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MEDIA RELEASE

New Foreign Investment Reforms May Prevent Australians from Receiving Their Inheritance, Encourage Intestacy, STEP Australia Warns

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STEP Australia has cautioned Treasury over changes to regulations which have far-reaching, unfair implications for Australians with relatives considered “foreign persons”

12 October 2021 – In response to Treasury's call for submissions, policy experts at STEP Australia have identified several gravely concerning implications arising from recent amendments to foreign investment regulations overseen by the Foreign Investment Review Board (FIRB).

Previously, residential real estate passing to beneficiaries considered “foreign persons” via a will were not subject to prohibitive foreign investment regulations – this exemption was (quietly) removed 1 January 2021. Because the term “foreign person” is defined very broadly, this has the potential to adversely affect millions of Australian property owners with overseas relatives and may prevent those relatives from receiving their inheritance. The removal of the exemption for interests acquired under a will means all residential property left to overseas persons, regardless of value, is subject to the FIRB regime.

Curiously, while the exemption for wills has been removed, an exemption remains for inheritances via an intestacy (dying without a will). This has the effect of encouraging people to manipulate their estate planning by having a will that deals with part of their estate and leaving gaps so that the rules of intestacy can apply to any residential property that is intended to pass to an overseas beneficiary. This is likely to mean that Australians without access to high-level legal counsel will be most severely affected, exacerbating the unfair consequences of these amendments.

This has the potential to prohibit children from receiving all, or a significant part of, their inheritance. Chris Herral, STEP Australia policy committee contributor, stated in the submission “It is a devastating consequence of the amendment that a child who is a foreign person could be forced to dispose of the family home that they inherited from their parents”. The probable impact of this legislative change is immense – in 2020, nearly a third (29.8%) of the Australian population was born overseas, meaning millions are liable to be affected.

STEP Australia strongly recommends that the exemption for property left to beneficiaries via a Will be reinstated and if ‘needed’, a high monetary threshold (~\$50 million) be applied so that the families of everyday Australians are not unfairly affected.

STEP Australia warns that the regulations in their current form encourages people to avoid creating wills because it prevents the regulations from applying. Thus, despite wills being universally recommended by legal professionals, in many certain cases a professional could be obligated to advise a client to embrace intestacy. STEP Policy Experts described this as “an absurd approach to legal advice”, and further noted that this benefits those with access to higher-level professional advice, and harms those without – contributing further to the unfair nature of this amendment.

The 1 January 2021 change also maintains the exemption for any residential transfers pursuant to Court orders that formally settle a deceased estate dispute. But the exemption does not apply to any out-of-Court settlement! This contradicts existing State Court recommendations to settle will disputes out of court. The vast majority of

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disputes are settled out-of-Court, it causes far less emotional stress, is cheaper and consumes far fewer Court resources. However, the FIRB amendments encourage individuals to fight it out in Court, because Court ordered transfers are not subject to the regulations. This directly contradicts the principle of delivering efficient justice and is yet another indictment of the FIRB amendments.

These recent foreign investment reforms threaten the interests of Australian families across generations; STEP Australia strongly urges Treasury to take action to rectify the harmful changes enacted in these recent foreign investment reforms. Specifically, the exemption for interests conferred via wills should unequivocally be reinstated. STEP Australia has offered to work with the Treasury and Foreign Investment Review Board in their further regulatory efforts to ensure the rights and wellbeing of Australians are protected.

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ABOUT STEP:

STEP is the global professional association for practitioners who specialise in family inheritance and succession planning. STEP works to improve public understanding of the issues families face in this area and promotes education and high professional standards among its members. STEP members help families plan for their futures, from drafting wills to issues surrounding international families, protection of the vulnerable, family businesses and philanthropic giving. Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

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