NOTES TO PARTICIPANTS

On 25 February 2015, the Government released an Options Paper on *Strengthening Australia's Foreign Investment Framework*. Treasury received 192 submissions in response to this Options Paper. Non-confidential submissions are now available on the Treasury website.

On Saturday 2 May 2015, the Prime Minister and Treasurer *announced* measures to strengthen the integrity of the foreign investment framework. Included in the announcement was an intention to undertake further consultation on options to simplify the foreign investment framework.

Item 8 of the February Options Paper sought views on modernising and simplifying the foreign investment framework. The Government has considered the feedback provided and now invites interested parties to lodge written submissions on the options in this Modernisation Options Paper.

Closing date for submissions: **Friday 29 May 2015**

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Submissions will be made available on the Treasury website unless you clearly indicate that you would like all or part of your submission to remain confidential. Automatically generated confidentiality statements in emails do not suffice for this purpose. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

Submissions should include the name of your organisation (or your name if the submission is made as an individual) and contact details for the submission, including an email address and contact telephone number where available. While submissions may be lodged electronically or by post, electronic lodgement is strongly preferred. For accessibility reasons, please email responses in a Word or RTF format. An additional PDF version may also be submitted.

The options outlined in this paper have not received Government approval and are obviously not yet law. As a consequence, this paper is merely a guide to options that might be adopted.

AUSTRALIA'S FOREIGN INVESTMENT FRAMEWORK: MODERNISATION OPTIONS

INTRODUCTION

1. The Government has decided to seek further views on Modernisation options for Australia's Foreign Investment Framework. This is in line with its commitment to reduce red tape.

    1.1. The final package and the approach to its implementation will be determined by the Government following consultation, also taking into account Australia's existing international commitments, such as trade agreements.

PURPOSE

2. The options under consideration would serve to modernise and simplify the framework for Australia's foreign investment screening.

FURTHER DETAILS

3. The proposals include:

    3.1. Incorporating policy only notification and prior approval requirements under Australia's Foreign Investment Policy (the Policy) into the legislative framework.

        3.1.1. The Policy would still provide guidance on operational issues and the application of the national interest to particular types of investments.

    3.2. Updating the legislation to reflect current administrative practices and regulatory concepts, as well as for modern business and corporate finance practices.

        3.2.1. This includes increasing legal certainty under the framework (by legislating to allow: applicants to voluntarily agree to extend the screening period; and the Treasurer to vary the enforceable conditions (subject to a no detriment test), and impose conditions if applicants fail to notify).

        3.2.2. It includes harmonisation with similar regulatory regimes such as Australia's takeovers rules. Such harmonisation would reduce regulatory cost, promote compliance, and leverage off an existing body of law that is better understood and tested.

    3.3. Exempting proposals that are unlikely to affect the national interest and increase the consistency of exemptions across the different acquisition types.

    3.4. Amending the legislation so that it applies irrespective of the transaction structuring (for example, moving from shares to securities, inclusive of units in trusts, and providing similar outcomes whether a direct or indirect acquisition (for example, acquiring a property or its holding company)).

4. See the below Modernisation options table for more detail on the specific options.

MODERNISATION OPTIONS TABLE

Issue	Option
ITEM 1: A LEGISLATED FRAMEWORK SUPPORTED BY GUIDANCE • *Australia's foreign investment screening framework includes some non-legislative prior notification and approval requirements (Policy only requirements) that are set out in Australia's Foreign Investment Policy (the Policy).* – *Policy only requirements are in relation to foreign government investors, the media sector, and heritage listed developed commercial property*[1]. – *Proposals may require prior approval under a Policy only requirement, as well as a legal requirement under the Foreign Acquisitions and Takeovers Act 1975 (the Act).* • *Incorporating the requirements into the legislative framework would increase transparency and provide greater certainty for investors.* • *The additional Policy only requirements are open to misunderstandings and can be the subject of criticism both domestically and in international negotiations, simply by being imposed by ministerial statement rather than statute.* • *Some flexibility would be retained to make changes through the Regulations.* • *Administrative guidance will supplement the understanding of some fundamental concepts.*	
1.1 Incorporate the foreign government investor rules into the legislative framework All direct investments, new businesses and acquisitions of any interests in land by foreign government investors generally require prior notification and approval, regardless of the value. Legislating the requirements would increase legal certainty for foreign government investors, legal advisers and the Government.	Incorporate the foreign government investor rules into the legislative framework
1.2 Legislate the media specific requirements with a higher percentage threshold All foreign investors require prior approval to make investments of 5 per cent or more in the media sector, regardless of value. Under the Policy, media sector is defined as daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media).	Legislate the media specific requirements Increase the percentage threshold from 5 per cent to align with

[1] The lower $15 million cumulative screening threshold for agricultural land has also been implemented through the Policy. The Government will introduce amendments in the Spring Sittings to give effect to this requirement. These amendments will be backdated to 1 March 2015.

Foreign ownership specific restrictions in the media sector (newspapers and broadcasting) were removed from the *Broadcasting Services Act 1992* in April 2007 (after their removal was announced in July 2006). The *Broadcasting Services Act 1992* adopts a non-discriminatory 15 per cent quantitative threshold for 'deemed control'. Media diversity rules continue to apply to both foreign persons and Australians in a non-discriminatory manner. The existing foreign investment screening framework for business acquisitions requires notification at specified percentage triggers or above (either regardless of value, or also subject to meeting an applicable monetary threshold). While 15 per cent is the starting percentage currently under the Act, 5 per cent applies in the media sector and 10 per cent for acquisitions termed direct investments by foreign government investors. It is proposed to align the 5 per cent for the media sector with direct investment (10 per cent) or the substantial interest threshold (15 per cent).	direct investment (10 per cent) or substantial interest (15 per cent)
1.3 Abolish or legislate the special screening requirements for heritage listed commercial developed property Commercial developed property that is heritage listed is subject to a lower non-indexed threshold ($5 million). The historical requirement dates back to when each level of government did not have regimes to protect heritage values and there may have been instances when Commonwealth intervention was warranted in exceptional circumstances. This aspect of the regime is also fragmented as the requirement does not apply to relevant trade agreement partners whose investors have access to the higher monetary screening threshold of $1,094 million for acquisitions in non-prescribed sensitive sectors and of commercial developed property.	Abolish this requirement
ITEM 2: UPDATE THE LEGISLATION TO REFLECT CORE ADMINISTRATIVE PRACTICES	
2.1 Update the legislation to reflect core administrative practices such as the no objections validity period, information sharing, screening timeframes and conditions Administratively, workarounds or administrative guidance has been in place for a significant period. These include: • on information collection, appropriate uses, and sharing; • withdrawal and resubmission by an applicant to extend the review period without the use of an Interim Order that is publicly gazetted; • a default 12 month validity period for approvals; • applying requirements that do not have full legislative backing; • not proceeding with compliance action so long as the foreign person complies with certain requirements; and • waiver of conditions in certain circumstances (for example, condition no longer in the national interest due to changes in	Update the legislation to reflect core administrative practices

circumstances such as economic conditions, residency, or citizenship). Such changes would better support or allow: • appropriate information sharing amongst relevant Departments and agencies; • applicants to voluntarily agree to extend the screening period on a confidential basis; • the Treasurer to issue exemption certificates under a common framework; • the Treasurer to impose conditions if a foreign person initially failed to notify; • the Treasurer to vary enforceable conditions (but only in a manner not to the foreign person's detriment); and • updating of the notification requirements.	
ITEM 3: CLOSER ALIGNMENT WITH OTHER COMMONWEALTH LEGISLATION	
3.1 Increase the substantial interest (control) threshold for a single foreign person from 15 to 20 per cent Foreign persons generally require approval if acquiring a stake of 15 per cent or more (depending on the relevant monetary threshold). Aligning the Act control threshold with the 20 per cent in the takeovers rules in the *Corporations Act 2001* would align non-government investor business acquisitions being notified to those where Australia's takeover rules consider that parties should generally make a takeover offer as control can change. This increase will automatically flow through to the definition of a 'foreign person' (currently a company is a foreign person if a single foreign person with Associates owns 15 per cent or more in the company). It will also flow through to the definition of a foreign government investor which also uses the 15 per cent test (that is, foreign government investors includes entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more). This will reduce compliance costs on investors and the Government as it will better focus the regime (both who is a foreign person and the proposals to be notified where control may change). It would also better align the framework with the more commonly understood takeovers regime, which is supported by an established body of law. Under the takeovers rules, specified interests are disregarded when assessing if the 20 per cent is met (for example, bare trust trustees, certain directorships, and operators of clearing and settlement facilities). The FATA also has provision to disregard certain interests. Incorporating some exceptions from the Corporations Act will also be considered as part of implementing this change.	Increase the substantial interest (control) threshold for a single foreign person from 15 to 20 per cent

3.2 Allowing certain interests to be disregarded when applying the foreign person definition 'Australian' companies that are Australian domiciled and controlled, can be deemed to be 'foreign persons' through the interests of numerous unrelated passive foreign shareholders exceeding the 40 per cent aggregate ownership threshold (that applies where no foreign person holds 15 per cent or more). This is or has been an issue for some major Australian listed companies as at different times their foreign ownership levels have neared or exceeded the 40 per cent threshold. The latter makes them foreign persons required to comply with the foreign investment framework (and under the screening framework they can be subject to less favourable treatment than investors from some of Australia's trade agreement partners). This may also be an issue for widely held unlisted entities. In these situations, the time and cost associated with an Australian publicly listed entity even assessing if it is a foreign person based on its share register can be considerable with the mechanisms available to them meaning the assessment may not be accurate.	Consider options to reduce the regulatory burden for substantially Australian entities
3.3 Simplifying the 'associates' definition without compromising integrity of the framework The 'associates' definition has been subject to criticism for being too broad, including that it deems associates to include any associate of an associate. It is not suited to the modern day where there are many listed entities and individuals who are directors on more than one board (including 'independent directors'), and greater cross border investment and mobility. Possible models that have been raised include the associates definition under Australia's takeover rules and that in the *Broadcasting Services Act 1992*. From an integrity perspective, it may be necessary to have a definition where additional limbs may apply for closely held entities investing in land.	Consider options to simplify the associates definition to better align with modern practice
3.4 Modernise the moneylending exemption in the Act to reflect current lending approaches The moneylending exemption excludes the acquisition of assets, shares or interests from screening when undertaken in the ordinary course of a moneylending business (in practice this only applies to non-government investors). However, as lending practices have evolved since the Act's introduction in 1975, it would be appropriate to modernise the exemption and better align it with the approach in the *Corporations Act 2001*.	Better align the moneylending exemption with current lending approaches

3.5 Exempt compulsory acquisitions and buy-outs following takeover bids Chapter 6A of the *Corporations Act 2001* 'Compulsory acquisitions and buy-outs' requires or allows a party with a 90 per cent or more interest to compulsorily acquire the remaining securities as per the prescribed rules (100 per cent of the securities required before compulsory buy-out of convertible securities). It represents an unnecessary regulatory burden when a party may be required to do something under one statute (the Corporations Act) but requires prior notification and approval under another before proceeding (the FATA).	Exempt compulsory acquisitions and buy-outs following takeover bids
3.6 Import selected exceptions from Australia's takeovers rules (subject to any necessary modifications) Australian businesses (both listed and unlisted) have mechanisms such as dividend reinvestment plans and pro-rata rights issues that assist in their ongoing capital management strategies. Investors in these businesses will often look to avail themselves of these opportunities as they arise as a means to maintain their stake, reinvest their earnings, or manage their stakes as part of their broader portfolio strategy. Such mechanisms are not considered means by which investors take control of Australian businesses. The current framework for both direct investments and substantial interests works on the basis that acquiring once the applicable thresholds are met even one additional share or unit (irrespective of its price), requires prior approval. Those seeking approval on an annual basis generally reflect that they want the ability to make incremental acquisitions which are also of benefit to the Australian business. For most of these investors, their stake does not significantly increase, and they have no intention to seek control in their own right. With the announced introduction of fees, better targeting of applications is important to maintaining Australia's reputation as an attractive investment destination. Chapter 6 of the *Corporations Act 2001* 'Takeovers' provides that certain acquisitions do not trigger a requirement to make a takeover offer (once a 20 per cent holding is reached). Each exception is premised on differing factors (for example, not triggering a change in control, or preapproval by non-related parties in the target). It is proposed to import the following exceptions which are not considered to change control (with potential modifications): 1. Rights issue (pro-rata): nil modifications proposed (an exemption to compulsory notification of shares already exists in the FATA and it is proposed that this is extended to all securities issues in all circumstances); and 2. Dividend reinvestment etc: there will only be negligible changes in percentage holdings unless an investor already holds a significant stake. It is proposed that this exception will be modified so that it is only applicable where the target has their primary market listing in	Import selected exceptions from Australia's takeovers rules (subject to any necessary modifications)

Australia.	
3.7 Provide an exemption for underwriters As a normal part of doing business, foreign financial institutions in the business of underwriting may acquire a substantial shareholding as a result of their underwriting activities. This would normally be temporary with no intent to control but notification can be required. The introduction of an exemption for acquisitions by foreign financial institutions (licensed by ASIC as underwriters) in the ordinary course of underwriting is being considered. Such an exemption may require that the underwriter waive the exercise of their voting rights and sell down to third parties within 6 months. Australia's takeovers rules also provide an exception for underwriting activities. However, an exemption for non-professional underwriters is not being considered, including because such underwriting may not include a sell down obligation, and if so, could be used by for example, a steelmaker, to gain control of an Australian iron ore business.	Provide an exemption for acquisitions in the ordinary course of underwriting
3.8 Exempt from compulsory notification acquisitions where a majority owner (greater than 50 per cent) is increasing their direct interest Under the framework, it is a criminal offence to acquire a substantial interest in an Australian company above the thresholds without prior notification (often referred to as compulsory notification). This applies even if the acquirer already has 'control' of the Australian company, as a majority owner. Under the business acquisitions framework in the Act, the Treasurer does not have powers unless firstly there is a change in control. Thus, there is no substantive reason to require notification and prior approval where a majority controlling owner is increasing their holding. Risks to the national interest would be minimised through limiting access (for example, exclude foreign government investors and acquisitions impacting sensitive sectors or land rich entities). With the announced introduction of fees, better targeting of applications of interest is important to maintaining Australia's reputation as an attractive investment destination.	Exempt from compulsory notification acquisitions where a majority owner is increasing their direct interest
3.9 Refine the foreign person definition Since the introduction of the framework, its 'foreign person' definition has been incorporated into other Commonwealth legislation, as well as some State and Territory legislation, as is, or in a modified form. It includes all natural persons not ordinarily resident in Australia and thus can include Australian expatriates who are no longer considered ordinarily resident in Australia. It does not include foreign governments or body politics.	Consider refinements to the foreign person definition

ITEM 4: EXEMPTING PROPOSALS THAT ARE UNLIKELY TO IMPACT THE NATIONAL INTEREST AND INCREASING THE CONSISTENCY OF THE EXEMPTIONS AVAILABLE ACROSS THE DIFFERENT ACQUISITION TYPES	
A: Acquisitions of interests in Land including urban land and new land concepts *Note: In light of the announced changes to the framework for land, existing exemptions and carve-outs will be consolidated and simplified, and their suitability assessed for extension to other land types.*	
4.1 Broaden coverage of annual programs Annual program arrangements are designed to minimise compliance costs for frequent foreign investors (a single approval every 12 months rather than potentially many spread over the period). In applying for an annual program foreign investors are required to specify the type of property acquisition they propose to make, the reason for the acquisition and location(s) where the acquisitions will be made. If granted, the program will specify an annual monetary limit for the acquisitions that an investor can make during the period. Where the limit has been used or the foreign person wants to purchase other types of property, the normal notification arrangements apply. Investors are required to report on acquisitions made through an annual program, as well as their compliance with any other conditions. Annual Programs currently only apply to acquisitions of direct interests in urban land. This has limited their usefulness to investors and the Government. The business environment and practices have evolved since the introduction of the annual programs and it is now common for properties to be acquired indirectly by acquiring the property holding entity (the seller may also dictate at which level the sale takes place for their own commercial interests). Widely held (listed and unlisted) real estate investment vehicles are also now common. However, as there is no obvious policy rationale to differentiate, it is proposed that annual programs be extended to cover acquisitions of indirect interests in urban land (for example, shares or units in Australian urban land corporations or trusts). While reducing compliance costs for both the investor and Government, annual programs assist in levelling the playing field between foreign and non-foreign persons. What land types this should be made available to will be considered.	Allow annual programs to cover indirect acquisition of interests in land
4.2 Fix and update the exemption for passive investments in urban land trusts The exemption for passive investments by foreign persons in Australian public urban land trusts is no longer operational as a result of obsolete references in the regulation. An interim solution where no action will be taken when a foreign person acquires a passive interest (10 per cent threshold for listed; 5 per cent for others) in a real estate investment trust or property trust in certain circumstances is in place. It is proposed to legislate this subject to any required minor	Legislate the interim arrangements for passive investments in land trusts (subject to any required minor

amendments. It is not being proposed to legislate the 15 per cent threshold of the obsolete exemption as the percentages for passive investment and (potential) control do not need to be mutually exclusive. As the framework also deals with collective control, the passive ceiling proposed is lower than the single person control threshold to reduce risks to the national interest arising from any collective foreign control.	modifications)
4.3 Broaden the scope of exemptions for Australian urban land corporations and trusts Some acquisitions of interests in urban land corporations and trusts would be exempt if the interest was acquired directly. • For example, exemptions such as the $55 million developed commercial property threshold do not flow through. • Pro-rata unit issues are not exempt. There is no discernible policy rational to distinguish between some direct and indirect acquisitions. It is proposed to extend the current exemptions to interests acquired indirectly through urban land corporations and trusts.	Broaden the scope of exemptions for Australian land corporations and trusts
4.4 Raise the developed commercial real estate screening threshold for some (non-sensitive) commercial real estate from $55 million to $252 million (indexed) The higher $1,094 million (indexed) threshold applies to developed commercial real estate for relevant trade agreement partners (non-government investors from Chile, Japan, Korea, New Zealand and the United States). For all other non-government investors a $55 million (indexed) threshold applies. Until December 2006, this threshold was aligned with the general business threshold. While developed commercial real estate is not defined in the Act, it is taken to be accommodation facilities (or parts thereof) and non-residential commercial land. It can include operational mines and infrastructure that may be considered sensitive or critical such as power stations or toll roads. It is proposed that the $252 million threshold would apply to accommodation facilities, office and industrial buildings, but not mines and critical infrastructure. Definitions of various land types such as developed commercial real estate are subject to further consideration.	Raise the developed commercial real estate screening threshold for non-sensitive commercial real estate from $55 million to $252 million (indexed)
B: Foreign Government Investors	
4.5 Adjust definition of 'foreign government investor' to reflect the proposed new single foreign person control threshold of 20 per cent Currently, foreign government investors include entities in which governments, their agencies or related entities from a single foreign country have a 15 per cent interest (40 per cent for multiple foreign countries). It is proposed that the 15 per cent threshold be increased to	Adjust definition of 'foreign government investor' to reflect the proposed new single foreign

20 per cent to maintain alignment with the 20 per cent threshold proposed for foreign persons generally (see 3.1). This may provide some relief to entities that are currently captured, but are not controlled by foreign governments. As part of modernisation options, further consideration will be given to disregarding specific interests when applying the percentage tests.	person control threshold of 20 per cent
4.6 Extend some existing exemptions to foreign government investors Some existing exemptions for non-government investors could be extended to foreign government investors. For example: • pro-rata capital raisings; and • clarify that acquisitions of securities in Australian urban land corporations and trusts only need approval if the acquisition constitutes a 'direct investment' (that is, 10 per cent or more, or the ability to control). Exemptions would not be extended where they may raise national security concerns.	Extend some existing exemptions to foreign government investors
4.7 Annual program facility for interests in land for foreign government investors (but case-by-case issue) Currently, all foreign government investors must get prior approval before acquiring an interest in land. Pre-approval has been provided to varying degrees over time on a case-by-case basis depending on who the investor is and their intended purchases. Under an explicit power to allow for annual programs, a certificate could limit the transactions covered and impose legally enforceable conditions. While reducing compliance costs for both the investor and the Government, annual programs assist in levelling the playing field between foreign and non-foreign persons. Reductions in investors costs can also be significant if investors undertakes many small acquisitions. In addition to item 4.6, it is proposed that an annual program (pre-approval) facility be formalised to minimise the compliance burden arising from certain land acquisitions (for example, interests acquired for pipelines) on the understanding the issue of such annual programs will be considered on a case-by-case basis.	Introduce an annual program facility for interests in land for foreign government investors
ITEM 5: FRAMEWORK TO APPLY EQUALLY IRRESPECTIVE OF TRANSACTION STRUCTURING • *Reflective of the framework's age, it is unduly focussed on shares, rather than equally dealing with other securities such as units.* • *The framework also results in inconsistent outcomes between some direct and indirect acquisitions, with no strong discernible policy rational for such differences (for example, exempt if direct but requires approval if not).*	

5.1 Framework to apply equally irrespective of transaction structuring Due to its age, the Act focusses on share acquisitions. While the Act addresses units in the urban land framework legislated in 1989, and there have been some ad-hoc changes since then, the issue has not been comprehensively addressed. It is proposed that this package will address this issue in a manner that would simplify the framework through greater consistency, while also ensuring the legislation cannot be easily avoided. The intention is that exemptions will also apply equally irrespective of the transaction structuring, unless there is policy or administrative rationale to discriminate (for example, see also 4.1 and 6.2).	Framework to apply equally irrespective of transaction structuring
ITEM 6: OTHER ISSUES	
6.1 Remove investments in financial sector companies from the foreign investment framework for all investors Foreign investors can require the Treasurer's approval under both the *Foreign Acquisitions and Takeovers Act 1975* and the *Financial Sector (Shareholdings) Act 1998* for the same investment (with both decisions made on national interest grounds). However, non-government investors from Chile, Japan, Korea, New Zealand and the United States do not need to obtain foreign investment approval for investments into financial sector companies because of trade agreement commitments (the *Financial Sector (Shareholdings) Act 1998* still applies). The current double-up for non-trade agreement investors adds cost, time and additional red tape.	Remove investments in financial sector companies from the framework (the *Financial Sector (Shareholdings) Act 1998* would still apply)
6.2 Tidy-up the legislation and Policy A general tidy-up is proposed to remove obsolete provisions and provide more clarity. Examples covered by this item include: • Legislate some existing administrative approaches (for example, approval validity, impact of change in residency/citizenship on conditions); • Have 'foreign person' defined once (there are numerous instances of a foreign person definition for a specific provision in the Act that has been supplemented elsewhere in the Act so that it is the same definition of foreign person throughout the Act), unless there is a strong policy rationale to do otherwise; • Remove potential double counting of subsidiary assets when determining access to the higher threshold; • Remove unintended consequence of 2010 amendments that it is possibly now an offence not to notify offshore transactions; • Ensure consistent use of terms such as interests in shares and units; and • Align definitions with whole-of-government definitions (for example, charity definition), unless there is a strong policy rationale to do otherwise.	Tidy-up the legislation and Policy