

# EXPOSURE DRAFT EXPLANATORY STATEMENT

## Airports (Ownership) Regulations 2023

Draft approved for consultation by the Hon Catherine King MP, Minister for Infrastructure, Transport, Regional Development and Local Government

### **Legislative authority**

The *Airports Act 1996* (the Act) establishes a regulatory framework for leased federal airports.

Section 252 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. The Act identifies a range of matters which may be prescribed by regulations (more details in the notes on sections at [Attachment A](#)).

The instrument is a disallowable legislative instrument for the *Legislation Act 2003*.

### **Purpose and operation of the instrument**

This instrument replaces the Airports (Ownership—Interests in Shares) Regulations 1996 and a part of the Airports Regulations 1997, which sunset on 1 April 2024. Sunsetting is an automatic repeal of instruments after a fixed period, under the *Legislation Act 2003*. The aim is to ensure instruments remain fit for purpose and only in force for so long as required.

The sunsetting date was set by the Legislation (Airport Instruments) Sunset-altering Declaration 2018, which allowed for a thematic review of a number of instruments related to airports, including the Airports (Ownership—Interests in Shares) Regulations 1996 and the Airports Regulations 1997.

Public consultation in early 2022, as part of the review of the sunsetting regulations, confirmed that there were opportunities to consolidate regulations about airport ownership in a single instrument, to modernise the regulations, and to update reporting requirements.

The main purpose of this explanatory statement is to outline the changes that have been made as part of the remaking process. The Federal Register of Legislation provides the legislative history of the sunsetting instrument, including past explanatory statements.

#### *Consolidation*

This instrument consolidates all regulations relating to the ownership and control of airport-operator companies, made under or in relation to Part 3 of the Act, into a single set of regulations. It replaces Part 3 of the Airports (Ownership—Interests in Shares) Regulations 1996 and Part 3 of the Airports Regulations 1997. This could help regulated entities and the public to better navigate these regulations and the regulatory obligations contained in them.

The updated title of this instrument, the Airports (Ownership) Regulations 2023 (referred to in this explanatory statement as ‘the regulations’), acknowledges that the ownership-related

content from the Airports Regulations 1997 does not relate specifically to interests in shares, so a broader title is more appropriate.

### *Modernisation*

The regulations have been updated to better align with the drafting of the Act, and reflect modern drafting practice, while generally maintaining the intent and effect of the regulations they replace.

A range of changes to language have been made throughout the instrument, and some sections have not been replaced – see the notes on sections at [Attachment A](#) for details.

### *Updated reporting requirements*

Reporting requirements have been updated in the regulations. In general, where there was a fixed annual reporting requirement, this has been adjusted or removed, to instead rely on a power of the Minister to request information. The objective of this change is to maintain the risk-based oversight of the ownership and control of airport-operator companies, while reducing regulatory burden for airport-operator companies. It improves the flexibility of requirements for the reporting and review of ownership information, and supports the alignment of reporting processes.

The notes on sections at [Attachment A](#) describe these changes in more detail, including intended changes to the frequency of reporting requirements, and benefits of administrative flexibility.

### *Operation*

Part 3 of the Act prescribes restrictions on the ownership of airport-operator companies. There is a 49% limit on foreign ownership, a 5% limit on airline ownership for certain airports, and a 15% limit on cross-ownership for Sydney (Kingsford-Smith)/Melbourne, Sydney (Kingsford-Smith)/Brisbane and Sydney (Kingsford-Smith)/Perth airports. The Act sets out enforcement provisions such as offences and remedial orders which may be sought from the Federal Court.

Those limits relate to a person's stake in a company. A person's stake includes the interests of the person's associates. The main kinds of stakes are the percentage of total paid-up share capital and the percentage of voting power.

Part 3 of the Act also imposes other requirements, such as for the central management and control of an airport-operator company to be exercised in Australia, and for a majority of the directors of an airport-operator company to be Australian citizens or residents.

Definitions are set out in section 5 of the Act and the Schedule to the Act.

The regulations support the operation of the Act, including by providing for recordkeeping and reporting requirements relevant to the ownership provisions of the Act, and limited exemptions to the ownership provisions (i.e. kinds of interests that are not counted towards the foreign ownership, airline ownership or cross-ownership provisions).

The Act and regulations will operate concurrently with state law where possible.

## **Consultation**

### *Policy*

The department conducted public consultation on policy through a survey on the sunseting regulations in 2017, and in 2022 through a consultation paper (with the paper and non-confidential submissions published on the [department's website](#)).

### *Draft regulations*

The Attorney General's Department was consulted on a draft of the regulations.

This draft explanatory statement accompanies a publicly-available exposure draft of the regulations.

## NOTES ON SECTIONS

### Part 1 – Preliminary

#### Section 1 – Name

1. Section 1 names this instrument the *Airports (Ownership) Regulations 2023*.

#### Section 2 – Commencement

2. This section provides that the regulations will commence on 1 April 2024. This is the same date that the *Airports (Ownership) Regulations 1996* are due to sunset, although this section could be amended to provide for earlier commencement, depending on when the regulations are made.

#### Section 3 – Authority

3. The *Airports Act 1996* provides authority for this instrument to be made.

#### Section 4 – Schedules

4. This section incorporates Schedule 1 to these regulations as part of this instrument, and gives it effect.

#### Section 5 – Definitions

5. Most defined terms used in these regulations are defined in the Act. Subsection 5(1) provides some additional definitions that have effect only for these regulations.
6. When the term *Act* is used in this instrument, it means the *Airports Act 1996*. Other Acts referenced in this instruments are referred to each time using their short title, for example *Corporations Act 2001*.
7. The term *details*, where it is used in the context of a person (i.e. details of a person), is defined. This term is used once in this context: in subparagraph 9(2)(a)(iii) of the regulations. Section 9 requires an airport-operator company to keep records about stakes relevant to their compliance with the foreign ownership, airline ownership and cross-ownership requirements in these regulations. Subparagraph 9(2)(a)(iii) requires records for each stake to include the details of a person holding a direct control interest. The definition provides that different details must be kept for different kinds of person (individuals, corporations and foreign government bodies), as relevant identifying information will be slightly different for each. The details are all a variation on “name” and “address”, except that for foreign government bodies, a record of the name of the relevant foreign state must also be kept. This term is central to the operation of the foreign ownership, airline ownership, and cross-ownership restrictions.
8. The term *entity* has the same meaning as provided in section 64A of the *Corporations Act 2001*.

9. The term *investment fund* is defined, with reference to enabling legislation, as a unit trust (other than a discretionary trust), a statutory fund, a superannuation entity, or an exempt public sector superannuation scheme.
10. The term *ownership matter* is defined by reference to subsection 60(6) of the Act, which gives the meaning of this term only for the purposes of section 60 (rather than for the purpose of the whole Act, and so requires definition in the regulations). Ownership matters are, in summary, about stake holdings, and exercise of direction or control over an airport-operator company.
11. Where terms are defined in the Act for the purpose of the whole Act, these definitions are relied on in the regulations. Subsection 5(2) of the regulations further provides that definitions of terms in the Schedule to the Act are also relied on in the regulations (even though the Schedule only provides for these definitions to apply to Part 3 of the Act). The note at the end of subsection 5(2) gives some examples of terms that are defined in the Schedule to the Act, and used in the regulations with that definition, but the list is not intended to be exhaustive.
12. The regulations no longer define the term *pair of companies*, as this definition is not required. Instead, the regulations rely on the defined term *pair of airport-operator companies* in the Act, in the same way they do for the term *airport-operator company*. Previous references to a pair of companies (e.g. from regulation 3.22 of the Airports Regulations 1997) have been updated to refer to a pair of airport-operator companies, which has the same meaning in context. This change has no substantive effect. It was made for technical reasons, for better alignment with the Act.

## **Section 6 – Beneficial interest in the capital or income of investment fund**

13. Section 6 explains the circumstances in which a person is taken, for the purposes of the regulations, to hold a beneficial interest in an investment fund.
14. The phrase “the person’s order” in subparagraph 6(1)(b)(ii) relates to the way this framework regulates control as well as ownership. It widens the scope of the meaning of a person’s beneficial interest in an investment fund – extending beyond (inter alia) a right of persons to have a beneficial interest transferred to themselves, to also a right to have a beneficial interest transferred to others at their direction (or at their “order”).
15. Section 6 is based on the previous regulation 1.04 of the Airports (Ownership—Interests in Shares) Regulations 1996, with the same intended effect. A few changes have been made to meet modern drafting standards, to improve clarity and to more closely align with the drafting of the Act, including:
  - In subsection 6(1), a reference to “a person who holds a beneficial interest in the capital, or income, of an investment fund”, instead of “a *holder of a beneficial interest*” being “a person who holds any beneficial interest in an investment fund”, to better align with the language of the Act and to allow for more consistent usage across the regulations. This is intended to maintain the same meaning as the previous regulations, but provide more clarity.

- Consequential changes based on the change to subsection 6(1), such as in paragraphs 6(1)(a) and (b) reference to “an interest of that kind”, meaning a beneficial interest in the capital, or income, of an investment fund, and in subparagraph 6(1)(b)(i) no longer needing to refer to a beneficial interest “in the capital or income of the fund” because the whole subsection is premised on that basis.

## **Part 2 – Record-keeping and giving information**

### **Section 7 – Purposes of this Part**

16. Section 7 describes the purposes of Part 2 of the regulations to assist readers in understanding and navigating the instrument. Part 2 covers sections 7 to 12 (inclusive) of the regulations. In summary, the purposes relate to the imposition of requirements about recordkeeping and the giving of information in relation to ownership matters.

### **Section 8 – Relationship with *Corporations Act 2001***

17. Section 8 confirms that the requirements of Part 2 (about recordkeeping and giving information) are in addition to, and not in substitution for, the requirements of the *Corporations Act 2001*.
18. The purpose of this section is to provide clarity. Regulated entities have enquired previously about whether meeting their reporting obligations under the *Corporations Act 2001* is sufficient for the purpose of these ownership provisions. This provision helps to avoid doubt that reporting obligations under *Corporations Act 2001* and these ownership provisions both apply separately.
19. Section 8 has the same intended effect as the previous regulation 3.21 of the Airports Regulations 1997.

### **Section 9 – Airport-operator company to keep records**

#### *Relationship with previous regulations and operation*

20. Section 9 sets out requirements for airport-operator companies to keep certain records about persons holding stakes in the company, and index them in a way that allows certain aggregation of stakes. This recordkeeping requirement supports an airport-operator’s compliance, and the Minister’s monitoring of compliance (under section 10), with a range of regulatory obligations, such as compliance with the foreign ownership, airline ownership and cross-ownership restrictions.
21. Section 9 is made under paragraph 60(1)(a) of the Act, which enables the regulations to provide for and in relation to requiring a person to keep and retain records, where the records are relevant to an ownership matter.
22. Section 9 has the same intended effect as the previous regulation 3.22 of the Airports Regulations 1997. A few changes have been made to meet modern drafting standards, to improve clarity and to more closely align with the drafting of the Act, including:
  - reference to requirements to “keep and retain records” instead of a “keep a register”, to better reflect the language of section 60 of the Act;

- reference to a “pair of airport-operator companies” instead of “pair of companies” – see the details for section 5 for more information;
  - updates to the notes in line with modern drafting standards (less detail is required in the notes); and
  - more details about the timing of the recordkeeping obligations is included, including when to make a record and how long to keep it, in line with modern drafting standards.
23. The recordkeeping requirements are not retrospective in practice, and would not disadvantage the rights of any person, because they mirror existing requirements in regulation 3.22 of the Airports Regulations 1997. While the timing for the recordkeeping requirements was not clearly prescribed on the face of the law, the intent and practical application of those requirements in regulation 3.22 was that records would need to be kept for a lengthy period of time – possibly indefinitely. Reflecting on its practical needs in monitoring compliance with regulatory obligations related to ownership, the Minister only requires records to be kept for a more limited period of time, now prescribed in the regulations.

*Personal information and privacy*

24. Among other matters, section 9 requires airport-operator companies to keep a record of any foreign persons, airlines, and airport-operator companies with a stake in an airport-operator company. This could include individuals as well as corporate entities, so could include the collection of a person’s name, nationality and residence details (i.e. addresses). Other information collected could relate to their financial interests (e.g. holdings of other relevant companies, such as holdings which are relevant to cross-ownership or airline ownership requirements).
25. Section 9 is an example of regulations dealing with the collection and use of personal information by airport-operator companies. Prescribing these matters in regulations is appropriate to provide flexibility for the regulations to determine the precise details of what information should be required to be collected by airport-operator companies. This ensures that the kind of information required to be collected by companies can be tailored as necessary.
26. The authority for this section, in paragraph 60(1)(a) of the Act, includes an important limitation on the nature of records that are to be kept and retained (i.e. where the records are relevant to an ownership matter). **Ownership matter** is a term defined by subsection 60(6) of the Act (see also section 5 of the regulations). Ownership matters are, in summary, about stake holdings, and exercise of direction or control over an airport-operator company. These matters are fundamental to a range of regulatory obligations under the Act and regulations. Records are required to be kept under section 9, and potentially disclosed to the Minister under section 10, where necessary to support the administration of the Act and regulations in relation to ownership matters.
27. Only by collecting and collating this information could an airport-operator company ensure that it is within the limits for foreign ownership, cross ownership and airline

ownership. The requirement to keep this information, aggregated in particular ways, (in combination with the Minister's powers to request the information) facilitates the monitoring of compliance, and investigation of possible non-compliance with these limits.

28. The new timeframe to keep these records (until the end of the financial year after the financial year in which the record is made or updated) supports the protection of personal information, and so promotes privacy. An airport-operator company that kept records in accordance with section 9 would need to delete these after the expiry of this recordkeeping period (provided that no other recordkeeping obligations applied). This would limit the duration that personal information could be vulnerable to misuse or unauthorised disclosure. This supports the appropriateness and proportionality of the recordkeeping requirement.
29. Airport-operator companies must have regard to their obligations under the *Privacy Act 1988*, especially in the protection of this information, and its collection, use and disclosure. It is intended that information collected for the purpose of section 9 would be used by the company for the purpose of supporting its compliance with its regulatory obligations related to ownership under the Act and regulations, and only be disclosed on lawful request of the Minister under the regulations.
30. The Minister's obligations in relation to the potential collection of this information (as well as its subsequent use and disclosure) are discussed below under the notes for section 10.

#### *Enforcement*

31. The note at the end of section 9 signals that an airport-operator company may commit an offence under subsection 60(4) of the Act if it contravenes requirements to keep records. This is a criminal offence under the Act, with a maximum penalty of 50 penalty units. This is consistent with liability under the previous regulation 3.22 of the Airports Regulations 1997.

#### **Section 10 – Minister may require information**

##### *Relationship with previous regulations and operation*

32. Section 10 replaces the previous regulations 3.23, 3.24 and 3.25 of the Airports Regulations 1997. It is made under paragraph 60(1)(b) of the Act, which enables the regulations to provide for and in relation to requiring a person to give information to the Minister that is relevant to an ownership matter, or ascertaining whether Division 6 has been or is being complied with.
33. The changes reflect intended updates to the reporting requirements for airport-operator companies about ownership and control.
34. Previously, companies were required to submit annual returns of information prescribed by the regulations, on a fixed annual basis (regulation 3.23). There was no flexibility in the timing or the information provided. Additionally, the Minister could, by written



notice, request further information at any time (regulation 3.24), or request a copy of the register kept by the airport-operator company under regulation 3.22 (regulation 3.25).

35. The new section 10 allows the Minister to, by written notice, require an airport-operator company to give the Minister information. The scope of the information that can be requested is the same as the information that could previously be requested under regulation 3.24 or 3.25 of the Airports Regulations 1997. The scope of the information also fully encompasses information that was previously required to be submitted in an annual return.
36. The previous regulation 3.23 imposed requirements about the form in which information was required to be provided, and about verification of that information. It required that certain information be contained in a declaration, and that that the declaration and return be signed by a director, verified by a statutory declaration of a director, and approved by directors of the company by resolution (for inclusion in the annual return). The new section 10 also enables the Minister to impose these requirements – but there is administrative flexibility for the Minister to consider whether to do so (e.g. on the basis of risk and operational needs).
37. The minimum timeframe for an airport-operator company to provide information pursuant to a written notice is 14 days. These are calendar days, not business days. The timeframe for the request for information (beyond the minimum of 14 days) can be set in the written notice from the Minister. The Minister could take into account the reasonableness of timeframes, considering factors such as:
  - whether alignment with other reporting processes is possible;
  - what the needs of airport-operator companies are (particularly in how much time they may need to compile the information requested); and
  - any operational requirements.

#### *Objectives of change*

38. The objective of this change is to maintain the risk-based oversight of the ownership and control of airport-operator companies, while reducing regulatory burden for airport-operator companies. It improves the flexibility of requirements for the reporting and review of ownership information, and supports the alignment of reporting processes. Relying on the power of the Minister to request information will provide administrative flexibility in relation to what information is requested, and the timing of the request for and review of ownership information. The intended effect of section 10 is that if the Minister considers it appropriate, the Minister could request a return that is identical to the return that was previously required under regulation 3.23. However, the Minister could also tailor requests to respond to risk and operational need by changing the frequency or content of reporting requirements.

#### *Personal information and privacy*

39. Section 10 is an example of regulations dealing with the disclosure of personal information by companies and the collection and use of personal information by the

Minister. Prescribing these matters in regulations is appropriate to provide flexibility for the Minister in administering the regulations, to determine the precise details of what information should be collected. As discussed above, this ensures that requests can be tailored, so that only the minimum necessary information is collected. This flexibility is also important in ensuring that the administrative burden imposed on regulated entities is proportionate to regulatory risks.

40. Paragraph 60(1)(b) of the Act authorises the regulations to make provision for and in relation to requiring a person to give information to the Minister that is relevant to an ownership matter or ascertaining whether Division 6 of the Act has been or is being complied with. This is an important limitation on the nature of information that can be collected, as discussed below.
41. While a need for the collection of personal information would be unlikely (typically it would suffice to collect general information about compliance with obligations), it is possible that the Minister may need to collect specific information about persons exercising control and ownership of airport-operator companies. For example, it is possible that names, nationalities and residence details (i.e. addresses) might need to be collected of persons such as company directors or those with interests in the company. Other information collected could relate to their financial interests (e.g. holdings of other relevant companies, such as holdings which are relevant to cross-ownership or airline ownership requirements. However, typically de-identified information, or information about companies, would suffice.
42. The Minister’s power to request this information is required for the proper regulatory purpose of monitoring an airport-operator company’s compliance with its regulatory obligations. The obligations under the *Privacy Act 1988* about the collection, use and disclosure of that information will apply in relation to any requests for information from the Minister. This is reflected in the requirement under paragraph 10(1)(a) of the regulations that the information requested must be about the following specified information, which are closely related to ownership and control requirements under the Act and regulations:
  - “An ownership matter relating to the company” - ***ownership matter*** is a term defined by subsection 60(6) of the Act (see also section 5 of the regulations). Ownership matters are, in summary, about stake holdings, and exercise of direction or control over an airport-operator company. These matters are fundamental to a range of regulatory obligations under the Act and regulations.
  - “The location of the place where the central management and control of the company is ordinarily exercised” – related to compliance with section 58 of the Act, which requires an airport-operator company to ensure that the central management and control of the company is ordinarily exercised at a place in Australia.
  - “Whether a director of the company is an Australian citizen or a foreign citizen ordinarily resident in Australia” – related to compliance with section 59 of the

Act, which requires an airport-operator company to ensure that a majority of its directors are Australian citizens or foreign citizens ordinary resident in Australia.

43. Such information would only be collected when doing so would be a necessary and proportionate response to a risk related to the ownership and control of airport-operator companies (e.g. it is necessary to monitor compliance with the Act or regulations, or to investigate possible non-compliance).
44. In line with the obligations under the *Privacy Act 1998*, information collected can only be used for limited purposes.
45. The updates to the regulations in removing fixed annual reporting, and relying only on requests for information support the protection of privacy, by ensuring that information is only collected where necessary on a risk-basis. This supports both personal privacy and the protection of potentially commercially sensitive information.

#### *Enforcement*

46. The note at the end of section 10 signals that an airport-operator company may commit an offence under subsection 60(4) of the Act if it does not give information to the Minister as required. This is a criminal offence under the Act, with a maximum penalty of 50 penalty units. This is consistent with liability under the previous regulations 3.23, 3.24 and 3.25 of the Airports Regulations 1997.

#### **Section 11 – Information about unacceptable foreign-ownership situations etc.**

47. Section 11 requires the reporting to the Minister of certain circumstances (related to where an airport-operator company has reason to believe it has breached certain requirements under the Act).
48. Section 11 is made under paragraph 60(1)(b) of the Act, which enables the regulations to provide for and in relation to requiring a person to give information to the Minister that is relevant to an ownership matter, or ascertaining whether Division 6 has been or is being complied with.

#### *Relationship with previous regulations*

49. Section 11 is based on the previous regulation 3.26 of the Airports Regulations 1997, with similar intended effect. A few changes have been made to meet modern drafting standards, to improve clarity and to more closely align with the drafting of the Act, including:
  - a more specific reference to the authorising provision of the Act – paragraph 60(1)(b) of the Act enables the regulations to require a person to give information to the Minister that is relevant to an ownership matter or relevant to ascertaining whether Division 6 has been or is being complied with, which is consistent with the content of section 11;
  - clarification of what needs to be included in the notice – except for the new requirements that the notice include the belief that one of the circumstances exist and reasons for that belief, the matters required to be included in the notice are

intended to be the same in practice as under the previous regulations, but are expressed more clearly in line with modern drafting standards;

- clarification of the existing policy intention about the reporting requirements relating to ordinarily exercising central management and control from Australia (more details below); and
- clarification of a general timeframe in which the notice must be provided, noting that the previous regulations imposed no timeframe, which could have had unintended consequences (more details below).

*Change to the regulations – “the central management and control of the company is no longer being ordinarily exercised at a place in Australia”*

50. Section 11 in general is about an airport-operator company needing to give the Minister notice if it has reason to believe that it has breached certain requirements of Part 3 of the Act and corresponding provisions of the regulations:

- the foreign-, airline- or cross-ownership restrictions (Divisions 3, 4 and 5 of the Act) – specifically about unacceptable ownership situations;
- the requirements about ordinarily exercising central management and control from Australia (section 58, Division 6 of the Act); and
- the requirements about Australian citizenship or residency of directors (section 59, Division 6 of the Act).

51. Consistent with this general intention, the regulations now clarify that the Minister only needs to be notified if the airport-operator company has reason to believe that it has breached the requirement about the exercise of central management and control, i.e. that such management and control is not ordinarily being exercised at a place in Australia. For example, the Minister does not need to be notified of every instance of an exercise of central management or control from another country (for example if important strategic decisions were taken by the management group when they were outside of Australia on work travel). The Minister would need to be notified if, for example, the company relocated its head office to another country (which would be a breach of section 58 of the Act).

*Change to the regulations – notice to be given “as soon as reasonably practicable”*

52. Previously there was no timeframe attached to the requirement for an airport-operator company to give the Minister the written notice. The lack of timeframe risks unintended consequences, including difficulty in enforcing this provision. It also lacked clarity for regulated entities.

53. The regulations include a timeframe of a “reasonable” time, expressed as a requirement for an airport-operator company to give the Minister a notice “as soon as reasonably practicable” after it has reason to believe that certain circumstances exist.

54. A strict timeframe (e.g. a specified number of days in which to report) is not appropriate for this reporting requirement, as the notice is quite complex, and a reasonable timeframe to impose would differ substantially depending on the circumstances.
55. The notice must include not just the belief (e.g. that a company believes it is in an unacceptable ownership situation), and reasons for this belief, but must also include information that is based on analysis by the company (e.g. steps to be taken to verify the belief, and to remedy the situation). Depending on the circumstances, that analysis may be quick and straightforward (e.g. the unacceptable ownership situation is clearly identified, and there is a simple path to remedy it), or more time-consuming (e.g. where determining steps to verify the belief, or the most appropriate steps to remedy it, are uncertain or the circumstances are complex).
56. The complexity of the holdings of stakes in a company, and the complexity of ties of foreign persons to the company, are examples of matters which would impact when a notice could reasonably be expected to be provided. Airports differ substantially in their ownership structures and so a one-size-fits-all approach is not suitable in this instance.

*“Has reason to believe”*

57. Section 11 retains the words “has reason to believe”, consistent with the words in regulation 3.26 of the Airports Regulations 1997.
58. The phrase “has reason to believe” is used in relation to the state of mind of an airport-operator company about certain circumstances such as the existence of unacceptable ownership situations. “Has reason to believe” is a lower threshold to meet than “becomes aware”, which is used elsewhere in the regulations. The uncertainty that may be attached to this belief is anticipated in subsection 12(2) of the regulations, which refers to steps taken to verify the belief (“the steps taken, or intended to be taken, by the airport-operator company to determine whether, in fact, a circumstance mentioned in paragraph (1)(a), (b) or (c) does exist”).

*Self-incrimination*

59. While section 11 does require the notification of the Minister about matters including potential criminal offences under the Act, there is no privilege against self-incrimination because the obligation to notify the Minister (and potential incrimination) only relates to airport-operator companies, not natural persons.

*Personal information and privacy*

60. It is not anticipated that any personal information would be provided to the Minister under section 11. The Minister could request information under section 10, including personal information, if it was necessary in the circumstances.

*Enforcement*

61. The note at the end of section 11 signals that an airport-operator company may commit an offence under subsection 60(4) of the Act if it does not give information to the Minister as required. This is a criminal offence under the Act, with a maximum penalty

of 50 penalty units. This is consistent with liability under the previous regulation 3.26 of the Airports Regulations 1997.

## **Section 12 – Person must give information relevant to ownership matter to airport-operator company**

### *Operation*

62. Section 12 requires a person to give to an airport-operator company, on their request, information that is relevant to an ownership matter of that company. It is made under paragraph 60(1)(c) of the Act, which enables the regulations to provide for and in relation to requiring a person to give information to an airport-operator company, where the information is relevant to an ownership matter that concerns the company.
63. Section 12 is made in recognition that to comply with ownership requirements imposed on it by the Act or the regulations, a company may not have all necessary information immediately available to it, and may need to ask others (such as its stakeholders and directors).
64. The information that may be requested is linked closely to the compliance of an airport-operator company with its regulatory obligations. For example, an airport-operator company may rely on section 12 to collect information, so that it can comply with section 9. Among other matters, section 9 requires airport-operator companies to keep a record of any foreign persons, airlines, and airport-operator companies with a stake in an airport-operator company. This could include individuals as well as corporate entities, so could include the collection of a person's name, nationality and residence details (i.e. addresses), which is personal information. Other information collected could relate to their financial interests (e.g. holdings of other relevant companies, such as holdings which are relevant to cross-ownership or airline ownership requirements).
65. Once this information is within the possession of the airport-operator company, it may also be requested by the Minister under section 10 (e.g. if relevant to an ownership matter). See notes about section 10 for comments about the possible collection of personal information by the Minister.

### *Relationship with previous regulations*

66. Section 12 has the same intended effect as the previous regulation 3.26A of the Airports Regulations 1997. A few minor changes have been made to meet modern drafting standards and to more closely align with the drafting of the Act, such as use of the word “give” instead of “provide”, and a reference to information “verified” by statutory declaration to better align with subsection 60(2) of the Act.

### *Personal information and privacy*

67. Section 12 is an example of regulations dealing with the collection and use of personal information by airport-operator companies. Prescribing these matters in regulations is appropriate to provide flexibility for the airport-operator companies to determine the precise details of what information they need to collect from others, within the limitations prescribed by the Act and repeated in the regulations. This ensures that the

kind of information required to be collected by airport-operator companies can be tailored as necessary.

68. The authority for this section, in paragraph 60(1)(c) of the Act, includes an important limitation on the nature of information that can be collected (i.e. only where information is relevant to an ownership matter that concerns the company). *Ownership matter* is a defined term under subsection 60(6) of the Act (see also section 5 of the regulations). Ownership matters are, in summary, about stake holdings, and exercise of direction or control over an airport-operator company. These matters are fundamental to a range of regulatory obligations under the Act and regulations.
69. Airport-operator companies' powers to request this information is for a proper regulatory purpose of facilitating compliance with a company's regulatory obligations (in ensuring they do not exceed the limits on foreign, airline and cross-ownership). The obligations under the *Privacy Act 1988* about the collection, use and disclosure of that information will likely apply in relation to any requests for information from an airport-operator company.
70. Without the collection of such information, airport-operator companies would be limited in their ability to comply with their regulatory obligations in relation to foreign ownership, airport ownership and cross-ownership.

#### *Enforcement*

71. The note at the end of section 12 signals that an airport-operator company may commit an offence under subsection 60(4) of the Act if it does not give information to an airport-operator company as required. This is a criminal offence under the Act, with a maximum penalty of 50 penalty units. This is consistent with liability under the previous regulation 3.26A of the Airports Regulations 1997.

### **Part 3 – Interests in shares that are to be disregarded**

#### **Section 13 – Purposes of this Part**

72. Section 13 describes the purposes of Part 3 of the regulations to assist readers in understanding and navigating the instrument. Part 3 of the regulations covers sections 13 to 24 (inclusive) of the regulations. In summary, it prescribes kinds of interests that must be disregarded for the purpose of the ownership provisions (essentially, requirements under Part 3 of the Act and the Schedule to the Act about the ownership and control of airport-operator companies). It is made for the purpose of paragraph 9(1)(c) of the Schedule to the Act.
73. This Part is most relevant to ascertaining whether an unacceptable foreign ownership, airline ownership, or cross-ownership situation exists.
74. This Part provides detail on how the requirements of the Act apply, and facilitates the operation of the Act by allowing complex technical matters (e.g. in tracing ownership through complex trust and company structures and investment vehicles, and considering functional control) to be prescribed flexibly in regulations, as permitted by paragraph 9(1)(c) of the Schedule to the Act. It was contemplated in that paragraph that

not all detail about interests in shares could be set out in the Act because of its complexity.

75. The Act appropriately prescribes ownership restrictions and how they operate, and leaves it to the regulations to determine the finer details of how these ownership restrictions operate in practice, having regard to the complex technical matters mentioned above. If these matters were not prescribed by regulation, the intention of the Act in prescribing ownership limitations would be subverted, because the tracing of this ownership and control, and necessary accommodations which acknowledge the complex reality of commercial relationships, would not exist.

#### **Section 14 – Double holding companies**

76. Section 14 provides for the use of a double holding company structure to hold the underlying interest in an airport-operator company, where the sole purpose of the double holding company is to hold 100% direct control interests in a first holding company, which in turn is being used to hold 100% direct control interests in the airport-operator company. This is an extension of the rules for a single holding company in clause 14 of the Schedule to the Act.
77. The use of a double holding company in the way described in section 14 is intended to be disregarded for the purpose of the ownership provisions (where, for example, it would otherwise breach the 49% limit on foreign ownership under Division 3 of Part 3 of the Act).
78. Section 14 has the same intended effect as the previous regulation 2.02 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity (such as use of subheadings to make the provision easier to read). Similar changes have been made to the other sections in Part 3 of the regulations.

#### **Section 15 – Indirect interest-holders**

79. Section 15 of the regulations disregards an interest existing as a result of the interest-holder being a shareholder in a company (other than the airport-operator company or a holding company) which is not a foreign person within the meaning of the *Foreign Acquisitions and Takeovers Act 1975*. This limits the application of the multiplier in subclause 12(5) of the Schedule to the Act.
80. **Foreign person** is defined in section 4 of the *Foreign Acquisitions and Takeovers Act 1975*.
81. Section 15 provides that, when tracing foreign ownership upstream, the tracing ceases once an entity that is not a foreign person is reached.
82. For example, if Company A is a foreign person, and Company B (also a foreign person) holds shares in Company A, foreign ownership may need to be traced through to Company B and beyond. If Company C (not a foreign person) holds shares in Company B, then the tracing of foreign ownership would stop with Company C. The tracing



would not continue upstream into any shareholders in Company C, because of the effect of section 15.

83. Section 15 has the same intended effect as the previous regulation 2.03 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

#### **Section 16 – Australian associates of a foreign person—no action in concert etc.**

84. Section 16 prescribes interests of interest-holders who are associates of foreign persons, where specified circumstances apply that mitigate the influence of the foreign person on the interest-holder. Provided that the interest-holder is not a foreign person, such prescribed interests must be disregarded for the purposes of the ownership provisions (where, for example, they would otherwise breach the 49% limit on foreign ownership under Division 3 of Part 3 of the Act).
85. Subparagraph 16(1)(a)(iii) provides that one of those circumstances is a person not being a specific kind of associate as defined in subclause 5(2) of the Schedule to the Act. In subsection 16(1), associate is used in the broad sense as defined by the whole clause 5 of the Schedule to the Act. In subparagraph 16(1)(a)(iii), associate is used in the narrower sense as defined only by subclause 5(2) of the Schedule to the Act.
86. Section 16 has the same intended effect as the previous regulation 2.04 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

#### **Section 17 – Australian associates of a foreign person—avoidance of double counting**

87. Section 17 prescribes a person's interest for the purposes of calculating the total interest of a group of persons in an airport-operator company, if they are not a person in the group, they are not a foreign person, and their interest would be counted more than once as part of the interests of the group. Such prescribed interests must be disregarded for the purposes of the ownership provisions (where, for example, they would otherwise breach the 49% limit on foreign ownership under Division 3 of Part 3 of the Act). This section complements subclause 11(3) of the Schedule to the Act.
88. Section 17 has the same intended effect as the previous regulation 2.05 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

#### **Section 18 – Foreign-owned investment funds**

##### *Declaration of substantially Australian investment fund*

89. Section 18 provides a mechanism for the trustee or manager of a partly foreign owned investment fund (Fund A) to seek a declaration that the fund is a substantially Australian investment fund if foreign persons hold less than 40% of the beneficial interests in the capital and the income of the fund. If this declaration is made by the Minister, the interest of the trustee or manager is disregarded for the purposes of the ownership provisions (where, for example, it would otherwise breach the 49% limit on foreign ownership under Division 3 of Part 3 of the Act).

90. Section 18 allows a similar test to be applied to a trustee of another investment fund (Fund B) which has invested in Fund A, before applying the test to Fund A. In other words, in determining the percentage interest which foreign persons have in Fund A, the trustee of Fund B would be treated as not being a foreign person if foreign persons have beneficial interests of less than 40% in Fund B. This rule can only be applied once – in other words, if there is a foreign trustee who has an interest in Fund B, 100% of their interest will be regarded as foreign.
91. The Minister must provide notice of a decision to make, or refuse to make, the declaration. If a declaration is made, a copy of the declaration must be given to the applicant, and a notice of the declaration must be published on the department's website. If the Minister refuses to make the declaration, the applicant must be provided with written reasons for the decision and written notice of their right to have the decision reviewed by the Administrative Appeals Tribunal.

*Obligation to advise the Minister of adverse facts or circumstances*

92. Subsection 18(7) sets out obligations of “the interest-holder” to provide certain information to the Minister that could contribute to the Minister's decision to revoke a declaration under paragraph 26(1)(a) of the regulations. This is not an obligation of any person who holds an interest in the fund – it is specifically only the trustee or manager of the investment fund, the same person who is prescribed, and whose interest is prescribed, under subsection 18(6). This will often be the same trustee or manager who applied for the declaration (although it may not necessarily be, because of personnel changes) – the obligation is attached to the office of trustee or manager, and not the individual person.
93. “Interest-holder” in this context has the same meaning in practice as “holder of the declaration” under subregulation 2.07(6) of the previous Airports (Ownership—Interests in Shares) Regulations 1996, but the change provides better consistency in how this person is referred to through section 18 of the regulations.
94. Failure to give the notice containing the information required, within the stated timeframe, could result in the Minister's decision to revoke the declaration of the substantially Australian investment fund under subparagraph 26(1)(b)(i) of the regulations.

*Request for information*

95. Subsection 18(8) enables the Minister to request information about the eligibility of the investment fund to continue to be declared a substantially Australian investment fund from “the interest-holder” – the same person as described above for subsection 18(7). Subsections 18(8) to (10) set out requirements about how the request is to be made, and timeframes for complying. If requested information is not provided within the required timeframe, the Minister may consider whether the declaration should be revoked under subparagraph 26(1)(b)(ii) of the regulations.
96. This provision allows the monitoring of ongoing compliance with the eligibility requirements of a fund to be declared a substantially Australian investment fund.

### *Privacy and personal information*

97. Subsection 18(8) is an example of regulations dealing with the potential disclosure of personal information by companies and the collection and use of personal information by the Minister. Prescribing these matters in regulations is appropriate to provide flexibility for the Minister in administering the regulations, to determine the precise details of what information should be collected. As discussed above, this ensures that requests can be tailored, so that only the minimum necessary information is collected. This flexibility is also important in ensuring that the administrative burden imposed on regulated entities is proportionate to regulatory risks.
98. While a need for the collection of personal information would be unlikely (typically it would suffice to collect general information about investment holdings), it is possible that the Minister may need to collect specific information about persons to confirm the eligibility of an investment fund to continue to be declared a substantially Australian investment fund. For example, it is possible that names, nationalities and residence details (i.e. addresses) might need to be collected of persons with interests in the company. Other information collected could relate to their financial interests. However, typically de-identified information, or information about companies, would suffice.
99. The Minister's power to request this information is required for the proper regulatory purpose of confirming that a declaration that an investment fund is a substantially Australian investment fund should continue in force, because of its continuing eligibility for that declaration. The obligations under the *Privacy Act 1988* about the collection, use and disclosure of that information will apply in relation to any requests for information from the Minister. This is reflected in the narrow framing of the power of the Minister, to require information only about "the eligibility of the investment fund to continue to be declared a substantially Australian investment fund."
100. The framing of the power supports information only being collected where necessary on a risk-basis. This supports both personal privacy and the protection of potentially commercially sensitive information.

### *Relationship with previous regulations*

101. Section 18 has the same intended effect as the previous regulations 2.06 and 2.07 of the *Airports (Ownership—Interests in Shares) Regulations 1996*. A few minor changes have been made to meet modern drafting standards, to improve clarity and to more closely align with the drafting of the Act, including:
  - The requirement to provide evidence with an application for a declaration is no longer explicitly stated. Inherent in the need for the Minister to be satisfied of the criteria before deciding to make a declaration is the need for evidence. The required evidence may vary depending on the circumstances and on the information already available to the Minister.
  - The draft makes clear that if the declaration of a substantially Australian investment fund was to cease to be in force (for example if it was revoked), then interests and persons in relation to that fund would no longer be prescribed under section 18 of the regulations (compare subsection 18(6) of the regulations to

regulation 2.06 of the Airports (Ownership—Interests in Shares) Regulations 1996)). This is consistent with existing policy, but the drafting change helps to avoid possible uncertainty.

- The power to declare a substantially Australian investment fund, and associated powers and functions, are now powers and functions of the Minister that can be delegated to the Secretary or to Senior Executive Service (SES) officers or acting SES officers in the department.
  - This provides the Minister a role in deciding how all powers under the regulations will be exercised, and at what level. The Minister may exercise powers personally or delegate powers to a limited class of persons at the appropriate level.
  - For each power of the Minister, the Minister will be able to consider delegation to the Secretary or to Senior Executive Service (SES) officers or acting SES officers in the department. SES officers are well-positioned to make such decisions about the rights and obligations of regulated entities because of their seniority and experience. This balances administrative expediency with proportionate controls on decision making.
- Subsection headings are now used, and the provisions are restructured, to improve readability.
- The power of the Minister to request information has been updated to meet modern drafting standards, and minimum timeframes for a request are included to provide better fairness and certainty to regulated entities.
- The requirement in the previous subregulation 2.07(8) of the Airports (Ownership—Interests in Shares) Regulations 1996, to provide an annual report about eligibility of the fund to retain its declaration as a substantially Australian investment fund, has been removed. The Minister can request information about the eligibility of the fund as needed, so a fixed annual reporting requirement is not required. The reasons are the same as for the changed approach to reporting and requests for information in section 10.
- Publication of a notice of a declaration is now required on the department’s website, rather than in the gazette. Information on the department’s website will be easier for members of the public and regulated entities to find, compared to having to search gazettes on the Federal Register of Legislation.

## **Section 19 – Agents**

102. Section 19 prescribes the interests in shares of depositories, custodians and nominees for the purposes of the ownership provisions, provided they do not have any interests or rights in respect of the share beyond those usually attached to such a position. Such prescribed interests must be disregarded for the purposes of the ownership provisions

(where, for example, they would otherwise breach the limits on foreign ownership, airline ownership or cross-ownership).

103. Depositories, custodians and nominees hold legal title to property for beneficiaries. They have no substantial interest in the property. However, because an interest in a share is defined in the Act to include (relevantly) any legal or equitable interest in the share (and various powers which nominees are likely to have such as exercising votes on behalf of beneficiaries), they may technically have an interest in a share in their capacity as depository, custodian or nominee. These interests are not intended to be captured by the ownership provisions.
104. Section 19 has the same intended effect as the previous regulation 3.02 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

## **Section 20 – Investment fund whose trustee or manager is an associate of an airline**

### *Prescribed persons and interests, and declaration of a distanced investment fund*

105. Section 20 allows for an investment fund to have investments in (or other associations with) an airline and an airport-operator company, under certain circumstances, where this would otherwise breach the limits on airline ownership. It provides a mechanism for the trustee or manager of an investment fund to seek a declaration that the fund is a distanced investment fund if certain criteria about control of the fund are met. If this declaration is made by the Minister, the trustee or manager is a prescribed person, and disregarded for the purposes of the ownership provisions (where, for example, the limit on airline ownership would otherwise be breached).
106. Subsection 20(1) provides that a person’s interest in a share of an airline is disregarded if:
  - that person is an associate of the airline in their capacity as trustee or manager of an investment fund (for example, the investment fund property includes 15% or more of the shares in an airline); and
  - the interest arose solely as a result of an action by the person in that capacity (for example, the airline share was purchased by the person in their capacity as investment fund manager and hence the share became part of the property in the investment fund).
107. Subsections 20(3) and (4) allow the interest-holder (the trustee or manager of the investment fund mentioned in subsection 20(1)) to apply for their investment fund to be declared a distanced investment fund. If this declaration is in force, the interest-holder is a prescribed person, disregarded for the purpose of the ownership provisions. The criteria are that neither the trustee or manager is a specific kind of associate of an airline (specified in paragraph 5(1)(j) of the Schedule to the Act), and that the investment fund does not meet a specified foreign ownership and control threshold (limiting beneficial interests of foreign persons in the capital or income of the fund).

108. The Minister must provide notice of a decision to make, or refuse to make, the declaration. If a declaration is made, a copy of the declaration must be given to the applicant, and a notice of the declaration must be published on the department's website. If the Minister refuses to make the declaration, the applicant must be provided with written reasons for the decision and written notice of their right to have the decision reviewed by the Administrative Appeals Tribunal.
109. The purpose of this section is to grant some flexibility for investment by investment funds that may have a relationship with an airline, and to clarify whether this relationship is consistent with the ownership provisions of the Act. In general terms, this section enables an investment fund to have investments in both an airport and an airline, provided most of the benefits of that investments went to Australians and neither the investment manager nor the fund's trustee was in a position to control the airline.

*Obligation to advise the Minister of adverse facts or circumstances*

110. Subsection 20(7) sets out obligations of "the interest-holder" to provide certain information to the Minister that could contribute to the Minister's decision to revoke a declaration under paragraph 26(2)(a). This is not an obligation of any person who holds an interest in the fund – it is specifically only the trustee or manager of the investment fund, the same person who is referred to in subsection 20(1) and whose interest is prescribed under subsection 20(2). This will often be the same trustee or manager who applied for the declaration (although it may not necessarily be, because of personnel changes) – the obligation is attached to the office of trustee or manager, and not the individual person.
111. "Interest-holder" in this context has the same meaning in practice as "holder of the declaration" under subregulation 4.03(6) of the previous Airports (Ownership—Interests in Shares) Regulations 1996, but the change provides better consistency in how this person is referred to through section 20 of the regulations.
112. Failure to give the notice containing the information required, within the stated timeframe, could result in the Minister's decision to revoke the declaration of the distanced investment fund under subparagraph 26(2)(b)(i) of the regulations.

*Request for information*

113. Subsection 20(8) enables the Minister to request information about the eligibility of the investment fund to continue to be declared a distanced investment fund from "the interest-holder" – the same person as described above for subsection 20(7). Subsections 20(8) to (10) set out requirements about how the request is to be made, and timeframes for complying. If requested information is not provided within the required timeframe, the Minister may consider whether the declaration should be revoked under subparagraph 26(2)(b)(ii) of the regulations.
114. This provision allows the monitoring of ongoing compliance with the eligibility requirements of a fund to be declared a distanced investment fund.

### *Privacy and personal information*

115. Subsection 20(8) is an example of regulations dealing with the potential disclosure of personal information by companies and the collection and use of personal information by the Minister. Prescribing these matters in regulations is appropriate to provide flexibility for the Minister in administering the regulations, to determine the precise details of what information should be collected. As discussed above, this ensures that requests can be tailored, so that only the minimum necessary information is collected. This flexibility is also important in ensuring that the administrative burden imposed on regulated entities is proportionate to regulatory risks.
116. While a need for the collection of personal information would be unlikely (typically it would suffice to collect general information about investment holdings), it is possible that the Minister may need to collect specific information about persons to confirm the eligibility of an investment fund to continue to be declared a distanced Australian investment fund. For example, it is possible that names might need to be collected of persons with interests in the company. Other information collected could relate to their financial interests. However, typically de-identified information, or information about companies, would suffice.
117. The Minister’s power to request this information is required for the proper regulatory purpose of confirming that a declaration that an investment fund is a distanced Australian investment fund should continue in force, because of its continuing eligibility for that declaration. The obligations under the *Privacy Act 1988* about the collection, use and disclosure of that information will apply in relation to any requests for information from the Minister. This is reflected in the narrow framing of the power of the Minister, to require information only about “the eligibility of the investment fund to continue to be declared a distanced investment fund.”
118. The framing of the power supports information only being collected where necessary on a risk-basis. This supports both personal privacy and the protection of potentially commercially sensitive information.

### *Relationship with previous regulations*

119. Section 20 has the same intended effect as the previous regulations 4.02 and 4.03 of the *Airports (Ownership—Interests in Shares) Regulations 1996*. A few minor changes have been made to meet modern drafting standards, to improve clarity and to more closely align with the drafting of the Act, including:
  - The requirement to provide evidence with an application for a declaration is no longer explicitly stated. Inherent in the need for the Minister to be satisfied of the criteria before deciding to make a declaration is the need for evidence. The required evidence may vary depending on the circumstances and on the information already available to the Minister.
  - The draft now makes clear that if the declaration of a distanced investment fund was to cease to be in force (for example if it was revoked), then persons in relation to that fund would no longer be prescribed under section 20 of the regulations (compare subsection 20(2) of the regulations to subregulation 4.03(1) of the

Airports (Ownership—Interests in Shares) Regulations 1996). This is consistent with existing policy, but the drafting change helps to avoid possible uncertainty.

- The power to declare a distanced investment fund, and associated powers and functions, are now powers and functions of the Minister that can be delegated to the Secretary or to Senior Executive Service (SES) officers or acting SES officers in the department.
  - This provides the Minister a role in deciding how all powers under the regulations will be exercised, and at what level. The Minister may exercise powers personally or delegate powers to a limited class of persons at the appropriate level.
  - For each power of the Minister, the Minister will be able to consider delegation to the Secretary or to Senior Executive Service (SES) officers or acting SES officers in the department. SES officers are well-positioned to make such decisions about the rights and obligations of regulated entities because of their seniority and experience. This balances administrative expediency with proportionate controls on decision making.
- Subsection headings are now used, and the provisions are restructured, to improve readability.
- The power of the Minister to request information has been updated to meet modern drafting standards, and minimum timeframes for a request are included to provide better fairness and certainty to regulated entities.
- The requirement in the previous subregulation 4.03(8) of the Airports (Ownership—Interests in Shares) Regulations 1996, to provide an annual report about eligibility of the fund to retain its declaration as distanced Australian investment fund, has been removed. The Minister can request information about the eligibility of the fund as needed, so a fixed annual reporting requirement is not required. The reasons are the same as for the changed approach to reporting and requests for information in section 10.
- Publication of a notice of a declaration is now required on the department’s website, rather than in the gazette. Information on the department’s website will be easier for members of the public and regulated entities to find, compared to having to search gazettes on the Federal Register of Legislation.

## **Section 21 – Airline holding stake in certain airport-operator companies**

### *Operation*

120. Section 21 prescribes interests in shares where the result of holding the interest is that an airline has a stake in an airport-operator company for Archerfield, Essendon Fields, Jandakot, Moorabbin or Parafield Airports. These prescribed interests must be disregarded for the purposes of the ownership provisions (where, for example, they would otherwise breach the limits on airline ownership).



121. The intention of this section is to increase the scope for investment in general aviation airports by permitting airlines or associates of airlines to take a greater than 5% stake in an airport-operator company for the five airports mentioned. This balances the risk of anti-competitive behaviour between airlines and airport-operator companies with the need for investment in general aviation airports.

*Relationship with previous regulations*

122. Section 21 has the same intended effect as the previous regulation 4.04 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

*Exemption from operation of the Act*

123. While section 21 is made under paragraph 9(1)(c) of the Schedule to the Act, as is the rest of this Part, paragraph 44(2)(a) of the Act also allows the regulations to specify that the airline ownership requirements do not apply to certain airports other than core regulated airports. Therefore the Act clearly provides for the regulations to exempt airports (other than core regulated airports) from the airline ownership restrictions. None of the five airports mentioned in section 21 are core regulated airports.
124. This is an ongoing exemption.

**Section 22 – Irrelevant associates—airline ownership**

125. Section 22 prescribes an interest in a share for the purposes of the ownership provisions where, after being counted for the purpose of determining the direct control interests held by the person (the primary interest holder) in an airport-operator company, the interest would otherwise be counted for the purpose of calculating the stake held by an irrelevant associate (who is an airline). If certain further requirements about control are met, these prescribed interests must be disregarded for the purposes of the ownership provisions (where, for example, they would otherwise breach the limits on airline ownership).
126. For example, Company A and Company B (an airline) are associates of each other because they both hold more than 15% in Company C (see paragraphs 5(1)(k), (l) and (m) of the Schedule to the Act). In the absence of section 22, Company A and Company B would be limited to a 5% aggregate stake in an airport-operator company. In other words, in determining what stake an airline (Company B) has in an airport-operator company, Company B's direct control interests in the airport-operator company, plus the direct control interests of its associate (Company A), would be counted if not for the operation of section 22.
127. This is relevant especially to co-investing consortia that have investments with airlines in irrelevant companies. If consortium members were to be treated as associates for the reason of these co-investments, if not for the operation of section 22 they would together be precluded from holding more than 5% of certain airport-operator companies.

128. Section 22 has the same intended effect as the previous regulation 4.05 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards, to improve clarity and to more closely align with the drafting of the Act.

### **Section 23 – Irrelevant associates—cross-ownership**

129. Section 23 provides a limited exemption to the cross-ownership restrictions. These restrictions only apply to certain pairings of airports. There is a 15% limit on cross-ownership for Sydney (Kingsford-Smith)/Melbourne, Sydney (Kingsford-Smith)/Brisbane and Sydney (Kingsford-Smith)/Perth airports.
130. Section 23 prescribes an interest in a share for the purposes of the ownership provisions where, after being counted for the purpose of determining the direct control interests held by the person (the primary interest holder) in an airport-operator company, the interest would otherwise be counted for the purpose of calculating the stake held by an irrelevant associate who holds an interest in an airport-operator company which is paired with the airport-operator company in which the primary interest holder has a stake. If certain further requirements about control are met, these prescribed interests must be disregarded for the purposes of the ownership provisions (where, for example, they would otherwise breach the limits on cross-ownership).
131. For example, Company A and Company B are associates of each other because they both hold more than 15% in Company C (see paragraphs 5(1)(k), (l) and (m) of the Schedule to the Act). In the absence of section 23, Company A and Company B would be limited to a 15% aggregate stake in a certain airport-operator company (for example, for Sydney (Kingsford-Smith) Airport), if one or the other also had a greater than 15% stake in an airport-operator company for a paired airport to which the cross-ownership restrictions apply (in this example, Brisbane, Melbourne, or Perth Airports). In other words, if Company A had a greater than 15% stake in Brisbane, Melbourne or Perth Airports, because Company A and Company B are associates they would be limited to a 15% aggregate stake in Sydney (Kingsford-Smith) Airport, if not for the operation of section 23.
132. This is relevant especially to co-investing consortia that have investments in non-airport related companies. If consortium members were to be treated as associates for the reason of these co-investments, if not for the operation of section 23 they would together be limited in the stake they could hold in one airport (for example, Brisbane, Melbourne or Perth Airports), if another consortium member holds a certain stake in its paired airport (Sydney (Kingsford-Smith) Airport).
133. Section 23 has the same intended effect as the previous regulation 5.02 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

## **Section 24 – Interest in specified airports**

*Prescribed interest where declaration about unacceptable cross-ownership situation is in force*

134. Section 24 provides a mechanism for the Minister to make a declaration that effectively exempts a person from the cross-ownership restrictions in order to enable them to acquire a stake in Sydney (Kingsford-Smith) Airport, provided that the person makes an undertaking that they will take necessary steps to remedy the unacceptable cross-ownership situation (for example, by divesting so that they hold a 15% or less interest in Brisbane, Melbourne and Perth Airports) within the 12 months after acquiring that stake in Sydney (Kingsford-Smith). Section 24 puts parameters around how this exemption operates.

*Good faith*

135. One of the requirements for the Minister to make the declaration is that they are reasonably satisfied that the application for the declaration is made in good faith.
136. ‘Good faith’ in this context goes to the interest-holder’s use of the declaration process for the purpose for which it was intended. This purpose is to provide a pathway to facilitate transactions, where genuine plans to adjust investments to come within the legislated limits are met with flexibility in these limits for up to 12 months.

*Firm strategy*

137. The phrase ‘firm strategy’ imposes a baseline for the adequacy of the strategy to remedy the unacceptable cross-ownership situation. It is intended that a detailed plan, with particulars about how the applicant intends to come within the legislated cross-ownership limits, would be provided. Hope, aspiration or ideas are not a firm strategy.

*Relationship with previous regulations*

138. Section 24 has the same intended effect as the previous regulations 5.03 and 5.04 of the Airports (Ownership—Interests in Shares) Regulations 1996. A few minor changes have been made to meet modern drafting standards and to improve clarity.

## **Part 4 – Revocation of declarations**

### **Section 25 – Purposes of this Part**

139. Section 25 describes the purpose of Part 4 of the regulations to assist readers in understanding and navigating the instrument. Part 4 covers sections 25 and 26 of the regulations. The main purpose is to set out the circumstances in which certain declarations may be revoked (although, as a corollary of this, it also prescribes some additional requirements about how such a revocation is made, and when it takes effect).
140. Like Part 3 of the regulations, Part 4 is made for the purpose of paragraph 9(1)(c) of the Schedule to the Act, as it provides how declarations made for the purpose of prescribing kinds of interests that must be disregarded for the purpose of the ownership provisions can be revoked.

## **Section 26 – Revocation of declarations**

### *Operation*

141. Section 26 sets out circumstances when the following declarations may be revoked:
- a declaration that an investment fund is a substantially Australian investment fund made under subsection 18(4);
  - a declaration that an investment fund is a distanced investment fund made under subsection 20(5); and
  - a declaration about an unacceptable cross-ownership situation (providing 12 months to remedy the situation) made under subsection 24(4).
142. The circumstances for revocation are if the Minister reasonably believes that facts or circumstances exist that would have been likely to have resulted in the Minister refusing to make the declaration, or if the Minister reasonably believes that the holder of the declaration has failed to comply with certain post-declaration obligations (such as giving information to the Minister).
143. The Minister must give the holder of the declaration written reasons for the revocation, and notice of their right to merits review of the decision to revoke the declaration, within 7 days of the decision to revoke the declaration. The revocation takes effect 30 days after the Minister gives this notification.

### *Concurrent operation with Acts Interpretation Act 1901*

144. Section 26 is not intended as any implied limitation of section 33 of the *Acts Interpretation Act 1901*. For example, sections 18 and 20 enable the Minister to enquire into whether the eligibility criteria for the declaration of a substantially Australian investment fund or a distanced investment fund are still met. If the eligibility criteria for a declaration are no longer met, the declaration is also revocable under subsection 33(3AA) of the *Acts Interpretation Act 1901*.

### *Relationship with previous regulations*

145. Section 26 has a similar intended effect as the previous regulation 6.01 of the *Airports (Ownership—Interests in Shares) Regulations 1996*. A few minor changes have been made, including:
- It is no longer explicitly required that a notice to the holder of the declaration (with reasons of revocation and the right to merits review) also includes the date of effect of that revocation. The date of effect is 30 days after the notice is given (i.e. the day it is sent by the Minister), which is likely to be a different day to when the notice is prepared. It is sufficient that the date of revocation is clear on the face of the law. The Minister may choose to include details of the revocation date or 30 day timeframe, but it is not necessary for this to be legislated.
  - Adjustments have been made to reflect the changes to the obligations of the holder of the declaration to give certain information to the Minister (e.g. the

move to providing information on request of the Minister, instead of fixed annual reporting). In substance, the same matters are covered.

- The section has been restructured, and subheadings used, to improve readability.

## **Part 5 - Review**

### **Section 27 – Purposes of this Part**

146. Section 27 describes the purpose of Part 5 of the regulations to assist readers in understanding and navigating the instrument. Part 5 covers sections 27 and 28 of the regulations. The purpose is to provide for review by the Administrative Appeals Tribunal of certain decisions under this instrument.

147. This part is made under paragraph 252(a) of the Act (being required or permitted by the Act), noting that subsection 242(6) of the Act contemplates the regulations providing for Administrative Appeals Tribunal review.

### **Section 28 – Review of decisions**

148. Section 28 enables application (subject to the *Administrative Appeals Tribunal Act 1975*) for the merits review of the following adverse decisions:

- a decision under subsection 18(4) to refuse to make a declaration that an investment fund is a substantially Australian investment fund, or a decision under subsection 26(1) to revoke such a declaration;
- a decision under subsection 20(5) to refuse to make a declaration that an investment fund is a distanced investment fund, or a decision under subsection 26(2) to revoke such a declaration; and
- a decision under subsection 24(4) to refuse to make a declaration about an unacceptable cross-ownership situation (providing 12 months to remedy the situation), or a decision under subsection 26(3) to revoke such a declaration.

149. These regulations provide (in sections 18, 20 and 24) that if a decision to not make a declaration or to revoke a declaration is made, reasons for the decision and the applicant's right to merits review must be given to the applicant in writing. This supports applicants to access review.

150. These regulations provide for other decisions to be made or functions to be performed, but these are not of an adverse nature (for example, decisions to make the declarations identified above, or requests for information as a routine part of monitoring compliance with regulatory obligations), and so not appropriate to be subject to review.

## **Part 6 – Application, saving and transitional provisions**

### **Section 29 – Definitions**

151. Sections 29 to 31 comprise Part 6 of the regulations. This Part sets out application, saving and transitional provisions to assist in a smoother transition between the old regulations and the new.

152. Section 29 provides a shorthand for the reference in this Part to the Airports (Ownership—Interest in Shares) Regulations 1996 and the Airports Regulations 1997, as in force immediately before the commencement of this section on 1 April 2024.

### **Section 30 – Things done under the old Ownership regulations and old Airports regulations**

153. Section 30 is a saving provision with broad effect. It preserves the effect of things done under the old Airports (Ownership—Interest in Shares) Regulations 1996 and Airports Regulations 1997, to the extent that those things can be done under these new regulations. Subsection 30(2) lists examples of such things that are intended to be preserved: directions, notices, applications, authorisations or other instruments being given or made. This list is non-exhaustive.

154. This provision is important given the context in which these regulations are made. These regulations replace the Airports (Ownership—Interests in Shares) Regulations 1996 and the ownership-related provisions of the Airports Regulations 1997, which sunset on 1 April 2024. The regulations were remade in substantially the same form (with some minor updates and necessary modernising changes), so there is a strong need for continuity between the old and new regulations.

### **Section 31 – Declarations, notices and requests**

155. Section 31 is also a saving provision, with more specific scope, to supplement the broad effect of section 30. It is not intended to impliedly limit the scope of section 30. Instead it is intended to put beyond doubt that the declarations, notices and requests it specifies continue to have effect under the new regulations.

156. The saved declarations, notices and requests are:

- the declaration of a substantially Australian investment fund under regulation 2.07 of the Airports (Ownership—Interests in Shares) Regulations 1996;
- the declaration of a distanced investment fund under regulation 4.03 of the Airports (Ownership—Interests in Shares) Regulations 1996;
- the declaration about an unacceptable cross-ownership situation in regulation 5.04 of the Airports (Ownership—Interests in Shares) Regulations 1996;
- a notice requiring an airport-operator company to provide information to the Minister under regulation 3.24 of the Airports Regulations 1997; and
- a notice requiring a person to provide information to an airport-operator company under regulation 3.26A of the Airports Regulations 1997.

## SCHEDULE 1 – REPEALS

### Item 1 – Repeal of Airports (Ownership—Interests in Shares) Regulations 1996

157. Item 1 repeals the Airports (Ownership—Interests in Shares) Regulations 1996, in reliance on subsection 33(3) of the *Acts Interpretation Act 1901*.
158. The Airports (Ownership—Interests in Shares) Regulations 1996 is being replaced by these regulations and, as explained above, Part 6 of the regulations preserves the effect of those old regulations to the extent necessary.
159. These regulations also replace a part of the Airports Regulations 1997 that pertained to ownership and control of airport-operator companies. Those regulations will be repealed on the same date (1 April 2024) by the instrument that replaces the remainder of those regulations: the Airports Regulations 2023.

## FURTHER INFORMATION

### Delegation

160. The regulations set out a range of powers of the Minister, which can be delegated.
161. Section 244 of the Act, read alongside the definition of *this Act* as including the regulations, enables the Minister to delegate their powers under the regulations. An additional delegation provision in the regulations is not required, so regulation 3.27 of the Airports Regulations 1997 has not been replaced.
162. The Minister now has a role in deciding how all powers under the regulations will be exercised, and at what level, because all are now expressed as powers of the Minister.
163. The Minister may exercise powers personally or delegate powers to a limited class of persons at the appropriate level.
164. For each power of the Minister, the Minister will be able to consider delegation to the Secretary or to Senior Executive Service (SES) officers or acting SES officers in the department. SES officers are well-positioned to make such decisions about the rights and obligations of regulated entities because of their seniority and experience. This balances administrative expediency with proportionate controls on decision making.

### Other provisions not replaced in the regulations

165. Provisions requiring the Minister to give notice before applying to the Federal Court for a remedial order related to a breach of foreign ownership restrictions (see regulations 3.01 and 3.02 of the Airports Regulations 1997) have been removed.
166. Instead, the Minister could engage with regulated entities (including giving them notice and an opportunity to respond) before applying to the Federal Court for such orders, without needing an express legislated requirement to do so.
167. The Minister could also seek information about a possible unacceptable foreign-ownership situation under section 10 of these new regulations, so the power of the Minister to do so under a specific notice issued before applying to court (see paragraph 3.01(2)(b) of the Airports Regulations 1997) is not required.