



Australian Government  
The Treasury

TSY/AU

# Enhancing Australia's foreign investment framework

Government response to the evaluation of the foreign investment reforms and discussion paper

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## Consultation process

Foreign investment plays a vital role in Australia's economic prosperity. This role is especially important as the Australian economy recovers from the challenges presented by the COVID-19 pandemic.

In response to the Secretary to the Treasury's evaluation of the foreign investment reforms, this discussion paper seeks to explore how Australia's foreign investment framework (**the framework**) could be further enhanced.

The paper seeks views from the public on options to improve the overall design and operation of the framework, reduce regulatory burden, refine compliance and enforcement powers and, where appropriate, increase scrutiny of certain types of investments. No part of the paper represents final Government views.

## Request for feedback and comments

The Government is seeking feedback on the questions outlined in this discussion paper by 11 March 2022. Responses may be submitted to the Treasury in two ways.

For written responses, electronic submission in Word or RTF format is preferable for accessibility. Submissions made by post or in less accessible digital formats, such as in PDF, will also be accepted. Written responses should be submitted by 11 March 2022 using the addresses listed in the table below.

Information in written responses, including names and address details, may be published on the Australian Treasury website. This is unless a respondent specifically instructs the Treasury at the time of its submission that part of or all of its written response is confidential and not for publication.

The Treasury will also consult broadly with industry representatives and other interested parties on the issues raised in this discussion paper. This may involve targeted consultation on specific issues where more information and views would help shape future reforms.

### Closing date for submissions: 11 March 2022

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# Enhancing Australia's foreign investment framework

## Evaluation of the reforms and key findings

As required by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020*, the Secretary to the Treasury undertook an evaluation of the operation of the foreign investment reforms, which came into effect on 1 January 2021 (**the Evaluation**).

The Evaluation considered the impact that the reforms and their implementation have had on foreign investment in Australia and the broader Australian economy, and whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests.

On 10 December 2021, the Secretary to the Treasury provided the final report to the Treasurer. The Evaluation report and the submissions are available on the Treasury website.

The Evaluation found that the reforms have achieved the Government's stated policy objectives. In the first year of operation, indications are that the reforms are striking the appropriate balance between supporting foreign investment into Australia and protecting the national interest. However, ongoing monitoring of the framework should occur to ensure it keeps pace with developments in the foreign investment landscape.

The Evaluation noted forward expectations of Australia's ability to attract beneficial foreign investment were positive. However, it identified a number of areas where there is scope to explore further improvements to framework.

The Evaluation also foreshadowed that the Treasury will seek to develop additional public performance reporting to increase the overall transparency of its operations.

## Government response

The Government accepts all seven of the Evaluation's findings (see **Attachment A**) and in doing so commits to making further refinements to the foreign investment framework to ensure it remains fit for purpose. This will be undertaken in two tranches:

- **Tranche 1:** an initial package of regulatory amendments to the *Foreign Acquisitions and Takeovers Regulation 2015* (the FATR) to support reducing the regulatory burden on investors; and
- **Tranche 2:** developing a broader package of legislative and regulatory reforms for implementation in the second half of 2022.

## Tranche 1: proposed regulatory amendments

The proposed amendments will contribute to reducing the regulatory burden faced by certain foreign investors. The exposure draft regulations that give effect to these changes are open for consultation on the Treasury website with feedback due by 25 February 2022.

The amendments include the following measures:

- *Money lending exemption – new entity*

This change would clarify that the money lending exemption in section 27 of the FATR is available when foreign moneylenders establish a new entity to enter into an agreement for the purpose of lending. This is a common industry practice, but is not expressly provided for under the FATR.

- *Moneylending exemption – subsidiaries, holding entities and receivers*

This change would clarify that the moneylending exemption can also generally apply to a moneylending interest acquired by a person capable of determining the investment policies of an exempt entity (including their subsidiary or holding entity); a security trustee who holds the interest on behalf of an exempt entity; or a receiver that has been appointed by an exempt entity.

- *Moneylending exemption – large financial institutions*

This change would extend the moneylending exemption to non-stock or mutual entities that are widely held (at least 100 members) and are licensed financial institutions (whether in Australia or elsewhere). This would exempt moneylending businesses which are owned by members from seeking foreign investment approval when they are involved in moneylending for residential land.

- *Australian media business*

This change would narrow the coverage of sections 13A and 55 of the FATR, particularly in relation to investment in digital-only media businesses.

The refined content requirement will provide a more targeted way to capture a digital-only media business, based on whether its content covers 'issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making' or 'current issues or events of public significance for Australians at a local, regional or national level'.

The audience threshold for digital-only media businesses will be narrowed from a daily, global audience of 10,000 people to a daily audience of 10,000 in Australia.

The control threshold for a foreign investor acquiring an interest in an Australian media business will be raised from 5 per cent to a direct interest (meaning 10 per cent or a position to influence), bringing it into line with the control threshold the framework generally applies to more sensitive investments, including acquisitions of national security businesses and acquisitions by foreign government investors.

- *Unlisted land entities*

This change would raise the control threshold from 5 per cent to 10 per cent for foreign investors who acquire an interest in an unlisted Australian land entity. This would reduce regulatory burden by aligning with the control threshold for listed Australian land entities and the control threshold that generally applies to more sensitive investments.

- *Acquisitions of interests in securities where the proportionate shareholding does not increase post-acquisition*

This change will ensure that the following foreign investment scenarios do not require notification provided the proportionate level of foreign ownership does not increase following an investment: where a foreign investor increases their capital in a wholly-owned Australian subsidiary; where pursuant to a capital call, foreign investors contribute additional funding to an investment vehicle in their respective ownership proportions; and where a foreign investor acquires extra securities in an Australian entity under a rights issue that is consistent with the *Corporations Act 2001*.

- *Foreign custodian corporations*

This change will ensure a foreign custodian does not require approval where it undertakes acquisitions in the course of providing custodian services on behalf of someone who is not a foreign person, including where the foreign custodian has a right to indemnification or is unable to exercise voting rights.

## Tranche 2: broader legislative and regulatory reforms

A further package of reforms to be pursued in the second half of 2022 will focus on ensuring Australia's foreign investment framework continues to strike a balance between facilitating investment and protecting the national interest (including national security). To achieve this, the Government is seeking views for further reform options that would clarify, liberalise, simplify and where required strengthen parts of the framework.

### 1. Areas to reduce regulatory burden

Finding 6 of the Evaluation noted the importance of continuing to explore options to refine the foreign investment framework to better facilitate foreign investment while safeguarding the national interest and national security. The Government is committed to reducing regulatory burden while maintaining appropriate safeguards.

During consultations to inform the Evaluation, stakeholders suggested further changes to clarify, liberalise and simplify the framework. Examples of suggested changes intended to reduce regulatory burden include:

- expanding the types of transactions that can be voluntarily notified (similar to the treatment of reviewable national security actions) or allowing some investments to be notified but not approved (similar to a notifiable action that is not a significant action);<sup>1</sup>
- providing an exemption for 'interfunding' activities, where a fund invests in a separate fund and both funds are controlled by the same responsible entity, and for other passive-style investments;
- improving the treatment of certain funds and schemes (e.g. superannuation and insurance);
- exempting subdivisions and amalgamations of land where investors already hold an interest in the land that is being subdivided or amalgamated, and their overall interest would not change; and
- expanding the passive foreign government investor streamlining measure,<sup>2</sup> which was introduced as part of the most recent reforms, to account for parallel funds and other investment vehicles.

#### Consultation questions

To help inform the Government's consideration of further foreign investment reform options, the Treasury is interested in hearing from stakeholders with regards to:

- 1.1** the types of less-sensitive transactions that could be exempted from foreign investment screening without compromising the national interest, including how this would best be achieved;
- 1.2** improving the treatment of passive-style investments and superannuation funds under the framework, including to better accommodate how entities in the financial sector operate and manage their affairs (e.g. interfunding); and

<sup>1</sup> That is, instead of requiring a notification to be accompanied by a full application and screening process, less-sensitive investments could be registered to ensure the Government has visibility of the proposed transaction.

<sup>2</sup> See section 17(2) of the *Foreign Acquisitions and Takeovers Regulation 2015* for further information.

- 1.3** other opportunities to simplify Australia's foreign investment framework or reduce regulatory burden while maintaining appropriate safeguards, in line with the Government's earlier reform packages.

## 2. Investments requiring greater scrutiny

Australia's foreign investment framework has developed over time to better manage risks to the national interest, including national security, and to address public concerns about foreign investment. For example, the most recent reforms were a response to a recognition, in Australia and around the world, that changes in technology and the international security environment have increased the national security risks associated with foreign investment.

It is important the framework continues to evolve in response to domestic and global developments and to ensure it continues to achieve an appropriate balance between attracting foreign investment and managing risks.

In this context, one issue that warrants consideration is foreign acquisitions of rural water entitlements. These acquisitions are generally not subject to foreign investment screening, unless tied to a land or business transaction that requires foreign investment approval. These acquisitions do however need to be reported to the Government's Register of Foreign Ownership of Water Entitlements (the Water Register). As at June 2020, 10.9 per cent of Australian water entitlements had a level of foreign ownership.<sup>3</sup>

As other regulatory regimes update their treatment of assets like water entitlements accordingly,<sup>4</sup> it is timely to consider whether acquisitions of rural water entitlements or other areas should be subject to greater scrutiny under the foreign investment framework.

### Consultation questions

To help inform the Government's consideration of further foreign investment reform options, the Treasury is interested in hearing from stakeholders with regards to:

- 2.1** whether foreign investors should be required to obtain foreign investment approval before acquiring rural water entitlements, and if so, how this new policy should be designed; and
- 2.2** whether there are other types of foreign investment that warrant greater scrutiny under Australia's foreign investment framework.

## 3. Exemption certificates

Exemption certificates are intended to reduce regulatory burden by enabling foreign investors to obtain up-front approval for a program of lower-risk investments over a specified period, rather than seeking separate approval for each investment.

<sup>3</sup> Based on the most recent Water Register Report (as of 30 June 2020).

<sup>4</sup> For example, the Australian Taxation Office is investigating whether water entitlements are taxable Australian real property under Division 855 of the *Income Tax Assessment Act 1997*, and therefore whether they are subject to Australia's capital gains tax regime.



Broadly speaking, there are five types of exemption certificates available: (1) business and entities certificates; (2) Australian land certificates; (3) exploration tenements and interests in mining, production and exploration entities certificates; (4) national security-related certificates; and (5) passive foreign government investor certificates.

Exemption certificates provide efficiency benefits for investors as well as the Government. However, in recognition that the Government cannot scrutinise the particular circumstances of each investment made under them, exemption certificates are typically granted subject to defined timeframes, transaction limits and conditions. Finding 5 of the Evaluation noted that investors would like to maximise the benefits that all types of exemption certificates under the framework can provide.

The Treasury is aware of some investors seeking to expand the terms under which exemption certificates are approved. For example, some investors have sought:

- larger financial limits;
- greater flexibility, including in scope and permitted purpose;
- longer acquisition periods to execute investments; and
- lower average screening times for exemption certificates.

The Summary Booklet that accompanied the announcement of the recent reforms signalled the introduction of an investor-specific exemption certificate.<sup>5</sup> It was judged at that time that the policy intent of these types of exemption certificates could be achieved by using the mix of existing exemption certificates. We would welcome the views of Investors in their experiences of using exemption certificates in this context.

In light of the above, there may be opportunities to consider further refinements, including expanding the exemption certificate framework to provide for a more nuanced treatment of investors, such as to specifically exclude certain legislative provisions from applying to a particular investor.

### Consultation questions

To help inform the Government's consideration of further foreign investment reform options, the Treasury is interested in hearing from stakeholders with regards to:

- 3.1** whether exemption certificates are striking an appropriate balance between facilitating investment and protecting the national interest, including whether the scope, timeframes and financial limits for exemption certificates are appropriately targeted; and
- 3.2** whether there are other types of exemption mechanisms that could be valuable for investors.

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<sup>5</sup> The Treasury, "Foreign investment reforms: June 2020," June 5, 2020, [https://treasury.gov.au/sites/default/files/2020-06/p2020-87595\\_0.pdf](https://treasury.gov.au/sites/default/files/2020-06/p2020-87595_0.pdf), page 11.

## 4. Compliance and enforcement

Maintaining strong compliance with Australia's foreign investment framework is a priority for the Government. Foreign investors are expected to be aware of, understand and comply with their obligations under Australia's foreign investment laws at all times. The Evaluation noted that the Treasury has established new processes and procedures to support the enhanced compliance and enforcement powers provided in the most recent reforms, supported by additional resourcing and staff for its compliance arm of the regime.

Finding 4 of the Evaluation noted that there are opportunities to further refine these compliance and enforcement measures to ensure proportionate and scalable responses are available for any contraventions of the framework. For example, some contraventions – such as failing to comply with record keeping obligations or not providing information when required – can only be responded to administratively or through criminal proceedings, and not via infringement notices and civil penalty provisions. On the other hand, while the Treasurer's general powers are enlivened by an investor employing a strategy to avoid the application of Australia's foreign investment laws, such behaviour is currently not a criminal offence or a breach of a civil penalty provision.

### Consultation questions

To help inform the Government's consideration of further foreign investment reform options, the Treasury is interested in hearing from stakeholders with regards to:

- 4.1 whether the new compliance and enforcement powers ensure proportionate and scalable responses are available for any contravention;
- 4.2 whether notification obligations under sections 98C, 98D and 98E are clear and reasonable;
- 4.3 whether existing reporting requirements, as specified in conditions, could be improved/streamlined; and
- 4.4 whether the introduction of infringement notices, monitoring and investigation powers and enforceable undertakings incentivise compliance.

## 5. Overall operation of the foreign investment framework

The Government is committed to ensuring that the foreign investment framework remains fit for purpose, continues to be operationally sound and that it meets community and investor expectations, without unintended consequences.

Stakeholders are invited to provide other reform ideas that are not covered in this paper, including by drawing on their interactions with the framework since the most recent reforms.

### Consultation questions

- 5.1 To help inform the Government's consideration of further foreign investment reform options, the Treasury is interested in hearing from stakeholders with regards to whether there are any other ways to improve the overall design and operation of Australia's foreign investment framework.

# Government response to the Evaluation

List of findings	Australian Government Response
<p><b>Finding 1</b></p> <p>The reforms have been implemented and investors are adjusting to the new framework. Work on establishing the Register of Foreign Ownership of Australian Assets and the Treasury’s enhanced foreign investment case management system is well progressed. To increase transparency of its operations, the Treasury is developing additional public performance reporting.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>The Government notes the Treasury’s administration of the 2021 foreign investment reforms is now well established, with ongoing progress being delivered through a digital transformation agenda.</p>
<p><b>Finding 2</b></p> <p>It is too early to determine whether the reforms have had a singular impact on foreign investment inflows, given the short time period and significant impact that COVID-19 has had on foreign investment flows globally, including into Australia. Australia’s attractiveness to foreign investment will continue to be underpinned by our stable democracy, strong rule of law, highly skilled workforce, proximity to dynamic and fast-growing markets, abundant natural resources, world class industrial capabilities, and strong and well managed economy.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>This finding reaffirms that the Government’s reforms have not changed the fundamental attributes that make Australia attractive to foreign investors. The Government will continue to monitor foreign investment inflows and overall investment conditions.</p>
<p><b>Finding 3</b></p> <p>The new national security measures are working as intended by identifying transactions that raise national security concerns. Investors would welcome greater clarity on the application of the national security test, which the Treasury will consider in future updates to investor guidance material.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>The Government notes the Treasury’s commitment to provide greater clarity to investors via its guidance material.</p>
<p><b>Finding 4</b></p> <p>The Treasury has established new processes and procedures to support the enhanced compliance and enforcement powers provided for in the reforms. There are opportunities for further refinements of the compliance and enforcement measures to ensure proportionate and scalable responses are available for any contravention of the foreign investment framework.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>The Government will consider options to refine its compliance and enforcement powers to ensure it can address contraventions in a proportionate and scalable manner.</p>
<p><b>Finding 5</b></p> <p>Stakeholders welcomed the streamlining measures in the reforms. While more time is required to fully assess the effectiveness of the passive foreign government investor exemption certificate, investors are keen to ensure they can maximise the benefits that all types of exemption certificates can provide.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>The Government will immediately seek further public and investor views on ways exemption certificates can be improved.</p>
<p><b>Finding 6</b></p> <p>Stakeholders suggested changes to further clarify, liberalise and simplify the framework. As the economy recovers from COVID-19, it is important to continue exploring options to refine the framework to better facilitate the foreign investment that has been and remains critical to Australia’s economic prosperity, while continuing to manage risks to the national interest and national security.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>The Government will immediately commence consultation on further refinements to the framework. This process will proceed in two tranches: an initial package of regulation measures in early 2022; and a broader package of legislative and regulation changes in late 2022.</p>
<p><b>Finding 7</b></p> <p>The new fee structure introduced as part of the reforms has ensured the cost of administering the foreign investment framework continues to be borne by foreign investors, and not Australian taxpayers. Aggregate fees collected in the first nine months of 2021 were \$13 million higher than in the corresponding period in 2020, reflecting the revised fees framework – where each fee is more closely linked to the transaction size – and an increase in the value of notified investments.</p>	<p>The Government <b>accepts</b> this finding.</p> <p>The Government maintains that the cost of administering the foreign investment framework should be borne by foreign investors, not Australian taxpayers. It notes that Australia’s continued attractiveness as a destination for foreign investment indicates that fees are not a material deterrent to incoming direct investment.</p>