scope, to ensure fulfilment of the policy intent to manage and protect Australia's foreign relations and ensure consistency in Australia's foreign policy.

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC20-018650

01 DEC 2020

Mr Glenn Ryall
Committee Secretary
Senate Scrutiny of Bills Committee
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scrutiny.sen@aph.gov.au

Dear Mr Ryall

Thank you for your correspondence of 11 November 2020 regarding the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020.

The Senate Scrutiny of Bills Committee has requested that I table an addendum to the explanatory memorandum to the Bill containing the information I have provided to the Committee regarding the types of documents that may be incorporated into a bilateral agreement, and whether those documents will be freely available.

In my view, an addendum to the explanatory memorandum is not necessary. I note my responses to the Committee's questions in relation to this matter are publicly available in the Scrutiny Digest 13/20 and Scrutiny Digest 15/20.

Yours sincerely

SUSSAN LEY

Senator the Hon Simon Birmingham

Minister for Trade, Tourism and Investment
Leader of the Government in the Senate
Senator for South Australia

Our Ref MS20-000212

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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CANBERRA ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear ~~Senator~~ Helen,

Thank you for the Committee's recent consideration of my response to your request for advice in relation to the *Export Market Development Grants Legislation Amendment Bill 2020* (the Bill).

An addendum to the Explanatory Memorandum to the Bill to address the issues raised by the Committee in relation to matters in delegated legislation and merits review will be tabled in the House of Representatives when the second reading debate occurs.

I would also like to take this opportunity to inform the Committee that the draft Export Market Development Grant Rules have been publicly released for consultation. Their release prior to the second reading debate in the House of Representatives will assist Parliament when considering the Bill.

Yours sincerely

Simon Birmingham

7/12/20.

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THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002629

Senator Helen Polley
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Dear Senator Polley

Thank you for your email on behalf of the Senate Standing Committee for the Scrutiny of Bills (Committee) regarding the Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2020 (FATFIA Bill) and the Foreign Investment Reform (Protecting Australia's National Security) Bill 2020 (FIR Bill).

In Scrutiny Digest 16 of 2020, the Committee sought my advice as to:

- the appropriateness of using delegated legislation to define key terms, set the amount of fees payable and provide for the sharing of information;
- the appropriateness and necessity of the new enforcement and compliance tools being introduced by this legislation and whether these powers are being delegated to persons with the appropriate skills, training and experience;
- the level of penalties imposed;
- the protections afforded to protected information shared with a foreign government;
- the purported retrospective application of fees on late applications; and
- the protection of an applicant's right to a fair hearing in proceedings for merits review.

Given the number of matters to be covered, I have set out my response in Annexure 1 to this letter.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

01 / 12 / 2020

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Annexure 1

Committee query regarding the FATFIA Bill

The Committee has requested the Treasurer's advice as to whether guidance in relation to the method of calculation of the fees in proposed section 6, which are imposed as taxes, can be included on the face of the bill.

Currently, fee amounts are set in the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* and in the *Foreign Acquisitions and Takeovers Fees Imposition Regulation 2015*. The power in proposed subsection 6(2) to place all fee amounts in the regulations is therefore not dissimilar to the current legislation.

This legislative design approach supports the Government's objective to establish a simpler fee framework. Prescribing the amount of a fee in a single piece of legislation (the regulations) creates a more user-friendly experience.

Additionally, allowing the regulations to list the fee amounts will provide the Government with the necessary flexibility to make timely amendments. However, we note there are protections included in the legislation place appropriate limits on the flexibility provided. For example, once amended, the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* will include a cap to limit the maximum fee that can be set and as the regulations are subject to disallowance parliamentary scrutiny over the regulations remains in place.

Committee queries regarding the FIR Bill

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate to leave the definitions of 'national security business' and 'national security land' to delegated legislation; and**
- **whether these definitions can instead be included on the face of the bill or, at a minimum, whether the bill can be amended to include at least high-level guidance regarding what may be covered by these definitions on the face of the primary legislation.**

The legislation seeks to address the potential risks that may arise from foreign ownership or control of assets and endeavours that are important for Australia's national security. The definitions of 'national security business' and 'national security land' are critical elements of the framework that is used to achieve this. They target the application of the legislative regime so that it focuses on businesses and premises where risks are likely to arise while minimising impact for areas of lower risk. As the risks to Australia's national security change over time, the definitions may also need to change to reflect this.

This essential flexibility to adapt to changing risks is best achieved by placing the definitions in the regulations which may be amended more quickly than primary legislation. The regulations remain subject to the constraints of the primary legislation and the general scope of the current definitions is outlined in the explanatory memorandum to the bill. However, given the manner in which national security risks arise, the regulations are expected to be amended if necessary, but in line with usual government processes will be open to

stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

The primary legislation will set out the core legal obligations and frameworks for managing the legal risks. The high level guidance is provided in the explanatory memorandum to the bill and further guidance will be provided in the explanatory statement to the regulations.

For the same reason that the detailed definitions need to be included in the regulations (flexibility to be promptly amended in response to evolving national security risks), the primary legislation should not excessively constrain the scope of the potential definitions that may be prescribed by the regulations.

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate for delegated legislation to provide for actions of a specified kind to be exempt notifiable national security actions or reviewable national security actions; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

The exemption certificate mechanism allows foreign investors to apply for an exemption certificate that, if granted, would allow the investor to make investments within the scope of the exemption certificate without needing to notify the Treasurer of each acquisition separately. This allows an investor who holds an exemption certificate to undertake programs of acquisitions with only one initial approval.

Alternatively, an investor may use an exemption certificate to seek approval for a proposed transaction so that it may proceed quickly once commercial details are finalised. The availability of an exemption certificate allows investors to be confident that their obligations under the *Foreign Acquisitions and Takeovers Act 1975* to notify the Treasurer before taking an action have been met.

Section 63 of the *Foreign Acquisitions and Takeovers Act 1975* allows regulations to prescribe the types of certificates the Treasurer may grant. Existing subsections 45(3) and 49(2) of the *Foreign Acquisitions and Takeovers Act 1975* expressly authorise regulations to prescribe that certain actions are neither notifiable nor significant actions respectively. This allows the regulations (current Subdivision B of Division 4 of Part 3 of the regulations) to establish an exemption certificate mechanism.

The same approach is taken in subsection 55B(3) and section 55G for notifiable national security actions and reviewable national security actions respectively, not because it is consistent with the approach to notifiable and significant actions under subsections 45(3) and 49(2), but because it is necessary to ensure that the exemption certificate mechanism continues to allow investors to undertake a program of acquisitions with efficiency and certainty while managing risks to Australia's national interest and national security. Importantly, the actual granting of the exemption certificate, will in each case be subject to a review process whereby the risks associated with the proposed exemption certificate are comprehensively assessed.

The introduction of additional notification requirements for notifiable national security actions and potential notification obligations for reviewable national security actions without corresponding exemption certificate provisions would undermine the benefits of the entire exemption certificate mechanism for investors who meet the criteria for receiving the existing exemption certificate. For this reason it is necessary to extend the exemption certificate mechanism to notifiable national security actions and reviewable nationals security actions.

It is not feasible to include guidance on circumstances where an exemption certificate will be granted by the Treasurer in the legislation because each situation will require a separate assessment of the risks associated with the proposed action or program of actions.

Applications will be considered on a case-by-case basis against the criteria for whether an exemption certificate could be granted. The regulations will set out the criteria that must be met in a manner similar to the current Subdivision B of Division 4 of Part 3 of the regulations. The particulars of meeting the criteria will be unique to each application.

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate to allow delegated legislation to expand the relevant laws in relation to which protected information may be disclosed;**
- **whether the bill can be amended to include at least high-level guidance as to the categories of laws that may be determined in the face of the primary legislation.**

Currently, section 122 of the *Foreign Acquisitions and Takeovers Act 1975* allows for protected information to be disclosed to a Minister or an accountable authority of a Commonwealth for the purposes of the administration of the prescribed list of Acts and for particular matters. Current paragraph 121(1)(w) of *Foreign Acquisitions and Takeovers Act 1975* allows regulations to be made to prescribe additional Acts. The amendments seek to expand the prescribed list of Acts and add three new matters for the permitted sharing of protected information within the Commonwealth. The amendments also change the regulation making power to an instrument making power.

The amendments largely replicate existing section 122 of the *Foreign Acquisitions and Takeovers Act 1975*, which already prescribes a number of Acts. For example the 'a taxation law (within the meaning of section 995-1 of the *Income Tax Assessment Act* 1997)' is already listed to ensure protected information under the *Foreign Acquisitions and Takeovers Act 1975* can be disclosed to the Commissioner of Taxation, to allow the Commissioner to ensure applicants are compliant with Australian tax laws.

The Treasurer will have the ability to prescribe any other Acts, by legislative instrument. The change gives the Treasurer flexibility to ensure protected information can be shared in a timely manner to enable other agencies to ensure compliance with their laws, including where the legislation currently does not exist but protected information collected under the *Foreign Acquisitions and Takeovers Act 1975* may be pertinent. Any legislative instrument prescribing new legislation under this section will be tabled in Parliament and open to parliamentary scrutiny.

Consistent with the current approach, an Act would not be prescribed unless it was necessary. For example, when decisions are made under different regimes, sharing of protected

information will ensure a consistent and whole-of-government approach. Sharing of protected information may also be necessary when new national interest concerns arise.

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate to provide the Treasurer and their delegates with a broad discretionary power to issue directions and interim directions;**
- **the appropriateness of amending the bill to provide that a person must be given an opportunity to respond and make submissions before a direction is made or varied;**
- **whether the threshold for engagement of the power to give a direction or interim direction of 'reason to believe' is a different threshold than 'reasonably believes';**
- **why it is necessary to allow the Treasurer's powers to give directions and interim directions to be delegated to an APS employee at any level within the Treasury or the ATO;**
- **whether the bill can be amended to provide some legislative guidance as to the categories of people to whom the power to give directions and interim directions might be delegated; and**
- **whether any limits or safeguards apply to personal information about individuals which may be published as part of a direction.**

The approach by Treasury to managing compliance has evolved over recent years as the nature and type of acquisitions has changed.

It has become increasingly clear that community expectations and those of Members of Parliament are that Treasury is able to do more in the compliance space. An example of this are the comments made to and questions asked of Treasury on 15 May 2020 at the public hearings of the Senate Economics References Committee Inquiry into foreign investment proposals.

The purpose of the amendments is to enhance and expand Treasury's enforcement and compliance toolkit. The FIR Bill brings the compliance and enforcement tools available to Treasury in line with other regulators, including those in the Treasury portfolio. The discretion in issuing directions and interim directions reflects the variety of actions covered by the *Foreign Acquisitions and Takeovers Act 1975,* different practices of businesses and entities, and allowing flexibility to effectively and efficiently respond to future business and industry practices.

Procedural fairness and the opportunity for a person to engage with Treasury prior to enforcement action being taken is inherent in the approach taken to administer Australia's foreign investment screening regime. It has been a longstanding practice of Treasury to work with a foreign investor to achieve compliance where non-compliance is identified. To include a requirement for Treasury to meet its procedural fairness obligations on the face of the Bill would create doubt elsewhere in the *Foreign Acquisitions and Takeovers Act 1975* about where and how procedural fairness obligations apply.

The term ‘reason to believe’ is not intended to create a lower or different bar to the term ‘reasonably believes’. .

Given the volume of work undertaken by Treasury and the Commissioner of Taxation, being able to delegate our powers is necessary to effectively and efficiently administer the regime. Consistent with Australian Government policy, these officials will have suitable training and experience to properly exercise these powers. The Government does not consider that it is necessary to include any guidance in the Bill as to how these powers will be delegated.

There are no prescribed limits or safeguards about the information that may be published as part of a direction. As noted in the Explanatory Memorandum to the Bill, there are strong public interest grounds in requiring directions to be published to increase public confidence that appropriate steps are being taken to ensure compliance with the *Foreign Acquisitions and Takeovers Act 1975*. However, the Bill recognises that there may be circumstances when publishing the direction would be contrary to Australia’s national interest. Similar to the overall administration of the *Foreign Acquisitions and Takeovers Act 1975*, the decision to withhold information will be made on a case-by-case basis.

The Committee has requested more detailed advice regarding why it is considered necessary and appropriate to allow protected information to be provided to foreign governments in circumstances where limited safeguards are provided on the face of the FIR Bill, including to ensure that an international agreement contains sufficient safeguards regarding the circumstances in which protected information can be disclosed.

The amendments provide that protected information under the *Foreign Acquisitions and Takeovers Act 1975* may be shared with foreign governments in limited circumstances where national security risks may exist, where it is not contrary to the national interest and subject to any agreements in place between the Commonwealth and the foreign government.

The information may be disclosed in performing the person’s functions or duties or exercise of the person’s powers under the *Foreign Acquisitions and Takeovers Act 1975* and the person must be satisfied the disclosure will assist the foreign government in the performance or exercise of their functions, duties, or powers under their law.

The information sharing with foreign governments may be necessary for the Commonwealth to obtain a ‘full picture’ of the applicant, as the applicant may be making similar investments in other countries. This would allow the Treasurer to tap into the knowledge and experience of other countries. Being able to draw on the knowledge and experience from other countries would better allow the Treasurer to assess any potential national security risks and make an assessment on cases related to national security. Such an assessment could materially assist in protecting Australia’s national security.

The Government recognises that much of this information required to assess an application will be commercially sensitive or of a private or confidential nature. As such information sharing will not be permitted unless there is an agreement in place between the Commonwealth and the foreign government. Paragraph 123B(1)(e) stipulates the sharing would not occur unless the foreign government undertakes not to use or further disclose the information in accordance with the agreement or otherwise as required or authorised by law. Additionally, if further constraints or protections are required when the information is shared,

paragraph 123B(3) allows the Treasurer to impose conditions in relation to the information to be disclosed.

In line with its obligations under the *Privacy Act 1988*, the Government would seek to include privacy related protections in the agreements, as appropriate to prevent any unnecessary release of information. However, as any information proposed for sharing will relate to national security risks, and therefore possible law enforcement actions, the receiving agencies should be able to receive sufficient information to identify persons or entities of interest for further inquiries. This approach is consistent with exceptions under the *Privacy Act 1988*, which exempts the applications of the Australian Privacy Principles for appropriate action relating to suspected unlawful activity or serious misconduct.

The Commonwealth would need to negotiate individual agreements with foreign governments setting out mutually agreed standards for handling personal and commercially sensitive information and that the information can only be used for the purpose shared.

For example, an agreement could stipulate specific arrangements for disclosure to the foreign entity; what the disclosed information can be used for; the categories of personal information that may be disclosed under the agreement; and that the foreign government must take reasonable steps to destroy or de-identify personal information where the overseas recipient no longer needs the information.

The Committee has requested the Treasurer's advice as to whether the FIR Bill can be amended to:

- **set out minimum protections and safeguards related to privacy that must be included in international agreements; and**
- **specify that international agreements must be tabled in Parliament.**

On the basis of the explanation above, the Government does not consider that further amendments are required to the Bill. Agreements in place will set mutually agreed standards for handling personal and commercially sensitive information.

The design of subsection 123B(2), specifying that protected information may be shared with foreign governments subject to agreements in place, is modelled on section 45 of the *Australian Border Force Act 2015.*

The Government has not yet commenced negotiating any international agreements under section 123B. Where the negotiations result in a treaty level agreement, then in accordance with established practice, any agreement proposed to be entered into by the Government will be tabled in Parliament and subject to scrutiny by the Joint Standing Committee on Treaties.

The Joint Standing Committee on Treaties would be able to review the appropriateness of the international agreement and provide adequate oversight and scrutiny on any proposed agreements between the Commonwealth and foreign governments.

The Committee has requested the Treasurer's advice as to how an applicant's right to a fair hearing will be protected in proceedings for merits review before the Administrative Appeals Tribunal.

The applicant's right to a fair hearing is protected in so far as it is possible to do so in the circumstances where the disclosure of particular information to the applicant may itself increase the risks to Australia's national security. An example of this may be a situation where the applicant would be able to infer from the information the technological means that were used to obtain the information or the reasons why a particular business or location is critical to national security.

Proposed Division 4 of Part 7 is closely modelled on the existing mechanism for the review of ASIO's security assessments by the Security Division of the AAT because it is likely that national security issues that arise in the review of applications under the *Foreign Acquisitions and Takeovers Act 1975* will be as sensitive as those in ASIO's security assessments and would require a comparable level of care and management. For this reason, the mechanism in the *Foreign Acquisitions and Takeovers Act 1975* adopts the same approach to balancing the applicant's rights against national security concerns.

The Committee has requested the Treasurer's advice as to whether the retrospective application of the transitional provisions in item 247 of Schedule 1 will have a detrimental effect on individuals, and if so, the number of individuals that may be affected.

Item 185 (together with items 182 and 183) of the FIR Bill provide that a person is liable to pay a fee if the Treasurer makes an order or no-objection notification about an action the person took, if the person did not notify the Treasurer before taking the action (and the person was not called in by the Treasurer). The fee applies regardless of whether the person notified the Treasurer after taking the action (known as a retrospective application) or never notified the Treasurer.

However, the Treasurer has no powers to make an order or no-objection notification about actions that are notifiable but not significant. Therefore, item 185 does not allow a fee to be charged if a person notifies retrospectively about an action that is notifiable but not significant.

Item 247 extends the fee liability to persons who notify the Treasurer of a retrospective action that is notifiable but not significant, and was taken between 1 December 2015 and 31 December 2020 inclusive.

Currently, section 81 of the *Foreign Acquisitions and Takeovers Act 1975* requires a person to notify the Treasurer before taking a notifiable action. Failing to give this notice is an offence under existing section 84. Item 247 only applies to people who are notifying after taking an action that is notifiable but not significant. That is, item 247 only applies to a person who is in breach of the *Foreign Acquisitions and Takeovers Act 1975*.

Had the person followed the law and notified the Treasurer prior to taking the action, they would have been charged a fee under table item 3 of subsection 113(1). Without item 247, the bill provides a financial incentive to break the law. Item 247 has been drafted to make sure that the fee amount a person pays is what they should have paid had they notified at the time they were required to notify (that is before taking the action), rather than the new (and potentially higher) fee being implemented by under the reforms.

The Committee has requested the Treasurer's advice as to:

- **why it is considered necessary and appropriate to allow the registrar to delegate powers and functions under Parts 4 and 5 of the *Regulatory Powers (Standard Provisions) Act 2014* and Part 7A of the *Foreign Acquisitions and Takeovers Act 1975* to the broad class of persons specified by the bill, which appears to include any APS employee at any level as well as any person specified by the regulations; and**
- **the appropriateness of amending the bill to provide at least high-level guidance as to the appropriate skills, experience and training required of persons who will exercise these delegated powers and functions.**

The Government considers the powers of the Registrar to delegate their powers necessary and appropriate to facilitate efficient management of the new Register of Foreign Owned Australian Assets. Consistent with Australian Government policy and current practice, the relevant officials will have suitable training and experience to properly exercise these powers.

The Committee has requested the Treasurer's more detailed advice as to the justification for the significant criminal and civil penalties that may be imposed under the FIR Bill, by reference to comparable Commonwealth offences and the requirements in the Guide to Framing Commonwealth Offences.

The design of the civil penalty amounts and quantum of the penalty is consistent with other legislation in the Treasury portfolio, including the *Corporations Act 2001* and the *Competition and Consumer Act 2010.*

The maximum penalty amounts proposed under the Bill are increased significantly above the amounts currently included in the *Foreign Acquisitions and Takeovers Act 1975*. The penalty amounts are not in all instances consistent with the *Guide to Framing Commonwealth Offences* but are considered appropriate.

These maximum penalty amounts are appropriate given the high value acquisitions captured by the foreign investment review framework, the potential resulting benefits and profits that may be derived from non-compliance with the *Foreign Acquisitions and Takeovers Act 1975* and potential risks to Australia's national interest and national security from that non-compliance. While Treasury can make submissions to the court on the penalty to be imposed, having significant maximum penalty amounts enables the courts to impose proportionate penalties in light of the circumstances of the contravention. It is important that the penalty regime acts as a sufficient deterrent and that the penalties reflect the seriousness of potential non-compliance, particularly in relation to investors with access to substantial funding where smaller maximum penalty amounts may be insignificant in contrast to the potential benefits and profits. The penalty amounts align with community standards and expectations.

Acquisitions and investments are generally only subject to screening under Australia's foreign investment screening regime if the acquisition is valued at more than $275 million or $1.125 billion for FTA partner countries. These are high value acquisitions which could have broad economic impacts or pose national security risks if not notified and considered by the Treasurer before being taken.

Similarly, a failure to meet any conditions imposed by the Treasurer to address any risks to the national interest, including national security, that may be posed by the acquisition could have a significant impact on Australia's economy or national security.

Therefore, by linking the calculation of the maximum penalty to a proportion of the value of the investment or acquisition, the penalty better reflects the benefit that could be obtained from the breach and acts as a deterrent rather than a 'cost of doing business'. The increased penalties available to a court are intended to neutralise any financial benefits or gains obtained from illegal behaviour.

As the Committee would be aware, the civil penalty amounts are maximum penalties and where appropriate a smaller penalty may be sought. The *Guide to Framing Commonwealth Offences* lists certain factors that would typically be considered by a court in deciding to set the maximum penalty. Paragraph 3.127 of the Explanatory Memorandum to the Bill recognises that these factors will be a consideration by a court when deciding to impose a penalty.