



21 May 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@treasury.gov.au; committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au

Dear Treasurer,

Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020 [F2020L00435]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all legislative instruments subject to disallowance, disapproval or affirmative resolution by the Senate against the scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and seeks your advice about this matter.

Parliamentary oversight

Senate standing order 23(3)(k) requires the committee to scrutinise each legislative instrument as to whether it complies with any ground relating to the technical scrutiny of delegated legislation. This includes where an instrument enacts significant policy measures, or appears to limit parliamentary oversight.

The instrument amends the Foreign Acquisitions and Takeovers Regulation 2015 (Principal Regulation), to set the monetary thresholds for particular significant actions and notifiable actions to nil. In effect, this would mean that the majority of actions relating to the holding or acquisition of interests in Australian business or land would require notification to the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* (Foreign Acquisitions Act). The Treasurer may impose conditions on these actions, and may refuse to allow an action to proceed if it is deemed contrary to the national interest.

The explanatory statement explains that this measure is necessary to safeguard the national interest during the COVID-19 pandemic, which is placing intense pressure on the Australian economy and Australian businesses. It also states that the measure is 'intended to be in place for the duration of the Coronavirus crisis'.

The committee considers that setting the monetary threshold at nil, for a large number of actions relating to the holding or acquisition of interests in Australian business and land, is a significant measure. The committee would therefore expect this measure to be subject to an appropriate level of parliamentary oversight.

The committee acknowledges that paragraph 55(1)(a) of the Foreign Acquisitions Act expressly contemplates the making of regulations that set monetary thresholds to nil. However, the committee is concerned that—although the explanatory statement indicates that the measure is intended to be temporary—the instrument does not specify a date by which the measure will cease. The committee notes that other instruments which implement temporary measures in response to COVID-19 generally specify a period for which the measures will apply.

The committee appreciates that the COVID-19 pandemic is creating unprecedented challenges for the Australian economy, which may necessitate changes to the foreign acquisitions regime. Nevertheless, the committee considers that the instruments implementing significant COVID-19 responses measures should still specify a date by which they will cease. This is to ensure an appropriate level of regular parliamentary oversight.

For example, the instrument could specify that the measures cease to operate six months after they commence, with the option to extend this date using a subsequent disallowable legislative instrument if necessary. If it is deemed appropriate to cease the measures at an earlier date, the measures could still be repealed at an earlier time. Noting this, the committee does not consider that specifying an end date for the measures would inhibit the government from responding flexibly to the economic impacts associated with the COVID-19 pandemic.

In light of the comments above, the committee requests your advice as to:

- **the length of time for which it is intended the measures enacted by the instrument will remain in force; and**
- **whether the instrument could be amended to specify a date by which the measures will cease to operate.**

Retrospective application

Senate standing order 23(3)(h) requires the committee to scrutinise each instrument as to whether it trespasses unduly on personal rights and liberties. This may include where an instrument applies retrospectively or has retrospective effect.

The instrument commenced on 18 April 2020. Item 5 of the instrument inserts a new section 74 into the Principal Regulation. Subsection 74(1) provides that the amendments made by the present instrument apply to actions taken on or after the announcement time, unless the action is covered by an agreement entered into before that time. Subsection 74(5) provides that 'announcement time' means 10.30 pm, by legal time in the Australian Capital Territory, on 29 March 2020. The amendments made by the present instrument therefore apply retrospectively.

The committee acknowledges that the retrospective application of the present instrument will only affect actions taken up to 19 days before the instrument commenced, and will not apply to actions covered by agreements made before that date.

Nevertheless, the committee is concerned that the explanatory statement only indicates that the instrument will apply retrospectively. It does not explain why retrospectivity is considered necessary and appropriate; whether any person has been, or may be, disadvantaged by the retrospectivity; and, if so, what steps have been or will be taken to avoid such disadvantage, and to ensure procedural fairness for affected persons. Where an instrument or a provision of an instrument applies retrospectively, the committee would expect this information to be included in the explanatory statement.

In light of the comments above, the committee requests your advice as to:

- **why it is considered necessary and appropriate that amendments made by the instrument apply retrospectively;**
- **whether any person was, or could be, disadvantaged by the retrospective application of the instrument; and**
- **if so, what steps have been or will be taken to avoid such disadvantage, and to ensure procedural fairness for affected persons.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

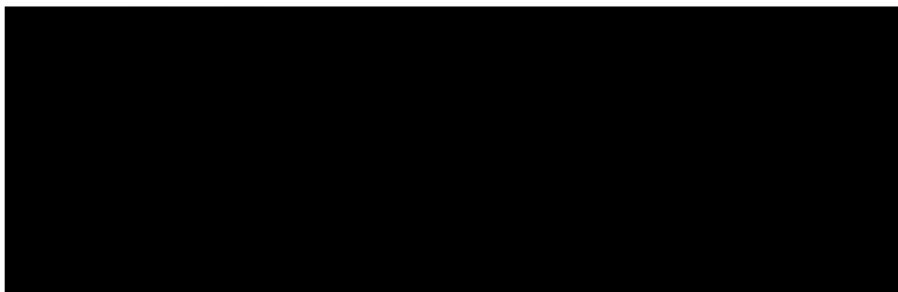
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **4 June 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* [F2020L00435] (the Regulations).

In that letter, the Committee sought my advice as to Parliamentary oversight, and the retrospective application, of the Regulations.

As outlined in the Explanatory Statement to the Regulations, the significant impact of Coronavirus on the Australian economy has increased the risk of foreign investment in Australia occurring in ways contrary to the national interest. The Regulations address this risk by amending the monetary value thresholds for particular significant actions and notifiable actions to nil, an action expressly contemplated by paragraph 55(1)(a) of the *Foreign Acquisitions and Takeovers Act 1975*.

The Regulations do not specify a date on which the measure will cease, and this reflects the uncertainty around the Coronavirus and its impact on foreign investment into Australia. While the Coronavirus crisis continues, it is in the national interest that the Regulations remain in force.

I note the comparison drawn by the Committee between the Regulations and other instruments, made in response to the Coronavirus crisis, which generally specify set time periods. In this case, it would not be appropriate to amend the instrument to specify a date on which the measures will cease to operate. If the Coronavirus crisis continues beyond any such nominal period, new regulations will be required to be drafted, to ensure the national interest remains protected.

The retrospective application of the Regulations was necessary and appropriate. As indicated above, the Coronavirus crisis increased the risk that foreign investment would occur contrary to the national interest, and the regulations address that risk. Significantly, the Regulations only apply retrospectively for a short period and only from the date of announcement of these changes to the foreign investment framework.

As noted in the Explanatory Statement, the Regulations were urgently prepared, but there was still a delay of 19 days between their announcement and commencement. Applying the Regulations from the time of the announcement on 29 March 2020 ensured that this period of time was covered, reducing the risk of foreign investment occurring contrary the national interest.

If the Regulations applied only prospectively, foreign investors could take advantage of the time between the announcement and the registration of the Regulations to avoid notifying the Treasurer

about some actions. This would pose a greater risk to the national interest, a risk that the Regulations are intended to address.

In terms of procedural fairness, the Government is not aware that any stakeholder was disadvantaged by the retrospective application of the Regulations. First, it is significant that the Regulations only applied to the time period following their announcement. The Regulations are simply the enactment of clearly articulated Government policy. Second, in the weeks following the announcement, the Foreign Investment Review Board and Treasury worked closely with stakeholders to address concerns arising from the changes, and remain committed to meeting commercial deadlines wherever possible. These proactive steps undertaken by the Government have ensured minimum disruption to foreign investors.

Generally, the amendments do not apply to an action taken under an agreement which was entered into by the parties before the announcement. This ensures that parties to such agreements are not unduly affected by the changes made by the Regulations.

Thank you for bringing your concerns to my attention.

Yours sincerely,



THE HON JOSH FRYDENBERG MP

3 / 6

/2020



AUSTRALIAN
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**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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18 June 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Via email: Josh.Frydenberg.MP@aph.gov.au

CC: tsrdlos@treasury.gov.au; committeescrutiny@treasury.gov.au;
chris.reside@treasury.gov.au

Dear Treasurer,

**Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020
[F2020L00435]**

Thank you for your response of 4 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee), in relation to the above instrument. The committee considered your response at its private meeting on 17 June 2020.

At that meeting the committee resolved to conclude its examination of the scrutiny issue relating to retrospective application. However, the committee retains scrutiny concerns about the second matter, and has resolved to seek your further advice.

Retrospective application

The committee sought your advice as to why it is considered necessary and appropriate that the measures in the instrument apply retrospectively; whether any person was or could be disadvantaged by this approach; and if so, what steps have been taken to avoid such disadvantage and to ensure procedural fairness for affected persons.

You advised that the measures would only apply retrospectively from the date of their announcement (29 March 2020), and noted that there was only a short period of time between the announcement of the measures and their commencement. You advised that applying the measures retrospectively was to ensure that foreign investors could not take advantage of the time between the announcement and commencement of the measures, to engage in activity that is contrary to the national interest. In addition, you indicated that stakeholders would have been aware of the measures before they were enacted, and advised that the government is not aware that any stakeholder was disadvantaged by the retrospective application of the measures.

In light of your advice regarding the retrospective application of the measures, the committee has resolved to take no further action in relation to this matter. The committee also considers that the information provided in your response should be included in the explanatory statement, noting the importance of that document as a point of access to understanding the law and, if necessary, as extrinsic material to assist with interpretation.

Parliamentary oversight

The committee sought your advice as to the length of time for which it is intended the measures enacted by the instrument will remain in force, and whether the instrument could be amended to specify a date by which the measures will cease to operate.

In response, you advised that not specifying a date on which the measures will cease reflects the uncertainty around the COVID-19 pandemic and its impact on foreign investment, and that it is in the national interest for the instrument to continue in force while the pandemic continues.

You also advised that it would not be appropriate to amend the instrument to specify a date on which the measures will cease to operate. In this respect, you observed that if the COVID-19 pandemic continues beyond any such nominal period, new regulations will be required to be drafted to ensure the national interest remains protected.

While noting your advice, the committee remains concerned that the instrument makes a significant change to the foreign acquisitions and takeovers regime without specifying a time by which the measures will cease to operate. While the committee appreciates that challenges associated with COVID-19 may make it necessary to implement significant measures by delegated legislation, the committee emphasises that any such legislation should specify a date by which the measures will cease. This is to ensure an appropriate level of regular parliamentary oversight, and to guard against the risk that temporary measures enacted in response to COVID-19 become a permanent part of Australian law without being subject to parliamentary scrutiny and debate.

Further, the committee does not consider uncertainty around the length of the COVID-19 pandemic to be sufficient reason for not specifying a date by which the measures in the instrument will cease to operate. In this respect, the committee reiterates that other instruments implementing temporary measures in response to COVID-19 generally specify a period for which the measures will apply.

The committee therefore considers that it would be appropriate to amend the instrument to specify a date on which the measures cease. The committee notes that this does not mean that the measures must, in fact, cease on that date. As noted in the committee's previous correspondence, the instrument could, for example, specify that the measures cease to operate six months after they commence, with the date being extended (or brought forward) by a subsequent disallowance instrument, if required.

The committee acknowledges that extending the date would require amendment regulations to be drafted. However, the committee does not consider that this would be an onerous process. Similarly, while the committee acknowledges that amending regulations may require approval by the Federal Executive Council, the committee

considers this to be an important accountability mechanism within executive government, and not an undue administrative burden.

In light of the matters above, the committee considers that it would be appropriate to amend the instrument to specify a date by which the measures cease to operate, and seeks your advice in relation to this matter.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

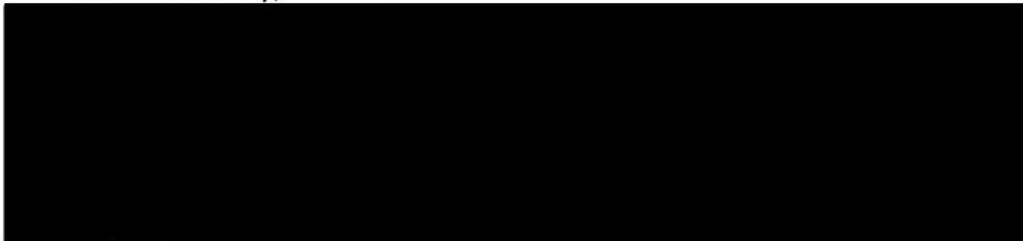
Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **2 July 2020**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,



Senator the Hon Concetta Fierravanti-Wells
Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-001236

Senator the Hon Concetta Fierravanti-Wells
Chair
Suite S1.111
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* [F2020L00435] (the Regulations).

In that letter, the Committee sought my further advice as to Parliamentary oversight of the Regulations. The Committee previously raised this issue with me in a letter dated 21 May 2020, to which I responded by letter dated 3 June 2020.

I note that the Committee considers it appropriate that the Regulations be amended to specify a date when the Regulations will cease to apply, as the Committee considers that the Regulations make a significant change to the foreign acquisitions and takeovers regime.

As outlined in the Explanatory Statement to the Regulations, and in my previous letter, the significant impact of the Coronavirus on the Australian economy has increased the risk of foreign investment in Australia occurring in ways contrary to the national interest. The Regulations address the risk by amending the monetary value thresholds for particular significant actions and notifiable actions to nil, an action expressly contemplated by paragraph 55(1)(a) of the *Foreign Acquisitions and Takeovers Act 1975*.

Given the continuing uncertainty surrounding the Coronavirus pandemic and its ongoing economic effects, it is appropriate that the Regulations remain in force throughout this time. To this end, it is appropriate that the Regulations do not specify a period of application.

I note the Committee's comment regarding the re-drafting and re-approval of the Regulations, but consider that such matters are not the motivation for excluding a specified period of application from the Regulations. Rather, the uncertainty as to when the Coronavirus pandemic will abate and the need to have these measures in place protecting the national interest are the considerations underpinning this decision.

On 5 June 2020, I announced significant reforms to Australia's foreign investment review framework. Announcing the reforms, I said the intention is for a seamless transition from the temporary Coronavirus measures, which include the Regulations, to the reforms measures, which

are scheduled to commence on 1 January 2021. While certain aspects of the temporary measures will be replaced by the reform measures, other aspects will return to pre-Coronavirus settings. As part of the development of the new framework, consideration will be given to the most appropriate way to reverse the effect of the Regulations and, where necessary, replace them with the provisions of the new framework. However, given the current uncertainties about the duration of the Coronavirus pandemic, I consider it is currently too early to specify an end-date for the application of the Regulations.

Thank you for bringing your concerns to my attention.

Yours sincerely



THE HON JOSH FRYDENBERG MP

26 / 6 /2020



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**Senate Standing Committee for the
Scrutiny of Delegated Legislation**

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27 August 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer,

**Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020
[F2020L00435]**

Thank you for your response of 26 June 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 26 August 2020. Whilst noting your advice, the committee remains concerned that the above instrument raises significant scrutiny concerns that should be brought to the attention of the Senate.

The committee's scrutiny concerns are detailed in Chapter 1 of its *Delegated Legislation Monitor 9 of 2020*, available on the committee's website at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor

As set out in the *Delegated Legislation Monitor*, the committee has recommended that the Senate disallow the instrument and has therefore resolved to give a notice of motion to disallow the instrument on 1 September 2020 for consideration and debate in the Senate 15 sitting days after that date. If there are any further developments in relation to this matter the committee may reconsider its recommendation and will report to the Senate in a future *Delegated Legislation Monitor*.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells

Chair

Senate Standing Committee for the Scrutiny of Delegated Legislation



THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002313

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Via email: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells

Thank you for the opportunity to provide an update to the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020* [F2020L00435] (the Regulations).

Since our last correspondence, regulations have been made which reinstate the monetary thresholds where a foreign person is renewing a lease over non-sensitive commercial property. This change was in response to feedback from stakeholders.

Between 18 September 2020 and 2 October 2020 draft amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* were also released for consultation. Amongst other things, the amendments propose reinstating the monetary thresholds from 1 January 2021 indexed at the rates the thresholds would have otherwise been had the amendments in response to the Coronavirus not been made. These amendments are part of the broader amendments to the foreign investment framework announced on 5 June 2020.

A final decision as to whether the monetary thresholds will be reinstated from 1 January 2021 will depend on the impact of the Coronavirus on the economy and whether there is an ongoing risk that foreign investment in Australia could occur in ways that would be contrary to the national interest.

Yours sincerely

THE HON JOSH FRYDENBERG MP

30 / 10 / 2020



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12 November 2020

The Hon Josh Frydenberg MP
Treasurer
Parliament House
CANBERRA ACT 2600


Dear Treasurer,

**Foreign Acquisitions and Takeovers Amendment (Threshold Test) Regulations 2020
[F2020L00435]**

Thank you for your response of 30 October 2020 to the Senate Standing Committee for the Scrutiny of Delegated Legislation, in relation to the above instrument.

The committee considered your response at its private meeting on 11 November 2020. The committee's comments are detailed in Chapter 1 of its *Delegated Legislation Monitor 12 of 2020*, available on the committee's website at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Monitor.

In summary, in light of your advice that regulations have been made to reinstate the monetary thresholds where a foreign person is renewing a lease over non-sensitive commercial property and that exposure draft regulations have been released which would reinstate the monetary thresholds for other actions from 1 January 2021, the committee has concluded its examination of the instrument and resolved to withdraw the notice of motion to disallow the instrument.

In the interests of transparency, I note that this correspondence will be published on the committee's website and recorded in the *Delegated Legislation Monitor*.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email at sdlc.sen@aph.gov.au.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation